

AFJ NOMINEE REPORT

KYLE

DUNCAN



U.S. Court of Appeals for the Fifth Circuit

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INTRODUCTION

On October 2, 2017, President Trump nominated Stuart Kyle Duncan for a seat vacated by W. Eugene Davis on the United States Court of Appeals for the Fifth Circuit.¹ Alliance for Justice strongly opposes his confirmation.

In opposing Executive nominations in the past, Senate Republicans have claimed that nominees whose records are defined by political ideologies are disqualified. For example, Senator Chuck Grassley claimed, “[t]he President’s nominee can’t be so committed to political causes, and so devoted to political ideology, that it clouds his or her judgment.”² Similarly, Senate Majority Leader Mitch McConnell disqualified a nominee whose litigation record was, in McConnell’s words, “marked by ideologically-driven positions[.]”³

Kyle Duncan is a nominee whose record is unquestionably “marked by ideologically-driven positions.” In fact, Duncan has spent his career fighting reproductive rights for women and civil rights for LGBTQ Americans, defending discriminatory voting laws, and dismantling protections for immigrants:

- » ***Duncan has fought contraception coverage for women.*** He served as lead counsel in [Burwell v. Hobby Lobby Stores, Inc.](#) 134 S. Ct. 2751 (2014); he opposed the Affordable Care Act’s contraception mandate in an amicus brief in [Zubic v.](#)

[Burwell](#), 136 S. Ct. 1557 (2016); and he authored a brief in [Stormans Inc. v. Weisman](#), 794 F.3d 1064 (2015) opposing a Washington law that required pharmacies to stock some forms of birth control.

- » ***Duncan has fought against a woman’s right to choose to have an abortion.*** Duncan co-authored an amicus brief in [Whole Woman’s Health v. Hellerstedt](#), 136 S. Ct. 2292 (2016) supporting Texas’s restrictions on abortion, restrictions that the Supreme Court found were an undue burden on the rights of women.⁴
- » ***Duncan has actively fought LGBTQ equality.*** Duncan authored briefs opposing marriage equality in [Obergefell v. Hodges](#), 576 U.S. _____ (2015) and supporting Louisiana’s and Virginia’s discriminatory “Defense of Marriage” laws in [Robicheaux v. George](#), 135 S.Ct. 995 (2015) and [Schaefer v. Bostic](#), 135 S.Ct. 308 (2014).⁵ Indeed, Duncan questioned the legitimacy of the Supreme Court itself following the *Obergefell* decision, saying “[the same-sex marriage case] raises a question about the legitimacy of the Court.”⁶ Moreover, he has repeatedly attacked the rights of same-sex couples attempting to adopt children. See [Adar v. Smith](#), 597 F.3d 697 (5th Cir. 2010); [V.L. v. E.L.](#), 136 S. Ct. 1017

¹ Press Release, Eight Nominations Sent to the Senate Today, The White House (June 7, 2017), <https://www.whitehouse.gov/the-press-office/2017/10/02/eight-nominations-sent-senate-today>.

² Press Release, Senator Chuck Grassley, Grassley statement on the Nomination of Debo Adegbile to be Assistant U.S. Attorney (Mar. 5, 2014), <https://www.grassley.senate.gov/news/news-releases/grassley-statement-nomination-debo-adegbile-be-assistant-us-attorney>.

³ Press Release, Senator Mitch McConnell, McConnell to Oppose Justice Nominee Over Advocacy on Behalf of Philadelphia Cop-Killer (Mar. 5, 2014), <https://www.mcconnell.senate.gov/public/index.cfm/pressreleases?ID=AEDCCD4C-73B9-4D8C-A511-243AFD40C898>.

⁴ See Brief of Amicus Curiae Assoc. of Am. Physicians and Surgeons, Inc. in Support of Respondents, *Whole Woman’s Health v. Hellerstedt*, No. 15-274 (Feb. 3, 2016).

⁵ See Brief of Louisiana, et al., as Amici Curiae Supporting Respondents in *Obergefell v. Hodges*, Nos. 14-556, 14-562, 14-571, 14-574 (Apr. 2, 2015); Respondents’ Brief in Support of Petition for Writ of Certiorari Before Judgment in *Robicheaux v. George*, No. 14-596 (Dec. 2, 2014); Petition for a Writ of Certiorari in *Schaefer v. Bostic*, No. 14-225 (Aug. 22, 2015).

⁶ Interview with Raymond Arroyo, World Over, EWTN Global Catholic Network (July 2, 2015).

