Senator Chuck Grassley, Ranking Member
Questions for the Record
Mr. John F. Murphy
Judicial Nominee to the U.S. District Court for the Eastern District of Pennsylvania

1. **In the context of federal case law, what is super precedent?**

   Response: To the best of my knowledge, neither the Supreme Court nor the Third Circuit have defined the term "super precedent," nor is it a term I use in my practice. As a district court judge, my obligation would be to adhere to all precedent of the Supreme Court and Third Circuit.

2. **Should judicial decisions take into consideration principles of social "equity"?**

   Response: Judicial decisions should be based upon a fair and neutral application of the applicable law to the facts of the case.

3. **Is threatening Supreme Court Justices right or wrong? Please explain your answer.**

   Response: Threatening Supreme Court justices is wrong. The Federal Criminal Code provides as much. *E.g.*, 18 U.S.C. § 118, 875, 876 & 1503.

4. **Under what circumstances can federal judges add to the list of fundamental rights the Constitution protects?**

   Response: The Supreme Court has held the Constitution protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). In that decision, the Supreme Court summarized a number of past decisions recognizing fundamental rights, such as *Loving v. Virginia* and *Skinner v. Oklahoma*. The Court has followed the *Glucksberg* approach several times since that decision.

5. **As a general matter, if a judge encounters unsettled Supreme Court precedent, should she anticipate where the Supreme Court will end up, or simply do her best to apply what the Supreme Court has already held?**

   Response: As a district judge, I would consult the applicable Third Circuit authority, and follow that. In a case where there is no binding precedent, there are a wide variety of decisional tools that may be relevant, including: statutory authority and canons of statutory interpretation; persuasive decisions from other circuits or other courts; and factually or legally analogous cases. The goal of the analysis is to reach the correct answer under the law and facts.

6. **Please explain your understanding of 18 USC § 1507 and what conduct it prohibits.**

Response: 18 U.S.C. § 1507 penalizes one who "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence."

7. **Under Supreme Court precedent, is 18 USC § 1507 or a state analog statute constitutional on its face?**

   Response: I am not aware of any determination by the Third Circuit or Supreme Court of that question. As a district court nominee, I do not think it would be appropriate for me to provide an opinion on that question.

8. **Please identify a Supreme Court decision from the last 50 years that exemplifies your judicial philosophy and explain why.**

   Response: I have never served as a judge before. However, my intention would be to approach judicial decision-making by coming to each case with an open mind; to carefully research, understand, and follow the applicable law; to confine my decision to resolving disputed issues using the record evidence; and to write clearly, succinctly, and logically. There are many Supreme Court and Third Circuit decisions that, on their faces, appear to exemplify such an approach, however that is only from the perspective of examining the decisions themselves.

9. **Please identify a Third Circuit decision from the last 50 years that exemplifies your judicial philosophy and explain why.**

   Response: Please refer back to my response to Question 8.

10. **Do you believe that local governments should reallocate funds away from police departments to other support services? Please explain.**

    Response: That question is entrusted to policymakers, not judges.

11. **What is more important during the COVID-19 pandemic: ensuring the safety of the community by keeping violent, gun re-offenders incarcerated or releasing violent, gun re-offenders to the community?**

    Response: Issues of appropriate circumstances for incarceration or release frequently come before district courts. If presented with such an issue, I would follow all of the

applicable law and guidance, and resolve each case on its facts. Beyond that, it would not be appropriate for me to comment on how I would resolve such a situation.

12. What or how much emphasis should a judge place on the suffering of the victim when crafting a sentence for a criminal defendant? Please explain.

Response: I have not had occasion in my career to be involved with the crafting of a sentence for a criminal defendant. If I were confirmed, my approach to sentencing would begin with 18 U.S.C. § 3553, which calls for considering, among other things, "the nature and circumstances of the offense." I would also consult the Sentencing Guidelines Manual, which in many occasions addresses the suffering of the victim. The outcome in any one case would largely depend on the factual circumstances.

13. Please answer the following questions yes or no. If you would like to include an additional narrative response, you may do so, but only after a yes or no answer:

a. **Was *Brown v. Board of Education* correctly decided?**

Response: *Brown v. Board of Education* is binding precedent that I would be obligated to follow if I were confirmed. Generally, I think it is inappropriate for me to comment on the correctness of binding precedent. However, in the case of *Brown*, I am unaware of any reason or possibility why the decision would ever be called into question. Thus, I can state that *Brown* was correctly decided without risk of calling into question my objectivity in a future case.

b. **Was *Loving v. Virginia* correctly decided?**

Response: Please refer to my response to Question 13(a).

c. **Was *Griswold v. Connecticut* correctly decided?**

Response: *Griswold v. Connecticut* is binding precedent that I would be obligated to follow if I were confirmed. It is generally inappropriate for me to comment on the correctness of binding precedent, so I will not do so here.

d. **Was *Roe v. Wade* correctly decided?**

Response: *Roe v. Wade* was overturned in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

e. **Was *Planned Parenthood v. Casey* correctly decided?**

Response: *Planned Parenthood v. Casey* was overturned in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

f. **Was *Gonzales v. Carhart* correctly decided?**

Response: Please refer to be response to question 13(c).

g. **Was *District of Columbia v. Heller* correctly decided?**

Response: Please refer to be response to question 13(c).

h. **Was *McDonald v. City of Chicago* correctly decided?**

Response: Please refer to be response to question 13(c).

i. **Was *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* correctly decided?**

Response: Please refer to be response to question 13(c).

j. **Was *New York State Rifle & Pistol Association v. Bruen* correctly decided?**

Response: Please refer to be response to question 13(c).

k. **Was *Dobbs v. Jackson Women's Health* correctly decided?**

Response: Please refer to be response to question 13(c).

14. **In a case of first impression should the Constitution be interpreted according to how it was understood by the public at the time of enactment? If not, how do you think it should be interpreted?**

Response: In the vast majority of, if not all, cases that would come before me if I were confirmed, the Supreme Court or Third Circuit will have provided a binding interpretation that would guide my decision. Absent such guidance, I would look again to the Supreme Court and Third Circuit for tools of interpretation. For example, the Supreme Court has frequently taken the approach that the text of a statute or the Constitution should be ascribed its ordinary public meaning at the time of enactment. *E.g., District of Columbia v. Heller*, 554 U.S. 570 (2008).

15. **What role should empathy play in interpreting the law?**

Response: Empathy does not play a role in the interpretation of the law.

16. **During your selection process did you talk with any officials from or anyone directly associated with the organization Demand Justice, or did anyone do so on your behalf? If so, what was the nature of those discussions?**

Response: Not to my knowledge.

17. During your selection process did you talk with any officials from or anyone directly associated with the American Constitution Society, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: Not to my knowledge.

18. During your selection process, did you talk with any officials from or anyone directly associated with Arabella Advisors, or did anyone do so on your behalf? If so, what was the nature of those discussions? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, the Hopewell Fund, the Windward Fund, or any other such Arabella dark-money fund that is still shrouded.

Response: Not to my knowledge.

19. During your selection process did you talk with any officials from or anyone directly associated with the Open Society Foundation, or did anyone do so on your behalf? If so, what was the nature of those discussions?

Response: Not to my knowledge.

20. Demand Justice is a progressive organization dedicated to "restor[ing] ideological balance and legitimacy to our nation's courts."
   a. **Has anyone associated with Demand Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
   b. **Are you currently in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**
   c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Brian Fallon, Christopher Kang, Tamara Brummer, Katie O'Connor, Jen Dansereau, Faiz Shakir, and/or Stasha Rhodes?**

Response to Question 20 and all subparts: Not to my knowledge.

21. **The Alliance for Justice is a "national association of over 120 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society."**
    a. **Has anyone associated with Alliance for Justice requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Are you currently in contact with anyone associated with the Alliance for Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**
    c. **Have you ever been in contact with anyone associated with Demand Justice, including, but not limited to: Rakim Brooks and/or Daniel L. Goldberg?**

Response to Question 21 and all subparts: Not to my knowledge.

22. **Arabella Advisors is a progressive organization founded "to provide strategic guidance for effective philanthropy" that has evolved into a "mission-driven, Certified B Corporation" to "increase their philanthropic impact."**
    a. **Has anyone associated with Arabella Advisors requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
    b. **Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund.**
    c. **Are you currently in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**
    d. **Have you ever been in contact with anyone associated with Arabella Advisors? Please include in this answer anyone associated with Arabella's known subsidiaries the Sixteen Thirty Fund, the New Venture Fund, or any other such Arabella dark-money fund that is still shrouded.**

Response to Question 22 and all subparts: Not to my knowledge.

23. **The Open Society Foundations is a progressive organization that "work[s] to build vibrant and inclusive democracies whose governments are accountable to their citizens."**
    a. **Has anyone associated with Open Society Fund requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**

b. **Are you currently in contact with anyone associated with the Open Society Foundations?**
c. **Have you ever been in contact with anyone associated with the Open Society Foundations?**

Response to Question 23 and all subparts: Not to my knowledge.

24. Fix the Court is a "non-partisan, 501(C)(3) organization that advocates for non-ideological 'fixes' that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people."

a. **Has anyone associated with Fix the Court requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
b. **Are you currently in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**
c. **Have you ever been in contact with anyone associated with Fix the Court, including but not limited to: Gabe Roth, Tyler Cooper, Dylan Hosmer-Quint and/or Mackenzie Long?**

Response to Question 24 and all subparts: Not to my knowledge.

25. The Raben Group is "a national public affairs and strategic communications firm committed to making connections, solving problems, and inspiring change across the corporate, nonprofit, foundation, and government sectors." It manages the Committee for a Fair Judiciary.

a. **Has anyone associated with The Raben Group or the Committee for a Fair Judiciary requested that you provide any services, including but not limited to research, advice, analysis, writing or giving speeches, or appearing at events or on panels?**
b. **Are you currently in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**
c. **Have you ever been in contact with anyone associated with the Raben Group or the Committee for a Fair Judiciary, including but not limited to: Robert Raben, Jeremy Paris, Erika West, Elliot Williams, Nancy Zirkin, Rachel Motley, Steve Sereno, Dylan Tureff, or Joe Onek?**

Response to Question 25 and all subparts: Not to my knowledge.

26. Please describe the selection process that led to your nomination to be a United States District Judge, from beginning to end (including the circumstances that led to your nomination and the interviews in which you participated).

