Nomination of Michael Liburdi to the District of Arizona
Questions for the Record
Submitted February 20, 2019

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 a lower federal court to deviate from Supreme Court precedent.

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

   District court judges ordinarily do not have the ability to issue concurring and dissenting opinions. A district court judge is always bound by Supreme Court precedent. A judge on the District of Arizona is also bound by precedent of the Ninth Circuit Court of Appeals. *E.g.*, *Nammo Talley Inc. v. Allstate Ins. Co.*, 99 F. Supp. 3d 999, 1003 (D. Ariz. 2015).

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

   While the Arizona District Court is always bound by the decisions of the Supreme Court and the Ninth Circuit, the District Court is not bound by the decisions of other district courts. *See, e.g., McMahon v. Astrue*, No. CV 07-14-PHX-MHM, 2009 WL 1066133 at *2 (D. Ariz. April 21, 2009). The rules of procedure establish standards for a district court to reconsider or set aside its prior rulings in a specific case. *See, e.g.,* Fed. R. Civ. P. 59(e), 60.

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

   Stare decisis and consistency in judicial decisions provide for certainty and predictability in the legal system. It is also useful for lower federal court judges in applying Supreme Court precedent, government institutions in making public policy, and private individuals whose objective is to comply with the law. As a nominee for a district court vacancy, it would be inappropriate for me to comment on when the Supreme Court should overturn its own precedent. I note that the Supreme Court has stated that, "even in constitutional cases, the doctrine [of *stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (quoting *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996)).

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 am not familiar with the terms "super-stare decisis" and "superprecedent." *Roe v. Wade* has been consistently reaffirmed by the United States Supreme Court since its decision in 1973. Most recently, the Court decided *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___ (2016), which reaffirmed *Roe*. If confirmed as a United States District Court Judge, I would be bound to follow these cases.

   b. Is it settled law?

   Please see my response to Question 2.a, above.

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. If confirmed as a United States District Court Judge, I would be bound to follow the *Obergefell v. Hodges* decision.

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 for the district court, it would be inappropriate for me to comment on the merits of a dissenting opinion of the Supreme Court. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges. If confirmed as a district court judge, I would faithfully follow Supreme Court precedent.

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

The majority opinion in *District of Columbia v. Heller* noted that "the right secured by the Second Amendment is not unlimited." 554 U.S. 570, 626-27 (2008). As a nominee for the district court, it would be inappropriate for me to comment on public policy. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges.

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

If confirmed as a district judge, I will follow all precedent established by the Supreme Court and the Ninth Circuit Court of Appeals. I am aware that, in the *Heller* decision, the Supreme Court observed that "nothing in [Supreme Court] precedents forecloses [the Court's] adoption of the original understanding of the Second Amendment." 554 U.S. at 625.

5. In the Fall 2010, Spring 2012, and Fall 2014 semesters, you taught a course called "Watergate's Legal Legacy" at the Arizona State University College of Law. According to your syllabus, the class covered "the purposes and procedures of impeachment, executive privilege, [and] the role and authority of the special prosecutor and the president's power to dismiss the special prosecutor." (Syllabus, *Watergate's Legal Legacy*, Arizona State University Sandra Day O'Connor College of Law (Spring 2012))

a. What did you teach your classes about the President's power to dismiss a special prosecutor?

The class covered the historical evolution of the President's authority to dismiss cabinet members and inferior officers. The early cases included *Myers v. United States*, 272 U.S. 52 (1926) and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). We discussed federal law and Department of Justice regulations in effect at the time that Archibald Cox was dismissed as the Watergate special prosecutor, the subsequent hiring of Leon Jaworski, and a federal case related to the dismissal. *See Nader v. Bork*, 366 F. Supp. 104 (1973) (citing applicable federal law and regulations).

b. What did you teach your classes about executive privilege?

The class analyzed the constitutional arguments concerning executive privilege asserted by the special prosecutor and President Nixon. We read, analyzed, and discussed the Supreme Court's decision in *United States v. Nixon*, 418 U.S. 683 (1974), and the consequences of the Court's decision. We also discussed *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), another Supreme Court case concerning executive privilege.

c. Did you teach your classes about the ability of a special prosecutor to obtain documents from or question a sitting President? If so, please detail what you taught on this subject.

In addition to the subject matter identified in my response to Question 5.b, above, we read, analyzed, and discussed the United States Supreme Court's decision in *Clinton v. Jones*, 520 U.S. 681 (1997). That case concerned the ability of a civil plaintiff to take discovery from a sitting president. I cannot recall if we discussed how this case may apply to a special prosecutor or independent counsel.

d. Did you teach your classes about the ability of a sitting President to be indicted? If so, please detail what you taught on this subject.

To the best of my recollection, this topic was not covered in the class.

