

June 12, 2017

The Honorable Charles Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

RE: National LGBT Groups Oppose Confirmation of John K. Bush and Damien Schiff

Dear Chairman Grassley and Ranking Member Feinstein:

We, the undersigned 16 national advocacy organizations, representing the interests of lesbian, gay, bisexual and transgender (LGBT) people and everyone living with HIV, write to oppose the nomination of John Kenneth Bush to the U.S. Court of Appeals for the Sixth Circuit and the nomination of Damien Schiff to the U.S. Court of Federal Claims.

After reviewing the records of Mr. Bush and Mr. Schiff, we have concluded that their views on civil rights issues are fundamentally at odds with the notion that LGBT people are entitled to equality, liberty, justice and dignity under the law. Although neither Mr. Bush nor Mr. Schiff has any judicial experience, their public statements and writings have repeatedly demonstrated contempt for LGBT Americans, people living with HIV, women, and other vulnerable populations. We wish to call to your attention aspects of their records that illustrate why these nominees are unfit for the bench, and pose a grave threat to the communities that our organizations serve.

John K. Bush

First and foremost, we are deeply concerned by Mr. Bush's writings regarding fundamental rights. In a 2016 paper, Mr. Bush lamented that the Kentucky Supreme Court departed from precedent and the will of the legislature when it "immunized consensual sodomy from criminal prosecution under the state constitution."¹ In addition, in a 2008 piece, Mr. Bush compared abortion to slavery and *Roe v. Wade* to *Dred Scott*, writing that "[t]he two greatest tragedies in our country—slavery and abortion—

¹ John K. Bush, *Eight Ways To Sunday, Which Direction Kentucky Supreme Court*, THE FEDERALIST SOCIETY FOR LAW & PUBLIC POLICY STUDIES (Sept. 22, 2006), available at <http://www.fed-soc.org/publications/detail/eight-ways-to-sunday-which-direction-kentucky-supreme-court>.

relied on similar reasoning and activist justices at the U.S. Supreme Court....”² Mr. Bush’s disparagement of decisions protecting the right of individuals to make highly personal decisions—including the right to engage in private consensual adult relationships and the right to procreative freedom—reveals a hostility to well-established fundamental rights of liberty, privacy, autonomy and self-determination that have been the lynchpin of legal progress for LGBT people.

Mr. Bush’s writings on these subjects are manifestations of his particular “originalist” approach to constitutional interpretation, which he has described as “the only principled way” to render judicial decisions.³ As we have explained to this Committee previously,⁴ this so-called “originalism” is a judicial philosophy that treats the Constitution as frozen in time, meaning that, unless the Constitution has been amended to explicitly protect individuals against particular violations of their rights, they have no more rights today than they did in 1789.⁵ Furthermore, this approach rejects the notion that laws targeting historically disfavored groups warrant any form of heightened scrutiny, with the exception of laws that discriminate on the basis of race. In fact, under Mr. Bush’s brand of originalism, even the seminal First Amendment case, *New York Times v. Sullivan*, was “wrongly decided.”⁶

Mr. Bush’s public statements enthusiastically endorsing the views of opponents of marriage equality for same-sex couples⁷ also raise serious concerns about Mr. Bush’s willingness to follow established legal precedent in decisions like *United States v. Windsor* and *Obergefell v. Hodges*. Based on these public statements and his self-avowed “originalism,” we do not believe that Mr. Bush will uphold established precedent on these and other important questions affecting the LGBT community. On this basis alone, Mr. Bush’s nomination should be rejected.

Other public statements from Mr. Bush demonstrate a level of contempt for LGBT people and women that should lead any reasonable member of this Committee to question Mr. Bush’s fitness to serve. For example, Mr. Bush apparently feels as though the term “faggot” is acceptable language to use in a public address.⁸ Any attempt to excuse this language by suggesting that Mr. Bush was merely quoting another should be dismissed out of hand. In addition to being offensive, use of this epithet in a

² G. Morris (John K. Bush), *The Legacy From Dr. King’s Dream That Liberals Ignore*, ELEPHANTS IN THE BLUEGRASS (Jan. 23, 2008, 1:13 PM), available at <https://elephantsinthebluegrass.blogspot.com/2008/01/legacy-from-dr-kings-dream-that.html>.

³ John K. Bush, *The Constitution and the Importance of Interpretation: Original Meaning*, THE FEDERALIST SOCIETY FOR LAW & PUBLIC POLICY STUDIES (Mar. 7, 2009), <http://www.fed-soc.org/multimedia/detail/the-constitution-and-the-importance-of-interpretation-original-meaning-event-audiovideo> (00:48:08).

⁴ See Lambda Legal, *Lambda Legal & 21 other LGBT groups: Judge Gorsuch poses a significant threat to the LGBT community* (March 16, 2017), available at https://www.lambdalegal.org/blog/2017316_lgbt-groups-say-gorsuch-significant-threat-lgbt-rights.