Response: On March 20, 2017, I submitted an application for the position of United States District Judge for the Eastern District of Pennsylvania to Senator Casey and Senator Toomey: I interviewed with the Senators' joint selection committee in May 2017. On April 16, 2018, I interviewed with Senator Toomey and his team. On May 9, 2018, I interviewed with Senator Casey and his team. On January 24, 2021, I reapplied to Senator Casey and Senator Toomey for the same position. On August 4, 2021, I interviewed with Senator Casey and his team. On February 14, 2022, I interviewed with attorneys from the White House Counsel's Office. Beginning February 15, 2022, I was in contact with officials from the Office of Legal Policy at the Department of Justice. On July 12, 2022, the President announced his intent to nominate me.

27. Please explain, with particularity, the process whereby you answered these questions.

Response: I research and drafted answers to the questions myself and provided my draft to the Department of Justice. I made some minor revisions in view of the feedback that I received, and then submitted the final version.

Questions for John Murphy
Submitted by Senator Patrick Leahy
September 14, 2022

1. **Courts are moving toward greater transparency in litigation funding, particularly in patent litigation. Recently, Chief Judge Connolly of the U.S. District Court for the District of Delaware issued a standing order that directs parties to disclose any third-party funders in pending and newly filed actions. In addition to revealing the identity of funders, under the order, parties must disclose any financial benefit the third-party funder stands to gain and whether the funder's approval is needed for settlements or litigation decisions. The U.S. District Courts for the District of New Jersey and Northern District of California have also recently imposed similar rules.**

   a. **Would you support a similar rule in your court or nationwide?**

      Response: I am familiar with those rules and orders. My understanding is that the rules, at least in part, are intended to promote settlement opportunities and reveal conflicts of interest. Those are important considerations, but before taking a position, I would want to make sure I understood the potentially relevant interests and consequences, as best as could be determined. The exact nature of the rule and what disclosure is called for is also significant. For example, district courts around the country have ruled on discovery motions relating to actual and potential litigation funding, and there is considerable disagreement about the appropriateness and scope of such discovery. Furthermore, various bar associations have promulgated views on ethical considerations for litigation funding.

   b. **Would it help to know ahead of time whether a party engaged in patent litigation in your court was being funded by a third party? If so, why?**

      Response: Depending on the situation, it could help in at least two ways: (1) by illuminating potential conflicts of interest helpful for the court to evaluate its ethical obligations; and (2) to the extent the court aims to facilitate settlement discussions, by helping the court understand which parties need to be involved.

2. **Federal judges have occasionally encouraged plaintiffs to file, in those judges' courtrooms, specific types of cases they'd like to preside over. I appreciate that you have a particular expertise in intellectual property law; I also believe that in no area of law should a plaintiff be allowed to shop not just for a particular forum but for a particular judge.**

   a. **Do you intend to do anything that would encourage parties to try to get you assigned as the judge in any particular kind of case, such as an intellectual property case?**

Response: No, and I am aware of no mechanism in the Eastern District of Pennsylvania that would allow for such a result.

3. **I appreciate that you have experience with the Leahy-Smith America Invents Act, which is rare in judicial nominees. Section 18(b) of the Leahy-Smith America Invents Act lays out four factors that the court would consider in determining whether to stay litigation for covered business method patents while a covered-business-method-patent review was pending. Stays for post-grant review and inter partes review proceedings are not covered by that provision of the statute, allowing judges more discretion when deciding whether to stay district court litigation pending a decision from the U.S. Patent and Trademark Office (USPTO).**

    a. **What factors would you weigh when deciding whether to grant a stay for a parallel proceeding at the USPTO? Would you look to the factors in section 18(b) or employ some other methodology?**

    Response: The Federal Circuit has noted that the first three factors provided by Section 18(b) of the Leahy-Smith America Invents Act are typically used by district courts when considering any stay. *Murata Machinery USA v. Daifuku Co.*, 830 F.3d 1357 (Fed. Cir. 2016). Furthermore, the Federal Circuit held that district courts are free to consider the fourth "burden of litigation" factor when weighing a stay in view of an inter partes review. *Id.* I would adhere to the Federal Circuit's guidance. More generally, the highly fact-dependent nature of the circumstances surrounding a potential stay may call for weighing still further considerations as the parties may identify.

Questions for the Record for John Frank Murphy
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?**

      Response: No.

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

      Response: No.

Senator Mike Lee
Questions for the Record
John Murphy, Nominee to be U.S. District Judge for the Eastern District of Pennsylvania

1. **How would you describe your judicial philosophy?**

   Response: I have never served as a judge before. However, my intention would be to approach judicial decision-making by coming to each case with an open mind; to carefully research, understand, and follow the applicable law; to confine my decision to resolving disputed issues using the record evidence; and to write clearly, succinctly, and logically.

2. **What sources would you consult when deciding a case that turned on the interpretation of a federal statute?**

   Response: I would first research the precedent of the Supreme Court and Third Circuit, because their interpretation would be binding on me. Absent that, I would begin with the text of the statute, and focus my analysis on determining the reasonable meaning of that text, using all the tools of statutory construction available. If necessary and helpful, I may also consult with persuasive authorities and analogous cases to gain insight into the meaning of the text.

3. **What sources would you consult when deciding a case that turned on the interpretation of a constitutional provision?**

   Response: I would take the same approach as for interpretation of a federal statute, as explained in my response to Question 2. I would pay special attention to the Supreme Court and Third Circuit's guidance on interpretative methodologies in the particular type of case before me.

4. **What role do the text and original meaning of a constitutional provision play when interpreting the Constitution?**

   Response: As a district judge, my primary source of authority for interpreting the Constitution would be the Supreme Court and Third Circuit. Absent that, the text and original meaning of a constitutional provision would play the central role in my analysis.

5. **How would you describe your approach to reading statutes? Specifically, how much weight do you give to the plain meaning of the text?**

   Response: Please refer back to my response to Question 2.

   a. **Does the "plain meaning" of a statute or constitutional provision refer to the public understanding of the relevant language at the time of enactment, or does the meaning change as social norms and linguistic conventions evolve?**

Response: The Supreme Court has held that the text should be accorded its ordinary public meaning at the time of enactment.

6. What are the constitutional requirements for standing?

Response: A plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992).

7. Do you believe Congress has implied powers beyond those enumerated in the Constitution? If so, what are those implied powers?

Response: Congress may act to carry out its enumerated powers, as was held in *McCulloch v. State of Maryland*, 17 U.S. 316 (1819) (Congress had the power to set up a national bank). Thus, a primary point of reference for such analysis is whether Congress's action indeed carried out an enumerated power. But as far as I am aware, the Supreme Court has not provided any exhaustive list of such powers.

8. Where Congress enacts a law without reference to a specific Constitutional enumerated power, how would you evaluate the constitutionality of that law?

Response: Please refer back to my response to Question 7. Further, as with any case, I would follow binding Supreme Court and Third Circuit authority. For example, the Supreme Court has held that Congress's authority to act does not "depend on recitals of the power which it undertakes to exercise." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

9. Does the Constitution protect rights that are not expressly enumerated in the Constitution? Which rights?

Response: The Supreme Court has held the Constitution protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). In that decision, the Supreme Court summarized a number of past decisions recognizing fundamental rights, such as *Loving v. Virginia* and *Skinner v. Oklahoma*. The Court has followed the *Glucksberg* approach several times since that decision. If confirmed, I would follow that approach as well, in addition to any other binding precedent to evaluate such claims.

10. What rights are protected under substantive due process?

Response: Please refer back to my response to Question 9.

11. If you believe substantive due process protects some personal rights such as a right to abortion, but not economic rights such as those at stake in *Lochner v. New York*, on what basis do you distinguish these types of rights for constitutional purposes?

Response: The substantive due process clause does not protect a right to an abortion. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). *Lochner* was abrogated by *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). If called upon to distinguish such rights, I would adhere to the Supreme Court's guidance.

12. What are the limits on Congress's power under the Commerce Clause?

Response: Congress has broad authority under the Commerce Clause with respect to regulating channels of interstate commerce, instrumentalities of interstate commerce, and activities that substantially affect interstate commerce. *National Federal of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). But the Supreme Court explained that "we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce." *Id.*

13. What qualifies a particular group as a "suspect class," such that laws affecting that group must survive strict scrutiny?

Response: The Supreme Court has identified various criteria for a suspect class, for example, being "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

14. How would you describe the role that checks and balances and separation of powers play in the Constitution's structure?

Response: The principles of checks and balances and separation of powers help secure individual liberty by dividing power among the branches of government and preventing any one branch from becoming too powerful.

15. How would you go about deciding a case in which one branch assumed an authority not granted it by the text of the Constitution?

Response: I would consider the arguments and authorities cited by the parties, and conduct exhaustive research into the particular situation at hand. I would follow any available and applicable precedent of the Supreme Court and Third Circuit. It is the province of the Judiciary to ensure that the constitutional plan of separation of powers is followed.

16. What role should empathy play in a judge's consideration of a case?

Response: Empathy does not play a role in the interpretation of the law.

17. What's worse: Invalidating a law that is, in fact, constitutional, or upholding a law that is, in fact, unconstitutional?

Response: Either outcome is undesirable, and a judge should do all in his or her power to avoid such an error.

18. From 1789 to 1857, the Supreme Court exercised its power of judicial review to strike down federal statutes as unconstitutional only twice. Since then, the invalidation of federal statutes by the Supreme Court has become significantly more common. What do you believe accounts for this change? What are the downsides to the aggressive exercise of judicial review? What are the downsides to judicial passivity?

Response: I have not had the opportunity to study this issue so I do not have a firm basis upon which to answer. It is the unflagging duty of the Judiciary to address controversies presented before the courts, and to say what the law is. That duty should not be performed "aggressively" or "passively," but rather in accordance with the law. Although I have not researched the question, I suspect that an increase in invalidations bears at least some correlation to an increase in the size of the United States Code, the size of the administrative state, and the overall size and business of the American economy.

19. How would you explain the difference between judicial review and judicial supremacy?

Response: These are not terms I use in my day-to-day practice. However, my general understanding is that judicial review is the term for a court's authority and duty to assess whether actions are in accordance with the law. Black's Law Dictionary (11th ed. 2019). Judicial supremacy refers to the Supreme Court's interpretations of the Constitution being binding. *Id.*

20. Abraham Lincoln explained his refusal to honor the Dred Scott decision by asserting that "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." How do you think elected officials should balance their independent obligation to follow the Constitution with the need to respect duly rendered judicial decisions?

