



January 17, 2018

VIA EMAIL

The Honorable Charles Grassley  
Chair  
Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, D.C., 20510

Senator Dianne Feinstein  
Ranking Member  
Senate Committee on the Judiciary  
152 Dirksen Senate Office Building  
Washington, D.C., 20510

Dear Senators Grassley and Feinstein,

On behalf of the National Women's Law Center (the Center), an organization that has fought to promote women's legal rights and protections for 45 years, I write to express serious concerns regarding the nomination of Matthew Kacsmark to the United States District Court for the Northern District of Texas.

Mr. Kacsmark currently serves as Deputy General Counsel of the First Liberty Institute, where Jeff Mateer, who recently withdrew his nomination to the U.S. District Court for the Eastern District of Texas, previously worked as General Counsel. Review of Mr. Kacsmark's record pertaining to women's rights and the rights of LGBTQ individuals, like that of Mr. Mateer, gives serious reason to doubt that he would uphold core constitutional rights and protections or treat all litigants fairly if confirmed to a lifetime position on the federal bench.

Often, Mr. Kacsmark's hostility to LGBTQ and reproductive rights has gone hand in hand. In one article, he lamented the rule implementing Section 1557 of the Affordable Care Act, which prohibits discrimination on the basis of sex, race, national origin, age, or disability, asserting that the rule's inclusion of gender identity, sex stereotyping, and termination of pregnancy under sex discrimination puts these categories "on a predictable and probable collision course with millennia-old religious beliefs about sex, sexuality, and marriage."<sup>1</sup> Accordingly, he argued that there must be a far-reaching religious exemption to Section 1557's sex discrimination prohibition, despite the absence of any such exemption in the statutory text. Not only does this argument assert a license to discriminate in the face of a nondiscrimination law that provides

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<sup>1</sup> Matthew Kacsmark, *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>. Notably, he advocated for "particularized conscience protections." *Id.* The comment letter described *infra* note 17 also argued that a broad religious exemption should be established for Section 1557 and proposed the following language: "RELIGIOUS ORGANIZATIONS WITH CONTRARY RELIGIOUS TENETS. The prohibition on sex discrimination shall not apply to a religious organization if such application would not be consistent with the religious tenets of such organization."

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no such broad exception on the basis of religion, it also ignores the long line of cases rejecting arguments that religiously-affiliated entities can ignore non-discrimination requirements.<sup>2</sup>

In another article, Mr. Kacsmark demonstrated the depths of his hostility to reproductive and LGBTQ rights by characterizing them as undermining marriage. In that piece, he argued that procreation is “a pillar of marriage law” destroyed by Supreme Court cases establishing that the constitutional right to privacy protects the decision to use contraceptives and to decide whether to have an abortion.<sup>3</sup> He went on to lament that “sexual revolutionaries” have made marriage and “the unborn child” secondary to “the erotic desires of liberated adults.”<sup>4</sup> He then criticized “the campaigns for same-sex marriage and ‘sexual orientation’ and ‘gender identity’ legislation,” for “litigating and legislating” to remove “sexual difference and complementarity.”<sup>5</sup> His framing of “sexual difference and complementarity” as another “pillar of marriage law” suggests that he believes that gendered expectations of how men and women should behave are an appropriate basis for lawmaking—a notion soundly rejected by the Supreme Court on many occasions.<sup>6</sup>

Other elements of Mr. Kacsmark’s record that raise concerns around women’s health and reproductive rights and LGBTQ rights are described below.

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<sup>2</sup> See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (holding that the government’s interest in eliminating racial discrimination in education outweighed any burdens on religious beliefs imposed by Treasury Department regulations); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968) (holding that a restaurant owner could not refuse to comply with the Civil Rights Act of 1964 and not serve African-American customers based on his religious beliefs); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990) (holding a religious school could not compensate women less than men based on the belief that “the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family . . . .”); *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316 (11th Cir. 2012) (reversing summary judgment for religious school that claimed a religious right to fire teacher for becoming pregnant outside of marriage).

<sup>3</sup> Matthew Kacsmark, *The Abolition of Man . . . and Woman*, THE CATHOLIC REGISTER (June 24, 2015), available at <http://www.ncregister.com/daily-news/the-abolition-of-man-...-and-woman>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* Mr. Kacsmark was quoted in another article as objecting to the EEOC’s interpretation that sex discrimination under Title VII encompasses discrimination on the basis of sexual orientation and gender identity because of its impact on “the fourth and final pillar of marriage law” – “sexual difference and complementarity.” See Mary Reichard, *A Few States Are Protecting Religious Liberty*, THE WORLD (Sept. 14, 2015), available at [https://world.wng.org/2015/09/a\\_few\\_states\\_are\\_protecting\\_religious\\_freedom](https://world.wng.org/2015/09/a_few_states_are_protecting_religious_freedom).

