



November 28, 2017

United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Grassley, Ranking Member Feinstein, and Committee Members:

On behalf of our hundreds of thousands of members across the United States, People For the American Way opposes the nomination of Kyle Duncan of McLean, Virginia (originally from Louisiana) to become an appellate judge on the Fifth Circuit Court of Appeals. His commitment to depriving targeted groups of their basic rights and dignity makes him unqualified for the federal bench.

After working as general counsel for the Becket Fund for Religious Liberty, Duncan co-founded a self-described “boutique law firm” which he has regularly used to help lead [the far right’s efforts to transform religious liberty from a shield into a sword to dismantle laws that protect people from harmful discrimination](#). [Duncan’s profile page](#) on his firm’s website links to about a dozen news items and blog posts highlighting his practice, all of them relating to his work against LGBTQ equality and the Affordable Care Act’s contraception coverage requirement. It is clear that his efforts to further the goals of the religious right are what he presents to the public, and what are clearly important to him. He is not just an attorney making whatever argument he can in the course of zealously representing a client. Instead, he is in search of clients whose cases he can use to further his vision of the law.

While the battles Duncan has chosen to fight are frequently referred to as “culture wars,” they are more than that: They are conflicts between competing interpretations of the law, over whether liberty and equality under the law are real or simply a false promise. Trump’s nominee has taken the latter side, spending years furthering legal arguments that pregnant women and LGBTQ people have only limited rights under the Constitution and the nation’s civil rights laws.

He was lead counsel for Hobby Lobby in *Burwell v. Hobby Lobby*, arguing that the large commercial business could use its owners’ religious beliefs to deny providing legally required contraception healthcare coverage to its women employees. The Supreme Court’s 5-4 ruling adopting [this redefinition of religious liberty distorted the Religious Freedom Restoration Act \(RFRA\)](#), undermining a panoply of hard-earned legal rights.

Duncan has worked to find other ways to undermine rights, including abortion rights.

When the far right Association of American Physicians and Surgeons wanted to support Texas’ [TRAP](#) (Targeted Regulation of Abortion Providers) laws restricting abortion rights in *Whole Woman’s Health v. Hellerstedt*, they turned to Duncan and his firm to author their amicus brief. Like Texas, and like the anti-choice movement that devised the TRAP law scheme, he argued that the restrictions protect women.

But laws like the ones Duncan defended are nothing more than ruses to get around the Supreme Court’s rulings in *Roe v. Wade* and *Planned Parenthood v. Casey* recognizing women’s right to abortion.

Medical safety “needs” are manufactured to justify undue burdens on women’s ability to exercise their constitutional rights. Indeed, in *Hellerstedt*, the Court saw through the smoke and mirrors and struck down the laws.

In addition, his definition of “equal protection under the law” excludes Americans who are LGBTQ. Duncan has chosen to represent clients fighting in the courts against custody and adoption rights for gay people, against transgender students’ ability to use the appropriate bathroom, and against marriage equality.

He also misapprehends LGBTQ equality as a zero-sum struggle. As a 2013 roundtable panelist on the EWTN Global Catholic Network, he is reported to have said:

We are seeing, as you all are, a rapid movement towards sort of general cultural acceptance of homosexuality and homosexual practices and also at the same time you’re seeing a rapid move towards marginalizing people who adhere to a traditional view of human sexuality and marriage.

This either/or framing is not only inaccurate, it implies approval of a social structure in which gays and lesbians are marginalized as “other” in all contexts and mistreated accordingly. Using the law to prevent discrimination against LGBTQ people is an advance in legal equality, not a marginalization of those imposing inequality. Duncan’s distorted view of the legal issue would likely affect his rulings from the court, to the detriment of innocent people and to the constitutional promise of equal protection.

Duncan’s confirmation to the Fifth Circuit would also threaten the right to vote, upon which all our other rights depend. When North Carolina went to the Supreme Court to defend its monster voter-suppression bill, Duncan was one of the lawyers they turned to. The Fourth Circuit had struck the law down, noting that its provisions “target[ed] African Americans with almost surgical precision.” He was also the one who accepted the call to represent Texas in defense of a restrictive voter ID law that the trial court judge concluded had been adopted with the intent to discriminate.

Kyle Duncan has used the courts to help his political allies deprive Americans of their right to vote. He also has a vision of the law that strips people of their rights and their dignity. That vision should have no home in America’s courts.

We urge you to oppose Duncan’s nomination to the Fifth Circuit.

Sincerely,

A handwritten signature in cursive script that reads "Marge Baker".

Marge Baker
Executive Vice President for Policy and Program