



## Kyle Duncan

President Trump nominated Kyle Duncan to serve on the Fifth Circuit Court of Appeals on September 28, 2017. Duncan is anti-choice.

### Career

- Bachelor of Arts, Louisiana State University<sup>1</sup>
- Master of Laws, Louisiana State University, 1992<sup>2</sup>
- Juris Doctorate, Duke University School of Law, 1992<sup>3</sup>
- Clerk, Judge John M. Duhé, Jr., Fifth Circuit Court of Appeals<sup>4</sup>
- Assistant Solicitor General, Office of the Attorney General of Texas (1999-2002)<sup>5</sup>
- Assistant Professor of Law, University of Mississippi School of Law (2004-2008)<sup>6</sup>
- Solicitor General, State of Louisiana (2008-2012)<sup>7</sup>
- General Counsel, The Becket Fund for Religious Liberty (2012-2014)<sup>8</sup>
- Partner, Schaerr/Duncan, LLP, 2014-present<sup>9</sup>

### Record on Choice-Related Issues

#### Court Cases

- Duncan is a strong opponent of the Affordable Care Act's contraceptive-coverage policy, the single greatest advancement in reproductive healthcare in a generation. He represented several plaintiffs in their challenges to the policy, arguing that for-profit employers should be free to deny contraceptive coverage to their employees on religious grounds.<sup>10</sup> Most notably, Duncan served as lead counsel representing Hobby Lobby in *Burwell v. Hobby Lobby Stores, Inc.* before the Supreme Court and in the preceding cases.<sup>11</sup>
- Duncan defended a Louisiana Targeted Regulation of Abortion Providers (TRAP) law in the courts.<sup>12</sup> The law, which was eventually struck down as unconstitutional, required any doctor providing abortion care in the state to have admitting privileges at a hospital within 30 miles, an unnecessary and burdensome requirement not applied to other healthcare providers. Duncan, however, called the law “medically reasonable.”<sup>13</sup>
- Duncan also filed an amicus brief in *Whole Woman's Health v. Hellerstedt* in support of Texas' TRAP law. He argued in the brief that the law rested on “solid medical ground” and that “the Court should defer to the judgment of the Texas legislature” in the

case.<sup>14</sup> The Supreme Court declined to do so, holding that the law placed an unconstitutional undue burden on women seeking abortion care.

- Duncan defended a Texas law that targeted clinics providing 300 or more abortion procedures per year, requiring them to register with the state.<sup>15</sup> He argued that the anti-choice law “made abortions safer by regulating high-volume clinics and increasing the criminal liability of doctors who perform abortions without a license” – tactics used by anti-abortion organizations to imply that an abortion is an unsafe procedure.<sup>16</sup>
- Duncan argued in an amicus brief that the federal government should be free to give millions of dollars to the U.S. Conference of Catholic Bishops (USCCB) for distribution to organizations that help trafficking victims, despite the fact that USCCB prohibits the organizations it funds from providing or referring for abortion or contraceptive care.<sup>17</sup> After a lower court prohibited the contract with USCCB, Duncan called the decision “anti-religion.”

### In His Own Words

- On the ACA contraceptive-coverage policy and *Hobby Lobby*:
  - In a press statement on the case, Duncan said, “The United States government is taking the remarkable position that private individuals lose their religious freedom when they make a living.”<sup>18</sup> In a separate statement, Duncan asserted, “Hobby Lobby is not ‘denying women healthcare’ as the [government’s] petition falsely claims.” He continued, “The 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.”<sup>19</sup>
  - Appearing at an event hosted by the Catholic Information Center, Duncan spoke about the policy, calling it “brute coercion for religious conscience” and stating that the government was “pick[ing] on religious employers and conscript[ing] them to violate their own consciences.”<sup>20</sup>
  - In an interview on Hobby Lobby’s objection to covering certain contraceptives in its insurance plans, Duncan parroted the false claim that emergency contraception is an abortifacient, saying: “The purpose of these drugs is emergency contraception. We don’t cover pregnancy termination.”<sup>21</sup>
  - Of his clients, Hobby Lobby’s owners, the Greens, Duncan said, “their moral objection is to being made to participate in the process,” of women accessing contraception.<sup>22</sup>
  - Appearing on CNN, Duncan asserted that “access to contraception is widespread and nobody really denies that.”<sup>23</sup>
  - Duncan strongly defended the idea that corporations can hold religious beliefs, arguing, “We won’t say, well, a corporation can’t exercise a right because it’s in corporate form. Is religion the kind of right that can only be

exercised by a natural person? ...It's not a purely personal right." He continued, Hobby Lobby is a "profit-making company, yes, but also a ministry."<sup>24</sup>

