



November 28, 2017

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OPPOSE THE CONFIRMATION OF STUART KYLE DUNCAN TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I write in strong opposition to the confirmation of Stuart Kyle Duncan to the U.S. Court of Appeals for the Fifth Circuit.

Mr. Duncan is a right-wing ideologue who has devoted his legal career to undermining civil and constitutional rights in America. He has aggressively advanced a radical personal agenda to set back LGBT rights, voting rights, immigrant rights, women's reproductive freedom, and criminal justice progress. Like every Trump circuit court nominee except one, Mr. Duncan is a member of the ultraconservative Federalist Society, and he has spoken to that legal organization on 26 occasions.¹ Mr. Duncan is so extreme that even one of his home-state senators, conservative Republican John Kennedy, has not yet agreed to support him.² It would be deeply troubling if Mr. Duncan were confirmed for a lifetime position to the Fifth Circuit, and I urge the Senate to reject his nomination.

LGBT Rights: Mr. Duncan has been at the center of the right-wing movement to diminish the civil and constitutional rights of the LGBT community. He has expressed outright hostility to marriage equality, writing in an April 2015 article just before the *Obergefell v. Hodges* decision was decided:

The plaintiffs are same-sex couples who assert that the Fourteenth Amendment removes same-sex marriage from democratic deliberation and compels all fifty states to adopt it. They are profoundly mistaken. The Constitution takes no sides on this issue, and so leaves it up to the states.... In our federal system, this issue must be resolved at the state level. To resolve it through federal judicial decree would demean the democratic process, marginalize the views of millions of Americans, and do incalculable damage to our national civil life.... It is often asked by proponents of same-sex marriage what "harms" would flow from judicial recognition of their claims. From the perspective of democratic self-government, those harms would be severe, unavoidable, and irreversible.³

¹ <https://www.judiciary.senate.gov/imo/media/doc/Duncan%20SJQ1.pdf>.

² http://www.theadvocate.com/baton_rouge/news/politics/article_402f06cc-cb1d-11e7-b626-672aa4e29e69.html.

³ <http://www.thepublicdiscourse.com/2015/04/14894/>.

Mr. Duncan made similar arguments in an amicus brief he wrote in the *Obergefell* case, which included the patronizing comment: “A decision from this Court constitutionalizing the issue of same-sex marriage would obliterate the significance of those remarkable democratic victories by same-sex marriage proponents.”⁴ After the *Obergefell* decision was issued, Mr. Duncan attacked it. He wrote: “I find *Obergefell* to be an abject failure,” and “the decision imperils civic peace.”⁵ In a July 2015 interview, he said the *Obergefell* decision “raises a question about the legitimacy of the Court.”⁶ In the case *Bostic v. Schaefer*,⁷ Mr. Duncan represented a Virginia clerk of court who refused to issue marriage licenses to same-sex couples. Mr. Duncan’s client, George Schaefer, lost at every stage of litigation in this case and after the Fourth Circuit struck down Virginia’s ban on same-sex marriage, Mr. Duncan filed a petition for writ of certiorari with the Supreme Court seeking reversal. The Supreme Court denied the petition.⁸ In light of Mr. Duncan’s demonstrated hostility to marriage equality, he would certainly need to recuse himself, if confirmed, in any case involving marriage equality and related issues.

Mr. Duncan has also been one of the nation’s leading lawyers in the effort to deny rights for transgender children. In *Gloucester County School Board v. G.G.*,⁹ he represented Virginia’s Gloucester County School Board in arguing that transgender high school student Gavin Grimm should not be permitted to use the boys’ bathroom. After the Fourth Circuit struck down the school board’s policy, Mr. Duncan appealed the decision to the Supreme Court and argued that Title IX does not protect transgender students. His brief was troubling in other respects as well. As Lambda Legal has explained: “Mr. Duncan’s brief deployed offensive and baseless ‘gender fraud’ arguments, suggesting that schools were entitled to refuse to respect a student’s gender identity in order to ‘prevent[] athletes who were born male from opting onto female teams, obtaining competitive advantages and displacing girls and women’ – a myth that has not materialized across hundreds of school districts with nondiscriminatory policies over many years.”¹⁰

Mr. Duncan was also involved in another major transgender case – he served as lead trial and appellate counsel for the North Carolina General Assembly in its defense of HB2, the discriminatory state law passed last year that prohibited transgender individuals from using the bathroom of their choice at state institutions.¹¹ In one case, *Carcano v. McCrory*,¹² Mr. Duncan filed a declaration by an “expert” who stated: “In psychiatry, a delusion is defined as a fixed, false belief which is held despite clear evidence to the contrary. In psychiatric practice, patients with the common diagnosis of anorexia nervosa have the false belief that they are overweight (‘fat’) in spite of overwhelming evidence of their cachexia. Similarly, those who are gender incongruent believe they are of the opposite sex despite clear and

⁴ Brief for Louisiana, et al. as Amici Curiae Supporting Respondents, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁵ Kyle Duncan, “Obergefell Fallout,” in *Contemporary World Issues: Same-Sex Marriage* (ABC-CLIO 2016).

