Nomination of Eric Earl Murphy to the U.S. Court of Appeals for the Sixth Circuit
Questions for the Record
October 17, 2018

QUESTIONS FROM SENATOR FEINSTEIN

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

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

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

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

   It may be appropriate, at times, for a circuit judge to identify areas in which Supreme Court cases appear to be inconsistent or in conflict. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (noting, for a unanimous Court, that a circuit judge had aptly described an earlier case's inconsistencies with later jurisprudence). That said, the Supreme Court has provided the following instructions to lower courts: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Circuit judges must follow those instructions whether they are writing majority opinions, concurrences, or dissents.

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

   In the Sixth Circuit Court of Appeals, one panel cannot overrule the published decision of another panel. "Published panel opinions are binding on later panels. A published opinion is overruled only by the court en banc." 6th Cir. R. 32.1(b); *see, e.g.*, *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). To determine when the en banc court should overrule a published panel decision, Federal Rule of Appellate Procedure 35(b)(1) and 6th Cir. I.O.P. 35(a) offer guideposts, including, for example, whether the decision has created a circuit split or whether the decision conflicts with other decisions from the Sixth Circuit or from the Supreme Court.

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

   The Supreme Court has articulated various factors for that Court to consider when it decides whether to overrule one of its precedents, including, for example, whether the doctrinal underpinnings of the precedent have been eroded, whether the

precedent has proved unworkable, whether the precedent has engendered reliance interests, and whether the precedent interprets a statute or the Constitution. *See, e.g.*, *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409-12 (2015); *Pearson v. Callahan*, 555 U.S. 223, 233-35 (2009); *Khan*, 522 U.S. at 10-22. Yet the Supreme Court has made clear that "it is this Court's prerogative alone to overrule one of its precedents." *Khan*, 522 U.S. at 20. That principle binds circuit judges.

2. In an April 2018 speech at the Federalist Society, you said "there are areas of vagueness in precedent where originalism principles can come into play. . . A lot of the Court's current jurisprudence is precedents with balancing tests, and when there are balancing tests, one of the factors to be considered could be the originalist understanding with respect to whatever the question is before the court." (April 6, 2018: Panelist, Introduction to Originalism and Federalism, 2018 Ohio Lawyers Chapters Conference, Federalist Society for Law & Public Policy Studies, Columbus, Ohio)

   a. Please identify the legal authority supporting your statement that "when there are balancing tests, one of the factors to be considered could be the originalist understanding."

   My comment during this panel discussion made the point that the Supreme Court has adopted constitutional tests that include a balancing of factors, and the Court often considers originalist principles (such as history and tradition) as one of the factors in that balance. Two examples come to mind. As one example, in an earlier portion of this panel discussion, I spoke about a personal-jurisdiction case, *Burnham v. Superior Court of California*, 495 U.S. 604 (1990). That case asked whether "tag" jurisdiction (serving an individual with process while that individual is temporarily traveling within the State) comported with the Due Process Clause. Justice Brennan's concurrence in the judgment would have adopted a balancing approach, and the concurrence "agree[d] that history is an important factor in establishing whether a jurisdictional rule satisfie[d] due process requirements." *Id.* at 629 (Brennan, J., concurring in the judgment); *id.* at 633 ("Tradition, though alone not dispositive, is of course *relevant* to the question whether the rule of transient jurisdiction is consistent with due process."). As another example, the Supreme Court's Fourth Amendment cases often consider, as a relevant factor, "'the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing.'" *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) (Souter, J.) (citation omitted). In *United States v. Jones*, 565 U.S. 400 (2012), for instance, the Court noted that it had "embodied [the] preservation of past rights in our very definition of 'reasonable expectation of privacy' which we have said to be an expectation 'that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" *Id.* at 407-08 (citation omitted).

b. How do you decide when to apply originalism when there is vagueness?

From the perspective of a circuit nominee, I would look to the applicable Supreme Court precedent to determine the general manner in which to approach a specific legal issue. In some areas, such as the Confrontation Clause, the Supreme Court has treated originalist principles as highly important. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004). In other areas, such as the Eighth Amendment, the Supreme Court has adopted more of an evolving-standards approach. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005).

c. How would you apply originalism to novel legal issues, such as data privacy?

From the perspective of a circuit nominee, I would again look to the applicable Supreme Court precedent to determine the general manner in which to approach a novel legal issue. In that respect, the Supreme Court has repeatedly applied the Fourth Amendment to new technologies. *See, e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Riley v. California*, 134 S. Ct. 2473 (2014); *Kyllo v. United States*, 533 U.S. 27 (2001).

3. While serving in the Ohio Solicitor General's office, did you ever develop, recommend, or advocate for a particular litigation position or a specific legal argument that the state ultimately adopted? If so, please explain.

Yes. The Ohio Attorney General frequently considers and evaluates counsel from me and others across the office.

4. While serving in the Ohio Solicitor General's office, did you ever recommend that the state should <u>not</u> take a particular litigation position or should <u>not</u> make a specific legal argument that the state nevertheless adopted? If so, please explain.

Yes. The Ohio Attorney General frequently considers and evaluates counsel from me and others across the office.

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

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

From the perspective of a circuit nominee, all Supreme Court precedent is "super-stare decisis" and "superprecedent" in that circuit judges have a duty to follow that precedent and cannot reach "divergent holdings" from it. In that sense, *Roe* (as well as *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)) is "super-stare decisis" and "superprecedent."

b. Is it settled law?

Yes, please see my response to Question 5(a).

6. In 2013, you were counsel of record for Ohio in an amicus brief filed before the Supreme Court in *Isaacson v. Horne,* in support of an Arizona law banning abortion after 20-weeks. The brief you signed argued that Arizona's law posed no undue burden on a woman's right to choose because Arizona "lack[s] any intent to impose any obstacle on the abortion right that *Casey* reaffirmed." (Brief of Amicus Curiae, *Horne v.* Isaacson, 134 S. Ct. 905 (2014) (No. 13-402), 2013 WL 5837683, at pp. 1, 7, 19))

a. Please identify all legal authority in support of the argument that a state's intent is a relevant consideration whether an undue burden exists.

The multi-state *amicus* brief in this case relied on Supreme Court precedent indicating that "[a]n undue burden exists, and therefore a provision of law is invalid, if its *purpose* or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878 (plurality op.; emphasis added). The States' *amicus* brief interpreted the "purpose" prong of this undue-burden test as considering the intent underlying the challenged provision. In *Gonzales v. Carhart*, 550 U.S. 124 (2007), for example, the Court upheld the Partial-Birth Abortion Ban Act after "reject[ing] the contention that the *congressional purpose* of the Act was 'to place a substantial obstacle in the path of a woman seeking an abortion.'" *Id.* at 160 (citation omitted; emphasis added); *see also Mazurek v. Armstrong*, 520 U.S. 968, 972-73 (1997) (per curiam).

b. Please identify the language in *Casey* that affirms or supports this rationale.

The multi-state *amicus* brief in this case relied on the following statement from *Casey*'s plurality opinion: "An undue burden exists, and therefore a provision of law is invalid, if its *purpose* or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." 505 U.S. at 878 (plurality op.; emphasis added).

c. Please describe your role in the preparation of the amicus brief joined by the state of Ohio in this case.

When the Ohio Attorney General decided to file an *amicus* brief in this case on behalf of the State of Ohio, I worked on the *amicus* brief and was counsel of record on it as an advocate for the State.

7. In 2016, you represented Ohio in an amicus brief before the Supreme in *Whole Woman's Health v. Hellerstedt*, which argued that Texas' admitting privileges law did not impose an undue burden on women seeking abortions. According to the brief, "[c]linic closures alone…do not prove that any woman has been unable to obtain a timely abortion." The United States Supreme Court disagreed with your argument and found that the clinic closures that resulted from HB 2 imposed an "undue burden" on women's rights. (*Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292 (2016) (No. 15-274) (merits amicus, 2016 U.S. S. Ct. Briefs LEXIS 551))

a. Please identify what you based your conclusion on that clinic closures did not constitute an undue burden and "do not prove that any woman has been unable to obtain a timely abortion."

The multi-state *amicus* brief asserted that States had long regulated healthcare facilities, including those that perform abortions, under a variety of approaches. Multi-State *Amicus* Br. at 4-18, in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). The brief argued further that such a regulation's effect under the undue-burden test should be evaluated based "on its *direct* impact on the ultimate right to choose an abortion, not its *incidental* impact when combined with other variables." *Id.* at 31. Ultimately, *Hellerstedt* invalidated the specific Texas regulations that were at issue in that case. 136 S. Ct. at 2300. If fortunate enough to be confirmed, I would faithfully follow *Hellerstedt*.

b. What would rise to the level of an undue burden if closing clinics and limiting access to medical care does not?

In *Hellerstedt*, the Supreme Court adopted a fact-specific approach for determining when particular abortion-provider regulations will impose an undue burden. That test "consider[s] the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. at 2309. When applying that test, *Hellerstedt* examined, in detail, the evidence presented concerning the reasons for, and effects of, Texas's admitting-privileges requirement, *id.* at 2310-14, and its surgical-center requirement, *id.* at 2314-18. If fortunate enough to be confirmed, I would faithfully follow *Hellerstedt*.

c. Please describe your role in the preparation of the amicus brief joined by the state of Ohio in this case.

When the Ohio Attorney General decided to file an *amicus* brief in this case on behalf of the State of Ohio, I worked on the brief and my name was listed on it as an advocate for the State.

8. In 2017, during your tenure as Ohio State Solicitor, the state joined an amicus brief before the Supreme Court in *Azar v. Garza* which argued that "the Constitution does not confer the right to an elective abortion on unlawfully-present aliens with virtually no ties to the country." The brief further states that the lower court's decision — permitting Jane Doe to have an abortion — "creates a perverse incentive to unlawfully enter the country." (*Azar v. Garza,* 138 S. Ct. 1790 (2018) (No. 17-654) (cert. amicus, 2017 U.S. S. Ct. Briefs LEXIS 4740).)

a. Please provide all legal authority supporting the argument that the "Constitution does not confer the right to an elective abortion on unlawfully-present aliens with virtually no ties to the country."

This question quotes the multi-state *amicus* brief's Summary of Argument. In the Argument Section, the brief identified the cases supporting its general legal position that the Due Process Clause adopts a "substantial-connection test" that provides a sliding scale of protections based on the degree of connection that an undocumented immigrant has with the country. Multi-State *Amicus* Br. at 5-11, in *Azar v. Garza*, 138 S. Ct. 1790 (2018) (citing legal authorities).

b. Please identify the evidence supporting the argument that permitting Jane Doe to access an abortion creates a "perverse incentive to unlawfully enter the country."

