Representing LGBTQ Clients from the Judicial Perspective

CLE Program

Thursday, June 7, 2018 | 6:30-7:30 P.M.

New York State Bar Association | Albany, NY

FACULTY

Hon. Paul G. Feinman, Associate Judge of the Court of Appeals

Hon. Elizabeth A. Garry, Presiding Justice of the Appellate Division, Third Department

Brittnay McMahon *(Moderator)*, Partner at O'Connell & Aronowitz

CLE CREDITS

1.0 Diversity, Inclusion, and Elimination of Bias

For Experienced Attorneys Only

Presented by

the lgbt bar association of greater new york

Capital District Women's Bar Association's LGBT Committee

Sponsored by

GT GreenbergTraurig

O'Connell Aronowitz Attorneys at Law

LeGaL presents: Representing LGBTQ Clients from the Judicial Perspective CLE

CLE Credit: 1.0 Credit in Diversity, Inclusion and Elimination of Bias

Date: June 7, 2018

Time: 6:30-7:30 p.m. (CLE Program); 7:30-8:30 p.m. (NYSBA Patio Mixer)

Location: New York State Bar Association, 1 Elk St, Albany, New York, 12207

Panel: Associate Judge of the Court of Appeals Paul G. Feinman and President Justice of the Appellate Division, Third Department Elizabeth A. Garry.

Moderator: Brittnay McMahon, Partner at O'Connell & Aronowitz

Introductions: Vito J. Marzano

Summary:

In conjunction with the launch of the Capital Region Chapter of LeGaL, please join LeGaL for a CLE with the Honorable Paul G. Feinman and the Honorable Elizabeth A. Garry as they provide rare insight into how to better represent LGBTQ+ clients in the New York State Judiciary. Listen to the panelist's take on what attorneys do right, wrong or what they can do better to zealously advocate for LGBTQ+ clients as the courts confront issues that are becoming increasingly common but remain unprecedent, such as divorcing same-sex couples, spousal support, child custody, or surrogacy; or workplace discrimination when an individual shares they are married to (or engaged to) a person with the same gender or intend to have a child; or how to explain concepts like gender identity and gender expression to a court that has yet to confront the issue.

General Talking Points:

- Before joining the Bench
    - Individual Perspective - What was it like to be an out LGBTQ practicing attorney?
    - Collegial Perspective -
        - Do you recall instances when you observed non-LGBTQ attorneys (even perhaps LGBTQ attorneys) not fully articulate the concerns of their client from an LGBTQ perspective?
            - When did they succeed?

            - If you represented LGBTQ clients, did you approach them differently than cisgender, heterosexual clients in a way to gain the client's trust?
        - What, if anything, would you have done differently in representing yourself as an LGBTQ attorney and/or advocating on behalf of LGBTQ clients?
    - Perspective of the Court
        - As a practicing attorney, how did you perceive the Court reacted to you as an out person?
        - How did you perceive the Court react to LGBTQ clients?
- Since admission to the Bench
    - Individual Perspective
        - What is it like to be openly LGBTQ while also being on the bench?
        - Ethics:
            - 100 NYCRR 100.2 (b) complimented or limited by 100 NYCRR 100.3 (B) (1) (and 100 NYCRR 100.3 [E] [1])
                - As an LGBTQ judge/justice, have you ever felt or have your colleagues implied that your status as an LGBTQ person has influenced you?
                    - How did you handle the situation?
                    - [Take away idea - giving attorneys a hint at how to anticipate the court perceiving that they are not objectively advocating]
            - Perceptions that their status as LGBTQ and a sitting judge, or their participation in certain activities, could cast doubt on their impartiality (see 100 NYCRR 100.4 [A]).
    - Court Perspective/Court Responsibility
        - Have you encountered instances where your colleagues failed to grasp LGBTQ issues, and to the extent permissible, how did you address the issue and explain the concept?
            - Did you feel a sense of obligation to ensure to explain the concept or issue to your colleagues? (see 100 NYCRR 100.3 [B] [3])
        - How could the attorney better articulate the issue and concepts to the court?
        - Ethics:
            - Their responsibility to ensure court personnel understand LGBTQ issues as to prevent the appearance of bias or prejudice (see 100 NYCRR 100.3 [C] [1], [2]).
    - Attorney Perspective

        - Since joining the Bench, what have you observed attorneys do best to effectively advocate issues unique to LGBTQ clients that is unfamiliar to the court?
        - Where do attorneys fall short or go too far?
            - Fall short - not fully articulating the issue or why the law should speak to the specific issue
            - Go too far - asking for too much at once [general concept – gender identity/expression issues and discrimination, or use of certain terminology with which the court may be unfamiliar that, in certain situations, may distract the Court.]
            - Ethics:
                - 100.3 NYCRR 100.3 (5)
                    - Do you recall instances where an attorney has manifested a bias or prejudice based upon an individual's sexual orientation?
        - Conceptual Questions and Practical Application
            - Where do you see the Court still struggling with respect to LGBTQ issues?
                - How can attorneys anticipate this in advocating for their clients?
            - How can an attorney explain a concept like gender identity is to a court that has never confronted the issue?
            - As married same-sex couples separate, how can attorneys better advocate in court the unique factors that these cases will involve?
- Current LGBTQ Legal Issues
    - Ethical concern about this category: 100 NYCRR 100.3 (B) (8) (see comment)
    - Federal
        - Topic: Anti-LGBTQ discrimination
            - Zarda v Altitude Express, 883 F3d 100 (2d Cir 2018)
            - Masterpiece Cakeshop v Colorado Civil Rights Commission, Dk Nos. 16-111 (2018 [decision pending from US Supreme Court).
                - Impact on Matter of Gifford v McCarthy, 137 AD3d 30 [3d Dept 2016]).
    - State
        - Topic: Surrogacy, Presumption of Legitimacy
            - Matter of Brooke S.B. v Elizabeth A.C.C., 28 NY3d 1 (2016)
            - Matter of Christopher YY. v Jessica ZZ., 159 AD3d 18 (3d Dept 2018)
            - Matter of Joseph O. v Danielle B., 158 AD3d 767 (2d Dept 2018)
            - Matter of Maria-Irene D. (Carlos A. – Han Ming T.), 153 AD3d 1203 (1st Dept 2017)

Representing LGBTQ Clients from the Judicial Perspective CLE

Faculty Biographies

Hon. Paul G. Feinman, ***Associate Judge of the Court of Appeals***

Paul G. Feinman, Associate Judge of the Court of Appeals, graduated from Columbia College, Columbia University (A.B. 1981) and the University of Minnesota Law School (J.D. 1985). He also studied at the Université de Paris VII (Jussieu),the Université de Paris II (Assas) and the Université de Lyon III. He began his legal career as a Staff Attorney for the Appeals Bureau of the Legal Aid Society of Nassau County and then worked for the Legal Aid Society, Criminal Defense Division in Manhattan. From 1989 to 1996, he clerked for Justice Angela M. Mazzarelli in Supreme Court, Criminal and Civil Branches, and in the Appellate Division, First Department.

In November 1996, Judge Feinman was elected to the Civil Court of the City of New York; he was re-elected in 2006. From 1997 - 2001, he was assigned to the Criminal Court. He was designated an Acting Supreme Court Justice in Manhattan in 2004 and elected a Justice of the Supreme Court in 2007. Governor Andrew M. Cuomo appointed him to the Appellate Division, First Department in October 2012. Cuomo nominated Judge Feinman to the Court of Appeals on June 16, 2017.

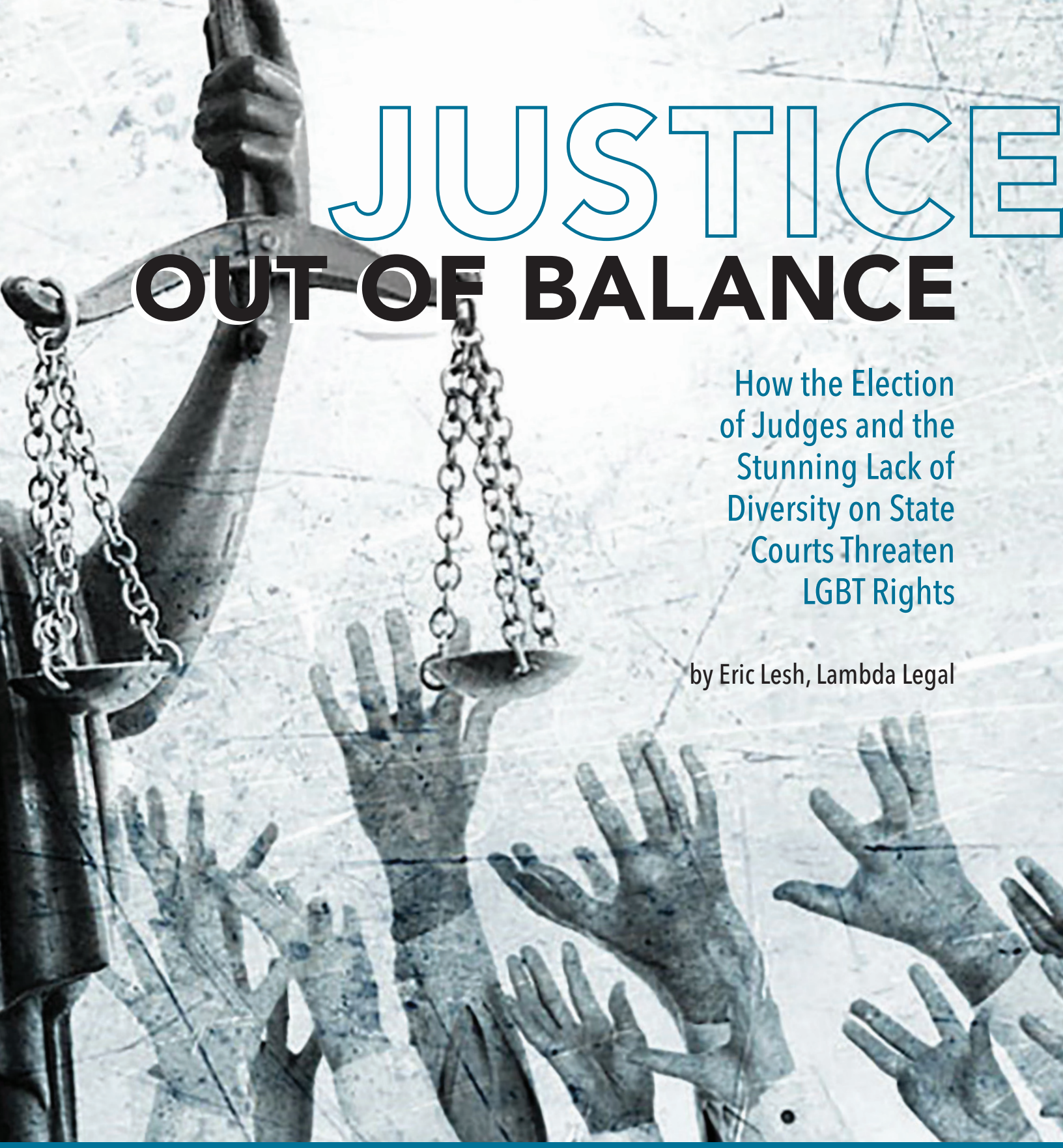
He previously served as President of the Association of Supreme Court Justices of the State of New York, Inc. (2013), President of the International Association of LGBT Judges (2008 - 2011), Presiding Member of the Judicial Section of the New York State Bar Association (2012 -2013), and President of LeGaL, the LGBT Bar of Greater New York (1996).

Hon. Elizabeth A. Garry, ***Presiding Justice of the Appellate Division, Third Department***

Presiding Justice Elizabeth Garry leads the Third Department's Appellate Court, which has held a session at Albany Law School each year since 1995. She serves as the department's chief administrator, and oversee the Committees on Professional Standards and Character and Fitness, Mental Hygiene Legal Services and the Office of Attorneys for Children, among other court functions. In addition, she will serve on the Administrative Board of the Courts, comprising New York Chief Judge Janet DiFiore and the state's four presiding justices. Justice Garry was elected to the bench of the New York State Supreme Court, 6th Judicial District, in 2006, and was appointed to the Appellate Division, Third Department, in 2009. She previously worked for 13 years in private practice with the Joyce Law Firm, and was a law clerk for New York State Supreme Court Justice Irad S. Ingraham.

Brittnay McMahon ***(Moderator)*****,** ***Partner at O'Connell & Aronowitz***

Brittnay McMahon is a Partner with our Litigation, Residential Real Estate, and Trusts & Estates practices. She has interned with the United States Attorney for the Northern District of New York, the Hon. Thomas J. McAvoy, a Federal Judge in the Northern District of New York, and the New York State Bar Association Continuing Legal Education Department. Brittnay formerly served as a Lead Articles Editor of the Albany Law Journal of Science and Technology. Last year, she was named to the 2017 Upstate New York Rising Stars list by Super Lawyers.



JUSTICE OUT OF BALANCE

How the Election of Judges and the Stunning Lack of Diversity on State Courts Threaten LGBT Rights

by Eric Lesh, Lambda Legal

\+ An Empirical Examination of Support for LGBT Rights Claims in State High Courts, 2003-2015

Lambda Legal
making the case for equality

Anthony Michael Kreis
Visiting Assistant Professor of Law,
IIT Chicago-Kent College of Law

Ryan Krog
Ph.D. Candidate,
George Washington University

Allison Trochesset
Ph.D. Candidate,
University of Georgia

JUSTICE OUT OF BALANCE

How the Election of Judges and the Stunning Lack of Diversity on State Courts Threaten LGBT Rights

I. INTRODUCTION: JUSTICE OUT OF BALANCE

In court, everyone should be treated with dignity and respect and our rights should be protected. Yet far too often, implicit bias, ideological factors and outside influences seep into the courtroom, tainting the judicial decision-making process and damaging public confidence in the courts.

The consequences are real. A recent community survey by Lambda Legal, the U.S.'s oldest and largest legal defense organization for LGBT people and people living with HIV, revealed a significant lack of trust in the courts among LGBT and respondents with HIV.[1] When it comes to courts, win or lose, LGBT people need to know that there isn't a thumb on the scales and that we haven't been shut out of the process.

The explosion in judicial campaign spending is affecting the impartiality of our courts. The most comprehensive empirical studies available show that the flood of money in judicial elections causes judges to issue more pro-business rulings,[2] send more people to jail,[3] and sentence more people to death.[4]

Now research commissioned by Lambda Legal shows that state high courts with elected judges are less supportive of LGBT rights claims. The results suggest that this lack of support for LGBT rights among state high courts with elected judges can be attributed to ideological factors playing a larger role in shaping judges' decisions in these courts.[5] Growing evidence indicates that state judges who face election, often in increasingly expensive races, can cede justice to politics. Clearly, the scales of justice are out of balance.

