

July 14, 2017

VIA EMAIL

Dear Senator,

On behalf of the National Women's Law Center (the Center), an organization that has fought to promote women's legal rights and protections for nearly 45 years, I write to urge you to oppose the nomination of John K. Bush to the United States Court of Appeals for the Sixth Circuit.

Mr. Bush has taken legal positions and expressed legal views that will make it virtually impossible for many who come before him as litigants, including women, to believe that he will give them a fair and impartial hearing. In addition, his statements demonstrate that he lacks the temperament to serve in a lifetime position on the federal bench.

As an initial matter, Mr. Bush wrote a significant number of blog posts under the pseudonym G. Morris on the blog *Elephants in the Bluegrass*, many of which contain extremely troubling positions, including on legal rights and protections important to women. Mr. Bush has sought to characterize these blog posts as political musings and personal views, and has even asserted that these legal views are irrelevant, because he would, if confirmed, follow Supreme Court and Sixth Circuit precedent. However, Mr. Bush's strongly worded legal views are extremely relevant to any future role as a judge on a federal court of appeals, as precedent can be unclear or fail to fully address the facts or legal questions in a particular case.¹

Extreme Hostility to the Constitutional Right to Abortion. In one blog post written under a pseudonym, Mr. Bush wrote that abortion and slavery are "[t]he two greatest tragedies in our country."² He analogized *Dred Scott* and *Roe v. Wade*, writing that both "relied on similar reasoning and activist justices at the U.S. Supreme Court."³ At his hearing, he maintained this comparison of *Roe* to the *Dred Scott* decision, a point that undermines the assertions made by Bush in response to written questions that he would abide by Supreme Court precedent upholding the constitutional right to abortion.⁴

¹ At his hearing, Mr. Bush could state only that, if he were confirmed, impartiality "is an aspiration. I will do my best to be impartial."

² 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>.

³ *Id.*

⁴ In addition, when asked specifically whether he agreed with Chief Justice Roberts, who testified at his Senate Judiciary Committee hearing that he believed that *Griswold v. Connecticut*, a critical precedent that established constitutional protections for married couples to use birth control, was correctly decided, Bush would only state that "My personal views on this issue are irrelevant to the position for which I have been nominated. If confirmed to the Sixth Circuit, I will be bound to apply

Critical Review of State Supreme Court’s Jurisprudence Around the Right to Privacy. Mr. Bush co-authored a paper critiquing the Kentucky Supreme Court’s privacy case law, including cases that set out the rights to abortion and same sex marriage, using disturbing rhetoric. For example, when writing about the court’s case law on LGBT issues, the article deployed extreme, anti-LGBT language, such as using the term “consensual sodomy”⁵ to refer to intimate relationships between same-sex partners. Bush and his co-author also criticized a 1992 case in which the Kentucky Supreme Court decriminalized intimate sexual behavior, in the wake of *Bowers v. Hardwick*, calling it an example of the Kentucky court’s “willingness to find rights [under the right to privacy] in the state constitution *above and beyond* those in the U.S. Constitution.”⁶ (Emphasis added).

The article also described a 1970s anti-abortion ruling as an “affirmance of the state’s efforts to protect unborn life,”⁷ language that demonstrates hostility to abortion rights. The use of rhetoric hostile both to LGBT individuals and to abortion rights in a legal article, and the criticism of binding precedent protective of LGBT rights and abortion rights, would reasonably give pause to any litigant seeking to vindicate those rights before Mr. Bush, were he to be confirmed to the Sixth Circuit.