(2016). This year, he represented the Gloucester County School Board in *Gloucester County Sch. Bd. v. G.G., No. 16-273 (Mar. 6, 2016)*, the well-publicized Gavin Grimm case, in which Duncan fought to keep transgender students from using the bathroom that conforms to their gender identity by advancing arguments that construe transgender Americans as mentally ill. Disturbingly, Duncan has spoken multiple times before the Alliance Defending Freedom.⁷ The Southern Poverty Law Center has classified the Alliance Defending Freedom as a “Hate Group” that “has supported the recriminalization of homosexuality in the U.S. and criminalization abroad; has defended state-sanctioned sterilization of trans people abroad; has linked homosexuality to pedophilia and claims that a ‘homosexual agenda’ will destroy Christianity and society.”⁸

- » ***Duncan has fought to make it more difficult for people of color to vote.*** In *North Carolina v. N.C. State Conf. of NAACP, 137 S. Ct. 1399 (2017)*, he (along with fellow Trump judicial nominee Thomas Farr⁹) unsuccessfully petitioned the Supreme Court to uphold a law that attacked the voting rights of communities of color, and that the Fourth Circuit said had been enacted with discriminatory intent, “target[ing] African Americans with almost surgical precision[.]” *North Carolina State Conf. of NAACP v. McCrory, 831 F.3d 204, 214 (2016)*. Similarly, Duncan

defended a controversial voter photo ID law in an amicus brief supporting the state of Texas in *Abbott v. Veasey, 137 S. Ct. 612 (2017)*.¹⁰

- » ***Duncan has taken a hardline stance against immigrants.*** Duncan filed an amicus brief against President Obama’s Executive Order that established the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program.¹¹ In his brief, Duncan challenged the naturalization of undocumented immigrants on the basis that it threatens public safety by arguing that “[m]any violent criminals would likely be eligible to receive deferred action under DAPA’s inadequate standards.”¹² This line of reasoning reinforces troubling stereotypes and misconceptions about immigrants.
- » ***Duncan has opposed criminal justice reform.*** For example, Duncan challenged the retroactive application of the Supreme Court’s decision in *Miller v. Alabama, 132 S. Ct. 2455 (2012)*, which held that mandatory life sentences without the possibility of parole were unconstitutional for juveniles.¹³
- » ***Duncan has made it clear he will not respect legal precedent.*** Federal judicial nominees often stand before the Senate Judiciary

⁷ Sen. Comm. on the Judiciary, 115th Cong., Stuart Kyle Duncan: Questionnaire for Judicial Nominees, 1.

⁸ See Southern Poverty Law Center, Extremist Files: Alliance Defending Freedom, available at <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom>; see also Alex Amend, *Anti-LGBT Hate Group Alliance Defending Freedom Defended State-Enforced Sterilization for Transgender Europeans*, SPLC HATEWATCH (July 27, 2017), <https://www.splcenter.org/hatewatch/2017/07/27/anti-lgbt-hate-group-alliance-defending-freedom-defended-state-enforced-sterilization>.

⁹ See Alliance for Justice Report: Thomas Farr, available at <https://www.afj.org/our-work/nominees/thomas-alvin-farr>.

¹⁰ Brief of Amici Curiae Members of Congress Representing States in the Fifth Circuit Supporting Petitioners in *Abbott v. Veasey*, No. 16-393 (Oct. 27 2016).

¹¹ Brief of Amici Curiae National Sheriffs’ Assoc., the Remembrance Project, and American Unity Legal Defense Fund Supporting Respondents in *United States v. Texas*, No. 15-674 (Apr. 4, 2016).

¹² *Id.* at *15.

¹³ See Brief of Respondent State of Louisiana, *Montgomery v. Louisiana*, No. 14-280 (Aug. 24, 2015).

Committee and pledge that they will follow judicial precedent. Duncan, by his own admissions, has indicated he will not respect precedent when he disagrees with the outcome of a case. After the *Obergefell* decision upheld the right to same-sex marriage, Duncan questioned the legitimacy of the Supreme Court, saying “[the same-sex marriage case] raises a question about the legitimacy of the Court.”¹⁴ He similarly disparaged the legitimacy of the Ninth Circuit before the court heard a case that required pharmacies to provide contraceptive drugs.¹⁵ And when asked at a Federalist Society event about the Affordable Care Act’s contraceptive mandate, Duncan commented that he was “very friendly philosophically to making arguments” not to follow precedent.¹⁶

BIOGRAPHY

Kyle Duncan was born in Baton Rouge, Louisiana in 1972.¹⁷ He attended Louisiana State University for both his undergraduate work and law school, obtaining his degrees in 1994 and 1997, respectively. He later obtained his L.L.M. from Columbia University Law School in 2004.

