

January 11, 2018

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 urge you to oppose the nomination of Stuart Kyle Duncan to the United States Court of Appeals for the Fifth Circuit.

Review of Mr. Duncan's record is incredibly worrisome. In particular, if Mr. Duncan is confirmed, his record pertaining to women's rights and the rights of LGBTQ individuals gives reason to doubt that he would uphold core constitutional rights and protections.

Women's Reproductive Rights and Health

Mr. Duncan has demonstrated support for allowing religious beliefs to override a women's ability to access birth control.

- As General Counsel at the Becket Fund for Religious Liberty, Duncan played a leading role in *Burwell v. Hobby Lobby Stores, Inc.*, serving as counsel of record for Hobby Lobby. In this role, Duncan advanced troubling legal arguments that went far beyond existing law, and far beyond the U.S. Supreme Court's ultimate decision. For instance, Duncan's arguments failed to acknowledge the importance of birth control to women's lives, arguing that the government did not have a compelling interest in ensuring access to birth control without cost-sharing and arguing that the Court was not required to consider the impact on employees under the Religious Freedom Restoration Act (RFRA).¹ The U.S. Supreme Court rejected each of these arguments. Five Justices found that the government has a compelling interest, and a compelling interest was assumed by the other four Justices. And every member of the *Hobby Lobby* Court, whether in the majority or in

¹ See Brief for Respondents Hobby Lobby Stores, Inc. et al., *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751 (2014)(13-354).

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dissent, reaffirmed that burdens on third parties must be considered under RFRA.²

- Following the *Hobby Lobby* decision, Mr. Duncan authored an *amicus* brief to the Supreme Court in *Zubik v. Burwell* on behalf of Eternal World Television Network, a non-profit organization seeking an exemption from the Affordable Care Act (ACA) birth control benefit. In the brief, Mr. Duncan argued that even the accommodation to the ACA birth control benefit – which allows certain non-profit employers to opt out of the benefit but still guarantees women seamless birth control coverage – violates RFRA. In the brief, he again disregarded the need to consider third party harm, arguing that RFRA could only be satisfied if objecting non-profit employers were exempt entirely from the birth control benefit, leaving their employees without insurance coverage of birth control.³ This was an approach far beyond the Court’s ultimate order, which directed the government and parties to arrive at an approach that ensures that affected women “receive full and equal health coverage, including contraceptive coverage.”⁴
- Mr. Duncan co-wrote an *amicus* brief in support of the petition for certiorari to the Supreme Court in *Stormans, Inc. v. Weisman* on behalf of the United States Conference of Catholic Bishops. The brief mischaracterized a Washington State regulation requiring pharmacies to “deliver lawfully prescribed drugs or devices,” including emergency contraception. Mr. Duncan argued that the regulation violated the Free Exercise Clause and that pharmacies must be allowed to refuse to fill birth control prescriptions.⁵ Duncan’s arguments would expand the reach of the Free Exercise Clause, making it easier for religiously-affiliated institutions to invalidate laws of general applicability, including those protecting women’s health. These arguments were rejected by the Ninth Circuit Court of Appeals, and the Supreme Court declined to review the case.

Mr. Duncan has also expressed skepticism about the importance of birth control to women’s health and economic well-being and asserted that women struggling to make ends meet had adequate access to birth control before the ACA’s birth control benefit.⁶ These comments call into question his ability to apply the law correctly and suggest that he would seek to expand the reach of RFRA in ways that would undermine women’s access to birth control coverage. This is not just hypothetical—cases challenging the Trump Administration’s rollback of the birth control benefit are pending in courts across the country.

² See *Hobby Lobby*, 134 S. Ct. 2751.

³ See Brief for Amicus Curiae Eternal World Television Network in Support of Petitioners, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016)(14-1418).

⁴ *Zubik*, 136 S. Ct. at 1560.

⁵ See Brief of Amici Curiae United States Conference of Catholic Bishops and Washington State Catholic Conference Supporting Petitioners, *Stormans v. Weisman*, 136 S. Ct. 2433 (2016) (15-862) *petition for cert. denied*.

⁶ Adelaide Darling, *Experts warn of troubling mindset behind conscience threats*, EWTN (Mar. 5, 2013), <http://www.ewtnnews.com/catholic-news/US.php?id=7163>.

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Mr. Duncan also co-authored an amicus brief on behalf of the Association of American Physicians and Surgeons to the Supreme Court in *Whole Woman's Health v. Hellerstedt* expressing widely discredited medical views about the need for the arbitrary restrictions on abortion clinics and providers at issue in the case.⁷ The Court resoundingly rejected these arguments, finding that the restrictions at issue did not provide medical benefits.⁸ In that case, the Court made clear that the burdens imposed by abortion restrictions must be weighed against any benefits—when the burdens outweigh the benefits, the restriction is unconstitutional. However, this brief calls into question whether Mr. Duncan, if confirmed, would give undue merit to medically inaccurate arguments, thereby tipping the scale in favor of abortion restrictions.

