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The Honorable Kyle Duncan Judge, U.S. Court of Appeals for the Fifth Circuit Research Summary

Age: 54 (born August 9, 1972)

2018 – Present: Judge, U.S. Court of Appeals, Fifth Circuit

2014 – 2018: Private Practice, Schaerr Duncan LLP, Washington D.C.

2012 – 2014: General Counsel, Becket Fund for Religious Liberty, Washington, D.C.

2008 – 2012: Appellate Chief, Office of the Attorney General, State of Louisiana

2004 – 2008: Assistant Professor of Law, University of Mississippi School of Law

2002 – 2004: Associate-in-Law, Columbia Law School

2001 – 2002: Private Practice, Weil, Gotshal & Manges LLP, Austin, Texas

1999 – 2001: Assistant Solicitor General, State of Texas

1998 – 1999: Private Practice, Vinson & Elkins LLP, Houston, Texas,

1997 – 1998: Law Clerk, Hon. John M. Duhe, Jr., U.S. Court of Appeals, Fifth Circuit

Education: Columbia Law School (LLM) 2004; Louisiana State University, Paul M. Hebert Law Center (J.D.) 1997; Louisiana State University (B.A.) 1994.

Judicial Philosophy & Separation of Powers:

- Judge Duncan is outspoken on the importance of the separation of powers as a safeguard to liberty.
 - o Judge Duncan has stated: “If improperly exercised, the judicial power distorts the balance of governmental authority in favor of our least-accountable officials.”¹
 - o He has also remarked, “I agree that our constitutional system of checks and balances is an indispensable means of ensuring that all three branches of the Federal government remain in their appropriate spheres of authority. That system provides

¹ Kyle Duncan, On the Side of the Angels?: Updating the Mississippi Supreme Court's View of the Judicial Role, 2004-2008, FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUDIES 1, 2 (2008), <https://fedsoc-cmspublic.s3.amazonaws.com/update/pdf/ZVdj8sFgTp80Hig809DwBHDQfeQ6shHi2jiREhpO.pdf> (emphasis added).

a critical protection for all Americans' freedom from the arbitrary abuse of government power.”²

- Duncan described “originalism” as “seek[ing] to interpret constitutional provisions according to their original public meaning.”³

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- Duncan added, “Where the Supreme Court has interpreted specific constitutional provisions by seeking to discern their original public meaning, I would fully and faithfully follow those precedents.”⁴

- Duncan has criticized the term “originalism,” but adheres to the concept in practice.
 - He said, “[A]lthough I think we profit greatly from a theoretical exploration of originalism. . . I wish that word didn’t exist, originalism, it makes it sound like this newfangled theory of interpretation.”⁵
 - He further explained, “[T]o a certain extent I come to originalism in a sense by default and in another sense because it’s just so darn obvious.”⁶

- Duncan is also an advocate of the principles of federalism.
 - Duncan wrote, “Federalism enhances collective freedom through ‘the diffusion of sovereign power.’ New York, 505 U.S. at 181. This diffusion enhances individual freedom by promoting self-government”⁷

Faith & the Public Square:

- Duncan, a devout Catholic, has spoken frequently on faith as it relates to the public square.⁸
- Specifically, he has been a critic of the modern understanding of the Establishment Clause.

² Questions from Senator Leahy Question #16(m), S. Questions for Answer, <https://www.judiciary.senate.gov/imo/media/doc/Duncan%20Responses%20to%20QFRs.pdf>, at PDF p. 22 (emphasis added).

³ Questions from Senator Feinstein Question #1, S. Questions for Answer, <https://www.judiciary.senate.gov/imo/media/doc/Duncan%20Responses%20to%20QFRs.pdf>, at PDF p. 1.

⁴ Questions from Senator Feinstein Question #1, S. Questions for Answer, <https://www.judiciary.senate.gov/imo/media/doc/Duncan%20Responses%20to%20QFRs.pdf>, at PDF p. 1 (emphasis added).

⁵ CIT, Originalism and the Catholic Intellectual Tradition: A Jurist's Perspective, YOUTUBE (Oct. 14, 2022), <https://www.youtube.com/watch?v=8oKHF1StpVA>, at 46:49 (emphasis added).

⁶ CIT, Originalism and the Catholic Intellectual Tradition: A Jurist's Perspective, YOUTUBE (Oct. 14, 2022), <https://www.youtube.com/watch?v=8oKHF1StpVA>, at 49:29 (emphasis added).

