

AFJ NOMINEE REPORT

ERIC MURPHY



U.S. Court of Appeals for the Sixth Circuit

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INTRODUCTION

On June 7, 2018, President Trump [announced](#) his intent to [nominate](#) Eric E. Murphy to the Sixth Circuit Court of Appeals seat previously [held](#) by Judge Alice Batchelder.

Currently, Murphy is the [State Solicitor](#) of Ohio in the Office of the Attorney General. In the course of his career, Murphy has fought to make it easier for Ohio to disenfranchise voters, has argued against marriage equality in the landmark [Obergefell v. Hodges](#), 135 S. Ct. 2584 (2015) case, has attacked reproductive rights, and has repeatedly sided with special interests over all Americans. Murphy's record demonstrates a narrow-minded elitism that raises serious concerns that he will undermine critical rights and legal protections.

As the Senate Judiciary Committee reviews the troubling positions Murphy took as an appointee in the attorney general's office, it's important to note that Senate Republicans have previously articulated their belief that legal work done in an official government capacity is entirely subject to scrutiny as part of the judicial nomination process. As now-Judiciary Committee Chairman Chuck Grassley said in [opposing](#) Caitlin Halligan, then Solicitor General of New York, to be a judge on the D.C. Circuit, "Some of my

colleagues have argued that we should not consider this aspect of [Caitlin] Halligan's record, because at the time she was working as the Solicitor General of New York. But, no one forced Ms. Halligan to approve and sign this brief."

Likewise, as Senator Ted Cruz [stated](#) in May 2018, opposing Mark Bennett's nomination to the Ninth Circuit based on Bennett's work as Hawaii Attorney General, "[Bennett's] record as Attorney General of Hawaii, I believe, represents an advocacy position that is extreme and inconsistent with fidelity to law, in particular, he was an aggressive advocate as attorney general for gay marriage, he was an aggressive advocate demonstrating hostility to the First Amendment and political speech, and most significantly, he was, he has been, an aggressive advocate for undermining the Second Amendment."¹

Similarly, the record Murphy established in the attorney general's office, in our view, "represents an advocacy position that is extreme," in that he has sought to weaken the rights of women, persons of color, and LGBTQ Americans, as well as environmental protections.

Senator Sherrod Brown [opposes](#) Murphy's confirmation, explaining, "I cannot support nominees who have actively worked to strip Ohioans of

their rights. Special interests already have armies of lobbyists and lawyers on their side, they don't need judges in their pockets."

Alliance for Justice also opposes Eric Murphy's confirmation.

BIOGRAPHY

Murphy, who is 39 years old, has [served](#) as the State Solicitor of Ohio in the Office of the Attorney General since 2013.² Prior to that position, Murphy was an associate at Jones Day. He previously clerked for Judge J. Harvie Wilkinson, III, of the U.S. Court of Appeals for the Fourth Circuit and for Justice Anthony Kennedy of the U.S. Supreme Court. Murphy received his B.A. from Miami University of Ohio and his J.D. from the University of Chicago.³

Like the majority of Trump's judicial nominees, Murphy is a member of the Federalist Society.⁴

VOTING RIGHTS

Murphy repeatedly led efforts to make it harder to vote in Ohio. He defended Ohio's voter purge in the Supreme Court case [Husted v. A. Philip Randolph Institute](#), 138 S. Ct. 1833 (2018). In that case, Murphy fought to allow the state to target infrequent voters for removal from the voter rolls and to deprive

them of the fundamental right to vote. The Supreme Court upheld Ohio's actions in a 5-4 decision.

As Justice Sonia Sotomayor's dissent noted, the law Murphy defended will disproportionately disenfranchise people of color, veterans, and low-income and disabled people who face barriers that may prevent them from voting. For example, it was used to remove 10% of voters in African-American areas of Cincinnati. In dissent, Justice Sotomayor [lamented](#) that the decision "entirely ignores the history of voter suppression against which the NVRA [National Voter Registration Act] was enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate."⁵ In the same case, Murphy was also [instrumental](#) in pressing the U.S. Department of Justice, which had [previously](#) made clear that Ohio's practice violated federal law, to take the "[really rare](#)" step of switching positions.