After graduating law school, Duncan clerked for Hon. John M. Duhé, Jr. on the Fifth Circuit Court of Appeals.¹⁸ He then joined Vinson & Elkins LLP for a year, before becoming an Assistant Solicitor General in the Texas

Attorney General’s Office. In 2001, Duncan joined the firm Weil, Gotshal & Manges LLP for a year before stints teaching at Columbia Law School and The University of Mississippi School of Law. In 2008, he became the appellate chief of the Louisiana Attorney General’s Office.

He left the public sector in 2012 to join the Becket Fund for Religious Liberty.¹⁹ He then left that position in 2016 to co-found his own firm, Schaerr Duncan LLP. Duncan is currently one of three attorneys at the firm, one of whom is fellow Trump judicial nominee Stephen Schwartz.²⁰

LEGAL AND OTHER VIEWS

I. REPRODUCTIVE RIGHTS

Duncan has vigorously fought the contraceptive mandate in the Affordable Care Act. In fact, Duncan has dismissed the importance of access to contraception. For example, he has accused the government of treating “contraceptives as ‘the sacrament of our modern life,’” and has criticized what he considers the idea that contraceptives are “necessary for ‘the good life,’ health and economic success of society, particularly women.”²¹

¹⁴ Interview with Raymond Arroyo, *World Over*, EWTN Global Catholic Network (July 2, 2015).

¹⁵ See Presenter, “Legal Issues in a Culture of Life Practice,” Annual Meeting of American Academy of Fertility Care Professionals (Aug. 10, 2013).

¹⁶ Duncan, Presenter at HHS Contraceptive Mandate Litigation Update, Federalist Society Religious Liberty Practice Group Podcast (Oct. 25, 2012).

¹⁷ Sen. Comm. on the Jud., 115th Cong., Stuart Kyle Duncan: Questionnaire for Judicial Nominations, 1.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 2.

²⁰ Alliance for Justice Report: Stephen Schwartz, available at <https://www.afj.org/our-work/nominees/stephen-schwartz>.

²¹ Adelaide Darling, *Experts warn of troubling mindset behind conscience threats*, ETWN News (Mar. 5, 2013), <http://www.ewtnnews.com/catholic-news/US.php?id=7163>.

Duncan has even questioned Supreme Court precedent in this area. When asked at a Federalist Society event about the Affordable Care Act's requirement to cover contraceptives, Duncan was dismissive. A participant asked: "[C]an't we just once in a while make the argument that shows that we do not accept those precedents?" Duncan responded, "[W]ell, you know I have to say I may be very friendly philosophically to making arguments like that..."²²

Most notably, Duncan served as lead counsel in *Hobby Lobby v. Burwell*, where the Supreme Court found in a 5-4 decision that closely-held for profit corporations can have religious beliefs, and can deny contraceptive coverage as part of their employer-sponsored health insurance plans when contraception conflicts with those beliefs.

In his brief, Duncan minimized the burden placed on women by businesses that fail to provide health insurance contraceptive coverage. In fact, he held that the impact on women was irrelevant:

In a situation like this, where the government program forces one party to provide a benefit to another, the loss of that benefit is not the kind of impact on third parties that should matter. From the perspective of the [Religious Freedom Restoration Act], a hypothetical government mandate that a person mow his lawn on Sundays should be analyzed no differently from a mandate that the same person mow his neighbor's lawn on Sundays. The fact that the neighbor loses free yard work in one scenario does not alter the substantial burden analysis in the

least.²³

Duncan also co-authored an amicus brief in *Zubik v. Burwell*, another case challenging the Affordable Care Act's contraceptive mandate.²⁴

Duncan, like another Trump nominee, Matthew Kacsmaryk,²⁵ unsuccessfully opposed women's reproductive rights in *Stormans Inc. v. Weisman*.²⁶ Duncan co-wrote an amicus brief petitioning the Supreme Court to overturn 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.²⁷

In the *Stormans* case, the Ninth Circuit decided that the pharmacists were required to follow the law, finding that when pharmacies deterred women from accessing birth control they burdened "ensuring timely and safe delivery" of medical services. See *Stormans, Inc.*, 794 F.3d at 1078. The Court elaborated on the importance of women having access to birth control at a local pharmacy:

The immediate delivery of a drug is always a faster method of delivery than requiring a customer to travel elsewhere. Speed is particularly important considering the time-sensitive nature of emergency contraception and of many other medications. The time taken to travel to another pharmacy, especially in rural

²² Duncan, Presenter at HHS Contraceptive Mandate Litigation Update, Federalist Society Religious Liberty Practice Group Podcast (Oct. 25, 2012).

