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June 28, 2017

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

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

Re: The Nomination of Damien M. Schiff to the United States Court of Federal Claims

Dear Chairman Grassley & Ranking Member Feinstein:

On behalf of the NAACP Legal Defense & Educational Fund, Inc. (LDF), I am writing to oppose the confirmation of Damien M. Schiff to the U.S. Court of Federal Claims. Mr. Schiff's record makes clear that he was nominated not to impartially resolve legal disputes, but to advance the same extremist, far-right agenda he has advocated as a lawyer and commentator. Throughout his career, Mr. Schiff has denigrated civil rights and equality in the harshest of terms while arguing to expand the property and economic rights of corporations. Along the way, he has revealed a stunning lack of judicial temperament, once writing that Supreme Court Justice Anthony Kennedy is a "judicial prostitute."¹ It is rare to see a judicial nominee who is so patently unqualified to serve on the bench, and the Judiciary Committee should reject Mr. Schiff's nomination.

Headquartered in New York City, LDF is the nation's first and foremost civil rights law organization. Founded by Thurgood Marshall in 1940, LDF has worked to pursue racial justice and eliminate structural barriers for African Americans in the areas of criminal justice, economic justice, education, and political participation for over 75 years. As part of that effort, LDF is committed to ensuring that the federal judiciary reflects the nation's diversity, and to protecting the central role played by the courts in the enforcement of civil rights laws and the Constitution's guarantee of equal protection. LDF therefore carefully evaluates nominations to the federal courts.

¹ Damien M. Schiff, *Kennedy as the most powerful justice?*, OMNIA OMNIBUS (Jun. 29, 2007), https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com:80/omnia_omnia/2007/06/index.html.

Nominations to the Court of Federal Claims can have a significant impact on civil rights. The court has nationwide jurisdiction over a wide-range of monetary claims against the federal government, including claims that federal statutes or regulations effect takings of private property that require just compensation under the Fifth Amendment. Laws that protect the environment and public health are frequent targets of takings challenges, but extreme rulings could also threaten antidiscrimination protections, such as the public accommodation clauses of the Civil Rights Act of 1964 and the Americans with Disabilities Act, and laws that bar discrimination in the sale of property. The court also addresses issues relating to equal opportunity in the context of government contracts and civilian and military employment.

The 38-year-old Mr. Schiff has spent his legal career working for the Pacific Legal Foundation (PLF), a self-styled “pro-liberty public interest law organization” that often litigates issues involving race.² Part of PLF’s mission is to advance—and constitutionalize—the perverse view that efforts to diversify and integrate society are no different from the pernicious racial discrimination underlying our nation’s long history of segregation. PLF’s recent litigation in this vein includes opposing a school integration program,³ challenging diversity programs in public employment,⁴ and filing an amicus brief in *Fisher v. University of Texas* that argued, unsuccessfully, that the University could not consider race as one of many factors to diversify its student body.⁵

While Mr. Schiff has made troubling statements on race that align with PLF’s mission, his own work has focused on challenging environmental protections. In this area, he has argued that the Endangered Species Act is unconstitutional, and expressed skepticism that climate change is “in part a function of man-made changes to the environment” including the emission “of greenhouse gases.”⁶ He has also said that the Environmental Protection Agency “treat[s] American citizens . . . as if they were just slaves,”⁷ and earlier this year, just three days after contacting the White House to express interest in a federal judgeship, he published an article called “Environmental Law—A Good Place To Start For Trump To Make America Great Again.”⁸

² Pacific Legal Foundation, *About PLF*, <https://www.pacificlegal.org/about>.

³ See *E.L. v. Voluntary Interdistrict Choice Corp.*, No. 4:16-cv-629, 2016 WL 3920198 (E.D. Mo. July 15, 2016).

⁴ *Shea v. Kerry*, 796 F.3d 42 (D.C. Cir. 2015).

⁵ Brief of Amicus Curiae for the Pacific Legal Foundation, *Fisher v. Univ. of Texas*, 136 S. Ct. 2198 (2016).

⁶ Damien Schiff, *‘Endangered’ Polar Bear Is Trotted Out As the Extremists’ Latest Trojan Horse*, INVESTORS’ BUSINESS DAILY (Feb. 25, 2008), <https://www.pacificlegal.org/page.aspx?pid=3873>.

⁷ Lou Dobbs Tonight (Fox Business Network LLC Nov. 24, 2011), transcript available at <http://www.afj.org/wp-content/uploads/2017/05/Schiff-LouDobbs.pdf>.