Murphy [helped](#) to end early voting in the state during "[Golden Week](#)." After the 2004 elections in Ohio forced voters to wait in lines that lasted into the early morning of the following day, the Sixth Circuit found many Ohio voters to be "[effectively disenfranchised](#)."⁶

Accordingly, Ohio adopted a policy to allow a five-day “Golden Week” for voters to register and vote at the same time before registration closed. After Ohio attempted to eliminate Golden Week in 2014, a district court issued an [injunction](#) reinstating it, finding that removing it would disproportionately impact minority voters. The Sixth Circuit, in a divided opinion, [reversed](#).

Murphy also [argued](#) in favor of upholding the so-called perfection requirement, allowing Ohio to discard ballots because of minor clerical errors.⁷ Judge Damon Keith of the Sixth Circuit [wrote](#), concurring in part and dissenting in part, “The birth of this Nation was founded upon the radical principle that we, as a people, would govern ourselves. And voting is the ultimate expression of self-government. Instead of making it easier for all persons, unrestrained and unfettered, to exercise this fundamental right to vote, legislators are making it harder. States are audaciously nullifying a right for which our ancestors relentlessly fought and — in some instances — even tragically died.”⁸

LGBTQ RIGHTS

I. MARRIAGE EQUALITY

In [DeBoer v. Snyder](#), 772 F.3d 388 (6th Cir. 2014) Murphy defended Ohio’s discriminatory constitutional

prohibition on same-sex marriage in the Sixth Circuit. The Sixth Circuit held that a ban on same-sex marriage did not violate the Equal Protection Clause of the Fourteenth Amendment.

When this decision was appealed, Murphy also argued to uphold Ohio’s same-sex marriage ban in [Obergefell v. Hodges](#), 135 S. Ct. 2584 (2015). In his [brief](#) to the Supreme Court, Murphy called a ruling for marriage equality “disruptive” to our constitutional democracy.⁹ The Supreme Court ultimately disagreed with Murphy. As Justice Kennedy [wrote](#) in his majority opinion, “the right to marry is a fundamental right inherent in the liberty of the person, and . . . couples of the same-sex may not be deprived of that right and that liberty.”¹⁰

Murphy has since mischaracterized the ruling. In his notes for a speech in 2015, Murphy [wrote that](#) “the Court held that traditional marriage violated the fundamental right to marry under substantive due process.”¹¹ In reality, the Court actually held that same-sex couples could not be deprived of the right to marry, which has long been considered a fundamental right under the due process and equal protection clauses of the Fourteenth Amendment.

II. TRANSGENDER EQUALITY

During Murphy's tenure as state solicitor, the state of Ohio joined an amicus [brief](#) in [Gloucester County School Board v. G.G.](#), 822 F.3d 709 (4th Cir. 2016), defending a school board's refusal to allow a transgender student to use the bathroom that matched his gender identity.¹² The school board had prohibited the student from using the men's restroom, forcing him to use the bathroom of his "biological gender." In the most recent [opinion](#) in this case, the district court held that the school board's policy was discriminatory: "The Board's argument that the policy did not discriminate against any one class of students is resoundingly unpersuasive."¹³

REPRODUCTIVE RIGHTS

In [Isacson v. Horne](#), 716 F. 3d 1213 (9th Cir. 2013), Murphy submitted a brief to the Supreme Court, [arguing](#) in support of an Arizona law that prohibited certain abortions pre-viability, contrary to the Supreme Court's decision in [Planned Parenthood v. Casey](#) (which noted that a "woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*"¹⁴). According to Murphy's brief, the Arizona law "seeks to channel elective abortions

to before twenty weeks' gestation—just weeks before an unborn child can survive outside the womb—to prohibit the severe fetal pain that could arise from later-term abortions."¹⁵

The law in question had an extremely narrow medical emergency exception which the Ninth Circuit [determined](#) "does not transform the law from a prohibition on abortion into a regulation of abortion procedure."¹⁶ Rather, "[a]llowing a *physician* to decide if abortion is medically necessary is not the same as allowing a *woman* to decide whether to carry her own pregnancy to term."¹⁷ The Supreme Court [denied](#) the petition for certiorari review.

