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Testimony before the Presidential Commission on the Supreme Court of the United States

Panel: "Perspectives on Court Reform"

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Good morning. Let me begin by thanking the President for convening this Commission, and by expressing my appreciation for the attention that is being paid to issues relating to the operation, integrity and credibility of not only the Supreme Court, but frankly of our entire federal judiciary. Thank you to the co-chairs of the Commission, Bob Bauer and Cristina Rodriguez, to the other members of the Commission, and to the staff supporting their work. I also wish to thank my colleagues at Lambda Legal for their support in preparing this testimony.[1]

I. Introduction

My name is Sharon McGowan, and I currently serve as the Chief Strategy Officer and Legal Director of Lambda Legal Defense & Education Fund, Inc. ("Lambda Legal"), the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender and queer ("LGBTQ") people and everyone living with HIV through impact litigation, education and public policy work.

Prior to joining Lambda Legal, I served as the Principal Deputy Chief of the Appellate Section of the Civil Rights Division of the U.S. Department of Justice. In that role, and previously as a line lawyer in the Appellate Section, I worked closely with the Office of the Solicitor General in crafting the litigation positions of the United States before the Supreme Court and in the federal appellate courts. Earlier in my career, I worked at the ACLU, litigating issues of liberty, equality, freedom of speech and expression, and separation of church and state, again in both the U.S. Supreme Court and in the lower federal courts.

[1] In particular, I would like to thank Jenny Pizer, Sasha Buchert, Ethan Rice, Maia Zelkind, Jamie Farnsworth and Kalli Joslin for their invaluable assistance.

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In my role at Lambda Legal, I am proud to lead an outstanding team of over thirty lawyers and paraprofessionals who operate with, and build upon, a tradition of excellence that our organization has developed over nearly fifty years of advocacy on behalf of the LGBTQ community and everyone living with HIV. The health, integrity and credibility of our federal judiciary, including but not limited to the Supreme Court, is of tremendous personal and professional import and concern to all of us, as it is an important venue where we seek justice on behalf of people who have too often been shut out and cast aside as "less than" or "other."

II. Lambda Legal: An Advocate in the Court and an Advocate for Fair Courts

Throughout our history, Lambda Legal has played a significant role in every major LGBTQ case decided by the Supreme Court. We have been party counsel in many of the watershed cases, including *Lawrence v. Texas*,[2] which in 2003 finally invalidated criminal sodomy laws in the thirteen states that still had such laws on the books, and which, as a practical matter, ensured that states could no longer make it a crime simply to be a lesbian, gay or bisexual person. Lambda Legal was co-counsel in *Romer v. Evans*,[3] the 1996 Supreme Court decision vindicating the principle that "[a] State cannot * * * deem a class of persons a stranger to its laws,"[4] which Colorado had sought to do to LGBTQ people by singling them out for unique disadvantage in the political process. Most recently, Lambda Legal was co-counsel in *Obergefell v. Hodges*, the 2015 decision that finally made marriage equality the law of the land.[5]

While we have experienced significant success in the Supreme Court, we have also had our share of disappointments. For example, we represented James Dale in his lawsuit against the Boy Scouts of America, which claimed a First Amendment right to exclude "avowed homosexuals."[6] Although the Supreme Court vindicated the Boy Scouts' right to exclude James in order to further its discriminatory message, the courage of this (now former) Eagle Scout transfixed many across the country, and his willingness to speak out against the prejudice he experienced simply because of who he was undoubtedly changed many hearts and minds. We have also been turned away by the Supreme Court in cases that presented questions that the Court later decided to take up, such as Jameka Evans', whose case raised the issue whether Title VII's prohibition of sex discrimination in employment also reached claims of discrimination based on sexual orientation.[7]

Our participation in the work of the Supreme Court is not, however, limited to our role as party counsel. Over the course of our history, Lambda Legal has submitted scores of *amicus curiae* briefs to the Court. Some of these briefs were filed in cases directly implicating the LGBTQ community. For example, in the Title VII cases ultimately decided under the consolidated

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[2] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[3] *Romer v. Evans,* 517 U.S. 620 (1996).

[4] *Id.* at 635.

[5] *Obergefell v. Hodges,* 576 U.S. 644 (2015).

[6] Brief for Respondent at 7, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/boy-scouts-v-dale_nj_20000329_brief-for-respondent.pdf.

[7] *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017), *cert. denied,* 138 S.Ct. 557 (2017).

caption *Bostock v. Clayton County*,[8] Lambda Legal filed two separate amicus briefs – in one, fleshing out arguments for why Title VII's prohibition on sex discrimination by necessity covers discrimination claims brought by transgender people,[9] and in the other, refuting the most commonly deployed arguments used to deny Title VII's coverage of sexual orientation claims. [10]

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[11] we filed an amicus brief setting forth data collected from our Legal Help Desk demonstrating the extent to which discrimination persists against LGBTQ people across the country in wide-ranging contexts, including not only wedding-related service providers but also doctor's offices and other healthcare facilities.[12] And this past term, we filed an amicus brief in *Fulton v. City of Philadelphia*,[13] in which we documented the serious harms that will befall LGBTQ youth in Philadelphia's foster care system and foster care systems nationwide if government-funded providers are permitted to turn away same-sex couples, thereby sending the damaging message that same-sex couples are inferior parents and can be subjected to discrimination, as well as reducing the pool of homes likely to care properly for LGBTQ youth. We also noted the likely connection between discrimination against same-sex couples by child welfare agencies, and discrimination against -- or inferior care provided to -- the LGBTQ youth who are under the care of child welfare agencies who put their opposition to married same-sex couples ahead of the best interests of children.