²³ See Brief for Respondents at 43-44, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (Oct. 21, 2013).

²⁴ See Brief of Amicus Curiae Eternal Word Television Network in Support of Petitioners, Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191 (Jan. 11, 2016).

²⁵ Alliance for Justice Report: Matthew Kacsmaryk, available at <https://afi.org/our-work/nominees/matthew-kacsmaryk>.

²⁶ See Brief of Amici Curiae United States Conference of Catholic Bishops and Washington State Catholic Conference Supporting Petitioners, No. 15-862 (Feb. 5, 2016).
²⁷ *Id.*

areas where pharmacies are sparse, may reduce the efficacy of those drugs.

Id. In addition, the Court focused on how deferring pregnant customers “could lead to feelings of shame in the patient[.]” *Id.* The Supreme Court denied the cert petition, leaving the Ninth Circuit decision in place. [Stormans, Inc. v. Weisman](#), 136 S. Ct. 2433 (2016).

When discussing *Stormans* before it arrived in the Ninth Circuit, Duncan disparaged the legitimacy of the court:

The Ninth Circuit Court of Appeals, often, well let’s just say, goes off on its own. One of the leading jurists on the Ninth Circuit Court of Appeals, who will remain nameless, because I’m sure this talk is being recorded, said at one point ‘well sure I get some things wrong, but the Supreme Court can’t catch them all.’ Right? This is the view of many on the Ninth Circuit, although I am sure there are some solid judges on the Ninth Circuit as well.²⁸

Beyond contraceptive access, Duncan has consistently fought against women’s reproductive rights in the form of the right to choose to have an abortion. He co-authored an amicus brief in *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).²⁹ The *Whole Woman’s Health* case involved a Texas law that required abortion providers to have admitting privileges within 30 miles of the clinic, which led to a mass closing of facilities that offered abortion procedures. Duncan’s brief argued that the regulation “enhance[ed] patient safety for an

array of outpatient procedures.”³⁰ However, the Supreme Court found that the admitting privileges requirement was unconstitutional as “there was no significant health-related problem that the new law helped to cure” and it placed an undue burden on women’s right to an abortion. *Whole Woman’s Health*, 136 S. Ct. at 2311.

II. LGBTQ DISCRIMINATION

In an interview, Duncan decried the dangers of society accepting LGBTQ citizens:

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.³¹

Duncan has vigorously fought equality for LGBTQ persons, raising serious concerns about whether he will be an unbiased jurist who will give proper effect to some of our nation’s most important Supreme Court precedents and equal justice to LGBTQ Americans.

a. Marriage Equality

Duncan has long opposed same-sex marriage, and has been an outspoken critic of the Supreme Court’s decisions in *Obergefell v. Hodges* and *United States v. Windsor*. Tellingly, Duncan co-authored an amicus brief representing Louisiana’s

²⁸ See Presenter, “Legal Issues in a Culture of Life Practice,” Annual Meeting of American Academy of Fertility Care Professionals (Aug. 10, 2013).

²⁹ See Brief of Amicus Curiae Assoc. of Am. Physicians and Surgeons, Inc. in Support of Respondents, *Whole Woman’s Health v. Hellerstedt*, No. 15-274 (Feb. 3, 2016).

³⁰ *Id.* at *6.

³¹ Panelist, “Religious Liberties Roundtable,” EWTN Global Catholic Network, Aug. 17-18, 2013.

opposition to same-sex marriage. The brief argued that:

States may rationally structure marriage around the biological reality that the sexual union of a man and a woman – unique among all human relationships – produces children...man-woman marriage furthers society’s “need to regulate male-female relationships and the unique procreative possibilities of them[.]”³²

Duncan wrote elsewhere that if the Court recognized that same-sex marriage was a fundamental right, the “harms” to our democracy “would be severe, unavoidable, and irreversible.”³³ In one interview, Duncan stoked fears about what a constitutional right to marriage would mean, speculating:

- » The Court has not recognized a constitutional right to same-sex marriage. If it does so, is it printing a license to persecute churches?
- » Every one of those [religious] groups should be afraid that the government will now view them as, open season on them because of their now unconstitutional view on marriage.
- » Why not let the people work this out instead of recognizing a constitutional right and printing a license to persecute...³⁴

Before *Obergefell*, when a court upheld Louisiana’s same-sex marriage ban, only one of two decisions in the country at that time to uphold such bans, Duncan said

³² Brief of Louisiana, et al. as Amici Curiae Supporting Respondents, at *11 (quoting *DeBoer v. Snyder*, 772 F.3d 388, 404–05 (6th Cir. 2014)(internal citation omitted).