⁷ Br. of La., Utah, Tex., Ala., Ariz., Ark., Ga., Idaho, Kan., Mont., Neb., N.D., Okla., S.D., and W. Va., *Obergefell v. Hodges*, 576 U.S. 644 (2015), <https://sblog.s3.amazonaws.com/wp-content/uploads/2015/04/14556562571574bsacLouisiana.pdf>, at PDF p. 16 (emphasis added).

⁸ Kathryn Jean Lopez, Religious Freedom Is No Mere Hobby: Shocking Arguments Made by Obama Administration in Largest HHS Mandate Suit Yet, NAT’L REV. (Nov. 1, 2012), <https://www.nationalreview.com/corner/religiousfreedom-no-mere-hobby-shocking-arguments-made-obama-administration-largest/>; Rosemary Westwood, Stuart Kyle Duncan: The Trump Appointed Judge Working to Ban Louisiana Abortions, THE GUARDIAN (June 14, 2020), <https://www.theguardian.com/law/2020/jun/14/stuart-kyle-duncan-the-trump-appointed-judge-working-to-ban-louisiana-abortions>. See also ST. BENEDICT PRESS, Defense of the Faith: A Forum on “Religious Liberty” (Part 3 of 4 - Kyle Duncan), YOUTUBE (May 28, 2012), https://www.youtube.com/watch?v=o-qfS4Q7Z_w, at 24:25.

- o When discussing the Establishment Clause and what is and is not the proper governmental relationship with religion, Duncan described, “The basic problem seems to be this: the circle of government actions forbidden by the [Establishment] Clause has been drawn too vaguely and too broadly — around something perhaps described as ‘bad relationships between religion and government.’ The circle needs to be far tighter — drawn in terms of ‘establishment’ as a legal construct and less as a cultural, sociological or theological construct; drawn in terms that restrain distinct institutional

relationships between the state and actual ‘churches,’ instead of policing the vague boundaries between the ‘religious’ and the ‘secular.’”⁹

Religious Liberty:

- Before his confirmation to the bench, Duncan demonstrated his promotion of religious liberty as an attorney working with the Becket Fund.
 - o In 2012, Duncan became General Counsel for the Becket Fund for Religious Liberty. Duncan stated that at Becket he, “[led] the litigation team, which brings constitutional and statutory challenges around the country in defense of the free exercise of religion and often weigh[ed] in at the appellate level as an amicus curiae in favor of the free exercise of religion.”¹⁰
 - o Duncan served as lead counsel in *Hobby Lobby Stores v. Sebelius*, representing Hobby Lobby in seeking a preliminary injunction against enforcement of a federal mandate requiring its insurance to cover all FDA-approved contraceptive methods.¹¹ He also represented the nuns in *Little Sisters of the Poor v. Sebelius* battling the same federal mandate.¹²
- His advocacy for religious liberty has taken place in and out of the courtroom.
 - o As aforementioned, Duncan defended the right of religiously-motivated, for-profit employers to exercise their right to conscience in denying to provide certain contraceptive devices and abortifacients to their employees. Duncan wrote, “The religious conduct at issue in these cases is familiar to any believer bound to avoid

⁹ Kyle Duncan, *The Establishment Clause and the Limits of Pure History*, AM. EXPERIMENT RELIGIOUS FREEDOM (Univ. of Portland 2008) (Hogan & Frederking, Eds.), <https://cpb-use2.wpmucdn.com/sites.up.edu/dist/d/10/files/2016/04/The-American-Experiment-Religious-Freedom-ConferenceProceedings-2008.pdf>, at PDF p. 185 (emphasis added).

¹⁰ S. Questionnaire, <https://www.judiciary.senate.gov/imo/media/doc/Duncan%20SJQ1.pdf>, at PDF p. 32 (emphasis added).

¹¹ S. Questionnaire, <https://www.judiciary.senate.gov/imo/media/doc/Duncan%20SJQ1.pdf>, at PDF p. 35-36.

