

February 6, 2018

To the Honorable Members of the United States Senate  
Washington, D.C. 20510

**RE: 39 LGBT Groups Oppose Confirmation of Stuart Kyle Duncan**

Dear Senator:

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’s long history of opposing the civil rights of LGBT people reflects his deeply-held beliefs that same-sex relationships are morally inferior to those of heterosexual couples, that LGBT people are not entitled to equal protection of the laws, and that court decisions providing such protections are illegitimate. While Mr. Duncan certainly has the right to advance those views, which he has done for over a decade, it is patently unreasonable to believe that he could provide fair and impartial justice to a community that he has spent the majority of his professional life vilifying.

Having built his career advancing ideologically-driven positions that target members of the LGBT community, and especially transgender Americans, Mr. Duncan is recognized as one of the nation’s leading opponents of LGBT equality. Mr. Duncan first gained national notoriety for his anti-LGBT stances while in the Louisiana Attorney General’s Office, where he defended the state’s refusal to issue an amended birth certificate to a Louisiana-born child who had been jointly adopted by a gay couple in New York based on the state’s public policy against recognizing same-sex relationships.<sup>1</sup> Yet, in the years prior to his joining that office, Mr. Duncan had already articulated an expansive view of religious liberty that would give states significantly more discretion in the “volatile area of social policy” than established First Amendment jurisprudence would allow, a position that has clear implications for LGBT equality.<sup>2</sup>

Mr. Duncan left the Louisiana Attorney General’s Office in 2012 to join The Becket Fund for Religious Liberty, an ultraconservative organization that has taken on a leading role in fighting against reproductive rights and LGBT equality.<sup>3</sup> While serving as General Counsel of the Becket Fund, Mr. Duncan worked aggressively—and with great success—to eliminate the Affordable Care Act’s

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<sup>1</sup> *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011).

<sup>2</sup> See, e.g., Kyle Duncan, *Subsidiarity and Religious Establishments in the United States Constitution*, 52 VILL. L. REV. 67, 133 (2007)

<sup>3</sup> See Amelia Thomson-DeVeaux, *God’s Rottweilers*, POLITICO MAG. (Oct. 5, 2014). The Becket Fund has engaged in a number of political campaigns, including work in support of California’s Proposition 8, which outlawed same-sex marriage. See Andy Towle, *Becket Fund Launches Full Page Ad in NYT Condemning Anti-Religion Violence Over Prop 8*, TOWERLOAD (Dec. 5, 2008), available at <http://www.towleroad.com/2008/12/becket-fund-lau/> (discussing Becket’s “No Mob Rule” full-page advertisement in the New York Times in support of effort to repeal same-sex marriage decision from California Supreme Court). The Becket Fund has also worked to end adoption programs in Massachusetts and Illinois rather than place children with same-sex couples.

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.<sup>4</sup>

Mr. Duncan has made no secret of the fact that he views the arguments advanced in the *Hobby Lobby* litigation as not only a way to limit access to contraception, but also 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.<sup>5</sup> Indeed, even though the Supreme Court included language in its *Hobby Lobby* decision reaffirming the compelling nature of the government's interest in ending employment discrimination, *Hobby Lobby* has already been relied upon 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).<sup>6</sup>

Mr. Duncan left The Becket Fund in 2014 to become a partner at Schaerr Duncan LLP, where he would have even greater control over his choice of clients and the legal theories he could pursue. From the outset, Mr. Duncan relentlessly pursued litigation designed to undermine the legal recognition of same-sex couples and their families. For example, he defended the state of Alabama against a challenge from a lesbian mother whose parental rights were stripped away by the state,<sup>7</sup> and organized an amicus brief filed by 15 states opposing the freedom to marry in *Obergefell v. Hodges*.<sup>8</sup>

Mr. Duncan has been the attorney-of-choice for those seeking to ostracize transgender people from public life by limiting their ability to access restrooms in public spaces. Specifically, Mr. Duncan led the defense of North Carolina's House Bill 2 when supporters of the legislation were unsure that then-Governor McCrory would defend the anti-transgender law with adequate vigor.<sup>9</sup> He was also retained by the Gloucester County School Board to defend its policy singling 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,<sup>10</sup> prior to the Supreme Court vacating the decision and remanding for further proceedings after the Department of Education and Department of Justice's

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<sup>4</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); see also *Wheaton Coll. v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012).

<sup>5</sup> Kyle Duncan, *How Fares Religious Freedom?*, FIRST THINGS (Oct. 2013), available at <https://www.firstthings.com/article/2013/10/how-fares-religious-freedom>.

<sup>6</sup> *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich. 2016).

<sup>7</sup> *V.L. v. E.L.*, 136 S. Ct. 1017 (2016).

<sup>8</sup> 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).

<sup>9</sup> 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](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).