³³ Duncan, *Marriage, Self-Government, and Civility*, PUBLIC DISCOURSE (Apr. 23, 2015).

³⁴ Duncan interview with Raymond Arroyo, World Over, EWTN Global Catholic Network (Apr. 30, 2015).

“[t]he Louisiana decision provides a crucial counterpoint to the many erroneous decisions usurping state authority to define marriage[.]”³⁵ Duncan also co-wrote a petition for writ of certiorari in the *Robicheaux v. George* case, requesting that the high court uphold the district court decision that allowed Louisiana to refuse to recognize same-sex marriage in other states.³⁶

Similarly, Duncan defended Virginia’s “Defense of Marriage” law in *Schaefer v. Bostic*. In *Schaefer*, the Fourth Circuit upheld a district court ruling striking down Virginia’s same-sex marriage ban. Duncan authored a petition for writ of certiorari on behalf of the state officials refusing to issue or recognize marriage licenses for same-sex couples.³⁷ The Supreme Court denied the writ. *Schaefer*, 135 S. Ct. at 308.

After the *Obergefell* decision upheld the right to same-sex marriage, Duncan questioned the legitimacy of the Supreme Court, saying “[the same-sex marriage case] raises a question about the legitimacy of the Court.”³⁸ He expanded on his rejection of *Obergefell*, claiming, “[a]ssessed from [the legal process] point of view, I find *Obergefell* to be an abject failure[.]” and “the decision imperils civic peace.”³⁹

b. LGBTQ Adoption

As counsel in [Adar v. Smith, 597 F.3d 697 \(5th Cir. 2010\)](#) and [V.L. v. E.L., 136](#)

³⁵ Janet McConnaughey, *La asks US Supreme Court to hear gay marriage case*, ASSOC. PRESS (Dec. 4, 2014).

³⁶ Respondents’ Brief in Support of Petition for Writ of Certiorari Before Judgment in *Robicheaux v. George*, No. 14-596 (Dec. 2, 2014).

³⁷ Petition for a Writ of Certiorari in *Schaefer v. Bostic*, No. 14-225 (Aug. 22, 2015).

³⁸ Interview with Raymond Arroyo, World Over, EWTN Global Catholic Network, July 2, 2015.

³⁹ Kyle Duncan, *Obergefell* Fallout, CONTEMPORARY WORLD ISSUES: SAME-SEX MARRIAGE, 132 (ABC-CLIO 2016) (David Newton, Ed.).

[S. Ct. 1017 \(2016\)](#), Duncan sought to deny same-sex couples adoption rights. In *Adar*, Duncan represented the Louisiana Department of Justice in opposing a same-sex couple who adopted a Louisiana-born child from being named the child's fathers on the birth certificate.⁴⁰ Duncan argued that under Louisiana law, adoptive parents can only be named on a birth certificate if they were eligible to adopt in Louisiana. At the time, same-sex marriage was still banned in Louisiana. In 2010, a three-judge panel of the Fifth Circuit affirmed a district court judgment ordering the Louisiana government to issue a new birth certificate listing the adoptive parents. See *Adar v. Smith*, 597 F.3d at 701. However, in 2011, a divided en banc panel of the Fifth Circuit reversed. See [Adar v. Smith](#), 639 F.3d 146, 162 (5th Cir. 2011) (en banc). Of course, since the Supreme Court's decision in *Obergefell v. Hodges*, Louisiana's ban on same-sex marriage has been nullified. See *Robicheaux v. Caldwell*, 791 F.3d 616, 618–19 (5th Cir. 2015).