Of course, there are many other cases heard by the Supreme Court every term that affect the legal rights and lived equality of LGBTQ people, and we participate as amicus in those cases as well. This past term, for example, we joined with the National Women's Law Center, the Lawyers Committee for Civil Rights Under Law and pro bono counsel Ropes & Gray in this term's student speech case, *Mahanoy Area School District v. B.L.*,[14] to ensure that the Court did not overlook schools' important responsibility to address harassing speech that interferes with

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[8] *Bostock v. Clayton Cnty*., 140 S.Ct. 1731 (2020).

[9] Brief of Lambda Legal Defense and Education Fund, Inc. as Amicus Curiae Supporting Respondent Aimee Stephens, *Equal Emp. Opportunity Comm'n, v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *petition for cert. granted in part, Bostock v. Clayton Cnty.*, 140 S.Ct. 1731 (2020) (No. 18-107), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/stephens_dc_20190703_ll-amicus-brief.pdf.

[10] Brief of Lambda Legal Defense and Education Fund, Inc. as Amicus Curiae Supporting the Employees, *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731 (2020) (Nos. 17-1618, 17-1623), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/zarda_ny_20190703_ll-amicus-brief.pdf.

[11] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 138 S.Ct. 1719 (2018).

[12] Brief of Lambda Legal Defense and Education Fund, Inc., et al. as Amici Curiae Supporting Respondents, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018) (No. 16-111), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/16-111bsaclambdalegaletal.pdf; Lambda Legal, *Lambda Legal to High Court: Religious License to Discriminate Harms LGBT People from Cradle to Grave* (Oct. 30, 2017), https://www.lambdalegal.org/news/us_20171030_religious-discrimination-harms-lgbt-people.

[13] Brief of Organizations Serving LGBTQ Youth as Amici Curiae Supporting the Respondents, *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021) (No. 19-123), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/fulton_pa_20200820_amicus.pdf.

[14] *Mahanoy Area Sch. Dist. v. B. L. by & through Levy,* 141 S.Ct. 2038 (2021).

the rights of students to learn, while protecting the free speech rights of students.[15] Likewise, Lambda Legal filed in the most recent unsuccessful challenge to the constitutionality of the Affordable Care Act, *California v. Texas*,[16] explaining in our amicus brief the lifesaving role the ACA has played in expanding healthcare coverage for people living with HIV, particularly those with lower incomes who have faced barriers to care in the past such as LGBTQ people and people of color.[17] We have participated in cases seeking to curtail reproductive healthcare access to highlight the harms that these restrictions inflict upon LGBTQ people (*Whole Women's Health v. Hellerstedt*),[18] and drew on our experience as a community targeted for government-sanctioned discrimination in opposing the anti-Muslim travel ban (*Trump v. International Refugee Assistance Project*). [19]

As demonstrated by the above, Lambda Legal is an organization that litigates to vindicate the promises of our Constitution and the protection of other laws not only for LGBTQ people and everyone living with HIV, but also for other historically marginalized communities of which we are a part. But our cases are not only about important legal principles of equal protection and due process. They are also – in fact, they are primarily – about people who wish to live their lives free from discrimination, with safety, security, and full opportunity for themselves and their families.

Therefore, when we talk about court reform, we must never lose sight of the fact that the integrity and credibility of our legal system depends equally on the substantive outcomes in individual cases and on whether people have perceived the process to be fair. It depends on whether they are treated with respect by judges and other officers of the court when navigating the judicial system. It depends on whether people have confidence that judges can be trusted to apply the law with integrity and without favor. It depends on how long it takes for a case to work its way through the process. It depends on whether judges behave like their actions and their words matter.

In recognition of these considerations, Lambda Legal's mission includes public education about our community's legal rights and the legal system, as well as advocacy and education with the

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[15] Brief for the National Women's Law Center, et al., as Amici Curiae Supporting Respondents, *Mahanoy Area Sch. Dist. v. B. L. by & through Levy,* 141 S.Ct. 2038 (2021) (No. 20-255), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/20-255_nwlc_et_al._amicus_brief.pdf.

[16] *California v. Texas*, 141 S.Ct. 2104 (2021).

[17] Brief for Lambda Legal Defense & Education Fund, Inc., et al. as Amici Curiae Supporting Petitioners, *California v. Texas*, 141 S.Ct. 2104 (2021) (Nos. 19-840, 19-1019), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/california_dc_20200513_amicus-brief.pdf; Lambda Legal, *Lambda Legal Urges Supreme Court to Uphold the Affordable Care Act* (May 13, 2020), https://www.lambdalegal.org/news/dc_20200513_ll-urges-scotus-to-uphold-aca-brief.

[18] Brief of Lambda Legal Defense and Education Fund, Inc., as Amici Curiae Supporting Petitioners and Supporting Reversal, *Whole Woman's Health v. Cole*, 790 F.3d 598 (5th Cir. 2015), *rev'd and remanded sub nom. Whole Woman's Health v. Hellerstedt,* 136 S.Ct. 2292 (2016) (No. 15-274), https://www.lambdalegal.org/sites/default/files/wwh_tx_20160104_amicus.pdf.