This power imbalance is exacerbated by the serious lack of judicial diversity in our nation's courts. While the U.S. is more diverse than ever, its state judiciaries are not. This is particularly true for state appellate courts, where white males are overrepresented by nearly double their proportion of the nation's population.[6] For our state courts to render fair decisions and to be seen as legitimate, they must reflect the rich diversity of the communities they seek to serve. Something has to be done to restore public trust and basic fairness in our courts.

Too little attention is paid to the selection and retention methods, judicial ethics rules and campaign regulations that are supposed to ensure that the judges who serve us are qualified, fair and impartial. Meanwhile far-right groups and powerful special interests *have* been paying attention and are working to game the system by stacking state courts with judges who will rule in accordance with their agendas.

Lambda Legal's Fair Courts Project works to advance an independent, diverse and well-respected judiciary that upholds the constitutional and other legal rights of LGBT people and people living with HIV. It is Lambda Legal's hope that this resource will support additional research, advocacy, litigation and policy efforts. We need to strengthen fair and impartial state courts and ensure equal access to justice for *everyone*.

II. **STUDY:** HOW JUDICIAL SELECTION IMPACTS LGBT RIGHTS DECISIONS

The U.S. Supreme Court hears oral argument in fewer than 85 cases each year.[7] State courts, in contrast, handle more than 100 million cases annually, including 2,000 constitutional law cases decided by state supreme courts.[8] Nevertheless, the vast majority of research, scholarship and media attention are devoted to the U.S. Supreme Court and the lower federal courts. As a result many advocates fail to appreciate how fair and impartial *state courts* play a crucial role in upholding the rights of LGBT people and other vulnerable groups.

Unlike the federal system, where judges are nominated by the President, confirmed by the Senate and serve for life, judicial selection at the state level varies widely. While some state court judges are appointed, most are elected and stand for re-election, where they are increasingly susceptible to political pressure and special interest money. In recent years, academics and advocacy organizations have begun to examine how these various state judicial selection methods may threaten the impartiality of courts and cause judges to issue decisions favoring certain litigants.[9]

What effect, if any, do these different state judicial selection methods have in shaping outcomes in cases dealing with LGBT rights? If we want state courts to treat LGBT people and people living with HIV fairly, then we have to understand how various judicial selection methods may influence a judge's ability to uphold LGBT rights.

Tyron Garner and John Lawrence, plaintiffs in *Lawrence v. Texas*, celebrate their victory on June 27, 2003.

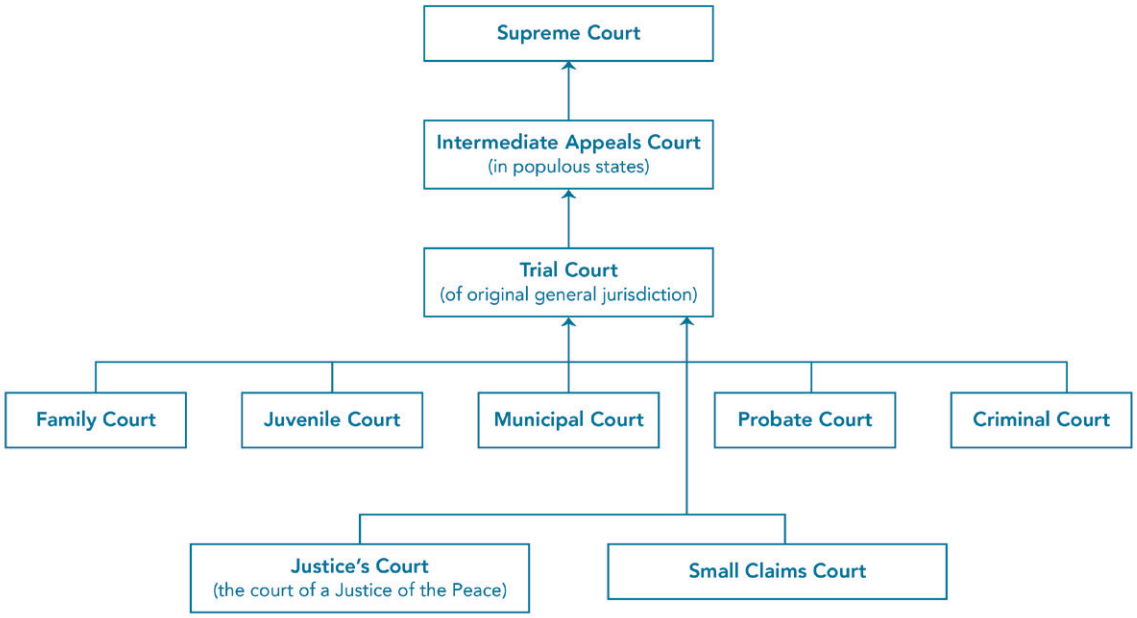
Lambda Legal Senior Counsel and National Director of Constitutional Litigation Susan Sommer and Lambda Legal then-Executive Director Kevin Cathcart, with Nicole and Pam Yorksmith and their children standing in front of the U.S. Supreme Court on decision day, June 26, 2015.

To examine the implications of judicial independence for state courts' treatment of LGBT claims, we collected data on all cases involving LGBT issues decided by state high courts starting in 2003, after the U.S. Supreme Court handed down its ruling in *Lawrence v. Texas*, through 2015. The majority of these cases were constitutional challenges to statutes which barred legal recognition of the relationships of same-sex couples as well as other family law issues which affected same-sex couples, including second-parent adoptions. The cases studied also included litigation by transgender plaintiffs challenging restroom restrictions or issues related to gender on driver's licenses. Other cases included challenges to ballot language concerning anti-LGBT referenda and disciplinary action against attorneys who were alleged to hold anti-LGBT attitudes.

The study's two key principle findings:

1. State high courts whose judges stand for election are less supportive of LGBT rights claims.
2. Results suggest that lack of support for LGBT rights among state high courts with elected judges can be attributed to ideological factors playing a larger role in shaping judges' decisions on these courts.

A Typical State Court System



III. STATE COURTS 101: STRUCTURE AND SELECTION

A. How State Courts Are Structured

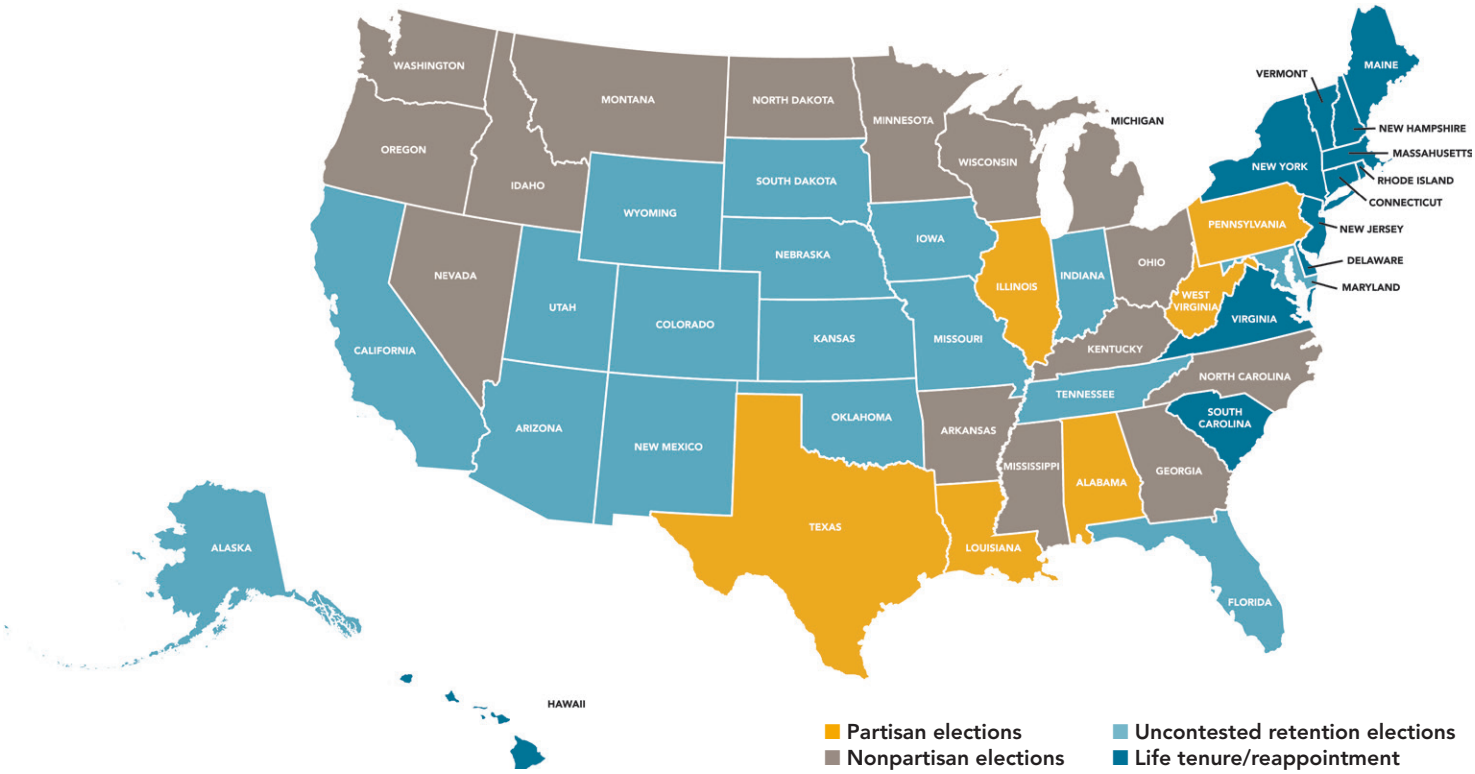
Each state's constitution and laws establish its state courts, which hear all cases not specifically designated for federal courts. Just as federal courts interpret federal laws, state courts interpret state laws. While names and structure of state court systems vary from state to state, there are similarities. Trial courts are generally where cases start. There are two types of trial courts: criminal and civil; although the procedures are different, the structure is generally the same. Appellate courts are intermediate courts that review decisions of the trial courts at the request of the parties. Finally, the high court, typically the state supreme court, hears appeals from the appellate courts. State high courts usually have the final word on important questions of state law.

B. How State High Court Judges Are Selected

State high court judges may be elected or appointed. **Elected judges** face voters in three ways: partisan elections, where candidates have party labels; nonpartisan elections; and up-or-down retention elections, in which only the incumbent is on the ballot and voters decide whether to grant another term. The primary model for **appointing high court justices** involves bipartisan nominating commissions, which submit slates of potential nominees to state governors, who in turn choose from such lists. This system is known by many as "merit selection." The methods include gubernatorial appointment where the governor makes the selection without the assistance of a commission and legislative appointment where judges are selected strictly by a vote of the state legislature.

In the selection of judges on their highest courts, 6 states use partisan elections and 15 states use nonpartisan elections.[10] In 29 states, the governor or legislature initially appoints judges to the highest court.

Once judges are on the bench, states also vary in how they retain their high court justices. Twenty states use contested partisan or nonpartisan elections. Eighteen states hold up-or-down retention elections, where incumbent judges run unopposed. Between contested elections and retention races, 38 states place high court judges' names on the ballot for voters. The remaining states rely on reappointment or grant justices permanent tenure.



IV. STATE COURTS AND THE RIGHTS OF LGBT PEOPLE AND PEOPLE LIVING WITH HIV

The courts of all 50 states and the U.S. territories have broad authority to uphold or restrict the rights of LGBT people and people living with HIV. In addition to interpreting the meaning of state laws and constitutional provisions that have tremendous consequences for individual rights, state courts handle more than 95 percent of all judicial business that most directly impacts people's lives—including nearly all family cases and criminal matters.[11]

The stakes are high for everyone. Despite remarkable legal, political and social advances, LGBT people and people living with HIV still face significant challenges—including ongoing employment discrimination, unfair state parenting laws, unequal health care access and abuses by law enforcement in the criminal legal system. Members of the LGBT community often face multiple and intersecting forms of discrimination based on not only their sexual orientation, gender identity or HIV status, but also race, national origin, socioeconomic disadvantage or immigration status. Many members of our community look to our state courts and the 30,000 state court judges to administer justice.

A. The Freedom to Marry Began with State Courts

Until the U.S. Supreme Court struck down all remaining marriage bans in *Obergefell v Hodges*, state courts played a critical role in the fight for the freedom to marry. At the beginning, state supreme courts outpaced federal courts and legislatures in affirming the rights of same-sex couples to marry. The first rulings in favor of the freedom to marry in Massachusetts, California, Connecticut and Iowa were all issued by state courts interpreting state constitutional guarantees.[12]

The justices on state high courts that ruled in favor of the freedom to marry have something in common: They were all appointed.[13] The fact that the justices did not have to face the voters in direct contested elections, afforded these high courts the independence required to impartially evaluate the merits of these case. Unfortunately, judicial retention elections left some judges vulnerable to backlash.

One of the early victories in the fight for equal marriage rights came from the Iowa Supreme Court, where the justices, who were appointees of both Republican and Democratic governors, looked at the law and the facts presented and ruled that Iowa's marriage ban was at odds with the guarantee of Equal Protection in Iowa's Constitution.[14] However, Iowa justices have to stand for retention elections. In the year following Iowa's marriage decision, antigay groups, including the National Organization for Marriage and the American Family Association, poured nearly $1 million dollars into a campaign which resulted in the ousting of three justices as punishment for the marriage ruling, which was unanimous.[15] The anti-retention effort urged Iowa voters to throw out "activist judges" for doing the very thing that judges are supposed to do: decide tough cases and uphold constitutional rights even if those decisions may not be politically popular.

Plaintiffs in Lambda Legal's Iowa marriage case, from the left, Trish Varnum, Kate Varnum, Jason Morgan and Chuck Swaggerty.

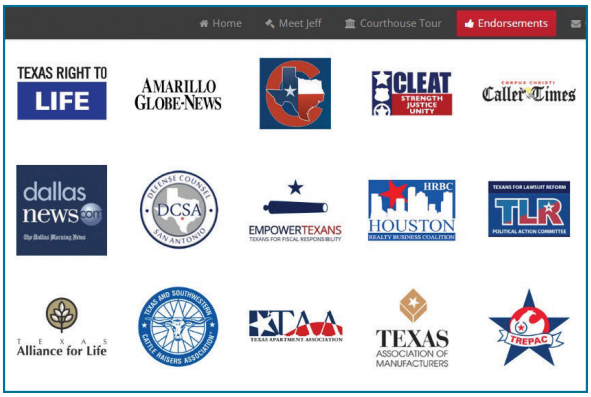
A Closer Look at Marriage Equality in States with Elected High Court Judges

Chief Justice Roy Moore, who was elected on an anti-marriage equality platform, predicted that the Supreme Court marriage ruling would "cause the destruction of our country."

