

**Nomination of Philip Calabrese to the United States District Court for the Northern
District of Ohio
Questions for the Record
Submitted August 5, 2020**

QUESTIONS FROM SENATOR FEINSTEIN

1. While you were still in private legal practice, you represented Robert Murray—CEO of a coal company, Murray Energy—in a lawsuit against a local newspaper.

The newspaper had criticized Murray for firing 156 of his employees, and Murray in turn sued the newspaper for defamation. A trial court dismissed Murray’s lawsuit, and a state appellate court found the lawsuit so frivolous and “aimed at chilling protected speech” that it recommended Ohio pass a statute cracking down on lawsuits that are designed to harass and deter critics, which are known as SLAPP suits. (*Murray v. Chagrin Valley Publishing Co. (2014)*)

a. How did you come to represent Robert Murray in this lawsuit?

One of my law partners at Porter Wright handled this particular case in the trial court. My partner asked me to argue the appeal.

b. As a sitting state court judge, have you presided over any SLAPP lawsuits? If so, please describe the case or cases and how you ruled. If not, please explain how you might approach a SLAPP lawsuit if you heard one on the Northern District of Ohio.

I have not. In my experience as a judge, I quickly rule on dispositive motions and address the need for and propriety of discovery during the pendency of such motions to conserve the resources of the parties. Under this approach, any lawsuit that is without merit or brought for improper purposes is quickly disposed of without unnecessary burden on the parties.

2. Robert Murray has a long history of filing lawsuits against media outlets that criticize him. (*See Robert Gehrke, Mine Owner Murray Threatens to Sue over Statements, SALT LAKE TRIBUNE (Sept. 22, 2007)*)

Were you aware of Murray’s history of suing his critics in the press when you agreed to represent him?

Before representing him, I was unaware of Robert Murray.

3. In 2011, you moderated a “Debate on Second Amendment,” at the City Club of Cleveland. On your Questionnaire, you noted, “I moderated a debate on the Second Amendment. I have no notes, transcript, or recording.”

a. How did you come to moderate this debate?

The organizers of the debate asked me to serve as the moderator.

b. Who were the individuals who participated in the debate?

I do not recall the names of the participants in the debate, but there was one representative from an organization advocating for gun control and one from a pro-Second Amendment organization.

c. What aspects of the Second Amendment were debated?

To the best of my recollection, the two debaters discussed various policy proposals that were being debated in the Ohio General Assembly at the time, though I do not recall particulars.

d. Please detail the comments that you made about the Second Amendment.

As the moderator, I did not make comments on the merits of any issue. My role was to keep time, facilitate questions from the audience, and ask reasonable follow up questions to each debater.

4. In 2006, you moderated a “Debate on Abortion,” at the City Club of Cleveland. On your Questionnaire, you stated that this event was “a debate between two other individuals,” adding that you have “no notes, transcript, or recording.”

a. How did you come to moderate this debate?

The organizers of the debate asked me to serve as the moderator.

b. Who were the two individuals who debated?

Professor David Forte, Cleveland-Marshall College of Law at Cleveland State University and Professor Jesse Hill, Case Western Reserve University School of Law.

c. What specific aspects of reproductive rights were debated?

I do not recall.

d. Please detail the comments that you made about reproductive rights.

As the moderator, I did not make comments on the merits of any issue. My role was to keep time, facilitate questions from the audience, and ask reasonable follow up questions to each debater.

5. While in private practice, you represented the Cleveland Browns football team in multiple lawsuits filed by injured players. In at least one of the cases, you argued that the players should be forced to resolve their claims through arbitration, rather than through the courts. The court rejected this argument. (*Cleveland Browns Football Co. LLC v. Bentley (2012)*).

a. Why did you argue that injured professional football players should have been required to resolve their claims through arbitration?

The position of the Cleveland Browns was that the collective bargaining agreement that bound them and their players provided the exclusive means for resolving disputes relating to injuries that allegedly occurred in connection with their employment. I made this argument on behalf of my client to the best of my legal ability consistent with the ethical rules governing the practice of law.

b. As an attorney in private practice, did you ever argue against the use of compelled arbitration? If so, what were the circumstances in which you made that argument?

No. My practice did not generally include labor and employment matters. To the best of my recollection, my representation of the Cleveland Browns was the only circumstance in which I encountered this issue while in practice.

6. 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 not appropriate for lower courts to depart from Supreme Court precedent.

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

No.

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

A district court decision is not binding. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011). Therefore, a district court is not bound by another district court's ruling. In addition, Rules 59(e) and 60 of the Federal Rules of Civil Procedure provide standards for a district court to set aside its prior rulings in a specific case. A district court should revisit or set aside its own decisions when they conflict with the precedent of the Supreme Court or the court of appeals where the district court is located.

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

Only the Supreme Court may overturn one of its prior decisions. *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989). The Supreme Court has articulated factors it may consider in determining whether to overturn its own precedent. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003); *Alleyne v. United States*, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring). It has also made clear that it is the Supreme Court's "prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3 (1997). It would be inappropriate for me as a lower court nominee to opine on when the Supreme Court should or should not overturn its own precedent. If confirmed, I will fully and faithfully apply all Supreme Court precedent.

7. 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"?

All Supreme Court decisions are binding on all district courts. If confirmed, I will fully and faithfully apply *Roe v. Wade* and its successor cases.

b. Is it settled law?

Yes. All Supreme Court decisions are binding on all district courts, and for a district court judge constitute settled law.

8. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

Yes. All Supreme Court decisions are binding on all district courts, and for a district court judge constitute settled law.

9. 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 judicial nominee, I do not believe it appropriate to comment on the merits of or otherwise "grade" a dissenting opinion of the Supreme Court. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *District of Columbia v. Heller*.

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

In *District of Columbia v. Heller*, the Supreme Court 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." 554 U.S. 570, 626–27 (2008). If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *Heller*.

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

As a judicial nominee, I do not believe it appropriate to comment further on or otherwise "grade" the merits of an opinion of the Supreme Court. If confirmed, I will fully and faithfully apply all Supreme Court precedent, including *District of Columbia v. Heller*.

10. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

The First Amendment provides fundamental guarantees to the people of the United States. First Amendment rights should always be of concern to judges considering cases and controversies before them. If confirmed, I will fully and faithfully apply all Supreme Court and Sixth Circuit precedent concerning First Amendment rights and campaign finance law, including *Citizens United v. FEC*. As a judicial nominee, I do not believe it appropriate to comment further on or otherwise "grade" the merits of an opinion of the Supreme Court.

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

Please see my response to Question 10(a).

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court provided guidance regarding the rights of closely held corporations under the Religious Freedom Restoration Act of 1993. If confirmed, I will fully and faithfully follow all Supreme Court and Sixth Circuit precedent, including *Hobby Lobby*. As a judicial nominee, I do not believe it appropriate to comment further on or otherwise “grade” the merits of an opinion of the Supreme Court.

11. Does the Equal Protection Clause of the Fourteenth Amendment place any limits on the free exercise of religion?

The Constitution guarantees both the equal protection of the laws and the right to the free exercise of religion. The relevant provision of the Fourteen Amendment provides “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The Constitution requires both that the government not deny a person the equal protection of the laws and that the government not prohibit a person’s free exercise of religion. Both of these constitutional amendments enshrine important constitutional values and reflect longstanding liberties that we enjoy in this country. If confirmed, I will fully and faithfully follow all Supreme Court and Sixth Circuit precedent.

12. Would it violate the Equal Protection Clause of the Fourteenth Amendment if a county clerk refused to provide a marriage license for an interracial couple if interracial marriage violated the clerk’s sincerely held religious beliefs?

The Supreme Court ruled that state laws prohibiting interracial marriage violate the Equal Protection Clause in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Also, please see my response to Question 11.

