

AFJ NOMINEE REPORT

MATTHEW KACSMARYK



U.S. District Court for the Northern District of Texas

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INTRODUCTION

LEGAL AND OTHER VIEWS:

On September 7, 2017, President Trump nominated Matthew Kacsmark to the United States District Court for the Northern District of Texas.¹ Kacsmark currently serves as Deputy General Counsel to the First Liberty Institute.² During his time at the Institute, which is also the former employer of fellow anti-LGBTQ nominee Jeff Mateer, Kacsmark has consistently and fervently attacked women's and LGBTQ rights.³ Such hostility, including highly controversial statements, calls into doubt his ability to even-handedly dispense justice to all who might come before him in a courtroom. While Alliance for Justice does not issue reports on all federal district court nominees, Kacsmark's disturbing record demands heightened scrutiny. Alliance for Justice strongly opposes his confirmation.

HOSTILITY TO LGBTQ AND WOMEN'S RIGHTS

Kacsmark has stated his belief that LGBTQ rights and women's reproductive rights stem from the "radical" and "libertine" sexual revolution.⁵ He has written that while the "Civil Rights Movement" was on "the right side of history," the same cannot be said for efforts by LGBTQ persons to achieve equality:

Despite repeated attempts to meld the two into one "right side of history" campaign, the Sexual Revolution is not the Civil Rights Movement. Both started in the post-war boom and gained ground in the social upheaval of the 1960s and 1970s, but they share almost nothing in common. They have different origins, different leaders, different objectives, and different legacies.⁶

BIOGRAPHY

Kacsmark received his B.A. from Abilene Christian University in 1999 and his J.D. from the University of Texas School of Law in 2003. From 2003 to 2008 he was an associate at Baker Botts, and then worked as an Assistant U.S. Attorney in the Northern District of Texas. He currently serves as Deputy General Counsel to First Liberty Institute. Like many other Trump nominees, Kacsmark has a leadership position in the right-wing Federalist Society.⁴

Kacsmark wrote that the civil rights movement "was rooted in the soil of the uniquely American Judeo-Christian tradition, spearheaded by Christian leaders, and was essentially 'moderate'

¹ Press Release, Eight Nominations Sent to the Senate Today (September 7, 2017), <https://www.whitehouse.gov/the-press-office/2017/09/07/eight-nominations-sent-senate-today>

² Michael Barajas, *Trump Nominates Lawyers from Anti-LGBT 'Religious Freedom' Group to be Texas Federal Judges*, TEXAS OBSERVER (Sept. 8, 2017), <https://www.texasobserver.org/trump-nominates-lawyers-from-anti-lgbt-religious-freedom-group-to-be-texas-federal-judges/>.

³ Chris Massie and Andrew Kaczynski, *Trump judicial nominee said transgender children are part of 'Satan's plan'; defended 'conversion therapy'*, CNN (Sept. 20, 2017), <http://www.cnn.com/2017/09/20/politics/kfile-jeff-mateer-lgbt-remarks/index.html>.

⁴ See Sen. Comm. on the Jud., 115th Cong., Matthew Joseph Kacsmark: Questionnaire for Judiciary Nominees

⁵ See Matthew Kacsmark, *The Inequality Act: Weaponizing Same-Sex Marriage*, THE PUBLIC DISCOURSE (Sept. 4, 2015), <http://www.thepublicdiscourse.com/2015/09/15612/>.

⁶ *Id.*

in its demands.”⁷ In contrast, the “Sexual Revolution,” “was rooted in the soil of elitist postmodern philosophy, spearheaded by secular libertines, and was essentially ‘radical’ in its demands.” Moreover:

It sought public affirmation of the lie that the human person is an autonomous blob of Silly Putty unconstrained by nature or biology, and that marriage, sexuality, gender identity, and even the unborn child must yield to the erotic desires of liberated adults. In this way, the Sexual Revolution was more like the French Revolution, seeking to destroy rather than restore.⁸