¹² S. Questionnaire, <https://www.judiciary.senate.gov/imo/media/doc/Duncan%20SJQ1.pdf>, at PDF p. 49. ¹³

Kyle Duncan, *How Fares Religious Freedom?*, FIRST THINGS (Oct. 2013), <https://firstthings.com/how-faresreligious-freedom/> (emphasis added).

certain practices, whether Sabbath work, eating pork, or manufacturing the implements of war. The conviction that such practices must be avoided has precisely the same force whether the occasion for sin arises in a church, a charity, or a business. The believer's conscience cries out for protection, even when he sells a product to make a living.”¹³

- o Duncan was an Assistant Professor of Law at the University of Mississippi Law School from 2004 to 2008, during which time, “The principal focus of [his] teaching and scholarship . . . was the U.S. Constitution and the First Amendment, including both religion clauses and the free speech clause.”¹³

¹³ S. Questionnaire, <https://www.judiciary.senate.gov/imo/media/doc/Duncan%20SJQ1.pdf>, at PDF p. 32 (emphasis added).

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When discussing religious liberty, Duncan has correctly explained that “the idea that we are compromising is offensive. . . . [I]f we were talking about abortion rights, so to speak, do you think we would be talking about compromise? No, of course not. But we are talking about the rights of religious organizations, and so we’re talking about compromise.”¹⁴

- In a March 2024 opinion that both protects religious exercise and preserves parental rights, Judge Duncan affirmed a district court holding that Title X does not preempt a Texas law giving parents the right to consent to their teenagers’ obtaining contraceptives.¹⁶

Sanctity of Life:

- Duncan has supported unborn life as both an attorney and a federal judge.
 - o While in private practice, Duncan represented the state of Louisiana in a suit to defend its law requiring abortionists to have local hospital admitting privileges.¹⁵
 - o Duncan co-authored an amicus brief supporting Texas's abortion restrictions in *Whole Woman’s Health v. Hellerstedt*.¹⁶ He also defended a Texas law requiring clinics that perform more than 300 abortions per year to register with the state.¹⁷
 - o Duncan worked with Becket Fund to “defend the conscience of millions of Americans impacted by the HHS abortion-drug mandate” imposed under the Obama administration.¹⁸ o Judge Duncan signed a concurring opinion holding the record substantially supported the conclusion that Planned Parenthood had violated state and federal regulations. The concurring opinion by Judge Elrod, joined by Judge Duncan, reads: “The record before the agency, therefore – the relevant touchstone for our analysis – substantially supported the conclusion that Planned Parenthood had

¹⁴ ST. BENEDICT PRESS, *Defense of the Faith: A Forum on “Religious Liberty”* (Part 3 of 4 - Kyle Duncan), YOUTUBE (May 28, 2012), https://www.youtube.com/watch?v=o-qfS4Q7Z_w, at 16:40 (emphasis added). ¹⁶ *Deanda v. Becerra*, 96 F.4th 750, 758 (5th Cir. 2024), <https://www.ca5.uscourts.gov/opinions/pub/23/23-10159CV0.pdf>.

¹⁵ Janet McConnaughey, Judge throws out part of suit against Louisiana abortion law, NOLA (June 2, 2015), https://www.nola.com/article_24ef447c-e506-5e04-9921-f8ef3d4c2b72.html. See also Sue Lincoln, *Admitting Privileges Law on Trial*, WRKF (June 24, 2015), <https://www.wwno.org/louisiana-news/2015-06-24/admittingprivileges-law-on-trial>.

¹⁶ AFJ Nominee Report, Kyle Duncan, ALL. FOR JUSTICE, <https://afj.org/wp-content/uploads/2019/12/AFJ-DuncanReport.pdf>, at PDF p. 3.

¹⁷ Kyle Duncan, NARAL PRO-CHOICE AM. (Nov. 19, 2017), https://reproductivefreedomforall.org/wpcontent/uploads/2017/12/Kyle-Duncan_NARAL-1.pdf, at PDF p. 2.

¹⁸ Kyle Duncan, *Abortion-Drug Mandate Unaffected by Delay of Obamacare's Employer Mandate*, CNSNEWS (July 3, 2013), <https://web.archive.org/web/20130704033201/https://cnsnews.com/blog/kyle-duncan/abortion-drugmandate-unaffected-delay-obamacares-employer-mandate> (emphasis added).

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violated state and federal regulations concerning the safe, legal, and ethical furnishing of medical care.”¹⁹

Duncan has been a vocal critic of the Obama administration’s decision to cut human trafficking aid funds to a Catholic public interest group because of its refusal to refer victims for abortions.