After the Supreme Court's ruling in *U.S. v Windsor* (2013), which found Section 3 of the Defense of Marriage Act to be unconstitutional, federal judges in deeply "red" states, who are appointed and have lifetime tenure, ruled in favor of the freedom to marry in quick succession. In contrast, challenges to discriminatory marriage bans in conservative states with elected judges were met with hostility or delay.[16] Even after *Obergefell*, several elected judges in southern states suggested a willingness to defy the rule of law.[17]

The justices of the **Alabama Supreme Court**, who are elected in expensive partisan races, told probate judges in the state to defy a federal court order which granted same-sex couples the right to marry. Alabama's Chief Justice Roy Moore, who is notoriously antigay, cited scripture in a 2002 judicial opinion in a child custody case that shockingly referred to lesbian parents as "immoral," "detestable," "an inherent evil," and "inherently destructive to the natural order of society."[19] After the U.S. Supreme Court ruling in *Obergefell* in 2015 which made marriage equality the law of the land, Alabama Supreme Court Justice Tom Parker suggested on conservative talk radio that a state supreme court ruling "would be a proper organ" for resisting the decision.[20] Chief Justice Roy Moore, who was elected on an anti-marriage equality platform, predicted that the ruling would "cause the destruction of our country" and would generate a "great backlash."[21]

In 2011, a same-sex married couple seeking a divorce ended up before the **Supreme Court of Texas** after the state contested their petition for divorce. The justices did not even hear oral argument until November 2013. The court then sat on the case until 2015, when one of the parties ultimately died—still trapped in a legal status and waiting for justice.[22] The nine Republican justices on the Texas Supreme Court were elected in partisan contests and some of their websites tout endorsements from groups like Texas Values Voters, Texas Right to Life and Tea Party Patriots.[23]



Endorsements from the Texas Supreme Court Justice Don Willet re-election website.

In 2014, **Arkansas Supreme Court** justices, who are elected, heard oral argument in a challenge to the state's discriminatory marriage ban. They held off on issuing an opinion until two new justices joined the court several months later. Then a majority of the court inexplicably ruled that adding justices required a new lawsuit to figure out who should hear the case. This caused two justices to step down from the case over their frustration and ethical concerns with the decision to delay.[24] Later, when Justice Donald Corbin retired from the bench, he admitted that he and his colleagues had voted to strike down the state's marriage ban in 2014.[25] But the justices held the case, leaving couples in legal limbo until the U.S. Supreme Court ruling, when the Arkansas justices quietly dismissed the case as moot.

Justice Jeff Hughes campaign TV ad.

In July 2015, the **Louisiana Supreme Court** dismissed a state court case involving the rights of a married same-sex couple. This was a good result; the Supreme Court's *Obergefell* decision had resolved the issues in the case.[26] But one lone Justice dissented. Casting his duty to support the rule of law aside, Justice Jefferson Hughes suggested that he would not follow the Supreme Court's ruling. Justice Hughes went on to inject a bit of shocking antigay bias into his dissent, noting: "The most troubling prospect of same sex marriage is the adoption by same sex partners of a young child of the same-sex."[27] Justice Hughes practically promised this kind of action during his campaign TV ad, in which he stated that he was "pro-life, pro-gun, pro-traditional marriage."[28]

In November 2015, the **Mississippi Supreme Court** narrowly granted a divorce to a same-sex couple based on the Supreme Court's ruling in *Obergefell*.[29] Four of the nine Justices dissented. One Justice wrote: "When five members of the [U.S. Supreme] court hand down an order that four other members believe has 'no basis in the Constitution,' a substantial question is presented as to whether I have a duty to follow it."[30] Another Justice noted that the idea that the U.S. Constitution means what a majority of the Supreme Court says it means "is not necessarily true and should be subject to questioning."[31] One of the justices who joined the majority to grant the divorce admitted, "As an elected member of this Court, the politically expedient (and politically popular) thing for me to do is to join my colleagues' separate statements and quote the dissenters in the *Obergefell* case. However, if I did, in my opinion, I would be in violation of the oath of office I now hold."[32]

B. Protecting Relationships and Families

After *Obergefell*, virtually all courts with pending marriage cases moved promptly to implement the ruling. Still, there is so much important work that remains in order to secure the rights, responsibilities, benefits and accurate documents for all family relationships of LGBT people and their children. Parents in many states remain legally unrecognized or severely disadvantaged in state court fights with ex-spouses, ex-partners or other relatives. Some same-sex couples continue to encounter discriminatory obstacles in their efforts to obtain access to two-parent birth certificates or accurate death certificates and turn to state courts for resolution.

Because family law is almost exclusively the domain of the states, state courts play an important role in the advancement or weakening of protections for LGBT families. State courts are also critical to efforts to expand legal recognition of parent-child relationships, based on the actions and intentions of parents in creating and raising children rather than on biological connections alone.

State Court Protection of Families in Iowa

Even after the Iowa Supreme Court issued a unanimous ruling in favor of marriage equality, families headed by same-sex couples still had to fight for the marital presumption of parentage. In 2010, married parents Heather and Melissa MacKenzie sued the Iowa health department after the agency refused to issue a birth certificate for their daughter MacKenzie that listed both mothers as parents.[33] The Iowa Supreme Court eventually ordered the state to provide accurate two-parent birth certificates to all children born to lesbian married parents. Iowa Supreme Court Justices are appointed and stand for retention elections.[34]

Alabama Supreme Court Refuses to Recognize Adoption

In 2015, the Alabama Supreme Court refused to recognize a lesbian mother as an adoptive parent of her three children even though both women raised the children from birth and consented to the adoption.[35] The court ruled that Alabama does not have to recognize second-parent adoptions granted by Georgia courts, breaking with more than a century of precedent requiring states to honor court judgments from other states. The ruling was reversed by the U.S. Supreme Court. Alabama Supreme Court Justices are elected in partisan races.

Donisha McShan, a woman who is transgender, was housed with men and addressed with male pronouns. Lambda Legal told facility officials about state and federal laws prohibiting discrimination against transgender people incarcerated in government-funded facilities. The halfway house issued McShan an apology and changed its policies.

C. Fighting for Transgender Rights

Transgender people are often the most vulnerable members of our community. Transgender people face harassment and discrimination in areas such as employment, health care, schools, housing, restroom access, foster care, family court matters and detention facilities and prisons. State courts routinely handle cases involving transgender people. In the context of parenting, many state courts have correctly treated custody cases involving transgender parents like any other child custody determination—by focusing on standard factors such as parental skills and the best interests of the child. However, some courts have lacked understanding about the need for a transgender parent's transition and as a result transgender parents have lost access to their children based solely on their gender identity.

Lambda Legal client Kimberly Hively and Lambda Legal Counsel and Employment Fairness Program Strategist Greg Nevins. In 2015, Lambda Legal urged the U.S. Seventh Circuit Court of Appeals to reverse a lower court ruling and allow Hively to present her case alleging that Ivy Tech Community College, where she worked as an instructor for 14 years, denied her full-time employment and promotions, and eventually terminated her employment, because she is a lesbian.

On identity documents, some states and agencies require that transgender people obtain a state court order to make gender marker changes.[36] Many of the jurisdictions that administer birth certificates require a court order to change or amend them.[37] When it comes to the routine process of filing papers for a name change, transgender people frequently have to deal with courts asking invasive questions about gender transition.[38]

Transgender Students in Maine

In *Doe v. Regional School Unit*, the Maine Supreme Court held that a transgender girl had the right to use the girls' restroom at school because her psychological well-being and educational success depended on her transition.[39] The school, in denying her access, had "treated [her] differently from other students solely because of her status as a transgender girl." The court determined that this was a form of discrimination. Justices on the Maine Supreme Court are appointed and never stand for election.

Transgender Discrimination in Illinois Courts

In 2007, the Illinois Supreme Court held that Duann Turner, a 52-year-old low-income transgender woman represented by Lambda Legal, was denied access to the judicial process. The Will County Circuit Court had rejected her request that a $450 fee related to her name change petition be waived, declaring, "I am not spending the county's money on something like this."[40] The *Turner* case highlights how LGBT discrimination in the judicial system is pervasive and

harmful to LGBT people and to the integrity of the courts. This discrimination is rarely combated; leaving unchecked prejudicial statements, harsher sentencing for LGBT defendants and irrelevant consideration of a person's sexual orientation, gender identity or HIV status. Illinois Supreme Court Justices are elected in partisan elections.

D. Achieving Employment Fairness

Employment fairness issues are a core aspect of the lives of LGBT people and people with HIV. Most people spend a large part of their time working. They depend on their jobs to support themselves and their families and to gain access to health care and other benefits. A number of cities, counties and states have passed laws that help protect LGBT people and people living with HIV from employment discrimination by explicitly covering sexual orientation and gender identity. In addition, many employers and union contracts have nondiscrimination protections for workers. This means that LGBT people can make a valid legal claim under state law. Many complaints are handled by state or local civil rights enforcement agencies, but state courts can also play a role in adjudicating these disputes.

In 2014, Lambda Legal secured a victory for client Deborah Harris when the Alaska Supreme Court unanimously ruled that the State's exclusion of lesbian and gay partners from survivor benefits violated the constitutional guarantee of equal protection.

Access to Survivor Benefits in Alaska

Kerry Fadely, who worked at Anchorage's Millennium Hotel, was shot and killed in 2011 by a disgruntled former employee.[41] Alaska's workers' compensation law requires employers to provide survivor benefits to spouses of people who die from work-related injuries. Yet Kerry's same-sex partner, Deborah Harris, was barred from accessing legal protections for survivors, as at the time, Alaska did not allow same-sex couples to marry. Deborah sued. In 2014, the Alaska Supreme Court ruled unanimously that committed same-sex couples must have equal access to the law's protection.[42] Alaska Supreme Court Justices are appointed and stand for retention elections.

Prohibiting Public Employers from Providing Benefits

In 2004, Michigan adopted a discriminatory constitutional ban on marriages by same-sex couples. Shortly after its passage, a lawsuit was filed to establish that the amendment didn't restrict public employers from providing benefits to domestic partners. In 2008, the Michigan Supreme Court ruled by a vote of 5-2 that the state constitutional amendment did prohibit public employers from doing so.[43] This case effectively prohibited recognition of civil unions, domestic partnerships and other forms of relationship recognition by state and local governments. Michigan Supreme Court Justices are elected in nonpartisan races.

E. Defending People Living with HIV

After three decades, the HIV epidemic in the U.S. continues to have a devastating impact on gay and bisexual men, transgender women and in many communities of color. People living with HIV continue to face discrimination in the workplace, denial of services, denial of access to long-term care facilities and violations of privacy rights. People with HIV also have to navigate uninformed, outdated and hostile HIV criminalization laws. Such discrimination and marginalization undermines the rights of all LGBT people.

If a person living with HIV is accused of violating criminalization laws, it is in state court that they will have to fight it. Most criminal cases involve violations of state law and are tried in state court. Thirty-nine states have HIV-specific criminal statutes or have brought HIV-related criminal charges, resulting in more than 160 prosecutions in the United States in the past four years.[44]

People living with HIV also turn to state courts to address discrimination in the workplace and in public accommodations based on the erroneous and outdated belief that people living with HIV present an immediate risk to the health and safety of others.[45]

Iowa Reverses HIV Criminal Conviction.

In 2014, the Iowa Supreme Court set aside the conviction of Nick Rhoades, an Iowan with HIV who was initially sentenced to 25 years in prison, with required registration as a sex offender, after one sexual encounter with another man during which they used a condom.[46] In reversing the conviction, the Court recognized that individuals with HIV and a reduced viral load as a result of effective treatment pose little risk of transmitting HIV. In so doing, the Court applied the law in light of current medical understanding of how HIV is and is not transmitted. The ruling made clear that an individual who takes precautions to prevent transmission should not be considered a criminal. Iowa Supreme Court Justices are appointed and stand for retention elections.

F. Securing the Rights of LGBTQ Youth

Numerous studies highlight the overrepresentation of LGBTQ youth and young adults in foster care, juvenile justice and runaway and homeless youth systems, where these youth are likely to interact with state courts. These young people are often particularly vulnerable because their experiences in and interactions with various institutions, including state courts, have a profound impact on the rest of their lives. In addition, state courts hear cases involving LGBTQ youth and family members who encounter discrimination, harassment and other denials of their rights in schools, foster care, juvenile and adult criminal justice systems and immigration systems.

State courts have been critical in the fights to protect LGBTQ youth from bullying and harassment in schools; to secure speech rights in schools and to create safe and inclusive schools through the formation of gay-straight or gender and sexuality alliances. In most states, a juvenile court hears cases for all youth younger than 18 charged with a law violation. In 2013, juvenile courts disposed of one million cases.[47]

Students Protected Against Bullying in New Jersey

L.W., a student in the Toms River Schools in New Jersey, was subjected to antigay harassment and bullying by other students based on his perceived sexual orientation. The harassment increased in frequency and severity as he progressed through school and eventually became so severe that he transferred to another school district. After many of the incidents, L.W. and his mother reported the problems to the school's administration, which took little or no action. In 2007, the New Jersey Supreme Court, in a unanimous decision, ruled that if a school is aware or should be aware of harassment of students based on sexual orientation, it is obligated to act to end the harassment.[48] New Jersey Supreme Court Justices are appointed and never stand for election.

G. The Experiences of LGBT People in Court

With the rights of LGBT people and their families at stake, it is imperative that cases are decided by judges who weigh the facts and apply the law without bias. Judges and attorneys have an ethical responsibility to make sure LGBT people and people living with HIV are treated fairly and respectfully in courts. But the reality falls far short of that ideal. As lawyers, litigants, defendants and jurors, LGBT individuals can face overt discrimination from state judges as well as more subtle discriminatory practices that have become prevalent in the judicial system.

In 2012, Lambda Legal, with the help of more than 50 supporting organizations, completed a national survey to understand how courts and other government institutions are protecting and serving LGBT people and people living with HIV.[49] The results show some of the ways in which the promise of fair and impartial proceedings is compromised by bias against LGBT people and individuals living with HIV.

Nineteen percent (19%) of people who responded to the survey reported hearing a judge, attorney or other court employee make negative comments about a person's sexual orientation, gender identity or gender expression.

Sixteen percent (16%) of respondents indicated that their own sexual orientation or gender identity was raised in court when it was not relevant.

Fifteen percent (15%) of respondents reported having their HIV status raised in court when it was not relevant.

As is often the case, respondents with multiple marginalized identities—for example, LGBT people who also have a low-income, are people of color or are disabled—reported significantly higher instances of discrimination. Significantly, only 27 percent of transgender people and 33 percent of LGBT people of color said that they "trust the courts."