Response: As the Supreme Court held following *Brown v. Board*, when the Supreme Court interprets the Constitution, it becomes the supreme law of the land. *Cooper v. Aaron*, 358 U.S. 1 (1958) (explaining Article VI of the Constitution).

21. In Federalist 78, Hamilton says that the courts are the least dangerous branch because they have neither force nor will, but only judgment. Explain why that's important to keep in mind when judging.

Response: Among the many lessons of Federalist 78, because the Judiciary does not create the law or enforce the law, a court's work must be carefully constrained to the questions posed to the court, and must provide answers that are clear and well-reasoned.

22. **As a district court judge, you would be bound by both Supreme Court precedent and prior circuit court precedent. What is the duty of a lower court judge when confronted with a case where the precedent in question does not seem to be rooted in constitutional text, history, or tradition and also does not appear to speak directly to the issue at hand? In applying a precedent that has questionable constitutional underpinnings, should a lower court judge extend the precedent to cover new cases, or limit its application where appropriate and reasonably possible?**

Response: A district court is duty bound to apply the controlling precedent fairly. If the closest authority does not answer the question, it may be distinguishable, but only where the facts and other related authorities warrant such an outcome.

23. **When sentencing an individual defendant in a criminal case, what role, if any, should the defendant's group identity(ies) (e.g., race, gender, nationality, sexual orientation or gender identity) play in the judges' sentencing analysis?**

Response: None.

24. **The Biden Administration has defined "equity" as: "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." Do you agree with that definition? If not, how would you define equity?**

Response: There are other definitions of equity, but I do not have one definition to which I ascribe. *See* Black's Law Dictionary (11th ed. 2019) (providing several definitions).

25. **Is there a difference between "equity" and "equality?" If so, what is it?**

Response: There does not appear to be widespread agreement about what these terms mean. *See, e.g.,* Black's Law Dictionary (11th ed. 2019) (defining equality as "[t]he quality, state, or condition of being equal" and providing several definitions for "equity"); Martha Minow, Equality vs. Equity, Am. J. Law & Equality (2021) 1:167-193. If these terms appeared in a case before me as a district judge, my decisions would be based on the law and the record, and not on one definition or the other.

26. **Does the 14th Amendment's equal protection clause guarantee "equity" as defined by the Biden Administration (listed above in question 24)?**

Response: The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It would be a difficult endeavor to hypothetically cross-reference the protections of the Fourteenth Amendment with the referenced definition of equity, and I am not aware that a court has undertaken that task.

27. How do you define "systemic racism?"

Response: I have only a very general understanding of what is meant by systemic racism, and there appear to be varying definitions, but I believe it refers generally to the notion of racism as a product of systemic organization.

28. How do you define "critical race theory?"

Response: I have only a very general understanding of what is meant by critical race theory, and there appear to be varying definitions, but I believe it refers generally to a field of study that explores the connections between race and law, among other things.

29. Do you distinguish "critical race theory" from "systemic racism," and if so, how?

Response: Please refer back to my responses to Questions 27 and 28.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for John F. Murphy, Nominee for the Eastern District of Pennsylvania

I. Directions

Please provide a wholly contained answer to each question. A question's answer should not cross-reference answers provided in other questions. Because a previous nominee declined to provide any response to discrete subparts of previous questions, they are listed here separately, even when one continues or expands upon the topic in the immediately previous question or relies on facts or context previously provided

If a question asks for a yes or no answer, please provide a yes or no answer first and then provide subsequent explanation. If the answer to a yes or no question is sometimes yes and sometimes no, please state such first and then describe the circumstances giving rise to each answer.

If a question asks for a choice between two options, please begin by stating which option applies, or both, or neither, followed by any subsequent explanation.

If you disagree with the premise of a question, please answer the question as-written and then articulate both the premise about which you disagree and the basis for that disagreement.

If you lack a basis for knowing the answer to a question, please first describe what efforts you have taken to ascertain an answer to the question and then provide your tentative answer as a consequence of its reasonable investigation. If even a tentative answer is impossible at this time, please state why such an answer is impossible and what efforts you, if confirmed, or the administration or the Department, intend to take to provide an answer in the future. Please further give an estimate as to when the Committee will receive that answer.

To the extent that an answer depends on an ambiguity in the question asked, please state the ambiguity you perceive in the question, and provide multiple answers which articulate each possible reasonable interpretation of the question in light of the ambiguity.

II. Questions

1. Is racial discrimination wrong?

Response: Yes, and it is generally contrary to law, as set forth, *e.g.*, in the Civil Rights Act of 1964.

2. Are there any unenumerated rights in the Constitution, as yet unarticulated by the Supreme Court that you believe can or should be identified in the future?

Response: The Supreme Court has held the Constitution protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). In that decision, the Supreme Court summarized a number of past decisions recognizing fundamental rights, such as *Loving v. Virginia* and *Skinner v. Oklahoma*. The Court has followed the *Glucksberg* approach several times since that decision. If confirmed, I would follow that approach as well, in addition to any other binding precedent to evaluate such claims.

3. How would you characterize your judicial philosophy? Identify which U.S. Supreme Court Justice's philosophy out of the Warren, Burger, Rehnquist, and Roberts Courts is most analogous with yours.

Response: I have never served as a judge before. However, my intention would be to approach judicial decision-making by coming to each case with an open mind; to carefully research, understand, and follow the applicable law; to confine my decision to resolving disputed issues using the record evidence; and to write clearly, succinctly, and logically. There are many Supreme Court decisions, written by a variety of justices, that appear to exemplify such an approach, however that is only from the perspective of examining the decisions themselves.

4. Please briefly describe the interpretative method known as originalism. Would you characterize yourself as an 'originalist'?

Response: My general understanding of originalism is that it refers to giving meaning to the words of a legal instrument in view of the meaning they carried at the time of adoption. In my career in private practice, I have never had occasion to characterize myself as an originalist, or as an adherent to any other interpretative method. As a district judge, I would not subscribe to any particular label, because I would be bound by precedent regardless of the interpretative method employed.

5. Please briefly describe the interpretive method often referred to as living constitutionalism. Would you characterize yourself as a 'living constitutionalist'?

Response: My general understanding of living constitutionalism is that it refers to giving meaning to the words of the constitution in accordance with changing social values. In my career in private practice, I have never had occasion to characterize myself as a living constitutionalist, or as an adherent to any other interpretative method. As a district judge, I would not subscribe to any particular label, because I would be bound by precedent regardless of the interpretative method employed.

6. **If you were to be presented with a constitutional issue of first impression— that is, an issue whose resolution is not controlled by binding precedent—and the original public meaning of the Constitution were clear and resolved the issue, would you be bound by that meaning?**

Response: I would follow the guidance of the Supreme Court and Third Circuit to determine whether it would be appropriate to apply the original public meaning of the Constitution or any other interpretative approach. The Supreme Court frequently looks to the original public meaning, and has done so in several recent cases. *E.g., District of Columbia v. Heller*, 554 U.S. 570 (2008). I would do so as well, in accordance with that guidance.

7. **Is the public's current understanding of the Constitution or of a statute ever relevant when determining the meaning of the Constitution or a statute? If so, when?**

Response: Please refer back to my response to Question 6.

8. **Do you believe the meaning of the Constitution changes over time absent changes through the Article V amendment process?**

Response: No.

9. **Is the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* settled law?**

   a. **Was it correctly decided?**

Response to Questions 9 and 9a: The Supreme Court's decision in *Dobbs* is binding precedent that I would be obligated to follow as a district judge. It is generally inappropriate for me to comment on the correctness of binding precedent, so I will not do so here.

10. **Is the Supreme Court's ruling in *New York Rifle & Pistol Association v. Bruen* settled law?**

a. **Was it correctly decided?**

Response to Questions 10 and 10a: Please refer back to my response to Questions 9 and 9a.

11. Is the Supreme Court's ruling in *Brown v. Board of Education* settled law?

a. **Was it correctly decided?**

Response to Questions 11 and 11a: *Brown v. Board of Education* is binding precedent that I would be obligated to follow if I were confirmed. Generally, I think it is inappropriate for me to comment on the correctness of binding precedent. However, in the case of *Brown*, I am unaware of any reason or possibility why the decision would ever be called into question. Thus, I can state that *Brown* was correctly decided without risk of calling into question my objectivity in a future case.

12. What sort of offenses trigger a presumption in favor of pretrial detention in the federal criminal system?

Response: There is statutory guidance on the issue of pretrial detention, which provides three categories of criminal offenses triggering a presumption in favor of pretrial detention. *See* 18 U.S.C. § 3142(e)(1)-(3).

a. **What are the policy rationales underlying such a presumption?**

Response: I have never had the opportunity to study the policy rationales underlying this matter. I would note that I would be obliged to apply the laws as written, and not base my decisions on policy rationales.

13. Are there identifiable limits to what government may impose—or may require—of private institutions, whether it be a religious organization like Little Sisters of the Poor or small businesses operated by observant owners?

Response: Yes. Such limitations arise from, for example, the First Amendment and the Religious Freedom Restoration Act of 1993. Generally, the First Amendment allows for rationally based restrictions that are neutral and generally applicable, but applies strict scrutiny if they are not. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Among other rationales, laws are not neutral and generally applicable where they have the object of suppression or are applied in a hostile manner. *Id.*; *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

In contrast, RFRA, which generally applies to federal laws, prohibits substantially burdening the exercise of religion unless it can be shown that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

14. Is it ever permissible for the government to discriminate against religious organizations or religious people?

Response: No.

15. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sued to block enforcement of an executive order restricting capacity at worship services within certain zones, while certain secular businesses were permitted to remain open and subjected to different restrictions in those same zones. The religious organizations claimed that this order violated their First Amendment right to free exercise of religion. Explain the U.S. Supreme Court's holding on whether the religious entity-applicants were entitled to a preliminary injunction.

Response: In *Roman Catholic Diocese of Brooklyn*, the Supreme Court enjoined the enforcement of an executive order by the Governor of New York that capped the attendance at religious services in areas affected by COVID-19 to certain degrees. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). The Supreme Court determined that the challenged restrictions were not neutral and of general applicability because they single out houses of worship for especially harsh treatment. Then, applying strict scrutiny, the Supreme Court found that the executive order was not narrowly tailored. After considering the remaining factors underlying injunctive relief, the Supreme Court held that the restrictions must be enjoined.