Advanced Arguments to Permit State-Sanctioned Sex Discrimination. Mr. Bush co-authored an *amicus curiae* brief in *United States v. Virginia*, advocating for the Supreme Court to permit the Virginia Military Institute (VMI) to continue excluding women from admission. The brief states that VMI’s military-style education “does not appear to be compatible with the somewhat different developmental needs of most young women.”⁸ The brief argued not only that the Constitution permitted VMI to continue to exclude women, but also that Virginia had no constitutional obligation to provide women with educational opportunities elsewhere equivalent to those provided by VMI.⁹ The brief further argued that striking down VMI’s policy would

all controlling Supreme Court precedent, including *Griswold*, and I will faithfully do so.” JOHN KENNETH BUSH, QUESTIONS FOR THE RECORD, SENATE JUDICIARY COMMITTEE 55 (2017), available at <https://www.judiciary.senate.gov/download/bush-responses-to-questions-for-the-record> [hereinafter Bush QFRs]. Bush’s unwillingness to state that a well-established precedent of the Supreme Court, upon which millions of women rely every day, was correctly decided raises further concerns.

⁵ JOHN K. BUSH & PAUL E. SALAMANCA, “EIGHT WAYS TO SUNDAY”: WHICH DIRECTION, KENTUCKY SUPREME COURT? 6 (2006), available at <http://www.fed-soc.org/publications/detail/eight-ways-to-sunday-which-direction-kentucky-supreme-court>.

⁶ *Id.* at 5. In answers to written questions from Senator Sheldon Whitehouse, Mr. Bush disputed that he criticized this decision. Bush QFRs, *supra* note 4, at 15. However, the tone of the article, and especially this section, can fairly be described as critical. As the conclusion states, “The Supreme Court of Kentucky has taken a fairly aggressive, and some might say overly aggressive, approach to the formulation of public policy and to the determination of where its own prerogatives end and those of the General Assembly begin.” Bush & Salamanca, *supra* note 5, at 11.

⁷ Bush & Salamanca, *supra* note 5, at 6.

⁸ Brief for Women’s Wash. Issues Network et al. as Amici Curiae in Support of Petition for Writ of Certiorari at 7, *U.S. v. Virginia*, 518 U.S. 515 (1996) (No. 92-1213).

⁹ See generally *id.* The Supreme Court struck down VMI’s male-only admissions policy, rejecting the brief’s core arguments. *U.S. v. Virginia*, 518 U.S. 515 (1996).

endanger government funding for battered women’s shelters and rape crisis centers.¹⁰ These arguments, if accepted, would not only have maintained VMI’s existing discriminatory policy, but also would have freed the state of any legal obligation to ensure that female students were provided equivalent educational opportunities elsewhere. The Supreme Court ultimately soundly rejected these arguments.

In his answers to written questions, Mr. Bush acknowledged Supreme Court precedent holding that the Fourteenth Amendment’s protections apply to categories other than race¹¹ and asserted that, if confirmed, he would be bound by circuit and Supreme Court precedent with regard to the Fourteenth Amendment’s protections against sex discrimination.¹² This blanket assertion provides little reassurance in the face of the extreme arguments in support of Virginia’s rights to provide disparate opportunities on the basis of sex that he made as an advocate.

Opposition to Affordable Care Act In multiple blog posts, Bush vehemently criticized the Affordable Care Act (ACA). First, he celebrated when he thought the ACA might not be enacted, writing a blog titled “Ding, Dong, the (Obamacare Senate Bill) Witch is Dead!”¹³ Once the ACA had become law, he called for it to be “repealed and replaced in the new Congress under the leadership of the new President.”¹⁴

Given the effort currently underway in Congress to repeal and replace the ACA, and the likelihood that any legislation that does so would be challenged in court, Mr. Bush’s statements expressing support in advance for such legislation are highly troubling. Yet in his answers to questions for the record, Mr. Bush declined to say whether he would recuse himself in cases where such legislation might be challenged.¹⁵ Thus, the record not only raises serious questions about whether Mr. Bush could fairly and impartially decide a case involving legislation repealing the ACA, but about whether or not he would recognize his inability to do so, and recuse himself accordingly.

Mr. Bush’s legal record clearly and consistently demonstrates troubling legal views, as well as language and rhetoric incompatible with the judicial role.¹⁶ At his hearing,

¹⁰ Brief for Women’s Wash. Issues Network, *supra* note 8, at 19.

¹¹ Bush QFRs, *supra* note 4, at 20–21.