In this context, Kacsmaryk has vigorously opposed LGBTQ equality, viewing LGBTQ rights as part of an impermanent sexual revolution that he believes “has been typified by lawlessness and just a complete refusal to obey basic rule of law principles.”⁹ In a 2015 article titled “The Abolition of Man ... and Woman,” he wrote:

In this century, sexual revolutionaries are litigating and legislating to remove the fourth and final pillar of marriage law: sexual difference and complementarity. The campaigns for same-sex “marriage” and “sexual orientation” and “gender identity” (SOGI) legislation share a common legal theory: Rules predicated on the sexual difference and complementarity of man and woman are relics of a benighted legal regime designed to harm “LGBT” persons or at least deny them “full equality.”¹⁰

Kacsmaryk’s statements demonstrate beliefs

⁷ *Id.*

⁸ *Id.*

⁹ Kacsmaryk Radio Interview with Drew Mariani, Relevant Radio (Sept. 8, 2015).

¹⁰ Kacsmaryk, *The Abolition of Man ... and Woman*, NATIONAL CATHOLIC REGISTER (June 24, 2015), <http://www.ncregister.com/daily-news/the-abolition-of-man-...-and-woman>.

that discrimination against LGBTQ Americans is valid and should be condoned.

I. ANTI-DISCRIMINATION LAWS

Kacsmaryk has defined the LGBTQ rights movement as a “clash of absolutes” between “religious liberty and sexual liberty.”¹¹ He vigorously opposed legislation that would add “sexual orientation” and “gender identity” to civil rights protections, blasting what he characterized as “a nationwide rule that ‘sexual orientation’ and ‘gender identity’ are privileged classes that give no quarter to Americans who continue to believe and seek to *exercise* their millennia-old religious belief that marriage and sexual orientation are reserved to the union of one and one woman.”¹²

He also opposed the Equal Employment Opportunity Commission’s (EEOC) position that sexual orientation and gender identity are covered by Title VII:

The EEOC says “sex discrimination,” which used to mean men and women, now includes sexual orientation. Matthew Kacsmaryk of Liberty Institute said policies like the EEOC’s are another step in a decades-long process to remove the first three pillars of marriage law: permanence, exclusivity, and procreation. No fault divorce laws undid permanence. Serial relationships and cohabitation undid exclusivity. And contraception and abortion unhinged sexual relations

¹¹ Kacsmaryk, Speech before the Missouri Catholic Conference, *The Next Clash of Absolutes: Religious Liberty and LGBT Sexual Liberty* (Oct. 4, 2014).

¹² See Kacsmaryk, *supra* note 5.

from marital procreation.¹³

He also vigorously opposed regulations promulgated by the Department of Health and Human Services (HHS) under the Affordable Care Act (which forbids healthcare providers from discriminating against individuals due to race, color, national origin, sex, age, or disability). HHS issued regulations that defined “sex” to include “gender identity,” “sex stereotyping,” and “termination of pregnancy.” Kacsmarky strongly opposed these regulations, claiming “all three categories are on a predictable and probable collision course with millennia-old religious beliefs about sex, sexuality, and marriage.”¹⁴ He went on to describe the regulations as “radical self-definition and sex-actualization.”

Indeed, Kacsmarky appears to have opposed *any* effort to ensure equality for LGBTQ persons. For example, while at the First Liberty Institute, he opposed a rule clarifying that hospitals receiving Medicare and Medicaid cannot discriminate against patients based on sexual orientation and gender identity,¹⁵ opposed Department of Labor regulations clarifying that discrimination on the basis of gender identity was prohibited under the Workplace Innovation and Opportunity Act,¹⁶ opposed federal housing regulations to add gender identity to anti-discrimination provisions in community planning and development programs,¹⁷ opposed gender identity and sexual orientation nondiscrimination rules in

the Affordable Care Act,¹⁸ and opposed nondiscrimination clauses in the Homeless Youth and Trafficking Prevention Act and the Violence Against Women Act 2013 reauthorization bill.¹⁹ Kacsmarky and the First Liberty Institute also represented the owners of an Oregon bakery that denied services to a same-sex couple because of their sexual orientation.²⁰