6. In 2016, while you were serving as General Counsel to Governor Doug Ducey, it was reported that you supported a proposal to split the Ninth Circuit Court of Appeals and create a new Circuit Court that would include Arizona and a number of other states currently in the Ninth Circuit. (*Ducey wants Arizona out of Ninth Circuit*, ARIZONA CAPITOL TIMES (Jan. 28, 2016))

a. Why did you support this proposal?

The State of Arizona's status in any particular circuit court of appeal is a matter that the United States Constitution vests with Congress. *See* U.S. Const. art I § 8 & art. III. It was the position of the Governor to evaluate options for the State of Arizona concerning the Ninth Circuit. As the Governor's General Counsel, my job duties included legal policy, and the Governor asked me to assist with this matter.

b. Do you still support splitting the Ninth Circuit?

Article I § 8 and Article III of the Constitution vests Congress with the authority to establish and structure lower federal courts, including the circuit courts. As a nominee for the United States District Court, I believe this issue is left to Congress to decide. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges.

7. 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?

If confirmed as a district court judge, I would follow all Supreme Court and Ninth Circuit precedent concerning First Amendment rights of individuals and corporate entities. This includes the *Citizens United v. FEC* decision and other applicable First Amendment precedent.

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

As a district court nominee, it would be inappropriate for me to comment on matters of campaign finance policy. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges. If confirmed as a district court judge, I would follow all Supreme Court and Ninth Circuit precedent concerning campaign finance law.

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

As a district court nominee, it would be inappropriate for me to comment on matters of constitutional interpretation. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges. If confirmed as a district court judge, I would follow all Supreme Court and Ninth Circuit precedent concerning the right to freedom of religion.

8. In 2013, you defended a piece of state legislation that increased campaign contribution limits for statewide, countywide, and local offices; eliminated restrictions on the aggregate amount of money candidates can receive from political committees; and eliminated restrictions on the amount of money individuals can contribute to political committees that give money to candidates. You argued that the law would "resolve problems associated with Arizona's historically low limits." (Real Parties in Interest Andy Biggs and Andrew M. Tobin's Supplemental Brief at *20, 2013 WL 7090459, *Arizona Citizens Clean Elections Commission v. Brain*, No. CV13-0341-PR (Ariz. 2013))

a. Please specify what problems arose from Arizona's limits on campaign contributions.

In *Randall v. Sorrell*, 548 U.S. 230 (2006), the Supreme Court struck down Vermont's campaign finance limits as excessively low in violation of the First Amendment. The Court identified some of Arizona campaign contribution limits, which were in place at the time of the decision, as either [i] lower than the constitutionally infirm Vermont limits or [ii] substantially the same. 548 U.S. at 250-51 ("[W]e have found only three States that have limits on contributions to candidates for state legislature below Act 64's $150 and $100 per election limits. Ariz. Rev. Stat. Ann. § 16–905 ($296 per election cycle, or $148 per election) ….").

The brief that I filed in the *Arizona Citizens Clean Elections Commission v. Brain* case speaks for itself, however, I recall that some of the arguments made were that Arizona's then-existing contribution limits unconstitutionally burdened candidates' free speech rights due to [i] the costs of maintaining an effective statewide or legislative district campaign in a state the size of Arizona and [ii] the existence of independent expenditure campaigns.

If confirmed as a district court judge, I would follow all Supreme Court and Ninth Circuit precedent concerning campaign finance law.

b. Do you believe that there are also "problems associated" with the ability of individuals and corporations to give unlimited funds in campaign contributions? If not, why not?

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the United States Supreme Court has recognized that corruption or the appearance of corruption is an important state interest that may justify government regulation of campaign contributions from individuals, corporations, and labor organizations. As a district court nominee, it would be inappropriate for me to comment on matters of campaign finance policy. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges. If confirmed as a district court judge, I would follow all Supreme Court and Ninth Circuit precedent concerning campaign finance law.

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?

During my interview with representatives of the White House Counsel's Office and the Department of Justice Office of Legal Policy on September 14, 2018, I discussed Arizona statutory procedures for appealing administrative decisions to the state court system.

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?

I have attended conferences sponsored by the Federalist Society that featured panel discussions on administrative law. I recall one instance where I discussed Arizona's statutory procedures for appealing administrative decisions to the state court system. I have not had any conversations with anyone affiliated with the Heritage Foundation concerning administrative law.

On June 17, 2016, I participated in a continuing legal education panel discussion on the *North Carolina Board of Dental Examiners* case decided by the United States Supreme Court. This seminar was sponsored by the State Bar of Arizona.

On February 18, 2016, I participated in a continuing legal education panel discussion, "The Rule of Law or the Law of Rules." This seminar included topics on Arizona's administrative procedures act and the Governor's Regulatory Review Council. This seminar was sponsored by the State Bar of Arizona.