13. Could a florist refuse to provide services for an interracial wedding if interracial marriage violated the florist’s sincerely held religious beliefs?

The Supreme Court ruled that state laws prohibiting interracial marriage violate the Equal Protection Clause in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Also, please see my response to Question 11.

14. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2005. The Federalist Society’s “About Us” webpage explains the purpose of the organization as follows: “Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law.” It says that the Federalist Society seeks to “reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.”

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

I was not aware of the cited webpage, and I cannot speak to its meaning as I was not the author and have never heard it discussed.

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

Please see my response to Question 14(a).

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

Please see my response to Question 14(a).

d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court? If so, please identify when, who was involved, and what was discussed.

During the course of this nomination process, I did not have any contact with anyone in the national office of the Federalist Society about my possible nomination.

e. Was it at any time communicated to you that membership in the Federalist Society would make your judicial nomination more likely? If so, who communicated it to you and in what context?

No.

f. When you joined the Federalist Society in 2005—5 years after you began practicing law—did you believe it would help your chances of being

nominated to a position within the federal judiciary? Please answer either “yes” or “no.”

No.

i If your answer is “no,” then why did you decide to join the Federalist Society in 2005, 5 years after you began practicing law?

I joined to be exposed to ideas and arguments that I might not otherwise encounter in my practice.

In January 2020, the Committee on Codes of Conduct of the U.S. Judicial Conference circulated a draft ethics opinion which stated that “membership in the ACS or the Federalist Society is inconsistent with obligations imposed by the Code [of Judicial Conduct].” (*Draft Ethics Opinion No. 117: Judges’ Involvement With the American Constitution Society, the Federalist Society, and the American Bar Association* (Jan. 2020))

g. Were you aware of this ethics opinion? If so, did you consider relinquishing your membership when you were nominated for this position? If not, why not?

I was aware of the debate over this ethics opinion. During the pendency of that debate, I allowed my membership to lapse.

h. If confirmed to the District Court, will you relinquish your membership in the Federalist Society? If not, how do you reconcile membership in the Federalist Society with Canon 4 of the Code of Judicial Conduct?

If confirmed, I will comply with Canon 4 of the Code of Judicial Conduct.

15. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former 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?

At my interview, I discussed my knowledge of various Supreme Court precedents, and that discussion may have included precedents related to

administrative law. I do not remember anyone asking about my thoughts on administrative law.

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

I may have been asked about issues relating to administrative law by the Ohio Senators’ bipartisan judicial advisory commission, which screens potential judicial nominees. If so, such questions related to my experience with matters of administrative law in practice, and I committed to fully and faithfully apply controlling Supreme Court and Sixth Circuit precedents.

- c. What are your “views on administrative law”?**

I am aware of a number of relevant Supreme Court decisions that relate to administrative law. As in all other areas of law, I would fully and faithfully apply all binding precedents

16. Do you believe that human activity is contributing to or causing climate change?

Yes.

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

The Supreme Court has given lower courts guidance on this question. The Court has said that, as a general matter, legislative history is not necessary when a statute is unambiguous, while it can be considered when a statute is ambiguous. Lower court judges should apply all Supreme Court precedents with regard to legislative history and should consider all arguments raised by litigants, including arguments related to legislative history.

18. 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.

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

I received these questions on Wednesday, August 5, 2020. I read them and prepared draft responses. I received comments on my draft responses, including from attorneys at the Department of Justice, Office of Legal Policy. I considered those comments in making

final revisions. Each answer is my own.

**Questions for the Record for J. Philip Calabrese
From Senator Mazie K. Hirono**

1. You wrote an op-ed in January 2017 criticizing the Ohio Supreme Court for being too lenient in punishing an attorney convicted of sexual battery. In the op-ed, you highlighted the case as detrimental to the bar's efforts to make the legal profession "more diverse and inclusive," and called these efforts "badly needed and considerably overdue."

Why do you believe making the legal profession more diverse and inclusive is so important?

In my view, the legal profession should generally reflect the diversity of our society. In this regard, the legal profession lags behind others, even as it is charged with upholding fundamental rights and important constitutional values.

2. President Trump has touted the over 200 judicial appointments he has made during his first term. Approximately 85% of his appointees have been white. Only about 25% are women. And, not a single one of the 53 circuit court judges President Trump appointed is Black.

Do you agree that, like the Ohio bar, making the federal judiciary more diverse and inclusive is badly needed and considerably overdue?

The Constitution sets the qualifications for federal judges, and it is not my place as a judicial nominee to comment on the efforts of the President, Ohio's Senators, or the Senate generally in the discharge of their respective nomination and advice-and-consent functions.

3. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

a. Do you agree that training on implicit bias is important for judges to have?

Judges are required to preside over and decide cases without regard to bias, prejudice, or preference. Training to help judges understand and fulfill this obligation is important.

b. Have you ever taken such training?

Yes.

c. If confirmed, do you commit to taking training on implicit bias?

If confirmed, I look forward to participating in training opportunities that will assist me in performing my job to the best of my ability.

Nomination of J. Philip Calabrese
United States District Court for the Northern District of Ohio
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QUESTIONS FROM SENATOR BOOKER

1. You listed *State v. Thorpe* as one of the top ten most significant cases over which you presided as a judge on the Cuyahoga County Court of Common Pleas.¹ That case involved a 15-year-old criminal defendant accused of committing murder. Before the case was assigned to you it was determined that the defendant would be tried as an adult even though juveniles are 36 times more likely to commit suicide in adult facilities and more than any other group they are the highest risk of sexual abuse and violence in adult prisons.²

a. Did you have any issue with a 15-year-old defendant being tried as an adult in the case?

Under Ohio law, the decision whether a juvenile is tried as an adult is made in juvenile court; therefore, that decision does not fall to me. Consistent with my oath, I must set aside any personal feelings on the issue and follow the law in presiding fairly and impartially, which I endeavored to do in this case as in all others before me.

b. Are there mitigating factors that should be considered when evaluating whether a juvenile should be tried as an adult? Were those factors considered in this case?

Please see my response to Question 1(a).

2. Previously, you represented Robert Murray, CEO of Murray Energy, in a defamation lawsuit against a local newspaper.³ Murray brought the suit against *The Chagrin Valley Times* after it published an article, an editorial, and a cartoon criticizing Murray for firing 156 of his employees after the 2012 presidential election. The trial court granted summary judgement to the defendant holding that the published pieces were protected under the First Amendment. A three-judge panel of Ohio's Court of Appeal affirmed and wrote a scathing opinion criticizing Murray for bringing the suit writing that it was designed to chill criticism and debate.

a. Do you agree with the Ohio Court of Appeals that the lawsuit was designed to chill criticism and debate?

I served as appellate counsel in this case and was not involved in the decision to bring the lawsuit. As appellate counsel, I represented my client with my best efforts consistent with my ethical obligations as a lawyer regardless of any personal views about the issues or arguments in the case I may have.

³ *Murray v. Chagrin Valley Publishing Co.*, 25 N.E.3d 1111 (Ohio Ct. App. 2014).

- b. Even if you disagree with the Court’s findings, do you agree that the lawsuit had that effect given that *The Chagrin Valley Times* removed all mention of Murray and the firings from its website?

Please see my response to Question 2(a).

3. While you were in law school, you published a review of a book on redistricting and the Voting Rights Act. In the book review, you wrote, “While it may seem fair to protect

¹ SJQ at pp. 16-17.

² Jessica Lahey, *The Steep Costs of Keeping Juveniles in Adult Prisons*, THE ATLANTIC (Jan. 8, 2016), <https://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201/>.

³ *Murray v. Chagrin Valley Publishing Co.*, 25 N.E.3d 1111 (Ohio Ct. App. 2014).

minority voting rights, fairness in this context necessarily involves treating minorities differentially from non-minority members of the population.”⁶⁴

- a. What did you mean by this statement?