As a sign of how extreme Kacsmarky is, when Republicans and Democrats in Utah reached a compromise to prohibit employment and housing discrimination based on sexual orientation or gender identity with a broad exemption for religious organizations, Kacsmarky opposed the bill. The bill was sponsored by Republicans, passed a Republican legislature, was signed by a Republican governor, and supported by countless religious groups. Moreover, its exemption was so broad that it was *progressives* who raised the most concerns with the bill (for example, writing “Utah ‘Compromise’ to Protect LGBT Citizens From Discrimination Is No Model for the Nation”).²¹ Significantly, Kacsmarky did not oppose the bill on the grounds that the religious exemption was insufficient, or that it imposed too great a burden on religious persons. Rather, he opposed it on grounds that businesses and landlords *should* be able to discriminate against LGBTQ Americans:

¹³ Mary Reichard, *A Few States Are Protecting Religious Freedom*, THE WORLD (Sept. 15, 2015), https://world.wng.org/2015/09/a_few_states_are_protecting_religious_freedom.

¹⁴ Kacsmarky, *Defending Conscience Rights at Hacksaw Ridge and in the HHS Cases*, FIRST THINGS (Nov. 4, 2016), <https://www.firstthings.com/blogs/firstthoughts/2016/11/defending-conscience-rights-at-hacksaw-ridge-and-in-the-hhs-cases>.

¹⁵ Comment Letter to the Department of Health and Human Services on Centers for Medicare and Medicaid Services Hospital and Critical Access Hospital Changes to Promote Innovation, Flexibility, and Improvement in Patient Care (Aug. 12, 2016).

¹⁶ Comment Letter to the Department of Labor on Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workplace Innovation and Opportunity Act (Mar. 24, 2016).

¹⁷ Comment Letter to the Department of Housing and Urban Development on Equal Access in Accordance with an Individual’s Gender Identity (Jan. 19, 2016).

¹⁸ Comment Letter to the Department of Health and Human Services on Nondiscrimination in Health Programs and Activities (Nov. 6, 2015).

¹⁹ Letter to the United States Senate regarding Runaway and Homeless Youth and Trafficking Prevention Act Amendments (Mar. 9, 2015).

²⁰ Brief of Petitioners, *Klein v. Or. Bureau of Labor and Indus.*, Agency Nos. 44-14, 45-14 (Or. Ct. App. Apr. 25, 2016).

²¹ Nelson Tebbe, *Utah “Compromise” to Protect LGBT Citizens from Discrimination Is No Model for the Nation*, SLATE (Mar. 18, 2015), http://www.SLATE.com/blogs/outward/2015/03/18/gay_rights_the_utah_compromise_is_no_model_for_the_nation.html.

My disagreement is prudential. I think it's a bad idea, particularly in deep red states like Utah and Texas, primarily for the problem of the protected class. Once a protected class is defined to be equivalent to race, it takes on a much heavier atomic weight.²²

In his fight against equality, Kacsmaryk also supported the Mississippi state government's attempt to allow businesses and government workers to discriminate against LGBTQ citizens in the *Barber v. Bryant* case.²³ Mississippi's H.B. 1523 allowed those with religious objections to same-sex marriage, sex outside of marriage, and transgender Americans to discriminate, and was "a direct response" to the Supreme Court's *Obergefell v. Hodges* decision. See *Barber v. Bryant*, 193 F. Supp. 3d 677, 689 (S.D. Miss. 2016). As one journalist summarized, H.B. 1523 would have "allowed religious landlords to evict gay and trans renters; permitted religious employers to fire workers for being LGBTQ; granted state and private adoption agencies the right to turn away same-sex couples; allowed private businesses to refuse service to LGBTQ people; given doctors a right to refuse to treat LGBTQ people in most circumstances; and permitted clerks to refuse to marry same sex-couples."²⁴