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

As a district court nominee, it would be inappropriate for me to comment on matters of judicial policy. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges. If confirmed as a district court judge, I would follow all Supreme Court and Ninth Circuit precedent concerning administrative law.

10. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2005. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It

says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

a. Could you please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools?

I did not write this statement. I am not familiar with this statement or its context and therefore I am unable to elaborate on its meaning.

b. How exactly does the Federalist Society seek to "reorder priorities within the legal system"?

I did not write this statement. I am not familiar with this statement or its context and therefore I am unable to elaborate on its meaning.

c. What "traditional values" does the Federalist society seek to place a premium on?

I did not write this statement. I am not familiar with this statement or its context and therefore I am unable to elaborate on its meaning.

d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court?

No.

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

    In all cases involving statutory construction, a judge should first look to the text of the statute to determine its meaning. Where ambiguities exist, legislative history may be useful to assist a judge in understanding the meaning of the words and phrases used in the statute.

12. 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.

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

    I carefully reviewed these questions after receiving them from the Department of Justice Office of Legal Policy ("OLP"). I reviewed my Senate Judiciary Committee Questionnaire, any materials referenced by these questions, and relevant statutes and caselaw. I prepared draft responses and shared them with OLP staff. I prepared revisions and finalized these responses on my own.

Nomination of Michael Thomas Liburdi to the
United States District Court for the District of Arizona
Questions for the Record
Submitted February 20, 2019
QUESTIONS FROM SENATOR WHITEHOUSE

1. During your hearing, I asked you whether a rule allowing unlimited political expenditures is more likely to advantage someone with unlimited money or someone with very little money. You told me that you didn't have sufficient facts to provide an answer. Would you like to amend your response?

   My role as a campaign finance attorney is to ensure that my clients comply with campaign finance laws and rules that are written by Congress, the Federal Election Commission, and the Arizona Legislature. As a supplement to my previous answer, money is one of many factors that contribute to electoral success. Other factors include, without limitation, the composition of the electorate, whether a candidate is an incumbent, the extent to which the electorate recognizes the candidate's name and positions, the candidate's voting history, the quality and experience of the candidate's campaign staff, and national trends and opinions. Evaluating these factors as they apply to any particular election requires specific factual analysis and would best be handled by a person experienced with political consulting.

2. Do you believe money in politics can have a corrupting influence?

   In *Buckley v. Valeo*, 424 U.S. 1 (1976), the United States Supreme Court has recognized that corruption or the appearance of corruption is an important state interest that may justify government regulation of campaign contributions. Whether money can have a corrupting influence requires policy-based findings and determinations reserved for the elected branches of government. Any legislative responses to these findings and determinations are also reserved for the elected branches. As a nominee for the district court, it would be inappropriate for me to comment on this policy matter. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges. If confirmed as a district court judge, I would faithfully follow the law as written by Congress, along with Supreme Court and Ninth Circuit precedent.

3. In a 2016 speech you said, "It seems as if our political system is reshaping itself. Such realignment is not unprecedented in the history. of America. From time to time, our political society undergoes significant change. Under these circumstances, it becomes even more important that our courts guard against encroachment of our rights, uphold the rule of law, and provide every person with due process." What is the role of the district judge in safeguarding against encroachments of our rights?

   As a coordinate branch of government, the judicial branch operates independently of political forces. Our system of separation of powers provides that an independent judiciary operates to ensure that persons are afforded due process of law, equal protection of the law, and the preservation of other Constitutional rights.

4. You have been an active member in the Federalist Society. Do you think it is appropriate for judges to actively maintain membership in a group with a stated ideological agenda?

   Please see my responses to subparts a and b, below.

   a. If confirmed, do you plan to remain an active participant in the Federalist Society?

      I have not considered the issue.

   b. Have you had contacts with representatives of the Federalist Society in preparation for your confirmation hearing?

      No.

5. Is it ever appropriate for judges to raise issues not directly presented by the litigants? When?

   Yes. It is appropriate for a judge to raise certain issues not presented by the parties. For example, the court has an independent duty to examine whether it has jurisdiction over a case. A court may also raise the issue of whether a party has standing on its own initiative.

6. If confirmed, what weight would you give to Supreme Court dicta in reaching your decisions?

   A district court judge should always follow the holdings and legal reasoning of the Supreme Court. Dicta should not be treated as a holding but may be useful in applying the Court's legal reasoning to similar factual situations that may come before the district court.

7. 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 Roberts's metaphor is a useful comparison to a judge's role in our constitutional government. An umpire, like a judge, does not write the rules of the game. That responsibility is left to Major League Baseball ("MLB") and its related entities. As part of the Chief Justices's metaphor, I compare Congress to the MLB. The umpire applies the rules to the facts as they unfold during the game.

