

November 9, 2017

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

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

RE: 21 LGBT Groups Oppose Confirmation of Gregory G. Katsas

Dear Chairman Grassley and Ranking Member Feinstein:

We, the undersigned 21 national, state and local advocacy organizations, representing the interests of lesbian, gay, bisexual and transgender (LGBT) people and everyone living with HIV, urge you to oppose the nomination of Gregory G. Katsas to the United States Court of Appeals for the District of Columbia. After a comprehensive review of Mr. Katsas's record, we have concluded that his views on civil rights issues are fundamentally at odds with the notion that LGBT people are entitled to equality, liberty, justice and dignity under the law.

As deputy counsel in the White House Counsel's office, Mr. Katsas has been a legal architect behind several of the Trump administration's most odious actions and policies targeting the LGBT community. We wish to call your attention to aspects of his record that illustrate why he poses a grave threat to the communities that our organizations serve and is not an appropriate candidate for the bench.

Mr. Katsas provided legal advice to the President on the ban on transgender individuals serving openly in the U.S. military. Indeed, the White House Counsel's office appeared to play a central role in morphing the trans military ban from tweet to policy. It was reported that the White House Counsel's office signed off on a "guidance" for implementation of President Trump's tweets announcing the ban. Additionally, it was reported that the guidance on the transgender service ban went back to the White House Counsel's office for "adjustments" in response to public statements by organizations after news broke that the 2½ page memo implementing the tweets was on its way to Defense Secretary Mattis. Mr. Katsas confirmed that he "provided legal advice on many of these issues."¹

Mr. Katsas also provided legal advice in the February 2017 decision by Attorney General Jeff Sessions and Secretary of Education Betsy DeVos to revoke federal guidelines intended to assist schools

¹ Senate Judiciary Committee, *Nomination of Greg Katsas to the U.S. Court of Appeals for the D.C. Circuit Questions for the Record, Submitted October 24, 2017, available at* <https://www.judiciary.senate.gov/imo/media/doc/Katsas%20Responses%20to%20QFRs.pdf>

in protecting transgender students from discrimination and complying with their obligations under Title IX.² At a time when transgender students are less likely to graduate and more likely to suffer violence and severe physical and emotional injuries, the withdrawal of the Title IX guidance invites schools to believe that transgender students are not entitled to access bathrooms or other single-sex facilities consistent with their gender identity, or that the law or their obligations under Title IX to protect transgender students have somehow changed, which is simply not the case.

In addition to the Trump administration's anti-civil-rights policies and actions, Mr. Katsas's fingerprints can be found on litigation seeking to dismantle legal protections for LGBT people. In July 2017, the Justice Department intervened in *Zarda v. Altitude Express*, a private employment lawsuit, to argue that the ban on sex discrimination in the Civil Rights Act of 1964 does not protect workers from discrimination on the basis of their sexual orientation.³ In August 2017, the Justice Department filed an amicus brief in support of the petitioner in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, arguing that First Amendment guarantees of freedom of expression preclude application of Colorado's general antidiscrimination law to a bakery that objects to providing custom-made wedding cakes to same-sex couples.⁴ Mr. Katsas has confirmed that he was involved in both these efforts.⁵

While his recent anti-LGBT legal work has been prolific, Mr. Katsas is not new to opposing LGBT rights. While he worked at the Justice Department, Mr. Katsas defended the so-called Defense of Marriage Act ("DOMA") that defined marriage for federal purposes as excluding same-sex couples, and between 2004 and 2006, he served as counsel in two different cases attempting to uphold the statute.⁶ While speaking before the Federalist Society in 2011, he was critical of the Obama administration's decision not to defend the legality of DOMA. Mr. Katsas argued that same-sex couples are not optimal parents, stating that government had a legitimate interest "in facilitating the ideal relationships for having and rearing children" and that "it seems to me pretty self-evident, but at least a debatable point, that the other things equal 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."⁷ When recently asked whether he understands why same-sex parents may be concerned that they will not get a fair hearing in his courtroom in light of these comments, he responded: "I do not believe that any such concerns would be warranted."⁸

Not only do these words demonstrate Mr. Katsas's complete and categorical disregard for any families other than those formed by heterosexual, gender conforming individuals, they are also in deep tension with the Supreme Court's decision in *Obergefell v. Hodges*, which recognized marriage equality as the law of the land. The majority of the Court in *Obergefell* was concerned that "[w]ithout the

² *Id.*

³ See Lambda Legal, *Lambda Legal Responds to Department of Justice's Brief* (July 26, 2017), available at https://www.lambdalegal.org/blog/20170726_lambda-legal-reponds-to-doj-anti-lgb-brief.

