

June 9, 2017

Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators:

We the undersigned organizations write to oppose the confirmation of John K. Bush to the United States Court of Appeals for the Sixth Circuit due to his troubling views on the issue of money in politics. We also express here our concern about Damien Schiff's nomination to the Court of Federal Claims.

We are deeply concerned with the power of wealthy campaign donors in American politics, and specifically with the aggressive role the U.S. courts have played in undermining our democracy by elevating the voices of a wealthy few over the views of everyday Americans. And, we are troubled by an emerging pattern of President Trump nominating judges hostile to basic protections against big money.

Four decades of flawed Supreme Court rulings have twisted the meaning of the First Amendment and prevented our elected representatives and the people from enacting common sense campaign funding rules.¹ In fact, nearly half of the money in the 2016 federal elections—more than \$3 billion—can be directly tied to a few of the Court's most damaging rulings.²

Despite running on a platform of “draining the swamp” and calling super PACs a “scam” and “disaster” on the campaign trail, President Trump is seeking to fill the federal courts with judges who have a record of siding with the wealthy and powerful over the rest of us.

Justice Gorsuch had a troubling record on the court of appeals, and his first significant action in a money-in-politics case confirms he will likely seek unfettered power for the fraction of one percent of Americans who can afford to spend big on elections.³ Trump's first appellate court nominee, Judge Amul Thapar, has embraced the troubling “money is

¹ Adam Lioz, [Breaking the Vicious Cycle: Rescuing Our Democracy and Our Economy By Transforming the Supreme Court's Flawed Approach to Money in Politics](#), DEMOS (2015).

² Adam Lioz, Juhem Navarro-Rivera & Sean McElwee, [Court Cash: 2016 Election Money Resulting Directly from Supreme Court Rulings](#), DEMOS (2017).

³ [Judge Gorsuch's Extreme Views Could Undermine Urgently Needed Money-in-Politics Reforms](#), DEMOS & CAMPAIGN LEGAL CENTER (January 31, 2017); Rick Hasen, [“Breaking: #SCOTUS Declines Soft Money Case; Thomas and Gorsuch Would Vote to Hear.”](#) ELECTION LAW BLOG (May 22, 2017).

speech” paradigm in a radical way that goes beyond Supreme Court doctrine.⁴ John K. Bush and Damien Schiff continue this disturbing trend.

Mr. Bush chose to represent Sen. McConnell—Congress’ leading proponent of big money politics—in filing an *amicus* brief attacking a Kentucky campaign finance law.⁵ More troubling, however, are the views that Mr. Bush has expressed under a pseudonym on a Kentucky political blog.⁶

First, Bush asserts outright that public financing of elections is unconstitutional.⁷ This is a radical view that runs directly counter to decades of Supreme Court precedent. The Court rejected a challenge to the presidential public financing system in the seminal *Buckley v. Valeo* case, and confirmed this view just four years later.⁸

Even the Roberts Court that gave us *Citizens United* has not embraced Bush’s extreme view that providing public funds to help fund campaigns for public office is somehow coercive.⁹ Given the Supreme Court’s skeptical approach towards limiting big money, helping all Americans raise our voices in the political process by providing limited public funding for campaigns is currently the best way to ensure that our representatives are accountable to all of their constituents and not just a narrow donor class skewed by race and gender.¹⁰

Further, Bush argues that how much someone is willing to contribute to a candidate is the right way to measure the level of her support:

But how is that we, in a capitalist system, usually determine the value of something? By how much we are willing to pay for it, of course. And there is nothing wrong with that. How much voters are willing to contribute to a candidate is a direct reflection of how strongly they support that candidate, just as how much we are willing to pay for an automobile shows how badly we want to drive that automobile... Wealth is scattered so

⁴ *Winter v. Wolnitzek*, 186 F.3d 673, 693 (E.D. Ky. 2016).

⁵ Brief of United States Senator Mitch McConnell as Amicus Curiae in Support of Movants/Cross-Respondents, *Martin v. Commonwealth*, 96 S.W.3d 38 (Ky. 2003) (No. 2000-SC-1101).

⁶ ALLIANCE FOR JUSTICE, [AFI Nominee Report: John K. Bush](#) (June 2, 2017).