16. Please explain the U.S. Supreme Court's holding and rationale in *Tandon v. Newsom*.

Response: In *Tandon*, the Supreme Court considered restrictions placed on at-home private gatherings of religious exercise. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). The Supreme Court granted an application for injunctive relief, finding the restrictions to be not neutral and generally applicable, and not satisfying strict scrutiny. The Court's holding was based on, among other things, that the restriction treated some comparable secular activities more favorably than at-home religious exercise, and that the state could not show the public health would be imperiled by less restrictive measures.

17. Do Americans have the right to their religious beliefs outside the walls of their houses of worship and homes?

Response: Yes.

18. Explain your understanding of the U.S. Supreme Court's holding in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

Response: In *Masterpiece Cakeshop*, the Supreme Court considered a challenge under the Free Exercise Clause to a determination by the Colorado Civil Rights Commission that a bakery had violated the Colorado Anti-Discrimination Act by refusing to create a cake for a same-sex wedding. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719 (2018). The Supreme Court held that the Commission had violated the First Amendment because the Commission evinced clear and impermissible hostility toward the sincere religious beliefs that motivated the baker's objection.

19. Under existing doctrine, are an individual's religious beliefs protected if they are contrary to the teaching of the faith tradition to which they belong?

Response: Yes. The Supreme Court has rejected "the notion that one must be responding to the commands of a particular religious organization to claim the protection of the Free Exercise Clause." *Frazee v. Illinois Dept. of Employment Sec.*, 489 U.S. 829 (1989). "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707 (1981) (also observing that yet, "[o]ne can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause").

a. **Are there unlimited interpretations of religious and/or church doctrine that can be legally recognized by courts?**

Response: Please refer back to my response to Question 19.

b. **Can courts decide that anything could constitute an acceptable "view" or "interpretation" of religious and/or church doctrine?**

Response: Please refer back to my response to Question 19.

c. **Is it the official position of the Catholic Church that abortion is acceptable and morally righteous?**

Response: Not as far as I know.

20. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court reversed the Ninth Circuit and held that the First Amendment's Religion Clauses foreclose the adjudication of employment-discrimination claims for the Catholic school teachers in the case. Explain your understanding of the Court's holding and reasoning in the case.

Response: In *Our Lady of Guadalupe*, the Supreme Court considered the application of the ministerial exception in the dismissal of two elementary school teachers who asserted employment discrimination. *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). The Supreme Court held that the ministerial exception acted to prevent the adjudication of discrimination claims. The Supreme Court recognized a "variety of factors" could come into play when determining whether the ministerial exception applies, and that what matters most "is what an employee does."

21. In *Fulton v. City of Philadelphia*, the U.S. Supreme Court was asked to decide whether Philadelphia's refusal to contract with Catholic Social Services to provide foster care, unless it agrees to certify same-sex couples as foster parents, violates the Free Exercise Clause of the First Amendment. Explain the Court's holding in the case.

Response: In *Fulton*, the Supreme Court considered a challenge under § 1983 to the city of Philadelphia's refusal to place children with a foster care agency affiliated with the Roman Catholic Archdiocese called CSS. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Philadelphia had conditioned its contract with CSS on the requirement that CSS certify same-sex couples as foster parents, which CSS declined to do for religious reasons. The Supreme Court held that Philadelphia's refusal violated the First Amendment because it was not "generally applicable" and thus subject to strict scrutiny, and because Philadelphia failed to show that exempting CSS from its policy would harm the goals of its foster care placement system.

22. In *Carson v. Makin*, the U.S. Supreme Court struck down Maine's tuition assistance program because it discriminated against religious schools and thus undermined Mainers' Free Exercise rights. Explain your understanding of the Court's holding and reasoning in the case.

Response: In *Carson*, the Supreme Court considered a challenge to a Maine law allowing only nonsectarian schools to receive public funds for tuition purposes. *Carson v. Makin*, 142 S. Ct. 1987 (2022). The Supreme Court held that the Maine law violated the First Amendment because the law was not neutral by virtue of funding only non-religious schools. The Supreme Court further held that Maine could not satisfy strict scrutiny because a state need not subsidize private education, but if it does so, it cannot disqualify schools solely because they are religious.

23. Please explain your understanding of the U.S. Supreme Court's holding and reasoning in *Kennedy v. Bremerton School District*.

Response: In *Kennedy*, the Supreme Court considered a challenge under § 1983 brought by a high-school football coach who lost his job because he knelt at midfield after games to offer a quiet personal prayer. *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022). The Supreme Court held the dismissal violated the First Amendment because, among other things, Kennedy's prayers occurred during a period when the District acknowledged that its coaching staff was free to engage in private speech; and because allowing the prayers did not constitute a violation of the Establishment Clause.

24. Explain your understanding of Justice Gorsuch's concurrence in the U.S. Supreme Court's decision to grant certiorari and vacate the lower court's decision in *Mast v. Fillmore County*.

Response: *Mast* involved a challenge brought under the Religious Land Use and Institutionalized Persons Act (RLUIPA), which, in relevant part, affords certain protections to churches and religious institutions against zoning law restrictions on their property use. 42 U.S.C. § 2000cc. The Court of Appeals of Minnesota had affirmed the rejection of an amish community's opposition to mandated use of gray water treatment systems. The Supreme Court vacated the judgment and remanded for further consideration in view of *Fulton*. *Mast v. Fillmore*, 141 S. Ct. 2430 (2021). Justice Gorsuch's concurrence outlined various issues and analyzed the County's actions under RLUIPA. Among other things, Justice Gorsuch wrote that the County "erred by treating the County's *general* interest in sanitation regulations as 'compelling' without reference to the *specific* application of those rules to *this* community."

25. Some people claim that Title 18, Section 1507 of the U.S. Code should not be interpreted broadly so that it does not infringe upon a person's First Amendment right to peaceably assemble. How would you interpret the statute in the context of the protests in front the homes of U.S. Supreme Court Justices following the *Dobbs* leak?

Response: 18 U.S.C. § 1507 penalizes one who "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence." I am not aware of any binding interpretation of this statute by the Supreme Court or Third Circuit that answers this question, and I do not think it would be appropriate for me to offer one. If confronted with a challenge brought

to the statute under the First Amendment, I would apply the principles of statutory construction and First Amendment law as provided by the Supreme Court and Third Circuit to the facts of the case.

26. **Would it be appropriate for the court to provide its employees trainings which include the following:**

a. **One race or sex is inherently superior to another race or sex;**
b. **An individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive;**

c. **An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; or**

d. **Meritocracy or related values such as work ethic are racist or sexist?**

Response to Question 26 and all subparts: No.

27. **Will you commit that your court, so far as you have a say, will not provide trainings that teach that meritocracy, or related values such as work ethic and self-reliance, are racist or sexist?**

Response: I do not have any understanding of what such trainings may exist in the Eastern District of Pennsylvania, or what, if any, role I would play in determining the content of such trainings.

28. **Will you commit that you will not engage in racial discrimination when selecting and hiring law clerks and other staff, should you be confirmed?**

Response: Yes.

29. **Is it appropriate to consider skin color or sex when making a political appointment? Is it constitutional?**

Response: On one hand, political appointments are generally made with great discretion; but on the other hand, there are numerous restrictions on discrimination, such as the 1964 Civil Rights Act. The appropriateness of a political appointment for any given reason is an issue that could come before a district court. Therefore, it is not appropriate for me to provide an opinion on this hypothetical question.

30. Is the criminal justice system systemically racist?

Response: I have not had the opportunity to study this question in the course of my career, and I have only a very general understanding of what is meant by systemic racism. Regardless, if I were confirmed, I would administer all cases fairly and impartially, and my touchstone in all actions would be the rule of law. If a case alleging "systemic" or any other type of racial discrimination came before me, I would apply the relevant Supreme Court and Third Circuit to the specific facts of that case.

31. President Biden has created a commission to advise him on reforming the U.S. Supreme Court. Do you believe that Congress should increase, or decrease, the number of justices on the U.S. Supreme Court? Please explain.

Response: This matter is entrusted to the judgment of Congress.

32. In your opinion, are any currently sitting members of the U.S. Supreme Court illegitimate?

Response: No.

33. What do you understand to be the original public meaning of the Second Amendment?

Response: The Supreme Court has held that the original public meaning of the Second Amendment is to "guarantee the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570 (2008). I would apply the Supreme Court's interpretation of the Second Amendment in any case that came before me as a district judge.

34. What kinds of restrictions on the Right to Bear Arms do you understand to be prohibited by the U.S. Supreme Court's decisions in *United States v. Heller*, *McDonald v. Chicago*, and *New York State Rifle & Pistol Association v. Bruen*?

Response: The Supreme Court provided the analytical framework for answering this question in *Bruen*. The first question is whether the challenged conduct falls within the meaning of the Second Amendment. If so, the second question is whether the government can show that the restriction is consistent with this country's historical

tradition of firearm regulation. *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022).

35. Is the ability to own a firearm a personal civil right?

Response: Yes, under *United States v. Heller* and the Supreme Court's cases following *Heller.*

36. Does the right to own a firearm receive less protection than the other individual rights specifically enumerated in the Constitution?

Response: Although the Supreme Court has approached civil rights cases using different tests and standards, as far as I know, the Supreme Court has never held that the right to own a firearm receives "less protection" than any other right.

37. Does the right to own a firearm receive less protection than the right to vote under the Constitution?

Response: Please refer back to my response to Question 36.

38. Is it appropriate for the executive under the Constitution to refuse to enforce a law, absent constitutional concerns? Please explain.

Response: The Constitution vests executive power in the President and requires that the President "take care that the Laws be faithfully executed." The Supreme Court has explained that "[i]n our criminal justice system, the Government retains broad discretion as to whom to prosecute." *Wayte v. U.S.*, 470 U.S. 598 (1985). Yet, there are limits to this discretion, e.g., "the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.*

39. Explain your understanding of what distinguishes an act of mere 'prosecutorial discretion' from that of a substantive administrative rule change.

Response: Prosecutorial discretion refers to the concept discussion in my response to Question 38, above. A substantive administrative rule change is when an administrative agency duly exercises its authority to promulgate rules affecting the rights of those who interact with the agency. If I were presented with such a question in a case that came before me as a district judge, I would research it thoroughly and apply all relevant precedent to the facts of the case.

40. Does the President have the authority to abolish the death penalty?

Response: 18 U.S.C. § 3591 provides authority for the death penalty. The President lacks the authority to abolish an act of Congress.