⁶ Interview with Raymond Arroyo, *World Over*, EWTN Global Catholic Network, July 2, 2015.

⁷ 760 F.3d 353 (4th Cir. 2014).

⁸ 135 S. Ct. 308 (2014).

⁹ 137 S. Ct. 1239 (2017).

¹⁰ https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/final_lgbt_letter_opposing_willett_duncan_and_kacsmayk_002.pdf.

¹¹ <https://www.judiciary.senate.gov/imo/media/doc/Duncan%20SJQ1.pdf>.

¹² 315 F.R.D. 176 (M.D.N.C. 2016).

overwhelming evidence to the contrary.”¹³ In a separate case, Mr. Duncan represented North Carolina legislators who brought a lawsuit against the U.S. Department of Justice seeking a declaratory judgment that HB2 was constitutional.¹⁴

In a 2016 speech to the Heritage Foundation, Mr. Duncan ridiculed the Justice Department’s position in the HB2 litigation that gender identity rather than biological sex should be the critical factor in defining a person’s sex. After summarizing the Justice Department’s litigation position, Mr. Duncan stated:

So there you have it. And I submit to you that, taking this worldview about “sex” and “gender identity” at face value helps explain – not condone, but explain – why the Attorney General of the United States publicly states that a law like HB2 – a law that wants men to use the men’s restroom and the men’s shower, and that wants women to use the women’s restroom and the women’s shower – is just like Jim Crow laws and just like “fierce resistance” to *Brown v. Board of Education*.... Let that sink in. Our federal government is telling us – not merely what it thinks the law is – but what “is a man” and what “is a woman.” Something has gone wrong.¹⁵

In light of his clear bias toward transgender individuals, Mr. Duncan would need to recuse himself in any case involving gender identity or transgender issues. It is difficult to fathom how any future LGBT litigant would have confidence that they would receive a fair hearing before a judge with this demonstrated record of hostility.

In yet other anti-LGBT litigation, Mr. Duncan has attempted to deny adoption rights for same-sex couples. In *Adar v. Smith*,¹⁶ he argued that a same-sex couple from New York should not be able to adopt a child in Louisiana because that state had a law that permitted only married couples to adopt. Because New York law would have permitted the adoption, the lower court and Fifth Circuit granted the adoption. However, the Fifth Circuit sitting en banc reversed the ruling.¹⁷ In another case, *V.L. v. E.L.*,¹⁸ Mr. Duncan defended the birth mother in a same-sex couple who sought to deny custody and visitation rights to her ex-partner. The Supreme Court ruled against Mr. Duncan and upheld custody and visitation rights, which had been granted by Georgia when the couple was still together but denied by Alabama after they split, under the Constitution’s Full Faith and Credit Clause.

Lastly, it should be noted that Mr. Duncan has given three speeches to the extremist organization Alliance Defending Freedom,¹⁹ which has been designated a hate group by the Southern Poverty Law Center

¹³ https://doc-0s-bk-apps-viewer.googleusercontent.com/viewer/secure/pdf/3nb9bdfcv3e2h2k1cmql0ee9cvc5l0le/cq9kbcakp0ienj7fsqujq2h7nnt69p1b/1511883375000/lantern/*/ACFrOgA-ryeqi-2mywz67VfeZAaKZ27gAUgQX_2d9Dw85w2gvvTT4b3gl5dlx7BcjU9LqF75IGJo4By82aRMeV-PEfcV0ucwhipxZXxhxB43tMJ6T8SqpoMCCBAuwHc=?print=true at page 189.

¹⁴ Complaint for Declaratory Relief, *Berger v. United States*, No. 5:16-cv-00240-FL (E.D.N.C. May 9, 2016).

¹⁵ Kyle Duncan, Panelist, “Obama’s Edict on School Showers, Lockers and Bathrooms: Challenges and Legal Responses,” Heritage Foundation, Washington, DC, July 7, 2016.

¹⁶ 597 F.3d 697 (5th Cir. 2010).

¹⁷ 639 F.3d 146 (5th Cir. 2011).

¹⁸ 136 S. Ct. 1017 (2016).