This question quotes the multi-state *amicus* brief's Summary of Argument. In the Argument Section, the *amicus* brief identified the legal and factual support for the brief's general assertion. Multi-State *Amicus* Br. at 21-25.

c. Please describe your role in the preparation of the amicus brief joined by the state of Ohio in this case.

This multi-state *amicus* brief was led by Texas. I did not draft the brief and my name was not on it. I would have reviewed the brief and communicated with the Ohio Attorney General and/or others in the office about it (and may have provided minor comments on the brief to Texas). The State of Ohio joined the brief through the Ohio Attorney General. *See* Multi-State *Amicus* Br. at 27.

9. In 2015, in *Obergefell v. Hodges*, you defended an Ohio law defining marriage as between a man and a woman. As a result of this law, Ohio did not recognize out-of-state marriage licenses for same-sex couples. In your brief, you argued that the decision to recognize same-sex marriages is an issue to be left to the democratic process, and that applying the decision

of *United States v. Windsor* onto states like Ohio would violate principles of federalism. (Brief of Respondent, *Obergefell v. Hodges*, No. 14-556 (Mar. 27, 2017)) The United States Supreme Court disagreed with your position. (*See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015))

a. Please describe your role in the preparation of the state of Ohio's briefing in this case.

I worked on the brief in this challenge to a 2004 amendment to the Ohio Constitution, and I was counsel of record on it.

b. Is the right to marry protected by the Constitution?

Yes, the Supreme Court has held that the right to marry is protected by the Constitution. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

c. Can states ignore the Constitutional right to privacy?

No.

d. Is the Supreme Court's decision in *Obergefell* settled law?

Yes, please see my response to Question 5(a). If fortunate enough to be confirmed, I would faithfully follow *Obergefell*.

e. In light of your involvement in the *Obergefell* case, will you commit to recusing yourself from matters involving the *Obergefell* decision?

As I noted on Question 24 of my Senate Judiciary Questionnaire, if I am fortunate enough to be confirmed to the Sixth Circuit, I would carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal were appropriate on a case-by-case basis. For specific cases on which I have worked as State Solicitor of Ohio, 28 U.S.C. § 455(b)(3) establishes a bright-line test requiring recusal. For other cases on which I have had no involvement, I would carefully evaluate and apply the standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges, and any relevant authorities interpreting these provisions.

f. If not, please indicate under what circumstances your impartiality would not be questioned in a case involving the *Obergefell* decision.

Please see my responses to Questions 9(d) and 9(e).

10. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a

national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

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

As a circuit nominee, it is not appropriate for me to comment about whether I personally agree or disagree with a particular majority decision or dissent from the Supreme Court, especially in areas in which there is pending or impending litigation. *See* Canon 3A(6) of the Code of Conduct for United States Judges.

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

As a general matter, the Supreme Court recognized that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). *Heller* also stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. It stated that "another important limitation on the right to keep and carry arms" "is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* at 627 (citation omitted). And it stated that it did "not undertake an exhaustive historical analysis today of the full scope of the Second Amendment." *Id.* at 626. As a specific matter, the permissible scope of state firearm regulation remains subject to litigation, so Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from commenting further.

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

The *Heller* Court "conclude[d] that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment." 554 U.S. at 625. As a circuit nominee, I am bound to apply *Heller*'s interpretation of the Supreme Court's prior cases, and it would not be appropriate for me to comment on whether I personally agree with that portion of its decision.

11. In 2017, during your tenure as Ohio State Solicitor, the state of Ohio joined an amicus brief in the case before the Supreme Court in *Peruta v. California.* This brief opposed a California law restricting the ability to carry concealed firearms in public. The brief argued that the Ninth Circuit's decision to uphold the California law effectively "destroy[s] the right to bear arms entirely." The brief also argued that the Ninth Circuit's decision "erroneously denies the existence" of the right to bear arms outside the home. (Brief of Amicus Curiae of Alabama and 25 Other States as Amici Curiae in Support of Petitioners, 2017 WL 705906 (Feb. 16, 2017))

a. Please identify all legal authority in support of the argument asserted in the *Peruta* brief that the Second Amendment encompasses the right to bear arms outside the home.

The multi-state *amicus* brief in this case provided the legal authority for its position that the right to bear arms extends outside the home in Part II of its Argument Section. *See* Multi-State *Amicus* Br. at 7-11, in *Peruta v. California*, 137 S. Ct. 1995 (2017) (citing legal authority).

b. Do states have a right to regulate guns?

Heller stated that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." 554 U.S. at 626. But the permissible scope of state firearm regulation remains subject to litigation, so Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from commenting further.

c. Can states limit who can access a conceal carry permit?

Please see my responses to Questions 10(b) and 11(b).

d. Please describe your role in the preparation of the amicus brief joined by the state of Ohio in this case.

This multi-state *amicus* brief was led by Alabama. I did not draft the *amicus* brief and my name was not on it. I would have reviewed the brief and communicated with the Ohio Attorney General and/or others in the office about it (and may have provided minor comments on the brief to Alabama). The State of Ohio joined the brief through the Ohio Attorney General. *See* Multi-State *Amicus* Br. at 20.

12. In 2015, during your tenure as Ohio State Solicitor, the state of Ohio joined an amicus brief before the Supreme Court in the case *Friedman v. City of Highland Park*. The brief in the *Friedman* case argued that a Chicago suburb's ordinance banning semiautomatic assault weapons and large-capacity magazines was unconstitutional in part because assault weapons and large-capacity magazines are "commonly used weapons." (Cert Petition Amicus Brief, *Friedman v. City of Highland Park*, 2015 WL 5139322 (U.S.))

a. Please identify the evidence to support the argument that assault weapons are "commonly used."

The multi-state *amicus* brief cited evidence from the record for its assertion that the ordinance banned commonly used weapons. Multi-State *Amicus* Br. at 14, in *Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015).

b. Where in the text of the Second Amendment does it say "common use"?

The multi-state *amicus* brief relied on *Heller* for its legal argument that the Second Amendment protected the right to possess firearms in common use. *See* Multi-State *Amicus* Br. at 6 (citing *Heller*, 554 U.S. at 624-25, 630). Apart from the *amicus* brief, under Canon 3A(6) of the Code of Conduct for United States Judges, it would not be appropriate for me to comment on impending matters.

c. Please identify all the legal authority that supports the "common use" test.

Please see my response to Question 12(b).

d. Please describe your role in the preparation of the amicus brief joined by the state of Ohio in this case.

This multi-state *amicus* brief was led by West Virginia. I did not draft the *amicus* brief and my name was not on it. I would have reviewed the brief and communicated with the Ohio Attorney General and/or others in the office about it (and may have provided minor comments on the brief to West Virginia). Ohio joined the brief through the Ohio Attorney General. *See* Multi-State *Amicus* Br. at 22.

13. In notes for remarks at a March 2017 event at the Ohio State Bar Association, you wrote that the Waters of the United States Rule "substantively" "violates the Clean Water Act and the Constitution" and "procedurally" "violates" the Administrative Procedures Act. Your notes also state that the Stream Protection Rule "substantively" "violates" the Surface Mining Act and Constitution, and "procedurally" "violates" the national Environmental Policy Act regulations and the Consolidated Appropriations Act of 2016. (March 30, 2017: Speaker, Federal Regulatory Update: Clean Power Plan, Waters of the U.S., Stream Protection Rule, and More, 32nd Annual Ohio Environment, Energy, and Resources Law Seminar, Ohio State Bar Association, Columbus, Ohio)

a. Please identify all legal authorities supporting your statement that the Waters of the United States Rule violates the Clean Water Act.

In this presentation, a co-panelist and I objectively described the Waters of the United States Rule, the arguments that a broad coalition of States had asserted against the rule, and the rule's then-current status. For the legal authorities supporting the States' arguments challenging the rule, *see, e.g.*, *Ohio v. U.S. Army Corps of Eng'rs (In re EPA & DOD Final Rule)*, 803 F.3d 804, 807-08 (6th Cir. 2015) (preliminarily enjoining rule); *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047, 1055-58 (D.N.D. 2015) (same); *see also* Opening Brief of State Petitioners, at 20-77, in No. 15-3751 and related cases (6th Cir.) (citing legal authorities).

b. Please identify all legal authorities supporting your statement that the Waters of the United States Rule violates the Constitution.

Please see my response to Question 13(a).

c. Please identify all legal authorities supporting your statement that the Stream Protection Rule violates the Surface Mining Act.

During the same presentation, a co-panelist and I also objectively described the Stream Protection Rule, the arguments that a broad coalition of States had asserted against the rule, and the rule's then-current status. For the legal authorities supporting the States' arguments challenging the rule, *see* Compl., Doc. 1, *Ohio v. U.S. Dep't of Interior*, No. 1:17-cv-108 (D.D.C.) (citing legal authorities). The States' challenge to this rule did not proceed past the pleading stage because the rule was rescinded under the Congressional Review Act.

d. Please identify all legal authorities supporting your statement that the Stream Protection Rule violates the Constitution.

Please see my response to Question 13(c).

14. In your notes for a 2016 Supreme Court Review, you discussed regulations passed by Washington state prohibiting pharmacists from refusing to stock drugs for moral or religious reasons. These regulations were passed to address the refusal of some pharmacists to fill prescriptions for contraceptives. Your notes said there are "strong reasons to doubt whether the regulations were adopted for—or that they actually serve—any legitimate purpose." (Speaker, Supreme Court Review and Preview, Federalist Society for Law & Public Policy Studies, Columbus, Ohio)

a. Please explain what evidence you relied on to conclude there are "strong reasons to doubt" whether the Washington state regulations "actually serve—any legitimate purpose."

Respectfully, the quoted statement from my notes was not expressing my own conclusion. On the page of my notes in question, I was quoting Justice Alito's dissent from the denial of certiorari. *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2433 (2016) (Alito, J., dissenting from the denial of certiorari) ("This case is an ominous sign. At issue are Washington State regulations that are likely to make a pharmacist unemployable if he or she objects on religious grounds to dispensing certain prescription medications. There are strong reasons to doubt whether the regulations were adopted for—or that they actually serve—any legitimate purpose. And there is much evidence that the impetus for the adoption of the regulations was hostility to pharmacists whose religious beliefs regarding abortion and contraception are out of step with prevailing opinion in the State."). While my notes did not include quotation marks around this paragraph, they were personal, informal notes that I quickly put together while preparing for the presentation to refresh my recollection during it. I did not look at the issue closely. My typical Supreme Court

review would generally provide an objective summary of noteworthy opinions and upcoming cases.

b. Do states have a compelling interest in ensuring access to contraceptives?