⁴ See Julie Moreau, *Department of Justice's Gay Rights Brief Slammed by Advocates as 'License to Discriminate'* (),

⁵ Senate Judiciary Committee, *supra* note 1.

⁶ See *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004); *Smelt v. Orange County*, 447 F.3d 673 (9th Cir. 2006).

⁷ Gregory Katsas, *Defending the Defense of Marriage Act*, Federalist Society for Law & Public Policy Studies, Indianapolis, Indiana (Aug. 18, 2011), available at <https://fedsoc.org/commentary/podcasts/defending-the-defense-of-marriage-act-event-audio>.

⁸ Senate Judiciary Committee, *supra* note 1.

recognition, stability, and predictability marriage offers, [same-sex couples'] children suffer the stigma of knowing their families are somehow lesser.” In arguing that same-sex couples cannot provide “ideal relationships for having and rearing children,” Mr. Katsas seems to be suggesting precisely that same-sex parents are “somehow lesser.” Nowhere does Mr. Katsas share the Supreme Court’s concern for the children of same-sex couples being subjected to “the stigma of knowing their families are somehow lesser” and the “material costs of being raised by unmarried parents.”

On the contrary, in describing the 2014 Supreme Court term as “grim” and “a very bad year for conservatives,”⁹ Mr. Katsas specifically highlighted the Court’s decision in *Obergefell*. He lamented that *Obergefell* prohibits every state in the country from adhering to the traditional definition of marriage between one man and one woman.¹⁰ Mr. Katsas has criticized Justice Kennedy’s LGBT rights jurisprudence generally for being “long on rhetoric and short on what one might think of as traditional legal reasoning,” even though Justice Kennedy spoke for Supreme Court majorities in *Obergefell*,¹¹ *United States v. Windsor*,¹² *Lawrence v. Texas*,¹³ and *Romer v. Evans*.¹⁴ Through his words and actions, Mr. Katsas has left no doubt that he would seek to restrict and roll back these landmark decisions protecting the liberty, equality, and dignity of LGBT people.

While the above examples focus on the threat that Mr. Katsas poses to the LGBT community, we share the concerns expressed by others about his approach to civil rights generally. Mr. Katsas’s record demonstrates that his appointment to the bench would cause grave harm to the LGBT community, as well as many other communities who rely on the federal judiciary to administer fair and impartial justice. Quite simply, Gregory Katsas is not the kind of judge that this country wants, needs or deserves. We urge you to reject his nomination.

It bears emphasis that in nominating Mr. Katsas to the D.C. Circuit, the President has made the startling leap of attempting to place a member of his own legal team on a court that historically has played a critical role in checking Executive excess. While all court of appeals positions are important, this particular nominee being selected for this particular court runs a profound risk of merging the judiciary with the executive. In rejecting Mr. Katsas’s nomination, we request that you make clear to the President that appointing his lawyer to become his judge is not a viable path to victory in court.

Thank you for considering our views on this important issue. Please do not hesitate to reach out if we can provide additional information throughout the confirmation process. You can reach us through Sharon McGowan, Director of Strategy for Lambda Legal, at smcgowan@lambdalegal.org.

⁹ Denise M. Champagne, *Conservatives take a hit in latest Supreme Court Term*, The Daily Record of Rochester (July, 17, 2015), available at <http://www.legalnews.com/detroit/1409723>.

¹⁰ *Id.*

¹¹ 135 S. Ct. 2584 (2015) (declaring that the Fourteenth Amendment requires every state to perform and recognize marriages between individuals of the same sex).

¹² 133 S. Ct. 2675 (2013) (invalidating federal definition of marriage as a union of one man and one woman under Fifth Amendment’s Due Process Clause).

¹³ 539 U.S. 558 (2003) (invalidating state ban on same-sex sodomy under Fourteenth Amendment’s Due Process Clause).

¹⁴ 517 U.S. 620 (1996) (invalidating state constitutional amendment barring protected status for gays, lesbians, or bisexuals under Fourteenth Amendment’s Equal Protection Clause).



Very truly yours,

Lambda Legal
Advocates for Youth
CenterLink: The Community of LGBT Centers
Equality California
FORGE, Inc.
GLAAD
Los Angeles LGBT Center
Mazzoni Center
National Black Justice Coalition
National Center for Lesbian Rights
National Center for Transgender Equality
National Council of Jewish Women
National LGBT Bar Association
National LGBTQ Task Force Action Fund
National Partnership for Women & Families
People For the American Way
Pride at Work
The Trevor Project
Transgender Law Center
URGE: Unite for Reproductive & Gender Equity
Whitman-Walker Health

cc: United States Senate Judiciary Committee Members