- Duncan appeared alongside Americans United for Life CEO Charmaine Yoest at a 2013 event. In a speech, he called the idea of a "right" to contraception "disturbing."<sup>25</sup>
- Duncan disparaged the constitutional right to abortion in a law review article. He wrote, "there is a significant difference between the constitutionally-protected right to choose an abortion and the constitutionally-protected right to free exercise of religion." He continued, arguing that "government must adopt a distinctly more agnostic stance toward religion" than abortion, because "government has a legitimate interest in the protection of fetal life throughout pregnancy."<sup>26</sup>

### Notable Information

- Several anti-choice groups celebrated Duncan's nomination:
  - Students for Life named him on a list of "solidly pro-life justices" and lauded his pro-life credentials.<sup>27</sup>
  - The anti-choice group Susan B. Anthony List thanked President Trump for nominating "such a strong pick" and urged the Senate to confirm Duncan quickly.<sup>28</sup>
- Duncan has been active in the conservative Federalist Society.<sup>29</sup>

### Record on Other Key Issues

- Duncan filed an amicus brief on behalf of 27 anti-choice U.S. Senators and Representatives from Texas in a case challenging Texas' voter identification law. Duncan's brief argued in support of the law, which was struck down as racially discriminatory under the Voting Rights Act. In the brief, Duncan called the discriminatory law "an excellent example of a voter identification law that fosters...benefits through even-handed, race-neutral, and non-burdensome means."<sup>30</sup>
- Duncan is a strong opponent of equal marriage. He defended Louisiana's ban on same-sex marriage in court<sup>31</sup> and co-authored an amicus brief in opposition to equal marriage in *Obergefell v. Hodges*.<sup>32</sup> In fact, he argued in an op-ed before the landmark Supreme Court decision that the Court would risk "civil peace" if it were to recognize a constitutional right to same-sex marriage.<sup>33</sup>
- Duncan is also deeply opposed to transgender students' rights. He represented Gloucester County, Virginia in its fight to deny transgender student Gavin Grimm's right to use the school bathroom that aligns with his gender identity. He even called Gloucester's discriminatory policy "commonsense."<sup>34</sup> Duncan also unsuccessfully

represented North Carolina legislators in a challenge to their infamous H.B.2 bill, which attempted to require transgender people to use the bathroom that aligned with the biological sex they were assigned at birth.<sup>35</sup>

November 19, 2017

## Notes

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<sup>1</sup> *President Donald J. Trump Announces Eighth Wave of Judicial Candidates*, THE WHITE HOUSE, September 28, 2017, at <https://www.whitehouse.gov/the-press-office/2017/09/28/president-donald-j-trump-announces-eighth-wave-judicial-candidates> (last visited October 25, 2017).

<sup>2</sup> Carrie Severino, *Who is Kyle Duncan?*, NATIONAL REVIEW, September 28, 2017, at <http://www.nationalreview.com/bench-memos/451946/who-kyle-duncan> (last visited Oct. 25, 2017).

<sup>3</sup> *Ibid.*

<sup>4</sup> *President Donald J. Trump Announces Eighth Wave of Judicial Candidates*, THE WHITE HOUSE, September 28, 2017, at <https://www.whitehouse.gov/the-press-office/2017/09/28/president-donald-j-trump-announces-eighth-wave-judicial-candidates> (last visited October 25, 2017).

<sup>5</sup> Carrie Severino, *Who is Kyle Duncan?*, NATIONAL REVIEW, September 28, 2017, at <http://www.nationalreview.com/bench-memos/451946/who-kyle-duncan> (last visited Oct. 25, 2017).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Eternal World Television Network, Inc. v. Secretary of the U.S. Department of Health and Human Services*, 818 F.3d 1122 (11th Cir. 2016); *Wheaton College v. Sebelius*, 887 F.Supp.2d 102 (D.D.C. 2012); *Ave Maria University v. Sebelius*, 2013 WL 1326638.