Please see my response to Question 14(a).

c. Can pharmacists refuse to stock drugs for cancer treatment for moral or religious reasons?

Please see my response to Question 14(a).

15. In 2016, you defended the state of Ohio in *Ohio Democratic Party v. Husted.* The Ohio law that you defended in this case shortened Ohio's 35-day early-voting calendar by one week. The brief you signed in defense of the Ohio law cited voter fraud and the risk of voter fraud as justification for shortening the early-voting calendar.

a. Does widespread voter fraud exists in the United States

Because this question implicates an ongoing political debate, Canon 5 of the Code of Conduct for United States Judges indicates that I should not provide my personal opinion. As I mentioned at the hearing, however, my client in this matter, Secretary of State Jon Husted, has publicly indicated that, in Ohio, voter fraud exists, it is rare, and officials should take reasonable measures to prevent it. Secretary Husted's litigating position in the *Ohio Democratic Party* case was generally consistent with his public position. The Appellants' Brief, for example, listed administrative burdens as the initial state interest for the early-voting change, and also noted that "Ohio strives to implement controls to make fraud as rare as possible." Appellants' Br. 27-29, in *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016).

b. Please provide any and all evidence supporting your conclusion.

Please see my response to Question 15(a).

c. Do you agree with President Trump's claim that 3 to 5 million people voted illegally in the 2016 Presidential election? If yes, please explain why.

Please see my response to Question 15(a).

16. You have been a member of the Federalist Society since 2008. Since 2008, have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court, including the Sixth Circuit?

Over the last ten years, I would have informally discussed a potential nomination to a federal judgeship (among other potential career paths) in casual conversations with friends and acquaintances, some of whom are members of or involved with the Federalist Society (as well as other groups), but I do not recall any such conversations in detail.

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

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

    As I noted on Question 26(a) of the Senate Judiciary Questionnaire, I interviewed with individuals from the White House Counsel's Office and the U.S. Department of Justice over a year ago. I generally recall some discussion of administrative-law principles. To the best of my recollection, the discussion would have focused on my understanding of current Supreme Court precedents in the general area.

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

    As listed on Questions 12(d) and (e) of the Senate Judiciary Questionnaire, I have spoken to individuals and groups affiliated with the Federalist Society and the Heritage Foundation. Administrative-law principles or cases may have arisen in the course of those conversations or speeches, or in informal conversations with friends or acquaintances who are members of the Federalist Society or other groups. But I do not recall ever being asked generically to describe my "views on administrative law."

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

    "Administrative Law" is a broad topic that covers many issues. From the perspective of a circuit nominee, I would follow the binding statutory law and Supreme Court cases concerning any particular administrative-law question that arises.

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

    The Supreme Court has indicated that *clear* legislative history may be used to assist in determining the meaning of *ambiguous* statutory text. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992); *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1267 (2011); *see also, e.g.*, *Marinello v. United States*, 138 S. Ct. 1101, 1107 (2018).

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

    No.

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

    I reviewed the questions and drafted answers. I asked for and considered some feedback from members of the Office of Legal Policy at the U.S. Department of Justice and from state employees. Each answer is my own.

Written Questions for Eric Murphy
Nominee for the U.S. Court of Appeals for the Sixth Circuit
Submitted by Senator Patrick Leahy
October 16, 2018

1. In August 2017 and February 2018, you assisted with amicus briefs signed by the Ohio Attorney General and several other state Attorneys General in *Benisek v. Lamone* and *Gill v. Whitford*. One of these briefs argued that partisan gerrymandering claims are not justiciable, as "the Constitution keeps the courts out of the inherently political issue of how much politics is acceptable in districting." Your view on this matter strikes at the spirit of *Reynolds v. Sims*, which held that "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."

   (a) Do you stand by these briefs and the arguments made therein?

   The multi-state *amicus* brief in *Gill* was led by Texas; the multi-state *amicus* brief in *Benisek* was led by Michigan. I did not draft these briefs and my name was not on them. In my capacity as an advocate for the State of Ohio, I would have reviewed the briefs and communicated with the Ohio Attorney General and/or others in the office about them (and may have provided minor comments on the briefs to the lead States). The State of Ohio joined the briefs through the Ohio Attorney General. *See Gill* Multi-State *Amicus* Br. at 29; *Benisek* Multi-State *Amicus* Br. at 15. The arguments advanced in these briefs were those of the *amici* States. If confirmed, I would faithfully apply all Supreme Court precedent in this area.

   (b) Can federal courts have a role in preventing states from implementing plainly discriminatory voting laws prior to their implementation?

   Yes, the Supreme Court has held that federal courts have a role in protecting the fundamental right to vote. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966). If confirmed, I would faithfully follow the Supreme Court's precedent in this area.

   (c) What is your understanding of "one person, one vote" under the 14th Amendment and its relation to state gerrymandering practices?

   The Supreme Court's cases on the one-person, one-vote principle have "instructed that jurisdictions must design both congressional and state-legislative districts with equal populations, and must regularly reapportion districts to prevent malapportionment." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016). As for how that principle relates to gerrymandering practices, under Canon 3A(6) of the Code of Conduct for United States Judges, I cannot make public comments on issues currently pending in court.

(d) Do you agree with Justice Scalia's characterization of the Voting Rights Act as a "perpetuation of racial entitlement?"

The Supreme Court has made clear that "[t]he historic accomplishments of the Voting Rights Act are undeniable," and that "dramatic improvements" in voter registration and turnout "are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 201-02 (2009). Beyond describing current Supreme Court precedent, I do not believe that it is appropriate for me, as a circuit nominee, to comment about whether I personally agree with statements that a Justice made during oral argument, especially in areas in which there is pending or impending litigation. *See* Canon 3A(6) of the Code of Conduct for United States Judges.

2. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home."

(a) Do you believe the Constitution protects that personal autonomy as a fundamental right?

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court held that "'there is a realm of personal liberty which the government may not enter'" that included, in that case, the right to engage in consensual "private sexual conduct." *Id.* at 578 (citation omitted). If confirmed, I would faithfully follow *Lawrence* and the other Supreme Court precedent in this area.

3. Do you agree with Justice Lewis F. Powell Jr. – whose seat Just Kennedy took – who wrote in *Moore v. East Cleveland*, "Freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the 14th Amendment? Do you consider it a "fundamental" liberty such that the government may interfere only for extraordinary reasons?

In addition to my response to Question 2(a), the Supreme Court has "long held the right to marry is protected by the Constitution." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). If confirmed, I would faithfully follow the Supreme Court precedent in this area.

4. Many are concerned that the White House's denouncement in 2017 of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

(a) If this President or any other executive branch official refuses to comply with a court order, how should the courts respond?

The appropriate judicial response in any such serious matter would depend on the facts and circumstances of the case. A lower court should faithfully apply all Supreme Court precedent that would be applicable. Under the Constitution, the federal judiciary is an independent branch of government. "Article III establishes a 'judicial department' with the 'province and duty . . . to say what the law is' in particular cases and controversies." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

(b) What examples would you cite of proper limits on the assertion of executive power by the president?

The Supreme Court has many cases in which it has limited the assertion of executive power. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). If confirmed, I would faithfully follow the Supreme Court's precedent in this area.

5. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.

(a) Do you agree with that view? Does the Constitution permit discrimination against women?

The Supreme Court has repeatedly held that the Equal Protection Clause provides protections against sex discrimination. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689-90 (2017); *United States v. Virginia*, 518 U.S. 515, 531-32 (1996). If confirmed, I would faithfully follow this precedent.

6. **What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?**

The Constitution provides: "[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. The scope and meaning of this clause is currently subject to litigation, and, under Canon 3A(6) of the Code of Conduct for United States Judges, I cannot make public comments on matters pending or impending in court.

7. **How would you describe Congress's authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation's "Second Founding"?**

   These Amendments give Congress the "power to enforce" their provisions "by appropriate legislation." U.S. Const. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2. Under this enforcement power, the Supreme Court has "sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976); *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966). If confirmed, I would faithfully follow the Supreme Court's precedent in this area.

8. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

   (a) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.

   As a specific example, under 28 U.S.C. § 455(b)(3), I would recuse myself from any case on which I have worked as State Solicitor of Ohio. That recusal would include both cases in which I have formally entered an appearance, and cases in which I have not entered an appearance but have otherwise been involved. More generally, as I noted on Question 24 of my Senate Judiciary Questionnaire, if I am fortunate enough to be confirmed to the Sixth Circuit, I would carefully review and apply 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal were appropriate on a case-by-case basis.

Senator Dick Durbin
Written Questions for Chad Readler and Eric Murphy
October 17, 2018

For questions with subparts, please answer each subpart separately.

Questions for Eric Murphy

1. **Will you pledge that if you are confirmed you will recuse yourself from any cases involving issues that you worked on as the Ohio State Solicitor, including issues involving Ohio voting restrictions?**

   As I noted on Question 24 of my Senate Judiciary Questionnaire, if I am fortunate enough to be confirmed to the Sixth Circuit, I would carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal were appropriate on a case-by-case basis. For specific cases on which I have worked as State Solicitor of Ohio, 28 U.S.C. § 455(b)(3) establishes a bright-line test requiring recusal. For cases on which I have had no involvement, I would address recusal by carefully evaluating and applying the standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges, and any relevant authorities interpreting these provisions.

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

   Because this question implicates an ongoing political debate, Canon 5 of the Code of Conduct for United States Judges indicates that I should not provide my personal opinion. As I mentioned at the hearing, however, my client in various election matters, Secretary of State Jon Husted, has publicly indicated that, in Ohio, voter fraud exists, it is rare, and officials should take reasonable measures to prevent it. Secretary Husted's litigating position in these matters was generally consistent with his public position. The Appellants' Brief in the *Ohio Democratic Party* case, for example, listed administrative burdens as the initial state interest for the early-voting change, and also noted that "Ohio strives to implement controls to make fraud as rare as possible." Appellants' Br. 27-29, in *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016).

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

   I believe that judicial nominees should answer all questions to the best of their ability and consistent with any applicable duties to their clients and the Code of Conduct for United States Judges. The Code provides guidance to "nominees for judicial office." *See* Canon 1 commentary, Code of Conduct for United States Judges.

4. You represented tobacco companies extensively in private practice. The Campaign for Tobacco-Free Kids sent the Committee a letter after you were nominated raising serious concerns about your ability to be impartial on tobacco-related matters if you are confirmed.