41. Explain the U.S. Supreme Court's holding on the application to vacate stay in *Alabama Association of Realtors v. HHS*.

Response: In *AAR*, the CDC had imposed a nationwide moratorium on evictions of any tenants who lived in a county experiencing certain level of COVID-19 transmission and who made certain declarations of need. *AAR v. HHS*, 141 S. Ct. 2485 (2021). The district court had vacated the moratorium as unlawful, but stayed the judgment pending appeal. The Supreme Court vacated the stay, rending the judgment enforceable. The substance of the decision involved the application of the four-factor test for injunctions, with a particular emphasis on the Supreme Court's finding of a substantial likelihood of success on the merits in view of the relevant statute.

Senator Josh Hawley
Questions for the Record

John Murphy
Nominee, Eastern District of Pennsylvania

1. **Then-Judge Ketanji Brown Jackson made a practice of refusing to apply several enhancements in the Sentencing Guidelines when sentencing child pornography offenders. Please explain whether you agree with each of the following Guidelines enhancements and whether, if you are confirmed, you intend to use them to increase the sentences imposed on child pornography offenders.**

    a. **The enhancement for material that involves a prepubescent minor or a minor who had not attained the age of 12 years**

    b. **The enhancement for material that portrays sadistic or masochistic conduct or other depictions of violence**

    c. **The enhancement for offenses involving the use of a computer**

    d. **The enhancements for the number of images involved**

    Response to Question 1 and all subparts: I have not been involved in criminal sentencing in my career. I have much to learn, but it is my general intention to begin with 18 U.S.C. § 3553 and the Guidelines Manual, and take each case on its facts, with due consideration given to the record and any applicable law.

2. **Federal law currently has a higher penalty for distribution or receipt of child pornography than for possession. It's 5-20 years for receipt or distribution. It's 0-10 years for possession. The Commission has recommended that Congress align those penalties, and I have a bill to do so.**

    a. **Do you agree that the penalties should be aligned?**

    b. **If so, do you think the penalty for possession should be increased, receipt and distribution decreased, or a mix?**

    c. **If an offender before you is charged only with possession even though uncontested evidence shows the offender also committed the crime of receiving child pornography, will you aim to sentence the offender to between 5 and 10 years?**

Response to Question 2 and all subparts: Questions about whether the penalties for any federal crime should be changed are best left to the judgment of Congress. If confirmed as a district judge, I would do my best to faithfully apply the provisions of 18 U.S.C. § 3553 in order to give effect to the law.

3. **Justice Marshall famously described his philosophy as "You do what you think is right and let the law catch up."**

   a. **Do you agree with that philosophy?**

      Response: On the face of the quotation, no.

   b. **If not, do you think it is a violation of the judicial oath to hold that philosophy?**

      Response: Without knowing the full context of what Justice Marshall was referring to, I cannot answer that question. In my view, a judge is obliged to follow the law, even if the outcome is dissatisfactory.

4. **Do you believe that the Supreme Court's ruling in *Dobbs* v. *Jackson Women's Health Organization* is settled law?**

   Response: Yes, *Dobbs* is binding precedent of the Supreme Court.

5. **What is the standard for each kind of abstention in the court to which you have been nominated?**

   Response: There are a number of such doctrines. Some of them are as follows: *Younger* abstention refers to when district courts should avoid interfering with state criminal or criminal-like proceedings that implicate a state's interest in enforcing the orders of judgments of its courts. *Younger v. Harris*, 401 U.S. 37 (1971). *Burford* abstention refers to when there are difficult questions of state law bearing on policy problems of substantial public import, or where the exercise of federal review would disrupt state efforts to establish coherent policy. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans (NOPSI)*, 491 U.S. 350, 361 (1989). *Rooker-Feldman* abstention acts to prevent federal courts other than the Supreme Court from modifying state court judgments involving injuries caused by state-court judgments rendered before federal district court proceedings. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283–84 (2005). *Colorado River* abstention refers to when there is parallel litigation in state court involving the same issues and the same parties, and abstention would conserve judicial resources. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). *Pullman* abstention refers to federal courts avoiding deciding federal constitutional challenges to state law if a

state might interpret the law in a way that avoids the federal issue. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

6. **Have you ever worked on a legal case or representation in which you opposed a party's religious liberty claim?**

   Response: No.

   a. **If so, please describe the nature of the representation and the extent of your involvement. Please also include citations or reference to the cases, as appropriate.**

      Response: Not applicable.

7. **What role should the original public meaning of the Constitution's text play in the courts' interpretation of its provisions?**

   Response: As a district judge, my primary source of authority for interpreting the Constitution would be the Supreme Court and Third Circuit. Absent that, the text and original meaning of a constitutional provision would play the central role in my analysis.

8. **Do you consider legislative history when interpreting legal texts?**

   Response: I would first research the precedent of the Supreme Court and Third Circuit, because their interpretation would be binding on me. Absent that, I would begin with the text of the statute, and focus my analysis on determining the reasonable meaning of that text, using all the tools of statutory construction available. If necessary and helpful, I may also consult with persuasive authorities and analogous cases to gain insight into the meaning of the text.

   a. **If so, do you treat all legislative history the same or do you believe some legislative history is more probative of legislative intent than others?**

      Response: The Supreme Court has observed that committee reports are more useful than comments of individual members of Congress. *Garcia v. U.S.*, 469 U.S. 70 (1984).

   b. **When, if ever, is it appropriate to consult the laws of foreign nations when interpreting the provisions of the U.S. Constitution?**

Response: I am not aware of any occasion where it would be appropriate to do so, but I would follow the guidance of the Supreme Court and Third Circuit on the question on interpretive methodologies.

9. **Under the precedents of the Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?**

   Response: The Supreme Court's standard calls for considering the existence of an alternative method of execution that would significantly reduce a substantial risk of severe pain that the state refused to adopt without legitimate justification. *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). I am not aware of a Third Circuit interpretation of *Bucklew*.

10. **Under the Supreme Court's holding in *Glossip v. Gross*, 135 S. Ct. 824 (2015), is a petitioner required to establish the availability of a "known and available alternative method" that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?**

    Response: Yes. Please refer back to my response to Question 9.

11. **Has the Supreme Court or the U.S. Court of Appeals for the Circuit to which you have been nominated ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?**

    Response: The Third Circuit has followed the Supreme Court's holding that there is no freestanding right to DNA evidence in that context. *See Bonner v. Montgomery County*, 458 Fed. Appx. 135 (3d Cir. 2012) (citing *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52 (2009)).

12. **Do you have any doubt about your ability to consider cases in which the government seeks the death penalty, or habeas corpus petitions for relief from a sentence of death, fairly and objectively?**

    Response: No.

13. **Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a facially neutral state governmental action is a substantial burden on the free exercise of religion? Please cite any cases you believe would be binding precedent.**

Response: Under the premise that the state governmental action is facially neutral, the action "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

14. Under Supreme Court and U.S. Court of Appeals for the Circuit to which you have been nominated, what is the legal standard used to evaluate a claim that a state governmental action discriminates against a religious group or religious belief? Please cite any cases you believe would be binding precedent.

Response: The Supreme Court has provided guidance on how to determine whether the state action is facially neutral or discriminatory. As just one example, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719 (2018); *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). With respect to laws of the federal government, the standard of the Religious Freedom Restoration Act of 1993 also applies, and prohibits substantial burden on a person's exercise of religion absent showing that it is the least restrictive means of furthering a compelling government interest. 42 U.S.C. §§ 2000bb-1(a), (b).

15. What is the standard in the U.S. Court of Appeals for the Circuit to which you have been nominated for evaluating whether a person's religious belief is held sincerely?

Response: The Supreme Court has held that "while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case." *U.S. v. Seeger*, 380 U.S. 163 (1965) (noting that it is "a question of fact—a prime consideration to the validity of every claim for exemption as a conscientious objector"); *see also Africa v. Comm. of Penn.*, 662 F.2d 1025 (3d Cir. 1981) (citing *Seeger* and holding that the subject beliefs were "truly held").

16. The Second Amendment provides that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

   a. What is your understanding of the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008)?

Response: In *Heller*, the Supreme Court held that the Second Amendment protects an individual right to possess a firearm, and to use that firearm for traditionally lawful purposes such as self-defense.

b. **Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Second Amendment or any analogous state law? If yes, please provide citations to or copies of those decisions.**

Response: No.

17. **Dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr. wrote that, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).**

a. **What do you believe Justice Holmes meant by that statement, and do you agree with it?**

Response: My understanding is that Justice Holmes was making the point that the Constitution did not select a particular economic theory.

b. **Do you believe that *Lochner v. New York*, 198 U.S. 45 (1905), was correctly decided? Why or why not?**

Response: *Lochner* was overturned. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). I would not follow *Lochner* as a district judge.

18. **Are there any Supreme Court opinions that have not been formally overruled by the Supreme Court that you believe are no longer good law?**

Response: Not that I am aware of.

a. **If so, what are they?**

Response: Not applicable.

b. **With those exceptions noted, do you commit to faithfully applying all other Supreme Court precedents as decided?**

Response: Yes.

19. **Judge Learned Hand famously said 90% of market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).**

a. **Do you agree with Judge Learned Hand?**

Response: If confirmed, my approach to determining what constitutes a monopoly would rely on the full body of relevant caselaw from the Supreme Court and the Third Circuit, and I would not place any special weight on Judge Hand's remark. As a point of reference exemplifying the available law, in *Eastman Kodak v. Image Tech*, 504 U.S. 451 (1992), the Supreme Court held that showing 80% market share with no readily available substitutes can be sufficient to show a monopoly.

b. **If not, please explain why you disagree with Judge Learned Hand.**

Response: Please refer to my response to Question 19(a).

c. **What, in your understanding, is in the minimum percentage of market share for a company to constitute a monopoly? Please provide a numerical answer or appropriate legal citation.**

Response: Please refer to my response to Question 19(a).