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

   A judge should always follow the law regardless of the practical consequences of a particular ruling. There are circumstances, however, when the law allows a judge to consider practical consequences. An example of this is when a judge determines whether to issue a preliminary injunction. Two of the factors that a judge considers are [i] whether a party will suffer irreparable harm unless the preliminary injunction is granted and [ii] the balance of hardships among the parties.

c. Federal Rule of Civil Procedure 56 provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact" in a case. Do you agree that determining whether there is a "genuine dispute as to any material fact" in a case requires a judge to make a subjective determination?

   When evaluating a motion for summary judgment, Rule 56, Fed. R. Civ. P., the "genuine dispute as to any material fact" determination requires the judge to evaluate evidence submitted by both the moving and non-moving parties. The court does not make credibility determinations as to the evidence. If the evidence presented is such that the judge would be required to make any subjective evidentiary determinations, the motion should be denied and tried to a jury.

8. 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?

    Judges should apply the law as written. That being said, all persons who are involved in the judicial process deserve to be treated with respect by the judge. A judge should consider that a person interacting with the courts may be doing so at a vulnerable time in their lives or for reasons beyond their control. This applies regardless of whether a party is accused of a crime, a victim, a person who has suffered civil damages, or a person accused of causing civil damages.

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

    Judges should apply the law. A judge's personal life experience should not factor into his or her decision-making process.

    c. Do you believe you can empathize with "a young teenage mom," or understand what it is like to be "poor or African-American or gay or disabled or old"? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

    Please see my responses to questions 8.a and b, above.

9. 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?

    If confirmed as a district court judge in Arizona, I would be bound to faithfully implement all precedent from the Supreme Court and the Ninth Circuit. An Arizona district judge is not bound by the rulings of a federal appeals court other than the Ninth Circuit.

Nomination of Michael T. Liburdi, to be United States District Court Judge for the District of Arizona
Questions for the Record
Submitted February 20, 2019

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?

   Please see my responses to Questions 1.a-f, below.

   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?

      In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court held that whether a right is deeply rooted in this nation's history and tradition is an appropriate inquiry into whether a right qualifies as fundamental. If confirmed, I will faithfully apply this and other applicable precedent.

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

      Yes. I would faithfully apply rights established by the Supreme Court and the Ninth Circuit Court of Appeals.

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

      Yes. I would carefully analyze whether rights established by the Supreme Court and the Ninth Circuit Court of Appeals apply in similar circumstances.

   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. I would faithfully apply rights established by the Supreme Court and the Ninth Circuit Court of Appeals.

   f. What other factors would you consider?

I would consider any factors established by the Supreme Court and the Ninth Circuit Court of Appeals.

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

   The text of the Fourteenth Amendment's Equal Protection Clause provides that, "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amd. XIV § 1. Nothing in the text limits the reach of the Equal Protection Clause solely to race. The Supreme Court applied heightened scrutiny to gender-based classifications in *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?

      The Supreme Court applied heightened scrutiny to gender-based classifications in *United States v. Virginia*, 518 U.S. 515 (1996). If confirmed as a district judge, I will faithfully apply this precedent.

   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 am not aware of the reasons why the Supreme Court did not apply heightened scrutiny to gender-based classifications until 1996.

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

      The Supreme Court has applied the Equal Protection Clause to gay and lesbian couples in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). Concerning the right to marry, the Supreme Court held that same-sex couples must be afforded that right "on the same terms as accorded to couples of the opposite sex."

   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 district court nominee, it would be inappropriate for me to comment on matters that are or may be litigated in the federal court system. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges. If confirmed as a district court judge, I would follow all Supreme Court and Ninth Circuit precedent concerning transgender rights.

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

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court held that the Constitution establishes a right of privacy that protects a person's decision to use contraceptives. If confirmed as a district judge, I will faithfully apply this precedent.

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

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that the Constitution establishes a right of privacy that protects a woman's right to obtain an abortion. If confirmed as a district judge, I will faithfully apply this precedent.

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?

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment protects intimate relations between consenting adults, regardless of sex or gender. If confirmed as a district judge, I will faithfully apply this precedent.

c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Please see my responses to the previous questions.

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?

It is appropriate for a trial court to consider any evidence that is relevant to the claims asserted in the complaint. This includes relevant evidence concerning the applicable standard of review established by United States Supreme Court and/or Ninth Circuit precedent.

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

The Federal Rules of Evidence provide for the circumstances under which scientific

evidence, including sociology and data, may be admitted and considered by a judge or a jury. *See* Fed. R. Evid. 702 (establishing factors for the admission of expert witness testimony). The trier of fact may consider such relevant and admissible evidence.