The letter said, quote, "Both men [you and Mr. Readler] personally and extensively represented R.J. Reynolds during their time at Jones Day. For example, Mr. Murphy was counsel to RJR on a series of petitions of certiorari to the United States Supreme Court that sought to limit RJR's liability from a landmark tobacco lawsuit in Florida, *Engle v. Liggett Group Inc*."

a. **Please provide a list of all tobacco-related matters you have worked on as Ohio's State Solicitor.**

To the best of my recollection, I do not remember working on any specific cases involving the tobacco industry while Ohio's State Solicitor (though it is possible, of course, that some of the matters on which I have worked as Ohio's State Solicitor could have relevance to the tobacco industry or to other industries).

b. **Will you commit that if you are confirmed you will recuse yourself from matters involving the tobacco industry?**

As I noted on Question 24 of my Senate Judiciary Questionnaire, if I am fortunate enough to be confirmed to the Sixth Circuit, I would carefully evaluate and apply 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal were appropriate on a case-by-case basis. For purposes of this question, I would pay special attention to 28 U.S.C. § 455(b)(2) and authorities interpreting it. Section 455(b)(2) directs a judge to recuse in the following circumstances: "Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it."

5.

a. **Is waterboarding torture?**

I have not studied this question closely during my career in private practice and state government. But it is my understanding that Congress has passed a law indicating that waterboarding constitutes torture when it is intentionally used "to inflict severe physical or mental pain or suffering" upon a detainee. 18 U.S.C. § 2340(1).

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

I again have not studied this question closely during my career in private practice and state government. But it is my understanding that Congress has passed a law providing that no person in the custody or under the control of the United States Government may be subjected to any interrogation technique not authorized in the Army Field Manual. 42 U.S.C. § 2000dd-2(a)(2). It is also my understanding that waterboarding is not authorized in the Army Field Manual.

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

Please see my responses to Questions 5(a) and 5(b).

6.

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

Because this question addresses an ongoing political debate, Canon 5 of the Code of Conduct for United States Judges indicates that I should not provide my personal opinion. With that said, I have not studied this question in the context of my own nomination, and I am unaware of any such expenditures supporting my nomination.

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

As I noted on Question 24 of my Senate Judiciary Questionnaire, if I am fortunate enough to be confirmed to the Sixth Circuit, I would carefully evaluate and apply 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal were appropriate on a case-by-case basis. I cannot, however, comment on the disclosure or nondisclosure of any particular donations because Canon 5 of the Code of Conduct for United States Judges indicates that I should not provide my personal opinion on matters of ongoing political debate. Again, however, I do not know of any donations supporting my nomination.

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

Please see my responses to Questions 6(a) and 6(b).

7.

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

From the perspective of a circuit nominee, I believe that judges should follow the interpretive approach that the Supreme Court has identified with respect to the relevant constitutional provision. For most constitutional provisions, the Supreme Court will have provided at least some guidance to the lower courts. In some areas, such as the Confrontation Clause, the Supreme Court has treated originalist principles as highly important. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004). In other areas, such as the Eighth Amendment, the Supreme Court has relied on more of an evolving-standards approach. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005).

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

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

I do not recall ever studying this constitutional provision or any legal precedent interpreting it. I am generally aware of a pending case or cases concerning the Clause, however, so Canon 3A(6) of the Code of Conduct for United States Judges indicates that I should not comment further.

8.

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

I do not recall ever examining this legal question, and do not presently have any informed views concerning it.

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

Please see my response to Question 8(a).

9. You say in your questionnaire that you have been a member of the Federalist Society since 2008.

a. **Why did you join the Federalist Society?**

I joined the Federalist Society because the Chicago Law School's Student Chapter organized interesting debates with speakers on both sides of legal issues. These debates often addressed cases that were then pending at the Supreme Court. When I returned to Columbus after my clerkships, I found that the Columbus Lawyers Chapter also organized interesting debates on pending legal issues. Attending these events has been a good way to stay on top of the Supreme Court's docket and of other interesting legal issues.

b. **Was it appropriate for President Trump to publicly thank the Federalist Society for helping compile his Supreme Court shortlist?** For example, in an interview with Breitbart News' Steve Bannon on June 13, 2016, Trump said "[w]e're going to have great judges, conservative, all picked by the Federalist Society." In a press

conference on January 11, 2017, he said his list of Supreme Court candidates came "highly recommended by the Federalist Society."

Because this question addresses an ongoing political debate, Canon 5 of the Code of Conduct for United States Judges indicates that I should not provide my personal opinion.

c. **Please list each year that you have attended the Federalist Society's annual convention.**

I attended the annual convention at least once, but I do not remember the year(s).

d. On November 17, 2017, Attorney General Sessions spoke before the Federalist Society's convention. At the beginning of his speech, Attorney General Sessions attempted to joke with the crowd about his meetings with Russians. Video of the speech shows that the crowd laughed and applauded at these comments. (See https://www.reuters.com/video/2017/11/17/sessions-makes-russia-joke-at-speech?videoId=373001899) **Did you attend this speech, and if so, did you laugh or applaud when Attorney General Sessions attempted to joke about meeting with Russians?**

No, I did not attend this speech.

Nomination of Eric Murphy, to be United States Circuit Judge for the Sixth Circuit
Questions for the Record
Submitted October 17, 2018

QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

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

   I would have no problem objectively and impartially evaluating any scientific evidence on the subject were it to be presented in the context of an Article III case and to the extent that such an evaluation was appropriate for the resolution of a justiciable appeal. That said, because climate change raises an ongoing political matter, Canon 5 of the Code of Conduct for United States Judges indicates that I should not provide my personal opinion on that subject.

2. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."
   a. Do you agree with Justice Roberts' metaphor? Why or why not?

      Yes, to the extent that this metaphor seeks to distinguish legal questions presented to the judiciary from policy questions reserved by our Constitution for the other branches of government. Judges should decide cases according to the governing legal principles, not according to their own views of good or bad public policy. In that sense, this metaphor provides a modern way of articulating what Alexander Hamilton famously indicated in Federalist No. 78: that the judiciary "may truly be said to have neither FORCE nor WILL, but merely judgment."

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

      A circuit judge may consider practical consequences in rendering decisions when the governing legal authorities direct or allow the circuit judge to do so. When interpreting a statute, for example, the Supreme Court has suggested that lower courts may sometimes look to whether a particular interpretation would produce absurd results. *See Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982). Other times, federal statutes may direct courts to consider practical factors in their decision-making, such as the statute authorizing an interlocutory appeal if such an appeal would "materially advance the ultimate termination of litigation." 28 U.S.C. § 1292(b). And federal courts do occasionally decide common-law questions, such as in admiralty or diversity cases. *See, e.g.*, *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 207, 215-16 (1994).

3. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."
    a. What role, if any, should empathy play in a judge's decision-making process?

    A judge should neutrally apply the law in all cases to the best of the judge's ability. Indeed, judges take an oath that requires them to "administer justice without respect to persons, and do equal right to the poor and to the rich." 28 U.S.C. § 453. Thus, as Justice Kagan said during her 2010 testimony before this Committee, "it's law all the way down. When a case comes before the court, parties come before the court, the question is not do you like this party or do you like that party, do you favor this cause or do you favor that cause. The question is—and this is true of constitutional law and it's true of statutory law—the question is what the law requires." The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Committee on the Judiciary, 111th Cong., S. Hrg. 111-1044, at 103 (2010).

    Yet empathy can affect other aspects of the judicial role. A circuit judge, for example, should be "respectful" and "courteous" to litigants and lawyers who come before the judge. *See* Canon 3A(3) of the Code of Conduct for United States Judges. In addition, a circuit judge should write appellate opinions in full awareness of the fact that there will be a losing party. The judge should strive to explain to that party, in an easily understandable way, why the relevant cases or statutes and the facts of record compelled a result against the party's position. Empathy can bolster a judge's dedication to the law and to ensuring that all parties receive, and believe that they have received, a "fair shake."

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

    As with my response to Question 3(a), I believe that judges should strive to apply the law neutrally and not permit personal interests or world views to affect legal decision-making.

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

    No.

5. What assurance can you provide this committee and the American people that you would, as a federal judge, equally uphold the interests of the "little guy," specifically litigants who

do not have the same kind of resources to spend on their legal representation as large corporations?

I can state unequivocally that, consistent with the oath of office, I would be firmly dedicated to getting the law right even when the parties appearing before me have unequal resources and unequal legal representation. Judges must be diligent in all cases to ensuring that they understand the correct legal principles to be applied.

Further, I generally agree with the ABA Model Rule of Professional Conduct indicating that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." ABA Model Rule 1.2(b). But I am proud of the diversity of litigation experiences that I have had over the course of my legal career.

While I have represented defendants in tort cases, I have also represented Ohio in defense of a state law permitting a medical-malpractice plaintiff's tort claim to proceed. *See Garber v. Menendez*, 888 F.3d 839 (6th Cir. 2018). While I have represented business defendants in commercial cases, I have also represented Ohio in an antitrust suit challenging business practices partially on the ground that they raised prices for poorer consumers. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018). While I have defended Ohio in civil-rights litigation under § 1983, I have also represented a plaintiff asserting a civil-rights claim under § 1983. *See Brockington v. Boykins*, 637 F.3d 503 (4th Cir. 2011). While I have represented Ohio in criminal appeals, I have also represented prisoners in challenges to their criminal convictions. *See Brown v. McKee*, 340 F. App'x 254 (6th Cir. 2009). While I have represented parties that challenged regulations issued under the Affordable Care Act, I have also defended the decision of Ohio officials to expand the Medicaid program under the Affordable Care Act. *See State ex rel. Cleveland Right to Life v. State Controlling Bd.*, 138 Ohio St. 3d 57 (2013). While I have represented Ohio in a suit seeking the enforcement of federal immigration laws, I have also represented *amici* in support of a preemption challenge to state immigration laws. *See Arizona v. United States*, 567 U.S. 387 (2012). While I have defended state laws in suits by abortion providers, I have also defended state laws in suits by those who oppose abortion. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014). While I have represented Ohio in challenges to federal environmental regulations, I have also represented Ohio in defense of state environmental regulations. *See Fairfield Cty. Bd. of Comm'rs v. Nally*, 143 Ohio St. 3d 93 (2015); *cf. Wilkins v. Daniels*, 744 F.3d 409 (6th Cir. 2014).

All told, whether I was representing the State, a habeas petitioner, or any client, I always strived to vigorously represent that client's position to the best of my abilities. And, as a circuit judge, I would strive to impartially apply the law to the best of my abilities.