20. **Please describe your understanding of the "federal common law."**

Response: The Supreme Court recently explained that "[ju]dicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's legislative Powers in Congress and reserves most other regulatory authority to the States. As this Court has put it, there is no federal general common law. Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision." *Rodriguez v. FDIC*, 140 S. Ct. 713 (2020) (quotations and citations omitted). The Supreme Court stated that federal common law cannot exist absent strict conditions, including "one of the most basic: In the absence of congressional authorization, common lawmaking must be necessary to protect uniquely federal interests." *Id.*

21. **If a state constitution contains a provision protecting a civil right and is phrased identically with a provision in the federal constitution, how would you determine the scope of the state constitutional right?**

Response: As a general matter, the highest court of a state interprets that state's constitution, and as a federal district judge, I would look to that interpretation.

a. **Do you believe that identical texts should be interpreted identically?**

Response: Generally, yes, but that proposition, however logical, must give way to the binding interpretations of the relevant courts. The Supreme Court has noted "that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, 574 U.S. 528 (2015).

b. **Do you believe that the federal provision provides a floor but that the state provision provides greater protections?**

Response: As a general matter, yes. The "floor" refers to the binding federal constitutional provisions. But subject to that "floor," the states are free to provide greater protections.

22. **Do you believe that *Brown v. Board of Education*, 347 U.S. 483 (1954) was correctly decided?**

Response: *Brown v. Board of Education* is binding precedent that I would be obligated to follow if I were confirmed. Generally, I think it is inappropriate for me to comment on the correctness of binding precedent. However, in the case of *Brown*, I am unaware of any reason or possibility why the decision would ever be called into question. Thus, I can state that *Brown* was correctly decided without risk of calling into question my objectivity in a future case.

23. **Do federal courts have the legal authority to issue nationwide injunctions?**

Response: Yes, in appropriate circumstances.

a. **If so, what is the source of that authority?**

Response: The sources of authority vary widely, and may include the inherent powers of the Judiciary. For example, the Patent Act provides for national injunction relief, as does the Lanham Act. 35 U.S.C. § 283; 15 U.S.C. § 1116. Such authority is implemented through Federal Rule of Civil Procedure 65. Depending on the nature of the case, the source of authority has been the subject of careful consideration. *See, e.g., Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599-600 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 138 S. Ct. 2392, 2428-29 (2018) (Thomas, J., concurring).

b. **In what circumstances, if any, is it appropriate for courts to exercise this authority?**

Response: That depends entirely on the context of the particular case, the sources of law, and the facts and equities. In nearly any situation, it would be

appropriate for a court to consider, among other things, the Supreme Court's four-factor test. *eBay v. MercExchange*, 547 U.S. 388 (2006).

24. **Under what circumstances do you believe it is appropriate for a federal district judge to issue a nationwide injunction against the implementation of a federal law, administrative agency decision, executive order, or similar federal policy?**

    Response: The Supreme Court and Third Circuit have not, to my knowledge, provided definitive guidance. The analysis would certainly embrace the full context of the facts and equities, as well as the relevant sources of law and issues at stake. If the issue were to come before me, part of the analysis would also involve studying the decisions on the issue from courts across the country to best ascertain the state of the law at that time.

25. **What is your understanding of the role of federalism in our constitutional system?**

    Response: Federalism is the notion that we are subject to both state and federal legal regimes, with interlocking duties and responsibilities. Federalism provides a mutual check between federal and state powers, and allows for differentiation in the areas of the law subject to state control.

26. **Under what circumstances should a federal court abstain from resolving a pending legal question in deference to adjudication by a state court?**

    Response: Please refer back to my response to question 5.

27. **What in your view are the relative advantages and disadvantages of awarding damages versus injunctive relief?**

    Response: Generally speaking, money damages compensate for past harm, and injunctive relief prevents future harm.

28. **What is your understanding of the Supreme Court's precedents on substantive due process?**

    Response: The Supreme Court has held the Constitution protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). In that decision, the Supreme Court summarized a number of past decisions recognizing fundamental rights, such as *Loving v. Virginia* and *Skinner v. Oklahoma*. The Court has followed the *Glucksberg* approach several times since that decision.

29. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

a. What is your view of the scope of the First Amendment's right to free exercise of religion?

Response: Please refer back to my responses to Questions 13-15.

b. Is the right to free exercise of religion synonymous and coextensive with freedom of worship? If not, what else does it include?

Response: I am not aware of any Supreme Court or Third Circuit decision identifying a difference between the concepts of free exercise of religion and freedom of worship. What is included under the umbrella of free exercise is best understood with reference to the Supreme Court's decisions applying the free exercise clause.

c. What standard or test would you apply when determining whether a governmental action is a substantial burden on the free exercise of religion?

Response: Please refer back to my responses to Questions 13-15.

d. Under what circumstances and using what standard is it appropriate for a federal court to question the sincerity of a religiously held belief?

Response: Please refer back to my responses to Questions 13-15.

e. Describe your understanding of the relationship between the Religious Freedom Restoration Act and other federal laws, such as those governing areas like employment and education?

Response: With respect to laws of the federal government, the standard of the Religious Freedom Restoration Act of 1993 applies, and prohibits substantial burden on a person's exercise of religion absent showing that it is the least restrictive means of furthering a compelling government interest. 42 U.S.C. §§ 2000bb-1(a), (b). RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise. RFRA also permits Congress to exclude statutes from RFRA's protections." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylva*nia, 140 S. Ct. 2367, 2383 (2020) (citations and quotations omitted).

f. **Have you ever issued a judicial opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land use and Institutionalized Person Act, the Establishment Clause, the Free Exercise Clause, or any analogous state law? If yes, please provide citations to or copies of those decisions.**

   Response: No.

30. **Justice Scalia said, "The judge who always likes the result he reaches is a bad judge."**

    a. **What do you understand this statement to mean?**

       Response: Cases should be adjudicated fairly and impartially under the rule of law, regardless of how the judge likes the outcome. Justice Scalia is suggesting that a judge who never dislikes the outcome of a case likely improperly allowed his feelings about the outcome guide the decision.

31. **Have you ever taken the position in litigation or a publication that a federal or state statute was unconstitutional?**

    Response: To the best of my recollection, no.

    a. **If yes, please provide appropriate citations.**

       Response: Not applicable.

32. **Since you were first contacted about being under consideration for this nomination, have you deleted or attempted to delete any content from your social media? If so, please produce copies of the originals.**

    Response: No.

33. **Do you believe America is a systemically racist country?**

    Response: No.

34. **Have you ever taken a position in litigation that conflicted with your personal views?**

    Response: Yes.

35. **How did you handle the situation?**

Response: A lawyer is obliged to zealously advocate for his or her client, and I have always done that for all of my clients, regardless of my personal feelings.

36. **If confirmed, do you commit to applying the law written, regardless of your personal beliefs concerning the policies embodied in legislation?**

    Response: Yes.

37. **Which of the Federalist Papers has most shaped your views of the law?**

    Response: I would not say that any Federalist Paper has shaped my views of the law. However, Federalist 78 provides an illuminating and foundational view on the role of the judiciary, and Federalist 51 is an insightful explanation of separation of powers and checks and balances.

38. **Do you believe that an unborn child is a human being?**

    Response: The Supreme Court did not answer this question in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). It would not be appropriate for me to provide an opinion on that issue, since it is one that could come before the courts. If such an issue did come before me as a district judge, I would faithfully apply all relevant law and precedent in addressing the issues in the case.

39. **Other than at your hearing before the Senate Judiciary Committee, have you ever testified under oath? Under what circumstances? If this testimony is available online or as a record, please include the reference below or as an attachment.**

    Response: To the best of my recollection, no.

40. **In the course of considering your candidacy for this position, has anyone at the White House or Department of Justice asked for you to provide your views on:**

    a. ***Roe v. Wade,* 410 U.S. 113 (1973)?**

       Response: No.

    b. **The Supreme Court's substantive due process precedents?**

       Response: No.

    c. **Systemic racism?**

       Response: No.

d. **Critical race theory?**

Response: No.

41. Do you currently hold any shares in the following companies:

a. **Apple?**

Response: Yes.

b. **Amazon?**

Response: Yes.

c. **Google?**

Response: Yes.

d. **Facebook?**

Response: No.

e. **Twitter?**

Response: No.

42. Have you ever authored or edited a brief that was filed in court without your name on the brief?

Response: To the best of my recollection, any brief that I primarily authored would have had my name on it. In my years of practice, I have edited or authored minor portions of countless briefs, and I cannot say for certain which ones had my name on them and which ones did not, because there were surely many circumstances where I was asked to make a contribution when I was a peripheral team member or not even on the relevant team.

a. **If so, please identify those cases with appropriate citation.**

43. Have you ever confessed error to a court?

Response: To the best of my recollection, no.

a. **If so, please describe the circumstances.**

Response: Not applicable.

44. **Please describe your understanding of the duty of candor, if any, that nominees have to state their views on their judicial philosophy and be forthcoming when testifying before the Senate Judiciary Committee. *See* U.S. Const. art. II, § 2, cl. 2.**

    Response: I believe nominees should be forthcoming in their responses to all questions from the Senate, consistent with their ethical and professional duties.

Senator Ben Sasse
Questions for the Record for John Frank Murphy
U.S. Senate Committee on the Judiciary
Hearing: "Nominations"
September 7, 2022

1. **Since becoming a legal adult, have you participated in any events at which you or other participants called into question the legitimacy of the United States Constitution?**

   Response: No.

2. **How would you describe your judicial philosophy?**

   Response: I have never served as a judge before. However, my intention would be to approach judicial decision-making by coming to each case with an open mind; to carefully research, understand, and follow the applicable law; to confine my decision to resolving disputed issues using the record evidence; and to write clearly, succinctly, and logically.

3. **Would you describe yourself as an originalist?**

   Response: My general understanding of originalism is that it refers to giving meaning to the words of a legal instrument in view of the meaning they carried at the time of adoption. In my career in private practice, I have never had occasion to characterize myself as an originalist, or as an adherent to any other interpretative method. As a district judge, I would not subscribe to any particular label, because I would be bound by precedent regardless of the interpretative method employed.

4. **Would you describe yourself as a textualist?**

   Response: My general understanding of textualism is that it refers to an approach to statutory interpretation that starts with, and focuses on, the words of the text and what they reasonably convey (rather than, for example, the intent behind the text). This approach to statutory interpretation is widely applied in courts, including the Supreme Court and the Third Circuit. Although I have never adopted any interpretative label for myself, I would certainly follow the guidance of the Supreme Court and Third Circuit by beginning my analysis of a statute with the text and maintaining primary focus on that.

5. **Do you believe the Constitution is a "living" document whose precise meaning can change over time? Why or why not?**

   Response: No. I believe that the Constitution has a meaning that is fixed, and can be changed only through the amendment process.

