



November 14, 2018

**OPPOSE THE CONFIRMATION OF ERIC MURPHY TO THE
U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT**

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I write in strong opposition to the confirmation of Eric Murphy to the U.S. Court of Appeals for the Sixth Circuit.

Mr. Murphy, age 39, is another extreme nominee advanced by President Trump in his attempt to pack the federal courts with biased judges who lack the neutrality and fair-mindedness to serve in lifetime judicial appointments. Throughout his legal career, Mr. Murphy has attempted to weaken and restrict a broad array of civil and human rights in America. He is strongly opposed by Senator Sherrod Brown, one of his home-state senators, which would have historically stopped his nomination from moving forward. The Senate must reject this nomination.

Worked to Undermine Voting Rights: Mr. Murphy, the state solicitor of Ohio, conducted the oral argument before the Supreme Court in *Husted v. A. Philip Randolph Institute*, where he defended Ohio's notorious voter purge law. Under this law, which was upheld in a controversial 5-4 decision earlier this year, Ohio may purge people from their voter rolls if they do not vote for six years and do not respond to a postcard asking them to confirm their address. Justice Sotomayor noted in her dissent that "low voter turnout rates, language-access problems, mail delivery issues, inflexible work schedules, and transportation issues, among other obstacles, make it more difficult for many minority, low-income, disabled, homeless, and veteran voters to cast a ballot or return a notice, rendering them particularly vulnerable to unwarranted removal."¹ She also stated that the position advocated by Mr. Murphy and the Court majority "entirely ignores the history of voter suppression against which the NVRA 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."² Mr. Murphy's defense of this discriminatory law to disenfranchise voters should not be the basis for a promotion.

Mr. Murphy also worked to restrict early voting in Ohio. Following the 2004 election in which many Ohio voters were forced to wait in line for up to 12 hours in order to vote, the

¹ 138 S. Ct. 1833, 1864 (2018) (Sotomayor, J., dissenting).

² *Id.* at 1865.

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state created a five-day “Golden Week” period in which voters could register and vote at the same time. In 2014, the state eliminated Golden Week voting, and a district judge concluded that the law’s elimination had a disproportionate impact on voters of color in violation of the Constitution and Voting Rights Act. But Mr. Murphy defended the elimination of Golden Week in court.³ Although the Sixth Circuit overturned the district court decision, Judge Stranch wrote a dissent and concluded that Ohio’s elimination of Golden Week “imposed a disproportionate burden on African Americans” and “was linked to social and historical conditions of discrimination that diminish the ability of African Americans to participate in the political process.”⁴

In *Northeast Ohio Coalition for the Homeless v. Husted*, Mr. Murphy defended another Ohio law that restricted the right to vote.⁵ The law (1) required county officials to reject the ballots of absentee and provisional voters whose identification did not perfectly match voting records, (2) reduced the number of post-election days for absentee and provisional voters to cure errors, and (3) limited the ways in which poll workers could assist voters.⁶ The district court struck down these discriminatory provisions and the Sixth Circuit partially affirmed that ruling.⁷

Defended Anti-LGBTQ Policies: Mr. Murphy filed a brief in the landmark case *Obergefell v. Hodges* in which he argued against the recognition of marriage equality and in defense of Ohio’s discriminatory law that only permitted marriage between a man and a woman. He also advanced this argument when the case was in the Sixth Circuit, and he personally conducted the oral argument there.⁸ In his *Obergefell* brief, Mr. Murphy argued that permitting marriage equality would be “disruptive...to our constitutional democracy.”⁹ Ultimately, the Supreme Court rejected his argument and recognized marriage equality.

Mr. Murphy sought to restrict the rights of transgender people in a Fourth Circuit amicus brief Ohio filed in *Gloucester County School Board v. G.G.*¹⁰ In the brief, Ohio argued against permitting transgender high school students to use the restroom that corresponded with their gender identity, and maintained on federalism grounds that states should control who uses which bathrooms. In essence, Mr. Murphy argued for a license to discriminate against transgender students.

Defended Anti-Immigration Actions of Trump Administration: Mr. Murphy filed an amicus brief in *United States v. Texas* in which he argued that the Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) program was unlawful and unconstitutional. He argued: “The preliminary injunction of DAPA is necessary to uphold the separation of powers and ensure the proper

³ <https://www.afj.org/wp-content/uploads/2018/06/Ohio-Democratic-Party-v.-Husted-brief.pdf>.

⁴ <https://www.judicialwatch.org/wp-content/uploads/2016/08/Ohio-Democratic-Party-v.-Husted-opinion-3561.pdf>.

⁵ <https://afj.org/wp-content/uploads/2018/09/Northeast-Ohio-Coalition-v.-Husted-opposition-to-emergency-application-for-a-stay.pdf>.