Other anonymous surveys conducted by judicial commissions and bar associations also found antigay bias and prejudice in courthouses around the country. These studies universally concluded that the majority of gay and lesbian courts users found courtrooms to be hostile environments, whether in criminal or civil cases.[50]

Transgender Discrimination in Oklahoma State Court

When Christie Ann Harvey, a transgender woman, sought a routine name change in Oklahoma state court, her petition was denied by Judge Bill Graves, who wrote in the decision that to grant a name change in this case would be "to assist that which is fraudulent."[51] He went on to write "It is notable that Genesis 1:27, 28 states: 'So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, be fruitful, and multiply, and replenish the earth…'"[52] When his decision was reversed by the Oklahoma Court of Appeals for abuse of discretion, Judge Graves flippantly remarked to the press, "I guess the guy gets to have his name changed."[53]

V. THE STUNNING LACK OF DIVERSITY ON THE STATE COURT BENCH

A. State Courts Must Reflect the Diverse Communities They Serve

In most states, judges simply do not look like the court users who stand before them. While the United States is more diverse than ever, that diversity is not reflected on state courts.

A state judiciary diverse in race, sex, ethnicity, gender identity and expression, sexual orientation and lived and professional experience serves not only to improve the quality of justice, but to boost public confidence in the courts. Judges of different backgrounds help to guard against the possibility of narrow decisions that don't appreciate factual nuances or the consequences of particular rulings.[54] The absence of judicial diversity results in a biased system that fosters a deserved perception among many segments of our society that the courts are unfair.

Earning the confidence of our diverse society requires access to and full participation in our democratic institutions at the highest levels. When it comes to access and participation, our state judiciaries are failing.

Courts in many states are overwhelmingly homogeneous. While people of color make up more than 40 percent of the population in 13 states, judges of color account for only 21 percent or less of state judiciaries.[55] For example, according to a report by the Center for American Progress, white Alabamians comprise only two-

Ten-State Comparison of Diversity on the Bench

State	Demographic	General Population	Bar Membership (as of 2004)	Supreme Court[323]	Appeals Court[324]	District Court[325]
Arizona	White	60.00%	92.00%	100.00%	82.00%	84.00%
	Non-White	40.00%	8.00%	0.00%	18.00%	16.00%
	Men	50.00%	Data unavailable	60.00%	77.00%	73.00%
	Women	50.00%	Data unavailable	40.00%	23.00%	27.00%
Colorado	White	71.00%	94.00%	85.80%	87.50%	88.00%
	Non-White	29.00%	6.00%	14.20%	12.50%	12.00%
	Men	50.30%	Data unavailable	57.14%	81.00%	77.00%
	Women	49.70%	Data unavailable	42.86%	19.00%	23.00%
Florida	White	61.00%	87.00%	71.43%	84.00%	87.60%
	Non-White	39.00%	13.00%	28.57%	16.00%	12.30%
	Men	49.10%	Data unavailable	71.43%	81.00%	73.80%
	Women	50.90%	Data unavailable	28.57%	19.00%	26.10%
Maryland	White	58.00%	86.00%	71.43%	92.30%	83.00%
	Non-White	42.00%	14.00%	28.57%	7.69%	16.90%
	Men	48.40%	Data unavailable	69.00%	69.20%	70.50%
	Women	51.10%	Data unavailable	31.00%	30.70%	29.40%
Missouri	White	84.00%	94.06%	86.00%	84.00%	99.30%
	Non-White	16.00%	5.94%	14.00%	16.00%	.70%
	Men	48.90%	Data unavailable	71.00%	75.00%	94.30%
	Women	51.10%	Data unavailable	29.00%	25.00%	5.67%
New Hampshire	White	93.00%	96.00%	100.00%	No appellate court	100.00%
	Non-White	7.00%	4.00%	0.00%		0.00%
	Men	49.30%	Data unavailable	80.00%		73.00%
	Women	50.70%	Data unavailable	20.00%		27.00%
New Mexico	White	43.00%	79.00%	60.00%	85.00%	82.00%
	Non-White	57.00%	21.00%	40.00%	15.00%	18.00%
	Men	49.40%	Data unavailable	60.00%	70.00%	84.50%
	Women	50.60%	Data unavailable	40.00%	30.00%	15.50%
Rhode Island	White	79.00%	98.00%	100.00%	No appellate court	90.91%
	Non-White	21.00%	2.00%	0.00%		9.09%
	Men	48.40%	Data unavailable	80.00%		68.00%
	Women	51.60%	Data unavailable	20.00%		32.00%
Tennessee	White	78.00%	94.00%	80.00%	91.67%	94.71%
	Non-White	22.00%	6.00%	20.00%	8.33%	5.29%
	Men	48.90%	Data unavailable	60.00%	75.00%	83.00%
	Women	51.10%	Data unavailable	40.00%	25.00%	17.00%
Utah	White	82.00%	96.00%	100.00%	85.80%	94.29%
	Non-White	18.00%	4.00%	0.00%	14.20%	5.71%
	Men	50.30%	Data unavailable	60.00%	57.20%	87.00%
	Women	49.70%	Data unavailable	40.00%	42.80%	13.00%

Ciara Torres-Spelliscy et al., Brennan Center for Justice, *Improving Judicial Diversity* at 49 (2010).

thirds of the total state population, but not one of the Alabama's appellate court judges is black.[56] Arizona's population is 40 percent non-white, but racial minorities occupy only 18 percent of intermediate appellate and 16 percent of trial court judgeships.[57] When it comes to the courts of last resort in each state, the numbers are even worse. Only 10 percent of state supreme court justices are non-white and only 3 percent are Latino.[58] The Arizona Supreme Court has never had a single black or Latino justice.[59]

Today, a majority of all law students are female, yet women account for just 16-34 percent of the state judiciary.[60] This pattern is most visible in state high courts, where women have historically been almost totally absent.[61] As a country we are just beginning to correct the historical legacy of exclusion of men of color and all women from the legal profession, and much remains to be done.

B. LGBT Inequality on the State Court Bench

LGBT people and people living with HIV are an integral part of the fabric of America and are entitled to equality and liberty under the law. Judges have decided and will continue to decide important life issues for LGBT people. There is every reason to demand that action be taken so that LGBT people do not continue to be significantly underrepresented on the bench.

The number of LGBT judges in state courts is hard to determine because 49 states do not formally collect data on sexual orientation and gender identity as part of a judicial application and reporting process.[62] There are only two openly transgender judges in the entire country. As far as we know, there are no openly HIV-positive judges and no openly bisexual judges nationwide.

However, out of 340 state high court justices, only 10 identify as openly gay or lesbian. Nine of the ten justices were appointed and all of these appointments were made by Democratic governors.

Spotlight on LGBT Diversity in California State Courts

California is the only state that requires the collection and reporting of demographic data on the sexual orientation and gender identity of state judges. Responding to the questionnaire is voluntary and the identities are kept confidential.[63] The latest LGBT-inclusive report, released in 2015, revealed:

- Only 1.1 percent of state judges self-identified as gay, 1.3 percent as lesbian, 0.1 percent as transgender and none as bisexual.
- Of the state's 98 appellate court justices, just one identified as lesbian and one as gay.
- There has never been an openly LGBT Justice of the California Supreme Court.
- 44 of California's 58 counties did not have any openly LGBT judges.[64]

Maite Oronoz Rodríguez, Chief Justice of the Puerto Rico Supreme Court.

Openly Lesbian Chief Justice on Puerto Rico High Court

Days before retiring from the Puerto Rico Supreme Court, Chief Justice Federico Hernández Denton reflected on his years of service and concluded that one of the decisions he most regretted was his vote in a 2005 case that interpreted Puerto Rico law as preventing individuals who are transgender from amending their birth certificates to reflect their true identities. In April 2014, Lambda Legal sent Governor Alejandro García Padilla a letter urging that when nominating a new justice to the Court or making any other judicial nominations, he ensure that the judicial philosophy of his nominees includes a commitment to rule fairly and impartially in cases involving LGBT litigants and litigants with HIV and to seek thoughtful jurists who reflect Puerto Rico's rich diversity. In June, 2014, Maite Oronoz Rodríguez was confirmed Associate Justice to the Puerto Rico Supreme Court, marking the first time that an openly lesbian judicial nominee was confirmed to the high court. In 2016, Oronoz Rodríguez was nominated and confirmed as the first openly LGBT Chief Justice in the country.

VI. THE PROBLEM WITH JUDICIAL ELECTIONS

> "If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."
>
> — Former Justice Sandra Day O'Connor, U.S. Supreme Court[65]

The U.S. is virtually the only country in the world that selects judges by popular election.[66] Thirty-eight states hold elections to select judges for their highest courts.[67] These elections range from contested multi-candidate contests to single candidate up-or-down retention votes. Ninety percent of appellate court judges face some kind of election.[68]

Here's the problem: judges are not politicians. Unlike legislative and executive officials, judges by design should decide individual cases without taking popular opinion into account. Each day, thousands of elected judges in state courts across the country make decisions that could cost them their jobs if the law requires a ruling that is unpopular enough to anger a majority of voters or inspire special interest attacks. This threat is particularly acute when counter-majoritarian constitutional rights are at stake, including those of LGBT people. If judges can't safeguard the rights of vulnerable minorities without fear of retaliation, that dynamic renders our constitutional right to due process extremely vulnerable.

The very practice of electing judges is antithetical to the notion of an independent judiciary. Far from being radical or controversial, the idea that judges should not be subject to retaliation for unpopular rulings is grounded in the U.S. Constitution, which grants federal judges life tenure and protected salaries.[69] Alexander Hamilton explained in Federalist 78 that fidelity to the law cannot be expected by judges who hold their office subject to reelection as the judges' fear of displeasing the re-electing authority would be "fatal to their necessary independence."[70]

Hamilton is right. In recent years, special interests have used the popular election and reelection of state judges to intimidate, vilify or remove judges in the hopes of influencing case outcomes. Still other judges openly run against the legal rights of LGBT people in order to pander to voters. Scholarly research now confirms that their efforts, in some cases, have been successful with tipping the scales in favor of wealthy business interests and against defendants in criminal cases.[71]

A. Judges Are Not Politicians

> "Judges are not politicians, even when they come to the bench by way of the ballot. And a state's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office."
>
> — Chief Justice Roberts writing for the majority in *Williams-Yulee v. The Florida Bar*[72]

Judges in states with contested partisan judicial contests inevitably feel pressure to curry favor with the political parties that helped elect them and likely feel pressure to rule in ways that will attract the political fundraising necessary to keep them in their jobs.

A critical part of our democracy stands on public confidence in the judiciary. Unfortunately, a 2014 Lambda Legal survey found that LGBT people generally don't trust the court system as a means of achieving justice. Reasonable regulation of campaign and political activities by judges and judicial candidates is paramount to improving confidence in state courts.

> "When you enter one of these courtrooms, the last thing you want to worry about is whether the judge is more accountable to a campaign contributor or an ideological group than to the law."
>
> — Former Supreme Court Justice Sandra Day O'Connor, *New York Times* op-ed, May 22, 2010

How can we expect justice and a fair trial if judges and judicial candidates are allowed to directly solicit campaign contributions or engage in partisan political activity?

> "Justice Don Willett is the most conservative justice on the Texas Supreme Court. Tea Party patriots, pro-life and pro-family conservatives, limited-government advocates, constitutionalists and any who value American liberty should support Justice Don Willett, a rock-solid judicial conservative who has never legislated from the bench. Justice Willett is one of only a few judicial candidates I have endorsed, and I do so wholeheartedly. He must be re-elected in 2012. Please join me in standing with Justice Don Willett."
>
> — James C. Dobson, featured on the "Endorsements" page on DonWillet.com, the campaign website for Texas Supreme Court Justice Don Willet.

Endorsement for Justice Jeff Boyd.

> "If you want a Chief Justice who is guided by prayer & not politics."
>
> — Google ad for Judge Dan Kemp's campaign for Chief Justice of the Arkansas Supreme Court.

> "Thanks for the endorsement @TXRightToLife."
>
> — Tweet, @JeffBoydTX, Twitter account for Texas Supreme Court Justice Jeff Boyd

> "Barack Obama would never appoint Judge Jeff Hughes to the Supreme Court because Judge Hughes is pro-life, pro-gun, and pro-traditional marriage."
>
> — Campaign ad for Judge Jeff Hughes' campaign for Louisiana Supreme Court.

> "I'm a Republican and you should vote for me. You're going to hear from your elected officials, and I see a lot of them in the crowd. Let me tell you something: the Ohio Supreme Court is the backstop for all those other votes you are going to cast… So forget all those other votes if you don't keep the Ohio Supreme Court conservative."
>
> — Ohio Supreme Court Justice Judith French at a GOP rally[73]

Most states have taken steps to insulate state courts from inappropriate political and special interest influence. However, many states do not go far enough, and others do very little at all.

Victory for Fair Courts in the U.S. Supreme Court

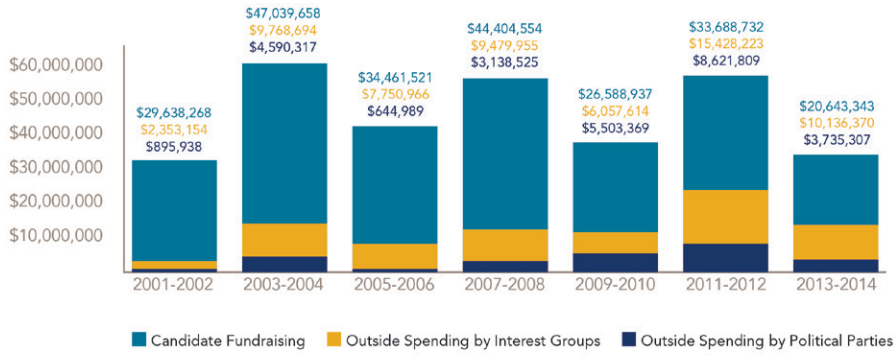
In 2015, the U.S. Supreme Court held in *Williams-Yulee v. The Florida Bar* that states could prohibit judicial candidates from personally soliciting campaign contributions in order to better keep courts fair and impartial. As the Court found, campaign contributions can create an appearance and risk of favoritism. The ruling protected an important aspect of judicial campaign finance laws in the majority of states, which help guard against a perception among the public that justice is for sale. The case paves the way towards securing further reasonable restrictions on judicial campaign conduct in the states that elect judges.

B. Special Interest Spending in Judicial Elections Has Exploded

A century or more ago, many states in the U.S. decided to adopt popular elections as their way of selecting their judges.[74] Unfortunately, *Citizens United*, the 2010 Supreme Court ruling that unleashed unlimited independent spending in elections, has dramatically altered the politics of judicial races, blurring the line that separates justice from politics.[75]

Dissenting in *Citizens United*, now-retired Supreme Court Justice John Paul Stevens noted the decision "unleashes the floodgates of corporate and union general treasury spending" in judicial elections at a time "when concerns about the conduct of judicial elections have reached a fever pitch."[76] Spending on state Supreme Court elections more than doubled in the past decade, exceeding $200 million and breaking records every cycle.[77]

Outside Spending as a Portion of Total Spending, 2001-14 (Historical Data)



Scott Greytak, Alicia Bannon, Allyse Falce and Linda Casey, *Bankrolling the Bench: The New Politics of Judicial Elections* 2013-14, at 12 (Laurie Kinney ed., 2015).