6. **Please name the Supreme Court Justice or Justices appointed since January 20, 1953 whose jurisprudence you admire the most and explain why.**

   Response: I have not sufficiently studied the jurisprudence of those justices to identify one that I admire most. When I read Supreme Court opinions, I tend to admire the ones that are clear, succinct, and persuasively reasoned. Our legal system relies on the credibility of well-reasoned, logical opinions that are based on sound precedent and do justice to the facts of the case.

7. **In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for appellate court to reaffirm its own precedent that conflicts with the original public meaning of the Constitution?**

   Response: An appellate court panel should follow the precedent of that court. Circuit courts have developed, for their own use, considerations for when to overturn their own precedent during the *en banc* process. Whether the original precedent is legally flawed is typically one of several such considerations.

8. **In the absence of controlling Supreme Court precedent, what substantive factors determine whether it is appropriate for an appellate court to reaffirm its own precedent that conflicts with the original public meaning of the text of a statute?**

   Response: Please refer back to my response to Question 7.

9. **What role should extrinsic factors not included within the text of a statute, especially legislative history and general principles of justice, play in statutory interpretation?**

   Response: As a district judge, I would be obliged to follow Supreme Court and Third Circuit precedent on the weight to give such "extrinsic" factors. But generally speaking, I would always begin with the text of the statute, and I would exhaust all of the tools of statutory interpretation before turning to any such "extrinsic" factors. In many cases, such "extrinsic" factors play no role at all, because the question may be clearly answered without their aid. Certainly, such "extrinsic" factors cannot contradict the plain meaning of the text.

10. **If defendants of a particular minority group receive on average longer sentences for a particular crime than do defendants of other racial or ethnic groups, should that disparity factor into the sentencing of an individual defendant? If so, how so?**

    Response: No. My understanding of the sentencing factors provided by Congress does not include the issue in the question. *See* 18 U.S.C. § 3553(a).

Questions for the Record
Senator John Kennedy

John Murphy

1. **Please describe your judicial philosophy. Be as specific as possible.**

   Response: I have never served as a judge before. However, my intention would be to approach judicial decision-making by coming to each case with an open mind; to carefully research, understand, and follow the applicable law; to confine my decision to resolving disputed issues using the record evidence; and to write clearly, succinctly, and logically.

2. **Should a judge look beyond a law's text, even if clear, to consider its purpose and the consequences of ruling a particular way when deciding a case?**

   Response: As a district judge, I would be obliged to follow Supreme Court and Third Circuit precedent on how to proceed with statutory interpretation. But generally speaking, if the text is clear, there would be no reason to consider the purposes of the law or consequences of ruling a particular way.

3. **Should a judge consider statements made by a president as part of legislative history when construing the meaning of a statute?**

   Response: As far as I am aware, no. Please also refer back to my response to Question 2.

4. **What First Amendment restrictions can the owner of a shopping center place on private property?**

   Response: Generally speaking, the First Amendment has not been held to bar such a private owner from placing such restrictions, however states may provide for different rights so long as they do not impinge on the Constitution. *E.g.*, *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

5. **What does the repeated reference to "the people" mean within the Bill of Rights? Is the meaning consistent throughout each amendment that contains reference to the term?**

   Response: In *Heller*, the Supreme Court analyzed the use of the term "the people" in different contexts in the Constitution and observed that "the people" are in essence our national community. *District of Columbia v. Heller*, 554 U.S. 570 (2008) (quoting *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990)).

6. **Are non-citizens unlawfully present in the United States entitled to a right of privacy?**

Response: I am unaware if the Supreme Court or Third Circuit has addressed this issue. But if confronted with this issue, I would thoroughly examine the authorities cited by the parties and conduct my own exhaustive research into the question.

7. **Are non-citizens unlawfully present in the United States entitled to Fourth Amendment rights during encounters with border patrol authorities or other law enforcement entities?**

   Response: The Supreme Court has held that the Fourth Amendment does not apply to search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990). I am unaware if the Third Circuit has addressed this issue with respect to non-citizens unlawfully present in the United States. But if confronted with this issue, I would thoroughly examine the authorities cited by the parties and conduct my own exhaustive research into the question.

8. **At what point is a human life entitled to equal protection of the law under the Constitution?**

   Response: In *Dobbs*, the Supreme Court recognized that the legitimate interests of a state include "respect for and preservation of prenatal life at all stages of development," and "the mitigation of fetal pain" among others. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). But beyond that, I am not aware of any Supreme Court or Third Circuit authority addressing the question.

9. **Are state laws that require voters to present identification in order to cast a ballot illegitimate, draconian, or racist?**

   Response: The Supreme Court has rejected a facial challenge to a voter identification law on at least one occasion. *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). If confronted with a case involving a challenge voter identification, I would adhere to all precedent of the Third Circuit and Supreme Court.

Questions from Senator Thom Tillis
for John Frank Murphy
Nominee to be United States District Judge for the Eastern District of Pennsylvania

1. **Do you believe that a judge's personal views are irrelevant when it comes to interpreting and applying the law?**

   Response: Yes.

2. **What is judicial activism? Do you consider judicial activism appropriate?**

   Response: The term judicial activism is likely viewed and used in different ways. I consider judicial activism to be when a judge's decision is guided by outcome rather than by a neutral application of the law to the facts of the case. In this sense, judicial activism is not appropriate.

3. **Do you believe impartiality is an aspiration or an expectation for a judge?**

   Response: Consistent with the Code of Conduct as well as the fundamentals of our system of justice, impartiality is an expectation for a judge.

4. **Should a judge second-guess policy decisions by Congress or state legislative bodies to reach a desired outcome?**

   Response: No.

5. **Does faithfully interpreting the law sometimes result in an undesirable outcome? How, as a judge, do you reconcile that?**

   Response: Yes. A judge's role is to resolve cases and controversies presented to the court in a fair and impartial manner under the applicable law. Whether the outcome is perceived as desirable or undesirable by a party or the judge is irrelevant.

6. **Should a judge interject his or her own politics or policy preferences when interpreting and applying the law?**

   Response: No.

7. **What will you do if you are confirmed to ensure that Americans feel confident that their Second Amendment rights are protected?**

   Response: If confirmed, I would approach each case in a fair and impartial manner, and I would follow the Supreme Court and Third Circuit precedent interpreting and applying the Second Amendment. *E.g., New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022).

8. **How would you evaluate a lawsuit challenging a Sheriff's policy of not processing handgun purchase permits? Should local officials be able to use a crisis, such as COVID-19 to limit someone's constitutional rights? In other words, does a pandemic limit someone's constitutional rights?**

   Response: I would evaluate the lawsuit under the applicable Supreme Court and Third Circuit precedent. The approach would depend upon the basis of the challenge presented by the plaintiff, but could include the principles set forth in *New York State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022) and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

9. **What process do you follow when considering qualified immunity cases, and under the law, when must the court grant qualified immunity to law enforcement personnel and departments?**

   Response: The qualified immunity inquiry contains two prongs: (1) whether the facts alleged by the plaintiff show the violation of a constitutional right, and (2) whether the law was clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194 (2001); *Jefferson v. Lias*, 21 F.4th 74 (3d Cir. 2021). If I were confirmed, I would follow the pertinent Supreme Court and Third Circuit guidance when considering qualified immunity cases.

10. **Do you believe that qualified immunity jurisprudence provides sufficient protection for law enforcement officers who must make split-second decisions when protecting public safety?**

    Response: As a district court nominee, I do not think it would be appropriate for me to provide my evaluation of the Supreme Court and Third Circuit's qualified immunity jurisprudence. I would be bound to follow that precedent.

11. **What do you believe should be the proper scope of qualified immunity protections for law enforcement?**

    Response: I believe that policymakers are best positioned to consider whether the current Supreme Court jurisprudence provides the proper scope of protection for law enforcement. As a district judge, I would be bound to apply the governing law and precedent in that regard.

12. **Throughout the past decade, the Supreme Court has repeatedly waded into the area of patent eligibility, producing a series of opinions in cases that have only muddled the standards for what is patent eligible. The current state of eligibility jurisprudence is in abysmal shambles. What are your thoughts on the Supreme Court's patent eligibility jurisprudence?**

    Response: I have had many occasions to analyze the Supreme Court's cases on patent eligibility and advocate on behalf of both patent owners and defendants on those issues. The Supreme Court's two-step framework, laid out in *Mayo* and *Alice*, is widely applied.

The analysis calls for a detailed and close look at the claims of the patent, the intrinsic evidence, the allegations of the patent owner, and potentially other record evidence, depending on the state of the case. It has been my observation that there are some factual situations where the outcome is relatively clear, and others where it is more challenging. If confirmed, I would follow the Supreme Court and Federal Circuit precedent. Beyond that, I do not feel it would be appropriate for me to provide my personal opinion on the Supreme Court's jurisprudence.

13. **How would you apply current patent eligibility jurisprudence to the following hypotheticals. Please avoid giving non-answers and actually analyze these hypotheticals.**

    a. ***ABC Pharmaceutical Company* develops a method of optimizing dosages of a substance that has beneficial effects on preventing, treating or curing a disease or condition for individual patients, using conventional technology but a newly-discovered correlation between administered medicinal agents and bodily chemicals or metabolites. Should this invention be patent eligible?**

    b. ***FinServCo* develops a valuable proprietary trading strategy that demonstrably increases their profits derived from trading commodities. The strategy involves a new application of statistical methods, combined with predictions about how trading markets behave that are derived from insights into human psychology. Should *FinServCo's* business method standing alone be eligible? What about the business method as practically applied on a computer?**

    c. ***HumanGenetics* Company wants to patent a human gene or human gene fragment as it exists in the human body. Should that be patent eligible? What if *HumanGenetics* Company wants to patent a human gene or fragment that contains sequence alterations provided by an engineering process initiated by humans that do not otherwise exist in nature? What if the engineered alterations were only at the end of the human gene or fragment and merely removed one or more contiguous elements?**

    d. ***BetterThanTesla ElectricCo* develops a system for billing customers for charging electric cars. The system employs conventional charging technology and conventional computing technology, but there was no previous system combining computerized billing with electric car charging. Should *BetterThanTesla*'s billing system for charging be patent eligible standing alone? What about when it explicitly claims charging hardware?**

    e. ***Natural Laws and Substances, Inc.* specializes in isolating natural substances and providing them as products to consumers. Should the isolation of a naturally occurring substance other than a human gene be patent eligible? What about if the substance is purified or combined with other substances to produce an effect that none of the constituents provide alone or in lesser combinations?**

