



HUMAN  
RIGHTS  
CAMPAIGN®

June 23, 2017

Dear Chairman Grassley and Members of the Senate Judiciary Committee:

On behalf of the Human Rights Campaign (HRC), America's largest civil rights organization working to achieve lesbian, gay, bisexual, transgender, and queer (LGBTQ) equality, we write to oppose the nomination of John K. Bush to the U.S. Court of Appeals for the Sixth Circuit. Only nominees with exceptional intellectual ability, distinguished experience in law, and a temperament that would enable them to make decisions fairly and with an open mind should be confirmed for lifetime appointments to the bench. Bush's statements during his hearing before the Judiciary Committee coupled with his lengthy public record demonstrates he does not possess the ability to fairly judge cases involving the rights of LGBTQ Americans. For this reason, HRC urges you to oppose the nomination of Bush to the Court of Appeals for the Sixth Circuit.

Bush has a clear record of hostility towards LGBTQ Americans. He co-authored a publication for The Federalist Society criticizing the "expansive view" of the Kentucky Supreme Court for striking down the state's sodomy ban;<sup>1</sup> a ban similar to that struck down shortly thereafter by the U.S. Supreme Court in *Lawrence v. Texas*.<sup>2</sup> The legal reasoning underlying the Court's decision in *Lawrence* informed the Court's later decisions in *United States v. Windsor*<sup>3</sup> and *Obergefell v. Hodges*,<sup>4</sup> recognizing LGBTQ people's right to equal protection under the Constitution and the fundamental right to same-sex marriage.<sup>5</sup>

Bush is an avid contributor on his wife's blog, *Elephants in the Bluegrass*, under the pseudonym "G. Morris." Writing under the pseudonym, Bush criticized the State Department's adoption of gender-neutral language on passport applications, writing, "Henceforth, the application will ask for 'Mother or Parent 1' and 'Father or Parent 2.' I suppose that's better than 'Thing 1' or 'Thing

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<sup>1</sup> JOHN K BUSH & PAUL E. SALAMANCA, THE FEDERALIST SOCIETY FOR LAW & PUBLIC POLICY STUDIES, "EIGHT WAYS TO SUNDAY": WHICH DIRECTION, KENTUCKY SUPREME COURT? (2006), <https://www.bgdlegal.com/clientuploads/Publications/Publications/John%20Bush%20-%20Eight%20Ways%20to%20Sunday.pdf>.

<sup>2</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>3</sup> 133 S. Ct. 2675, 2695-96 (U.S. 2013).

<sup>4</sup> 135 S. Ct. 2584, 2599 (U.S. 2015).

<sup>5</sup> *Id.*

2'...."<sup>6</sup> This decision by the State Department was made to support and affirm the reality of same-sex couples; Yet, Bush not only viewed this change as unnecessary action that he believed would spark outrage,<sup>7</sup> he chose to frame it in a demeaning and derogatory way.

We are also troubled by his outlandish statement comparing abortion to slavery.<sup>8</sup> Bush took to his blog calling both “[t]he two greatest tragedies in our country” and that both were based on the same legal philosophy led by activist justices.<sup>9</sup> Such a gross misunderstanding of either case is alarming. When questioned about his statement at the hearing, Bush attempted to reframe the “tragedies” as something entirely different than what he wrote: that *Roe* was a tragedy because it divided the nation. Not only does Bush’s statement conflict with his own blog, but calls into question his ability to adhere to precedent. This is of particular importance to LGBTQ Americans because the constitutional right to privacy that underlies *Roe* informs the liberty rights that enable LGBTQ Americans to live as equal citizens.<sup>10</sup>

Any federal judge should have a demonstrated commitment to full equality under the law for all Americans, this is particularly crucial for an appellate court judge. In light of his judicial record, HRC believes Bush fails this test. The Sixth Circuit often decides important cases and controversies addressing critical questions of American democracy and liberty. The addition of Bush to that bench would endanger those fundamental rights and expose litigants to the risk that their cases will not be decided in accordance with established constitutional and legal principles. Accordingly, we urge you to vote against his lifetime appointment to a seat on the United States Court of Appeals for the Sixth Circuit.

Thank you for your consideration. If you have any questions or need more information, please contact Government Affairs Director David Stacy at [david.stacy@hrc.org](mailto:david.stacy@hrc.org).

Sincerely,



David Stacy  
Government Affairs Director

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<sup>6</sup> G. Morris, *A Parent 2's Outrage*, ELEPHANTS IN THE BLUEGRASS (Jan. 9, 2011, 8:01 PM), <https://elephantsinthebluegrass.blogspot.com/2011/01/parent-2s-outrage.html>.

<sup>7</sup> *Id.*

<sup>8</sup> G. Morris, *The Legacy from Dr. King's Dream that Liberals Ignore*, ELEPHANTS IN THE BLUEGRASS (Jan. 23, 2008, 1:13 PM), <https://elephantsinthebluegrass.blogspot.com/2008/01/legacy-from-dr-kings-dream-that.html>.

<sup>9</sup> *Id.*

<sup>10</sup> *See Lawrence*, 539 U.S. at 564–566.