This spending raises real concerns about the ability of our courts to remain independent and provide equal access to justice—particularly for marginalized, politically unpopular and disenfranchised populations. **Seventy-six percent of Americans believe that campaign cash affects court decisions.[78] Almost half of judges agree.**[79]

C. Attacks Against Judges Threaten Rulings in Favor of Individual Rights

Political attacks on the courts stemming from rulings affecting the rights of LGBT people and their families are nothing new. Often when judges rule on civil rights issues they risk backlash from those who oppose the rights of minority populations, whom the courts are charged to protect.

For years, those on the far-right have jumped at the opportunity to label any decision with which they disagree as "judicial activism." This strategy was successfully employed, for example, by antigay groups like the National Organization for Marriage (NOM) in a 2010 campaign to remove three well-respected Iowa Supreme Court justices after that court's unanimous decision to strike down Iowa's ban on marriage for same-sex couples. NOM's bus tour against "activist judges" traveled the state on a crusade of distortion, not only to punish specific justices but also to threaten judges across the nation if they ruled for equality and against NOM's extreme, antigay agenda.[80]

This line of attack was replicated by politicians and anti-LGBT organizations in the wake of the Supreme Court's ruling in *Obergefell v. Hodges*. In his dissent, Chief Justice John Roberts wrote that the "five lawyers" (his fellow Justices) who ruled in favor marriage equality "have closed the debate and enacted their own vision of marriage as a matter of constitutional law."[81] This theme was repeated by Justice Scalia, who wrote, "A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy." And once again, those on the far-right repeated that "five unelected lawyers" were "destroying the once great republic, where people rule," both widely and often.[82]

In 2015, an elected Tennessee judge was reprimanded for an opinion decrying the "judi-idiocracy" that resulted in the "iron fist and limp wrist" of the *Obergefell* ruling. Some elected judges in the South continue to resist or defy the ruling in *Obergefell*.[83]

LGBT civil rights rulings are not the only decisions that are twisted and exploited to undermine judicial independence or take down a judicial candidate. Attack ads are particularly vicious when they exploit criminal legal issues.

If you live in one of the 38 states that elect judges, you may have seen one of those oft-charged "soft on crime" TV ads claiming that a judicial candidate "sides with child predators,"[84] "is sympathetic to rapists"[85] or "helped free a terrorist."[86]

Some of the most manipulative and dishonest TV attack ads don't come from groups interested in criminal justice at all, but rather from powerful business and political interests that wish to remove judges who rule against them on issues like voting rights, reproductive justice, consumer protections or LGBT equality.

The exact identities of the special interests behind judicial election attack ads are often hard to discern, as many of these groups are not required to disclose their donors or report their expenditures under state law.[87] Often cloaked in anonymity, these groups use "soft on crime" ads as a means to exploit viewers' emotions and tilt elections, at the expense of criminal defendants and judicial fairness. Overall, 82 percent of all judicial election attack ads in 2013-14 discussed criminal justice issues.[88]

D. The Consequences for the Due Process Rights of Individuals Are Dire

It might come as no surprise to learn that these judicial election attacks, while vile, are very effective at influencing elections. But it's disturbing to learn the extent to which the threat of such attacks also influences judges' rulings. Recent empirical studies suggest that state court judges in criminal cases are imposing harsher punishments on defendants—including death sentences—in apparent attempts to bolster their reelection campaigns.

1. When Justice Is for Sale, More People Go to Jail

A recent study shows that TV attacks ads in judicial elections are costing people their liberty. According to the study, the more TV ads aired during state supreme court judicial elections, the less likely justices were to find in favor of criminal defendants.[89] The results predict, on average, that a state with 10,000 ads would see judges vote differently and against criminal defendants in 8 out of 100 cases.[90]

This finding is outrageous, and the implications are far-reaching. Criminal caseloads in our state trial courts totaled about 20.5 million in 2012, and disproportionately represented in this statistic are people of color, low-income people, LGBT people and people living with HIV (with many of these identities overlapping and intersecting).[91] If you are a defendant facing the state in a criminal case, receiving a fair trial is fundamental to accessing justice. This means, among other factors, that the case must be presided over by an impartial judge who makes decisions based on the law and the facts and not on campaign contributions and super-PAC spending or concerns that the judge will be labeled "soft on crime."

2. Judicial Elections Are Literally Killing People

Concern that bias, prejudice and politics will interfere with the fair administration of justice is particularly consequential when an individual's very life is at stake. Alarmingly, a new study from the American Constitution Society shows that justices chosen by voters reverse death penalties at less than half the rate of those who are appointed, suggesting that politics play a part in appeals.[92] Whether a justice was elected or not was a far stronger variable in determining outcomes of death penalty cases—beyond state politics and more than race.[93]

A recent report from the Brennan Center for Justice at NYU School of Law reviewed 10 empirical investigations into the impact that judicial election has on outcomes for defendants. According to the report, "These studies, conducted across states, court levels, and type of elections, all found that proximity to re-election made judges more likely to impose longer sentences, affirm death sentences, and even override sentences of life imprisonment to impose the death penalty."[94]


Supreme Court Justice Sonia Sotomayor.

As Justice Sotomayor's dissent in *Woodward v. Alabama* noted, "[s]ince 2000 ... there have been only 27 life-to-death overrides, 26 of which were by Alabama judges." In attempting to explain why Alabama had become the only state in which judges routinely override the decisions of juries in order to impose capital punishment, she surmised that, "[t]he only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures."[95]

3. Corporate Spending Means More Pro-Business Rulings

In several recent judicial elections across the country, million-dollar battles have been waged by trial lawyers and large corporations.[96] From 2000 to 2009, conservative and business groups spent $26.3 million on state court elections—more than twice as much as plaintiffs' lawyers and liberal groups. Campaign contributions in states with partisan judicial races were three times greater.[97] A report by the Center for American Progress found that from 1992-2010, the six states with the highest judicial campaign spending ruled in favor of corporations 71 percent of the time.[98] A study from the American Constitution Society reveals that the more campaign contributions from business interests that justices receive, the more likely they are to vote for business litigants appearing before them in court.[99] The analysis reveals that a justice who receives half of his or her contributions from business groups can be expected to vote in favor of business interests almost two-thirds of the time.[100]

4. Spending in Judicial Elections Affects Judicial Diversity

Several studies have attempted to determine how different judicial selection methods affect judicial diversity. At least at the trial level, results have been inconclusive, usually showing only minor differences in percentages in states with different systems. Judicial elections have been important for achieving diversity at the trial court level in certain communities—particularly where voters are black or Latino. However, the lack of diversity at the high court level is striking. Only 10 percent of state supreme court justices are nonwhite. Only 3 percent of high court justices are Latino—just 10 total.[101] A 2009 report by the American Judicature Society found that appointive methods were more likely than popular elections to place people of color judges on state high courts.[102]

A recent study from the Center for American Progress looked at the success rates of all incumbent state high court justices running for re-election since 2000.[103] The study found that supreme court justices of color have a harder time holding onto judicial seats than white justices.

The data revealed a:

- 90 percent re-election rate for white incumbents
- 80 percent re-election rate for black incumbents
- 66 percent re-election rate for Latino incumbents

The report found that in many states with elections, "advocates for diversity have succeeded in pressing for diverse appointments, but these victories are often fleeting."[104] In many states where judges of color were appointed, they were rejected by voters in their first election. The research showed that appointed black and Latino justices running in their first election were only re-elected 68 percent of the time.[105]

The findings of the Center for American Progress report suggest that increased campaign spending in judicial elections has a deleterious effect on efforts to foster racial diversity on state supreme courts. For example:

- Today, all of Alabama's supreme court and appellate court justices, including both its civil and criminal appellate courts, are white. Since spending in Alabama Supreme Court elections skyrocketed in the 1990s, not a single African American has sat on the state's high court.[106]
- The huge spending in Ohio judicial races over the last few decades brought about a loss of racial diversity on the Ohio Supreme Court. Two of the three black justices ever to serve were immediately voted off the high court after their initial appointment.[107]
- Louis Butler—the first black justice appointed to serve on the Wisconsin Supreme Court—immediately lost re-election after a misleading and racially tinged attack ad from his opponent accused him "working to put criminals on the street" including a defendant who was convicted of raping an 11-year-old girl "who went on to molest another child." Justice Butler was the only incumbent to lose re-election in more than 40 years.[108]

E. The Right-Wing Attack on Judicial Campaign Rules

In addition to the growing influence of money in judicial elections, judicial independence is threatened by right-wing efforts to dismantle codes of judicial ethics that exist to prevent judges from turning into political partisans.

James Bopp, longtime general counsel for the National Right to Life PAC, is also the attorney behind lawsuits like *Citizens United v. FEC*, which take direct aim at campaign finance limits. Bopp, who often uses anti-abortion groups as plaintiffs in his lawsuits, has also looked to roll back state restrictions on judicial campaign conduct. Bopp successfully argued *Republican Party of Minnesota v. White*, the 2002 Supreme Court ruling that on First Amendment grounds struck down rules barring judicial candidates from announcing their positions on legal and policy issues.[109] The ruling in *White* significantly weakened the ability of states to limit the political behavior of judicial candidates—creating the conditions that allow judges to run openly on anti-choice and anti-LGBT platforms while campaigning.

Judges must decide individual cases on the basis of the law and the facts, and not on personal politics or popular opinion. When judges make their own personal views on issues a part of their campaign, individuals understandably question whether they will receive a fair hearing. Explicitly or implicitly telegraphing decisions in advance undermines the right to due process.

Unfortunately, almost immediately after the ruling in *White*, judicial candidates in many states were sent questionnaires by political parties and special interest groups seeking to nail down positions on issues like access to abortion, equal marriage rights, voter ID and the role of religion in the public sphere.[110] While candidates have a right not to answer such questions, contested campaign pressures often make it difficult to decline.

After *White*, it was not uncommon to see judicial candidates in several states openly expressing anti-LGBT views.

> "The rules have changed. I agree with the new rule because I believe the old system kept the voters in the dark and was arbitrary and elitist. I want you, the voters, to know that I oppose abortion. I support having the Ten Commandments in our schools and courthouses. . . . I support the Second Amendment right to bear arms. . . . I believe marriage is between only one man and one woman. I live a life of traditional western Kentucky values. I think the way you think."
>
> — Rick Johnson, candidate for Kentucky Supreme Courts, embracing the ruling in *White*.[111]

> "We can't keep disparaging our military and promoting things like same-sex marriage, L-G-B-T. To hear the President of the United States say that we are promoting L-G-B-T. Let's think about what that is: lesbian, gay, bisexual and transgendered right... Same-sex marriage will be the ultimate destruction of our country because it destroys the very foundation upon which this nation is based."
>
> — Roy Moore, candidate for Chief Justice of the Alabama Supreme Court at a campaign rally in 2012.[112]

White also opened the door to a series of lawsuits over the years, by Bopp and others, attempting to expand the ruling to strike other ethics rules that limited campaign conduct like canons prohibiting direct solicitation of contributions and rules designed to limit partisan political activity, like permitting judicial candidates to endorse or campaign for other candidates for political office.[113] Right-wing forces continue to target individual court elections[114] and laws governing how state judges are selected, blocking proposed changes from contested elections to merit selection systems in Minnesota and Pennsylvania.[115] Bopp filed lawsuits attempting to change the way states with merit selection, like Kansas and Alaska, choose judges.[116]

> "We have a pro-life House and a pro-life Senate and a pro-life governor… We pass pro-life legislation–and we get sued. The next frontier is the courts."
>
> — Mary Kay Culp, Executive Director, Kansans for Life, July 2014[117]

VII. THE IMPACT OF JUDICIAL SELECTION ON LGBT RIGHTS CASES

In 2015, Lambda Legal commissioned a series of statistical analyses on an expansive new dataset on state high court decisions adjudicating LGBT rights claims. The study was conducted by a team of independent researchers led by Anthony Michael Kreis with support from Ryan Krog and Allison Trochesset. The research compared the outcomes in LGBT rights cases in states with different judicial selection methods, finding that processes through which different states select judges can play a role in how state high courts rule in LGBT cases. Below is a summary of the study. For a complete analysis of the dataset, variables, and findings, please visit Lambda Legal's **Fair Courts Project** at http://www.lambdalegal.org/issues/fair-courts-project.

Briefly, the study found that:

1. State high courts whose judges stand for election are less supportive of LGBT rights claims.
2. Results suggest that lack of support for LGBT rights among state high courts with elected judges can be attributed to ideological factors playing a larger role in shaping judges' decisions on these courts.

A. Data: A Look at State High Court Cases

To examine the implications of judicial independence for state courts' treatment of LGBT rights claims, the study's dataset included all cases involving LGBT claims decided by state high courts starting in 2003, after the U.S. Supreme Court handed down its ruling in Lambda Legal's case *Lawrence v. Texas*, through 2015. The search recovered a total of 127 relevant cases.[118] Although the data contain decisions from 43 different states of the 50 states and the District of Columbia, there is some variation in the sample, with some states having issued more relevant decisions than others. California had the most LGBT rights cases during this time handing down 12 decisions, followed by Massachusetts with 10 cases.

After identifying a set of relevant cases, rulings were then classified as either favorable or unfavorable to LGBT rights. Cases that either directly upheld rights for LGBT persons, e.g. in favor of marriage rights for same-sex couples, or decisions that the parties would reasonably foresee yielding results that which could particularly benefit LGBT persons, e.g. second-parent adoption, were coded as "pro-LGBT." Those cases where courts denied LGBT rights claims or restricted the legal rights that LGBT persons could avail themselves of were coded as "anti-LGBT." Cases that were not decided on the merits were excluded.

B. Key Variables

The notable variable throughout the analysis is the method by which states select their judges. Although the exact system varies from state to state, most select and retain judges via one of four broad schemes: (1) **Partisan Elections;** (2) **Nonpartisan Elections;** (3) **Uncontested Retention Elections;** (4) **Lifetime tenure or reappointment.** Thirty-eight states have some type of judicial elections; the remaining twelve grant life tenure or use reappointment of some form.

Though the central focus of this research is investigating the extent to which outcomes in LGBT rights cases are influenced by judicial selection methods, it is important to account for additional factors that might also influence judges' decisions on these issues. To summarize, the study controls for four sets of factors that can influence the state high courts' rulings on LGBT rights: (1) the institutional design of a state's **judicial selection mechanism**; (2) characteristics of the panel of judges hearing a case, such as their **judicial ideology**[119]; (3) the **nature of the legal questions**[120] being adjudicated in a case; (4) the **political context of the state**[121] in which a court operates. Next, using statistical models, the study generates predicted probabilities of the likelihood a court would rule in favor of LGBT rights, given these factors.

