



January 10, 2018

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

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

Dear Chairman Grassley and Ranking Member Feinstein:

As an organization that is dedicated to expanding opportunities for women and promoting reproductive health and rights, access to quality affordable health care and fairness in the workplace, the National Partnership for Women & Families writes to express strong opposition to the nomination of Stuart Kyle Duncan to the United States Court of Appeals for the Fifth Circuit.

Mr. Duncan's record raises serious concerns on issues that are vital to women's health and economic security, including access to contraception and abortion care, and LGBTQ rights. Mr. Duncan's record demonstrates a blatant disregard for civil rights, generally, and for women's efforts to achieve equality. Mr. Duncan's record shows that he does not have the requisite impartiality to serve on the federal bench.

Throughout his career, Mr. Duncan has gone to great lengths to oppose women's rights, and in particular, to undermine women's access to reproductive health care. As general counsel at the Becket Fund for Religious Liberty, Mr. Duncan led the charge against the Affordable Care Act's contraceptive coverage guarantee, which is one of the greatest advances for women's health in a generation. Mr. Duncan represented several employers who challenged the contraceptive coverage guarantee on grounds that they should be free to deny employees contraceptive coverage on religious grounds.¹ As an attorney for the states of Louisiana and Texas, Mr. Duncan has also vehemently opposed women's constitutional right to abortion, defending burdensome laws that interfere in the patient-provider relationship and deny women access to abortion care.²

Mr. Duncan served as lead counsel representing Hobby Lobby Stores in the U.S. Court of Appeals for the Tenth Circuit.³ He blatantly disregarded the positive impact that the contraceptive coverage guarantee has had on women's health and economic equality,⁴

¹ *E.g.*, *Eternal World Television Network, Inc. v. Sebelius*, 818 F.3d 1122 (11th Cir. 2016); *Wheaton Coll. v. Sebelius*, 887 F. Supp. 2d 102 (D.D.C. 2012); *Ave Maria Univ. v. Sebelius*, 2013 WL 1326638.

² *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27 (M.D. La. 2017); *Women's Med. Ctr. v. Bell*, 248 F.3d 411 (5th Cir. 2001).

³ *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).

⁴ *See, e.g.*, Adam Sonfield et al., *Impact of the Federal Contraceptive Coverage Guarantee on Out-of-Pocket Payments for Contraceptives: 2014 Update*, 91 *CONTRACEPTION* 44, 45-47 (2015).

claiming that “Hobby Lobby is not ‘denying women healthcare’. . . .”⁵ Instead, Mr. Duncan asserted that “[t]he only people who are being denied anything are Hobby Lobby and the Green Family, who are being denied the right to practice their religion or face millions of dollars in fines.”⁶ Mr. Duncan has also made clear his disregard for the importance of contraception in women’s lives at speaking events and in interviews. For example, he has mischaracterized and contradicted the preponderance of medical evidence on contraception, falsely asserting that some types of contraception are an abortifacient.⁷ Moreover, Mr. Duncan stated at a 2013 event that the idea of a “right” to contraception was “disturbing.”⁸

Mr. Duncan has also been an avid opponent of women’s constitutional right to an abortion. As a state attorney, he defended a Louisiana Targeted Regulation of Abortion Providers (TRAP) law,⁹ which required any medical professional providing abortion care to have admitting privileges within 30 miles of the medical facility where they practice. Mr. Duncan asserted – despite overwhelming evidence to the contrary – that Louisiana’s TRAP law was “medically reasonable.”¹⁰ Moreover, Mr. Duncan served as counsel of record for an amicus brief in *Whole Woman’s Health v. Hellerstedt*, in support of Texas’ TRAP law, in which he argued – despite a total lack of evidence – that the law rested on “solid medical ground” and that the “[t]he Court should defer to the judgment of the Texas legislature.”¹¹ As we now know, the U.S. Supreme Court did not agree with Mr. Duncan, finding that Texas’ TRAP law placed an unconstitutional undue burden on women’s access to abortion, and that the provisions in question were medically unnecessary for ensuring women’s health and safety.¹²

As an assistant to the Texas Solicitor General, Mr. Duncan also defended a Texas law that required abortion providers to obtain a special license for their offices to serve as abortion facilities.¹³ In that case, he made inaccurate claims about abortion safety in order to undermine women’s access to abortion.