[19] Brief for Members of the Clergy, et al., as Amici Curiae Supporting Respondents, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (No. 16-1436 and 16-1540), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/16-1436_bsac_clergy_americans_united_for_separation_of_church_and_state.pdf.

goal of ensuring fair and equitable treatment for LGBTQ people and everyone living with HIV who are interacting with the justice system in any way – whether as civil litigation plaintiffs, criminal defendants, prospective jurors, victims of crime, bystander witnesses, or advocates. Specifically, through our Fair Courts Project, we provide tools and information to counter attacks on the courts that threaten LGBTQ and HIV-related civil rights or jeopardize the ability of our courts to make decisions based on constitutional and legal principles, not politics or popular opinion. In recent years, our work has also involved speaking out against federal judicial nominees whose records reflect deep hostility to LGBTQ people or other indications that they should not be trusted to administer fair and impartial justice irrespective of sexual orientation, gender identity or HIV status. As an organization that litigates in federal court, the decision to publicly oppose a judicial nominee is one made only after careful analysis and consideration. Even understanding the risks associated with opposing nominees before whom we may appear, however, we have determined that we have a responsibility to sound the alarm when we believe that our community's ability to receive a fair consideration of their legal claims will be jeopardized. In other words, we know that the courts cannot protect us if we do not protect the courts.

III. The Erosion of Confidence in the Supreme Court

It is clear that our courts continue to need protection from forces that are fundamentally opposed to the notion that LGBTQ people are entitled to be treated with equal dignity, justice and respect in the eyes of the law. With each victory that we have achieved in the Supreme Court, expressions of outrage and even accusations of betrayal have been leveled against judges – particularly those appointed by Republicans – who have not ruled as opponents of LGBTQ equality would have wished.

In some ways, the cases vindicating the rights of LGBTQ people over roughly the past twenty-five years could be viewed as a bit of an anomaly when compared to the rest of the Supreme Court's docket, considering the extraordinary rollbacks of civil rights in other areas, such as voting rights, reproductive freedom and workers' rights. Yet, it is important to put the LGBTQ cases decided by the Supreme Court in their proper context. In each of these cases – *Romer*, *Lawrence*, *Windsor*,[20] and *Obergefell* – we were dealing with laws that unabashedly targeted LGBTQ people for mistreatment or legal disadvantage: laws that made it more difficult for LGBTQ people to use the political process to secure protections against discrimination; laws that criminalized our relationships, and thereby facilitated and enabled other forms of discriminatory treatment; a law that carved out only the marriages of same-sex couples from recognition for the purposes of federal benefits; and state laws (including state constitutional amendments) that specifically excluded same-sex couples from marriage's legal protections for illegitimate or irrational reasons.

With respect to the marriage equality cases, while the rationales for these discriminatory exclusions evolved over time to seem more socially palatable, the fact remains that these cases have always involved explicit and unapologetic discrimination against LGBTQ people. The fact that the favorable rulings in these and the other cases I have mentioned had the cumulative effect

[20] *U.S. v. Windsor*, 570 U.S. 744 (2013).

of lifting LGBTQ people out of a legal sinkhole of formal government-sanctioned inequality should not be lost here when assessing how much weight to give these cases when grading the Court's performance along the political spectrum.

Even with respect to the recent decision in *Bostock*, the arguments against coverage under Title VII for claims of discrimination based on sexual orientation and gender identity amounted to little more than an elevation of a presumed congressional intent to exclude LGBTQ people from a law whose terms would otherwise have covered these claims. Recall that similar arguments were made with respect to whether Title VII covered claims of same-sex sexual harassment, and that they were resoundingly rejected in the Supreme Court's unanimous 1998 decision in *Oncale v. Sundowner Services.*[21] As Justice Scalia wrote for the Court, even though "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII[,]" "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[22]

Nevertheless, pockets of outsized outrage after the marriage equality decisions in 2013 and 2015 produced heightened fervor to pack the Supreme Court with jurists who could be relied upon to enforce a selectively tailored version of a so-called originalist philosophy. This jurisprudential approach would limit the Constitution's protections to the highly constrained notions of freedom that were recognized centuries ago,[23] and starkly opposes the view expressed by Justice Kennedy that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[24]

To be sure, the Supreme Court has never been wholly divorced from politics. However, the last five years have produced an unprecedented shattering of norms, the discarding of institutional safeguards, and in some cases unabashed hypocrisy in service of this goal of making the Court into an instrument of an extreme and reactionary ideology.

The history of which I speak is well known and need only be referenced briefly. First, in 2016, then-Senate Majority Leader Mitch McConnell refused to hold even a hearing, let alone a vote, on President Obama's nominee to fill the vacancy created by the death of Justice Scalia. This was consistent with a larger pattern of obstruction with respect to President Obama's federal judicial nominations, which resulted in the elimination of the filibuster for lower court nominees.

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[21] *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75 (1998).

[22] *Id.* at 79.

[23] To such originalist arguments, Justice Kennedy responded: "Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence v. Texas*, 539 U.S. 558, 578-579 (2003).

[24] *Id.at 579; cf. Obergefell v. Hodges,* 576 U.S. 644, 660 (2015). ("Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.").

Within days of taking office, President Trump nominated then-Circuit Court Judge Neil Gorsuch, a jurist whose position in *Hobby Lobby* on what constituted an undue burden on religious liberty had been too extreme for even Justice Scalia to adopt.[25] Unable to secure sixty votes, then-Leader McConnell exercised the so-called "nuclear" option and changed the rules to require only a simple majority for confirmation to a lifetime appointment to the Supreme Court.

