

November 8, 2017

VIA EMAIL

The Honorable Charles Grassley
Chair
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C., 20510

Senator Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C., 20510

Dear Senators Grassley and Feinstein,

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 45 years, I write to express serious concerns regarding the nomination of Gregory Katsas to the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit is widely considered the second-most important court in the country, with national jurisdiction and a caseload that impacts environmental protections, federal agencies, workers' rights, and women's rights. Review of Mr. Katsas' legal record in light of his nomination to this most important court raises serious concerns.

Mr. Katsas' most problematic legal experience arises in the context of his current position as Deputy Assistant and Deputy White House Counsel to President Trump, which he has held since January 2017. In that capacity, he has been

providing legal advice to senior staff in the White House Office, including the President and the Counsel to the President; managing legal issues involving executive-branch agencies; [and] interviewing and recommending candidates for various executive and judicial appointments. . . .¹

His current position in the Administration that nominated him raises obvious questions about his ability, if confirmed, to act as an independent check on the Administration in future potential legal proceedings. But his work in the White House raises substantive concerns as well. As part of his Senate Judiciary Committee hearing, Mr. Katsas testified that he rendered legal advice on a number of Executive Branch actions that have severely curtailed women's legal rights in a variety of ways, including:²

¹ GREGORY KATSAS, UNITED STATES SENATE COMMITTEE ON THE JUDICIARY, QUESTIONNAIRE FOR JUDICIAL NOMINEES 33 (2017), available at <https://www.judiciary.senate.gov/imo/media/doc/Katsas%20SIQ.pdf> [hereinafter "KATSAS QUESTIONNAIRE"].

² See, e.g., Cogan Schneider, *Key Moments from Jones Day Alum Greg Katsas' Senate Confirmation Hearing*, NAT'L L.J. (Oct. 17, 2017), available at <https://www.law.com/nationallawjournal/almID/1202800650796>; U.S. SENATE COMMITTEE ON THE JUDICIARY, HEARINGS, NOMINATIONS (Oct. 17, 2017), available at <https://www.judiciary.senate.gov/meetings/10/17/2017/nominations>; GREGORY KATSAS, U.S. SENATE COMMITTEE ON THE JUDICIARY, QUESTIONS FOR THE RECORD (2017), available at

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- The DOJ guidance giving unprecedented weight to claims of religious liberty;
- The rules allowing employers to cite religious or moral objections to deprive their employees of birth control coverage under the Affordable Care Act;
- The Muslim travel ban, successive versions of which have been found to be unconstitutional;
- The ban on transgender individuals serving in the military;
- The removal of guidance on transgender students by the Departments of Education and Justice;
- The sham panel that has persisted in asserting voter fraud in the absence of evidence (the Presidential Advisory Commission on Election Integrity); and
- Ending the Deferred Action for Childhood Arrivals program.

Mr. Katsas was also involved in the Department of Justice’s decision to intervene in *Zarda v. Altitude Express*, currently pending before the Second Circuit, in order to argue that Title VII does not protect workers from discrimination on the basis of their sexual orientation,³ and in its decision to file an amicus brief in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,⁴ currently pending before the Supreme Court, arguing that the First Amendment precludes the application of Colorado’s general antidiscrimination law to a baker who refused to provide a wedding cake to a same-sex couple, simply because the couple is gay.

Mr. Katsas’ involvement in those cases and his approach to the law are especially concerning in light of the Administration’s policies on reproductive rights, immigrants, LGBTQ individuals, and religious and ethnic minorities. (He declined to answer questions about his work on those issues, citing attorney-client privilege).⁵ Although he asserted that he would recuse himself from any cases involving the issues on which he worked as Deputy White House Counsel, recusal would not address concerns about his impartiality and lack of bias, or his lack of independence.

