



NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

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April 12, 2018

The Honorable Mitch McConnell
Senate Majority Leader
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Charles E. Schumer
Senate Minority Leader
322 Hart Senate Office Building
Washington, DC 20510

**RE: OPPOSITION TO THE CONFIRMATION OF STUART KYLE DUNCAN TO
THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT**

Dear Majority Leader McConnell and Minority Leader Schumer:

The NAACP strongly opposes the Senate confirmation of Stuart Kyle Duncan to the U.S. Court of Appeals for the Fifth Circuit. Mr. Duncan is a white, male attorney practicing law in Washington DC who has been nominated to a Louisiana seat on the Fifth Circuit. We oppose the confirmation because Mr. Duncan is a dangerous ideologue who has spent his career battling against civil rights protections for non-white communities while, aggressively seizing opportunities to roll back legal progress in civil rights, particularly in the South. By any reasonable and objective standard, Mr. Duncan's record must be regarded as spectacularly disqualifying for any federal judgeship, let alone an appellate court appointment. The Senate must reject his nomination.

President Trump's nomination of Mr. Duncan to the Fifth Circuit is a brazen insult to the civil rights legacy of this court. During the civil rights movement, judges serving on the Fifth Circuit became the "Unlikely Heroes," as Jack Bass's iconic book called them, who courageously enforced the Supreme Court's ruling in *Brown v. Board of Education* in the face of massive resistance and grave personal danger. Committed to the rule of law, the judges of the Fifth Circuit extended the principles of *Brown* to desegregate public institutions of all types throughout the South.

Today, the Fifth Circuit remains of vital importance to the NAACP, vulnerable communities, and to the advancement and enforcement of civil right protections. The three states comprising the Fifth Circuit—Louisiana, Mississippi, and Texas—have the largest percentage of persons of color of any circuit in the country. As a result, the Fifth Circuit presides over a tremendous number of civil rights cases involving discrimination based on race, ethnicity, and national origin. The issues at stake include voting rights, equal educational opportunity, employment discrimination, fair housing, environmental justice, and the criminal justice system, including the death penalty. For decades, the NAACP has fought to ensure that judicial nominees to the Fifth

Circuit are diverse, fair, independent, and committed to the progress our nation has made in civil rights.

As a threshold matter, we are gravely concerned about the lack of racial and ethnic diversity with respect to the Duncan nomination and nominations to this court generally. Although the Fifth Circuit has the highest percentage of residents of color, four of President Trump's five appointees to this court are white. The White House's recent appointment of Fifth Circuit Judge Edward Prado to serve as Ambassador to Argentina is also worthy of note as his departure leaves no active Hispanic representation on this appellate court for the first time in decades. This refusal to diversify appointments to the Fifth Circuit is reflective of an extremely disturbing pattern evidenced in President Trump's judicial selections overall. Of 106 judicial nominations made by President Trump, only one is African American and only three are Latino.

Moreover, the State of Louisiana is long overdue for increased racial diversity on its federal appellate and district courts. Throughout its long history, Louisiana has had only one person of color serve on the Fifth Circuit. Judge Carl Stewart, an African American, was appointed by President Clinton in 1994 and now serves as its Chief Judge. At the federal district court level, African Americans hold only 2 of the 22 seats in Louisiana. These numbers are woefully inadequate and wholly misrepresentative of a state where African Americans comprise a full one-third of the population. A new study by Tulane University on judicial diversity within Louisiana's federal and state courts warned that President Trump's nominations of almost exclusively white males mean that "federal courts in Louisiana will likely become less diverse."¹ President Trump has made five nominations to Louisiana's federal district courts. Not only were these nominees exclusively white, one of the nominees, Wendy Vitter, refused to tell the Senate Judiciary Committee whether *Brown v. Board of Education* was correctly decided.²

However, our opposition to Kyle Duncan's nomination extends well beyond the issue of diversity. Throughout his career, Kyle Duncan has demonstrated an unparalleled ferociousness in fighting civil rights in all shapes and in all forms. Not only has he taken aggressively adverse positions in civil rights litigation, but he has also consistently searched for opportunities to undermine civil rights jurisprudence with such zealotry it borders on fanaticism.

