

January 17, 2018

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: 39 LGBT Groups Oppose Confirmation of Stuart Kyle Duncan

Dear Chairman Grassley and Ranking Member Feinstein:

We, the undersigned 39 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 Stuart Kyle Duncan to the U.S. Court of Appeals for the Fifth Circuit.

Mr. Duncan has built his career around pursuing extreme positions that target members of the LGBT community, and especially transgender Americans. The combination of Mr. Duncan's approach to important legal issues affecting the LGBT community and his history of seeking out opportunities to oppose the civil rights of LGBT and other marginalized people render him unqualified for this position.

We are particularly concerned by the fact that Mr. Duncan's career has been dedicated to advancing positions that seek to marginalize, and often vilify, groups that do not conform to his ultraconservative social views. In recent years, Mr. Duncan has achieved national notoriety for his niche practice opposing LGBT equality at every turn. Between 2012 and 2014, Mr. Duncan served as general counsel of The Becket Fund for Religious Liberty, an extremely conservative organization focused on bringing right-wing campaigns and defeating LGBT equality.¹ While at the Becket Fund, Mr. Duncan worked aggressively to eliminate the Affordable Care Act's contraceptive mandate by, among other things, advancing the position that for-profit corporations have religious rights that can override the government's interest in eliminating historic discrimination against women in health care. Perhaps most notable among the clients for whom Mr. Duncan advanced this theory was Hobby Lobby, the for-profit craft stores that Mr. Duncan represented in the Supreme Court, and whose case resulted in a

¹ The Becket Fund ran a full-page advertisement in The New York Times entitled "No Mob Rule" in support of California's Proposition 8, which outlawed same-sex marriage (Dec. 8, 2008), *available at* <http://www.towleroad.com/2008/12/becket-fund-lau/>. The Becket Fund has also worked to end adoption programs in Massachusetts and Illinois rather than place children with same-sex couples.

controversial decision that closely held corporations are exempt from regulations requiring those companies to provide contraceptive care.²

Mr. Duncan has made no secret of the fact that he views the *Hobby Lobby* litigation as not only a way to use religious liberty arguments to limit access to contraception, but as a sword that can be wielded more broadly to curtail the rights of LGBT people by, among other things, providing a path by which employers can evade their obligation to provide health care to transgender individuals.³ Indeed, while the Supreme Court tried to clarify in *Hobby Lobby* that the government has a compelling interest in ending employment discrimination based on race, the case has already been used by at least one court to hold that the religious liberty of a business owner to fire its transgender employee overrides the compelling interest of the government to end discrimination on the basis of sex (transgender status).⁴

Mr. Duncan left The Becket Fund in 2014 to become a partner at Schaerr Duncan LLP, where he would have greater control over his choice of clients and the legal theories he could pursue. His initial focus at the law firm was to relentlessly pursue litigation designed to undermine the legal recognition of same-sex couples and their families. As made clear through his personal writing, Mr. Duncan is driven by a deeply held view that same-sex marriage “imperils civic peace” and he has gone to great lengths to thwart efforts to achieve legal equality for same-sex couples.⁵ Specifically, Mr. Duncan has:

- defended Louisiana against a challenge to the state’s ban on same-sex marriage;⁶
- defended the state against a challenge to its refusal to recognize same-sex marriages from other jurisdictions;⁷
- defended the state of Alabama against a challenge from a lesbian mother whose parental rights were stripped away by the state;⁸
- represented the state of Louisiana when it refused to issue a birth certificate to a same-sex couple after they adopted a child;⁹ and
- organized an amicus brief filed by 15 states opposing the freedom to marry in *Obergefell v. Hodges*, the landmark marriage equality decision holding that same-sex couples have a constitutional right to marriage.¹⁰

² *Wheaton Coll. v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

³ Kyle Duncan, *How Fares Religious Freedom?*, FIRST THINGS (Oct. 2013), available at <https://www.firstthings.com/article/2013/10/how-fares-religious-freedom>.

⁴ *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich. 2016).

⁵ Stuart Kyle Duncan, *Marriage, Self-Government, and Civility*, PUBLIC DISCOURSE (Apr. 23, 2015), available at <http://www.thepublicdiscourse.com/2015/04/14894/>.

⁶ *Constanza v. Caldwell*, 2014-2090 (La. 7/7/15).

⁷ *Robicheaux v. Caldwell*, 791 F.3d 616 (5th Cir 2015).

⁸ *V.L. v. E.L.*, 136 S. Ct. 1017 (2016).

⁹ *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011).

¹⁰ Brief of Amicus Curiae Louisiana, Utah, Texas, Alaska, Arizona, Arkansas, Georgia, Idaho, Kansas, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, and West Virginia Supporting Respondents, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574).