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 district court nominee, it would be inappropriate for me to comment on issues that are or may be litigated in the federal judicial system. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges. If confirmed as a district court judge, I will faithfully apply the *Obergefell* precedent.

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

      As a district court nominee, it would be inappropriate for me to comment on issues that are or may be litigated in the federal judicial system. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges. If confirmed as a district court judge, I will faithfully apply *Obergefell* to cases that may come before me.

6. 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?

      Brown v. Board of Education is a landmark decision of the Supreme Court that corrected an egregious wrong. The text of the Fourteenth Amendment's Equal Protection Clause states that, "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amd. XIV § 1. If confirmed as a district judge, I would faithfully follow the text of the Equal Protection Clause and *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 Feb. 15, 2019).

I am not familiar with this quotation, the cited article, or the authors' legal argument. If confirmed, I will faithfully apply the text of the Constitution and laws of the United States, as well as precedent established by the Supreme Court and the Ninth Circuit.

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?

Whenever possible, the text of a constitutional provision should be dispositive. In matters where the Supreme Court has ruled on a provision interpreting the meaning of a provision at the time of its adoption, that precedent would be binding on me as a district court judge, if confirmed.

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

Whenever possible, the text of a constitutional provision should be dispositive. In matters where the Supreme Court has ruled on a provision interpreting the meaning of a provision at the time of its adoption, that precedent would be binding on me as a district court judge, if confirmed.

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

I would consult the text of the provision at issue and any applicable Supreme Court or Ninth Circuit precedent.

7. According to a syllabus for your Arizona State University College of Law course entitled "Watergate's Legal Legacy," you have taught students about *United States v. Nixon*, 418 U.S. 683 (1974), and *Morrison v. Olson*, 487 U.S. 654 (1988). Do you agree that these cases remain good law?

Yes. If confirmed to serve as a United States District Judge, I will follow all precedent established by the Supreme Court, including *United States v. Nixon* and *Morrison v. Olson*, however, I note that Congress has allowed the Independent Counsel statute to lapse in 1999. *See* 28 U.S.C. § 599.

8. On the same day the Supreme Court issued its decision in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), you tweeted, "Media coverage of #HobbyLobby overblown and fanatical. Case applied only to closely held corps and 4 post-contraceptive measures." After another user tweeted that "over 90% of businesses in the US are closely held. And contraception is contraception," you tweeted in response, "objections limited 2 morning afters and 2 IUDs. No complaints about 16 other birth control methods."

a. Is it your understanding that the holding in *Burwell v. Hobby Lobby Stores, Inc.*, allowed

for-profit closely held corporations to refuse to comply with the contraception mandate as a whole?

No.

b. How should a court evaluate a claim based on an employer's religious beliefs when those beliefs conflict with generally applicable laws that protect others' fundamental rights?

Under these circumstances, I would carefully evaluate the claims asserted by the parties and faithfully apply applicable precedent established by the Supreme Court and the Ninth Circuit.

Nomination of Michael Thomas Liburdi
United States District Court for the District of Arizona
Questions for the Record
February 20, 2019

QUESTIONS FROM SENATOR BLUMENTHAL

1. From 2010 to 2014, you served as the chairman of the Arizona Right to Life PAC. Arizona Right to Life, like all Right to Life groups, is staunchly anti-abortion.

    a. **What was your role as PAC chair?**

    My primary role as chair was [i] filing campaign finance reports with the Arizona Secretary of State and [ii] providing compliance advice concerning whether PAC members should recuse themselves from decisions under specific circumstances.

    b. **How did you choose which candidates to endorse?**

    It is my recollection that the PAC members reviewed a list of candidates for certain elected office and made endorsement decisions. I recall that we may have used a survey in either 2012 or 2014. I recall that some candidates asked for an endorsement. Some candidates did not seek an endorsement.

    c. **Given your work advocating against abortion rights, will you commit to recuse yourself from any reproductive rights cases that come before you as a district court judge?**

    I commit that, if confirmed, in all cases I will follow the Code of Conduct for United States Judges, the Ethics Reform Act of 1989, 28 U.S.C. § 455, and all other relevant recusal rules and guidelines, in all cases.

2. While you were working for Gov. Ducey, he signed into law 2018 Senate Bill 1394, which requires women to disclose their reason for accessing abortion care.

    a. **Were you involved in the discussions and considerations of 2018 Senate Bill 1394?**

    I respectfully disagree with the question's characterization that SB 1394 (2018) "requires women to disclose their reason for accessing abortion care." My understanding of the bill, as it was amended and enacted, is that any information requested may be voluntarily provided by the patient and that the reasons are limited to health and safety.