To the best of my recollection, this statement summarizes one of the arguments of the authors of the book I reviewed. I have not read that book since I reviewed it over 20 years ago and, therefore, am not able to comment on it further.

- b. You also wrote, “One can make a strong argument that the racial appeals underlying welfare and immigration reform in the 1990s could have occurred only after sizable numbers of minority voters were drawn into minority-access districts.”⁶⁵ Were you arguing that minority voters would have greater political influence if they were more dispersed and there were fewer majority-minority districts? If not, what did you mean by this statement?

To the best of my recollection, this part of the review suggested an argument the authors of the book being reviewed could have developed further and considered as part of their overall thesis. I was not advancing an independent argument.

4. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

I prefer not to label myself as an originalist or a textualist because these terms mean different things to different people. Most commonly, I think originalism refers to interpreting a text according to its original public meaning. I believe that the original public meaning of constitutional and statutory texts must be considered when interpreting and applying any text. The Supreme Court has recognized the importance of the Constitution’s text, structure, and original understanding in interpreting a constitutional provision. The Supreme Court has also repeatedly stated that statutory interpretation begins with the text, and where the text is clear, that is the end of the inquiry. If confirmed, I will fully and faithfully apply all Supreme Court and Sixth Circuit precedent, including precedent concerning constitutional and statutory interpretation.

5. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

Please see my response to Question 4.

6. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress’s intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

⁶⁴ 554 U.S. 570 (2008).

- a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

In interpreting a statute, the Supreme Court has held that if the text of a statute is unambiguous, that ends the inquiry. When the text of a statute is ambiguous, however, the Supreme Court has stated that consideration of legislative history may be appropriate. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). When the text of a statute is ambiguous, parties often cite legislative history in their briefs in aid of their textual analysis. If confirmed, I will fully and faithfully apply all Supreme Court and Sixth Circuit precedent, including precedent concerning statutory interpretation and the use of legislative history.

- b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

Please see my response to Question 6(a).

7. Do you believe that judicial restraint is an important value for an appellate judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

Yes. I believe that judicial restraint is an important value for all judges. I understand judicial restraint to mean that the role of the judge is limited to applying the law to the facts of the specific case before the court and to do so in a fair and impartial manner without regard to the judge's personal views or preferred outcome. Further, the court should not go beyond the issues the parties present or not squarely before the court.

- a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.⁶ Was that decision guided by the principle of judicial restraint?

Heller is binding Supreme Court precedent, and, if confirmed as a district court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Sixth Circuit precedent. As a district court nominee, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions.

⁴ Calabrese Book Review, HARVARD JOURNAL ON LEGISLATION (1998) (SJQ Attachment 12(a) at p. 82, 83) (internal citations omitted).

⁵ Calabrese Book Review, HARVARD JOURNAL ON LEGISLATION (1998) (SJQ Attachment 12(a) at p. 82, 86-87).

⁶ 554 U.S. 570 (2008).

- b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.⁷ Was that decision guided by the principle of judicial restraint?

Citizens United is binding Supreme Court precedent, and, if confirmed as a district court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Sixth Circuit precedent. As a district court nominee, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions.

- c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.⁸ Was that decision guided by the principle of judicial restraint?

Shelby County is binding Supreme Court precedent, and, if confirmed as a district court judge, I will fulfill my duty to observe and apply all binding Supreme Court and Sixth Circuit precedent. As a district court nominee, it is, as a general rule, inappropriate for me to opine on the correctness of Supreme Court decisions.

8. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated, however, that widespread voter fraud is a myth.⁹ In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.¹⁰

- a. Do you believe that in-person voter fraud is a widespread problem in American elections?

No. If confirmed, I would faithfully apply any applicable Sixth Circuit or Supreme Court precedent on this issue.

- b. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

Voting is a fundamental constitutional right that must be protected. I have not studied this particular issue, about which I am aware there is general political controversy. As a judicial nominee, it would be inappropriate to comment on matters that may come before the courts.

- c. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

Please see my response to Question 8(b).

9. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.¹¹ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.¹²

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.¹³ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.¹⁴

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

I am not familiar with this Brookings Institution study, however, based on the statistics it reports and similar news reports of which I am aware, I believe that racial bias continues to affect our country in many ways, including implicit racial bias in our criminal justice system. Any bias, implicit or explicit, has no place in the criminal justice system.

⁷ 558 U.S. 310 (2010).

⁸ 570 U.S. 529 (2013).

⁹ *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth>.

¹⁰ *Id.*

¹¹ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

¹² *Id.*

¹³ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

¹⁴ *Id.*

- 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 have not specifically studied the issue beyond reading articles and commentary in the media and in connection with performing my duties as a state court judge.

- d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.¹⁵ Why do you think that is the case?

I have not studied this issue closely enough to form an opinion on this question. Equal justice under the law means that racial bias should play no role in our criminal justice system. If confirmed, I will make every effort to ensure that all parties in my courtroom are treated fairly, equally, and impartially without regard to race, including when it comes to sentencing.

- e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.¹⁶ Why do you think that is the case?

Please see my response to Question 9(d).

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

Judges have the responsibility of ensuring that bias will not be found in their courtrooms and that every defendant is treated fairly, respectfully, and with dignity. I will honor the judicial oath of office: I will "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to decide cases "faithfully and impartially" under the laws of our nation.

10. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.¹⁷ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁸

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

I have not studied this issue sufficiently to have an opinion on it.

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

I have not studied this issue sufficiently to have an opinion on it.

11. 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.

12. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

Yes, and I have done so as a state court judge.

¹⁵ U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

¹⁶ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014)

¹⁷ Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

¹⁸ *Id.*

13. Do you believe that *Brown v. Board of Education*¹⁹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes.

14. Do you believe that *Plessy v. Ferguson*²⁰ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No.

15. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

No.

16. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had “an absolute conflict” in presiding over civil fraud lawsuits against Trump University because he was “of Mexican heritage.”²¹ Do you agree with President Trump’s view that a judge’s race or ethnicity can be a basis for recusal or disqualification?

The decision to recuse or disqualify is primarily one for the presiding judge to make himself or herself. *See* 28 U.S.C. § 455. I am not aware of an instance in which a judge was recused or disqualified based on his or her race or ethnicity.

17. President Trump has stated on Twitter: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”²² Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has held that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). If confirmed, I will fully and faithfully apply all Supreme Court and Sixth Circuit precedent, including *Zadvydas*.

¹⁹ 347 U.S. 483 (1954).

²⁰ 163 U.S. 537 (1896).

²¹ Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (June 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

²² Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

Questions for the Record from Senator Kamala D. Harris
Submitted August 5, 2020
For the Nomination of:

J. Philip Calabrese, to be United States District Judge for the Northern District of Ohio

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

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

As a state court judge, I fully appreciate the magnitude and seriousness of the sentencing process, along with the care and attention it requires. I would fully and faithfully follow the law and my judicial oath in carrying out this responsibility.

A district court judge should follow relevant legal authorities when sentencing a defendant. This includes calculating the Guidelines range, considering policy statements in the Guidelines regarding departures, and considering the seven § 3553(a) sentencing factors. The process includes review and consideration of rules of procedure, relevant precedent, the indictment, the presentence report, any victim impact statements, any statements on the defendant's behalf, the arguments of the prosecution and defense, and any statements by the defendant. Binding precedents, the Guidelines, policy statements, and the § 3553(a) factors inform a judge's consideration of a fair and proportional sentence. A fair sentence is "sufficient, but not greater than necessary."

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

Please see my response to Question 1(a).