Then, in 2018, Justice Kennedy resigned, creating a vacancy that President Trump would fill with Kennedy's former clerk, then-D.C. Circuit Judge Brett Kavanaugh.[26] The troubling accusations about the nominee's alleged prior misconduct, the disturbingly intemperate display by the nominee during his confirmation hearing, the fervent calls for further investigation, and the frenetic rush to a vote on the nomination before the 2018 mid-term elections left even the most ardent defenders of conservative jurisprudence ill at ease. It also galvanized many who were previously disengaged from the conversations about the Court that are happening today.

Finally, there was the vacancy created by the death of Justice Ruth Bader Ginsburg on September 18, 2020. Even though early voting in the 2020 presidential election was already underway, and notwithstanding the prior justifications given by then-Leader McConnell for denying a hearing on Merrick Garland months prior to the 2016 presidential election, then-Circuit Court Judge Amy Coney Barrett was nominated on September 26, and confirmed exactly one month later on October 26.

While the nomination was pending, on October 5, Justices Thomas and Alito issued a statement dissenting from the denial of certiorari in the case brought by Kim Davis, the Kentucky clerk who blocked issuance of marriage licenses to eligible same-sex couples based on her personal religious objection to their marriages. Decrying *Obergefell*'s "ruinous consequences for religious liberty," Justice Thomas lamented that "Davis may have been one of the first victims of this Court's cavalier treatment of religion [in *Obergefell*]," but "she will not be the last."[27]

Shortly after Justice Barrett's confirmation, Justice Alito gave a keynote address at the Federalist Society that can only be described as part victory speech and part call to arms. In his remarks, he promoted the false narrative that religious liberty is under attack, when the fact is that religious

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[25] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), presented the question of a for-profit company's obligation to comply with the Affordable Care Act's contraceptive mandate in the face of the company's asserted moral objections. In his 10th Circuit decision in Hobby Lobby, Judge Gorsuch insisted that any individual should be able to opt out of any law that, in that person's view, makes them "complicit" in conduct of another considered to be immoral, regardless of how compelling the state's interest in enforcing the law. *Hobby Lobby Stores, Inc., v. Sebelius*, 723 F.3d 1114, 1152-56 (10th Cir. 2013) (Gorsuch, Kelly, Tymovich, J.J., concurring). In a 5-4 decision authored by Justice Alito and joined by Justices Scalia, the Supreme Court reaffirmed that an individual's claim of religious liberty may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Burwell,* 573 U.S. at 739.

[26] At least one reporter suggests that Justice Kavanaugh's nomination was the result of influence by Justice Kennedy. Robert Barnes, *Justice Kennedy asked Trump to put Kavanaugh on Supreme Court list, book says*, Washington Post (Nov. 21, 2019), https://www.washingtonpost.com/politics/courts_law/justice-kennedy-asked-trump-to-put-kavanaugh-on-supreme-court-list-book-says/2019/11/21/3495f684-0b0f-11ea-8397-a955cd542d00_story html (discussing Ruth Marcus' book, Supreme Ambition: Brett Kavanaugh and the Conservative Takeover).

[27] *Davis v. Ermold*, 141 S.Ct. 3 (2020) (Mem) (Thomas, J. and Alito, J., dissenting from denial of certiorari).

liberty arguments are being used in aggressive and unprecedented ways to demand exemptions from basic nondiscrimination requirements that, among other things, require businesses and government contractors to serve all comers, as well as public health measures enacted to save lives during a global pandemic.

Finally, just a few weeks ago, in his concurring opinion in *Fulton v. City of Philadelphia*,[28] Justice Alito laid bare his exasperation that the case did not become the vehicle for realizing one of the key goals alluded to in his keynote: namely, dramatically altering the calculus used to weigh individual religious liberty claims against the government's interest in addressing discrimination. The main opinion, joined by the Court's liberal justices, ruled against the city on the basis of the specific contract at issue;[29] Justices Gorsuch and Alito each wrote separate concurring opinions in frustration over the Court's failure to address head-on whether *Employment Division v. Smith*[30] should finally (in their view) be overruled.[31] While the *Fulton* decision is certainly narrower than it might have been, there is no doubt that, on the Court's current trajectory, the mission of Justices Alito and Gorsuch, and those who went to unprecedented lengths to pack the Court with jurists like them, will soon be accomplished. The fact that the Chief Justice described the City of Philadelphia's interest in preventing discrimination against LGBTQ people as merely "weighty" rather than "compelling" should alone be enough to alarm anyone who cares about civil rights, but the fact that at least some of the liberal justices presumably joined this opinion to stave off a worse outcome (for now) further demonstrates the extent to which the right of LGBTQ people to equal treatment under law is hanging in the balance.

IV. Measures to Restore Confidence in Our Courts

The public's confidence in the Supreme Court as the ultimate arbiter of the rule of law in our country stems from a belief – or at least the ability to believe on most days – that the Court itself is invested in acting as though, and cultivating a public perception that, it is committed to administering equal justice under law. The hyper-partisan manipulation of the Court's membership and the brazen actions of some of the Court's current members over the last five years have made it difficult, if not impossible, to maintain these beliefs.

While I come to this discussion with a focus on issues of equality and justice for LGBTQ people and everyone living with HIV, these are issues that are deeply intertwined with other important issues including voting rights, reproductive justice, racial and gender equity, workers' rights, and economic justice to name a few. As the Commission is certainly aware, these are all areas in which the Court's decisions in recent years have made it more difficult to protect and advance each of these important interests. Therefore, the questions that we are grappling with about the credibility of the Supreme Court must be understood as not just tangentially related to civil rights, but rather as directly implicating core civil rights issue.