Murphy also [defended](#) a law targeting Planned Parenthood that would have cut off critical health funds, including funding for breast and cervical cancer prevention and sexual violence prevention, to any entity that provides abortion services. Murphy argued that "the record contains no evidence that the Funding Law would reduce abortion access in Ohio, or pressure women to sacrifice any abortion right or obtain other services."¹⁸ The law was [struck down](#) by a three-judge panel of the Sixth Circuit. In June 2018, the Sixth Circuit [granted](#) a petition to rehear the case.

In addition, Murphy filed a [brief](#) supporting Texas restrictions on abortion care that the Supreme Court found were an undue burden on the rights of women in the case [Whole Woman's Health v. Hellerstedt](#), 136 S. Ct. 2292 (2016). Murphy also defended Targeted Regulation of Abortion Providers (TRAP) laws in Ohio, in the case [Preterm-Cleveland, Inc. v. Kasich](#), 2018 Ohio 441 (Ohio 2018).

Murphy fought to make it harder for women to obtain contraceptives, filing an [amicus brief](#) in [Burwell v. Hobby Lobby, Inc.](#), 134 S. Ct. 2751 (2014), arguing that certain corporations may deny contraceptive coverage as part of employer-sponsored health insurance plans.

While at Jones Day, Murphy defended employers who refused to provide their employees with insurance coverage for contraception, thereby violating the Affordable Care Act's contraceptive coverage requirement. Murphy [represented](#) Catholic Charities of Tennessee in [Catholic Diocese of Nashville v. Sebelius](#), No. 3-12-0934 (M.D. Tenn. Nov. 21, 2012). The case was dismissed for lack of standing and failure to state a claim that was ripe for judicial review. Murphy also [represented](#) Notre Dame University in a similar challenge, which was also dismissed. [Univ. of Notre](#)

[Dame v. Sebelius](#), 2012 U.S. Dist. LEXIS 183267 (N.D. Ind. Dec. 31, 2012).

During Murphy's tenure as state solicitor, the state of Ohio joined amicus briefs in the cases [NIFLA v. Becerra](#), 138 S. Ct. 2361 (2018), [Azar v. Garza](#), No. 17-654 (2018), [Zubik v. Burwell](#), 136 S. Ct. 1557 (2016), [Planned Parenthood of Kan. and Mid-Mo. v. Andersen](#), 882 F. 3d 1205 (10th Cir. 2018), and [Gee v. Planned Parenthood of Gulf Coast, Inc.](#), 862 F. 3d 445 (5th Cir. 2017).¹⁹

CRIMINAL JUSTICE

I. DEATH PENALTY

In [In Re: Ohio Execution Protocol](#), 860 F.3d 881 (6th Cir. 2017) (en banc), three Ohio death-row inmates challenged Ohio's execution protocol (a sequence of three drugs) as cruel and unusual punishment under the Eighth Amendment, and the district court held in their favor. The Sixth Circuit initially [affirmed](#), but this judgment was vacated for a rehearing en banc.

During reargument, [Murphy defended](#) Ohio's controversial drug protocol, arguing that having inmates who "coughed, heaved, flailed their arms, and/or clinched their fists at

some point during the execution . . . does not prove a *sure-or-very-likely* risk of severe pain.”²⁰ A sharply divided en banc Sixth Circuit [reversed](#). In dissent, Judge Karen Nelson Moore argued that as the district court had only granted a preliminary injunction, the plaintiffs should at least be permitted to have a trial on their claims as to whether the execution method was constitutional.²¹

Murphy also [advocated](#) for the imposition of the death penalty on a criminal defendant despite the man’s claims that he had an intellectual disability.²² Murphy argued that the defendant’s death sentence should be carried out, [despite](#) several sub-70 IQ test scores and evidence of significant academic and social limitations.²³ The Sixth Circuit sided with the state.