LGBTQ Rights

Similarly, Mr. Duncan's record regarding LGBTQ individuals and rights raises serious concerns. As an initial matter, he has made statements decrying "general cultural acceptance of homosexuality."⁹ In addition, he has taken numerous positions in cases that are hostile to the rights of LGBTQ people. For example:

- Mr. Duncan authored an *amicus brief* supporting Louisiana's "Defense of Marriage" law in *Robicheaux v. George*, 135 S.Ct. 995 (2015).¹⁰
- Mr. Duncan also wrote an *amicus brief* supporting Virginia's Defense of Marriage law in *Schaefer v. Bostic*, 135 S.Ct. 308 (2014).¹¹
- In *V.L. v. E.L.*, he argued that a woman who had adopted the children of her same-sex partner, with whom she had raised the children for eight years, should be denied parental rights.¹²
- Mr. Duncan authored an *amicus brief* opposing marriage equality in *Obergefell v. Hodges*.¹³ Also, Mr. Duncan wrote in a contemporaneous article that if the Court recognized that same-sex marriage was a fundamental right, the "harms" to our democracy "would be severe, unavoidable, and

⁷ See Brief of Amicus Curiae Assoc. of Am. Physicians and Surgeons, Inc. in Support of Respondents, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2015)(15-274).

⁸ See *Whole Woman's Health*, 136 S. Ct. 2292.

⁹ Kyle Duncan, Remarks at the EWTN Global Catholic Network 2013 Family Celebration: Religious Liberties Roundtable (Aug. 17-18, 2013).

¹⁰ See Respondents' Brief in Support of Petition for Writ of Certiorari Before Judgment, *Robicheaux v. George*, 135 S.Ct. 995 (2015) (No. 14-596).

¹¹ See Petition for a Writ of Certiorari, *Schaefer v. Bostic*, 135 S.Ct. 308 (2014) (No. 14-225).

¹² See Respondent E.L.'s Brief in Opposition, *V.L. v. E.L.*, 136 S. Ct. 1017 (2016) (No. 15-648); see also Jess Bravin, *Supreme Court Allows Lesbian Adoptive Mother to See Children in Alabama Case*, WALL ST. J. (Dec. 14, 2015), <https://www.wsj.com/articles/supreme-court-allows-lesbian-adoptive-mother-to-see-children-in-alabamacase-1450123712>.

¹³ See Brief of Amici Curiae Louisiana, et al. Supporting Respondents, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574).

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irreversible,”¹⁴ and his brief made similar arguments.¹⁵ After the *Obergefell* decision upheld the right to same-sex marriage, Mr. Duncan said that “[the same-sex marriage case] raises a question about the legitimacy of the Court,”¹⁶ and that he found the decision “to be an abject failure.”¹⁷

- Mr. Duncan represented the Gloucester County School Board in *Gloucester County Sch. Bd. v. G.G.*, No. 16-273 (Mar. 6, 2016). As Lambda Legal wrote, “In particular, 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.”¹⁸
- Mr. Duncan also served as lead trial and appellate counsel for the North Carolina General Assembly in *Carcaño v. McCrory*, 315 F.R.D. 176 (M.D.N.C. 2016) and *United States v. North Carolina*, 2016 U.S. Dist. LEXIS 174103 (M.D.N.C. Dec. 16, 2016), defending North Carolina’s discriminatory “bathroom bill.” In *Carcaño*, Duncan introduced expert declarations that characterized transgender Americans as being delusional.¹⁹

In addition, Duncan has spoken multiple times before the Alliance Defending Freedom, which the Southern Poverty Law Center has classified as a “Hate Group” that “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.”²⁰ Taken together, Mr. Duncan’s statements, writings, and litigation positions raise serious concerns about whether

¹⁴ Kyle Duncan, *Marriage, Self-Government, and Civility*, PUBLIC DISCOURSE (Apr. 23, 2015), available at <http://www.thepublicdiscourse.com/2015/04/14894/>.

¹⁵ See e.g., Brief of Amici Curiae Louisiana, et al. Supporting Respondents, *supra* note 13, at 31 (arguing that creating a constitutional right to same-sex marriage “would do incalculable damage to our civic life in this country”).

¹⁶ Interview with Raymond Arroyo, WORLD OVER, EWTN Global Catholic Network (July 2, 2015).

¹⁷ Kyle Duncan, *Obergefell Fallout*, in CONTEMPORARY WORLD ISSUES: SAME-SEX MARRIAGE 131, 132 (David Newton ed., 2016).

¹⁸ See Letter from Lambda Legal to Chairman Grassley and Ranking Member Feinstein 6 (Nov. 14, 2017), available at https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/final_lgbt_letter_opposing_willett_duncan_and_kacsmaryk_002.pdf (quoting Brief of Petitioner at 41).

¹⁹ See Supplemental Brief of State Defendants and Intervenor-Defendants in Opposition to Plaintiff’s Due Process Claim, *Carcaño v. McCrory*, No. 1:16-cv-00236-TDS-JEP (M.D. NC. Oct. 28, 2016), Decl. of Paul W. Hruz, M.D. ¶ 38 (p. 137), Quentin L. Van Meter, M.D. ¶ 50 (p. 170), Decl. Allan M. Josephson, M.D. ¶ 42 (p. 189), available at <https://docs.google.com/viewerng/viewer?url=http://files.eqcf.org/wp-content/uploads/2016/11/173-Ds-and-I-Ds-Supp-Brief-Oppn-Ps-Due-Process-Claim.pdf>.

²⁰ S. Poverty L. Ctr., *Extremist Group Info: Alliance Defending Freedom*, <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom> (last visited Dec. 11, 2017).

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he would recognize and properly apply Constitutional protections for LGBTQ individuals when considering cases involving marriage equality, adoption rights for same-sex couples, or the rights of transgender individuals if he is confirmed.

For all of the foregoing reasons, the National Women's Law Center urges you to reject the nomination of Stuart Kyle Duncan to a lifetime position on the U.S. Court of Appeals for the Fifth Circuit. 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,

A handwritten signature in blue ink that reads "Fatima Goss Graves". The signature is written in a cursive, flowing style.

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

cc.: Judiciary Committee