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[28] *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1883 (2021) (Alito, J., concurring).

[29] *Id.* at 1874.

[30] *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990).

[31] *Fulton*, 141 S.Ct. at 1883-1884, 1926.

It is hard to think about how we restore the credibility of our Supreme Court – and of our justice system more broadly – without acknowledging the deeper political dysfunction plaguing our country right now. But what is politically possible in this moment is a different question than whether various proposals are legally sound. For example, of the many proposals to restore faith in the Supreme Court, the most clearly constitutional proposal probably is to expand the number of justices. It only requires the political will on the part of Congress (and the Executive) to accomplish.

To be clear, there is nothing sacrosanct about the number 9. As an historical matter, the number of justices changed eight times during the first century of our nation's history, starting at six justices with the Judiciary Act of 1789, [32] decreasing to five with the Judiciary Act of 1801, [33] reaching as high as ten justices with the Judiciary Act of 1863,[34] falling to seven justices in 1866,[35] and then settling at its current number of nine justices with the Judiciary Act of 1869.[36]

Considering the dramatic growth of our country since 1869, as well as the increased volume of litigation in our judicial system since then,[37] there is certainly a reasonable case to be made for expansion of the Court independent of the political backdrop that has brought us to this moment. While it is true that the Supreme Court has taken fewer cases in the last two terms than at almost any time since World War II, the volume of cert petitions, stay motions and other requests for intervention by the Supreme Court is a function of the volume of work in the lower courts, which has also grown exponentially since the last expansion of the Court. [38]

If expansion is on the table, what might the right number be? Some have referred to a need to correct for two "stolen" seats; other proposals suggest that the addition of four justices is needed to bring the Court back to something closer to equilibrium, which would inspire more confidence that civil rights will be protected appropriately. Of course, whether that is true would depend on how these new justices were chosen and what their jurisprudence turned out to be. But it is

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[32] Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73.

[33] Judiciary Act of 1801, ch. 4 § 1, 2 Stat. 89.

[34] Tenth Circuit Act of 1863, ch. 100 § 1, 12 Stat. 794.

[35] Judicial Circuits Act of 1866, ch. 210 § 1, 14 Stat. 209.

[36] Judiciary Act of 1869, ch 22 § 1, 16 Stat. 44. President Roosevelt proposed expanding the Supreme Court to fifteen in 1937, but that effort was not successful.

[37] According to the Federal Judicial Center, the number of cases filed in the Supreme Court has grown from 417 in 1880 to between 6,000-8,000 in recent decades. *Caseloads: Supreme Court of the United States, 1878-2017*, Fed. Jud. Ctr., https://www fjc.gov/history/courts/caseloads-supreme-court-united-states-1878-2017#ftnt1.

[38] For example, the number of cases pending in the federal courts of appeals have jumped from 438 in1892 to roughly 40,000 in 2017, and there have been similarly dramatic jumps in the number of civil and criminal cases pending in federal court each year. *Caseloads: U.S. Courts of Appeals, 1892-2017*, Fed. Jud. Ctr., https://www.fjc.gov/history/courts/caseloads-us-courts-appeals-1892-2017; *Caseloads: Civil Cases, Private, 1873-2017,* Fed. Jud. Ctr., https://www fjc.gov/history/courts/caseloads-civil-cases-private-1873-2017; *Caseloads: Civil Cases, U.S. a Party, 1870-2017*, Fed. Jud. Ctr., https://www.fjc.gov/history/courts/caseloads-civil-cases-us-party-1870-2017; *Caseloads: Criminal Cases, 1870-2017*, Fed. Jud. Ctr., https://www fjc.gov/history/courts/caseloads-criminal-cases-1870-2017.

certainly reasonable to propose expanding the Court to thirteen, a number that would reflect the number of federal circuit courts of appeals in our country. In fact, one virtue of this approach – adjusting the number of justices to align with the number of federal circuits – is that it provides a limiting principle for the number, which would address any objection or concern about continual expansion of the Court to an unwieldy size.

For those who suggest that any expansion of the Supreme Court will overly politicize the institution and trigger a race to the bottom cannot make that argument without willfully ignoring the history of the last five years outlined above. Then-Senate Majority Leader McConnell's decision to withhold consideration of a Supreme Court nominee effectively reduced the Court to an eight-justice body, and there are affirmative indications that he is prepared to withhold consideration of a future nominee advanced by this administration should he find himself once again with the political power to do so.[39] In other words, there is no basis for saying that an earnest discussion about expanding the Court now would dramatically alter the political landscape – that Rubicon was crossed five years ago.

Would expanding the Court actually address the fact and perception of ideological extremism and offer greater protection for the civil rights of LGBTQ people and other vulnerable groups? Again, depending on who is choosing the additional justices, it is reasonable to think that it would. Would expansion restore confidence in the Supreme Court? In light of recent history and depending on the nature of the confirmation process, yes, it likely would, as it would directly respond to the concern that the composition of the Court was inappropriately skewed through selection of nominees far outside the jurisprudential mainstream and a grotesque flouting of procedural norms.

Would a recommendation against expansion actually inhibit those political actors determined to instill on the Court a deep and lasting hostility to civil rights, including the rights of LGBTQ people, should they find themselves with the political opportunity to do so? Of course not. The last five years have demonstrated the willingness of those opposed to civil rights to leverage political advantage and trample longstanding norms to advance their core objectives.