<sup>6</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (holding unconstitutional exclusion of women from Virginia Military Institute because of state’s reliance on gender stereotypes); *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (holding unconstitutional federal statute providing for support only in event of father’s unemployment based on stereotype that father is principal provider “while the mother is the ‘center of home and family life’”); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (invalidating measure imposing alimony obligations solely on husbands because it “carries with it the baggage of sexual stereotypes”); *Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (striking down statute assigning different ages of majority to girls and boys and stating, “[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas”); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (holding unconstitutional a Social Security Act provision that required payment of benefits to a deceased worker’s widow and minor children, but not to a deceased worker’s widower and acknowledging harms caused by “gender-based generalization”); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality) (striking down a military benefits scheme premised on the gender-based expectation that women were financially dependent on their husbands).

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### *Reproductive Rights*

Mr. Kacsmark's record shows disdain for *Roe v. Wade* and a willingness to use religion in order to circumvent important legal protections that guarantee critical reproductive health care.

He has demonstrated hostility toward the fundamental constitutional right to decide whether to obtain an abortion. He sarcastically described *Roe v. Wade* as follows: "On January 22, 1973, 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."<sup>7</sup> These comments call into question whether he would respect and uphold binding and repeatedly affirmed Supreme Court precedent on abortion, despite his generalized assurances to the Committee.

Mr. Kacsmark has repeatedly chosen to represent individuals and entities that seek to use religion in order to get out of critical non-discrimination laws and other important legal protections. For example, as Deputy General Counsel of the First Liberty Institute, he wrote an *amicus* brief in support of the petition for *certiorari* to the U.S. Supreme Court in *Stormans, Inc. v. Weisman*.<sup>8</sup> The brief opposed a Washington State regulation requiring pharmacies to "deliver lawfully prescribed drugs or devices," including emergency contraception, and generally extolls the long history and importance of "particularized and belief-specific" religious exemptions. As Deputy General Counsel, he also represented several organizations with religious objections to birth control in their challenges to the Affordable Care Act's requirement that insurance plans cover contraception.<sup>9</sup> Mr. Kacsmark's representation of these organizations calls into question whether he would privilege religious beliefs over other important federal laws including those protecting constitutional rights and public health. This threat is not just hypothetical—cases challenging the Trump Administration's rollback of the birth control benefit are pending in courts across the country.

### *LGBTQ Rights*

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<sup>7</sup> Matthew Kacsmark, *The Inequality Act: Weaponizing Same-Sex Marriage*, PUBLIC DISCOURSE (Sept. 4, 2015), available at <http://www.thepublicdiscourse.com/2015/09/15612/>.

<sup>8</sup> Brief for 43 members of Congress as Amici Curiae Supporting Petitioners, *Storman's Inc. v. Weisman*, 794 F.3d 1064 (9th Cir., 2015), available at [https://scholar.google.com/scholar\\_case?case=2698078703628605908&q=794+F.3d+1064+&hl=en&as\\_sdt=200P](https://scholar.google.com/scholar_case?case=2698078703628605908&q=794+F.3d+1064+&hl=en&as_sdt=200P). In a subsequent article, Mr. Kacsmark described the law as prohibiting "conscientious objectors" from declining to "dispense abortifacient drugs in violation of their religious beliefs." Matthew Kacsmark, *Defending Conscience Rights at Hacksaw Ridge and in the HHS Cases*, FIRST THINGS (Nov. 4, 2016), available at <https://www.firstthings.com/blogs/firstthoughts/2016/11/defending-conscience-rights-at-hacksaw-ridge-and-in-the-hhs-cases>.

<sup>9</sup> *Christian and Missionary Alliance Foundation, Inc. v. Burwell*, No. 2:14-cv-580 (M.D. Fla. 2015); *Insight for Living Ministries v. Burwell*, No. 4:14-cv-675 (E.D. Tex. 2014); Brief for Christian and Missionary Alliance Foundation, Inc. et al. as Amici Curiae Supporting Petitioners, *Zubik v. Burwell*, 136 S.Ct. 1557 (2016) (No. 14-1418).

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Similarly, Mr. Kacsmark's record regarding LGBTQ rights raises serious concerns. He has criticized Supreme Court precedent establishing marriage equality and endorsed the description of transgender identity as a mental disorder. In addition, in his writings, he repeatedly elevates the supposed harm to those who are prevented by law from discriminating against LGBTQ individuals under the guise of religious beliefs, over the harm to individuals who face discrimination on the basis of sexual orientation or gender identity.