At first glance, Kyle Duncan's record on voting rights is deeply disturbing. However, when one considers the Fifth Circuit's jurisdiction over twenty million people of color and the significance of its voting rights docket to the entire country, Mr. Duncan's record is unquestionably terrifying. More than fifty years after the passage of the Voting Rights Act, we expect our nation's federal judges to be committed to ensuring full participation for everyone in our democracy. Kyle Duncan's record reflects no such commitment. Instead, he repeatedly contributed to state-sponsored efforts throughout the South to prevent or discourage African Americans from fully participating in our political process.

Specifically, Duncan defended the actions of the North Carolina Legislature to enact a host of draconian voter suppression measures that included a strict voter ID requirement. The North Carolina NAACP led the challenge to this "monster voter suppression law." The U.S. Court of

¹ K. Brannon, *Tulane Study Finds Slow Progress for Women and Minorities in Louisiana Judiciary*, Tulane University News, Jan. 24, 2018, citing "The Gender and Race of Louisiana's Judges 1992 – 2017, a Research Report by Heather L. Johnson and Sally J. Kenney, January 2018.

² Rebecca Shapiro, *Trump Judicial Nominee Refuses to Say Whether She Agrees with Desegregated Schools*, HUFFINGTON POST, April 11, 2018.

Appeals for the Fourth Circuit ruled that the legislature purposefully discriminated against Black voters and “targeted African Americans with almost surgical precision.”³ Duncan joined Thomas Farr, President Trump’s nominee to the Eastern District of North Carolina whom the NAACP also opposes, in assisting North Carolina with its unsuccessful appeal of the ruling to the Supreme Court. In his brief seeking Supreme Court review, Duncan chastised the Fourth Circuit: “The notion that *these* election laws are reminiscent of the ‘era of Jim Crow’ is ludicrous.”⁴ He wrote: “In the eyes of the panel, where North Carolina is concerned, it is *always* 1965. The opinion conjures a menacing world where ‘race and politics’ are ‘inextricab[ly] linked,’” and “where ‘powerful undercurrents’ tempt legislators to racial warfare.”⁵ Duncan stated that the court’s ruling “insults the people of North Carolina and their elected representatives by convicting them of abject racism.”⁶

Duncan just as eagerly defended the Texas voter ID law that federal courts similarly found was adopted with an intent to discriminate against voters of color. The Texas NAACP challenged this law, known as the most restrictive in the nation, under the Voting Rights Act. More than 600,000 registered voters lacked the required forms of ID, which included a handgun license but excluded student ID. Sitting *en banc*, the Fifth Circuit upheld a district court decision striking down the ID law as racially discriminatory against Black and Latino voters.⁷ Duncan filed an amicus brief asking the Supreme Court to overturn the Fifth Circuit ruling, which he said “converts a prohibition on abridging minority voters’ right to vote into a mandate for boosting minority voting.”⁸ Texas had relied on the myth of voter fraud to enact the law, and Duncan endorsed this manufactured motive in his brief, writing that “voter identification requirements not only help prevent voter fraud, but also foster public confidence in elections.”⁹ The Supreme Court declined review.¹⁰

Mr. Duncan’s record on criminal justice is equally abysmal. He opposed retroactive application of the Supreme Court’s holding in *Miller v. Alabama* that mandatory life sentences for juveniles without the possibility of parole were unconstitutional.¹¹ He defended inhumane conditions in prison, arguing that severe overcrowding in California jails did not constitute an Eighth Amendment violation.¹²

Most shockingly, Duncan led an effort to overturn a \$14 million-dollar wrongful conviction verdict based on horrendous prosecutorial misconduct. John Thompson, an African American, served 14 years on death row because the New Orleans District Attorney failed to turn over evidence of his innocence; his execution was scheduled seven times before he was finally exonerated. The Fifth Circuit upheld the historic jury verdict that awarded him \$1 million for every year he served on death row. But Kyle Duncan appealed the case to the Supreme Court

³ *N.C. St. Conf. of the NAACP v. McCrory*, 831 F.3d 204, 211 (4th Cir. 2016).