II. FOURTH AMENDMENT

Murphy has ridiculed Justice Sotomayor’s dissent in [Utah v. Strieff](#), 136 S. Ct. 2056 (2016), a Fourth Amendment Supreme Court case that allows evidence gleaned from unlawful searches to be introduced in court if the officer finds an outstanding arrest warrant. Justice Sotomayor’s dissent [discussed](#) the decision’s likely effect on racial profiling and cited studies on racial equality.²⁴ Murphy [criticized](#) the dissent’s focus on racial justice, pointing out the defendant

was white.²⁵ He also compared it to Justice Elena Kagan’s dissent, which he called “more legalistic.”²⁶

During Murphy’s tenure as state solicitor, the state of Ohio also joined an amicus [brief](#) in the case.²⁷

CONSUMER RIGHTS

While he was working at Jones Day, Murphy fought to allow pharmaceutical companies to sell drugs for uses that are not Food and Drug Administration (FDA) approved in the case [United States v. Caronia](#), 703 F.3d 149 (2d Cir. 2012). Murphy [filed](#) an amicus brief on behalf of the Washington Legal Foundation. Murphy argued that the First Amendment protects the rights of individuals to speak truthfully about off-label uses of FDA-approved products, even in a commercial context.

As a [former attorney](#) for the tobacco industry, Murphy [fought](#) victims seeking compensation from cigarette companies. In [R.J. Reynolds Tobacco Company v. Campbell](#), 60 S. 3d 1078 (Fla. Dist. Ct. App. 2011) (cert denied), Murphy [challenged](#) a jury verdict that awarded a victim’s family \$7.8 million after finding that smoking cigarettes had caused the victim’s death.

ENVIRONMENTAL PROTECTIONS

In [*National Association of Manufacturers v. Dept. of Defense*](#), 138 S. Ct. 617 (2018), the Supreme Court held that district courts have jurisdiction over challenges to the Clean Water Rule. Murphy argued on behalf of states challenging the rule.

Murphy also joined the [*Petition for Stay of Final Agency Action*](#) over the implementation of the Environmental Protection Agency's Clean Power Plan. Ohio signed on to this petition to challenge the rule's validity on several different grounds, including the argument that it infringes on states' rights. The Clean Power Plan is an Obama-era regulation aimed at combating climate change by reducing carbon dioxide emissions, which the Trump administration has attempted to [repeal](#). It appears that Murphy did not include his involvement in this case when he submitted a long list of cases he had worked on in response to the Senate Questionnaire for Judicial Nominees.

During Murphy's tenure as state solicitor, Ohio joined a multi-state [brief](#) that sought to weaken the Endangered Species Act in the case [*Bldg. Indus. Ass'n. of the Bay Area v. U.S. Dept. of Commerce*](#), 792 F.3d 1027

(9th Cir. 2015). The state also joined a [brief](#) in [*People for the Ethical Treatment of Prop. Owners v. U.S. Fish and Wildlife Serv.*](#), 852 F.3d 990 (10th Cir. 2017), challenging the constitutionality of a regulation issued under the Endangered Species Act.

IMMIGRATION

Murphy signed an [amicus brief](#) in the case [*County of Santa Clara v. Trump*](#), 250 F. Supp. 3d 497 (N.D. Cal. 2017).

Additionally, Murphy was co-counsel on a [brief](#) for the state respondents in [*United States v. Texas*](#), 136 S. Ct. 2271 (2016), opposing the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program.

During Murphy's tenure as state solicitor, Ohio joined multi-state briefs in [*Trump v. Hawaii*](#), 138 S. Ct. 2392 (2018), and [*Trump v. Int'l. Refugee Assistance Project*](#), 138 S. Ct. 353 (2017). In both of these cases, Ohio defended the legality of two versions of Trump's Muslim ban. In *Trump v. Hawaii*, the Supreme Court upheld the most recent version of the travel ban.

EDUCATION

During Murphy's tenure as state solicitor, Ohio joined a multi-state [brief](#) supporting voucher laws in [Colo. State Bd. Of Educ. v. Taxpayers for Pub. Educ.](#), 137 S. Ct. 2325 (2017).

AFFORDABLE CARE ACT

Murphy defended the state of Ohio's challenges to one of the Affordable Care Act's tax provisions. In [Ohio v. United States](#), 849 F.3d 313 (6th Cir. 2017), Ohio argued that the ACA's Transitional Reinsurance Program should only apply to private employers, and that it violated the Tenth Amendment. The Sixth Circuit rejected Murphy's "novel" challenge to the ACA.²⁸

CONCLUSION

Eric Murphy's record illuminates the troubling stances he has maintained throughout his career. He has defended Ohio's numerous attempts to restrict access to the ballot, disproportionately disenfranchising people of color and low-income

Ohioans. He has advocated for bans on same-sex marriage. He has also attempted to dismantle women's access to reproductive health care, defended the death penalty by means of controversial execution procedures, and condoned attempts to whittle away environmental protections and immigrants' rights. For these reasons, Alliance for Justice opposes his confirmation to the Sixth Circuit Court of Appeals.