    I was not involved in any efforts to draft, amend, lobby, or otherwise advocate for SB 1394. To the extent I was involved in any discussion about the bill with the Governor prior to his action on the bill, the subject matter of any such discussion is protected by the attorney-client privilege.

    b. **If so, did you recommend that Gov. Ducey sign the bill?**

To the extent I was involved in any discussion about the bill with the Governor prior to his action on SB 1394, the subject matter of any such discussion is protected by the attorney-client privilege.

c. If so, what was your reasoning for supporting the bill?

As I stated in my response to Question 2.a, I was not involved in "supporting the bill." To the extent I was involved in any discussion about the bill with the Governor prior to his action on SB 1394, the subject matter of any such discussion is protected by the attorney-client privilege.

Questions for the Record for Michael T. Liburdi
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. From 2010 to 2014, you were chairman of the Arizona Right to Life PAC, an organization pushing an anti-choice agenda.

   Given your leadership of this organization, what assurances can litigants have that you will deal with reproductive rights issues fairly and impartially?

   If I am fortunate enough to be confirmed as a United States District Court Judge, I commit to following the law. This includes faithfully interpreting and following the law as it has been enacted by Congress and following constitutional and statutory interpretations and precedent as decided by the United States Supreme Court and the Ninth Circuit Court of Appeals. A judge swears an oath to uphold the Constitution of the United States, and this means that a judge should faithfully follow the law and never allow his or her personal views to influence a decision. To proceed otherwise would undermine our democratic system and the Constitution itself.

3. During a 2018 investiture ceremony for Arizona state court judges, you said that "[w]e are living in uncertain times" and that "[u]nder these circumstances, it becomes even more important that our courts guard against encroachment of our rights, uphold the rule of law, and provide every person with due process." I agree with you. President Trump has used his bully pulpit to undermine the rule of law—including by attacking federal judges, the Department of Justice, and the FBI—and others in positions of power have to stand up to the President and for the rule of law.

   Why did you remind these new judges of the importance of their duty to uphold the rule of law? Are you as concerned as I am about President Trump's war against the independent judiciary?

   Our Constitution vests matters of policy with the elected branches of government. As a coordinate branch of government, the judicial branch must operate independently of political forces. Our system of separation of powers provides that an independent judiciary operates to ensure that persons are afforded due process of law, equal protection of the law, and the preservation of other Constitutional rights.

Nomination of Michael T. Liburdi
United States District Court for the District of Arizona
Questions for the Record
Submitted February 20, 2019

1. On June 30, 2014, you wrote a tweet that said: "Media coverage of #HobbyLobby overblown and fanatical. Case applied only to closely held corps and 4 post-contraceptive measures."[1]

    a. When you wrote that tweet, did you believe that women who worked for closely held corporations who were concerned about access to birth control coverage were "overblown and fanatical"?

    No.

    b. Why did you post that tweet?

    The purpose of this tweet was to respond to media analysis that United States Supreme Court's decision in *Burwell v. Hobby Lobby* abrogated women's reproductive rights under the 14th Amendment, as established in *Roe v. Wade* and subsequent decisions. The *Hobby Lobby* decision involved a question of regulatory law and statutory interpretation. A Supreme Court decision of this nature is subject to reversal by Congressional action or may be addressed by administrative action by the Department of Health and Human Services. The Department of Health and Human Services adopted rules to address the *Hobby Lobby* decision.

2. From 2010 to 2014, you served as the chairman of the Arizona Right to Life PAC.[2] According to its website, the organization endorses candidates whose "presence in the public square could determine future outcomes regarding pro-life issues and legislation in our state and in the nation."[3]

    a. How did you first become involved in the organization?

    I was asked to participate in the organization as its chair because [i] I am familiar with the procedures for filing campaign finance reports with the Arizona Secretary of State and [ii] I provided compliance advice concerning whether PAC members should recuse themselves from decisions under specific circumstances.

    b. What were your duties as chairman?

    See my answer to Question 2.a, above.

    c. Did the Arizona Right to Life PAC ever endorse a political candidate who did not identify as pro-life while you were chairman?

    I do not recall specifically whether such a candidate or candidates received an endorsement.

d. Do you commit to recuse yourself in any case regarding a women's right to choose given your service as chairman of the Arizona Right to Life PAC?

I commit that, if confirmed, in all cases I will follow the Code of Conduct for United States Judges, the Ethics Reform Act of 1989, 28 U.S.C. § 455, and all other relevant recusal rules and guidelines, in all cases.

e. If you don't commit to recuse yourself, how will you ensure that any litigant who appears before you in a case involving contraceptives or abortion issues would view you as a fair and impartial jurist?