⁵ See Erwin Chemerinsky, *The Misguided Debate Over Constitutional Interpretation*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY (Sept. 16, 2013), available at <https://www.acslaw.org/acsblog/the-misguided-debate-over-constitutional-interpretation>.

⁶ See *supra* note 3.

⁷ G. Morris (John K. Bush), *Are Giuliani’s Friends Attacking The Wrong Man?*, ELEPHANTS IN THE BLUEGRASS (Nov. 30, 2007, 9:46 AM), available at <https://elephantsinthebluegrass.blogspot.com/2007/11/are-giulianis-friends-attacking-wrong.html>.

⁸ John K. Bush, *A Certain Starting Place, Address at The Forum Club of Louisville* (Sept. 8, 2005), notes available at Sen. Comm. on the Judiciary, 115th Cong., John Kenneth Bush: Questionnaire for Judicial Nominees—Public Appendix 12(d).

public speech illustrates a stunning lack of judgment, not to mention a gross insensitivity to the experiences of vulnerable communities. These traits are incompatible with the role of a federal judge.

Mr. Bush's record is also riddled with sexist remarks that are equally inflammatory. In a piece from 2008, Mr. Bush referred to House Speaker Nancy Pelosi as "Mama Pelosi" and called for her to be gagged.⁹ In the same year, Mr. Bush criticized a U.S. State Department decision to create gender-neutral parental indicators on passport applications, writing that the policy was an example of excessive government interference with the family, and called Secretary Hillary Clinton a "nanny Secretary of State."¹⁰ Even his court filings, while more tempered in tone, reveal a view of women steeped in anachronistic and harmful stereotypes. Specifically, in a 1993 amicus brief, Mr. Bush opposed the right of women to be admitted to the state-supported Virginia Military Institute, writing that VMI's educational style "does not appear to be compatible with the somewhat different developmental needs of most young women."¹¹

Damien Schiff

Mr. Schiff's nomination is equally frightening to the LGBT community. Mr. Schiff's writings reveal a documented antipathy toward legal equality for LGBT people and other populations that depend on the federal judiciary. For example, in a 2007 piece, Mr. Schiff wrote that he "strongly disagrees" with *Lawrence v. Texas*, the Supreme Court's 2003 landmark decision striking down Texas's sodomy law as an unconstitutional deprivation of liberty.¹² Mr. Schiff grounded his objection to *Lawrence* in "originalist" judicial philosophy, writing that "I can find no historical or precedential basis, pre-1868, for its limitation on the legislative proscription of sodomy."¹³ As noted previously, this judicial philosophy essentially writes LGBT people out of the Constitution in a way that denies the full personhood of this group of Americans and is out of touch with where we are as a nation. In other writings, Mr. Schiff criticized the California Supreme Court's application of heightened judicial scrutiny to laws targeting gay people, lamenting that doing so would have far-ranging and, in his view, negative effects in the years to come.¹⁴ Mr. Schiff has also aligned himself with the concept of "natural law" or "divine law," the theory that particular, ostensibly universal moral truths trump constitutional rights.

⁹ G. Morris (John K. Bush), *Thanks, Mama Pelosi, For That 700 Point Stock Market Plunge!*, ELEPHANTS IN THE BLUEGRASS (Sept. 29, 2008, 3:51 PM), available at <https://elephantsinthebluegrass.blogspot.com/2008/09/thanks-mama-pelosi-for-that-700-point.html>.

¹⁰ G. Morris (John K. Bush), *A Parent 2's Outrage*, ELEPHANTS IN THE BLUEGRASS (Jan. 9, 2011, 8:01 PM), available at <https://elephantsinthebluegrass.blogspot.com/2011/01/parent-2s-outrage.html>.

¹¹ Brief Amici Curiae on Behalf of Women's Washington Issues Network, Women for VMI, Frank F. Hayden and Oscar W. King, III in Support of Petition for Writ of Certiorari at 7, *Virginia Military Institute v. United States*, No. 92-1213

¹² Damien Schiff, *Federalism and Separation of Powers Part I, OMNIA OMNIBUS* (May 15, 2008, 9:03 PM), available at https://web.archive.org/web/20080610122430/http://omniaomnibus.typepad.com:80/omnia_omnibus/2008/05/index.html

¹³ *Id.*

¹⁴ Timothy Sandefur and Damien Schiff, *The Modern California Supreme Court: Progressivism and Practical Constraints*, THE FEDERALIST SOCIETY FOR LAW & PUBLIC POLICY STUDIES (Oct. 6, 2008), available at <http://www.fed-soc.org/publications/detail/the-modern-california-supreme-court-progressivism-and-practical-constraints>.