- o Duncan stated, “[I]n the conception of public good that the [Obama] administration has, everyone has to have contraception, for free, and if you’re a victim of something, you have to have abortion as a means of healing what happened to you. What a perverse view of life, and religion.”²⁰

LGBT Issues:

- Duncan represented the birth mother of three children who wished to prevent her former same-sex spouse from obtaining visitation.²¹
- Duncan also represented a Virginia school board in a challenge by a “transgender” student over bathroom access.
 - o Duncan described the school's rule requiring students to use the bathroom aligning with their biological sex as a “commonsense restroom and locker room policy”²⁴ and asserted the position that “decisions about bathroom use should be left to states and local school boards.”²²
- Duncan opposes the decision in Obergefell and condemns the government’s meddling in free speech and LGBTQ agendas.
 - o Judge Duncan wrote an article criticizing the Obergefell decision, arguing that it is inconsistent with Windsor’s respect for state's rights and the democratic process: “To be sure, Obergefell does not entirely omit mention of democratic debate. It gestures towards ‘referenda, legislative debates, and grassroots campaigns.’ But the

¹⁹ Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs. v. Kauffman, 981 F.3d 347, 382 (5th Cir. 2020), <https://cases.justia.com/federal/appellate-courts/ca5/17-50282/17-50282-2020-1123.pdf?ts=1606177810>, at PDF p. 57 (emphasis added).

²⁰ ST. BENEDICT PRESS, Defense of the Faith: A Forum on “Religious Liberty” (Part 3 of 4 - Kyle Duncan), YOUTUBE (May 28, 2012), https://www.youtube.com/watch?v=o-qfS4Q7Z_w, at 28:09 (emphasis added).

²¹ Chris Johnson, Anti-LGBT Trump judicial nominee Kyle Duncan confirmed to Fifth Circuit, WASH. BLADE (Apr. 24, 2015), <https://www.washingtonblade.com/2018/04/24/anti-lgbt-trump-judicial-nominee-kyle-duncan-confirmed-fifth-circuit/>. The Alabama Supreme Court had agreed with Duncan’s position, but the U.S. Supreme Court later reversed. See V.L. v. E.L., 577 U.S. ____ 2016, <https://supreme.justia.com/cases/federal/us/577/15-648/case.pdf>. ²⁴ Mark Sherman, Supreme Court won’t say if trans teen can pick bathroom, AP NEWS (Mar. 6, 2017), <https://apnews.com/supreme-court-of-the-united-states-8cb7fb31f1214e63851028bd731bc332> (emphasis added).

²² Lydia Wheeler, Transgender Fight Now in Supreme Court's Hands, THE HILL (Feb. 25, 2017), <https://thehill.com/regulation/court-battles/321076-transgender-fight-now-in-supreme-courts-hands/> (emphasis added).

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majority seems to say that these things are valuable only to give the Court an ‘enhanced understanding’ of the issue, which it is now time to decide. That is an alarming theory of constitutional law.”²³ He also expressed concern over the waning ability of same-sex marriage dissenters to express their views openly: “One hopes Justice Alito is mistaken. One fears that – given the rhetoric and reasoning of the majority opinion in Obergefell – he may be proven right.”²⁷

Duncan represented at least 15 states who sought to defend their marriage laws prior to Obergefell.²⁴

- As Louisiana Attorney General, Duncan defended a statute that prohibited adoption of children by unmarried couples, which included a homosexual male couple.
 - Duncan was lead attorney on a case in which two out-of-state men sued to have their names both placed on a birth certificate of a Louisiana-born child that they had legally adopted together in New York.²⁵
- In an appeal to the Fifth Circuit, Duncan refused to utilize the preferred feminine pronouns of a biological male litigant.
 - Duncan wrote: “Congress has said nothing to prohibit courts from referring to litigants according to their biological sex, rather than according to their subjective gender identity.”²⁶
- Duncan refuses the imposition of gender identity language by the government.
 - On July 7, 2016, The Heritage Foundation held a panel regarding the Obama administration’s edict on school showers, lockers and bathrooms. During this panel discussion, Duncan said: “Our justice department is telling us what a man is and what a woman is. Something has gone wrong.”²⁷

²³ Kyle Duncan, Symposium: Overruling Windsor, SCOTUSBLOG (June 27, 2015), <https://www.scotusblog.com/2015/06/symposium-overruling-windsor/> (emphasis added). ²⁷ Kyle Duncan, Symposium: Overruling Windsor, SCOTUSBLOG (June 27, 2015),

<https://www.scotusblog.com/2015/06/symposium-overruling-windsor/> (emphasis added). Duncan was referencing Justice Alito's ominous Obergefell dissent in which he warned: “I assume that those who cling to old beliefs will be”
²⁴ Nina Totenberg, Legal Battle Over Gay Marriage Hits the Supreme Court Tuesday, NAT’L PUB. RADIO (Apr. 27, 2015), <https://www.npr.org/sections/itsallpolitics/2015/04/27/402456198/legal-battle-over-gay-marriage-hits-the-supreme-court-tuesday>.