If I am fortunate to be confirmed as a United States District Court Judge, I commit to following the law. This includes faithfully interpreting and following the law as it has been enacted by Congress and following constitutional and statutory interpretations and precedent as decided by the United States Supreme Court and the Ninth Circuit Court of Appeals. A judge swears an oath to uphold the Constitution of the United States. This means to me that a judge must faithfully follow the law and never allow his or her personal views to influence a decision. To proceed otherwise would undermine our democratic system and the Constitution itself.

3. You are a member of the Federalist Society for Law and Public Policy and the Arizona Lawyer's Chapter of the Federalist Society.[4] On Feb. 7, 2017, you were interviewed on Copper Talk on the nomination of Neil Gorsuch to be an Associate Justice on the United States Supreme Court.[5] In the interview, you spoke about the process of selecting a nominee to be an Associate Justice on the United States Supreme Court and joked that if someone is interested in that job he or she "better start lobbying the Federalist Society."

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[1] Twitter, Mike Liburdi, https://twitter.com/mliburdi/status/483643940831506433 (last visited Feb. 19, 2019).
[2] SJQ at pp. 7-8.
[3] Arizona Right to Life PAC, Endorsement Guidelines, https://www.azrtl.org/endorsements (last visited Feb. 19, 2019).
[4] SJQ at pp. 7-8.
[5] SAMUEL RICHARD, BARRETT MARSON, AND MATT MORALES, *Episode 104 – Supreme Court Nomination*, (Copper Talk 2017), http://coppertalkaz.com/episode-104-supreme-court-nomination/.

a. Do you believe the Federalist Society plays a role in the selection of nominees to the federal bench?

No. That was not intended to be a serious statement.

b. Did you consult with the Federalist Society when advising Governor Ducey on judicial appointments in Arizona?

No. As part of the judicial appointment process, Governor Ducey and his legal staff welcomed comments from any individual concerning judicial candidates. We received comments from a broad cross-section of the community, including persons affiliated with organizations that represent many different viewpoints. I cannot recall specifically whether any person associated with the Federalist Society provided comments on any particular judicial applicant.

c. What role did the Federalist Society play in your nomination? For instance, did the Federalist Society reach out to the White House on your behalf? Did the Federalist Society contact either of the Arizona Senators on your behalf?

I did not solicit assistance from anyone at the Federalist Society concerning my nomination. I do not have any knowledge whether any person associated with the Federalist Society contacted the White House or any Arizona Senators.

d. Did you inform anyone with the Federalist Society of your interest in being nominated to be a federal district judge?

No.

4. 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.[6] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[7] 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.[8] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[9]

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

I have not studied this issue, but I am aware of studies that suggest the existence of such bias.

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

Again, I have not studied the issue and therefore cannot comment.

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 specifically. I hold an undergraduate degree in Justice Studies from Arizona State University. I recall that some of my classes in this academic program addressed historical racial bias in our justice system. Although I cannot recall specific examples, I believe that this subject matter was covered in classes in which I enrolled concerning the administration of the justice system, justice theory, and the history of the civil rights movement.

As General Counsel to Arizona Governor Doug Ducey, I was involved in policy discussions concerning criminal justice reform and sentencing reform. I recall engaging in discussions on this subject matter with representatives of the Arizona Judiciary.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.[10] Why do you think that is the case?

I have not previously reviewed this report and these statistics. I am, however, aware of similar studies. It would be inappropriate for me, as a judicial nominee, to offer an opinion on this subject matter.

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[6] 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.
[7] *Id.*
[8] 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.
[9] *Id.*
[10] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.[11] Why do you think that is the case?

I have not previously reviewed this study and these statistics. I am aware, however, of similar studies. It would be inappropriate for me, as a judicial nominee, to offer an opinion on this subject matter.

f. What role do you think federal appeals judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

I have not studied how appellate court judges can address this issue. When an appellate court reviews a lower-court criminal decision, my understanding is that the court should perform a thorough review of the record in light of the issues presented.

5. 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.[12] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[13]

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 previously reviewed this report and these statistics. It would be inappropriate for me, as a judicial nominee, to offer an opinion on this subject matter.

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.

I have not previously reviewed this report and these statistics. It would be inappropriate for me, as a judicial nominee, to offer an opinion on this subject matter.

6. 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.

7. Do you believe that *Brown v. Board of Education*[14] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Brown v. Board of Education corrected an egregious wrong by applying the 14th Amendment's Equal Protection Clause to end racial segregation. If confirmed to serve as

a district court judge, I would fully apply *Brown v. Board of Education* and all other relevant Supreme Court precedent on this issue.