The U.S. District Court for the Southern District of Mississippi enjoined the bill. In the decision, Judge Carlton Reeves found that the law gave Mississippians "an absolute right to refuse service to LGBT citizens without regard for the impact on their employer, coworkers, or those being denied service." *Barber*, 193 F. Supp 3d

at 721. In finding that the unconstitutional law violated the Equal Protection Clause, he observed that a "layperson reading about the bill might conclude that it gives a green light to discrimination and prevents accountability for discriminatory acts[.]" and that, instead of promoting religious liberty, H.B. 1523 "establishes an official preference for certain religious beliefs over others." *Id.* at 693, 716. Anti-LGBTQ religious beliefs are explicitly favored, and adherents to those beliefs receive a special right to discriminate: "Persons who hold contrary religious beliefs are unprotected, the State has put its thumb on the scale to favor some religious beliefs over others. Showing such favor tells nonadherents that they are outsiders, not full members of the political community, and . . . adherents that they are insiders, favored members of the political community." " *Id.* at 688 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000)). Accordingly, Judge Reeves wrote:

The majority of Mississippians were granted special rights to not serve LGBT citizens, and were immunized from the consequences of their actions. LGBT Mississippians, in turn, were "put in a solitary class with respect to transactions and relations in both the private and governmental sphere" to symbolize their second-class status. As in *Romer*, *Windsor*, and *Obergefell*, this "status-based enactment" deprived LGBT citizens of equal treatment and equal dignity under the law. . . . Under the guise of providing additional protection for religious exercise, HB 1523 creates a

²² Mary Reichard, *A Few States Are Protecting Religious Freedom*, THE WORLD (Sept. 15, 2015), https://world.wng.org/2015/09/a_few_states_are_protecting_religious_freedom.

²³ Chuck Lindell, *Will Mississippi ruling against religion law deter Texas Republicans?*, AUSTIN AMERICAN-STATESMAN, <http://www.mystatesman.com/news/state--regional-govt--politics/will-mississippi-ruling-against-religion-law-deter-texas-republicans/DK8RW69jPZRaPI8VmoYp/>.

²⁴ Mark Joseph Stern, *Federal Judge Blocks All of Mississippi's Vicious Anti-LGBTQ Law From Taking Effect*, SLATE (July 1, 2016), http://www.slate.com/blogs/outward/2016/07/01/mississippi_hb_1523_blocked_by_judge_carlton_reeves.html.

vehicle for state-sanctioned discrimination on the basis of sexual orientation and gender identity. *Id.* at 708, 710.

While the Fifth Circuit reversed on standing grounds, it is disturbing that Kacsmark supported a law that could undermine the rights of so many Mississippians. See *Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017).

II. MARRIAGE EQUALITY

Kacsmark has also opposed marriage equality. He has said that “traditionally and legally, we define sex according to chromosomes . . . that’s typically how we define sex. That’s how we ordered our marriage laws and made certain presumptions of paternity in the family code. All of that is cast into disarray if you declare sex irrelevant to marriage.”²⁵

Kacsmark was also highly critical of *Obergefell v. Hodges*:

On June 26, five justices of the Supreme Court found an unwritten “fundamental right” to same-sex marriage hiding in the due process clause of the Fourteenth Amendment – a secret knowledge so cleverly concealed in the nineteenth-century amendment that it took almost 150 years to find.²⁶

He also dismissively referred to the reach of constitutional decisions regarding LGBTQ equality: “this is a consequence of some of the poetic but illogical language of Justice Kennedy in his sweet mystery dignitarian thesis.”²⁷

Kacsmark also publicly supported Kim Davis, a county clerk in Kentucky, after she violated a federal court order by refusing to issue a marriage license to a same-sex couple following the *Obergefell* decision. In a radio interview, Kacsmark compared Davis’s actions to that of “pacifistic Quakers” who refused to serve as riflemen in the military, as well as “Jewish butchers” who follow kosher dietary laws.²⁸

III. TRANSGENDER CHILDREN

Kacsmark questioned the legality of state bans on the discredited and dangerous practice of conversion therapy.²⁹

Kacsmark also criticized the Obama Administration’s guidance regarding transgender students and their rights under federal law to use restrooms that correspond to their gender identity.³⁰ On that same issue, he denounced a Fort Worth schools policy put in place to protect transgender children:

This is not diversity but displacement, the absolutist imposition of a sexually revolutionized view of the human person without any accommodation for religious dissenters who may have a different view of man and woman, male and female.³¹

²⁸ *Supra* note 9.