For example, Mr. Kacsmark was quoted in an article as arguing 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."<sup>10</sup> He went on to express particular concern that, "[a]s sexually revolutionized definitions of marriage, sexuality and sexual identity are mainstreamed and codified in the non-discrimination boilerplate, faith-based organizations cannot safely assume that their external contracts, grants or cooperative agreements honor their sincerely held religious beliefs."<sup>11</sup> In this framing, he not only elevated the concerns of religious organizations over the rights of LGBTQ individuals, but indeed failed to recognize or acknowledge the harm individuals might suffer if not protected from discrimination on the basis of sexual orientation or gender identity.

This dismissive approach to LGBTQ rights and to the harm arising from denial of these rights is a consistent theme in Mr. Kacsmark's record. He co-authored an *amicus* brief in *Obergefell v. Hodges*,<sup>12</sup> which made the attenuated argument that a Supreme Court decision "imposing same-sex marriage on the States" would "lead to untold violations of the latter's First Amendment free speech rights."<sup>13</sup>

Mr. Kacsmark criticized the Supreme Court's *Obergefell* decision itself, writing sardonically in an article: "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."<sup>14</sup> He also objected to the Equality Act, which would add explicit protections from discrimination on the basis of sexual orientation and gender identity to federal law, asserting in an article that the legislation would "weaponize" *Obergefell* and "punish dissenters who disagree with same-sex marriage."<sup>15</sup> Mr. Kacsmark also represented the owners of an Oregon bakery who refused to provide a wedding cake to a same-sex couple,

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<sup>10</sup> See Reichard, *supra* note 5.

<sup>11</sup> Reichard, *supra* note 5.

<sup>12</sup> Brief of Amici Curiae Religious Organizations, Public Speakers, and Scholars Concerned About Free Speech in Support of Respondents, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574).

<sup>13</sup> *Id.*

<sup>14</sup> Kacsmark, *supra* note 7.

<sup>15</sup> Kacsmark, *supra* note 7.

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co-authoring a brief arguing that upholding a finding of discrimination under state law would violate the business owners' religious beliefs and Free Speech rights.<sup>16</sup>

Mr. Kacsmark also has taken positions hostile to transgender individuals and in opposition to their right to access necessary health care. For example, he signed a comment letter to the U.S. Department of Health and Human Services, along with a number of religiously-affiliated organizations and organizations, that argued transition-related medical care should not be covered by employer programs because "we believe, as do many health care providers, that medical and surgical interventions that attempt to alter one's sex are, in fact, **detrimental to patients**"<sup>17</sup> (emphasis added). In addition, the comments cited statements characterizing an individual's identification as transgender as "a mental disorder" and gender reassignment surgery as "collaborat[ing] with and promot[ing] a mental disorder."<sup>18</sup> Other comments that Mr. Kacsmark signed on to disputed that the failure to provide services like transition-related medical care could be considered discrimination against transgender individuals, stating, "It is not 'discrimination' when a hospital provides care it considers appropriate, declines to perform procedures destructive to patients' welfare and well-being, or declines to take actions that undermine the health, safety, and privacy of other patients."<sup>19</sup>

These consistent and repeated statements, writings, and litigation positions raise serious concerns about whether Mr. Kacsmark would recognize and properly apply statutory or constitutional protections for LGBTQ individuals when considering cases involving marriage equality or antidiscrimination protections, if confirmed. Further, his record raises serious questions about whether he would give religious preferences precedence over the legal rights of LGBTQ individuals. Indeed, the totality of his record on LGBTQ rights would make it virtually impossible for LGBTQ individuals who might come before him if he were confirmed to have any confidence that they would receive a fair hearing in his courtroom.

For all of the foregoing reasons, the nomination of Matthew Kacsmark to a lifetime position on the U.S. District Court for the Northern District of Texas raises serious concerns for the National Women's Law Center. Please feel free to contact me, or Amy Matsui, Senior Counsel and Director of Government Relations at the Center, at (202) 588-5180, should you have any questions.

Sincerely,

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<sup>16</sup> See Petitioners' Opening Brief in *Klein v. Or. Bureau of Labor and Indus.*, Agency Nos. 44-14, 45-14 (Or. App. Apr. 25, 2016), available at <http://boydengrayassociates.com/petitioners-opening-brief-in-klein-v-oregon-bureau-of-labor-and-industries-agency-nos-44-14-45-14/>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See Comment Letter from Catholic Med. Ass'n et. al to Ctrs. for Medicare & Medicaid Servs., Dep't of Health and Human Servs. (Aug. 12, 2016), available at <https://www.regulations.gov/document?D=CMS-2016-0095-0135>.

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A handwritten signature in blue ink that reads "Fatima Goss Graves". The signature is written in a cursive, flowing style.

Fatima Goss Graves  
President and CEO  
National Women's Law Center

cc.: Judiciary Committee