In addition to his involvement in specific actions by the Administration, Mr. Katsas indicated in his questionnaire that he has interviewed and made recommendations “for various executive and judicial appointments.”⁶ Given that the Trump Administration has nominated numerous individuals with concerning views on women’s rights, LGBTQ rights, civil rights and more, Mr. Katsas’ leadership role in that process likewise raises concerns.

<https://www.judiciary.senate.gov/imo/media/doc/Katsas%20Responses%20to%20QFRs.pdf> [hereinafter “KATSAS QFRS”].

³KATSAS QFRS, *supra*.

⁴ *Id.*

⁵ *See, e.g., id.*

⁶ *See* KATSAS QUESTIONNAIRE, *supra* note 1.

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Prior to his service to this Administration, Mr. Katsas expressed troubling legal views on a number of other legal issues important to women. For example, in a speech before the Federalist Society, he argued that the federal Defense of Marriage Act could satisfy constitutional scrutiny based on the government's interest in facilitating the "ideal relationships for having and bearing children."⁷ He stated that "the best arrangement for a child is to be raised by both of the child's biological parents, which by definition have to be one man and one woman."⁸ The bald assertion that it is "ideal" for children to be raised in families with opposite-sex parents raises questions about whether LGBTQ individuals would receive fair treatment, and a fair hearing, from Mr. Katsas if he were confirmed to the D.C. Circuit.

In addition, Mr. Katsas has praised decisions that may make it more difficult for plaintiffs to vindicate their rights in employment discrimination and civil rights cases. For example, while in private practice, Mr. Katsas testified in support of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), cases which changed the law to require plaintiffs in civil cases to state a "plausible" claim for relief in their initial complaint with greater factual specificity than previously mandated. Mr. Katsas testified in opposition to legislation intended to overturn these decisions,⁹ and asserted that the decisions had had limited impact on litigation, based on data from the federal court system that was available shortly after the Supreme Court's decisions were handed down.¹⁰ However, subsequent research suggests that the number of cases – and particularly civil rights cases – dismissed on the grounds of lack of specificity in the pleadings increased dramatically in the year following the *Iqbal* decision.¹¹ Given his outspoken support of decisions like *Iqbal*, plaintiffs coming before Mr. Katsas, if he were confirmed, would have legitimate concerns about whether or not they would have a fair opportunity to pursue their civil claims before the court.

Further, according to press accounts, Mr. Katsas was selected to work in the White House Counsel's office in order to further that office's broad effort to "roll back regulatory efforts across the U.S. government," in part, because of his work "challeng[ing] the Affordable Care Act

⁷ Gregory Katsas, *Defending the Defense of Marriage Act*, Federalist Society for Law & Public Policy Studies, Indianapolis, Indiana (Aug. 18, 2011).

⁸ *Id.*

⁹ See *Open Access to Courts Act of 2009: Hearing on H.R. 4115 Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Jud.*, 111th Cong. 67-109 (2009).

¹⁰ See *id.* at 93-96.

¹¹ See Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleadings Standards in Employment and Housing Discrimination Litigation*, 100 KENTUCKY L. J. 235 (2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1941294.

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at the Supreme Court while in private practice.”¹² White House Counsel Don McGahn, moreover, described several lawyers in the White House Counsel’s office as “appellate lawyers who have spent their careers fighting regulatory and government overreach.”¹³ This description raises serious questions about whether, if confirmed to a court with special jurisdiction over administrative law, he could set aside his previous antiregulatory advocacy and impartially evaluate federal regulations, many of which have been critically important in implementing women’s legal rights.

The nomination of Gregory Katsas to a lifetime position on the U.S. Court of Appeals for the District of Columbia Circuit raises serious concerns for the National Women’s Law Center. 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

cc.: Judiciary Committee

¹² See, e.g., Zeke J. Miller, *President Trump’s Lawyers Plan a White House Legal Attack on Federal Agency Power*, TIME (Mar. 13, 2017), available at <http://time.com/4700311/donald-trumpwhite-house-counsel-steve-bannon/>.

¹³ *Id.*

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