²⁹ *Id.*

³⁰ First Liberty, *Threat to Religious Schools Partially Lifted by Trump Executive Order and Supreme Court Action* (Mar. 10, 2017), <https://firstliberty.org/newsroom/threat-to-religious-schools-partially-lifted-by-trump-executive-order-and-supreme-court-action/>.

³¹ Leah Jessen, *Parents Beat Back Obama’s Transgender Bathroom Mandate in Texas Schools*, THE DAILY SIGNAL (July 24, 2016), <http://dailysignal.com/2016/07/24/parents-beat-back-obamas-transgender-bathroom-mandate-in-texas-schools/>.

²⁵ Mary Reichard, *A Few States Are Protecting Religious Freedom*, THE WORLD (Sept. 15, 2015), <https://world.wng.org/2015/09/a-few-states-are-protecting-religious-freedom>.

²⁶ Kacsmark, *supra* note 5.

²⁷ Kacsmark Radio Interview with World Lutheran News Digest (Oct. 5, 2016).

IV. WOMEN'S REPRODUCTIVE RIGHTS

Kacsmarky has attacked [Roe v. Wade](#), describing the case as one in which “seven justices of the Supreme Court found an unwritten ‘fundamental right’ to abortion hiding in the due process clause of the Fourteenth Amendment and the shadowy ‘penumbras’ of the Bill of Rights, a celestial phenomenon invisible to the non-lawyer eye.”³²

Kacsmarky also has vigorously opposed policies that support women’s reproductive rights. For example, he opposed the Obamacare employer contraceptive mandate, representing an organization that sought to avoid providing the healthcare required by the Department of Health and Human Services to female employees.³³ His organization, the First Liberty Institute, has taken a hard-line stance against the contraception provision.

Kacsmarky also had a lead role in opposing a Washington state law that required pharmacists to stock a “representative assortment of drugs... in order to meet the pharmaceutical needs of its patients,” including birth control, a position rejected by the Ninth Circuit Court of Appeals. See [Storman’s Inc. v. Weisman, 794 F.3d 1064 \(9th Cir. 2015\)](#). In the *Storman’s Inc. v. Weisman* decision, the court wrote that the denial of emergency contraception at local pharmacies overburdened women seeking the medication. Kacsmarky, who co-authored an amicus brief opposing the Ninth Circuit decision, also wrote an article condemning the requirement that the pharmacies provide birth control.³⁴

³² Kacsmarky, *supra* note 5.

³³ Comment Letter to the Department of Health and Human Services on Request for Information Regarding Contraceptive Coverage (Sept. 20, 2016).

³⁴ Kacsmarky, *supra* note 14; see also Brief for 43 members of COngress as Amici Curia Supporting Petitioners, *Storman, Inc. v. Weisman*, 794 F. 3d 1064 (9th Cir. 2015)(No. 15-862).

CONCLUSION

Matthew Kacsmarky has built his legal career opposing equal rights for millions of his fellow citizens. His harsh and demeaning rhetoric regarding LGBTQ rights and reproductive rights sends a clear message that he has little regard for established legal precedent in this area. Kacsmarky often couches his opposition to equal rights in religious language, views he certainly has a First Amendment right to maintain. But principled opposition to his confirmation has nothing to do with his sincerely held religious views and everything to do with the reality that many individuals within the Northern District of Texas would rightly fear that a Judge Kacsmarky would bring entrenched biases and hostility against them into his courtroom. AFJ strongly opposes the confirmation of Matthew Kacsmarky to the federal bench.