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 John K. Bush to the United States Court of Appeals for the Sixth Circuit

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 John K. Bush to the United States Court of Appeals for the Sixth Circuit. Mr. Bush has proven himself to be a staunch opponent of civil rights and has expressed extremist views—often through incendiary rhetoric—that are antithetical to the principles of equal justice. Mr. Bush also lacks the basic temperament and sound judgment required to be a federal judge, even conceding in hearing testimony that he may be unable to remain impartial. Based on his record, litigants with civil rights claims, including LDF’s clients, cannot have confidence that Mr. Bush will apply our nation’s civil rights laws fairly and impartially.

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.

John Bush’s record includes over 20 years at Bingham Greenebaum Doll LLP in Louisville, Kentucky, as well as six years as an associate at an international firm in Washington, D.C., and a clerkship on the Eighth Circuit Court of Appeals. Mr. Bush has also given speeches and published writing outside his legal practice—
writings that include over 400 blogposts that he anonymously published under the pseudonym “G. Morris.” Mr. Bush’s previous experience and public statements reveal a stunning hostility to equal justice, including in areas—such as voting and policing reform—at the core of LDF’s work. Based on this record, we can only conclude that, as a federal judge, Mr. Bush would pose a grave threat to civil rights and racial justice, and LDF therefore strongly opposes his confirmation.

The bases for our opposition, focusing on racial justice and LDF’s core practice areas, are set forth below.

A. Civil Rights & Reproductive Justice

Mr. Bush has compared antiabortion activism to the civil rights movement and invoked the legacy of Dr. Martin Luther King, Jr. to attack women’s reproductive rights. In a blog post titled “The Legacy from Dr. King’s Dream That Liberals Ignore,”1 Bush wrote that the “two greatest tragedies in our country” are “slavery and abortion,” and equated the legal reasoning of *Dred Scott v. Sandford,2* the Supreme Court’s notorious 1857 decision that upheld slavery, to *Roe v. Wade,3* which recognized a constitutional right to access abortion.

This line of argument, common among abortion opponents,4 is both offensive and dishonest. In truth, Dr. King saw reproductive justice as a critical part of the struggle for racial equality. In 1960, he served on a committee for a Planned Parenthood study on contraception and said that he had “always been deeply interested in and sympathetic with the total work of the Planned Parenthood Federation.”5 In 1966, he received Planned Parenthood’s Margaret Sanger Award “in recognition of excellence and leadership in furthering reproductive health and reproductive rights,”6 and afterward wrote that the “award will remain among my

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3 410 U.S. 113 (1973).
6 See Acceptance Speech of Martin Luther King Jr. delivered by Coretta Scott King for the Margaret Sanger Award (1966), https://www.plannedparenthood.org/planned-parenthood-gulf-coast/mlk-acceptance-speech.
most cherished possessions” and “will cause me to work even harder for a reign of justice and a rule of love all over our nation.”

Mr. Bush’s hearing testimony compounded these already troubling views; he said that he continues to believe that Roe is a “national tragedy” because “it divided our country” and “created such a division in our country.” Asked if Brown v. Board of Education is a “tragedy” for the same reason, Bush initially responded: “I don’t think it [divided our country]” and “Brown was a great decision[.]” When pressed, Bush acknowledged that President Eisenhower deployed the 101st Airborne Division and federalized the Arkansas National Guard to implement Brown in his hometown of Little Rock, but otherwise did not change his response.

Neither of Mr. Bush’s contradictory answers are adequate. Either he is deeply ignorant of the massive and sometimes violent resistance with which Southern white political leaders met the Brown decision, or he has no principled way to distinguish his views on Roe and Brown. The former would reflect a shocking lack of historical knowledge essential to understanding the continued impact of race discrimination, while the latter would show that his views on legal precedent are driven solely by his own policy preferences over the law.

B. Policing

Mr. Bush’s statements about police misconduct suggest that he is biased against victims of police violence and fails to recognize the systemic problem of discriminatory and unconstitutional policing. As a law firm associate, Mr. Bush was part of the defense team that represented Los Angeles Police Department Officer Stacey Koon, who in 1993 was convicted of civil rights violations for the vicious beating of Rodney King. Mr. Bush represented Koon in a sentencing appeal. On his Senate Judiciary Questionnaire, Mr. Bush listed the case among his “ten . . . most significant litigated matters,” and described the videotaped beating of King—which

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7 Letter from Dr. Martin Luther King, Jr. to Cass Canfield, Chairman of the Executive Committee of PPFA (1966), https://www.plannedparenthood.org/planned-parenthood-gulf-coast/mlk-acceptance-speech.
9 Id.
11 We are long past the point where judicial nominees should get credit for saying merely that Brown was rightly decided. At this point, the obligation to do so has become so ingrained in the confirmation process as to render the question meaningless—no nominee would ever disagree, even while refusing to opine on the correctness of virtually any other Supreme Court decision. The real question, and the one nominees have not had to answer, is how they understand the enduring legacy of Brown in the context of ongoing efforts to integrate schools, workplaces, and other public spaces.
caused skull fractures, permanent brain damage, a broken ankle, and multiple lacerations—as a “police encounter.”