²⁵ Bill Barrow, State To Appeal Adoption Ruling, NOLA (Feb. 22, 2010), https://web.archive.org/web/20240305053756/https://www.nola.com/news/crime_police/article_b842ce8d-8f8058b9-9b58-0cf142226624.html.

²⁶ U.S. v. Varner, 948 F.3d 250 (5th Cir. 2020), <https://www.ca5.uscourts.gov/opinions/pub/19/19-40016-CR0.pdf>, at PDF p. 8. See also, Tim Fitzsimmons, Trump-appointed judge dismisses trans defendant's chosen pronouns, CNBC (Jan. 16, 2020), <https://www.nbcnews.com/feature/nbc-out/trump-appointed-judge-mocks-transgenderwoman-s-gender-identity-opinion-n1117501/>.

²⁷ Emily Jones, Obama’s Edict on School Showers, Lockers and Bathrooms: Challenges and Legal Responses, HERITAGE FOUND. (July 7, 2016), <https://cbn.com/news/us/what-obamas-bathroom-edict-means-education> (emphasis added).

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- o Judge Duncan wrote the opinion in *United States v. Varner*, explaining, “First, no authority supports the proposition that we may require litigants, judges, court personnel, or anyone else to refer to gender-dysphoric litigants with pronouns matching their subjective gender identity. Federal courts sometimes choose to refer to gender-dysphoric parties by their preferred pronouns.”²⁸
- Duncan wrote a vigorous dissent in a Fifth Circuit opinion which effectively prevents public libraries from exercising discretion in the books they make available.²⁹ Under the guise of preventing viewpoint discrimination, the ruling Duncan dissented from prevents

able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.”

²⁸ *U.S. v. Varner*, 948 F.3d 250 (5th Cir. 2020), <https://www.ca5.uscourts.gov/opinions/pub/19/19-40016-CR0.pdf>, at PDF p. 6 (emphasis added).

²⁹ *Little v. Llano Cnty.*, 103 F.4th 1140 (5th Cir. 2024), <https://www.ca5.uscourts.gov/opinions/pub/23/23-50224CV0.pdf>, at PDF p. 31.

public libraries from removing books identified as “pornographic filth” and “CRT and LGBTQ books.”³⁰

Faith & Worldview:

- Judge Duncan is a devout Catholic Christian.
 - Duncan was out of the Catholic Church for about 20 years and returned to it around 2006.³¹
 - Duncan has a robust faith which he speaks openly about and he seems to actively submit his work to the Lord.
 - For example, Duncan stated that, “[i]t was the Lord speaking to me saying, ‘you think you have it hard,’ get a taste, a tiny little bit of what my Son endured to save you. Do pray for us . . . and most importantly, that the Lord’s purposes would be worked out in this litigation.”³²
- Judge Duncan has stated that he would not be willing to take an oath that he is independent of the Catholic pope to serve as a federal judge.
 - Duncan declared, “If I were required to take an oath that I’m independent from the pope to serve as a federal judge, my answer would be—and yes this is being recorded—hell no, I’m not going to take that oath. It’s no business of the United States whether I consider myself independent of the pope.”³³
 - He said, “Madison’s point still holds, men are not angels and so they need government, and they need separation of powers. And that’s why Justice Scalia was right about that.”³⁴
- Duncan believes that no-fault divorce did “the opposite” of strengthening marriage and helping children.³⁵
- When asked about what types of rights should be subject to democratic vote, Duncan remarked, “Constitutional rights are, by definition, not subject to democratic vote because the people have removed them from the majoritarian process. As Justice Jackson eloquently

³⁰ Little v. Llano Cnty., 103 F.4th 1140 (5th Cir. 2024), <https://www.ca5.uscourts.gov/opinions/pub/23/23-50224CV0.pdf>, at PDF p. 40.