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

The *Guidelines Manual* addresses circumstances that counsel in favor of a departure. For example, a defendant's substantial assistance is often a ground for a downward departure. USSG § 5K1.1. Another example is that, in appropriate circumstances, a district judge should depart when aggravating or mitigating circumstances are not "of a kind, or to a degree, not adequately taken into consideration" by the Sentencing Commission. USSG § 5K2.0(a)(1). In addition, a judge must exercise the discretion required by *Booker* and guided by 18 U.S.C. § 3553(a).

- d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum

sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.¹

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

I am not familiar with Judge Reeves' statements. I believe that the inclusion of mandatory minimum sentences in criminal statutes is reserved to Congress's judgment. As a judicial nominee, I do not believe it appropriate to comment further on policy matters that are the subject of legislative consideration and debate by Congress. If confirmed, I would fully and faithfully apply federal sentencing laws as determined by Congress and as required by Supreme Court and Sixth Circuit precedent.

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

Please see my response to Question 1(d)(i).

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

Please see my response to Question 1(d)(i).

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

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

I am not familiar with Judge Gleeson's opinions on this subject. I am aware that mandatory minimum sentences have generated significant controversy and debate. If I am confirmed, I would evaluate each case individually and would carefully consider the law and my ethical obligations if confronted with the circumstances in this question, consistent with my duty to apply federal sentencing laws as determined by Congress and as required by Supreme Court and Sixth Circuit precedent.

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

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

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

The separation of powers among the branches of the federal government places charging policies and decisions exclusively with the Executive Branch. If confirmed, I would be bound to respect the separation of powers built into the constitutional framework. However, if I am aware of ethical violations by prosecutors, I would not hesitate to consider and take appropriate action consistent with my oath of office.

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

Please see my response to Question 1(d)(iv)(2).

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

Yes.

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

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

Yes.

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

Yes. *See Demographic Differences in Sentencing: An Update to the 2012 Booker Report* (United States Sentencing Commission 2017). If confirmed, I will make every effort to ensure that all parties in my courtroom are treated fairly, equally, and impartially without regard to race.

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

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

Yes.

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

Yes. If confirmed, I plan to take steps to ensure that qualified minorities and women are given serious consideration with regard to positions for which I exercise hiring authority and input.

Senator Josh Hawley
Questions for the Record

J. Philip Calabrese
Nominee, U.S. District Court for the Northern District of Ohio

- 1. Under Supreme Court and U.S. Court of Appeals for the Sixth Circuit precedent, what is the legal standard that applies to a claim that an execution protocol violates the Eighth Amendment's prohibition on cruel and unusual punishment?**

Under the law of the Sixth Circuit, “to challenge successfully a State’s chosen method of execution, the plaintiffs must ‘establish that the method presents a risk that is *sure or very likely* to cause’ serious pain and ‘needless suffering.’” *Fears v. Morgan (In re Ohio Execution Protocol)*, 860 F.3d 881, 886 (6th Cir. 2017) (en banc) (quoting *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015)). This standard requires a rigorous showing; it is not enough that there is a substantial risk of serious harm. Instead, the method of execution must be sure or very likely to cause serious pain. *Id.* If confirmed, I will faithfully apply the precedents of the Supreme Court and Sixth Circuit.

- 2. Under the Supreme Court’s holding in *Glossip v. Gross*, is a petitioner required to establish the availability of a “known and available alternative method” that has a lower risk of pain in order to succeed on a claim against an execution protocol under the Eighth Amendment?**

Yes. *See Glossip v. Gross*, 576 U.S. 863, 135 S.Ct. 2726, 2738 (2015). In this regard, *Glossip* follows the plurality opinion in *Baze v. Rees*, 553 U.S. 35, 61 (2008). If confirmed, I will faithfully apply the precedents of the Supreme Court and Sixth Circuit.

- 3. Have the Supreme Court or the U.S. Court of Appeals for the Sixth Circuit ever recognized a constitutional right to DNA analysis for habeas corpus petitioners in order to prove their innocence of their convicted crime?**

The Supreme Court has ruled that there is no due-process right to post-conviction DNA testing for a habeas petitioner to prove actual innocence. *See District Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). To my knowledge, the Sixth Circuit has not held to the contrary. Instead, the availability of DNA testing, particularly following conviction, is left to the legislative branches of the States, not the federal courts. Indeed, Ohio has a specific statutory procedure for DNA testing in such circumstances. If confirmed, I will faithfully apply the precedents of the Supreme Court and the Sixth Circuit and the statutes governing habeas relief under Section 2254.

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

No. If confirmed, I will faithfully apply the law in any case involving the death penalty fairly, objectively, and according to binding Supreme Court and Sixth Circuit precedent.

5.

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

In *Employment Division v. Smith*, 494 U.S. 872, 877-79 (1990), the Supreme Court held that enforcement of facially neutral and generally applicable laws against religious conduct ordinarily does not trigger strict scrutiny under the Free Exercise Clause, even where those laws impose a substantial burden on religious exercise. Under *Smith*, however, strict scrutiny applies to state laws that burden religious exercise if the law at issue “discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993). Further, if the law is not of general application, it is subject to strict scrutiny. *Id.* at 531-34, 546. The Free Exercise Clause forbids subtle departures from neutrality and covert suppression of religious beliefs. *Id.* Under this standard, unequal treatment between religious and comparable secular conduct requires application of strict scrutiny. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020). Additionally, courts must carefully examine the context of the law’s adoption and enforcement to determine whether the government has demonstrated impermissible hostility to religious beliefs. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1731-32 (2018). Under the Religious Land Use and Institutionalized Persons Act, certain state actions, even if facially neutral, must survive strict scrutiny. Nor does *Smith* purport to apply to all Free Exercise Claims. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017). For example, *Smith* does not apply to “an internal church decision that affects the faith and mission of the church itself.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012).

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

Under Sixth Circuit law, “[d]iscriminatory laws come in many forms.” *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020). Beyond outright bans, which obviously fail strict scrutiny, general bans that apply to religious activity where there are exceptions for comparable secular activities constitute discriminatory conduct. *See Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012). As a rule, the more exceptions to a prohibition, the less likely it counts as a general, non-discriminatory law because, at some point, “an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.” *Id.* at 740. Even a law that lacks individualized exceptions will trigger strict scrutiny if the government excludes secular conduct from the law’s coverage in a way that results in substantial underinclusion with respect to the government’s asserted ends. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 543 (1993).

- c. What is the standard in the U.S. Court of Appeals for the Sixth Circuit for evaluating whether a person’s religious belief is held sincerely?**

Under Sixth Circuit law, courts “determine whether the line drawn by the plaintiff between conduct consistent and inconsistent with her or his religious beliefs reflects an honest conviction.” *New Doe Child #1 v. Congress of U.S.*, 891 F.3d 578, 586 (6th Cir. 2018) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014)). “Sincerity is distinct from reasonableness.” *Id.* If certain conduct violates sincerely held religious beliefs, it is not within the court’s purview to question the reasonableness of the plaintiff’s beliefs or to say that those religious beliefs are mistaken or insubstantial. *Fox v. Washington*, 949 F.3d 270, 277 (6th Cir. 2020) (quoting *Hobby Lobby*, 573 U.S. at 725); *see also Haight v. Thompson*, 763 F.3d 554, 566 (6th Cir. 2014) (courts are not “to inquire into the centrality to a faith of certain religious practices—dignifying some, disapproving others”).

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

I have not issued an opinion, order, or other decision adjudicating a claim under the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act, or an analogous state law. One case in which I presided implicated the principles of the First Amendment’s religion clauses. *See Islamic Ctr. of NE Ohio v. Alkhatib*, No. CV-19-918704, 2020 Ohio Misc. LEXIS 45, at *2 (Ct. Com. Pl. Mar. 24, 2020) (copy provided).

6.

a. What is your understanding of the Supreme Court’s holding in *District of Columbia v. Heller*?