In a July 19, 2016 blog post recounting a day at the Republican National Convention, Mr. Bush wrote that the “speakers who really were on fire were Rudy Giuliani and the Milwaukee police chief [David Clarke]. They both gave stirring talks focusing on why blue lives matter.” Clarke began his remarks with a reminder that “blue lives matter in America,” and he praised the acquittal of Brian Rice, one of the Baltimore Police Department Officers responsible for the death of Freddie Gray, who was arrested without cause and died in police custody. Clarke called the prosecution against Rice “malicious.” Clarke also said that the protests against police violence in Baltimore and Ferguson, Missouri were “a collapse of the social order” and that the Black Lives Matter movement advocates “anarchy.”

The federal courts play a central role in ensuring fair policing practices and vindicating the civil rights of those who face discrimination by law enforcement. Mr. Bush’s praise for David Clarke’s remarks, combined with his minimization of the police brutality against Rodney King, render him unfit to perform this vital judicial function.

C. Voting Rights

Mr. Bush’s limited statements on voting rights raise serious concerns about his ability to apply the Voting Rights Act and other federal laws, including the Constitution, that protect equal access to the ballot box. In answers to written questions from the Judiciary Committee, Mr. Bush refused to say whether he “agree[s], as a factual matter, with President Trump’s claim that 3 to 5 million people voted illegally in the 2016 election” because that would require him to “opine” on a “subject of political debate.” In fact, there is absolutely no evidence of widespread voter fraud in the 2016 election, and The New York Times has included the claim on its “definitive list” of the president’s lies. It is disturbing and dangerous that Mr.

16 Id.
17 For example, in April 2017 a federal judge approved a consent decree to reform the Baltimore Police Department despite the Justice Department—under the direction of Attorney General Jeff Sessions—reversing its position and urging further delay.
Bush regards this purely factual matter as something properly within the scope of “political debate.” Giving credence to the voter-fraud myth enables discriminatory voter suppression tactics that disenfranchise eligible voters.

In a May 7, 2008 blog post, Mr. Bush took issue with Senate Democrats who opposed the nomination of Hans von Spakovsky to the Federal Election Commission. He called the opposition a strategy to “[k]eep the FEC debilitated so that it has no oversight over Senator Obama, aka ‘Senator Moneybags,’ as the [Wall Street Journal] put it.” Mr. Bush noted that “Democrats’ opposition to von Spakovsky’s nomination ostensibly arises from his support of voter identification to prevent election fraud,” and argued that that “position hardly should disqualify him for a seat on the FEC.”

Mr. Bush’s post disregards the discriminatory effects of voter ID laws and mischaracterizes the opposition to von Spakovsky, which was based on ethics concerns and his long history of voter suppression.

In the last year, federal courts across the country have struck down voter ID laws because they disproportionately disenfranchise African Americans and other people of color. Most recently, in a case litigated by LDF, a federal court found that Texas intentionally discriminated against African-American and Latino voters when it enacted the strictest voter ID law in the country. This followed a Fourth Circuit decision finding that North Carolina’s package of voting restrictions, which included a photo ID requirement, “target[ed] African Americans with almost surgical precision.”

Von Spakovsky is a longtime advocate of these laws. For example, while serving in the Justice Department’s Civil Rights Division in 2005, von Spakovsky was instrumental in securing DOJ approval of Georgia’s restrictive photo ID law. The approval came despite a thorough analysis by career DOJ lawyers who concluded that the law violated the Voting Rights Act and should be blocked. And at the same time that he was working within DOJ to approve Georgia’s law, von Spakovsky anonymously published a law review article endorsing voter ID laws—a conflict that raised serious ethical concerns about his official role within the Justice Department.

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21 Id.
As a result, when President George W. Bush nominated von Spakovsky to the FEC, six former lawyers from DOJ’s voting section named him the “point person for undermining the Civil Rights Division’s mandate to protect voting rights.”

As a civil rights law firm that litigates voting rights cases and represents disenfranchised African-American voters, LDF cannot approve a nominee who shows such little concern for discriminatory voting restrictions, and who cannot see the opposition to von Spakovsky as anything more than a partisan ruse. That is especially true now, as the administration moves forward with a sham “election integrity commission” based on ludicrous claims of widespread voter fraud that Mr. Bush refuses to say are false.