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Dear Chairman Grassley and Members of the Senate Judiciary Committee:

On behalf of the Human Rights Campaign (HRC), America's largest civil rights organization working to achieve lesbian, gay, bisexual, transgender, and queer (LGBTQ) equality, we write to oppose the nomination of Damien Schiff to the U.S. Court of Federal Claims. Based on our review of his record, we believe Schiff has proven that he fails to possess the judicial temperament critical to reach impartial judgments and to fairly assess policies based upon fact rather than ideology.

HRC believes that a judge should have a distinguished record and make decisions fairly and with an open mind. However, Schiff has a long, demonstrated record opposing LGBTQ legal rights. We have a comprehensive window into his views due to his extensive posting on his blogs. For example, Schiff stated he “strongly disagree[s] with *Lawrence*,”<sup>1</sup> the foundational U.S. Supreme Court holding states cannot criminalize same-sex intimate relationships.<sup>2</sup> This case laid the groundwork for future landmark cases recognizing the right to same-sex marriage: *United States v. Windsor*<sup>3</sup> and *Obergefell v. Hodges*.<sup>4</sup>

Moreover, in another piece addressing California's Proposition 8, the California voter referendum that prohibited same-sex marriage, Schiff maintained that the “empirical foundations” of anti-LGBTQ animus have merit.<sup>5</sup> His attempt to rationalize bias and animus against a particular minority group is not only alarming in itself, but also conflicts with a judge's mandate: to be impartial.

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<sup>1</sup> Damien Schiff, *Federalism and Separation of Powers Part I*, OMNIA OMNIBUS (May 15, 2008, 9:03 PM), [https://web.archive.org/web/20080610122430/http://omniaomnibus.typepad.com:80/omnia\\_omnibus/2008/05/index.html](https://web.archive.org/web/20080610122430/http://omniaomnibus.typepad.com:80/omnia_omnibus/2008/05/index.html).

<sup>2</sup> 539 U.S. 558, 578 (2003).

<sup>3</sup> 133 S. Ct. 2675, 2695-96 (U.S. 2013).

<sup>4</sup> 135 S. Ct. 2584, 2599 (U.S. 2015).

<sup>5</sup> Damien Schiff, *Traditional Sexual Mores and the Permissible in Secular Discourse*, OMNIA OMNIBUS (Nov. 26, 2008, 8:21 PM), [https://web.archive.org/web/20090427193309/http://omniaomnibus.typepad.com:80/omnia\\_omnibus/2008/11/index.html](https://web.archive.org/web/20090427193309/http://omniaomnibus.typepad.com:80/omnia_omnibus/2008/11/index.html).

Perhaps most troubling, Schiff referred to Justice Kennedy, author of the majority opinion in *Lawrence*, *Windsor*, and *Obergefell*, as “a judicial prostitute.”<sup>6</sup> When questioned by Senator Grassley about Schiff’s choice language, Schiff maintained he was not attacking Justice Kennedy, but rather a style of judging he labeled as “strategic judging” that relies on factors other than the law and fact.

In addition, Schiff has voiced his disapproval for LGBTQ-inclusive protections. In his blog, aptly titled “*Teaching ‘gayness’ in public schools*,” Schiff criticized a California school district for its inclusive anti-bullying program, writing, “[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.”<sup>7</sup> Report after report shows that LGBTQ youth face disproportionate rates of bullying and harassment based on their actual or perceived sexual orientation and gender identity compared to their non-LGBTQ peers.<sup>8</sup> Schiff’s disregard for the rights and recognition of LGBTQ individuals is rife with misconceptions and biases.

The totality of Schiff’s record raises grave concerns and serious doubts about his nomination. Only a nominee who has demonstrated that he can be a fair and impartial judge for all Americans, regardless of their sexual orientation and gender identity, is entitled to confirmation on this important court. Schiff has not met this standard. We strongly urge you to oppose Schiff’s nomination to the U.S. Court of Federal Claims.

Thank you for your consideration. If you have any questions or need more information, please contact Government Affairs Director David Stacy at [david.stacy@hrc.org](mailto:david.stacy@hrc.org).

Sincerely,



David Stacy  
Government Affairs Director

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<sup>6</sup> Damien Schiff, *Kennedy as the Most Powerful Justice?*, OMNIA OMNIBUS (June 29, 2007, 8:35 AM), [https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com:80/omnia\\_omnibus/2007/06/index.html](https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com:80/omnia_omnibus/2007/06/index.html).

<sup>7</sup> Damien Schiff, *Teaching “Gayness” in Public Schools*, OMNIA OMNIBUS (May 17, 2009, 2:32 PM), [https://web.archive.org/web/20090530124852/http://omniaomnibus.typepad.com:80/omnia\\_omnibus/2009/05/index.html](https://web.archive.org/web/20090530124852/http://omniaomnibus.typepad.com:80/omnia_omnibus/2009/05/index.html).

<sup>8</sup> See, e.g., JOSEPH G. KOSCIW ET AL., GLSEN, *THE 2015 NATIONAL SCHOOL CLIMATE SURVEY 21–25* (2016); *Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9–12 — United States and Selected Sites, 2015*, MORBIDITY & MORTALITY WKLY. REP., Aug. 12, 2016, at 14 (finding that 12.5% of gay, lesbian, and bisexual students and 10.8% of students unsure of their sexual orientation deliberately missed school due to feeling unsafe either at or traveling to school compared to 4.6% of straight students).