⁶ <https://www.afj.org/wp-content/uploads/2018/06/Northeast-Ohio-Coalition-for-the-Homeless-v.-Husted-837-F.3d-612.pdf>.

⁷ *Id.*

⁸ <https://www.c-span.org/video/?320907-2/ohio-marriage-oral-argument-audio>.

⁹ https://www.supremecourt.gov/ObergefellHodges/PartyBriefs/14-556_Brief_of_Hodges.pdf.

¹⁰ <http://www.scotusblog.com/wp-content/uploads/2016/10/16-273-cert-amicus-west-virginia-et-al.pdf>.



functioning of the administrative state.”¹¹ Mr. Murphy also filed amicus briefs in support of President Trump’s discriminatory travel bans against Muslims, in *Trump v. Hawaii* and *Trump v. International Refugee Assistance Project*.¹²

And Mr. Murphy filed an amicus brief in a district court case, *San Francisco v. Trump*, in which Ohio and other conservative states defended President Trump’s executive order that threatened to strip funding for so-called “sanctuary cities.” Mr. Murphy’s brief argued: “Sanctuary jurisdictions—cities and localities that prohibit or otherwise obstruct cooperation between federal and local officials on immigration enforcement—undermine the rule of law and deprive law enforcement of the tools necessary for effective civil and criminal enforcement.”¹³

Hostile to Reproductive Freedom: Mr. Murphy has argued against women’s access to basic contraception in a wide array of cases. In *Sebelius v. Hobby Lobby Stores*, he argued that corporations are “persons” and should be able to use their religious beliefs to circumvent the Affordable Care Act’s requirement that employers provide contraceptive access to their employees.¹⁴ Mr. Murphy made similar arguments in his representation of the plaintiffs in *Catholic Diocese of Nashville v. Sebelius*¹⁵ and *University of Notre Dame v. Sebelius*.¹⁶ And in *Zubik v. Burwell*, Mr. Murphy filed a brief arguing that filling out a short form was too burdensome for religious employers that did not want to fulfill the federal requirement of providing contraceptive access to their employees.¹⁷

Mr. Murphy has also sought to restrict access to abortions by defending Targeted Regulation of Abortion Providers (“TRAP”) laws. He defended a draconian Texas law that would have required any physician performing an abortion to have admitting privileges at a hospital within 30 miles of where the abortion was performed, and also would have required that all abortion clinics comply with standards for ambulatory surgical centers.¹⁸ This TRAP law was struck down by the Supreme Court in 2016 in *Whole Woman’s Health v. Hellerstedt* because it imposed an undue burden on women seeking access to health care. Mr. Murphy also defended an Ohio law that sought to defund Planned Parenthood, and he defended an Ohio TRAP law that would have closed down the only abortion clinic in Toledo.¹⁹

Defended Inhumane Death Penalty Practices: Mr. Murphy defended Ohio’s controversial lethal injection three-drug protocol in *In Re: Ohio Execution Protocol Litigation*. He argued that “the evidence on which Plaintiffs rely—e.g., that inmates coughed, heaved, flailed their arms, and/or clinched their fists

¹¹ http://www.scotusblog.com/wp-content/uploads/2016/03/15-674_ts_Texas.pdf.

¹² <https://www.judiciary.senate.gov/imo/media/doc/Murphy%20SJO2.pdf>.

¹³ https://www.ag.state.la.us/Files/AmicusBriefs/CountyOfSantaClara_Vs_Tump_17-cv-485.pdf.

¹⁴ https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_som.authcheckdam.pdf.

¹⁵ https://afj.org/wp-content/uploads/2018/09/CATHOLIC-DIOCESE-OF-NASHVILLE-v.-SEBELIUS_-2012-U.S.-Di.pdf.

¹⁶ https://afj.org/wp-content/uploads/2018/09/UNIVERSITY-OF-NOTRE-DAME-v.-SEBELIUS_-2012-U.S.-Dist.-C.pdf.

¹⁷ https://scholar.google.com/scholar_case?case=10733179381121386717&q=zubik+v.+burwell&hl=en&as_sdt=2003.

¹⁸ <http://www.scotusblog.com/wp-content/uploads/2016/02/15-274-bsac-IndOh21otherStates.pdf>.