³¹ ST. BENEDICT PRESS, Defense of the Faith: A Forum on “Religious Liberty” (Part 3 of 4 - Kyle Duncan), YOUTUBE, https://www.youtube.com/watch?v=o-qfS4Q7Z_w&t=0s, at 3:00.

³² ST. BENEDICT PRESS, Defense of the Faith: A Forum on “Religious Liberty” (Part 3 of 4 - Kyle Duncan), YOUTUBE (May 28, 2012), https://www.youtube.com/watch?v=o-qfS4Q7Z_w, at 32:50.

³³ CIT, The Catholic Foundations of the Establishment Clause, YOUTUBE, <https://www.youtube.com/watch?v=1rNesO44Elo>, at 1:02:20 (emphasis added).

³⁴ CIT, Originalism and the Catholic Intellectual Tradition: A Jurist’s Perspective, YOUTUBE (Oct. 14, 2022), <https://www.youtube.com/watch?v=8oKHF1StpVA>, at 42:29.

³⁵ EWTN, World Over - 2015-04-30 - US Supreme Court arguments on marriage, Kyle Duncan with Raymond Arroyo, YOUTUBE (May 1, 2015), <https://www.youtube.com/watch?v=INdSJq3OZpE>, at 4:22.

observed, ‘[o]ne’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be

submitted to vote; they depend on the outcome of no elections.’ West Va. State Bd. of Elections v. Barnette, 319 U.S. 624, 638 (1943).”³⁶

- On March 9, 2023, Judge Duncan was invited to give a presentation at Stanford University entitled, “The Fifth Circuit in Conversation with the Supreme Court: Covid, Guns, and Twitter,” per an invitation by Stanford’s Federalist Society. The presentation was interrupted by a disruptive protest, and Judge Duncan gave up after attempting to give his presentation for about 10 minutes. He called the students “juvenile idiots” and said he couldn’t believe the “blatant disrespect” he was being shown.³⁷ Duncan also commented that the “prisoners were now running the asylum,” and that the invitation was a “setup.”³⁸

Second Amendment:

- Duncan voted against upholding a federal law that threatened Second Amendment rights.
 - In *Mance v. Sessions*, Judge Duncan joined the dissents of Judges Ho, Elrod, and Willett arguing against the majority’s refusal to rehear the case en banc when a 5th Circuit panel upheld a federal law that required firearms dealers to only sell guns to in-state residents.³⁹
- In *United States v. McGinnis*, Judge Duncan applied the post-Heller two-part framework for Second Amendment challenges and affirmed the conviction of a defendant who possessed a firearm while subject to a domestic violence protective order.
 - However, notably, Duncan wrote a concurrence to “reiterate the view that we should retire this framework in favor of an approach focused on the Second Amendment’s text and history,”⁴⁰ and further noted that he “would support en banc review in this case or any appropriate future case to reassess our Second Amendment analysis.”⁴¹

Educational Opportunity:

³⁶ Questions from Senator Hirono Question #2(b), S. Questions for Answer, <https://www.judiciary.senate.gov/imo/media/doc/Duncan%20Responses%20to%20QFRs.pdf>, at PDF p. 46.

³⁷ David Lat, Yale Law Is No Longer #1—For Free-Speech Debacles, ORIGINAL JURISDICTION (Mar. 10, 2023), <https://davidlat.substack.com/p/yale-law-is-no-longer-1-for-free-speech>.

³⁸ David Lat, Yale Law Is No Longer #1—For Free-Speech Debacles, ORIGINAL JURISDICTION (Mar. 10, 2023), <https://davidlat.substack.com/p/yale-law-is-no-longer-1-for-free-speech>.

³⁹ *Mance v. Sessions*, 896 F.3d 390 (5th. Cir. 2018), <https://www.ca5.uscourts.gov/opinions/pub/15/15-10311CV1.pdf>.

⁴⁰ *U.S. v. McGinnis*, 956 F.3d 747 (5th Cir. 2020), <https://cases.justia.com/federal/appellate-courts/ca5/19-10197/1910197-2020-04-21.pdf?ts=1587490256>, at PDF p. 21 (emphasis added).

⁴¹ *U.S. v. McGinnis*, 956 F.3d 747 (5th Cir. 2020), <https://cases.justia.com/federal/appellate-courts/ca5/19-10197/1910197-2020-04-21.pdf?ts=1587490256>, at PDF p. 21 (emphasis added).