Nomination of Eric Murphy, to be United States Circuit Judge for the Sixth Circuit
Questions for the Record
Submitted October 17, 2018

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

   The Supreme Court has provided significant guidance in the area of substantive due process, and circuit judges should pay close attention to its cases to identify the factors to consider. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483 (1955).

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

      Yes. The Supreme Court has incorporated many expressly enumerated rights against the States under the Due Process Clause. *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

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

      Yes, the Supreme Court has repeatedly indicated that history and tradition are relevant factors. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2598 ("History and tradition guide and discipline this inquiry but do not set its outer boundaries."); *Glucksberg*, 521 U.S. at 710 ("We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices."). I would consult the historical sources that the Supreme Court has identified, which have included, among others, statutory laws and the common-law tradition. *Glucksberg*, 521 U.S. at 710-19.

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

      Yes, if the Supreme Court or a previous Sixth Circuit decision has already recognized a right as fundamental, a panel judge within the Sixth Circuit would be bound to follow that precedent. I would also review out-of-circuit judicial decisions that have considered the issue for their persuasive power.

   d. Would you consider whether a similar right has previously been recognized by

Supreme Court or circuit precedent?

Yes, the Supreme Court has considered the "'novelty'" of an asserted right as a factor. *See, e.g.*, *Osborne*, 557 U.S. at 72 (citation omitted). It has also considered whether an asserted right shares attributes with a right that it has already recognized. *Compare Obergefell*, 135 S. Ct. at 2598-2601, *with Glucksberg*, 521 U.S. at 723-28.

e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Yes, *Lawrence* and *Casey* are binding decisions that I would faithfully apply.

f. What other factors would you consider?

I would consider any other factors that the Supreme Court has suggested may be relevant, and any other factors that the litigating parties presented in their briefs in the context of a concrete case.

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

The Supreme Court has repeatedly held that the Equal Protection Clause provides protections against gender discrimination. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689-90 (2017); *United States v. Virginia*, 518 U.S. 515, 531-32 (1996). If confirmed, I would faithfully follow this precedent.

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

I am generally aware that, as an academic matter, many originalist scholars have debated the scope of the Fourteenth Amendment's protections. From the perspective of a circuit nominee, however, my response would be that the Supreme Court has held that the Fourteenth Amendment provides protections against gender discrimination, and circuit judges must follow that precedent.

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

I do not know why the *Virginia* litigation was not brought until the 1990s. From the perspective of a circuit nominee, however, it does not matter: *Virginia* is binding precedent of the Supreme Court that circuit judges must follow.

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

In *Obergefell*, the Supreme Court indicated that the state laws at issue were unconstitutional "to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." 135 S. Ct. at 2605. Apart from *Obergefell*, this question implicates specific legal issues that are pending or impending in court, so Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from commenting.

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

This question implicates specific legal issues that are pending or impending in court, so Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from commenting.

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

Yes, the Supreme Court held in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), that there is a constitutional right to privacy that protects a woman's right to use contraceptives. If confirmed, I would faithfully follow this precedent.

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

Yes, the Supreme Court held in *Roe* (as well as *Casey* and other subsequent cases) that the Constitution protects a woman's right to an abortion. If confirmed, I would faithfully follow this precedent.

b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

Yes, the Supreme Court held in *Lawrence* that "'there is a realm of personal liberty which the government may not enter,'" including, in that case, the right to engage in consensual "private sexual conduct." 539 U.S. at 578 (citation omitted). If confirmed, I would faithfully follow *Lawrence*.

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

Please see my responses to Questions 3, 3(a), and 3(b).

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

   a. When is it appropriate for judges to consider evidence that sheds light on our changing understanding of society?

      From the perspective of a circuit nominee, the applicable Supreme Court precedent would generally determine the manner in which to consider a legal question. In some areas, such as the Confrontation Clause, the Supreme Court has treated the original understanding of a provision as highly important. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004). In other areas, such as the Eighth Amendment, the Supreme Court has adopted more of an evolving-standards approach. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005). When the Supreme Court has directed lower courts "to consider evidence that sheds light on our changing understanding of society," the lower courts should do so.

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

      From the perspective of a circuit nominee, it would depend on the relevant Supreme Court precedent. As one example, the Supreme Court has generally indicated that district judges act as the "'gatekeep[ers]'" to consider this type of evidence when considering a relevant fact under Federal Rule of Evidence 702. *See United States v. Mallory*, Nos. 17-3500, 17-3537, 17-3538, at slip op. 8 (6th Cir. Aug. 30, 2018) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993)).

5. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93.

   a. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I have not analyzed this issue in great detail, but I am generally aware that many originalist scholars assert that *Brown*'s holding comports with the original meaning of the Fourteenth Amendment. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995). From the perspective of a circuit nominee, however, this is an academic point. I would faithfully follow *Brown* whether or not it is consistent with originalism.

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

Various originalists have acknowledged and addressed similar concerns. *See, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 399-402 (2012). But this question raises an academic point from the perspective of a circuit nominee. Circuit judges must follow the interpretive approach that the Supreme Court has held applies to a given constitutional provision, whether or not they personally agree with that approach.

c. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

As I noted in response to Question 4(a), from the perspective of a circuit nominee, the applicable Supreme Court precedent would provide guidance on when circuit judges should treat the original public meaning as dispositive or as only one relevant factor.

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

Please see my response to Question 5(c).

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

I would look to the same sources on which the Supreme Court has relied in analogous circumstances.

6. During your opening statement at your nomination hearing, you thanked Justice Kennedy for teaching you the difference between law and policy.

a. What is the difference between law and policy?

With these comments, I was referring to a judge's general obligation to impartially decide cases according to the controlling legal authorities even when the ultimate outcome of the case does not comport with the judge's own personal views of what is "good" or "bad" public policy. Justice Kennedy's concurrence in *Texas v. Johnson*, 491 U.S. 397 (1989)—the Texas flag-burning case—well illustrates this difference.

Justice Kennedy stated "that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics." *Id.* at 421. But Justice Kennedy concluded that Mr. Johnson's acts qualified as "speech, in both the technical and the fundamental meaning of the Constitution," and that "he must go free." *Id.* As Justice Kennedy noted, "[t]he hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." *Id.* at 420-21. That is what I meant by the difference between law and policy.

b. How should a judge interpret legislative inaction after a judicial decision?

The Supreme Court's precedent makes it depend on the particular facts and circumstances of the case. The Court has at times noted that "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation." *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (internal quotation marks omitted). But it has also sometimes suggested that statutory amendments that did not alter a previously interpreted provision illustrated that the legislature accepted that prior interpretation. *Tex. Dep't of Housing and Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015).

7. In your opening remarks, you stated, "[T]here are two types of the fundamental right to vote. There is just the fundamental right to a vote that applies to everybody. And then there is the anti-discrimination, Fifteenth Amendment type right."

a. Please further explain the right to vote that applies to everybody and the Fifteenth Amendment type right?

With these comments, I was attempting to summarize two types of constitutional voting claims that the Supreme Court and Sixth Circuit now recognize. *First*, under what the Sixth Circuit has come to call the "*Anderson-Burdick* framework" (after two Supreme Court cases), these courts recognize a "general right to vote" that is "implicit in our constitutional system." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 626 (6th Cir. 2016) (internal quotation marks omitted); *see Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). Under this framework, the Sixth Circuit assesses the constitutionality of election laws by "weighing competing interests." *Ohio Democratic Party*, 834 F.3d at 627. It considers the size of the burden imposed on the right to vote and then chooses a corresponding standard of review; severe burdens receive scrutiny approaching strict scrutiny and minimal burdens receive scrutiny approaching rational-basis review. *Id.*; *cf. Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008) (Stevens, J., op.) (noting that "a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands"). When I said that this claim "applies to everybody," I meant that the Sixth Circuit has applied this balancing test (and can potentially invalidate an election law) even when the law was not found to be intentionally discriminatory. In *Ohio Democratic Party*, for example, the district court had rejected the argument that

the challenged law was intentionally discriminatory, *Ohio Org. Collaborative v. Husted*, 189 F. Supp. 3d 708, 762-66 (S.D. Ohio 2016), but invalidated it under this *Anderson-Burdick* framework, *id.* at 727-39. (The latter portion of the district court's opinion was reversed by the Sixth Circuit.)

Second, the Supreme Court and the Sixth Circuit have held that the Fourteenth and Fifteenth Amendments separately prohibit election laws (no matter their burdens) that are intended to discriminate "along racial lines." *See Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985); *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 368-69 (6th Cir. 2002). I was referencing this separate claim when I mentioned "the anti-discrimination, Fifteenth Amendment type right."

b. Is registering to vote or accessing a polling place a component of the protected exercise of the right to vote?

The Supreme Court has given constitutional scrutiny to many different types of election and voting regulations, including registration requirements. *Compare Marston v. Lewis*, 410 U.S. 679 (1973) (per curiam), *with Dunn v. Blumstein*, 405 U.S. 330 (1972). But I cannot say anything further on this topic under Canon 3A(6) of the Code of Conduct for United States Judges because state voting and election laws remain the subject of litigation.

8. In the brief that you filed in *Husted v. Ohio State Conference of the NAACP*, 834 F.3d 620 (6th Cir. 2016), you argued that shortening the early-voting period did not violate the law even if it had a disparate impact on African-American, lower-income, and homeless voters. Do individuals challenging voting restrictions have to prove intentional discrimination to succeed?

Secretary of State Jon Husted's arguments in this brief tracked the two types of claims described in response to Question 7(a). The brief noted that the *Anderson-Burdick* framework bars voting regimes that unjustifiably burden voting rights (even if they are not intentionally discriminatory), Appellants' Br. 18-22, in *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016) (Part I.A.1), and that the Constitution separately bars any voting law passed with racially discriminatory animus, *id.* at 22-23 (Part I.A.2). Thus, the brief made the answer to this question depend on the type of claim that the challengers were asserting: The brief indicated that if the challengers were asserting an intentional-discrimination claim, they must prove intentional discrimination, and if they were relying on the *Anderson-Burdick* framework, they must undertake the benefits/burdens analysis that the framework requires. In *Ohio Democratic Party*, the Sixth Circuit held that the *Anderson-Burdick* claim failed not just because the Ohio law was non-discriminatory, but also because the State had shown that its interests were sufficient to justify the burdens imposed. *Ohio Democratic Party*, 834 F.3d at 635-36.

9. In your brief in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2018) you stated, "[T]here is no fundamental right to the recognition of out-of-state same-sex marriage" because "such a right would conflict with our Nation's tradition." In the Supreme Court's *Obergefell* opinion, however, Justice Kennedy explained, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification

and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."