<sup>10</sup> *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).

change in position with respect to Title IX of the Education Amendments Act of 1972 and the protection it provides to transgender students.<sup>11</sup>

While the relentlessness of Mr. Duncan’s anti-transgender advocacy is troubling, the substance of his arguments is even more so, as it has the purpose and effect of demeaning the dignity of transgender people. During the HB2 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.”<sup>12</sup> And Mr. Duncan’s *G.G.* 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.<sup>13</sup>

As demonstrated by Mr. Duncan’s personal statements and writings, these positions are not simply abstract arguments made on behalf of clients in the context of specific litigation; rather, they reflect Mr. Duncan’s deeply-held personal beliefs on issues affecting the legal rights of LGBT people. Mr. Duncan has repeatedly claimed that full marriage equality “imperils civic peace,”<sup>14</sup> suggesting that the sky would fall once same-sex couples gained equal rights. In the wake of *Obergefell v. Hodges*, Mr. Duncan compared the effects of marriage equality to “all of the social pathologies from no-fault divorce,”<sup>15</sup> and cautioned that the “harms” to our democracy “would be severe, unavoidable, and irreversible.”<sup>16</sup> He derided the Supreme Court’s ruling as an “abject failure”<sup>17</sup> that “raises a question

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<sup>11</sup> Although the Supreme Court did not reach the merits of the case, Mr. Duncan urged the Court to adopt an interpretation of Title IX of the Education Amendments of 1972 that would exclude transgender students from protection against discrimination. See Brief of Petitioner at 1, *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 65477.

<sup>12</sup> 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.”

<sup>13</sup> Brief of Petitioner at 41.

<sup>14</sup> Stuart Kyle Duncan, *Marriage, Self-Government, and Civility*, PUBLIC DISCOURSE (Apr. 23, 2015), available at <http://www.thepublicdiscourse.com/2015/04/14894/>; See also Kyle Duncan, *Obergefell Fallout*, in SAME-SEX MARRIAGE: A REFERENCE HANDBOOK 131, 132 (2016).

<sup>15</sup> Kyle Duncan with Raymond Arroyo, *The World Over with Raymond Arroyo*, YouTube (July 2, 2015), available at <https://www.youtube.com/watch?v=bgo8U9KKv24>.

<sup>16</sup> *Id.*

<sup>17</sup> Kyle Duncan, *Obergefell Fallout*, in SAME-SEX MARRIAGE: A REFERENCE HANDBOOK 131, 132 (2016).

about the legitimacy of the Court.”<sup>18</sup> Any suggestion that Mr. Duncan is now committed to respecting constitutional precedent concerning LGBT equality is rendered untenable by his own words.

In other writing, Mr. Duncan has dismissed LGBT discrimination as less odious than other forms of discrimination. Specifically, Mr. Duncan criticized lower courts’ frequent reliance on *Loving v. Virginia* in marriage equality cases and argued that “those odious [anti-miscegenation] laws have nothing—*nothing*—to do with same-sex marriage.”<sup>19</sup> The Supreme Court disagreed with him in *Obergefell* and cited *Loving* to recognize the right to marriage equality. Mr. Duncan’s statements, like his advocacy, reflect his deeply-held belief that discrimination against LGBT people is different in kind from other forms of discrimination, to the extent that he thinks that unequal treatment of LGBT people constitutes “discrimination” at all. But we are a nation of laws, not governed by any specific religious orthodoxy, and LGBT people are entitled to expect equal justice under law.

Mr. Duncan’s work has caused real harm to LGBT people in Louisiana, and his confirmation threatens to harm all LGBT people living in the south. Texas, Louisiana and Mississippi are states where there are few explicit protections for LGBT rights, and where LGBT people have historically needed a strong and independent judiciary to vindicate their statutory and constitutional protections. We are concerned that generations of LGBT people in these states will have no meaningful access to justice if Mr. Duncan is confirmed.

Our concerns are compounded by the fact that Mr. Duncan has taken on other causes that diminish the civil rights of vulnerable minority groups. 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.”<sup>20</sup> Furthermore, as set forth in the letter from The Leadership Conference on Civil and Human Rights, Mr. Duncan has also worked to diminish the rights of criminal defendants and undermined efforts to protect immigrant children.<sup>21</sup> In sum, Mr. Duncan’s long record of anti-civil rights advocacy renders him unsuitable for a lifetime appointment to a federal court of appeals. Quite simply, Stuart Kyle Duncan is not the kind of judge that this country wants, needs or deserves. We strongly urge you to reject his nomination.

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<sup>18</sup> Kyle Duncan with Raymond Arroyo, *The World Over with Raymond Arroyo*, YouTube (July 2, 2015), available at <https://www.youtube.com/watch?v=bgo8U9KKv24>.

<sup>19</sup> Stuart Kyle Duncan, *Marriage, Self-Government, and Civility*, PUBLIC DISCOURSE (Apr. 23, 2015), available at <http://www.thepublicdiscourse.com/2015/04/14894/> (adapted from a legal brief).

<sup>20</sup> *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

<sup>21</sup> 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/>.



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](mailto: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  
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