<sup>11</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 573 U.S. (2014)

<sup>12</sup> *June Medical Services LLC v. Kliebert*, 250 F.Supp.3d 27 (M.D.La. 2017)

<sup>13</sup> Janet McConaughy, *Judge throws out part of suit against Louisiana abortion law*, ASSOCIATED PRESS, May 12, 2015.

<sup>14</sup> *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016).

<sup>15</sup> *Women's Medical Center of Northwest Houston v. Bell*, 248 F.3d 411 (5th Cir. 2001)

<sup>16</sup> *Federal appeals court decides a Texas abortion law is vague*, ASSOCIATED PRESS STATE & LOCAL WIRE, April 13, 2001.

<sup>17</sup> *American Civil Liberties Union of Massachusetts v. U.S. Conference of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013).

<sup>18</sup> Dena Bunis, *Obama Justice Department Asks Supreme Court to Hear Hobby Lobby Case*, CONGRESSIONAL QUARTERLY HEALTH BEAT, September 19, 2013.

<sup>19</sup> Ali Meyer, *OKC Reverend speaks out against Hobby Lobby lawsuit*, NBC-4 KFOR, September 27, 2012.

<sup>20</sup> Video: *Health Care Law Contraceptives Rule* (Catholic Information Center 2012), at <https://www.c-span.org/video/?304319-1/health-care-law-contraceptives-rule>

<sup>21</sup> Tim Talley, *Hobby Lobby asks judge to block health care law*, THE ASSOCIATED PRESS, November 1, 2012.

<sup>22</sup> Irin Carmon, *Supreme Court rules for Hobby Lobby in contraception case*, MSNBC, June 30, 2014, at <http://www.msnbc.com/msnbc/hobby-lobby-supreme-court-wins-narrow-ruling#52998> (last visited October 26, 2017).

<sup>23</sup> Carol Costello, George Howell, A.J. Hammer, and Sanjay Gupta, *Florida A&M Wants Hazing Suit Dropped; Contraception Mandate Challenged; "The Hobbit" Premieres in New Zealand; Sounds Technology May Diagnose Parkinsons*, CNN NEWSROOM, November 28, 2012.

<sup>24</sup> Kristen Wyatt, *Hobby Lobby tests birth-control mandate*, THE ASSOCIATED PRESS, May 23, 2013.

<sup>25</sup> Experts warn of troubling mindset behind conscience threats, EWTN, March 13, 2013, at <http://www.ewtnnews.com/catholic-news/US.php?id=7163> (last visited Nov. 17, 2017).

<sup>26</sup> Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493 (Dec. 2003).

<sup>27</sup> *Trump nominates pro-life justices*, STUDENTS FOR LIFE, Oct. 2, 2017, at <http://studentsforlife.org/tag/kyle-duncan/> (last visited Nov. 17, 2017).

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<sup>28</sup> SBA Statement on Kyle Duncan's Appointment to the Fifth Circuit Court of Appeals, Susan B. Anthony List, Sept. 28, 2017, at <https://www.sba-list.org/newsroom/press-releases/sba-list-statement-kyle-duncans-appointment-fifth-circuit-court-appeals/> (last visited Nov. 17, 2017).

<sup>29</sup> Carrie Severino, *Who is Kyle Duncan?*, NATIONAL REVIEW, September 28, 2017, at <http://www.nationalreview.com/bench-memos/451946/who-kyle-duncan> (last visited Oct. 25, 2017).

<sup>30</sup> *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

<sup>31</sup> *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (E.D.La. 2014).

<sup>32</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>33</sup> Kyle Duncan, *Marriage, Self-Government, and Civility*, THE WITHERSPOON INSTITUTE, April 23, 2015, at <http://www.thepublicdiscourse.com/2015/04/14894/> (last visited Nov. 19, 2017).

<sup>34</sup> Alix Bryan, *Court denies request to expedite Va. teen Gavin Grimm's bathroom case*, CBS6, April 7, 2017, at <http://wtvr.com/2017/04/07/court-denies-request-to-expedite-va-teen-gavin-grimms-bathroom-case/> (last visited Nov. 19, 2017).

<sup>35</sup> Jordan Green, *North Carolina Tried to Defend HB 2 in Federal Court. It Didn't Go Well.*, INDY WEEK, August 3, 2016, at <https://www.indyweek.com/indyweek/north-carolina-tried-to-defend-hb-2-in-federal-court-it-didnt-go-well/Content?oid=5056011> (last visited Nov. 19, 2017).