ENDNOTES

- 1 Senate Judiciary Committee Executive Meeting, Recording at 49:40, available at: <https://www.judiciary.senate.gov/meetings/05/10/2018/executive-business-meeting%20> (May 10, 2018).
- 2 Sen. Comm. On the Judiciary, 115th Cong., Eric Earl Murphy Questionnaire for Judicial Nominees, 1, available at <https://afj.org/wp-content/uploads/2018/09/Eric-Murphy-Senate-Questionnaire-PUBLIC-OCR.pdf>.
- 3 *Id.* at 1.
- 4 *Id.* at 4.
- 5 *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1865 (2018) (Sotomayor, J., dissenting).
- 6 *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 531 (6th Cir. 2014).
- 7 Brief of Respondent, *N.E. Ohio Coalition for the Homeless v. Husted*, 137 S. Ct. 2265 (2017) (No. 16A405).
- 8 *N.E. Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 667 (6th Cir. 2016).
- 9 Brief for Respondent at 10, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).
- 10 *Obergefell*, 135 S. Ct., at 2604.
- 11 Sen. Comm. On the Judiciary, 115th Cong., Eric Earl Murphy Questionnaire for Judicial Nominees, 9-10, available at <https://afj.org/wp-content/uploads/2018/09/Eric-Murphy-Senate-Questionnaire-PUBLIC-OCR.pdf>.
- 12 Amicus Brief of the States of West Virginia, 18 Other States, and the Governors of Kentucky and North Carolina Supporting Petitioner, *Gloucester Cty. School Board v. G.G.*, 137 S. Ct. 1239 (2017) (No. 16-273).
- 13 *Grimm v. Gloucester County School Bd.*, 302 F. Supp. 3d 730, 752 (E.D.Va. 2018).
- 14 505 U.S. 833, 871 (1992).
- 15 Amicus Brief of the States of Ohio, Montana, and 14 Other States Supporting Petitioners at 1, *Horne v. Isaacson*, 134 S. Ct. 905 (2014).
- 16 *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013).
- 17 *Id.*
- 18 Brief of Appellant Richard Hodges at 4, *Planned Parenthood of Greater Ohio v. Hodges*, 888 F.3d 224 (6th Cir. 2018).
- 19 Sen. Comm. On the Judiciary, 115th Cong., Eric Earl Murphy Questionnaire for Judicial Nominees, 24-30, available at <https://afj.org/wp-content/uploads/2018/09/Eric-Murphy-Senate-Questionnaire-PUBLIC-OCR.pdf>.
- 20 Supplemental Brief for Defendants-Appellants at 11, *In re Ohio Execution Protocol*, 860 F. 3d 881 (6th Cir. 2017)
- 21 *In re Ohio Execution Protocol*, 860 F. 3d 881, 892-93 (6th Cir. 2017) (J. Nelson Moore, dissenting).
- 22 Brief in Opposition to the Petition for Writ of Certiorari, *O'Neal v. Bagley*, 135 S. Ct. 69 (2014) (No. 13-10044).
- 23 *O'Neal v. Bagley*, 728 F.3d 552, 562-64 (2013).
- 24 *Utah v. Strieff*, 136 S. Ct. 2056, 2064-71 (2016) (J. Sotomayor dissenting).
- 25 Sen. Comm. On the Judiciary, 115th Cong., Eric Earl Murphy Questionnaire for Judicial Nominees, 8, available at <https://afj.org/wp-content/uploads/2018/09/Eric-Murphy-Senate-Questionnaire-PUBLIC-OCR.pdf>.
- 26 *Id.*
- 27 Sen. Comm. On the Judiciary, 115th Cong., Eric Earl Murphy Questionnaire for Judicial Nominees, 28, available at <https://afj.org/wp-content/uploads/2018/09/Eric-Murphy-Senate-Questionnaire-PUBLIC-OCR.pdf>.
- 28 *Ohio v. United States*, 849 F.3d 313, 315 (6th Cir. 2017).