Mr. Duncan has openly disparaged women’s constitutional right to an abortion in his writing. In one law review article, he wrote, “there is a profound difference between the constitutionally-protected right to choose an abortion and the constitutionally-protected right to free exercise of religion.”¹⁴ Mr. Duncan goes on, writing that “government must adopt a distinctly more agnostic stance toward religion” than toward abortion, because

⁵ Ali Meyer, *OKC Reverend Speaks Out Against Hobby Lobby Lawsuit*, NBC-4 KFOR (Sept. 27, 2012, 12:57 PM), <http://kfor.com/2012/09/27/okc-reverend-speaks-out-against-hobby-lobby-lawsuit/>.

⁶ *Id.*

⁷ Tim Talley, *Hobby Lobby Asks Judge to Block Health Care Law*, ASSOCIATED PRESS (Nov. 1, 2012, 2:09 PM), <http://www.spokesman.com/stories/2012/nov/01/hobby-lobby-asks-judge-to-block-health-care-law/> (“The purpose of these drugs is emergency contraception. We don’t cover pregnancy termination.”).

⁸ Adelaide Darling, *Experts Warn of Troubling Mindset Behind Conscience Threats*, EWTN NEWS (Mar. 5, 2013, 6:05 AM), <http://www.ewtnnews.com/catholic-news/US.php?id=7163>.

⁹ *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27 (M.D. La. 2017).

¹⁰ Janet McConaughy, *Judge Throws Out Part of Suit Against Louisiana Abortion*, ASSOCIATED PRESS (May 12, 2015), <https://www.washingtontimes.com/news/2015/may/12/judge-throws-out-part-of-suit-against-louisiana-ab/>.

¹¹ Brief of *Amicus Curiae* Association of American Physicians and Surgeons, Inc. in Support of Respondents at 4, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274).

¹² *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

¹³ *Women’s Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411 (5th Cir. 2001).

¹⁴ Kyle Duncan, *Secularism’s Laws: State Blaine Amendments and Religious Persecution*, 72 *FORDHAM L. REV.* 493, 587 (2003).

government “has a legitimate interest in the protection of fetal life throughout pregnancy.”¹⁵

In addition to his troubling record on women’s rights, Mr. Duncan has been an active opponent of a number of other civil rights, including voting rights,¹⁶ marriage equality,¹⁷ and the rights of transgender individuals. Most recently, he represented Gloucester County, Virginia in its opposition to allowing a transgender student to use a public school bathroom that aligns with the student’s gender identity. In his representation of Gloucester County, Mr. Duncan called the government’s discriminatory policy “commonsense.”¹⁸ Mr. Duncan also represented North Carolina legislators as they defended North Carolina’s infamous “bathroom bill,” which would have preempted local anti-discrimination laws, prevented local governments from advancing transgender equality and prohibited transgender persons from using the bathroom that aligns with their gender identity.¹⁹

In sum, Mr. Duncan’s record is deeply problematic for women and families. The National Partnership for Women & Families urges you to oppose the nomination of Stuart Kyle Duncan for a lifetime appointment on the United States Court of Appeals for the Fifth Circuit.

Sincerely,

National Partnership for Women & Families

¹⁵ *Id.* at 589–590.

¹⁶ *See, e.g.*, Brief of *Amici Curiae* Members of Congress Representing States in the Fifth Circuit Supporting Petitioners, *Veasey v. Abbott*, 830 F.3d. 216 (5th Cir. 2016) (in which Duncan served as an author on an amicus brief on behalf of 27 members of Congress who supported a discriminatory voter identification law).

¹⁷ *See, e.g.*, *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014) (in which Mr. Duncan defended Louisiana’s ban on same-sex marriage). Mr. Duncan also authored an amicus brief in *Obergefell v. Hodges*, in which he provided the patronizing comment: “A decision from this Court constitutionalizing the issue of same-sex marriage would obliterate the significance of those remarkable democratic victories by same-sex marriage proponents.” Brief of Louisiana et al. as *Amici Curiae* Supporting Respondents at 18, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574).

¹⁸ Alix Bryan, *Court Denies Request to Expedite Va. Teen Gavin Grimm’s Bathroom Case*, CBS6 (Apr. 7, 2017, 3:56 PM), <http://wtvr.com/2017/04/07/court-denies-request-to-expedite-va-teen-gavin-grimms-bathroom-case/>.

¹⁹ *See Carcaño v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016).