⁴ Petition for Writ of Certiorari, at 20, *N.C. St. Conf. of the NAACP v. McCrory*, 581 U.S. __ (2017) (emphasis in original).

⁵ *Id.* at 19 (emphasis in original).

⁶ *Id.* at 2.

⁷ *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

⁸ Brief for Members of Congress Representing States in the Fifth Circuit as Amicus Curiae Supporting Petitioners, at 15-16, *Abbott v. Veasey*, 137 S. Ct. 612 (2017).

⁹ *Id.* at 1.

¹⁰ 137 S. Ct. 612 (2017).

¹¹ Brief of Respondent State of Louisiana, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

¹² Brief for Louisiana, et al. as Amici Curiae in Support of Appellants, *Schwarzenegger v. Plata*, 563 U.S. 493 (2010).

and won a 5-4 reversal¹³ in what has been called one of the Court's "meanest rulings."¹⁴ Former Supreme Court Justice John Paul Stevens repeatedly criticized the ruling for its "untenable rationale" and "manifest injustice."¹⁵ In a powerful op-ed in the New York Times, John Thompson, who is now deceased, wrote:

"Worst of all, I wasn't the only person they played dirty with. Of the six men one of my prosecutors got sentenced to death, five eventually had their convictions reversed because of prosecutorial misconduct. Because we were sentenced to death, the courts had to appoint us lawyers to fight our appeals. I was lucky, and got lawyers who went to extraordinary lengths. But there are more than 4,000 people serving life without parole in Louisiana, almost none of whom have lawyers after their convictions are final. Someone needs to look at those cases to see how many others might be innocent."¹⁶

Kyle Duncan has also demonstrated an unqualified animosity to the rights of the LGBTQ community. He is a staunch opponent of marriage equality and co-authored an amicus brief for Louisiana and other states in *Obergefell v. Hodges* which opposed "constitutionalizing the issue."¹⁷ He then strongly criticized the Supreme Court's marriage equality ruling, saying "the decision imperils civil peace,"¹⁸ and "raises a question about the legitimacy of the Court."¹⁹ When the Fourth Circuit struck down Virginia's ban on same-sex marriage,²⁰ Duncan sought reversal from the Supreme Court on behalf of state officials refusing to issue marriage licenses for same-sex couples.²¹ The Supreme Court denied his petition.²²

In his zeal to attack the LGBTQ community, Duncan appeared in some of the most prominent efforts to deny rights to transgender children. He represented the Gloucester County School Board in Virginia in opposing the right of Gavin Grimm, a transgender high school student, to use the boys' restroom. After the Fourth Circuit struck down the policy, Duncan appealed to the Supreme Court, arguing that the decision "would upend the ingrained practices of nearly every school in the nation on a matter of basic privacy and dignity," and that "no one imagined" that Title IX would be used to "erase all distinctions between men and women, nor dismantle expectations of privacy between the sexes."²³ In North Carolina, Duncan served as lead counsel for the North Carolina General Assembly in defending HB2, the discriminatory state law that prohibited transgender individuals from using the restroom of their choice.²⁴ His expressions of disdain for LGBTQ rights extend beyond his advocacy in litigation. On several occasions, Duncan has delivered remarks to the Alliance Defending Freedom,²⁵ a legal advocacy and

¹³ *Connick v. Thompson*, 563 U.S. 51 (2011).

¹⁴ Dahlia Lithwick, *Cruel But Not Unusual*, SLATE, Apr. 1, 2011.

¹⁵ Letter to the Editor by former Supreme Court Justice John Paul Stevens, *Prosecutors' Misconduct*, NY TIMES, Feb. 18, 2015.