In *V.L. v. E.L.*, Duncan represented the birth mother of three children whom she and her same-sex partner had raised for eight years.⁴¹ In 2007, the non-birth parent was granted adoption rights. After the birth mother moved back to Alabama, the couple split up. The birth mother then attempted to block the other parent from fulfilling any of her parental rights, including visitation. The Alabama Supreme Court ruled that it would not recognize the adoption judgment of a same-sex couple. See *V.L. v. E.L.*, 136 S. Ct. at 1019. When Duncan was asked whether visits by the adoptive mother, who had raised the children for eight years, would be in the best interest of the children, Duncan said, according to a Wall Street Journal article, he believed “it is unclear, at least

until an Alabama court holds a hearing to examine whether such visits would be in the children's best interest.”⁴² The Supreme Court reversed the decision of the Alabama Supreme Court in 2016. *Id.* at 1022.

c. **Transgender Rights**

At a speech before the Heritage Foundation in 2016, Duncan criticized federal protections against discrimination based on gender identity, claiming “[t]he whole concept of sex has been turned on its head.”⁴³ Duncan remarked:

[N]ote that DOJ's position on these matters is not *merely* about the positive law. Listen again to what they say in their brief: “For purposes of determining whether a person is a man or a woman, gender identity is the critical factor...” [] Let that sink in. Our federal government is telling us—not merely what it thinks the law is—but what “is a man” and what “is a woman.” Something has gone wrong.⁴⁴

Duncan represented Virginia's Gloucester County School Board and argued that Gavin Grimm, a transgender high school boy, should not be allowed to use the men's restroom. See *Gloucester County School Board v. G.G.*, 137 S. Ct. 1239 (2017). The Gloucester school board attempted to isolate the transgender student, enforcing use of a separate, private facility. After the

⁴² Jess Bravin, *Supreme Court Allows Lesbian Adoptive Mother to See Children in Alabama Case*, THE WALL STREET JOURNAL (Dec. 14, 2015), <https://www.wsj.com/articles/supreme-court-allows-lesbian-adoptive-mother-to-see-children-in-alabama-case-1450123712>.

⁴³ Moriah Balingit, *Texas A.G. attacks transgender ruling*, WASH. POST (July 8, 2016).
⁴⁴ Duncan, Remarks Notes on “Obama's Edict on School Showers, Lockers and Bathrooms: Challenges and Legal Responses,” Heritage Foundation, Washington, D.C. (July 7, 2016).

⁴⁰ See Brief in Opposition in *Adar v. Smith*, No. 11-46 (Sept. 9, 2011).

⁴¹ See Respondent E.L.'s Brief in Opposition, No. 15-648 (Dec. 21, 2015).

Fourth Circuit struck down the school board’s policy, Duncan filed a brief appealing the decision to the Supreme Court, claiming that Title IX does not protect transgender students.⁴⁵ In reviewing Duncan’s brief, Lambda Legal noted:

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 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.⁴⁶

Duncan also served as lead trial and appellate counsel for the North Carolina General Assembly in *Carcaño v. McCrory*, 315 F.R.D. 176 (M.D.N.C. 2016) and *United States v. North Carolina*, 2016 U.S. Dist. LEXIS 174103 (M.D.N.C. Dec. 16, 2016), defending North Carolina’s discriminatory “bathroom bill.” The bill in question stated that “multiple occupancy bathrooms and changing facilities, including those managed by local boards of education, must be ‘designated for and only used by persons based on their biological sex.’” See *United States v. North Carolina*, 2016 U.S. Dist. LEXIS 174103 at *5 (citing North Carolina’s Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3).

In *Carcaño*, Duncan introduced expert declarations that characterized transgender

⁴⁵ Brief of Petitioner, *Gloucester County Sch. Bd. v. G.G.*, 2017 U.S. S. Ct. Briefs LEXIS 25 (Jan. 3, 2017).

⁴⁶ See Lambda Legal Letter to Chairman Grassley and Ranking Member Feinstein, Re: 35 Groups Oppose Confirmation of Don Willett, Stuart Kyle Duncan and Matthew Kacsmarky (Nov. 14, 2017) (quoting Brief of Petitioner at 41), available at https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/final_lgbt_letter_opposing_willett_duncan_and_kacsmarky_002.pdf.

Americans as being mentally ill:

With regard to public restrooms and other intimate facilities, there is no evidence to support social measures that promote or encourage gender transition as medically necessary or effective treatment for gender dysphoria.

What is missing is sound science to show that gender identity discordance is not a delusional state.

In psychiatry, a delusion is defined as a fixed, false belief which is held despite clear evidence to the contrary. In psychiatric practice, patients with the common diagnosis of anorexia nervosa have the false belief that they are overweight (“fat”) in spite of overwhelming evidence of their cachexia. Similarly, those who are gender incongruent believe they are of the opposite sex despite clear and overwhelming evidence to the contrary.⁴⁷

d. Alliance Defending Freedom

Duncan has spoken several times before the Alliance Defending Freedom (ADF).⁴⁸ The Alliance Defending Freedom, an organization that has defended the state-enforced sterilization of transgender people overseas, is classified as a hate group by the Southern Poverty Law Center.⁴⁹

⁴⁷ 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), Decl. of Paul W. Hruz, M.D. ¶ 38 (p. 137), Quentin L. Van Meter, M.D. ¶ 50 (p. 170), Decl. Allan M. Josephson, M.D. ¶ 42 (p. 189), available at <https://docs.google.com/viewerng/viewer?url=http://files.ecqf.org/wp-content/uploads/2016/11/173-Ds-and-I-Ds-Supp-Brief-Oppn-Ps-Due-Process-Claim.pdf>.