- Duncan moderated a Federalist Society panel entitled “Classrooms, Curricula, and the Law” at the 2021 National Lawyers Convention, in which speakers discussed and debated the role of Critical Race Theory (“CRT”) in K-12 schools and laws that attempt to limit the use of CRT in schools.
 - When an audience member asked a panelist to define the concept of “equity,” Duncan added: “Where did this come from? These are ideas, right? They didn't

just blossom out of nowhere. These are ideas, so where did it come from, how is this equity idea getting into the school boards, the teachers, or the curricula, and why now?”⁴²

- As a judge, he also addressed First Amendment issues in the classroom.
 - In 2021, Judge Duncan wrote the dissenting opinion in *Oliver v. Arnold* and argued that an assignment to transcribe the Pledge of Allegiance is not tantamount to “compelled speech.” Duncan wrote: “We live in an easily offended age. Even Dr. Seuss is controversial. . . . [S]uppose a teacher, hoping to pass on the legacy of Dr. Martin Luther King, Jr., asks students to transcribe his most famous speech. . . . Today, this aspiration of colorblindness has come under fire. May an offended student sue the teacher for being asked to copy Dr. King's words? Under the majority's approach, yes.”⁴³

Administrative State:

- Judge Duncan has correctly pointed out that administrative agencies are staffed by individuals who are not elected by the public, yet they hold significant power and issue decisions that are “extremely consequential to the lives of the American people.”⁴⁴
- Judge Duncan appears to be apprehensive regarding the lack of accountability for administrative agencies.⁴⁵
- When discussing the Major Questions doctrine, Judge Duncan explained that an “administrative agency is a creature of law . . . and because the administrative agency is

⁴² FEDERALIST SOC’Y, Classrooms, Curricula, and the Law, 2021 National Lawyers Convention, YouTube (Nov. 11, 2021), <https://www.youtube.com/watch?v=HAul5RHxN4k>, at 1:32:40 (emphasis added)

⁴³ *Oliver v. Arnold*, 3 F.4th 152 (5th Cir. 2021), <https://www.ca5.uscourts.gov/opinions/pub/20/20-20215-CV0.pdf>, at PDF p. 21-22 (emphasis added).

⁴⁴ REGENT UNIV. SCH. OF L., S1 E16 – The Administrative State – Part 6 of 6 – Judge Kyle Duncan, YOUTUBE (July 5, 2024), <https://www.youtube.com/watch?v=d92o3fUnwbA>, at 18:20.

⁴⁵ REGENT UNIV. SCH. OF L., S1 E16 – The Administrative State – Part 6 of 6 – Judge Kyle Duncan, YOUTUBE (July 5, 2024), <https://www.youtube.com/watch?v=d92o3fUnwbA>, at 24:00.

not directly accountable to the people, in order to preserve some accountability, we have to find a legal mandate for it.”⁴⁶

History of Commitment to the Causes:

- Duncan has been a longtime member of the Federalist Society and an active participant over a 12-year period.⁴⁷

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- Duncan has been a member of the Knights of Columbus since 2005,⁴⁸ and was a poll watcher for Mitt Romney’s presidential campaign in 2012.⁴⁹
 - Lastly, in 2016, Duncan was a member of the religious liberty advisory board for Marco Rubio’s presidential campaign.⁵⁴

Government Overreach:

- Duncan supported voter-ID laws and upheld election integrity during COVID-19.
 - Judge Duncan wrote the majority opinion in *Tex. League of United Latin Am. Citizens v. Hughes*, upholding Texas’ absentee voting laws. Judge Duncan’s opinion explained, “First, the district court vastly overstated the ‘character and magnitude’ of the burden allegedly placed on voting rights by the October 1 Proclamation [that specified mail-in ballots could be delivered only to one designated location per county]. Steen, 732 F.3d at 387 (quoting *Burdick*, 504 U.S. at 434). Indeed, one strains to see how it burdens voting at all.”⁵⁰ Judge Duncan further states, “States have critically important interests in the orderly administration of elections and in vigilantly reducing opportunities for voting fraud.”⁵¹

⁴⁶ REGENT UNIV. SCH. OF L., S1 E16 – The Administrative State – Part 6 of 6 – Judge Kyle Duncan, YOUTUBE (July 5, 2024), <https://www.youtube.com/watch?v=d92o3fUnwbA>, at 29:45 (emphasis added).