C. Findings

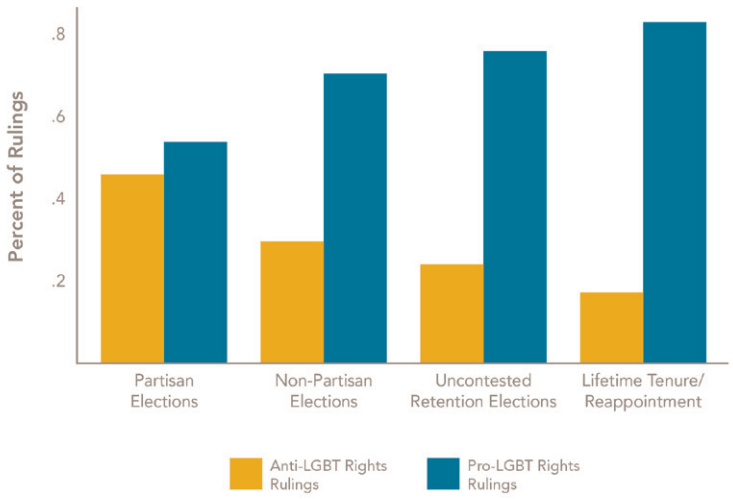
FINDING: State high courts whose judges stand for election are less supportive of LGBT rights claims.

1. The Impact of Judicial Selection of LGBT Rights Claims

The study first examines how the judicial selection mechanism employed for high state judges effects LGBT rights claims. Results of the study show that courts whose judges face either partisan or nonpartisan elections are less supportive of LGBT rights claims. Figure 1 shows that high court judges elected through partisan elections are the least supportive of LGBT rights claims according to the data, supporting a pro-LGBT claim in only 53 percent of cases. Slightly more supportive are courts where high court judges are elected through nonpartisan elections (70 percent of cases), followed closely by high courts where judges are appointed and run in uncontested retention elections (76 percent of cases.) The high courts that are most supportive of LGBT rights are those where the judges are granted lifetime tenure or reappointed, supporting a position favorable to LGBT rights in 82 percent of cases in the data.[122]

Figure 1.

State High Court Rulings on LGBT Issues across Judicial Selection Methods



FINDING: Results suggest that this lack of support among state high courts with elected judges can be attributed to ideological factors playing a larger role in shaping judges' decisions on these courts.

2. The Impact of Judicial Ideology of LGBT Rights Claims

Judicial selection is not the only factor driving LGBT litigation outcomes. A primary factor in state high courts' willingness to rule against or in favor of upholding LGBT rights is the ideological disposition of the sitting justices. That fact notwithstanding, the role of ideology is noticeably amplified in courts subject to elections, as compared to those whose members are not. In other words, ideology plays a larger role in the decision-making process in less independent courts, where judges are subject to competitive elections. This amplification effect is not uniform for all judges. Judges sitting on ideologically conservative courts are far more sensitive to the appointment mechanism than their counterparts sitting on ideologically liberal courts. This sensitivity helps explain why conservative courts where judges face partisan elections are the least supportive of LGBT claims.

Figure 2.

The Effect of State High Court Ideology on Support for LGBT claims[123]

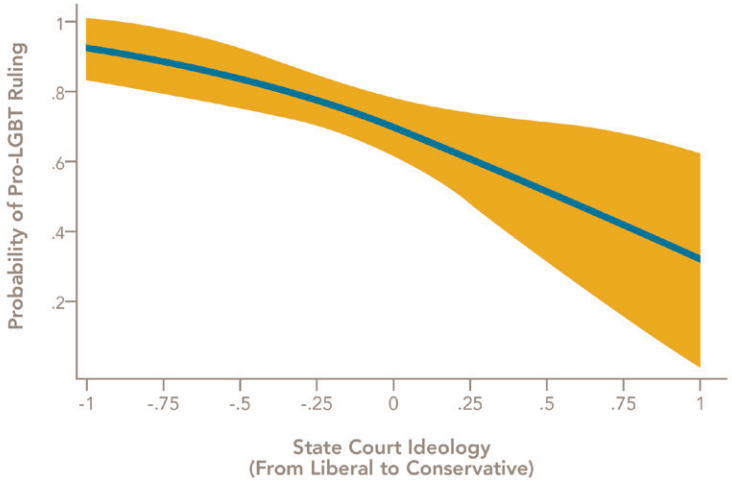


Figure 2 demonstrates the effect of the ideological disposition of sitting justices on support for LGBT rights claims. Figure 2 shows more ideologically conservative courts are less supportive of LGBT claims. The empirical results lend strong support for an ideological account for state court decision-making in cases involving LGBT legal claims. For instance, the probability of an ideologically moderate court ruling in a pro-LGBT position is 62 percent, holding all other variables at their mean or modal value. Contrast this with a highly conservative court, where the predicted probability of a pro-LGBT ruling drops precipitously to 32 percent; or for a very liberal court where the probability jumps to 90 percent.

3. The Interaction between Judicial Selection and Judicial Ideology on LGBT Rights Claims

Although the effects of variables for judicial selection mechanisms and ideology of judges are interesting in their own right, the interaction between these variables can provide several key insights into how the institutional design of a court can condition judicial behavior. It is plausible that certain selection systems encourage judges to behave more ideologically than others on cases dealing with LGBT rights. For instance, with political constituencies that must be appeased, elected judges may respond to their constituents by voting in ways that reflect their constituents' views.

Figure 3.

The Effect of Partisan Elections in Enhancing Ideological Voting by State High Courts

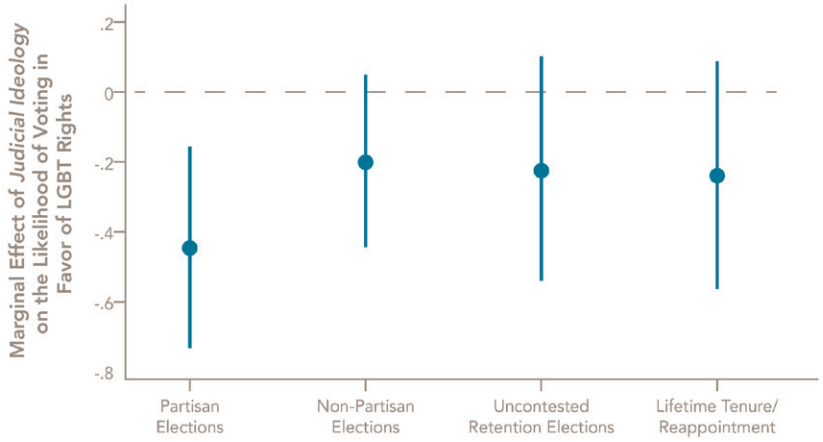


Figure 3 presents the interaction between the **judicial selection mechanism** variables and the **judicial ideological positioning** on the high court. Figure 3 shows that as courts become more ideologically conservative, they become less supportive or LGBT rights; however, this effect is strongest for courts where judges are selected through partisan elections.

Figure 4.

Selection Methods and Levels of Support for LGBT Rights in Ideologically Liberal Versus Ideologically Conservative State Courts

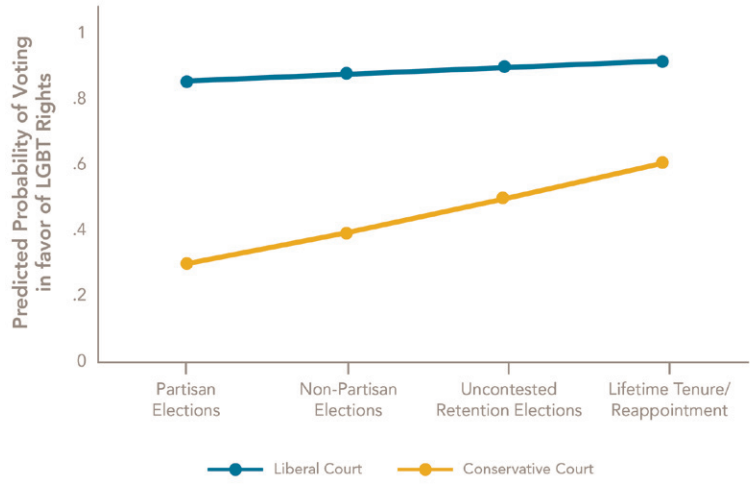


Figure 4 presents the probability of a state high court's supporting LGBT rights across different methods of selection. Judges sitting on ideologically conservative courts are far more sensitive to the appointment mechanism than their counterparts sitting on ideologically liberal courts. As the graph displays, liberal courts are more likely to vote in favor of LGBT rights claims, regardless of how the judges are seated. Conservative courts where judges face partisan elections are the least supportive of LGBT rights claims. The probability of a conservative panel of judges who face partisan elections is only 20 percent, holding all other variables at their mean or modal value. That probability increases to 37 percent for nonpartisan elections, and up to 42 percent when facing uncontested retention elections, and more than doubles up to a probability of 57 percent for courts that have lifetime tenure or reappointment systems.

4. The Interaction between Political Context of the State and Judicial Selection Mechanisms on LGBT Rights Claims

Overall, if judges are responsive to the electorates of their states, then the clearest way to observe the implications of the effects observed in Figures 3 and 4 would be to examine courts' treatment of LGBT issues in liberal versus conservative states. This is explored by examining the interaction between **judicial selection mechanism** and the **political context of the state** as determines by the *State Citizen Ideology* score.

Figure 5:

Political Context of the State and the Effects of Different Selection Mechanisms on Support of LGBT Claims

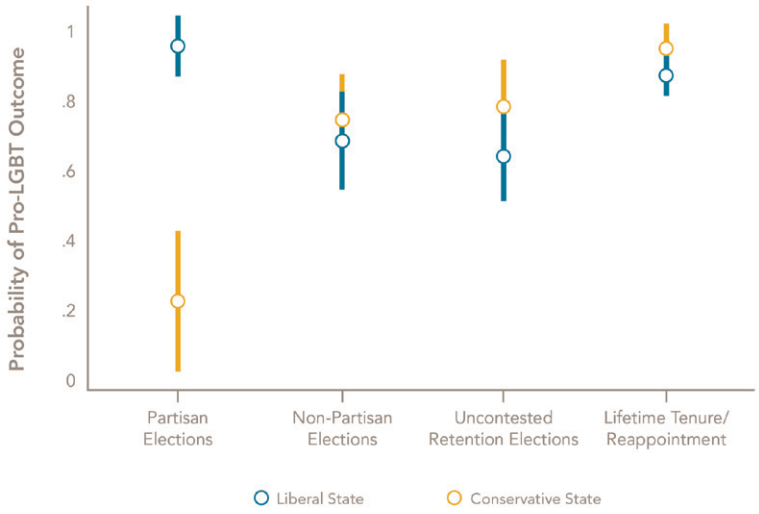


Figure 5 presents the predicted likelihood of support for LGBT claims across selection mechanisms for an average state designated "conservative," compared to an average state designated "liberal" (drawn from the 25th and 75th percentile of the *State Citizen Ideology* variable, respectively). As demonstrated by the graph, there is a considerable gap between judges elected in partisan elections in states with liberal versus conservative populations. Courts whose members are selected through partisan elections in more liberal states are considerably more supportive of LGBT positions than their counterparts in liberal states with other appointment designs. Conversely, judges on courts selected through partisan elections in states with more conservative electorates are considerably more hostile to LGBT legal claims. To illustrate, for states with partisan elections, the predicted probability of a state high court ruling in a pro-LGBT position in state with a liberal citizenry is extremely high at 94 percent; in stark contrast, the probability of a pro-LGBT position drops to 22 percent for courts housed in conservative states with partisan elections. For every other type of selection mechanism, there is no statistical distinction to between courts with conservative versus liberal citizenries.

VIII. A SOCIAL JUSTICE AGENDA FOR ACHIEVING FAIR AND IMPARTIAL COURTS

Significant reform is needed to ensure impartial state courts that treat LGBT people and people living with HIV fairly and inspire confidence among the diverse communities these courts serve. It is time for advocates in all states to take action by pushing measures to strengthen judicial independence, promote judicial diversity and expand access to justice. Specifically, we offer seven recommendations that are key components to advancing a social justice agenda for achieving fair and impartial courts.

A. Stop Electing Judges

It is time to stop putting our rights—most especially our constitutional right to due process—at risk by continuing the practice of electing state judges. The damaging consequences resulting from the explosion of political and special interest group involvement in judicial elections, and in particular, the impact on the

legal rights LGBT people, has become undeniably clear. Similarly, retention elections are now systematically targeted by politicians and special interest groups.

State court judges must decide cases based on constitutional and legal principles—not political pressure, popular opinion or fear of retaliation. In too many ways, judicial elections undermine judges' ability to perform their essential role as independent arbiters of the law. The need to appease voters, special interest groups and political partisans threatens judicial independence and integrity in states that require candidates to face off against each other. Furthermore, the increasingly corrosive influence of money in elections, combined with the escalating assault on reasonable regulation of judicial campaign conduct, have made efforts to reform judicial elections very difficult. Selection and retention by popular election is no way to ensure access to justice for marginalized, politically unpopular and disenfranchised populations or to inspire public confidence in our court system.

Ending judicial elections won't be easy. Recent efforts to replace judicial elections with commission-based appointment systems have stalled, and many states' merit-selection systems have only narrowly survived repeated attacks by political partisans. Dynamic campaigns led by diverse national, state and local organizations will be required, and social justice groups that understand why access to fair and impartial courts that safeguard the rights of all people is so critical must champion those efforts.

B. Institute Commission-Based Appointment of Judges (Merit Selection)

A commission-based appointment system of selecting judges based on merit is the best way to ensure due process, boost public confidence in the courts, improve the quality of justice and guard against money and political influence affecting judicial decision-making. The task of a judicial nominating commission in a merit selection system is to solicit applications for judicial vacancies, screen and interview candidates, and recommend a list of the most qualified candidates to the appointing authority—usually the governor. Currently, 22 states use a commission-based appointment method to select high court judges. Many states with contested elections already use commission-based appointment to fill interim supreme court vacancies. There are several states that select high court judges through a commission-based appointment system without the use of retention elections.

Not all commission-based systems are created equal. The value of such a merit system depends on proper design and effective function. Drawing on the expertise of our colleagues at Justice at Stake, the Brennan Center for Justice at NYU School of Law, and the Institute for Advancement of the American Legal System, we recommend that the best commission-based appointment systems should include at least the following elements:

- Judicial nominating commissions that consist of commissioners who are professionally, politically, geographically and demographically diverse. Diversity in nominating commissions should be established by statute when possible.
- Clearly established and published procedures for how judicial nominating commissions will operate, with written ethics procedures for conflicts.
- Mandatory implicit bias training and diversity training for commissioners.
- Clarity and prioritization of diversity in the nominating process and strategic recruitment measures to ensure wide distribution of judicial opening announcements.
- Transparency in the application and interview process, and published record keeping.

C. Promote Judicial Diversity

A state judiciary diverse in race, ethnicity, gender identity and expression, sexual orientation and lived and professional experience serves not only to improve the quality of justice, but to improve public confidence in the courts. It is absolutely critical that state judiciaries be composed of judges who truly reflect the diversity of the population and understand the issues facing the communities they serve. Social justice and

human rights organizations can and should be on the front lines of pushing for diverse, high-quality, and fair state court judges.