¹⁹ <https://www.judiciary.senate.gov/imo/media/doc/Duncan%20SJQ1.pdf>.



(SPLC)²⁰ for its radical and offensive views on LGBT issues. According to the SPLC, the Alliance Defending Freedom “has supported the recriminalization of homosexuality in the U.S. and criminalization abroad; has defended state-sanctioned sterilization of trans people abroad; has linked homosexuality to pedophilia and claims that a ‘homosexual agenda’ will destroy Christianity and society.”²¹ Senators should interrogate Mr. Duncan about whether he agrees with those outrageous positions.

Voting Rights: Mr. Duncan aggressively defended North Carolina’s massive voter suppression law passed in 2013 in the wake of the Supreme Court’s *Shelby County v. Holder* decision, which struck down the Voting Rights Act provision that required jurisdictions like North Carolina with a history of voter discrimination to pre-clear voting changes with the U.S. Department of Justice. North Carolina’s law imposed a burdensome photo ID requirement, eliminated same-day voter registration and voting, reduced the availability of early voting, and prohibited the counting of out-of-precinct voting. This law was struck down last year by the Fourth Circuit, which concluded that the law had been passed with discriminatory intent. The Fourth Circuit stated that provisions of the law “target African Americans with almost surgical precision,” and the court described the law as “the most restrictive voting law North Carolina has seen since the era of Jim Crow.”²² In his brief to the Supreme Court seeking review of the case – which was co-written with Trump judicial nominees Thomas Farr (nominee to the Eastern District of North Carolina) and Stephen Schwartz (nominee to the U.S. Court of Federal Claims) – Mr. Duncan scolded the Fourth Circuit, writing that “the notion that *these* election laws are reminiscent of ‘the era of Jim Crow’ is ludicrous,” “[e]vidently in the Fourth Circuit’s eyes, where North Carolina is concerned, it is *always* 1965,” and “the decision insults the people of North Carolina and their elected representatives by convicting them of abject racism.”²³ The Supreme Court denied Mr. Duncan’s appeal.²⁴

In addition, Mr. Duncan defended Texas’s discriminatory photo ID law in the case *Abbott v. Veasey*.²⁵ He filed an amicus brief on behalf of Republican members of Congress asking the Supreme Court to overturn a Fifth Circuit en banc decision that upheld the district court decision to strike down the photo ID law because it was passed with discriminatory purpose or effect in violation of Section 2 of the Voting Rights Act. In his brief, Mr. Duncan perpetuated the voter fraud myth, stating: “Like other voting regulations, voter identification requirements not only help prevent voter fraud, but also foster public confidence in elections – thus facilitating the peaceful, orderly transfer of power that is a hallmark of American democracy.”²⁶ The Supreme Court denied Mr. Duncan’s appeal.

Immigrant Rights: Last year Mr. Duncan filed an amicus brief challenging the legality of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) executive order, which granted legal status to nearly four million illegal immigrant parents whose children are either U.S. citizens

²⁰ <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom>.

²¹ *Id.*

²² *N.C. St. Conf. of the NAACP v. McCrory*, 831 F.3d 204, 211, 219 (4th Cir. 2016).

²³ *Petition for Writ of Certiorari, N.C. v. N.C. St. Conf. of the NAACP*, 581 U.S. ___ (2017) (No. 16-833), 2016 WL 7634839, at *20, *2.

²⁴ *N.C. v. N.C. St. Conf. of the NAACP*, 137 S. Ct. 1399 (2017).

²⁵ 137 S. Ct. 612 (2017).

²⁶ *Brief for Members of Congress Representing States in the Fifth Circuit as Amici Curiae Supporting Petitioners, Abbott v. Veasey*, 137 S. Ct. 612 (2017).

or residents. Mr. Duncan called DAPA “a lawless departure from the Nation’s duly enacted immigration laws” and wrote: “DAPA would exacerbate the very safety problems Congress hoped to prevent. Combined with the policies of numerous ‘sanctuary cities’ on the detention of criminal aliens, DAPA’s implementation would greatly increase the risk of unauthorized immigrants committing serious crimes against American citizens and other lawful residents.”²⁷ DAPA remains blocked by a federal district court and was never formally implemented.