⁴⁷ S. Questionnaire, <https://www.judiciary.senate.gov/imo/media/doc/Duncan%20SJQ1.pdf>, at PDF p. 5. See also Kyle Duncan, Past Events, FEDERALIST SOC’Y, <https://fedsoc.org/past-events?speaker=stuart-kyle-duncan&page=1>.

⁴⁸ S. Questionnaire, <https://www.judiciary.senate.gov/imo/media/doc/Duncan%20SJQ1.pdf>, at PDF p. 5.

⁴⁹ JUSTICEFORTexas, Court of Appeals for the Fifth Circuit Judge Kyle Duncan holds Memberships with the Knights of Columbus and the Federalist Society, LAWS IN TEX. (July 22, 2019), <https://lawsintexas.com/court-of-appeals-forthe-fifth-circuit-judge-kyle-duncan-holds-memberships-with-the-knights-of-columbus-and-the-federalist-society/>.

⁵⁴ JUSTICEFORTexas, Court of Appeals for the Fifth Circuit Judge Kyle Duncan holds Memberships with the Knights of Columbus and the Federalist Society, LAWS IN TEX. (July 22, 2019), <https://lawsintexas.com/court-of-appeals-forthe-fifth-circuit-judge-kyle-duncan-holds-memberships-with-the-knights-of-columbus-and-the-federalist-society/>.

⁵⁰ *Tex. League of United Latin Am. Citizens v. Hughes*, 978 F.3d 136 (5th Cir. 2020), <https://www.ca5.uscourts.gov/opinions/pub/20/20-50867-CV0.pdf>, at PDF p. 10 (emphasis added).

⁵¹ *Tex. League of United Latin Am. Citizens v. Hughes*, 978 F.3d 136 (5th Cir. 2020), <https://www.ca5.uscourts.gov/opinions/pub/20/20-50867-CV0.pdf>, at PDF p. 14 (emphasis added).

- He also supported bodily autonomy and disfavored government overreach regarding the COVID vaccine.
 - o Duncan signed onto an order written by Judge Engelhardt to block the implementation of OSHA’s emergency temporary standard for COVID-19 vaccination. The order by Judge Engelhardt states: “It is clear that a denial of the petitioners’ proposed stay would do them irreparable harm. For one, the Mandate threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s).”⁵² Duncan also wrote in his concurrence, “Whether Congress could enact such a sweeping mandate under its interstate commerce power would pose a hard question. See

NFIB v. Sebelius, 567 U.S. 519, 549–61, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012).

Whether OSHA can do so does not.”⁵³ o Judge Duncan was also on a Fifth Circuit panel that maintained an injunction preventing the Department of Defense from enforcing certain COVID-19 vaccination requirements. The per curiam opinion held, in reference to the servicemembers’ RFRA claim, that “[a]ccepting the vaccine would directly burden their respective faiths by forcing them to inject an unremovable

⁵² BST Holdings, L.L.C. v. Occupational Safety & Health Admin., U.S. Dep’t of Lab., 17 F.4th 604 (5th Cir. 2021), <https://cases.justia.com/federal/appellate-courts/ca5/21-60845/21-60845-2021-11-12.pdf?ts=1636763415>, at PDF p. 18-19 (emphasis added).

⁵³ BST Holdings, L.L.C. v. Occupational Safety & Health Admin., U.S. Dep’t of Lab., 17 F.4th 604 (5th Cir. 2021), <https://cases.justia.com/federal/appellate-courts/ca5/21-60845/21-60845-2021-11-12.pdf?ts=1636763415>, at PDF p. 22 (emphasis added).

substance at odds with their most profound convictions,”⁵⁴ and ultimately found that “[t]hese circumstances impose a substantial burden on Plaintiffs.”⁵⁵

⁵⁴ U.S. Navy Seals 1-26 v. Biden, 27 F.4th 336 (5th Cir. 2022), <https://www.ca5.uscourts.gov/opinions/pub/22/2210077-CV0.pdf>, at PDF p. 23-24 (emphasis added).

⁵⁵ U.S. Navy Seals 1-26 v. Biden, 27 F.4th 336 (5th Cir. 2022), <https://www.ca5.uscourts.gov/opinions/pub/22/2210077-CV0.pdf>, at PDF p. 24.