D. Club Membership

In addition to troubling views on legal issues, Mr. Bush’s conduct reveals an indifference toward the racial inequities that continue to pervade American life as a result of discrimination past and present. From 2006 to 2011, Bush was a member of the Pendennis Club, a Louisville social club that for much of its history excluded African Americans, women, and Jews. In 1978, it so prized its all-white identity that the club began using a side door as its main entrance so that its address would not include the newly named Muhammad Ali Boulevard. More recently, the club challenged the Kentucky Commission on Human Rights’ authority to investigate discrimination at private clubs until it lost a state supreme court case in 2004, just two years before Mr. Bush became a member.

Just as troubling, Mr. Bush failed to disclose this history of discrimination as required by the Senate Judiciary Questionnaire. The questionnaire asks whether any of the organizations to which a nominee has belonged “currently discriminate or formerly discriminated on the basis of race, sex, religious or national origin.” Ignoring the clear terms of the question and breaking with the practice of prior nominees, Mr. Bush limited his answer to the “period of [his] membership.” Mr. Bush’s lack of candor to the Committee is problematic in its own right, and suggests he is uninterested in further explaining his membership or his understanding of how exclusionary social institutions, including private clubs, perpetuate segregation and discrimination.

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27 Lithwick, supra n.25.
29 Raad Cawthon, Louisville, Ali Setting things right, PHILADELPHIA INQUIRER (Nov. 27, 1999).
31 Questionnaire, supra n.13, Question 11 (emphasis added).
32 Id.
E. Judicial Temperament

Among other necessary qualifications, judges must be able to treat litigants with respect and decide legal issues dispassionately, without favor or prejudice toward either party. Mr. Bush’s record, conversely, is rife with intemperance, poor judgment, and disdain for those who oppose his political views.

At his confirmation hearing, Mr. Bush conceded that he may be unable to remain impartial. When asked if “impartiality is an aspiration or an absolute expectation” for a judge, Mr. Bush said it was only “an aspiration,” and “I will do my best to be impartial.” Mr. Bush’s testimony contradicts the federal judicial oath, which requires all judges to swear they will “impartially discharge” their judicial duties.33

Mr. Bush’s deep-seated bias is also reflected in blog posts that exhibit extreme partisanship and incendiary rhetoric unbecoming a federal judge. For example, in October 2008, under the title “Take That!,” Mr. Bush posted a photo of a large sign that said: “On 10-3 Obama supporters vandalized-trespassed and stole my Palin-McCain sign violating my 1st Amendment right to free speech. Do it again + you will find out what the 2nd Amendment is all about!!!”34 The month before, he wrote a blog post called “Thanks, Mama Pelosi, For That 700 Point Stock Market Plunge,”35 in which he rebuked then-House Speaker Nancy Pelosi for blaming Republicans for the financial crisis and advised Congress to “gag the House Speaker.”

Mr. Bush’s online writing also relies heavily on radical right-wing sources known for promoting discredited conspiracy theories and racist hate speech.36 In October 2008, for example, he promoted a story from World Net Daily about a reporter who had been detained in Kenya while investigating Obama’s familial ties to the country.37 World Net Daily is known primarily for promoting the birther conspiracy theory,38 and the Southern Poverty Law Center described the website as “devoted to manipulative fear-mongering and outright fabrications designed to further . . .

paranoid gay-hating, conspiratorial and apocalyptic visions.” In another example, Mr. Bush cited the blog *Riehl World View*, written by Dan Riehl, now a writer with the far-right website *Breitbart*. Among other things, Riehl has criticized Congressman Keith Ellison—the first Muslim elected to Congress—for being sworn into office on a Quran and suggested he is part of a terrorist “set up”; referred to President Obama as “Lil’ Obambi,” “Obama-Islamo-Ding-Dong,” and “proof of the failure of Affirmative Action”; and called Obama’s presidential campaign ads “afro-mercials.”

Mr. Bush’s reliance on these sources in his public writing is, at best, evidence of extraordinarily poor judgment that falls well below the standard expected and required of federal judges. Taken together with his partisan rhetoric and his own hearing testimony, these posts suggest a clear bias that would make it difficult for litigants to believe they would receive a fair and impartial hearing before a panel that included John Bush.

On the whole, Mr. Bush’s regressive views on civil rights issues, intemperate rhetoric, extreme partisanship, and lack of sound judgment render him unfit to serve with life tenure on the federal bench, and LDF opposes his confirmation to the Sixth Circuit. We appreciate your consideration of our views. If you have any questions, please contact Senior Policy Counsel Kyle Barry at 202-682-1300.

Sincerely,

Sherrilyn A. Ifill
President & Director Counsel

Cc: Members of the Senate Judiciary Committee

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40 See *Riddle*, *supra* n.36.