⁸ Damien Schiff, *Environmental Law—A Good Place To Start For Trump To Make America Great Again*, INVESTOR’S BUSINESS DAILY (Feb. 9, 2017),

<http://www.investors.com/politics/commentary/environmental-law-a-good-target-for-trumps-efforts->

Mr. Schiff's record of dangerous extremism, further detailed below, is not one that can be wiped away by the hollow assurances to "set personal views aside" and merely "apply the law and the facts" that he recited during his confirmation hearing. Mr. Schiff's views on both political and legal questions—including questions that would come before him on the Court of Federal Claims—are clear, as are the deleterious effects they would have on civil rights and equal justice. These are the biases and prejudices that Mr. Schiff would bring to the bench, and, when combined with his lack of temperament, no litigant would have confidence that he could fairly apply the law.

Mr. Schiff's refusal to answer questions about his record is similarly unhelpful. He refused to discuss his "personal views" to avoid suggesting that they are "somehow relevant to decisionmaking as a judge." Thus, on the one hand, Mr. Schiff asserts that his lengthy and controversial record should be of no concern because he promises to be impartial, while, on the other, he cannot answer questions about that record for fear of prejudicing future litigants. He cannot have it both ways. If anything, Mr. Schiff's voluminous blog posts and legal commentary give a more accurate picture of his judicial philosophy than what he might say in the carefully-rehearsed setting of a Senate confirmation hearing.

The following examples from Mr. Schiff's troubling record illustrate with stunning clarity his overt hostility to civil rights and his lack of sound judgment and judicial temperament:

Racial Justice.

- In a 2011 law review article,⁹ Mr. Schiff argued that the Supreme Court should overturn *Grutter v. Bollinger*,¹⁰ which upheld race-conscious admissions policies that enhance student body diversity, and reject the principle that states have a compelling interest in furthering diversity in higher education. To make his point, Mr. Schiff claimed that *Grutter* repeated the same mistakes of the Supreme Court's most odious decisions on race, including *Plessy v. Ferguson*,¹¹ which established the "separate but equal" doctrine that *Brown*

[to-make-america-great-again/](#); Sen. Comm. on the Judiciary, 115th Cong., Damien Schiff: Questionnaire for Judicial Nominees, Question 26 ("On February 6, 2017, I contacted an official with the White House Counsel's Office to express my interest in serving on the Court of Federal Claims."), <https://www.judiciary.senate.gov/imo/media/doc/Schiff%20SJQ.pdf>.

⁹ Joshua P. Thompson & Damien M. Schiff, *Divisive Diversity at the University of Texas: An Opportunity for the Supreme Court to Overturn Its Flawed Decision in Grutter*, 15 TEX. REV. L. & P. 437, 486 (2011). <https://drive.google.com/file/d/0BxwJ7kqwYA7FLXV4N0hRMWdfbWM/view>.

¹⁰ 539 U.S. 306 (2003).

¹¹ 163 U.S. 537 (1896).

later overturned, and *Korematsu v. United States*,¹² which upheld the internment of Japanese Americans.¹³

- Consistent with his law review article, Mr. Schiff has written that “the Colorblind Constitution” is the “real Constitution.”¹⁴ Under this view, which PLF advocates in litigation, there is no constitutional distinction between the pernicious racial segregation that Black schoolchildren challenged in *Brown*, and ongoing efforts to further diversify education that the Supreme Court has repeatedly upheld in cases like *Grutter* and *Fisher*.
- Mr. Schiff’s radical views were laid bare in a May 2009 blog post, when he wrote that he would have “objected to an anti-racism curriculum being taught in 1950s Arkansas” because at that time, in Mr. Schiff’s understanding, the propriety of racism remained a debatable question.¹⁵

LGBTQ Equality.

- In 2009, Mr. Schiff criticized a school district for “teaching gayness” when it implemented a program to address the bullying of LGBTQ students. Mr. Schiff said that the anti-bullying program inappropriately taught that “the homosexual lifestyle is a good, and that homosexual families are the moral equivalent of traditional heterosexual families.”¹⁶
- Mr. Schiff said that he “strongly disagree[s]” with the Supreme Court’s decision in *Lawrence v. Texas*,¹⁷ which struck down statutes criminalizing sodomy.
- Mr. Schiff has been critical of both marriage equality and rulings that allow same-sex couples to adopt children. On marriage equality, he authored two amicus briefs for PLF as part of the effort to defend California’s ban on same-sex marriage,¹⁸ and he lamented the California Supreme Court’s use of strict

¹² 323 U.S. 214 (1944).

¹³ Thompson & Schiff, *supra* n.9 at 486.

¹⁴ See Schiff, *Some additional thoughts on PICS/Meredith*, OMNIA OMNIBUS (July 30, 2007), https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com:80/omnia_omnibus/2007/06/index.html.