In *Heller*, the Supreme Court recognized that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation” and that the core of the Second Amendment’s individual right to keep and bear arms allows “law-abiding, responsible citizens to use arms in defense of hearth and home.” *District of Columbia v. Heller*, 554 U.S. 570, 592, 635 (2008). If confirmed, I will faithfully apply *Heller* and its progeny.

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

No.

7. Please state whether you agree or disagree with the following statement and explain why: “Absent binding precedent, judges should interpret statutes based on the meaning of the statutory text, which is that which an ordinary speaker of English would have understood the words to mean, in their context, at the time they were enacted.”

I agree with this statement. The original public meaning is how the statute in question was reasonably understood by a well-informed reader at the time of the provision’s enactment. It does not rely on the subjective intent of the people who wrote the text. Nor does that meaning evolve over time. If confirmed, I will fully and faithfully apply all Supreme Court and Sixth Circuit precedent, including precedent concerning constitutional and statutory interpretation.



COURT OF COMMON PLEAS
CUYAHOGA COUNTY

ISLAMIC CENTER OF NORTHEAST OHIO,
Plaintiff/Counterclaim Defendant,
v.
MUSTAFA ALKHATIB, *et al.*,
Defendants/Counterclaim Plaintiffs.

) Case No. CV-19-918704
)
) JUDGE J. PHILIP CALABRESE

FILED
MAR 24 2020
Clerk of Courts
Cuyahoga County, Ohio

OPINION AND ORDER

This dispute involves claims and counterclaims over the operation of a mosque and related property and accounts. Two Defendants seek leave to amend their counterclaims, and Plaintiff seeks sanctions based on allegations in third-party claims that have been withdrawn. Following briefing, supplemental briefing regarding jurisdiction under governing First Amendment principles the Court requested, and oral arguments on the record on March 16, 2020, the Court determines that it lacks jurisdiction over this dispute and, therefore, DISMISSES Plaintiff's complaint and Defendants' counterclaims. Lacking jurisdiction, the Court DISMISSES the motion for leave to amend the counterclaims as moot. Further, the Court GRANTS Plaintiff's motion for sanctions under R.C. 2323.51.

STATEMENT OF FACTS

A. The Allegations of the Complaint

Plaintiff Islamic Center of Northeast Ohio filed suit against Defendants Mustafa Alkhatib, Mahmoud Amawi, and Suliman Amawi. Fouad Saeed Abdulkadir, the President of the Islamic Center (Complaint at ¶ 31), verified the allegations of the complaint. According to the complaint,

the Islamic Center welcomed Defendants as active members in 2017, but discharged them for cause in July 2019 due to their alleged disruptive actions. (*Id.* at ¶ 1.) Nonetheless, the complaint claims Defendants continue to enter the Islamic Center’s premises, conduct improper activities, and cause disruption, including removing security cameras and Wi-Fi equipment. (*Id.* at ¶¶ 1 & 24.)

Plaintiff is an Ohio not-for-profit corporation that owns and operates a mosque. (*Id.* at ¶ 2.) It is governed by a constitution and bylaws, and a board of directors (known as the Shoura Council) directs the Islamic Center. (*Id.*) In December 2017, the Islamic Center set up this governance structure. (*Id.* at ¶ 11.) At that time, at least some Defendants became part of the congregation and the Islamic Center’s governing committees. (*Id.*) Under the organization’s constitution, a board member’s failure to attend three consecutive meetings results in the immediate removal of that member without notice. (*Id.* at ¶ 13.)

The complaint contains many allegations regarding the allegedly disruptive behavior of Defendants, which runs counter to the spirit of peace, tolerance, fellowship, and goodwill at the heart of the Islamic Center’s mission as embodied in its constitution. (*See, e.g., id.* at ¶¶ 7, 16, 18, 21, 22, 23 & 26.) In addition, the complaint alleges that Defendants forged documents, moved the Islamic Center’s funds, and closed bank accounts without authority. (*Id.* at ¶ 19.) Effective July 5, 2019, the Islamic Center removed Mr. Alkhatib and put Mr. Suliman Amawi on notice of removal. (*Id.* at ¶ 20.) Despite these efforts, the Islamic Center claims that Defendants “promote further division within the community and * * * criticize the executive leadership.” (*Id.* at ¶ 22.) As an example, the complaint maintains that Defendants “disturbed the peace” at the mosque multiple times in 2019 during the month of Ramadan, “the most holy period in the Islamic year.” (*Id.* at ¶ 28; *id.* at ¶ 29.) Based on these allegations, the complaint alleges that Defendants’ conduct

“is not consistent with the Islamic Center’s Constitution, the Islamic Center’s goals, and with the direction of its leadership.” (*Id.* at ¶ 26.)

Additionally, the complaint alleges that the Islamic Center had bank accounts at Citizens Bank and Chase and that the Islamic Center’s President, Fouad Saeed Abdulkadir, was the only authorized signatory for these accounts. (*Id.* at ¶¶ 30 & 31.) According to the complaint, one or more Defendants withdrew funds from these accounts by providing false documents to the banks on July 1, 2019. (*Id.* at ¶¶ 32 & 33.)

Based on these allegations, which Defendants deny, the complaint asserts claims for trespass (Count I); fraud (Count II); conversion (Count III); theft (Count IV); civil conspiracy (Count V); and breach of fiduciary duty (Count VI).

B. Counterclaims and Proposed Amendment

Collectively, the three defendants asserted counterclaims in two separate pleadings.

1. Counterclaims of Mr. Suliman Amawi and Mr. Alkhatib

According to the counterclaims of Defendants Suliman Amawi and Alkhatib, Mr. Mahmoud Amawi incorporated the Islamic Center in 2016. (Counterclaim at ¶ 6.) In 2017, Mr. Abdulkadir resided in Chicago and was attempting to become the imam of a mosque. (*Id.* at ¶ 7.) By June 2017, Mr. Abdulkadir, Mr. Suliman Amawi, and Mr. Mahmoud Amawi had discussed Mr. Abdulkadir serving as the imam, “provided he adhere to the rules of the Islamic Center.” (*Id.* at ¶ 10.)

Apparently, Mr. Abdulkadir assumed responsibility as imam; the counterclaim alleges that he met with Mr. Amawi, Mr. Alkhatib, and Hamza Harmouche beginning in October 2017 to discuss issues relating to the operation and governance of the Islamic Center. (*Id.* at ¶ 12.) Mr. Abdulkadir allegedly drafted the constitution and bylaws of the Islamic Center dated

November 8, 2017 unilaterally and presented these documents for signature “without opportunity for opposition.” (*Id.* at ¶ 15; *id.* at ¶ 13.) When established, the Shoura Council consisted of Mr. Abdulkadir as President; Mr. Amawi as Vice President; Mr. Alkhatib as Secretary; and Harmouche as Treasurer. (*Id.* at ¶ 14.) The constitution allows the President or four members to call a meeting and provides for the suspension of any member of the Shoura Council by unanimous vote on charges of a direct violation of “the Islamic Laws, Constitution [of the Islamic Center],” or for cause, including misappropriation of funds or “obvious damages to the existence or interest of the Islamic Center.” (*Id.* at ¶¶ 17 & 18.) Among other things, the counterclaim states the purpose of the Islamic Center’s constitution as “best serv[ing] the interests of Muslims per the Qur’an and the Sunnah.” (*Id.* at ¶ 16.)