¹² *Id.* at 8.

¹³ G. Morris, *Ding, Dong, the (Obamacare Senate Bill) Witch is Dead!*, ELEPHANTS IN THE BLUEGRASS (Jan. 21, 2010, 11:32 AM), available at <https://elephantsinthebluegrass.blogspot.com/2010/01/ding-dong-obamacare-senate-bill-witch.html>.

¹⁴ G. Morris, *Don’t Let The Door “HIT” American Taxpayers on Obama’s Way Out*, ELEPHANTS IN THE BLUEGRASS (Sept. 25, 2016, 1:31 PM), <https://elephantsinthebluegrass.blogspot.com/2016/09/dont-let-door-hit-american-taxpayers-on.html>.

¹⁵ Bush QFRs, *supra* note 4, at 6.

¹⁶ *See, e.g.*, G. Morris, *Thanks, Mama Pelosi, For That 700 Point Stock Market Plunge!*, Elephants in the Bluegrass (Sept. 29, 2008, 3:51 PM), <https://elephantsinthebluegrass.blogspot.com/2008/09/thanks-mama-pelosi-for-that-700-point.html> (referring to then-Speaker of the House

Mr. Bush admitted, “if I could do some of [my blog posts] over today, I would do them over.” In his answers to questions for the record, he elaborated that “based on my review of the posts in the course of completing my Senate Judiciary Committee Questionnaire, I have a general sense that many of [the blog posts] used flippant or intemperate language”¹⁷ but contended that language did not accurately reflect his demeanor. However, Mr. Bush has a history of injudicious statements in addition to his blog posts, including a public address in which he used a quote that included an anti-gay slur,¹⁸ that underscore the questions about his judicial temperament raised by his blog posts. Future litigants who rely on the courts to resolve their disputes should not be the ones to bear the risk that, as ample evidence in the record suggests, Mr. Bush’s best efforts at impartiality may fail.

Mr. Bush’s record demonstrates troubling legal views on a number of issues important to women, as well as a stunning lack of judicial temperament. His blanket assurances provide little comfort to those who would come to the Sixth Circuit seeking an impartial and fair hearing. For all of the reasons described above, the Center has concluded that John K. Bush should not be confirmed to a lifetime position on the U.S. Court of Appeals for the Sixth Circuit. We urge you to reject his nomination. Please feel free to contact me, or Amy Matsui, Senior Counsel and Director of Government Relations at the Center, at (202) 588-5180, should you have any questions.

Sincerely,



Fatima Goss Graves
President and CEO
National Women’s Law Center

Pelosi as “mama” and saying to “gag the House Speaker”); G. Morris, *Baring My Pre-Convention Thoughts*, ELEPHANTS IN THE BLUEGRASS (July 17, 2016, 11:58 PM), https://elephantsinthebluegrass.blogspot.com/2016/07/baring-my-pre-convention-thoughts_17.html (“The Democrats are trying to win with the same game plan as in 2008, only substitute woman for Black.”); G. Morris, *Take That!*, ELEPHANTS IN THE BLUEGRASS (Oct. 15, 2008, 7:33 PM), <https://elephantsinthebluegrass.blogspot.com/2008/10/take-that.html> (implicitly condoning a sign threatening that anyone who removed a McCain-Palin sign from the owner’s yard would “find out what the 2nd Amendment is all about”).

¹⁷Bush QFRs, *supra* note 4, at 41.

¹⁸ John K. Bush, *A Certain Starting Place*, Address at The Forum Club of Louisville (Sept. 8, 2005) *notes in* JOHN KENNETH BUSH, QUESTIONNAIRE FOR JUDICIAL NOMINEES, SENATE JUDICIARY COMMITTEE—PUB. APP’X 12(d) (2017), available at <http://www.afj.org/wp-content/uploads/2017/06/A-Certain-Starting-Place.pdf>. At his hearing and in his answers to questions for the record, he apologized for using this slur. Bush QFRs, *supra* note 4, at 53–54.