With that said, would expansion of the Court be sufficient alone to rehabilitate its credibility? Certainly not. And should we only be talking about the Supreme Court? Absolutely not.

So, what other things would help solve this larger credibility crisis? Here are five recommendations.

1. **Institute a Binding Ethics Code for the Supreme Court.**

The lack of a binding ethics code for the Supreme Court is inexcusable, and instituting such a code must be part of any comprehensive proposal to repair the credibility of the Court. There is simply no reason to treat the Supreme Court as beyond the reach of – or need for – a clear and binding code of conduct. The current code governing lower federal court judges sets forth five

[39] Grace Panetta, *Mitch McConnell says it's 'highly unlikely' he'd let Joe Biden fill a Supreme Court seat in 2024 if Republicans win back control of the Senate,* Bus. Insider (June 14, 2021, 11:42 AM), https://www.businessinsider.com/mcconnell-biden-block-supreme-court-seat-in-2024-2021-6.

canons, articulating their duty to (1) uphold the integrity and independence of the judiciary; (2) avoid impropriety and the appearance of impropriety in all activities; (3) perform the duties of the office fairly, impartially and diligently; (4) engage in extrajudicial activities that are consistent with the obligations of judicial office; and (5) refrain from political activity.[40] The Chief Justice's suggestion that the Supreme Court's operations are so unique that these basic ethical rules should not be applied to them is unpersuasive.[41] These are reasonable expectations that one can and should be able to expect of Supreme Court justices as well as lower court judges.

As Congress has the power to impeach judges, including justices, it would seem utterly reasonable that Congress could establish such basic standards for the Supreme Court. Crafting principles of this sort would seem to be a natural extension of that constitutional authority, undermining the suggestion that separation of powers concerns would prevent Congress from providing clarity concerning the standards of conduct it considers to be "good behavior" by members of the Supreme Court. Other proposals would have the Judicial Conference of the United States create a code of ethics for the Supreme Court, another approach that seems eminently reasonable. Legitimate questions exist about what body would hold the Justices accountable for a failure to comply with these principles short of impeachment. But one need only look to state supreme courts for models of how one might approach this issue. For example, the Supreme Court of Louisiana was able to adjudicate a complaint when one of their own, Justice Jefferson Hughes, violated the ethical duties of that office.[42] When Chief Justice Roy Moore of the Alabama Supreme Court violated ethics rules, the other justices recused themselves from hearing the matter and retired justices were selected to form a special court to adjudicate the issue.[43] One could easily imagine a body comprised of retired judges, including perhaps even retired Supreme Court justices, to provide accountability for compliance with these basic tenets of fairness, impartiality and decorum. Should term limits or a mandatory retirement age for Supreme Court justices be deemed viable, it would be even more practical to rely on retired justices to serve this function.

The lack of any accountability for Supreme Court justices who disregard their duty to act in a manner that preserves an appearance of fairness and impartiality completely disincentivizes the

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[40] The Chief Justice has correctly observed that the Code of Conduct for United States Judges currently states that the code applies only to lower federal courts judges. *Code of Conduct for United States Judges* (March 12, 2019). But for purposes of this discussion, the point is not whether it currently does, but whether, as the Chief Justice seems to suggest, there are valid reasons why such a code should not or could not be applied to the Justices of the Supreme Court. *See* https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

[41] *2011 Year-End Report on the Federal Judiciary*, at 5 (December 31, 2011), https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[42] Associated Press, *Louisiana High Court Censures One of Its Own*, U.S. NEWS & WORLD REPORT (June 30, 2021), https://www.usnews.com/news/best-states/louisiana/articles/2021-06-30/louisiana-high-court-censures-one-of-its-own.

[43] *Moore v. Alabama Jud. Inquiry Comm'n,* 234 So. 3d 458 234 (Ala. 2017); Kim Chandler, *Alabama Supreme Court upholds Chief Roy Moore's suspension,* Associated Press (Apr. 19, 2017), https://apnews.com/article/94edbee84bff4a269362f7f291760c9e; Mike Cason, *Seven Retired Judges Picked for Special Court on Roy Moore Appeal*, Birmingham Real-Time News, (Posted Oct. 31, 2016, updated Jan. 13, 2019), https://www.al.com/news/birmingham/2016/10/seven_retired_judges_picked_fo.html.

exercise of judgment and prudence, as demonstrated by Justice Alito's keynote address to the Federalist Society last fall. But it also sends a dangerous signal to lower court judges about what behavior is acceptable from a federal judge. As noted above, Lambda Legal's Fair Courts Project was created in part to ensure that LGBTQ people and everyone living with HIV can be assured of fair and respectful treatment in our justice system. Fortunately, most judges share that goal. But with the recent confirmation of a number of deeply anti-LGBTQ judges,[44] we have seen a rise in particularly troubling instances of denigrating and disrespectful treatment of LGBTQ litigants. For example, in *United States v. Varner*, [45] Fifth Circuit Judge Kyle Duncan not only repeatedly misgendered a transgender plaintiff but also used his opinion to denigrate her identity and disparage the identity of transgender and non-binary people more broadly. In fact, he went even further to suggest that judicial ethics *required* judges to disrespect transgender plaintiffs, a position that is both offensive and frivolous. In response, Lambda Legal filed an amicus brief in support of rehearing by the panel to remove the gratuitously harmful language from the opinion.[46] The effort was unsuccessful, but this case offers an example of how the cavalier attitude enabled by the lack of an ethics code for the Supreme Court can trickle down into the rest of the federal judiciary.