As a nominee for the United States District Court, it is inappropriate for me to comment on or offer views on prior decisions of the United States Supreme Court. *See* Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. On the Judiciary, 111th Cong. 64 (2010) ("I think that in particular it would not be appropriate for me to talk about what I think about past cases, you know, to grade cases."); *see also* Canon 3(a)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

8. Do you believe that *Plessy v. Ferguson*[15] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

   As a nominee for the United States District Court, it is inappropriate for me to comment on or offer views on prior decisions of the United States Supreme Court. *See* Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. On the Judiciary, 111th Cong. 64 (2010) ("I think that in particular it would not be appropriate for me to talk about what I think about past cases, you know, to grade cases."); *see also* Canon 3(a)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

   As stated in my answer to the previous question, *Brown v. Board of Education* corrected an egregious wrong by applying the 14th Amendment's Equal Protection Clause to end racial segregation. If confirmed to serve as a district court judge, I would fully apply *Brown v. Board of Education* and all other relevant Supreme Court precedent on this issue.

9. 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?

   No.

10. 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,

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[11] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

[12] 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.

[13] *Id.*

[14] 347 U.S. 483 (1954).

[15] 163 U.S. 537 (1896).

bring them back from where they came."[16] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

Yes. In *Zadvydas v. Davis*, 553 U.S. 678, 693 (2001), the United States Supreme Court held that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." One of my *pro bono* clients was a refugee from a Central American country who sought asylum in the United States. Because of her rights under the Due Process Clause and federal law, we successfully obtained reversal of an administrative removal order.

[16] 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 February 20, 2018
For the Nomination of

Michael Liburdi, to the U.S. District Court for the District of Arizona

1. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

    a. **What is the process you would follow before you sentenced a defendant?**

    If confirmed as a United States District Court Judge, I will carefully follow federal statutes, including 18 U.S.C. § 3553, and the United States Sentencing Guidelines when issuing a sentence on a criminal defendant. I will also carefully consider the circumstances of the offense, the defendant's allocution, any statements provided by witnesses or victims, the presentence report, and arguments of counsel as to what the sentence should be.

    I would also consider whether a downward departure or variance is justified under the circumstances.

    If a defendant is entering a guilty plea or accepting a plea offer, I would ask questions to ensure that the defendant is voluntarily entering the guilty plea. A district judge has the authority to reject a plea under certain circumstances.

    b. **As a new judge, how do you plan to determine what constitutes a fair and proportional sentence?**

    Please see my response to Question 1.a, above.

    c. **When is it appropriate to depart from the Sentencing Guidelines?**

    In *United States v. Booker*, 543 U.S. 220 (2005), the United States Supreme Court held that the Sentencing Guidelines are not binding on trial court judges but are, instead, advisory. The Sentencing Guidelines explain when a judge may depart from the advisory sentencing range. 18 U.S.C § 3553(a) provides factors and considerations that a judge may consider before departing from the guidelines.

    d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.[1]

[1] https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf

i. **Do you agree with Judge Reeves?**

I am not familiar with Judge Reeves' or his views on this subject.

ii. **Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?**

The authority to define federal criminal law and sentencing rests with Congress. As a nominee for the district court, it would be inappropriate for me to comment on mandatory minimum sentencing and its impact on the criminal justice system. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges. If I am confirmed, I will follow criminal sentencing law as written by Congress.

iii. **Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.**

The authority to define federal criminal law and sentencing rests with Congress. As a nominee for the district court, it would be inappropriate for me to comment on mandatory minimum sentencing and its impact on any particular defendant. *See* Canons 2, 3(a)(6), and 5, Code of Conduct for United States Judges. If I am confirmed, I will follow criminal sentencing law as written by Congress.

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.[2] **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

1. **Describing the injustice in your opinions?**

   If confirmed as a district judge, I will faithfully apply federal sentencing law as determined by Congress. Matters of sentencing policy are appropriately addressed by the elected branches of government. A judge has authority under the Sentencing Guidelines to consider downward departures and variances for sentencing.

2. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**

[2] *See, e.g.,* "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html

The executive power is vested in the executive branch of government. This includes prosecutorial decisions. If confirmed as a district court judge, I would hold prosecutors to satisfying their constitutional burdens at every stage of a criminal proceeding, including that prosecutors satisfy their evidentiary burden of proof beyond a reasonable doubt.

3. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

   The executive power is vested in the executive branch of government. This includes decisions on whether to grant a pardon, clemency, or a commutation to a person convicted of a crime.

e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are "generally appropriate for first offenders not convicted of a violent or otherwise serious offense." **If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

   I would consider alternatives to incarceration, consistent with the law and where appropriate.

2. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

   a. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

      Yes.

   b. **Do you believe there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

      I have not studied the issue and therefore cannot provide an opinion.

3. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

   a. **Do you believe it is important to have a diverse staff and law clerks?**

      Yes.

   b. **Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

Yes. If confirmed, I will give qualified minorities and women the same consideration I would give any applicant during the hiring process.