Mr. Duncan has also tried aggressively to defeat basic equal opportunity protections for transgender people. Mr. Duncan chose to represent North Carolina legislators Phil Berger and Tim Moore (the architects of the House Bill 2 which restricted transgender people’s ability to access public restrooms) in a lawsuit against the Department of Justice seeking a declaratory judgment that HB2 was constitutional.¹¹ He upped the ante by representing the same legislators in a separate action to intervene in litigation against then Governor Pat McCrory. Mr. Duncan supported the writers and defenders of HB2 to ensure there was a vigorous defense of the discriminatory law (the governor’s initial lawsuit did not seek a declaration that HB2 does not violate Title IX).¹² During the litigation, Mr. Duncan filed expert declarations on behalf of the legislators that relied on “junk science” that described transgender people as delusional (arguing, in essence, that transgender people do not exist) and advocating that parents should discourage “transgender persistence.”¹³

In the midst of representing the architects of HB2, Mr. Duncan chose to defend the Gloucester County School Board after they implemented a discriminatory anti-transgender policy that singled out transgender students from their peers by requiring them to use separate “alternative, private” facilities, a policy that was struck down by the Fourth Circuit Court of Appeals.¹⁴ As lead counsel for the School Board in the *G.G.* case, Mr. Duncan filed a merits brief with the Supreme Court appealing the decision and arguing that Title IX of the Education Amendments Act of 1972 does not protect transgender students.¹⁵ Title IX is critical to ensuring that LGBT students have access to an education free from discrimination and harassment. Numerous circuit courts have held that laws prohibiting discrimination on the basis of sex, including Title IX, prohibit discrimination against individuals for being transgender or discrimination for failing to conform to gender stereotypes.¹⁶ However, in his brief in the *G.G.* case, Mr. Duncan urged the court to adopt a constricted view of the law that would deny transgender students like Gavin Grimm (*G.G.*) the ability to go to school without fear of discrimination. 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

¹¹ Complaint for Declaratory Relief, *Berger v. United States*, No. 5:16-cv-00240-FL (E.D. NC. May 9, 2016).

¹² Memorandum in Support of Motion to Intervene, *Carcaño v. McCrory*, No. 1:16-cv-00236-TDS-JEP (M.D. NC. May 25, 2016) available at https://docs.google.com/viewerng/viewer?url=http://files.eqcf.org/wp-content/uploads/2016/05/34-Memo-iso-Berger_Moore-Motion-to-Intervene.pdf.

¹³ 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) 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> (*E.g.*, Decl. of Paul W. Hruz, M.D. ¶ 38: “With regard to public restrooms and other intimate facilities, there is no evidence to support social measure that promote or encourage gender transition as medically necessary or effective treatment for gender dysphoria”; Quentin L. Van Meter, M.D. ¶ 50 (p. 170): “what is missing is sound science to show that gender identity discordance is not a delusional state.”; Decl. Allan M. Josephson, M.D. ¶ 42 (p. 189), “In psychiatry, a delusion is defined as a fixed belief which is held despite evidence to the contrary... Similarly, those who are gender incongruent believe they are of the opposite sex despite clear and overwhelming evidence to the contrary.”)

¹⁴ *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir.), cert. granted in part, 137 S. Ct. 369 (2016), and vacated and remanded, 137 S. Ct. 1239 (2017).

¹⁵ Brief of Petitioner at 1, *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 65477.

¹⁶ See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *Chavez v. Credit Nation Auto Sales, L.L.C.*, 2016 WL 158820 (11th Cir. 2016); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. Salem*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Parks W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

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.¹⁷

While the above examples focus on the threat that Mr. Duncan poses to the LGBT community, we share the concerns expressed by The Leadership Conference on Civil and Human Rights¹⁸ and other groups about his approach to civil rights generally. For example, Mr. Duncan (alongside Thomas Farr, nominee to the Eastern District of North Carolina) aggressively defended the North Carolina state legislature after it enacted a law with the discriminatory intent of “target[ing] African Americans with almost surgical precision.”¹⁹ Mr. Duncan’s relentless pursuit of litigation targeting the rights of vulnerable groups and promoting dogmatic and exclusionary views couched in the language of religion renders him patently unqualified for a lifetime appointment to a federal court of appeals. In light of his words and actions, it is quite unfathomable that Mr. Duncan would administer justice equally to litigants of various racial backgrounds, and all genders and sexual orientations. Stuart Kyle Duncan is not the kind of judge that this country wants, needs or deserves. We strongly urge you to reject his nomination.

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.

Very truly yours,

Lambda Legal
Advocates for Youth
Alaskans Together For Equality
American Atheists
CenterLink: The Community of LGBT Centers
Equality Alabama
Equality California
Equality Federation
Equality Illinois
EqualityMaine
Equality NC
Equality New Mexico
Equality North Carolina
Equality Ohio
Equality Pennsylvania
Equality South Dakota
Equality Texas

¹⁷ Brief of Petitioner at 41.

¹⁸ The Leadership Conference, *Oppose the Confirmation of Stuart Kyle Duncan to the U.S. Court of Appeals for the Fifth Circuit* (Nov. 29, 2017), <https://civilrights.org/oppose-confirmation-stuart-kyle-duncan-u-s-court-appeals-fifth-circuit/>.

¹⁹ *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).



Equality Utah
Family Equality Council
FORGE, Inc.
Forum for Equality Louisiana
FreeState Justice
Garden State Equality
Gender Justice League
Georgia Equality
Mazzoni Center
National Black Justice Coalition
National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition for LGBT Health
National LGBT Bar Association
National LGBTQ Task Force Action Fund
OutFront Minnesota
SC Equality
The Trevor Project
Trans Women of Color Collective
Transgender Law Center
Whitman-Walker Health
Witness to Mass Incarceration

cc: United States Senate Judiciary Committee Members