2. Continue Live-Streaming Oral Arguments to the Supreme Court.

A recent development that we believe bolsters the Court's credibility, and which we hope will continue, is the practice of live-streaming Supreme Court oral arguments. Even after the public health crisis of COVID subsides, live-streaming will expanding the number of people who are able to observe the operation of the Court in real time. As the arguments conducted during this past term have demonstrated, the Justices and those appearing before the Court are able to conduct business with professionalism and decorum, and the legal community and the public benefit from being able to observe these important public proceedings as they happen. Moreover, the round-robin method of questioning used by the Court during its virtual oral arguments had the ancillary benefit of facilitating more active and equal participation from all of the Justices, which provides helpful insight into their thinking and an invaluable educational opportunity for attorneys, law students and beyond. For all of these reasons, the Court should continue live-streaming its arguments going forward.

3. Limit Use of the Shadow Docket.

We share the concerns expressed by those who have critiqued the increased use of the Court's shadow docket to shift legal doctrine without the transparency that comes from full briefing, amicus participation and oral argument. Much ink has already been spilled about the shadow docket, so I will not retread that ground. Rather, I wish merely to lift up how these shadow docket actions can severely impact the lives of real people. For example, Supreme Court

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[44] Lambda Legal, *New Report Illuminates Trump's Legacy of Radicalizing Federal Courts with Alarming Speed* (Jan. 5, 2021), https://www.lambdalegal.org/blog/20210105_new-report-four-years-trump.

[45] *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020).

[46] Brief of Lambda Legal Defense and Education Fund, Inc., et al. as Amici Curiae Supporting Defendant-Appellant's Petition for Rehearing, *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/jett_tx_20200319_amici-curiae.pdf.

practitioners and observers often speak of the fifth vote to stay a lower court ruling as a "courtesy." However, I would urge all of us to remember how a transgender teenage boy in Virginia, Gavin Grimm, was barred from using the boys' restroom along with all the other boys throughout his last year of high school because Justice Breyer offered his vote as the "courtesy fifth" to stay a lower court ruling that would have allowed Gavin to use the appropriate restroom.[47] Fortunately, just a few weeks ago, the Supreme Court denied certiorari in Gavin's case after years of litigation driven by a school district's (and anti-LGBTQ organizations') unrelenting determination to deny Gavin the right to live as his authentic self.[48] But Gavin suffered significant pain and indignity in the interim because of this "courtesy," and we should not allow euphemistic language to distract from the real harm that resulted.

Similarly, a January 2019 shadow docket order lifting a lower court stay reinstated President Trump's transgender military ban, a blatantly discriminatory policy that has since been rescinded by the Biden Administration.[49] As other panelists have discussed, there are different perspectives on what it means to "preserve the status quo" in these contexts, but the fact remains that the lives of thousands of brave transgender servicemembers (and those wishing to enlist) were thrown into chaos as a result of the Court's dissolution of the Ninth Circuit stay through a shadow docket order, and for some, their dreams of serving their country were lost. While for many this is an interesting topic for academic debate, we must always remember that people's lives and livelihoods often hang in the balance.

4. Give Serious Consideration to Petitions in Capital Cases, Especially to Bias Claims.

We wholeheartedly endorse the recommendations of our colleagues at the Innocence Project to lower the number of votes required to stay an execution in capital cases still under review, and to require a more rigorous standard of review before overturning a stay of execution granted by a lower court. Likewise, we support the recommendation that the Supreme Court should be required to automatically stay an execution to permit full review of first-time habeas petitions. Lambda Legal deals with the legal system's fallibility and the effects of bias on court decisions on a regular basis, and the stakes could not be higher than in capital cases. For example, in 2018, we filed an amicus brief on behalf of Charles Rhines, urging that he be allowed to present evidence that antigay bias may have motivated the jury to sentence him to death – specifically, comments from jurors suggesting that sentencing Mr. Rhines, a gay man, to life in prison with other men would be "sending him where he wants to go."[50] On November 5, 2019, the Supreme Court rejected his request for a stay of execution,[51] and he was put to death by lethal injection. As part of our Fair Courts work, we have urged courts to use all of the tools at their disposal to root out anti-LGBTQ bias, as well as bias against people living with HIV, including the robust

[47] *Gloucester County School Bd. v. G.G. ex rel. Grimm*, 136 S.Ct. 2442 (2016) (Mem) (Breyer, J., concurring).

[48] *Gloucester County School Board v. Grimm*, No. 20-1163, 2021 WL 2637992 (June 28, 2021) (Mem).

[49] *Trump v. Karnoski*, 139 S.Ct. 950 (2019) (Mem).

[50] Brief of American Civil Liberties Union, et al. as Amici Curiae Supporting Plaintiff-Appellants, *Rhines v. Young*, 941 F.3d 894 (2019) (No. 18-2376), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/rhines_sd_20180802_brief-of-amici-curiae.pdf.

[51] *In re Rhines*, 140 S.Ct. 488 (2019) (Mem).

use of voir dire at the commencement of criminal proceedings, and meaningful post-conviction review should evidence of bias later come to light. Due to the inherent fallibility of our justice system and the irrevocable nature of capital punishment, Lambda Legal opposes the death penalty; however, as long as it remains a legal form of punishment in this country, we will advocate for additional safeguards like those proposed by the Innocence Project to ensure that the Constitution's guarantees of due process and a fair trial are not sacrificed in the rush to execute.