¹⁶ John Thompson, *The Prosecution Rests, But I Can't*, NY TIMES, Apr. 9, 2011.

¹⁷ Brief for Louisiana, et al. as Amici Curiae Supporting Respondents, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹⁸ Kyle Duncan, *Obergefell Fallout*, Contemporary World Issues: Same-Sex Marriage (ABC-CLIO 2016).

¹⁹ Interview with Raymond Arroyo, World Over, EWTN Global Catholic Network, July 2, 2015.

²⁰ *Bostic v. Schaefer*, 760 F.3d 353 (4th Cir. 2014).

²¹ Petition for Writ of Certiorari, *Schaefer v. Bostic*, 135 S. Ct. 308 (No. 14-225).

²² 135 S. Ct. 308 (2014).

²³ Ariane Vogue, *Transgender Teen Moves Forward with Supreme Court Challenge After Trump Action*, CNN, Feb. 23, 2017.

²⁴ *Carcano v. McCarty*, 315 F.R.D. 176 (M.D.N.C. 2016); *United States v. North Carolina*, 2016 U.S. Dist. LEXIS 174103 (M.D.N.C. Dec. 16, 2016).

²⁵ Sen Comm. on the Judiciary, 115th Cong., Stuart Kyle Duncan: Questionnaire for Judicial Nominees, 14-15.

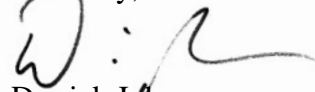
training organization which has supported the recriminalization of homosexuality and which the Southern Poverty Law Center has classified as a “hate group.”²⁶

Duncan has also lent his services to the fight against immigrant rights. He wrote an amicus brief for the National Sheriffs’ Association in the challenge to the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) executive order. He invoked inflammatory public safety concerns about naturalizing undocumented immigrants, arguing that “[m]any violent criminals would likely be eligible to receive deferred action under DAPA’s inadequate standards.”²⁷ He also challenged the Deferred Action for Childhood Arrivals (DACA) program, writing in yet another amicus brief that DACA is “offensive to the constitutional order.”²⁸ Duncan has also used the law to reduce access to women’s health care and reproductive freedom. For example, he served as lead counsel for Hobby Lobby in its challenge to the contraceptive mandate of the Affordable Care Act as a violation of the Religious Freedom Restoration Act. He argued that corporations are persons with religious rights and can deny contraceptive coverage as part of health insurance plans consistent with their religious beliefs.²⁹

It is the charge of federal courts, and its judges, to serve as the guardian of civil rights for all Americans. Those given the honor to serve on those courts must demonstrate a respect for the rule of law and for the advances our nation has made in ensuring equal justice for all. Kyle Duncan’s long record of hostility to civil rights protections across the board demonstrates that he lacks the fundamental qualities necessary for dispensing justice in a fair and impartial manner. We urge the Senate to reject his nomination to the Fifth Circuit Court of Appeals.

Thank you for considering the NAACP’s strong opposition to this nomination. Should you have any questions or comments, please do not hesitate to contact Hilary Shelton, Director of the Washington Bureau and Senior Vice President for Policy and Advocacy, at his office at (202) 463-2940.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Johnson", with a stylized flourish extending from the end.

Derrick Johnson,
President and CEO

²⁶ See Alex Amend, *Anti-LGBT Hate Group Alliance Defending Freedom Defended State-Enforced Sterilization for Transgender Europeans*, SPLC HATEWATCH, July, 27, 2017.

²⁷ Brief for National Sheriffs’ Association, et al. as Amici Curiae Supporting Respondents, *United States v. Texas*, 579 U.S. __ (2016).

²⁸ Brief for Governor Jeb Bush as Amicus Curiae Supporting Petitioners, *Brewer v. Arizona Dream Act Coalition*, 137 S. Ct. 2320 (2017).

²⁹ Brief for Respondents, *Sebelius v. Hobby Lobby Stores, Inc.*, 573 U.S. __ (2014).