Mr. Duncan has also challenged the legality of President Obama’s other signature immigration program: Deferred Action for Childhood Arrivals (DACA), which defers the removal of non-citizens who entered the United States as children and who meet certain conditions. In an amicus brief filed just a few months ago, Mr. Duncan wrote that DACA is “offensive to the constitutional order” and “the Constitution did not permit President Obama to override Arizona law by executive order. A program like DACA, which purports to change legal rights and (according to the Ninth Circuit) preempt State law has to be passed by Congress. Otherwise, it is not law.”²⁸

Criminal Justice: Mr. Duncan has filed numerous Supreme Court briefs to try and limit the rights of criminal defendants. In *Montgomery v. Louisiana*, he argued against retroactive application of the *Miller v. Alabama* rule, which prohibited life sentences without parole for children.²⁹ In *Schwarzenegger v. Plata*, he argued that severe prison overcrowding in California jails did not constitute an Eighth Amendment violation.³⁰ And in *Padilla v. Kentucky*, Mr. Duncan argued that there was no valid ineffective assistance of counsel claim when a lawyer failed to inform her client that a guilty plea may result in deportation.³¹ The Supreme Court ruled against Mr. Duncan in all three cases.

Women’s Reproductive Freedom: Mr. Duncan has repeatedly and aggressively sought to diminish access to women’s health care and reproductive freedom. He served as the lead counsel for Hobby Lobby in the case *Hobby Lobby v. Burwell*,³² where the Supreme Court struck down the contraceptive mandate of the Affordable Care Act as a violation of the Religious Freedom Restoration Act. In his petition for a writ of certiorari, Mr. Duncan argued that corporations are persons with religious rights and should not have to provide contraception to employees.³³ Mr. Duncan also filed a brief in *Zubik v. Burwell*,³⁴ in which he made similar arguments but where the Supreme Court remanded the case and requested that the parties attempt to find a mutually satisfactory accommodation to provide contraceptive access. In *Stormans v. Wiesman*, Mr. Duncan filed an amicus brief arguing that Catholic pharmacists should not

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

³⁰ Brief for Louisiana, et al. as Amici Curiae in Support of Appellants, *Schwarzenegger v. Plata*, 563 U.S. 493 (2010).

³¹ Brief for Louisiana, et al. as Amici Curiae in Support of Respondent, *Padilla v. Kentucky*, 559 U.S. 356 (2010).

³² 573 U.S. ____ (2014).

³³ Brief for Respondents, *Sebelius v. Hobby Lobby Stores, Inc.*, 573 U.S. ____ (2014).

³⁴ Brief for Eternal World Television Network as Amicus Curiae in Support of Petitioners, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).



have to follow Washington state law that required pharmacists to fill contraception prescriptions.³⁵ And in *Whole Woman's Health v. Hellerstedt*, Mr. Duncan filed an amicus brief in support of the draconian Texas law – struck down by the Supreme Court in 2016 – that would have required any physician performing an abortion to have admitting privileges at a hospital within 30 miles of where the abortion was performed, and also would have required that all abortion clinics comply with standards for ambulatory surgical centers. Mr. Duncan wrote, incorrectly, that “settled law . . . requires deference to state judgments about the best means of protecting the health and safety of their citizens.”³⁶ In light of this record, Mr. Duncan could not be trusted to be impartial on any matter involving women’s reproductive health care.

Stacked Hearings: Chairman Grassley continues to abuse Senate tradition by scheduling hearings with multiple circuit court nominees. Mr. Duncan will be joined at his November 29 hearing by Eighth Circuit nominee David Stras. The tradition of having just one circuit court nominee per hearing exists because circuit courts are the second highest courts in the land, and they make critical decisions involving multiple states and tens of millions of people. Each such nominee is deserving of the Senate Judiciary Committee’s time, attention, and thorough examination. During the eight years of the Obama presidency, only three hearings featuring two circuit court nominees took place – out of 94 judicial nominations hearings – and Republican senators agreed to each of them. In just the first year of the Trump presidency, Chairman Grassley has jammed two circuit court nominees into four out of the 11 judicial nominations hearings – over 36% of the time – despite Democratic objections. Chairman Grassley has steamrolled President Trump’s judicial nominees through the committee and deprived the committee adequate time and resources to properly assess each lifetime nominee. This rushed process has already led to an embarrassing trend of previously undisclosed information coming to light after nominees have been reported from committee.

For the foregoing reasons, The Leadership Conference urges you to reject the nomination of Stuart Kyle Duncan to the U.S. Court of Appeals for the Fifth Circuit. Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel and Legal Director, at (202) 466-3311.

Sincerely,

Vanita Gupta
President & CEO

³⁵ Brief for U.S. Conference of Catholic Bishops, et al. as Amici Curiae in Support of Petitioners, *Stormans v. Wiesman*, 136 S. Ct. 2433 (2016).

³⁶ Brief for Association of American Physicians and Surgeons, Inc. as Amicus Curiae in Support of Respondents, *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).