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

As I noted at the hearing, *Obergefell* indicated near the beginning of its legal analysis (in Part III) that history and tradition were *relevant* factors, but not *dispositive* ones, in the context of the fundamental right to marry: "History and tradition guide and discipline this inquiry but do not set its outer boundaries." *Obergefell*, 135 S. Ct. at 2598. And, as I also noted at the hearing, *Obergefell* indicated that the weight that history and tradition should be given in the substantive-due-process inquiry depends on the specific right at issue. *Id.* at 2602 (distinguishing *Glucksberg* on the ground that "while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy"). Beyond this general summary of Supreme Court precedent, questions concerning how the Fourteenth Amendment should apply to other types of asserted fundamental rights remain unsettled, and cases presenting such questions could come before me as a judge. Accordingly, I cannot express any specific comments under Canon 3A(6) of the Code of Conduct for United States Judges other than to say that I would faithfully follow *Obergefell* and the other Supreme Court precedent in this area.

b. Has Justice Kennedy's opinion in *Obergefell* "destroy[ed] the federalist structure that protects liberty," as you warned in your brief?

Respectfully, this question misunderstands that quotation from Ohio's *Obergefell* brief, which did not warn that the holding in *Obergefell* would destroy the federalist structure. As I noted at the hearing, the cases from the States that made up the *Obergefell* litigation involved two different constitutional claims: (1) a constitutional claim requiring a State to *license* same-sex marriages within the State (as in the Michigan case); and (2) a constitutional claim requiring a State to *recognize* same-sex marriages lawfully performed in another State (as in the Ohio cases). From the beginning of its Argument Section, Ohio's brief "concede[d] that if [the Supreme] Court reject[ed] all grounds for retaining marriage's traditional definition" (that is, if it held that the Constitution requires States to *license* same-sex marriage), then "States may not refuse to *recognize* out-of-state same-sex marriages." Br. of Respondent, at 10, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (emphasis added). Thus, the brief hinged on the assumption that the first constitutional question that was at issue in the Michigan case would be resolved in the States' favor. It is in that context that the brief argued that a *standalone* recognition right would be disruptive to federalism because it would allow a single State to dictate the answer to this important question for the other 49 States. Ultimately, however, this federalism argument was *mooted* by the decision. *Obergefell* held that Constitution requires each State to license same-sex marriage (the question in the Michigan case), which triggered Ohio's concession that the States had a duty to recognize out-of-state same-sex marriages as well.

c. In response to Senator Kennedy, you indicated that a right protected under Fourteenth Amendment substantive due process must be deeply rooted in our nation's history and tradition. Justice Kennedy's opinion in *Obergefell* provides a different test. When is it appropriate to apply Justice Kennedy's formulation of substantive due process?

As a general matter, as I mentioned at the hearing and in response to Question 9(a), the Supreme Court's cases instruct that the weight that history and tradition should receive depends on the specific fundamental right that is asserted in the particular case. Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from commenting further because specific matters implicating this question could come before me as a judge.

10. As a solicitor general, you have represented the state of Ohio.
    a. If confirmed, do you agree there are circumstances under which it may be appropriate to recuse yourself from cases in which the state of Ohio is a party?

    Yes.

    b. Do you commit to following all applicable judicial ethics rules in determining whether to recuse yourself in cases where former clients are parties?

    Yes.

11. What role does morality play in determining whether a challenged law or regulation is unconstitutional or otherwise illegal?

    The Supreme Court indicated in *Lawrence* and *Casey* that "'[o]ur obligation is to define the liberty of all, not to mandate our own moral code.'" *Lawrence*, 539 U.S. at 571 (quoting *Casey*, 505 U.S. at 850).

Questions for the Record for Eric E. Murphy
From Senator Mazie K. Hirono

1. According to a Pew Research study, just over 55% of eligible voters participated in the 2016 election. The United States ranks near the bottom of developed countries in terms of voter turnout. Yet, you have repeatedly defended Ohio laws designed to further suppress voter turnout—in particular by minority, low-income, and disabled voters. In *Husted v. A. Philip Randolph Institute*, you defended Ohio's efforts to purge its voter rolls. In *Northeast Ohio Coalition for the Homeless v. Husted*, you defended Ohio's voter ID law. In *Ohio Democratic Party v. Husted* and *NAACP v. Husted*, you defended Ohio's decision to shorten the early voting period.

   a. When working on these voting cases, did you educate yourself with scholarly research regarding voter fraud?

   As the State Solicitor of Ohio (an appellate lawyer for the State and its officers), I was tasked with defending in the appellate courts the state laws and policies that were adopted by Ohio or its state officials. When working on these cases, I would have generally reviewed and relied upon the evidentiary record created in the district court to present Ohio's arguments on appeal.

   b. Are you aware that evidence shows that voter fraud is exceedingly rare, including one study that found only 31 instances of <u>possible</u> voter fraud over a 14-year period where more than 1 billion ballots were cast?

   Because this question implicates an ongoing political debate, Canon 5 of the Code of Conduct for United States Judges indicates that I should not provide my personal opinion. As I mentioned at the hearing, however, my client in these election matters, Secretary of State Jon Husted, has publicly indicated that, in Ohio, voter fraud exists, it is rare, and officials should take reasonable measures to prevent it. Secretary Husted's litigating position in these cases was generally consistent with his public position. The Appellants' Brief in *Ohio Democratic Party*, for example, listed administrative burdens as the initial state interest for the early-voting change, and also noted that "Ohio strives to implement controls to make fraud as rare as possible." Appellants' Br. 27-29, in *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016).

2. You defended Ohio's ban on same-sex marriage all the way to the Supreme Court. In your brief to the Supreme Court, you argued that recognizing a right to same-sex marriage would be "disruptive . . . to our constitutional democracy."

   a. Please explain how allowing same-sex individuals in a loving relationship to get married would disrupt our constitutional democracy.

   Respectfully, this question mischaracterizes the quoted sentence from Ohio's *Obergefell* brief as suggesting that same-sex marriage *itself* would disrupt democracy. Ohio's brief did not take a position on the critical public-policy

debate about whether same-sex marriage should be permitted. The brief instead focused on a process question: Who should decide that important issue?

As I noted at the hearing, moreover, the cases from the States that made up the *Obergefell* litigation involved two different constitutional claims: (1) a constitutional claim that would require a State to *license* same-sex marriages within the State (as in the Michigan case); and (2) a constitutional claim that would require a State to *recognize* same-sex marriages lawfully performed in another State (as in the Ohio cases). From the beginning of its Argument Section, Ohio's *Obergefell* brief "concede[d] that if [the Supreme] Court reject[ed] all grounds for retaining marriage's traditional definition" (that is, if it held that the Constitution requires States to *license* same-sex marriage), then "States may not refuse to *recognize* out-of-state same-sex marriages." Br. of Respondent, at 10, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (emphasis added). Thus, the brief hinged on the assumption that the first constitutional question that was at issue in the Michigan case would be resolved in the States' favor. It is in that context that the brief argued that a *standalone* recognition right would be disruptive to our constitutional democracy because it would allow a single State to dictate the answer to this important question for the other 49 States despite the Constitution's federalist structure. Ultimately, however, this federalism argument was *mooted* by the decision. *Obergefell* held that the Constitution requires each State to license same-sex marriages within the State (the question at issue in the Michigan case), which triggered Ohio's concession that the States had a duty to recognize out-of-state same-sex marriages as well.

b. Do you believe that a concern about disrupting our constitutional democracy is a valid reason for denying individuals their constitutional rights?

Respectfully, Ohio's *Obergefell* brief did not argue that "a concern about disrupting our constitutional democracy is a valid reason for denying individuals their constitutional rights." The brief argued, consistent with Supreme Court precedent, that "'[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action.'" *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973) (citation omitted); Br. of Respondent, at 18, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Ultimately, *Obergefell* rejected the States' arguments, and, if confirmed, I would faithfully follow that decision.

3. In a case called *Horne v. Isaacson*, you signed an amicus brief supporting an Arizona law that banned abortions as early as twenty weeks except in extremely limited circumstances. You argued that "[t]he law in 'no real sense' deprives women of the decision" to choose, despite the fact that it practically prohibited women from obtaining abortions after twenty weeks of pregnancy. As the Ninth Circuit recognized, the Arizona law's narrow "medical emergency exception does not transform the law from a prohibition on abortion into a regulation of abortion procedure." Your arguments were

inconsistent with the Supreme Court's precedent in *Planned Parenthood v. Casey*, which stated:

> "It must be stated at the outset and with clarity that *Roe's* essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."

a. Is it your view that a law that for all practical purposes, eliminates a woman's right to have an abortion is not an undue burden on a woman's right to choose? How do you reconcile that argument with the quote above from *Casey*?

The arguments asserted in this *amicus* brief were those of Ohio and the other States that joined the brief; I was acting as an advocate for the State. As an ABA Model Rule of Professional Conduct notes, "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities. ABA Model Rule 1.2(b). In addition, the States filed this *amicus* brief at the certiorari stage, and primarily asserted the need for the Supreme Court's guidance on this topic given, among other reasons, the number of States that have passed similar laws. *See* Multi-State *Amicus* Br., at 6-17, in *Horne v. Isaacson*, 134 S. Ct. 905 (2014). As for the States' arguments why these laws were consistent with *Casey* (including the quote above), Part III of the brief's Argument Section presented those arguments. *Id.* at 17-24.

b. Is it your view that only an explicit ban on abortions without any exception constitutes a "prohibition of abortion"?

The arguments asserted in this multi-state *amicus* brief were those of the State of Ohio and the other States that joined the brief; I was acting as an advocate for the State. The States' *amicus* brief, moreover, did not assert that only an absolute prohibition on abortion would violate the Constitution; it defended the state law at issue through *Casey*'s undue-burden lens. The brief's Introduction stated: "At the outset, it should be noted that this legislation does not attempt to invalidate the central 'undue burden' framework established by" *Casey*. *Id.* at 1. And Part III of the Argument Section offered reasons why the Arizona law comported with *Casey*. *Id.* at 17-24.

4. Although you did not need to weigh in on laws in different states, you went out of your way as State Solicitor of Ohio to co-lead Supreme Court amicus briefs in *Horne v. Isaacson* (2013) and *Whole Woman's Health v. Hellerstedt* (2016) to support laws severely restricting women's reproductive rights. In *Horne*, you were actually the Counsel of Record for that amicus brief.