One of the best ways to promote judicial diversity is to advance a properly designed merit selection system with a judicial nominating commission that prioritizes diversifying the judicial bench. Advocates can also play a critical role by educating their constituencies about the importance of judicial diversity; disseminating vacancy announcements and encouraging individuals to pursue a path to the bench; holding elected and appointing authorities responsible for their diversity records; and advocating for improved data collection on the diversity of all applicants and judges that is inclusive of sexual orientation and gender identity.

D. Strengthen and Defend Judicial Codes of Conduct

Judges are not politicians. The rules that govern judicial campaign conduct in the 38 states that require at least some judges to stand for election are essential components of ensuring the independence, impartiality and fairness of the judiciary. In recent years, rules regulating judicial campaign conduct have been attacked as unduly restrictive of candidates' free speech rights. At a time of rising spending and politics in judicial elections, rules that preserve the public's confidence in the judiciary and protect the due process rights of litigants are more important than ever.

Social justice advocates should encourage state courts and legislatures to adopt and strengthen reasonable rules governing judicial campaign conduct. Protecting and promoting these rules is important as a means of safeguarding the due process rights of litigants and preserving public confidence in state courts. Judges are charged with safeguarding our cherished rights and liberties and ensuring equal access to justice for all. Social justice advocates should oppose weakening rules to allow candidates for judicial office to campaign against the rights of many of the vulnerable communities or politically unpopular groups judges have a duty to serve.

E. Support Anti-Bias and Cultural Competency Training

Ensuring that state judges are fair-minded and approach the decisions they make without bias or prejudice is of utmost importance both for our legal system and for the rights of vulnerable people, whom our legal system has an obligation to protect. Implicit and explicit bias poses a serious threat to securing fair and impartial state courts. Cultural competency and anti-bias education strengthen the state court system, affirm the dignity of court users, and work environments of judges, court staff and attorneys.

Improving the cultural competency of the bench with regard to gender and sexuality issues, and equipping legal practitioners with resources to curb LGBT bias, will increase the likelihood of fair and just results in court proceedings for LGBT people. Social justice advocates can work with organizations like Lambda Legal to become part of our emerging network of educators who have the skills and training to deliver anti-bias and cultural competency trainings to state court systems in all regions of the U.S.

F. Engage Constituencies by Educating Community Members About the Importance of Fair and Impartial Courts

State courts have broad authority to protect or restrict the rights of LGBT people and people with HIV, and they decide fundamental cases that touch on nearly every aspect of life and every issue. It is critical for more social justice and human rights advocates to promote the connection between fair courts and important rights and issues affecting our communities. For example:

- **Voting rights:** The right to vote is a state-based right and is protected by state constitutions. Therefore, state courts play a central role in defining the constitutional right to vote.[124] Evidence suggests that elected judiciaries rule more narrowly regarding voting rights, and appointed judges tend to issue opinions that more broadly interpret the constitutional right to vote.[125]

- **Reproductive justice:** State legislators are passing laws at a rapid pace to restrict access to abortion. State courts are increasingly important for upholding reproductive rights. Lawsuits challenging these

new restrictions are pending or have been recently decided by elected Supreme Court justices in many states.[126] Still, many state courts are hostile to reproductive rights claims, and judicial elections make judges susceptible to popular opinion and political influence, particularly in "red" and "purple" states where restrictive laws are more prevalent to begin with. Anti-abortion forces also are targeting individual court elections and laws governing how state judges are selected.[127]

- **Environmental justice:** Special interests seeking to unravel environmental regulations and limit liability for polluters are spending heavily in judicial elections. Recently, the Ohio Supreme Court, which elects justices in partisan races, ruled 4-3 that cities and counties can neither ban nor regulate fracking through zoning laws or other restrictions. In a dissenting opinion, Justice William M. O'Neill wrote that the "oil and gas industry has gotten its way."[128] Indeed, the Ohio oil and gas lobby contributed heavily to state legislative campaigns, and gave $8,000 for the Justice who wrote the pro-industry ruling and $7,200 for another who concurred.[129]

- **Redistricting:** In 2015, the Florida Supreme Court, where Justices are appointed through a commission, invalidated several congressional districts as unduly influenced by partisanship.[130] In 2016, the North Carolina Supreme Court, where judges are elected in partisan races, upheld the state's redistricting map by a 4-3 ruling in a case alleging that the map discriminates against black voters.[131] The North Carolina General Assembly received drafting assistance for the map from the Republican State Leadership Committee, a group that also spent millions of dollars to keep the North Carolina Supreme Court conservative.[132]

To better understand how state courts impact fundamental rights and how these courts are being targeted, see the Piper Fund's series of Fair Courts Toolkits, available at www.proteusfund.org/piper/resources

G. Build Dynamic Networks with Diverse Allies to Advance Fair Courts

The powerful, organized threat to fair and impartial state courts requires a dedicated, aggressive and well-coordinated response to prevent extensive damage to our democracy and the further erosion of our constitution right to due process. State courts and the judges who serve play a significant role in deciding cases involving LGBT equality, reproductive justice, voting rights, criminal justice, consumer protections and environmental justice.

Greater interest and activism can help to increase public awareness of the ways that money, politics, ideology and bias undermine judicial independence, affect case outcomes, impede diversity, and impact access to justice. Fair courts networks made up of a diverse range of players can work together to create dynamic educational and advocacy campaigns for positive change, while providing strategic support to defeat political and interest group efforts to capture the courts.

IX. CONCLUSION

Fair and impartial state courts are critical to making the case for equality. The courts of all fifty states and the U.S. territories, along with the more than 30,000 state court judges, have broad authority to uphold or restrict the rights of LGBT people and people living with HIV. But the scales of justice are out of balance. The stunning lack of diversity in the judiciary of our state courts and the broken judicial election process for selecting judges in most states contributes to a biased system that threatens access to justice for LGBT people and people living with HIV. Lambda Legal's new research and the growing body of evidence indicate that state judges facing election, often in increasingly expensive races, are ceding justice to politics. Something has to be done to restore public trust and basic fairness. Lambda Legal's Fair Courts Project works to advance an independent, diverse and well-respected judiciary that upholds the constitutional and other legal rights of LGBT people and people living with HIV. It is our hope that this resource will support additional research, advocacy, litigation and policy efforts to strengthen fair and impartial state courts and ensure equal access to justice for everyone.

Acknowledgments

Lambda Legal extends deep appreciation to the Piper Fund, a Proteus Initiative for supporting this important research and publication. Lambda Legal would also like to thank Open Society Foundations and the Rockefeller Brothers Fund for their generous support of the Fair Courts Project.

1. Lambda Legal, *Protected and Served? A national survey exploring discrimination by police, courts, prisons and schools against LGBT people and people living with HIV in the United States* (2014), available at www.lambdalegal.org/protected-and-served
2. Joanna Shepherd, *Justice At Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions* (2013), available at http://www.acslaw.org/ACS%20Justice%20at%20Risk%20%28FINAL%29%206_10_13.pdf
3. Joanna Shepherd and Michael S. Kang, *Skewed Justice: Citizens United, Television Advertising and State Supreme Court Justices' Decisions in Criminal Cases* (2014), available at http://www.acslaw.org/sites/default/files/Joanna_Shepard_and_Michael_S_Kang_Skewed_Justice_Citizens_United_Television_Advertising_and_State_Supreme_Court_Justices%E2%80%99_Decisions.pdf
4. Kate Berry, Brennan Center for Justice, *How Judicial Elections Impact Criminal Cases* (2015), available at https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf
5. Anthony Michael Kreis, Ryan Krog and Allison Trochesset, *An Empirical Examination of Support for LGBT Rights Claims in State High Courts*, 2003-2015, (2015).
6. Mark S. Hurwitz and Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity across 20 Years*, 29 JUST. SYS. J. 47, 52-53 (2008).
7. Supreme Court of the United States, *Frequently Asked Questions*, http://www.supremecourt.gov/faq.aspx
8. See Neal Devins and Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U.PA.J.CONST.L.455, 456-57 (2010).
9. See Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO STATE L.J.1 (forthcoming 2016); John D. Echeverria, *State Judicial Elections and Environmental Law: Case Studies of Montana, North Carolina, Washington and Wisconsin*, 16 VT. J. ENVTL. L. 363 (2015); Shepherd, supra note 3.
10. Roy A. Schotland, *New Challenges to Judicial Selection*, 95 GEO.L.J.1077, 1085, (2007). All judges in New Mexico are initially appointed, face a contested partisan election for a full term, and then run in uncontested retention elections for additional terms. Ohio and Michigan have nonpartisan general elections, but political parties are involved with the nomination of candidates, who often run with party endorsements.
11. Id. at 1084.
12. *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003); In re Marriage Cases, 43 Cal.4th757 (2008), *Kerrigan v. Commissioner of Health*, 289 Conn. 135 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).
13. Billy Corriher and Eric Lesh, *Southern Judges Continue to Defy SCOTUS on Marriage Equality*, Advocate.com (Dec. 9, 2015), http://www.advocate.com/commentary/2015/12/09/southern-judges-continue-defy-scotus-marriage-equality
14. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).
15. Eric Lesh, "Standing Up to Judicial Bullies: A Profile in Courage," Lambda Legal Blog (May 8, 2012), http://www.lambdalegal.org/blog/standing-up-to-judicial-bullies
16. Billy Corriher and Eric Lesh, "Marriage Equality Cases Languish Before Elected Judges," *L.A. Times* (June 1, 2015), http://www.advocate.com/commentary/2015/12/09/southern-judges-continue-defy-scotus-marriage-equality
17. *Obergefell v. Hodges*, 135 S. Ct. 1732 (2015).
18. *Corriher and Lesh*, supra note 13.
19. Brian Lyman, "SPLC Files Complaint Against Justice Tom Parker," *Montgomery Advertiser* (Oct. 13, 2015), http://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2015/10/13/splc-files-complaint-against-justice-tom-parker/73884180/
20. Jacob Kerr, "Alabama Chief Justice Roy Moore On Gay Marriage Ruling: 'I Hope We Don't Have A War'," HuffingtonPost.com (July 8, 2015), http://www.huffingtonpost.com/2015/07/08/roy-moore-gay-marriage_n_7754106.html
21. Corriher and Lesh, supra note 13.
22. Corriher and Lesh, supra note 16.
23. See Texas Supreme Court Justice Don Willet re-election website, available at http://www.donwillett.com/
24. Corriher and Lesh, supra note 16.
25. Jon Lyon, "Ex-Justice: Arkansas Supreme Court Voted To Strike Gay Marriage Ban, Withheld Ruling," *Arkansas News Bureau* (Nov. 11, 2015), http://swtimes.com/news/state-news/ex-justice-arkansas-supreme-court-voted-strike-gay-marriage-ban-withheld-ruling#sthash.ABMDPNoR.dpuf
26. *Costanza v. Caldwell*, 167. So. 3d 619 (La. 2015).
27. Eric Lesh, "Outrageous Dissent from Louisiana Supreme Court Justice Shows why Our Fight for Fair Courts Continues," Lambda Legal Blog (July 9, 2015), http://www.lambdalegal.org/blog/20150709_outrageous-dissent-louisiana-supreme-court-fair-courts
28. Id.
29. *Czekala-Chatham v. State ex rel. Hood*, 2015 Miss. LEXIS 114 (Miss. Feb. 24, 2015)
30. Jeff Amy and Emily Wagster Pettus, *Mississippi Supreme Court Narrowly Grants Same-sex Divorce*, Associated Press (Nov. 5 2015), http://bigstory.ap.org/article/88b726584d2e4210b6c11451aed02e8b/mississippi-supreme-court-narrowly-grants-same-sex-divorce
31. Id.
32. Id.
33. *Gartner v. Iowa Deparment of Pub. Health*, 830 N.W.2d 335 (Iowa 2013).
34. Id.
35. *Ex parte E.L.*, 2015 Ala. LEXIS 110 (Ala. Sept. 18, 2015)
36. Lambda Legal, Know Your Rights: Transgender (2015), available at http://www.lambdalegal.org/know-your-rights/transgender

37. Id.
38. Id.
39. *Doe v. Regional School Unit*, 86 A.3d 600 (Me. 2014).
40. *Turner v. The Honorable Stephen White, Chief Judge, Twelfth Judicial Circuit and Pamela J. McGuire, Circuit Court Clerk, Twelfth Judicial Circuit*, available at http://www.lambdalegal.org/in-court/legal-docs/turner_il_20080117_verified-complaint-for-a-writ-of-mandamus-il-supreme-court
41. *Harris v. Millennium Hotel*, 330 P.3d 330 (Alaska 2014).
42. Id.
43. *National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008).
44. Lambda Legal, Know Your Rights: HIV (2014), available at http://www.lambdalegal.org/know-your-rights/hiv
45. Id.
46. *Rhoades v. State*, 848 N.W.2d 22, (Iowa 2014).
47. Office of Juvenile Justice and Delinquency Prevention, *Statistical Briefing Book: Estimated number of delinquency cases*, 2013, available at http://www.ojjdp.gov/ojstatbb/court/qa06201.asp?qaDate=2013
48. *L.W. ex rel. L.G. v. Toms River Regional School Board of Education*, 189 N.J. 381, 390 (N.J. 2007).
49. Lambda Legal, supra note 1.
50. Joey L. Mogul, Andrea J. Ritchie and Kay Whitlock. *Queer (In)Justice: The Criminalization of LGBT People in the United States*, Boston: Beacon Press, 2011, pp. 72, 74.
51. Nolan Clay, *Oklahoma Appeals Court Orders Name Change in Transgender Case, The Oklahoman*, (Nov. 20 2012).
52. Id.
53. Id.
54. See Linda Merola and Jon Gould, Lawyers' Committee for Civil Rights under Law, *Improving Diversity on the State Courts: A Report From the Bench* 6 (2009), available at http://www.justiceatstake.org/media/cms/DiversityReport2009_4F739E0E55910.pdf
55. Ciara Torres-Spelliscy et al., Brennan Center for Justice, *Improving Judicial Diversity* at 49 (2010).
56. Michele L. Jawando and Billy Corriher, Center for American Progress, *More Money, More Problems: Fleeting Victories for Diversity on the Bench* at 5 (Oct. 2015), available at https://cdn.americanprogress.org/wp-content/uploads/2015/10/26055523/JudicialDiversity-reportB.pdf
57. Supra note 55 at 49.
58. Supra note 56.
59. Id.
60. Supra note 55.
61. Id.
62. Eric Lesh, "Making Judicial History in California and the Importance of LGBT Judges," Lambda Legal Blog (Dec. 21, 2012), http://www.lambdalegal.org/blog/making-judicial-history-in-california-and-the-importance-of-lgbt-judges
63. Matthew S. Bajko, "Online Extra: Political Notes: Bisexuals left off CA judicial bench," *The Bay Area Reporter* (Mar. 12, 2015), http://www.ebar.com/news/article.php?sec=news&article=70436
64. California LGBT Bar Coalition, Groundbreaking Report on LGBT Inequality in the Courts, Press Release, available at http://www.lgla.net/Resources/Documents/Article_press%20release.final.pdf
65. *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (O'Connor, J., concurring).
66. Justice at Stake. "Your State National Map," available at http://www.justiceatstake.org/issues/state_court_issues/justice-at-stake-and-judicial-elections/
67. Id.
68. Id.
69. U.S. Const . art III, §1.
70. *The Federalist Papers*, No. 78.
71. Shepherd, supra note 2; Shepherd and Kang, supra note 3.
72. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015). Lambda Legal, along with six other organizations, filed an amicus brief before the U.S. Supreme Court in support of the Florida Bar.
73. Randy Ludlow, *Justice French Defends 'Backstop' Comment at GOP Rally, The Columbus Dispatch* (Oct.28th 2014), available at http://www.dispatch.com/content/stories/local/2014/10/27/justice-french-defends-comments.html
74. Scott Greytak, Alicia Bannon, Allyse Falce and Linda Casey, *Bankrolling the Bench: The New Politics of Judicial Elections* 2013-14, at (Laurie Kinney ed., 2015), available at newpoliticsreport.org/report/2013-14
75. Id.
76. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); See, Adam Skaggs, Brennan Center for Justice, *Buying Justice: The Impact of Citizens United on Judicial Elections* 2 (2010), available at http://www.brennancenter.org/publication/buying-justice-impact-citizens-united-judicial-elections#_edn9
77. Supra note 74.
78. Greenberg Quinlan Roser Research Inc., *Justice at Stake Frequency Questionnaire* (2002), available at http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf
79. Id.
80. Eric Lesh, "This Time the Wheels Came Off the Antigay Bus: A Victory for Equality and Justice in Iowa," Lambda Legal Blog (Nov. 13, 2012), http://www.lambdalegal.org/blog/this-time-the-wheels-came-off-the-antigay-bus
81. *Obergefell*, 135 S. Ct. at 1732 (Roberts, CJ., dissenting).