⁴⁸ Sen. Comm. on the Judiciary, 115th Cong., Stuart Kyle Duncan: Questionnaire for Judicial Nominees, 14–15.

⁴⁹ See Alex Amend, *Anti-LGBT Hate Group Alliance Defending Freedom Defended*

III. VOTING RIGHTS

In 2016, Duncan, along with fellow Trump judicial nominees Thomas Farr and Stephen Schwartz, unsuccessfully represented North Carolina in an attempt to obtain a Supreme Court reversal of the Fourth Circuit's ruling in *North Carolina v. N.C. St. Conf. of the NAACP*. The Fourth Circuit had struck down a restrictive voting law that required voters to have photo identification, reduced the days of early voting, and eliminated same-day registration, out-of-precinct voting, and preregistration. In its ruling, the Fourth Circuit observed that the law "target[s] African Americans with almost surgical precision." *N.C. State Conf. of NAACP*, 831 F.3d at 214.

In his petition for writ of certiorari, Duncan's brief argued that there is no evidence that the law was passed with discriminatory intent or had a discriminatory impact.⁵⁰ Taking umbrage with the Fourth Circuit's findings, the brief stated, "the decision insults the people of North Carolina and their elected representatives by convicting them of abject racism. That charge is incredible on its face given the pains the legislature took to ensure that no one's right to vote would be abridged[.]"⁵¹ Of course, the Supreme Court denied cert, letting stand the decision that the law had clear racially discriminatory intent and therefore violated the Equal Protection Clause of the United States Constitution. See *North Carolina v. N.C. St. Conf. of the NAACP*, 581 U.S. ____ (2017).

Duncan's record of defending discriminatory voting laws is not limited to North Carolina. In 2016, Duncan co-authored a brief on behalf of elected officials in *Abbott v. Veasey* petitioning

State-Enforced Sterilization for Transgender Europeans, SPLC HATEWATCH (July 27, 2017).
50 Petition for a Writ of Certiorari and Volume 1 of the Appendix in *State of North Carolina v. N.C. State Conf. of the NAACP*, No. 16-833 (Dec. 27, 2016).
51 *Id.* at *2.

for Supreme Court review of a Fifth Circuit decision.⁵² In his brief, Duncan defended Texas' strict voter identification law. See *Abbott v. Veasey*, 137 S. Ct. 612 (2017). The District Court had found that the law "creates an unconstitutional burden on the right to vote, has an impermissible discriminatory effect on Hispanics and African Americans, and was imposed with an unconstitutional discriminatory purpose." *Veasey v. Perry*, 71 F.Supp 627, 633 (S.D. Tex. 2014). The Fifth Circuit, sitting en banc, remanded the case, but did not overturn the conclusion that the law was unconstitutional in its discriminatory effects and violated Section 2 of the Voting Rights Act, which bans any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgment of the right of any citizen" See *Veasey v. Abbott*, 830 F.3d 216, 243 (5th Cir. 2016) (en banc) (quoting 52 U.S.C. § 10301(a)). The Supreme Court denied Duncan's petition for cert. *Veasey*, 137 S.Ct. at 613. But following Texas' passage of a new voter ID law in June 2017, the Fifth Circuit has temporarily stayed enforcement of the district court's injunction from enforcing the voter ID laws until after the recent election cycle. See *Veasey v. Abbott*, 870 F.3d 387, 391–92 (5th Cir. 2017). Oral arguments have been scheduled for December.⁵³

IV. IMMIGRATION

Duncan was involved in the litigation involving President Obama's Executive Order that established the Deferred

52 Brief of Amici Curiae Members of Congress Representing States in the Fifth Circuit Supporting Petitioners in *Abbott v. Veasey*, No. 16-393 (Oct. 27 2016).

53 *Texas NAACP v. Steen* (consolidated with *Veasey v. Abbott*), Brennan Center for Justice (Nov. 20, 2017), <https://www.brennancenter.org/legal-work/naacp-v-steen>.

Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. Duncan filed an amicus brief on behalf of National Sheriffs' Association, the Remembrance Project, and Americans Unity Legal Defense Fund, in support of Texas in [*United States v. Texas*, 579 U.S. ____ \(2016\)](#).⁵⁴ In the brief, Duncan challenged DAPA on the basis that it threatened public safety. In particular, Duncan argued that “[m]any violent criminals would likely be eligible to receive deferred action under DAPA’s inadequate standards.”⁵⁵

Duncan also fought President Obama’s Deferred Action for Childhood Arrivals (DACA). In an amicus brief supporting a petition for cert on behalf of Governor Jeb Bush and the State of Florida, in the case *Brewer v. Arizona Dream Act Coalition*, Duncan argued that DACA was not properly enacted by Congress, was not legally valid, and thus, is not binding on the state of Arizona.⁵⁶

Duncan also participated as counsel for amicus curiae in [*Padilla v. Kentucky*, 130 S.Ct. 1473 \(2010\)](#) while at the Louisiana Attorney General’s Office. The Supreme Court examined whether Padilla’s counsel misadvised him of the consequences of a plea deal that resulted in his deportation. The Court, in a 7-2 decision, held that counsel must inform her client about the direct consequences of a plea. Duncan’s amicus brief argued that Padilla’s counsel was not constitutionally deficient, claiming that deportation should not be a consequence about which counsel must inform a client.⁵⁷ Justice Stevens, writing for the majority, disagreed, observing that deportation in the event of the plea at issue was “practically

⁵⁴ Brief of Amici Curiae National Sheriffs’ Assoc., the Remembrance Project, and American Unity Legal Defense Fund Supporting Respondents in *United States v. Texas*, No. 15-674 (Apr. 4, 2016).

⁵⁵ *Id.* at *9.

⁵⁶ Brief of Governor Jeb Bush as Amicus Curiae Supporting Petitioners in *Brewer v. Ariz. DREAM Act Coal.*, No. 16-1180, at *11 (May 1, 2017).

⁵⁷ See Brief for the State of Louisiana, et al. in *Padilla v. Kentucky*, No. 08-651 (Aug. 17, 2009).

inevitable,” and noted that “[w]e too have previously recognized that ‘preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.’” *Id.* at 1480, 1483 (quoting *INS v. St. Cyr*, 533 U.S. 289, 322 (2001)).

V. CRIMINAL JUSTICE

While a private attorney, Duncan represented the State of Louisiana at the U.S. Supreme Court in fighting the retroactivity of the *Miller v. Alabama* rule forbidding life sentences without the possibility of parole for juveniles in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).⁵⁸ The Court, in a 6-3 decision, rejected Duncan’s arguments. Justice Kennedy explained in his majority opinion why the Court chose to forbid life sentences for all juvenile offenders:

Henry Montgomery has spent each day of the past 46 years knowing he was condemned to die in prison. Perhaps it can be established that, due to exceptional circumstances, this fate was a just and proportionate punishment for the crime he committed as a 17-year-old boy. In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, however, prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be

⁵⁸ See Brief of Respondent State of Louisiana, *Montgomery v. Louisiana*, No. 14-280 (Aug. 24, 2015).

restored.

Id. at 736–37.

In his capacity as Appellate Chief in the Louisiana Department of Justice, Duncan also filed an amicus brief during the lower court proceedings in [Brown v. Plata, 563 U.S. 493 \(2010\)](#). In *Plata*, the Supreme Court held that the Eighth Amendment’s prohibition on cruel and unusual punishment required population limits in California prisons to ensure the prisoners were treated humanely:

The degree of overcrowding in California’s prisons is exceptional. California’s prisons are designed to house a population just under 80,000, but at the time of the three-judge court’s decision the population was almost double that. The State’s prisons had operated at around 200% of design capacity for at least 11 years... [and] Prisoners in California with serious mental illness do not receive minimal, adequate care. Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets.

Id. at 503–04. Duncan unsuccessfully argued that this treatment was not an ongoing violation of the prisoners’ constitutional rights.⁵⁹

CONCLUSION

Throughout his career, Kyle Duncan has chosen to attack the rights of all Americans under the guise of protecting them. He has been a leading advocate against LGBTQ rights, women’s reproductive rights, voting rights, and the rights of immigrants. Alliance for Justice opposes his confirmation to the Fifth Circuit Court of Appeals.

⁵⁹ Brief for the State of Louisiana, et al., as Amici Curiae in Support of Appellants in *Schwarzenegger v. Plata*, No. 09-1233 (Sept. 3, 2010).