In *Whole Woman's Health v. Hellerstedt*, the Supreme Court amicus brief you signed in 2016 argued that Texas' anti-abortion law imposing onerous restrictions on abortion clinics and doctors performing abortions was valid under Supreme Court precedent. You claimed that the Texas law was not an undue burden, even though it would have led to the closure of about 75 percent of the abortion clinics in Texas.

a. In both cases, you argued in favor of laws that for all practical purposes, would have denied women their constitutional right to an abortion as recognized in *Roe v. Wade* and *Planned Parenthood v. Casey*. Since you did not believe these laws constituted an undue burden, but the Supreme Court disagreed with you in *Whole Woman's Health*, do you believe your understanding of what constitutes an "undue burden" on a woman's right to choose had been too narrow before?

The arguments asserted in the multi-state *amicus* briefs in these two cases were those of the State of Ohio and the other States that joined the briefs; I was acting as an advocate for the State. Further, the State of Ohio had a state interest in these cases. The State has since passed a law similar to the one at issue in *Horne* and it has long maintained health regulations of ambulatory surgical facilities, including abortion clinics. These *amicus* briefs were seeking to protect Ohio's interests or laws, as were other *amicus* briefs filed in other cases. *See, e.g.*, Multi-State *Amicus* Br. in *Walker v. Tex. Div., Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015).

In *Hellerstedt*, the Supreme Court adopted a fact-specific approach for determining when abortion-provider regulations will impose an undue burden. That test "consider[s] the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. at 2309. When applying that test, *Hellerstedt* examined, in detail, the evidence presented concerning the reasons for, and effects of, Texas's admitting-privileges requirement, *id.* at 2310-14, and its surgical-center requirement, *id.* at 2314-18. If fortunate enough to be confirmed, I would faithfully follow *Hellerstedt*.

b. Given that you went out of your way to oppose these anti-abortion laws, litigants challenging similar laws will not be able to assume that you would rule fairly and without bias in their cases. If confirmed will you recuse yourself from cases involving any similar anti-abortion laws?

As I noted on Question 24 of my Senate Judiciary Questionnaire, if I am fortunate enough to be confirmed to the Sixth Circuit, I would carefully review and follow 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges to determine if recusal were appropriate on a case-by-case basis. For specific cases on which I have worked as State Solicitor of Ohio, 28 U.S.C. § 455(b)(3) establishes a bright-line test requiring recusal. For cases on which I have had no involvement, I would address recusal by carefully evaluating and applying the standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges, and any relevant authorities interpreting these provisions.

In addition, the decision to file these *amicus* briefs was ultimately made by the Ohio Attorney General, and the briefs sought to protect Ohio's interests in the appellate courts—my role as the State's chief appellate advocate. Sometimes that role led me to be an advocate in defense of Ohio abortion regulations, but other times it put me on the opposite side of anti-abortion groups. For example, I defended Ohio's laws against a free-speech challenge by an anti-abortion group that asserted that the Affordable Care Act permitted taxpayer-funded abortion. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014). And I defended the decision of Ohio officials to expand the Medicaid program under the Affordable Care Act against a challenge by, among others, anti-abortion groups. *See State ex rel. Cleveland Right to Life v. State Controlling Board*, 138 Ohio St. 3d 57 (2013).

I fully recognize the difference between being an advocate and being a judge. If fortunate enough to be confirmed, I would set aside all of these advocacy positions and faithfully apply the relevant precedent in the areas that come before me.

5. In *United States v. Caronia*, you argued that the conviction of a pharmaceutical sales consultant for promoting off-label use of a drug should be overturned because the conviction "is based on a speech ban unsupported by any sufficient interest." In that case, Mr. Caronia was caught on tape promoting the drug Xyrem for a variety of off-label uses—including use by patients under age sixteen—despite the FDA placing a "black box" warning on the drug. This is the most serious warning required by the FDA and is reserved for particularly dangerous drugs. As you know, commercial speech has long been afforded a lower level of First Amendment protection than other forms of speech.

Is it your view that public safety and patients' right to be protected from potentially dangerous uses of prescription drugs are not "sufficient interests" when weighed against the free speech rights of a pharmaceutical sales consultant in selling commercial products?

The arguments presented in the *amicus* brief in *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012), stated the views of the client that I represented, the Washington Legal Foundation. Here, too, I have represented clients on both sides of commercial-speech questions. As a state lawyer, I defended an Ohio law regulating precious-metals dealers against a commercial-speech challenge presented in a petition for certiorari. Ohio's brief in opposition in that case distinguished the Second Circuit's *Caronia* decision. Br. in Opp., at 22-23, in *Liberty Coins, LLC v. Porter*, 135 S. Ct. 950 (2015). Judge Chin's opinion in *Caronia*, moreover, concerned only truthful and non-misleading speech to physicians. *Cf.* 703 F.3d at 165 n.10 ("The government did not argue at trial, nor does it argue on appeal, that the promotion in question was false or misleading."). And the opinion indicated that "the government's asserted interests in drug safety and public health are substantial." *Id.* at 166. So the decision solely addressed the other prongs of the commercial-speech test—whether the ban on truthful speech directly advanced the government's interests and whether it was narrowly drawn. *Id.* at 166-69. If confirmed, I would faithfully apply the Supreme Court's commercial-speech precedent.

Nomination of Eric E. Murphy
United States Court of Appeals for the Sixth
Circuit Questions for the Record
Submitted October 17, 2018

QUESTIONS FROM SENATOR BOOKER

1. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[1] Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.[2] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[3] In my home state of New Jersey, the disparity between blacks and whites in the state prison system is greater than 10 to 1.[4]

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

    I do believe that conscious and unconscious racial bias exists in the criminal-justice system, and that every circuit judge has a duty to prevent that bias and/or correct it whenever it occurs. As the Supreme Court has noted, it has engaged in "'unceasing efforts to eradicate racial prejudice from our criminal justice system.'" *Johnson v. California*, 543 U.S. 499, 512 (2005) (citation omitted).

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

    Yes.

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

    I recall attending some presentations on the general topic of implicit bias, but have not studied it extensively and am not familiar with scholarly books and articles about it.

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

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

I have not previously studied this issue in any scientific way, and do not have an informed basis on which to opine.

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[1] JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), *available at* https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on- drugs-damages-black-social-mobility/.
[2] *Id.*
[3] ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), *available at* http://www.sentencingproject.org/publications/color-of- justice-racial-and-ethnic-disparity-in-state-prisons/.
[4] *Id.* at 8.
[5] THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), *available at* http://www.pewtrusts.org/~/media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.p df.
[6] *Id.*

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

Please see my response to Question 2(a).

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

Yes.

4. The color of a criminal defendant plays a significant role in capital punishment cases. For instance, people of color have accounted for 43 percent of total executions since 1976 and 55 percent of those currently awaiting the death penalty.[7]

a. Do those statistics alarm you?

Yes.

b. Do you believe it is cruel and unusual to disproportionately apply the death penalty on people of color? Why not?

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court provided the legal principles that would apply to this question. *Id.* at 299-319. If confirmed, I would faithfully follow *McCleskey*. Apart from generally referencing *McCleskey*, I am barred from opining on matters that might come before me as a judge under Canon 3A(6) of the Code of Conduct for United States Judges.

c. The color of the victim also plays an important role in determining whether the death penalty applies in a particular case. White victims account for about half of all murder victims, but 80 percent of all death penalty cases involve white victims. If you were a judge, and those statistics were playing out in your courtroom, what would you do?

I would follow the relevant Supreme Court precedents to the best of my ability. Apart from that general comment, I am barred from opining on matters that might come before me as a judge under Canon 3A(6) of the Code of Conduct for United States Judges.

5. In *Ohio Democratic Party v. Husted*, you defended the state of Ohio in a case challenging the state's curtailment of its early voting period. Ohio had adopted a law allowing in-person early voting in the 35 days leading up to an election day, including a five-day "Golden Week" during which voters could both register and vote at the same time. After Ohio eliminated Golden Week in 2014, a district court concluded that the elimination of this voting period would "disproportionately burden African Americans," and that the

rates at which African Americans voted during Golden Week were "far higher . . . than among whites in both 2008 and 2012."[8]

You argued the appeal to the Sixth Circuit and won a reversal of the district court's decision. You began your brief by stating that "Ohio is a national leader in making voting easy."[9] Yet the Sixth Circuit had previously concluded that "many voters in the 2004 general election were *effectively disenfranchised and unable to vote*" due to waiting lines of up to twelve hours, stretching as late as 4:00 a.m. into the day after the election.[10]

In authoring this brief, had you studied the problems that had plagued Ohio's administration of elections and had led to Ohio's creation of an early voting period?

As the State Solicitor of Ohio (an appellate lawyer for the State and its officers), I was tasked with defending in the appellate courts the state laws and policies that were adopted by Ohio or its officials. When working on cases, I would have generally reviewed and relied upon the evidentiary record created in the district court to present Ohio's arguments on appeal. To the best of my recollection, the record in the *Ohio Democratic Party* case did include some evidence concerning the 2004 election that led Ohio to adopt its early-voting calendar. In addition, the statement from the Appellants' Brief that is quoted in this question was based on a comparison of Ohio's early-voting opportunities to the early-voting opportunities in other States for the then-upcoming 2016 election. The district court that invalidated Ohio's law itself stated that "Ohio's national leadership in voting opportunities is to be commended." Stay Order, Doc. 125, PageID#6302, *Ohio Org. Collaborative v. Husted*, No. 2:15-cv-1802 (S.D. Ohio).

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[7] The American Civil Liberties Association, Race and the Death Penalty, https://www.aclu.org/other/race-and-death-penalty (Last visited June 13, 2018).
[8] *Ohio Org. Collaborative v. Husted*, 189 F. Supp. 3d 708, 730 (S.D. Ohio 2016), *rev'd*, 834 F.3d 620 (6th Cir. 2016).
[9] Brief of Appellants at 1, *Ohio Democratic Part v. Husted*, No. 16-3561 (6th Cir. June 24, 2016).
[10] *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 531 (6th Cir. 2014), *vacated as moot*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014) (emphasis added).

6. You argued that the Ohio legislature's decision to eliminate Golden Week was based in part on concerns about supposed voter fraud—and that having an overlapping period in which voters could both register and vote "raises some fraud risk."[11] As evidence, you noted two instances in which voters "were suspected of voting fraudulently" and had their cases referred to a prosecutor, and you stated that "some ballots" cast in one county listed purportedly vacant residences.[12]

   Were you unable to find a single instance in which anyone who voted during Golden Week was actually convicted—or even charged—for committing voter fraud?