⁷ G. Morris, [“Barack Obama and Monica Lewinsky Change Democrats’ Minds.”](#) ELEPHANTS IN THE BLUEGRASS (June 20, 2008).

⁸ *Buckley v. Valeo*, 424 U.S. 1 (1976); *Republican National Committee v. FEC*, 445 U.S. 955 (1980).

⁹ The Roberts Court has cut back on public financing programs by striking “triggered” matching provisions, but the core policy of providing public funding for campaigns remains on firm constitutional ground. See *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011).

¹⁰ See e.g. Sean McElwee, [Whose Voice, Whose Choice? The Distorting Influence of the Political Donor Class in Our Big-Money Elections](#), DEMOS (December 8, 2016).

broadly in this country, and held by so many different people of diverse political viewpoints, that there is no danger of one mainstream political ideology unfairly having an upper hand in the raising of funds for political campaigns.¹¹

Mr. Bush apparently fails to recognize what makes our democracy fundamentally different than our economy: while it may be fine for some of us to drive fancier cars, we're all supposed to have an equal say over the decisions that affect our lives. He pretends that significant discrepancies in wealth that play out across race, gender, and class do not shape what Americans are "willing" to contribute to candidates.¹² And, he ignores compelling empirical research that demonstrates that the wealthy in fact have starkly different views than the rest of us, especially on core economic issues; and that these views translate quite readily into government action.¹³

Damien Schiff's views on money-in-politics are equally disturbing. The Court of Federal Claims does not rule on relevant cases, but can be a launching point for future judicial appointments so we feel compelled to register our concerns at this stage.

As an attorney for the Pacific Legal Foundation, Schiff filed an amicus brief in the *Citizens United* case featuring two pro-big-money arguments.¹⁴ Schiff argued for more corporate political spending, ignoring that for-profit corporations are economic actors that actually distort our democracy when bringing their wealth to bear upon policy questions in narrow service of their bottom line.¹⁵ More important, he called for an extreme form of strict scrutiny review of money in politics laws, requiring "actual evidence of quid pro quo corruption" to sustain any campaign finance rules—an even narrower standard than the Roberts Court's current restrictive view that would threaten remaining protections.¹⁶

The role of big money in politics became a central issue in the debate over Justice Neil Gorsuch's confirmation to the U.S. Supreme Court because the public cares deeply about

¹¹ G. Morris, ["The Right to Put Your Money Where Your Mouth Is."](#) ELEPHANTS IN THE BLUEGRASS (February 6, 2008).

¹² Sean McElwee, ["Whose Voice, Whose Choice? The Distorting Influence of the Political Donor Class in Our Big-Money Elections,"](#) DEMOS (December 8, 2016).

¹³ David Callahan & J. Mijin Cha, ["Stacked Deck: How the Dominance of Politics By the Affluent and Business Undermines Economic Mobility in America,"](#) DEMOS (2013).

¹⁴ [Brief Amicus Curiae of Pacific Legal Foundation in Support of Appellant on Supplemental Question, Citizens United v. FEC, 558 U.S. 310 \(2010\) \(No. 08-205\).](#)

¹⁵ *Id.* at 11-17.

¹⁶ *Id.* at 4.

this issue.¹⁷ This continued in the debate over Judge Thapar's confirmation.¹⁸ And it must continue here.

To ensure that all voices are heard, not just those of powerful corporations and wealthy donors, it is essential that we confirm judges and justices who understand that the Constitution gives we the people the power to protect our democracy from big money.

Unfortunately, John K. Bush does not appear to see our pro-democracy Constitution as the vast majority of Americans do—and for this reason we urge you to oppose his confirmation to the U.S. Court of Appeals for the Sixth Circuit. In addition, we have serious reservations about elevating Damien Schiff onto the federal bench, and are concerned that confirming him to the Court of Federal Claims could put him in a position to move onto a court of more general jurisdiction in the future.

Sincerely,

Demos
Every Voice
People for the American Way

¹⁷ [The Supreme Court and Money in Politics: Survey Topline Findings](#), HATTAWAY COMMUNICATIONS (January 2017).

¹⁸ Adam Lioz, ["Role of Big Money Again Key Theme in Judicial Nomination Fight."](#) DEMOS (May 26, 2017).