¹⁹ https://www.prochoiceamerica.org/wp-content/uploads/2018/10/Eric-Murphy_NARAL-2.pdf.



at some point during the execution []—does not prove *a sure-or-very likely* risk of severe pain.”²⁰ The district court rejected that argument and said the plaintiffs deserved to have a trial on the issue, and a Sixth Circuit panel affirmed, but the conservative Sixth Circuit, sitting en banc, overturned that decision and let the execution go forward. In another case, Mr. Murphy defended Ohio’s decision to execute an intellectually disabled man with a sub-70 IQ.²¹

Ideological Affiliations: Mr. Murphy has been a stalwart member of the Federalist Society since 2008. On his Senate questionnaire, he listed four different positions of leadership in the Federalist Society over the past decade, including service as the president of the Columbus, Ohio Lawyers Chapter in 2013 and 2014.²² He has given 17 speeches to the Federalist Society. This out-of-the-mainstream legal organization represents a sliver of America’s legal profession – just four percent – yet more than 80 percent of President Trump’s circuit court nominees, and a significant number of his district court nominees, have been Federalist Society members. In addition, Mr. Murphy has written letters of support for six very controversial judicial nominees from President Trump: Neil Gorsuch, Stuart Duncan, J. Campbell Barker, Patrick Wyrick, Britt Grant, and Andrew Brasher. This is a strong indication that he shares their ideologically right-wing judicial philosophy.

Lack of Home-State Senator Support: Due to his extreme record, Mr. Murphy is strongly opposed by a home-state senator, Sherrod Brown.²³ In light of this opposition, he should not be granted a committee hearing or vote. During the Obama presidency, Chairman Grassley did not grant a hearing or vote to a single nominee unless they had support from both home-state senators. In 2015, Chairman Grassley said:

For nearly a century, the chairman of the Senate Judiciary Committee has brought nominees up for committee consideration only after both home-state senators have signed and returned what’s known as a “blue slip.” This tradition is designed to encourage outstanding nominees and consensus between the White House and home-state senators. Over the years, Judiciary Committee chairs of both parties have upheld a blue-slip process, including Sen. Patrick Leahy of Vermont, my immediate predecessor in chairing the committee, who steadfastly honored the tradition even as some in his own party called for its demise. I appreciate the value of the blue-slip process and also intend to honor it.²⁴

During the Trump presidency, Chairman Grassley has made the hypocritical decision to give a hearing to eight circuit court nominees who lacked the support of a home-state senator: David Stras, Michael Brennan, Ryan Bounds, David Porter, Eric Murphy, Chad Readler, Eric Miller, and Paul Matey. The Congressional Research Service has identified only three known instances during the 101-year history of

²⁰ <https://afj.org/wp-content/uploads/2018/09/Ohio-Execution-Protocol2c-Supplemental-Brief.pdf>.

²¹ <https://afj.org/wp-content/uploads/2018/09/O27Neill-v.-Bagley.pdf>.

²² <https://www.judiciary.senate.gov/imo/media/doc/Murphy%20SJQ2.pdf>.

²³ <https://www.brown.senate.gov/newsroom/press/release/brown-will-not-support-judge-nominees-who-worked-to-strip-ohioans-of-their-rights>.

²⁴ <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2015/04/15/working-secure-iowas-judicial-legacy/25801515/>.



the blue slip – prior to the Trump presidency – in which a judicial nominee was confirmed over the objections of a home-state senator.²⁵

Over the years, when the Senate majority placed partisan loyalty to the president over the Senate’s institutional interest in independently carrying out its constitutional responsibilities, the blue slip served as a vital corrective. This institutional check has arguably never been more important than today, with a president who undermines the legitimacy of judges and their rulings, and who prioritizes loyalty to him over fealty to the law. As Senator Hatch astutely observed in 2014: “Weakening or eliminating the blue slip process would sweep aside the last remaining check on the president’s judicial appointment power. Anyone serious about the Senate’s ‘advice and consent’ role knows how disastrous such a move would be.”²⁶

Stunning Lack of Diversity: Mr. Murphy and the other nominees listed above who have been opposed by home-state senators are all conservative white men. More generally, President Trump’s lack of commitment to diversity on the federal judiciary is deeply disturbing. He has appointed the least diverse group of nominees in decades.²⁷ Of his 43 appellate nominations, none are African-American. None are Latino. Only eight are women. Our nation’s great diversity should be reflected in its government institutions, especially the federal judiciary, which serves as the guardian of our rights and liberties. At a time when the legal profession has more women and attorneys of color than ever before, President Trump’s record on judicial diversity is truly appalling.

For the foregoing reasons, The Leadership Conference urges you to oppose the confirmation of Eric Murphy to the U.S. Court of Appeals for the Sixth Circuit. Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel, at (202) 466-3311.

Sincerely,

Vanita Gupta
President & CEO

²⁵ <https://fas.org/sgp/crs/misc/R44975.pdf>.

²⁶ <https://thehill.com/opinion/op-ed/203226-protect-the-senates-important-advice-and-consent-role>.

²⁷ <https://www.usatoday.com/story/news/politics/2018/02/13/trumps-87-picks-federal-judges-92-white-just-one-black-and-one-hispanic-nominee/333088002/>.