5. Increase and Diversify the Bench of the Lower Federal Courts.

Finally, we simply must expand the number of lower court judges. Even before the backlogs created by COVID, the federal judiciary has been grossly understaffed, resulting in justice delayed for far too many people. As just one example, I was privileged to sit next to Aimee Stephens when her case was heard by the Supreme Court in October 2019, six years after she was fired from her job at a funeral home in Detroit simply because she was transgender. My heart broke when Aimee died in May 2020, just a few weeks before the Supreme Court vindicated her struggle with its decision in *Bostock v. Clayton County*.

Lengthy litigation can exact enormous financial and emotional costs, particularly for litigants seeking to vindicate their civil rights. Some of this is due to unavoidable aspects of litigation, but judicial backlog even before the pandemic was a significant issue, and now things are exponentially worse. As it is often said, but worth repeating, justice delayed can be justice denied. Months or even years of a person's life can be lost in pretrial detention, causing psychological harm and economic devastation to family members relying on them for support. Memories may fade and witnesses may move on, making it harder for a litigant to garner the necessary evidence to support their claims.

Earlier this year, a House judiciary subcommittee hearing highlighted the urgent need for more lower court judges.[52] Congress' last significant authorization of new district court judgeships occurred in 1990, when 74 positions were added bringing the total to 645.[53] Since then, the number of district court filings has increased by roughly 40 percent.[54] The Judicial Conference issued a report in 2019 calling for the addition of 65 new district judges, the conversion of five temporary judgeships to permanent ones, and the addition of five additional slots on the Ninth Circuit Court of Appeals. Yet, as the Chair of the Judicial Resources Committee of the Judicial Conference of the United States testified in June 2020, even with these additional positions, fourteen district courts would still exceed the standard of weighted filings per judgeship (430 per

[52] *The Need for New Lower Court Judgeships, 30 Years in the Making: Hearing Before the Subcomm. on Cts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 117th Cong. (2021), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4378.

[53] Barry J. McMillion, Cong. Rsch. Serv., R45899, *Recent Recommendations by the Judicial Conference for New U.S. Circuit and District Court Judgeships: Overview and Analysis* 4 (2019), https://fas.org/sgp/crs/misc/R45899.pdf.

[54] *Id*. at 8.

judgeship) used to make its recommendations for adding judges.[55] Likewise, the Judicial Conference recommendations would only increase circuit court judgeships by 3 percent, even though circuit court filings have grown by 15 percent since 1990. Considering the fact that, since 1990, our population has grown by a third,[56] and our GDP has ballooned by 250%,[57] the increased volume in our federal courts comes as no surprise. To the contrary, what is shocking is that, notwithstanding these clear data, Congress has refused year after year to take the necessary steps to relieve this pressure on our courts.

All of this points to the obvious conclusion that the Judicial Conference recommendations must be viewed as a floor, not a ceiling. They should only be the starting point for a plan to add capacity to our federal judiciary at the district and circuit levels. In addition to ameliorating the harm caused by delays in access to justice, expanding district and circuit court judgeships will also create an opportunity to address the anachronistic and embarrassing lack of diversity on the federal bench. I commend my fellow panelist Dennis Parker for raising this issue in his testimony and add our voice to the call for greater professional diversity, and diversity of life experience.

Our legal profession is filled with outstanding LGBTQ people, people of color, people with disabilities, and others from communities that have for too long been overlooked for these important positions of public trust. It is 2021, and yet we still await the confirmation of our *first* openly lesbian federal appellate judge, as well as our first openly transgender or bisexual judges to *any* Article III court. The last four years set our country back even further with respect to diversity on the bench, with 85% of President Trump's circuit court nominees being white, 80% being men and none who were Black.[58] Moreover, we need greater professional diversity on the bench. It is unacceptable to treat prosecutors and corporate lawyers as presumptively fair and impartial, and to dismiss civil rights lawyers, public defenders, and legal aid attorneys as "having an agenda." The quality of decision-making from our federal judiciary will be stronger when these perspectives are brought into the fold, and it is long past time for our bench to better reflect our legal profession and our nation.

At a time when our nation has infrastructure top of mind, we should recognize that our courts are an essential part of our national infrastructure. The situation was already dire, and now with the backlogs caused by COVID, the delays in our justice system will become even worse. The effectiveness and efficiency of our judicial system is crucial to our nation, not only because it is where important economic disputes can be resolved but also because it is where core legal rights are vindicated.

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[55] *The Judicial Conference's Recommendation for More Judgeships Before the S. Comm. on the Judiciary*, 116th Cong. 1 (2020) (statement of Hon. Brian Stacy Miller, J. E.D. of Ark., Chair, Jud. Res. Comm. Subcomm. On Jud. Stat.), https://www.judiciary.senate.gov/imo/media/doc/Miller%20Testimony2.pdf.

[56] *Decennial Census of Population and Housing: By Decade*, https://www.census.gov/programs-surveys/decennial-census/decade.html.

[57] *GDP (current US$) – United States,* THE WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=US.

[58] *See* Lambda Legal Report, *supra* note 44.

V. Conclusion

While many of the issues being considered by the Commission are steeped in history and are rightfully the subject of significant academic debate, I close by calling upon this Commission to remember that these are not merely abstract questions. The operation of our courts affects the lives of real people, and the failings of our justice system diminish the credibility of our constitutional democracy as a whole.

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