¹⁵ Damien Schiff, *Teaching “gayness” in public schools*, OMNIA OMNIBUS (May 17, 2009), <http://www.afj.org/wp-content/uploads/2017/05/Schiff-SJQ-1487-1488.pdf>.

¹⁶ *Id.*

¹⁷ 539 U.S. 558 (2003).

¹⁸ See Amicus Letter for Pacific Legal Foundation, *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011) (No. S189476), <http://www.courts.ca.gov/documents/4-s189476-letterfrom-damien-m-schiff-1-24-11.pdf>; Application for Permission to File Amicus Curiae Brief and Brief of Amicus Curiae, *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011) (No. S189476).

scrutiny in cases where the government discriminates against people on the basis of sexual orientation.¹⁹

- In 2008, Mr. Schiff criticized a state court decision that struck down a ban on same-sex couples adopting children. He argued that the court ignored “expert testimony indicating that adoptees of same-sex relationships exhibit higher incidences of drug and alcohol abuse, and other anti-social behavior.”²⁰ He said the ruling “underscores my fear that soon the advocacy of traditional sexual morality will be deemed to fall outside the sphere of legitimate public debate[.]”²¹

Gender Equality.

- In 2011, Mr. Schiff filed a lawsuit challenging the application of Title IX to high school students.²² The suit was based on a spurious theory of “reverse discrimination” that is also present in his writings on race. He argued that “Congress had absolutely no evidence . . . that there was sexual discrimination going on in high schools,”²³ and that “applying Title IX to high school athletes . . . in fact violates the Constitution because . . . the government can only discriminate or differentiate on the basis of sex if the government has an exceedingly strong justification for it.”²⁴ Schiff’s argument has been repeatedly rejected by the Supreme Court and the federal courts of appeals,²⁵ as well as by the Department of Education under President George W. Bush.²⁶

¹⁹ Damien M. Schiff & Timothy Sandefur, *The Modern California Supreme Court: Progressivism and Practical Constraints*, THE FEDERALIST SOCIETY at 10 (Oct. 6, 2008), <http://www.fed-soc.org/publications/detail/the-modern-california-supreme-court-progressivism-and-practical-constraints>.

²⁰ Damien M. Schiff, *Traditional Sexual Mores and the Permissible in Secular Discourse*, OMNIA OMNIBUS (Nov. 26, 2008), <http://www.afi.org/wp-content/uploads/2017/05/Schiff-SJQ-Attachments-Final-1503.pdf>.

²¹ *Id.*

²² *See Am. Sports Council v. U.S. Dept. of Educ.*, 850 F. Supp. 2d 288 (D.D.C. 2012).

²³ D.A. Tuma, *Libertarian Counterpoint #1044*, 8/4/11, YOUTUBE at 17:20 (Aug. 13, 2011), <https://www.youtube.com/watch?v=cQbBuAYIov4>.

²⁴ *Id.*

²⁵ *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (holding that Title IX provides a cause of action for retaliation in a case involving high school athletics); *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910 (7th Cir. 2012) (reversing summary judgment for school district in suit involving violation of Title IX and high school sports).

²⁶ Letter from Margaret Spellings, Secretary of Education, United States Department of Education, to Steven Geoffrey Gieseler, Pacific Legal Foundation (Mar. 27, 2008) (denying request to rescind guidance that applied Title IX to high schools and explaining that Title IX “neither violates equal protection nor creates a gender-conscious affirmative action or quota system”), <https://www2.ed.gov/about/offices/list/ocr/letters/title-ix-2008-0327.pdf>.

This is not a normal, business-as-usual judicial nomination. Mr. Schiff's views are so radical, and his qualifications to serve as a judge so lacking, that his nomination can only be understood as part of this administration's broader attack on civil rights and government regulation.²⁷ A vote to confirm Mr. Schiff is a vote to bend the law in favor of the wealthiest and most powerful at the expense of our most vulnerable and marginalized communities. The Members of this Committee should reject this overt attempt to undermine civil rights and equal justice through judicial selection.

We appreciate your consideration of our views. If you have any questions, please contact Senior Policy Counsel Kyle Barry at 202-682-1300.

Sincerely,

A handwritten signature in black ink that reads "Sherrilyn A. Ifill". The signature is written in a cursive, flowing style.

Sherrilyn A. Ifill
President & Director Counsel

Cc: Members of the Senate Judiciary Committee

²⁷ See Kyle Barry, *The Strange Civil Rights Views of Trump's Latest Court Nominees*, POLITICO MAGAZINE (June 14, 2017), <http://www.politico.com/magazine/story/2017/06/14/trump-judicial-nominees-civil-rights-newsom-bush-schiff-215253>.