By early 2018, according to the counterclaim, dissatisfaction with Mr. Abdulkadir emerged over the handling of contributions and donations from members of the Islamic Center. (*Id.* at ¶¶ 21 & 22.) Based on these concerns, Mr. Amawi and Mr. Alkhatib requested an accounting, but none has yet taken place. (*Id.* at ¶ 23.) As a result of the failure to account for funds, Defendants claim that Mr. Abdulkadir “engaged in a scheme to loot the Islamic Center of its assets and harm its business operation,” by, among other things, diverting funds or taking funds without authority, opening new bank accounts without authority, and providing inaccurate information to the Shoura Council to conceal his actions. (*Id.* at ¶ 24.) On June 28, 2019, the Shoura Council voted to remove Mr. Abdulkadir as President. (*Id.* at ¶ 26.) Defendants’ counterclaims allege that this removal had the effect of leaving Mr. Amawi to serve as President of the Shoura Council pending selection of a new President. (*Id.* at ¶ 28.)

Defendants allege that Mr. Abdulkadir defied his removal and “continued to act in the role of Imam.” (*Id.* at ¶ 29.) Since his discharge, the counterclaims alleges that Mr. Abdulkadir has

regularly entered the Islamic Center's premises and "through intimidation, has continued to assume the role of Imam and to sermonize at the Islamic Center." (*Id.* at ¶ 30.) Further, the counterclaim alleges that Mr. Abdulkadir delivers messages to promote division within the Islamic Center's community and to criticize members of the Shoura Council, going so far as to attempt to remove Mr. Amawi and Mr. Alkhatib from the Shoura Council and accusing them of fraudulent and criminal activity. (*Id.* at ¶ 31.)

These Defendants assert counterclaims for dissolution of the Islamic Center; an accounting; and a declaratory judgment that they are the lawful representatives of the Islamic Center, the removal of Mr. Abdulkadir was proper, and the validity of Mr. Abdulkadir's acts following his removal.

2. Counterclaims of Mr. Mahmoud Amawi

In his counterclaims, Defendant Mahmoud Amawi alleges that, following Mr. Abdulkadir's creation and implementation of the Islamic Center's constitution and bylaws, the bylaws were not properly enacted or ratified within 90 days as required under R.C. 1702.10. (Counterclaim at ¶¶ 12-14.) Nor did the Islamic Center's members properly approve them. (*Id.* at ¶ 15.) In fact, the counterclaims allege that the identity and number of members of the Islamic Center cannot be determined from the bylaws. (*Id.* at ¶ 16.)

Defendant's counterclaims allege that a series of improper financial actions resulted in the removal of Mr. Abdulkadir as President of the Islamic Center, each of which occurred without the oversight or consent of the Shoura Council. (*Id.* at ¶ 18.) Defendant alleges that the funds Mr. Abdulkadir misappropriated funded his expenses and travel unrelated to his duties for the Islamic Center. (*Id.* at ¶ 21.) Further, the counterclaim maintains that Mr. Abdulkadir fraudulently obtained property that belongs to Mr. Mahmoud Amawi. (*Id.* at ¶ 23.)

In his first counterclaim, Defendant seeks the appointment of a receiver to operate the Islamic Center. He also requests judicial dissolution of the Islamic Center, asserts a claim for unjust enrichment, and seeks a declaratory judgment that Plaintiff obtained title to the property of Mr. Amawi through Mr. Abdulkadir's alleged fraud and misrepresentations.

3. Proposed Amendment

Defendant Mahmoud Amawi proposes to amend his counterclaims. In his proposed counterclaim, Defendant alleges that Mr. Mahmoud Amawi incorporated the Islamic Center in 2016, served as the Islamic Center's initial statutory agent, and was the Islamic Center's sole incorporator with authority under State law to adopt bylaws and elect directors and members. (Proposed Amended Counterclaim at ¶¶ 1-7.) Further, the proposed amendment avers that Mr. Mahmoud Amawi did not adopt bylaws, create a constitution for the Islamic Center, or elect members, directors, or officers for the Islamic Center. (*Id.* at ¶¶ 9-14.) Because Mr. Mahmoud Amawi did not exercise his power as the Islamic Center's incorporator to take any of these actions, the proposed amendment claims that he retains the sole authority to act on behalf of the Islamic Center. (*Id.* at ¶¶ 15-17.)

Based on these allegations, Defendant seeks a declaratory judgment that Mr. Mahmoud Amawi is the incorporator and sole person with authority over the Islamic Center. Additionally, this proposed amended count seeks dismissal of Plaintiff's complaint and costs and attorneys' fees. This proposed amendment would have the effect of dismissing Defendant's counterclaims for appointment of a receiver, dissolution, and unjust enrichment.

D. The Islamic Center's Constitution

Plaintiff's complaint and Defendants' counterclaims discuss various provisions of the Islamic Center's constitution and bylaws. By doing so, both documents are considered part of the

pleadings, and the Court may consider them at the pleading stage without converting the motion into one for summary judgment. In any event, when examining its jurisdiction, the Court is not confined to the allegations of the complaint, but may consider any material pertinent to the inquiry.

The Islamic Center's constitution includes a dispute resolution procedure. In Paragraph 12 of Article I, the constitution provides what is called an arbitration procedure, under which the parties to a dispute involving the Islamic Center can bring that dispute to the President of the Shoura Council, who will then appoint two members of the Shoura Council to resolve the dispute promptly and definitively. In its entirety, that provision provides:

Arbitration Procedure: In any dispute between persons concerning activities of [the Islamic Center], all parties involved shall cooperate in good faith to resolve the dispute. If the parties cannot resolve the dispute between themselves, [Islamic Center] members can bring the concern or complaint in writing to the Shoura Council Chairman. Shoura Council Chairman shall acknowledge such complaint, in writing, within 15 days and try to resolve the dispute. The Shoura Council Chairman may form a Grievance Committee, formed and headed by the Shoura Council Chairman. The committee will consist of two members of Shoura. This committee will try to conduct a reasonable investigation of the issue in 15 days and then will present their findings to the Shoura Council Chairman in next scheduled meeting. The Shoura will then take a final decision in the matter of concern.

In the Court's view, this provision may bear on determining whether the Court may exercise jurisdiction under First Amendment principles.

JURISDICTION

Before proceeding to consideration of the various pending motions, the Court examines its jurisdiction over the parties' competing claims and counterclaims. This Court has an independent obligation to examine its own jurisdiction, even if the parties do not raise the issue. *See, e.g., Sherman v. Burkholder*, 8th Dist. Cuyahoga No. 66600, 1994 Ohio App. LEXIS 5658, at *4 (Dec. 15, 1994). Based on the pleadings, there are two separate bodies of law that may limit the Court's

jurisdiction. Before applying them to the parties' respective claims and counterclaims, the Court briefly outlines each.

I. First Amendment

Disputes involving governance of religious institutions are cognizable in only limited circumstances. *Shariff v. Rahman*, 152 Ohio App.3d 210, 2003-Ohio-1336, 787 N.E.2d 72, ¶ 11 (8th Dist.). “Generally, civil courts lack jurisdiction to hear ecclesiastical disputes within a church, although courts may hear church disputes that are secular in nature.” *Slavic Full Gospel Church, Inc. v. Vernyuk*, 8th Dist. Cuyahoga No. 97158, 2012-Ohio-3943, ¶ 16, citing *Watson v. Jones*, 80 U.S. 679, 727, 20 L.Ed. 666 (1872), and *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-25, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976). Under First Amendment principles, “the question of who will preach from the pulpit of a church is an ecclesiastical question, review of which by the civil courts is limited by the First and Fourteenth Amendments.” *Tibbs v. Kendrick*, 93 Ohio App.3d 35, 41, 637 N.E.2d 397 (8th Dist.1994).

In a case involving a church dispute or a dispute between members of a church, the Court follows a two-step analysis. First, courts look at whether the church is hierarchical or congregational. *Slavic Full Gospel Church* at ¶ 17. If the church is hierarchical, civil courts generally lack jurisdiction to hear the dispute. *Tibbs* at 42. In a hierarchical system, the congregation is subordinate to a general organization, typically consisting of clerics or tribunals, which controls religious or doctrinal policy and makes decisions for the entire membership. *Shariff* at ¶ 12.