This vague notion incorporates the radical views that LGBT identities and intimate relationships are “unnatural.”¹⁵

Mr. Schiff has also taken aim at key civil rights protections upon which the LGBT community relies by challenging the application of Title IX of the Education Amendments of 1972 to high school students. In a 2011 lawsuit, Mr. Schiff claimed that “Congress had absolutely no evidence before it enacted Title IX that there was sexual discrimination going on in high schools. Therefore, they [have] no constitutional basis to impose those requirements on high schools.”¹⁶ Title IX is critical to ensuring that LGBT and gender non-conforming students are able to have equal educational opportunity. Someone who displays such contempt for key federal civil rights protections should not be rewarded with a judicial appointment.

Mr. Schiff has gone beyond merely disagreeing with the judicial precedents that serve as the foundation of the LGBT community’s legal security and progress, and has denigrated LGBT people in ways that suggest that he is simply incapable of administering the law with respect to LGBT people without bias or prejudice. In a 2009 piece entitled “*Teaching ‘Gayness’ in Public Schools*,” Mr. Schiff criticized California public schools for teaching “not only that bullying of homosexuals qua homosexuals is wrong, *but also* that the homosexual lifestyle is a good, and that homosexual families are the moral equivalent of traditional heterosexual families.”¹⁷ Mr. Schiff went on to write that “[u]ntil consensus is reached on the moral implications of homosexuality, any attempt on the part of the public schools to take sides on those implications is wrongheaded.”¹⁸ Mr. Schiff’s piece reduces gay people’s rights and dignity to a “lifestyle” and demonstrates his complete and categorical disregard for any families other than those formed by heterosexual, gender conforming individuals.

The recklessness of Mr. Schiff’s other inflammatory writings should also trouble this Committee. In a 2007 piece entitled *Kennedy as the Most Powerful Justice?*, Mr. Schiff referred to Supreme Court Justice Anthony Kennedy as “a judicial prostitute” for “selling his vote as it were to four other Justices in exchange for the high that comes from aggrandizement of power and influence, and the blandishments of the fawning media and legal academy.”¹⁹ As offensive as this statement is in its own right, it is not lost on our community that the target of such calumny is the author of the four pillars of jurisprudence from the last two decades recognizing the full humanity and citizenship of LGBT Americans.²⁰

¹⁵ Damien M. Schiff & Luke A. Wake, *Leveling The Playing Field In David V. Goliath: Remedies To Agency Overreach*, 17 TEX. REV. L. & POL. 97, 122-23 (2013), available at <https://www.troip.org/blog/2016/9/13/leveling-the-playing-field-in-david-v-goliath-reme-dies-to-agency-overreach>.

¹⁶ See D.A. Tuma, *Libertarian Counterpoint #1044, 8/4/11*, YOUTUBE (Aug. 13, 2011), <https://www.youtube.com/watch?v=cQbBuAYIov4> (00:17:20).

¹⁷ Damien Schiff, *Teaching “Gayness” in Public Schools*, OMNIA OMNIBUS (May 17, 2009, 2:32 PM), available at <http://www.afj.org/wp-content/uploads/2017/05/Schiff-SJQ-1487-1488.pdf> (emphasis in original).

¹⁸ *Id.*

¹⁹ Damien Schiff, *Kennedy as the Most Powerful Justice?*, OMNIA OMNIBUS (June 29, 2007, 8:35 AM), available at https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com:80/omnia_omnibus/2007/06/index.html.

²⁰ See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (declaring that the Fourteenth Amendment requires every state to perform and recognize marriages between individuals of the same sex); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (invalidating federal definition of marriage as a union of one man and one woman under Fifth Amendment’s Due Process

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While the above examples focus on the threat that Mr. Bush and Mr. Schiff pose to the LGBT community, we share the concerns expressed by the Leadership Conference on Civil and Human Rights and others about their approaches to civil rights generally. The records of Mr. Bush and Mr. Schiff demonstrate that their appointment to the bench would cause grave harm to the LGBT community, as well as many other communities who rely on the federal judiciary to administer fair and impartial justice. Simply put, these are not the kinds of judges that this country wants, needs or deserves. We urge you to reject their respective nominations.

Thank you for considering our views on this important issue. Please do not hesitate to reach out if we can provide additional information throughout the confirmation process. You can reach us through Sharon McGowan, Director of Strategy for Lambda Legal, at smcgowan@lambdalegal.org.

Very truly yours,

Lambda Legal
Advocates for Youth
CenterLink: The Community of LGBT Centers
Equality California
Family Equality Council
Freedom for All Americans
GLBTQ Legal Advocates & Defenders (GLAD)
Immigration Equality Action Fund
National Black Justice Coalition
National Center for Lesbian Rights
National Center for Transgender Equality
National LGBTQ Task Force
OutServe-SLDN
Transgender Legal Defense & Education Fund
URGE: Unite for Reproductive & Gender Equity
Whitman-Walker Health

cc: United States Senate Judiciary Committee Members

Clause); *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating state ban on same-sex sodomy under Fourteenth Amendment's Due Process Clause); *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating state constitutional amendment barring protected status for gays, lesbians, or bisexuals under Fourteenth Amendment's Equal Protection Clause).