   I do not recall all of the evidence presented in the district court in this case. Yet, as I noted at the hearing, my client in the case, Secretary of State Jon Husted, has publicly indicated that, in Ohio, voter fraud exists, it is rare, and officials should take reasonable measures to prevent it. Secretary Husted's litigating position in the case was consistent with his public position. The Appellants' Brief, for example, listed administrative burdens as the initial state interest for the early-voting change, and also noted that "Ohio strives to implement controls to make fraud as rare as possible." Appellants' Br. 27-29, in *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016).

7. Although the district court did not conclude that the Ohio legislature acted with the express purpose of disenfranchising minority voters, it noted there was some evidence that legislators were aware that the elimination of Golden Week, combined with other provisions of the challenged law, could disproportionately burden African Americans.[13] Did you personally have any concern that the law you were defending was intended to reduce the number of African Americans who cast ballots in Ohio elections?

   The district court provided a reasoned opinion on the intentional-discrimination claim that addressed all of the evidence presented, and, as a lawyer who represented a client, it would be inappropriate for me to give my personal opinion on this issue.

8. In *Obergefell v. Hodges*, you argued to the Supreme Court that a ruling in favor of the Petitioners would be "disruptive . . . to our constitutional democracy."[14] Do you believe the Court's holding in *Obergefell* has led to a disruption of our constitutional democracy?

   Respectfully, this question misunderstands that quotation from Ohio's *Obergefell* brief, which did not argue that the actual holding in *Obergefell* would be disruptive to our constitutional democracy. As I noted at the hearing, the cases from the States that made up the *Obergefell* litigation involved two different constitutional claims: (1) a constitutional claim that would require a State to *license* same-sex marriages within the State (as in the Michigan case); and (2) a constitutional claim that would require a State to *recognize* same-sex marriages lawfully performed in another State (as in the Ohio cases). From the beginning of its Argument Section, Ohio's brief "concede[d] that if [the Supreme] Court reject[ed] all grounds for retaining marriage's traditional definition" (that is, if it held that the Constitution requires States to *license* same-sex marriage), then "States may not refuse to *recognize* out-of-state same-sex marriages." Br. of Respondent, at 10, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (emphasis added). Thus, the brief hinged on the assumption that the first constitutional question that was at

issue in the Michigan case would be resolved in the States' favor. It is in that context that the brief argued that a *standalone* recognition right would be disruptive to federalism because it would allow a single State to dictate the answer to this important question for the other 49 States. Ultimately, however, this federalism argument was mooted by the decision. *Obergefell* held that Constitution requires each State to license same-sex marriage (the question in the Michigan case), which triggered Ohio's concession that the States had a duty to recognize out-of-state same-sex marriages as well.

9. Several Ohio death row inmates have challenged the state's lethal injection method on the grounds that its novel three-drug protocol violates the Eighth Amendment's prohibition against cruel and unusual punishments. The district court noted that in a recent Ohio execution involving one of the drugs, midazolam, the person executed gasped over a dozen times; appeared to be choking; and clenched and unclenched his hands.[15] Furthermore, the court noted that in several other states that had relied upon midazolam to render the condemned person unconscious, the men being executed appeared to choke and gasp for air during their final minutes. One man was observed to be "coughing, heaving, flailing, or attempting to flail arms."[16]

   After conducting a five-day hearing, the district court concluded based on voluminous expert evidence that Ohio's use of midazolam would "create a substantial risk of serious harm or an objectively intolerable risk of harm."[17] You successfully briefed and argued an appeal to the Sixth Circuit, which reversed the district court and allowed the executions to proceed.[18] The court concluded that although there was "some risk" that people being executed would be sufficiently conscious to feel pain, the plaintiffs had not

[11] Brief of Appellants at 28, *Ohio Democratic Part v. Husted*.
[12] *Id.*
[13] *Ohio Org. Collaborative*, 189 F. Supp. 3d at 764-65.
[14] Brief for Respondent at 10, *Obergefell v. Hodges*, No. 14-556, 135 S. Ct. 2701 (Mar. 27, 2015).
[15] *In re Ohio Execution Protocol*, 235 F. Supp. 3d 892, 905 (S.D. Ohio 2017), *rev'd*, 860 F.3d 881 (6th Cir. 2017).
[16] *Id.* at 906.
[17] *Id.* at 953.
[18] *In re Ohio Execution Protocol*, 860 F.3d 881 (6th Cir. 2017).

met their burden to show that the execution method was "sure or very likely to cause serious pain."[19]

Did you have any moral hesitations about arguing that the state should be free to execute people even if there was some risk that they would be conscious enough to experience what one expert witness called "feelings of suffocation like being buried alive"?[20]

The en banc Sixth Circuit provided a reasoned opinion explaining why the challengers had not presented sufficient evidence showing the required risk, and, as a lawyer who represented a client, it would be inappropriate for me to give my personal opinion.

[19] *Id.* at 890 (internal quotations omitted).
[20] *In re Ohio Execution Protocol Litigation*, 235 F. Supp. 3d at 917.

Questions for the Record from Senator Kamala D. Harris
Submitted October 17, 2018
For the Nomination of

Eric Murphy, to the U.S. Court of Appeals for the Sixth Circuit

1. As State Solicitor, you signed amicus briefs in *Anderson v. Planned Parenthood of Kansas and Mid-Missouri* and in *Gee v. Planned Parenthood of Gulf Coast, Inc*. In both cases, your briefs supported state decisions to prevent local Planned Parenthood clinics from participating in Medicaid. Your briefs further argued that, in order to determine whether Planned Parenthood was a qualified Medicaid provider, the court should look to state regulations rather than federal law.

    a) Did you have any role in deciding whether to file amicus briefs in these cases? If so, what was that role?

    The multi-state *amicus* briefs in *Gee* and *Andersen* were led by Indiana. The *amicus* briefs addressed only a statutory (not a constitutional) issue—asking the Supreme Court to grant certiorari to consider whether the Medicaid Act or 42 U.S.C. § 1983 created a private right of action for healthcare providers or patients to bring suit to enforce 42 U.S.C. § 1396a(a)(23). The State of Ohio joined those *amicus* briefs through the Ohio Attorney General. *See Gee* Multi-State *Amicus* Br. at 22; *Andersen* Multi-State *Amicus* Br. at 22. I did not draft these *amicus* briefs and my name was not on them. I would have reviewed the briefs and communicated with the Ohio Attorney General and/or others in the office about them (and may have provided minor comments on the briefs to Indiana).

    b) When determining whether a law places an undue burden on a woman's right to choose, do you agree that the analysis should consider whether the law would disproportionately affect poor women?

    The Supreme Court has indicated that that "there 'exists' an 'undue burden' on a woman's right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the '*purpose or effect*' of the provision '*is to place a substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability.'" *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality op.)). If confirmed, I would faithfully follow *Hellerstedt*, *Casey*, and the Supreme Court's other cases in this area. Apart from generally describing those cases, however, I cannot comment further under Canon 3A(6) of the Code of Conduct for United States Judges because this question addresses a legal issue that may arise in court.

c) Did you consider the abortion access of poor women before signing these briefs?

Please see my response to Question 1(a).

2. As State Solicitor, you also assisted with an amicus brief in *Peruta v. California*, a case concerning a California law that restricted the ability to carry concealed guns in public. Your amicus brief argued that the lower court's decision to uphold the law effectively destroyed the right to bear arms entirely.

   We recently held hearings for Judge Kavanaugh's nomination to the U.S. Supreme Court. Judge Kavanaugh's interpretation of the Supreme Court's 2008 decision in *Heller* is that public safety is not a factor that a court can consider when evaluating gun safety laws.

   a) Do you agree with this interpretation of *Heller*?

   In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court stated that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626. *Heller* also indicated: "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* It noted that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. And it stated that "another important limitation on the right to keep and carry arms" "is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* at 627 (citation omitted). Apart from generally describing *Heller*, however, I cannot comment further under Canon 3A(6) of the Code of Conduct for United States Judges because the permissible scope of state firearm regulation remains subject to litigation.

   Judge Kavanaugh also interprets *Heller* to say that a weapon cannot be banned if: (a) the weapon has not traditionally been banned; and (b) the weapon is now commonly used by law-abiding citizens. He used this reasoning to argue that the D.C. assault weapons ban should be struck down.

   a) Do you agree with this interpretation of *Heller*?

   Please see my response to Question 2(a). This question also implicates legal issues that could come before me as a judge, so Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from commenting.

b) If not, what do you believe the test should be when deciding whether a gun safety law can be upheld?

Please see my response to Question 2(a). This question also implicates legal issues that could come before me as a judge, so Canon 3A(6) of the Code of Conduct for United States Judges prohibits me from commenting.

3. In 2015, you were counsel of record in *Obergefell v. Hodges* and argued in defense of an Ohio law that defined marriage as between a man and a woman. Your brief argued that the decision to recognize same-sex marriage should be left to the democratic process and that marriage equality would be "disruptive" to our constitutional democracy. Your brief also argued that heightened scrutiny should not apply because "there is no fundamental right to the recognition of out-of-state same-sex marriage" and because gays and lesbians are not a discrete and insular minority.

a) Do you believe that LGBTQ individuals have historically been discriminated against?

Yes.

b) Do you agree that long-standing discrimination against LGBTQ individuals is relevant when determining whether heightened scrutiny applies?

The Supreme Court has indicated that its "traditional indicia of suspectness" (for purposes of triggering heightened scrutiny based on a suspect classification) include whether a class has been "subjected to such a history of purposeful unequal treatment . . . as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Apart from generally describing previous Supreme Court precedent, however, I cannot comment further under Canon 3A(6) of the Code of Conduct for United States Judges because this question implicates a legal issue that could come before me as a judge.

c) Does the right to marry include an implicit guarantee that everyone should be able to exercise that right equally?

In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court held that the state marriage laws there were unconstitutional "to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Id.* at 2605. The Court also noted that "[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." *Id.* at 2602. If confirmed, I would faithfully follow *Obergefell*. Apart from generally describing *Obergefell*, however, I cannot comment further under Canon 3A(6) of the Code of Conduct for United States Judges because this question implicates a legal issue that could come before me as a judge.

a. If a state or county makes it harder for same-sex couples to marry than for straight couples to marry, are those additional hurdles constitutional?

Because this question addresses a legal issue that may arise in court, I cannot opine on it under Canon 3A(6) of the Code of Conduct for United States Judges.

b. If a state or county makes it harder for same-sex couples to adopt children, are those additional hurdles constitutional?

Because this question addresses a legal issue that may arise in court, I cannot opine on it under Canon 3A(6) of the Code of Conduct for United States Judges.