In contrast, in a congregational system, the congregation governs itself; it is subservient to no other body. *Id.*, citing *State ex rel. Morrow v. Hill*, 51 Ohio St.2d 74, 76, 364 N.E.2d 1156 (1977). If the church is congregational, a civil court has jurisdiction only to determine a narrow

issue—whether the proper church authority made the decision regarding an ecclesiastical dispute. *Tibbs* at 42. The ultimate arbiter of the bylaws is the highest authority within the organization, and the Court’s role is limited to identifying that authority, not reviewing its decision. *Shariff* at ¶ 15.

Second, courts determine whether the nature of the dispute is ecclesiastical or secular. *Slavic Full Gospel Church* at ¶ 18. This determination involves review of the complaint and counterclaims to identify whether the controversies in each count involve ecclesiastical or secular issues. *Tibbs* at 43. Ecclesiastical matters include decisions about faith, doctrine, and selection of the clergy as well as matters of church government. *Sacrificial Missionary Baptist Church v. Parks*, 8th Dist. Cuyahoga No. 71608, 1997 Ohio App. LEXIS 5308, *5-6, citations and quotations omitted. Where civil law intrudes on the power of a church for the benefit of one segment of the congregation by displacing one administrator in favor of another, judicial action runs afoul of the First Amendment’s protections for ecclesiastical rights. *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 119, 73 S.Ct. 143, 97 L.Ed. 120 (1952). But civil courts retain jurisdiction over purely secular issues, whether the church is hierarchical or secular. *Id.* at *6-7, citations omitted. In short, the Court’s “jurisdiction is limited to purely secular issues, and the court must not be involved in ecclesiastical issues.” *Tibbs* at 42, citations omitted.

II. Quo Warranto

R.C. Chapter 2733 governs quo warranto actions. Such an action may be brought against “a person who usurps, intrudes into, or unlawfully holds or exercises * * * an office in a corporation created by the authority of this state.” R.C. 2733.01(A). An action in quo warranto may be brought against a corporation that has “offended against a law providing for its creation,” “when it has

forfeited its privileges and franchises by nonuser,” when it “has misused a franchise, privilege, or right.” R.C. 2733.02(A), (B) & (D).

A quo warranto action provides “the proper and exclusive remedy for determining the legal right of an officer of an incorporated nonprofit association to hold office.” *State ex rel. Gmoser v. Village at Beckett Ridge Condominium Owners’ Assn., Inc.*, 2016-Ohio-8451, 82 N.E.3d 464, ¶ 15 (12th Dist.), quoting *Carlson v. Rabkin*, 152 Ohio App.3d 672, 2003-Ohio-2071, 789 N.E.2d 1122, ¶ 35 (1st Dist.); *Greater Temple Christian Church v. Higgins*, 9th Dist. Summit No. 23022, 2006-Ohio-3284, ¶ 17; *see also State ex rel. Salim v. Ayed*, 141 Ohio St.3d 129, 2014-Ohio-4736, 22 N.E.3d 1054, ¶ 16. In such an action, a court will render judgment on the rights of the claimants to hold an office and oust and exclude a usurper. *Masjid Omar Ibn Khattab Mosque v. Salim*, 10th Dist. Franklin No. 12AP-807, 2013-Ohio-2746, ¶ 18, citing R.C. 2733.08 & R.C. 2733.14.

To determine whether an action seeks relief in the nature of quo warranto, courts “identify the core issues raised by the parties for judicial resolution.” *Id.* at ¶ 20. “If the principal or primary issue is the validity of the election of corporate officers, then the action, no matter how pleaded, is actually a quo warranto action.” *Id.*, citing *State ex rel. Babione v. Martin*, 97 Ohio App.3d 539, 544, 647 N.E.2d 168, 647 N.E.2d 169 (6th Dist.1994), and *Goldberg v. Rite Rug Co.*, 10th Dist. Franklin No. 82-AP-135, 1983 Ohio App. LEXIS 15370 (June 23, 1983). Where the core relief sought consists of a declaratory judgment identifying which claimant has a right to office or an injunction ordering the removal of a person, then such relief must be pursued through an action in quo warranto. *Id.*

Under R.C. 2733.03, only the Ohio Supreme Court or the court of appeals may exercise jurisdiction over a quo warranto action. In turn, “the courts of common pleas are without

jurisdiction over actions in quo warranto.” *Kirby v. Oatts*, 2d Dist. Montgomery No. 28455, 2020-Ohio-301, ¶ 19, citations omitted.

III. Application

Under governing First Amendment principles, based on the pleadings and the Islamic Center’s governing documents, the Court finds that the Islamic Center is congregational. The Islamic Center is not subordinate to a broader organization. Indeed, the Islamic Center’s constitution makes clear that the congregation is the ultimate authority within that particular religious community. To the extent this dispute involves ecclesiastical disputes, therefore, the Court’s role is limited to identifying the proper church authority for decision of those matters involving ecclesiastical disputes between the parties. Plaintiff’s complaint asserts a claim for trespass in Count I based on Defendants’ alleged meetings and actions at the Islamic Center that ran counter to the constitution and spirit of the Islamic Center and their continued attendance and alleged disturbances of the peace. These allegations lie at the heart of First Amendment values, implicating fundamental notions of who may enter and worship at the Islamic Center and otherwise participate in the life of that particular religious community. Accordingly, the First Amendment prohibits the exercise of jurisdiction over this claim. To the extent that Count II, a claim for fraud, alleges that Defendants are entering or participating in the communal life of the Islamic Center, this cause of action suffers from the same jurisdictional defect.

But Counts III, IV, and VI, alleging conversion, theft, and breach of fiduciary duty, respectively, assert claims that arguably implicate purely secular matters—who has authority to act for the Islamic Center. To the extent Count II alleges fraud based on the same facts as these counts, it will ultimately turn on the same question. (Because civil conspiracy requires an underlying wrong, it depends on the viability of another claim over which the Court may exercise

jurisdiction.) Additionally, the counterclaims of Defendants Suliman Amawi and Alkhatib for dissolution, and accounting, and a declaratory judgment that they are lawful representatives of the Islamic Center and their acts following Mr. Abdulkadir's removal are valid fall into this category—as do the counterclaims of Defendant Mahmoud Amawi, both those in his original complaint and in his proposed amendment. Arguably, these claims and counterclaims also implicate religious matters such that the First Amendment would preclude the exercise of jurisdiction. This may be so because the Islamic Center's constitution shows, as do the allegations of the complaint, that the religious mission of the organization permeates its fabric, rendering resolution of disputes over who has authority over the organization and its property difficult, if not impossible, without stepping into the religious disputes between the parties. Further, this case may, like *Kedroff*, invite civil authority to intervene in internal governance matters of a congregation to the benefit of one segment at the expense of another within the community in violation of the First Amendment. 344 U.S. at 119, 73 S.Ct. 143, 97 L.Ed. 120.

On whichever side of the First Amendment line these disputes ultimately fall, ecclesiastical or secular, the Court need not determine, because quo warranto provides an additional limitation on the Court's jurisdiction. Even if secular, the disputes between the parties raise issues and seek relief in the nature of quo warranto. Fundamentally, they ask the Court to determine the valid officers of the Islamic Center and, by extension, who may act with authority for the organization. For this reason, no matter how the parties plead their respective claims and counterclaims, to the extent the Court may exercise jurisdiction under the First Amendment, this is actually a quo warranto action. See *Masjid Omar Ibn Khattab Mosque*, 2013-Ohio-2746, ¶ 20, citations omitted. Under R.C. 2733.03, this Court lacks jurisdiction over actions in quo warranto, which may be brought in the Eighth District or the Ohio Supreme Court. To the extent the parties' claims and

counterclaims present justiciable disputes over which a civil court may exercise jurisdiction under First Amendment principles, the Court concludes that any such dispute presents, in actuality, a quo warranto action over which the common pleas court lacks jurisdiction.