f. **A business methods company, *FinancialServices Troll,* specializes in taking conventional legal transaction methods or systems and implementing them through a computer process or artificial intelligence. Should such implementations be patent eligible? What if the implemented method actually improves the expected result by, for example, making the methods faster, but doesn't improve the functioning of the computer itself? If the computer or artificial intelligence implemented system does actually improve the expected result, what if it doesn't have any other meaningful limitations?**

g. ***BioTechCo* discovers a previously unknown relationship between a genetic mutation and a disease state. No suggestion of such a relationship existed in the prior art. Should *BioTechCo* be able to patent the gene sequence corresponding to the mutation? What about the correlation between the mutation and the disease state standing alone? But, what if *BioTech Co* invents a new, novel, and nonobvious method of diagnosing the disease state by means of testing for the gene sequence and the method requires at least one step that involves the manipulation and transformation of physical subject matter using techniques and equipment? Should that be patent eligible?**

h. **Assuming *BioTechCo's* diagnostic test is patent eligible, should there exist provisions in law that prohibit an assertion of infringement against patients receiving the diagnostic test? In other words, should there be a testing exemption for the patient health and benefit? If there is such an exemption, what are its limits?**

i. ***Hantson Pharmaceuticals* develops a new chemical entity as a composition of matter that proves effective in treating TrulyTerribleDisease. Should this new chemical entity be patent eligible?**

j. ***Stoll Laboratories* discovers that superconducting materials superconduct at much higher temperatures when in microgravity. The materials are standard superconducting materials that superconduct at lower temperatures at surface gravity. Should *Stoll Labs* be able to patent the natural law that superconductive materials in space have higher superconductive temperatures? What about the space applications of superconductivity that benefit from this effect?**

Response to Subparts (a) – (j): In all of these hypothetical scenarios, my approach would be to follow the Supreme Court's two-step approach of *Mayo* and *Alice*. First, I would determine whether the subject claim is directed to something the Supreme Court has indicated is unpatentable, such as an abstract idea. If so, I would then evaluate whether the claim, taken as an ordered combination, nonetheless contains an inventive concept sufficient to render the claim eligible. I would also follow all of the Federal Circuit's precedent, such as that relating to potential underlying factual issues. The outcome of any one specific scenario would depend

very much on the exact wording of the claim, the rest of the record evidence, and the presence or absence of analogous decisions from the Supreme Court and Federal Circuit.

14. **Based on the previous hypotheticals, do you believe the current jurisprudence provides the clarity and consistency needed to incentivize innovation? How would you apply the Supreme Court's ineligibility tests—laws of nature, natural phenomena, and abstract ideas—to cases before you?**

    Response: Please refer back to my response to questions 12 and 13.

15. **Copyright law is a complex area of law that is grounded in our constitution, protects creatives and commercial industries, and is shaped by our cultural values. It has become increasingly important as it informs the lawfulness of a use of digital content and technologies.**

    a. **What experience do you have with copyright law?**

       Response: I have had some modest experience with copyright law.

    b. **Please describe any particular experiences you have had involving the Digital Millennium Copyright Act.**

       Response: I have from time to time advised clients on the Digital Millennium Copyright Act.

    c. **What experience do you have addressing intermediary liability for online service providers that host unlawful content posted by users?**

       Response: I have studied that issue for informational purposes but have not had occasion to advise clients on it.

    d. **What experience do you have with First Amendment and free speech issues? Do you have experience addressing free speech and intellectual property issues, including copyright?**

       Response: I have a general understanding of the interaction between free speech concerns and intellectual property protection, but I have not had the occasion to advise clients on that interaction.

16. **The legislative history of the Digital Millennium Copyright Act reinforces the statutory text that Congress intended to create an obligation for online hosting services to address infringement even when they do not receive a takedown notice. However, the Copyright Office recently reported courts have conflated statutory obligations and created a "high bar" for "red flag knowledge, effectively removing it from the**

statute..." It also reported that courts have made the traditional common law standard for "willful blindness" harder to meet in copyright cases.

a. **In your opinion, where there is debate among courts about the meaning of legislative text, what role does or should Congressional intent, as demonstrated in the legislative history, have when deciding how to apply the law to the facts in a particular case?**

   Response: The Supreme Court has held that the focus of statutory analysis must be the text of the statute. I would follow the guidance of the Supreme Court and Third Circuit when weighing the legislative history, and in particular I would look for such guidance relevant to the particular statute at issue. For example, in the trademark context, the Supreme Court examined arguments based on the legislative history, but found them unpersuasive at least in part because the "inquiry into the meaning of the statute's text ceases when the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Matal v. Tam*, 137 S. Ct. 1744 (2017).

b. **Likewise, what role does or should the advice and analysis of the expert federal agency with jurisdiction over an issue (in this case, the U.S. Copyright Office) have when deciding how to apply the law to the facts in a particular case?**

   Response: In the context of a challenge to agency action under the Administrative Procedure Act, I would adhere to the Supreme Court and Third Circuit's guidance on the proper level of deference to agency expertise, which depends upon the statute, the nature of the action, and other considerations. Outside of the context of a challenge to an agency action, it may be still appropriate to consider agency analysis to the extent it is persuasive and useful.

c. **Do you believe that awareness of facts and circumstances from which copyright infringement is apparent should suffice to put an online service provider on notice of such material or activities, requiring remedial action?**

   Response: I do not think it would be appropriate for me to provide an opinion on the result of a hypothetical question that could come before me were I confirmed.

17. **The scale of online copyright infringement is breathtaking. The DMCA was developed at a time when digital content was disseminated much more slowly and there was a lot less infringing material online.**

    a. **How can judges best interpret and apply to today's digital environment laws like the DMCA that were written before the explosion of the internet, the ascension of dominant platforms, and the proliferation of automation and algorithms?**

Response: As I district judge, I would faithfully apply the acts of Congress as they were written, and as they have been interpreted by the Supreme Court and Third Circuit.

b. **How can judges best interpret and apply prior judicial opinions that relied upon the then-current state of technology once that technological landscape has changed?**

Response: This general problem arises frequently in any area of the law affected by technology. Sometimes, like the Constitution itself, statutory language is written in a manner such that it may be applied to new and different technologies. But the desire to accommodate new technologies cannot justify a misinterpretation or rewriting of statute by a judge.

18. **In some judicial districts, plaintiffs are allowed to request that their case be heard within a particular division of that district. When the requested division has only one judge, these litigants are effectively able to select the judge who will hear their case. In some instances, this ability to select a specific judge appears to have led to individual judges engaging in inappropriate conduct to attract certain types of cases or litigants. I have expressed concerns about the fact that nearly one quarter of all patent cases filed in the U.S. are assigned to just one of the more than 600 district court judges in the country.**

a. **Do you see "judge shopping" and "forum shopping" as a problem in litigation?**

Response: Statutory law, as well as Supreme Court and Circuit Court law, provide requirements for personal jurisdiction and venue. Within those constraints, plaintiffs typically have discretion for where to file their complaints. And in some jurisdictions having several subdivisions within the district, the local rules may direct complaints to particular subdivisions chosen by the plaintiff. I have had many occasions in my career to advise clients on the strategic implications of these rules and potential options. To the best of my understanding, the rules of the Eastern District of Pennsylvania do not provide plaintiffs a way to select an individual judge. Beyond that, I do not believe it would be appropriate for me to provide an opinion about whether the current state of the law and various court rules represents a problem.

b. **If so, do you believe that district court judges have a responsibility not to encourage such conduct?**

Response: Please refer back to my response to question 18(a).

c. **Do you think it is *ever* appropriate for judges to engage in "forum selling" by proactively taking steps to attract a particular type of case or litigant?**

Response: I am not familiar with the term "forum selling." If confirmed, I would follow all the applicable law as well as the rules and practices of the Eastern District of Pennsylvania, and I would not take steps to proactively attractive any type of case or litigant.

d. **If so, please explain your reasoning. If not, do you commit not to engage in such conduct?**

Response: Please refer back to my response to questions 18(a) and 18(c).

19. **In just three years, the Court of Appeals for the Federal Circuit has granted no fewer than 19 mandamus petitions ordering a particular sitting district court judge to transfer cases to a different judicial district. The need for the Federal Circuit to intervene using this extraordinary remedy so many times in such a short period of time gives me grave concerns.**

    a. **What should be done if a judge continues to flaunt binding case law despite numerous mandamus orders?**

    Response: As far as I am aware, there is no limit to the number of times that the Federal Circuit may exercise its mandamus power. Thus, the Federal Circuit is free to do so as many times as it deems necessary.

    b. **Do you believe that some corrective measure beyond intervention by an appellate court is appropriate in such a circumstance?**

    Response: I do not think it would be appropriate for me to provide an opinion on what, if any, extrajudicial intervention would be warranted in such a circumstance.

20. **When a particular type of litigation is overwhelmingly concentrated in just one or two of the nation's 94 judicial districts, does this undermine the perception of fairness and of the judiciary's evenhanded administration of justice?**

    a. **If litigation does become concentrated in one district in this way, is it appropriate to inquire whether procedures or rules adopted in that district have biased the administration of justice and encouraged forum shopping?**

    b. **To prevent the possibility of judge-shopping by allowing patent litigants to select a single-judge division in which their case will be heard, would you support a local rule that requires all patent cases to be assigned randomly to judges across the district, regardless of which division the judge sits in?**

Response to all Question 20 and all subparts: Please refer back to my response to questions 18(a) and 18(c).

21. **Mandamus is an extraordinary remedy that the court of appeals invokes against a district court only when the petitioner has a clear and indisputable right to relief and the district judge has clearly abused his or her discretion. Nearly every issuance of mandamus may be viewed as a rebuke to the district judge, and repeated issuances of mandamus relief against the same judge on the same issue suggest that the judge is ignoring the law and flouting the court's orders.**

    a. **If a single judge is repeatedly reversed on mandamus by a court of appeals on the same issue within a few years' time, how many such reversals do you believe must occur before an inference arises that the judge is behaving in a lawless manner?**

    Response: The Federal Circuit may invoke mandamus power when it is proven that there is no other means of obtaining the relief desired and the right to issuance of the writ is clear and undisputable. The Federal Circuit has provided mandamus relief in venue disputes on a number of occasions dating back at least 14 years. *See In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008). I am unaware of any particular limit on the number of times that a Circuit Court may exercise its mandamus power, or of any particular legal inference to which the question refers.

    b. **Would five mandamus reversals be sufficient? Ten? Twenty?**

    Response: Please refer back to my response to question 21(a).