SANCTIONS

Plaintiff seeks sanctions under R.C. 2323.51 against Defendant Mahmoud Amawi based on Defendant's previous filing of a verified third-party complaint. In his verified third-party complaint, Defendant brought three claims against Mr. Abdulkadir and Alexander White, who notarized a deed transferring certain land from an organization called The Great Americans of Ohio to the Islamic Center. Defendant asserted claims for fraud, civil conspiracy, and theft. By verifying this third-party complaint, Mr. Mahmoud Amawi swore under oath that his claims were true.

Later, Defendant amended his third-party complaint, without leave, to add The Great Americans of Ohio as a plaintiff and to assert additional claims to quiet title, for constructive trust, and for a declaratory judgment. Mr. Mahmoud Amawi also verified this amended third-party complaint. Plaintiff and Mr. Abdulkadir moved to strike the third-party complaint and the amended third-party complaint. Additionally, the third-party complaint resulted in litigation over whether the Islamic Center and Mr. Abdulkadir were in default, and Mr. Mahmoud Amawi moved to disqualify the counsel representing the Islamic Center and Mr. Abdulkadir.

In January 2020, Mr. Mahmoud Amawi voluntarily dismissed his third-party complaint and amended third-party complaint, resolving the collateral litigation mentioned above. Further, he changed counsel. This specific litigation conduct, against the backdrop of the internecine dispute involving control of the Islamic Center, prompted Plaintiff's motion for sanctions. For the sake of clarity and ease of reference, this section of this opinion refers to the Islamic Center and

Mr. Abdulkadir as “Plaintiff,” although third-party defendants may be more accurate, and the term “Defendant” refers to Mr. Mahmoud Amawi.

I. Jurisdiction

At the outset, the Court notes that, although Defendant voluntarily dismissed his third-party claims and amended third-party claims, the Court retains jurisdiction over collateral matters, such as a request for sanctions. *See, e.g., ABN AMRO Mtge. Group, Inc. v. Evans*, 8th Dist. Cuyahoga No. 96120, 2011-Ohio-5654, ¶ 6 (collecting authorities). This principle holds true where a court lacked jurisdiction over the underlying dispute in the first instance. *See, e.e., Goff v. Ameritrust Co., N.A.*, 8th Dist. Cuyahoga Nos. 65196, 66016, 1994 Ohio App. LEXIS 1916, at *25 (May 5, 1994), citations omitted.

II. Standard for Sanctions

R.C. 2323.51(B)(1) provides, in relevant part, that “any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal.” Under the statute, a court may make an award against a party, counsel, or both. R.C. 2323.51(B)(4). Frivolous conduct under the statute means conduct that “obviously serves merely to harass or maliciously injure another party” or “is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.” R.C. 2323.51(A)(2)(a)(i). It includes, as well, “allegations or other factual contentions that have no evidentiary support” or “factual contentions that are not warranted by the evidence.” R.C. 2323.51(A)(2)(a)(iii) & (iv). Under the statute, the court has discretion whether to award sanctions. R.C. 2323.51(B)(2).

III. Application

Here, Defendant twice falsely swore under oath that Mr. Abdulkadir forged his name on a deed. Specifically, in his third-party claim, Mr. Mahmoud Amawi alleged that “Abdulkadir forged Amawi’s signature on the said deed and White, as an Ohio notary, improperly attested to said signature, all without the knowledge of Amawi.” (Third-Party Claim at ¶ 51.) Further, he alleged that “White’s fraudulent use of his notary seal in conjunction with Abdulkadir’s fraudulent concealment of his actions from Amawi constitutes an unlawful act.” (*Id.* at ¶ 64.) Then, in the amended third-party claim, Mr. Mahmoud Amawi alleged that “Abdulkadir did not disclose to Amawi that Abdulkadir intended to immediately record the deed, and thereupon forged Amawi’s signature on the deed and arranged for White, an Ohio notary, to improperly attest to said signature, all without the knowledge of Amawi.” (Amended Third-Party Claim at ¶ 14.) Each of these allegations was verified; Mr. Mahmoud Amawi attested to their truth under oath.

In his opposition to Plaintiff’s motion for sanctions, however, Mr. Mahmoud Amawi confirms that these allegations are not true. Defendant now argues that “the facts demonstrate that, in an attempt to control the Islamic Center, * * * Abdulkadir tricked Mahmoud Amawi into signing a deed which does not operate to transfer the real estate.” This statement may well be factually accurate (a matter the Court lacks jurisdiction to determine), but it concedes that the allegations in the third-party claims are not truthful. Nor are they an accident, since Mr. Mahmoud Amawi attested to their truthfulness on two separate occasions, months apart, by verifying the third-party claims and amended third-party claims. For these reasons, the Court finds that Mr. Mahmoud Amawi has engaged in frivolous conduct within the meaning of the statute by making allegations or other factual contentions that have no evidentiary support or by making factual contentions not warranted by the evidence. R.C. 2323.51(A)(2)(a)(iii) & (iv).

In resisting this finding, Defendant argues that there is nothing remarkable about imprecision in allegations in a pleading, which may in the normal course of litigation develop in ways unanticipated or unforeseen. This argument accurately captures the reality of litigation in many cases, and the Court agrees that sanctions are warranted in those cases on rare occasion and only in the most extreme circumstances. Had Mr. Mahmoud Amawi not verified his false allegations, twice, this might be such a case. Even then, the facts at issue are ones within the knowledge of Mr. Mahmoud Amawi, not some non-party to be discovered. This is not a case where allegations made in good faith turn out differently than a party anticipates. The conduct at issue falls squarely within the definition of frivolous conduct under the statute.

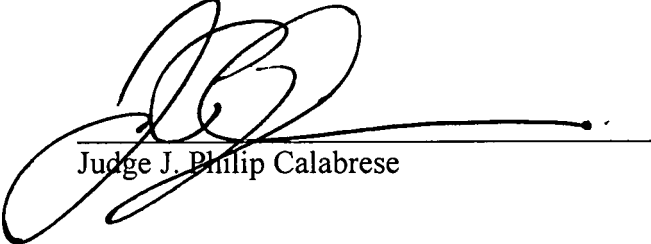
IV. Unclean Hands

The statute contemplates that “any relevant evidence” may inform a court’s decision to impose sanctions, which remains a matter of discretion. R.C. 2323.51(B)(2)(c) & (B)(3). In this case, review of the pleadings, record, and the hearing held on March 16, 2020 confirm for the Court that no party to the underlying dispute has clean hands. Each party has contributed to one degree or another to the events culminating in the litigation. Against this backdrop, the Court has concern that Plaintiff’s motion represents another weapon in the escalating litigation battle between the parties. That does not justify or excuse the frivolous conduct in which Mr. Mahmoud Amawi engaged. But in the Court’s judgment, the overall facts and record do not justify a deviation from the traditional American rule, under which parties bear their own fees and costs in litigation. For these reasons, the Court declines to make an award of fees or costs in this case. *See Scott v. Nameth*, 10th Dist. Franklin No. 16AP-64, 2016-Ohio-5532, ¶ 29.

ORDER:

For the foregoing reasons, the Court concludes that it lacks jurisdiction over the parties' disputes and, therefore, DISMISSES the action in its entirety. The Court GRANTS Plaintiff's motion for sanctions against Mahmoud Amawi, but exercises its discretion to decline to make an award of fees or costs for the frivolous conduct at issue.

Dated: March 24, 2020



Judge J. Philip Calabrese