82. Cristian Farias, "Mike Huckabee Thinks He Knows the Constitution Better Than the Supreme Court," Huffington Post, available at http://www.huffingtonpost.com/entry/mike-huckabee-constitution_55ef46ede4b093be51bc95d6

83. Debra Cassens Weiss, "Judge is reprimanded for opinion referring to 'iron fist and limp wrist' of gay-marriage decision," *ABA Journal* (Jan. 6, 2016), available *at* http://www.abajournal.com/mobile/article/judge_is_reprimanded_for_opinion_referring_to_iron_fist_and_limp_wrist_of_g

84. Eric Lesh, "When Justice is For Sale, More People Go to Jail," Lambda Legal Blog (Oct. 29, 2013), http://www.lambdalegal.org/blog/20141029_when-justice-is-for-sale-more-people-go-to-jail

85. Id.

86. Id.

87. James Sample, Adam Skaggs, Jonathan Blitzer and Linda Casey, "The New Politics of Judicial Elections 2000-2009: Decade of Change," 70 (Charles Hall ed., 2010), available at http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf.

88. Supra note 4.

89. Supra note 3.

90. Supra note 3.

91. R. LaFountain, R. Schauffler, S. Strickland, S. Gibson and A. Mason, *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads* (NCSC 2012), available at http://www.courtstatistics.org/flashmicrosites/csp/images/csp2009.pdf

92. Supra note 3.

93. Supra note 4.

94. Id.

95. *Woodward v. Alabama*, 134 S. Ct. 405, 409 (Sotomayor, J., dissenting) (citing Velasco, "More Judges Issue Death despite Jury," Birmingham News, at 11A (July 17, 2011).

96. Supra note 74.

97. Id.

98. Billy Corriher, Center For American Progress, *Big Business Taking Over State Supreme Courts* (Aug. 12, 2012), available at https://www.americanprogress.org/wp-content/uploads/2012/08/StateCourtsReport.pdf

99. Supra note 2.

100. Id.

101. Supra note 56.

102. Malia Reddick, Michael J. Nelson, and Rachel Paine Caufield, *Racial and Gender Diversity on State Courts: An AJS Study*, 48 JUDGES' J 28 (Summer 2009).

103. Supra note 56.

104. Id. at 9.

105. Id.

106. Pam Levy, "Judicial Elections Erode Diversity on the Bench," Mother Jones (Oct. 26, 2015), http://www.motherjones.com/politics/2015/10/judicial-elections-diversity-spending-report

107. Supra note 58.

108. Id.

109. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

110. Bert Brandenburg and Amy Kay, "Crusading Against the Courts: The New Mission to Weaken the Role of the Courts in Protecting our Religious Liberties," *Justice at Stake*, 13 (May 2007).

111. T.R. Goldman, "In Kentucky Supreme Court Race, Judges Get Out Their Soapboxes," Legal Times, (Nov. 6, 2006).

112. Kim Chandler, "Roy Moore says gay marriage will be 'ultimate destruction of our country'" (video), AL.Com, (Oct. 6, 2012). http://blog.al.com/spotnews/2012/10/roy_moore_says_gay_marriage_wi.html

113. *Williams-Yulee*, 135 S. Ct. 1656 (2015); *Wolfson v. Concannon,* 811 F.3d 1176 (9th Cir. Ariz. 2016).

114. Dawn Johnsen, *State Court Protection of Reproductive Rights: The Past, the Perils, and the Promise,* 29 Columbia Journal of Gender and Law 41 (2015), available at http://acslaw.org/sites/default/files/pdf/Johnsen-Appendix-B-Anti-Abortion-Efforts.pdf

115. Id.

116. Id.

117. Zoe Greenberg, "Anti-Choice Groups Seek to Stack State Courts," Rewire, (July 24, 2014) http://rhrealitycheck.org/article/2014/07/24/anti-choice-groups-seek-stack-state-courts/

118. Specially, we searched cases that included one or several of the following terms: "homosexual," "same-sex ," "gender identity," "transgender," "gay," "lesbian," "bisexual," "sexual orientation," "sexual preference," "LGBT" or "queer."

119. Although political scientists have developed a number of different measures for judicial ideology, this study relies on the innovative scores developed by political science professors Adam Bonica and Michael Woodruff. Their campaign finance scores (CFscores) for state high court judges are based on campaign contributions and the ideologies associated with various contributors. See, Bonica, Adam. 2013. Database on Ideology, Money in Politics, and Elections: Public version 1.0. Bonica, Adam. 2014. "Mapping the Ideological Marketplace." *American Journal of Political Science,* 58 (2): 367-387, available at http://onlinelibrary.wiley.com/doi/10.1111/ajps.12062/abstract. Contributions made by the judges themselves, as well as contributions towards the judges' campaigns are also factored in. In the absence of elections, the ideology of the appointing body (governor or legislature) was factored in, based on their campaign contributions data. A score above 0 indicates a more conservative leaning ideology, while scores below 0 are more liberal. Thus, in the context of our regression models, we expect the coefficients for this variable to be negative if conservative courts are less supportive of LGBT issues.

120. Two legal issues of particular interest are constitutional issues and family law. Cases centering on constitutional questions may be more subject to strategic litigation. Family law cases include all actions related to marriage, divorce, civil unions, child custody and adoption that were not constitutional challenges. This study includes two variables capturing whether a case involved a constitutional issue or a family law (coded 1, if yes; 0, otherwise). These variables are labeled Constitutional Law Case and Family Law Case, respectively.

121. This study employs commonly used measures developed by political scientists to capture the ideological character of a state's citizenry and governmental

officials. These measures—State Citizen Ideology and State Government Ideology—were originally developed by a the team of political scientists in Berry et al. (1998) and are imputed from ADA interest group ratings of each state's congressional delegation. See, William D. Berry, Evan J. Ringquist, Richard C. Fording and Russell L. Hanson. "Measuring Citizen and Government Ideology in the American States, 1960-93." *American Journal of Political Science,* Vol. 42, No. 1 (Jan.), pp. 327-348. Both of these measures were gathered online from: https://rcfording.wordpress.com/state-ideology-data/. A control was added for whether the deciding court was the focus of a highly competitive electoral cycle within two years prior to the decision. The relative metric for assessing competitiveness will likely be based on both primary election vote share and general election vote share, where applicable. This variable is labeled as Competitive Elections.

122. These data do not allow firm conclusions to be drawn about the impact of judicial selection mechanisms on LGBT rights claims based on the selection mechanism variable alone. There are far fewer cases in our data that were decided by courts in partisan or non-partisan elections. This may be due, in part, to strategic litigants who forum shop for courts that plaintiffs perceive as having greater independence and, therefore, are more likely to rule in favor of LGBT plaintiffs. While this explanation works well for impact litigation, it less satisfying for other types of cases like non-constitutional family law cases that are not deliberative actions intended to advance a broader end.
123. The graph demonstrates that more ideologically conservative courts are less support of LGBT rights.
124. Joshua A. Douglas, "The Right to Vote Under State Constitutions," 68 VAND.L.REV. 89 (2014).
125. Id.
126. Supra note 114.
127. Id.
128. State ex rel. *Morrison v. Beck Energy Corp.,* 143 Ohio St.3d 271, (Ohio 2015).
129. Darrel Rowland and Jim Siegel, "Ohio's Oil-and-Gas Industry Donations, Ruling Tied?," *Columbus Dispatch,* (Feb. 22, 2015). http://www.dispatch.com/content/stories/local/2015/02/22/industry-donations-ruling-tied.html
130. *League of Women Voters of Fla. v. Detzner,* 172 So. 3d 363 (Fla. 2015).
131. Billy Corriher, "North Carolina Supreme Court Disregards U.S. Supreme Court in Redistricting Case," Center for American Progress (Jan. 20 2016), https://www.americanprogress.org/issues/civil-liberties/news/2016/01/20/129372/north-carolina-supreme-court-disregards-u-s-supreme-court-in-redistricting-case/
132. Id.

Stock images for illustrative purposes only.

SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS

Final Report of the Sexual Orientation Fairness Subcommittee of the Judicial Council's Access and Fairness Advisory Committee

January 2001

TABLE OF CONTENTS

ACCESS AND FAIRNESS ADVISORY COMMITTEE

Hon. Frederick P. Horn, Chair
Assistant Presiding Judge
Superior Court of California
County of Orange

Mr. Elliott L. Aheroni
Attorney at Law
Encino

Mr. Lucius C. "Bud" Angell
Human Resources Manager
Superior Court of California
County of Placer

Hon. Steven K. Austin
Judge
Superior Court of California
County of Contra Costa

Hon. Carlos T. Bea
Judge
Superior Court of California
County of San Francisco

Hon. Helen I. Bendix
Judge
Superior Court of California
County of Los Angeles

Prof. Todd Brower
Western State University
College of Law
Fullerton

Hon. Judith C. Chirlin
Judge
Superior Court of California
County of Los Angeles

Hon. Thierry P. Colaw
Judge
Superior Court of California
County of Orange

Hon. Manuel J. Covarrubias
Commissioner
Superior Court of California
County of Ventura

Ms. Phyllis Culp
Director, Legal Unit
Office of Certification
State Bar of California
San Francisco

Hon. Teresa Estrada-Mullaney
Judge
Superior Court of California
County of San Luis Obispo

Ms. Jo Anne Frankfurt
Administrative Law Judge
Fair Employment and
Housing Commission
San Francisco

Ms. Denise Gordon
Deputy Court Executive Officer
Superior Court of California
County of Sonoma

Ms. Pat Hill
Executive Director
Lamoreaux Justice Center Operations
Superior Court of California
County of Orange

Hon. David A. Horowitz
Judge
Superior Court of California
County Los Angeles

Dean Maryann Jones
Western State University
College of Law
Fullerton

Hon. Ken M. Kawaichi
Judge
Superior Court of California
County of Alameda

Hon. Jerold A. Krieger
Judge
Superior Court of California
County of Los Angeles

Hon. Barbara Kronlund
Commissioner
Superior Court of California
County of San Joaquin

Ms. Alice Greenfield McGrath
Coordinator of Volunteers
Superior Court of California
County of Ventura

Ms. Malissa McKeith
Attorney
Loeb & Loeb, LLP
Los Angeles

Ms. Sheila Conlon Mentkowski
Chief
Client Assistance Program
Department of Rehabilitation
Sacramento

Mr. Joseph A. Myers
Executive Director
National Indian Justice Center
Petaluma

Mr. Gordon R. "Sam" Overton
Deputy Attorney General
Department of Justice
Los Angeles

Hon. Eric C. Taylor
Assistant Supervising Judge
Superior Court of California
County of Los Angeles

Dr. Dorothy M. Tucker
Organizational Psychologist
Los Angeles

Hon. Glenda Veasey
Commissioner
Superior Court of California
County of Los Angeles

Hon. Fumiko Hachiya Wasserman
Judge
Superior Court of California
County of Los Angeles

Hon. Barbara Ann Zúñiga
Judge
Superior Court of California
County of Contra Costa

ADVISORY MEMBERS

Ms. Christine Burdick
Executive Director and General Counsel
Santa Clara County Bar Association
San Jose

Mr. Jon W. Davidson
Senior Counsel
Western Regional Office
Lambda Legal Defense and Education Fund, Inc.
Los Angeles

Ms. Sally J. Elkington
Attorney at Law
Law Offices of Sally J. Elkington
Oakland

Ms. Kathryn D. Kendell
Executive Director
National Center for Lesbian Rights
San Francisco

Ms. Dana M. McRae
Chief Assistant County Counsel
Office of the County Counsel
County of Santa Cruz
Santa Cruz

STAFF

Ms. Arline Tyler
Staff Counsel

Mr. Clifford Alumno
Staff Analyst

Ms. Romunda Price
Administrative Coordinator

FOREWORD

An ongoing priority of the Judicial Council of California has been ensuring that the court system is fair and accessible to all persons in the state of California. As part of its efforts to meet this challenge, the council created the Access and Fairness Advisory Committee. There has been a growing awareness of the number of gay men and lesbians who are involved in various ways with the court system, as judges, attorneys, court users, and court employees. Reflecting this awareness, the court rules have changed to specifically prohibit sexual orientation discrimination. In addition, in recent years, the Chief Justice has spoken to various lesbian and gay bar associations throughout the state. With this background in mind, the Access and Fairness Advisory Committee undertook to examine the question of fairness and sexual orientation in the California court system. This report is the result of that examination.

This report represents the findings and conclusions of the advisory committee. The committee is made up of judges and attorneys of differing sexual orientations and racial, political, and philosophical backgrounds from various parts of the state. We want to thank the dedicated members of the advisory committee's Sexual Orientation Fairness Subcommittee, who have devoted long hours to the development of the surveys, the analysis of the survey results, and the drafting of this report. Some of these subcommittee members have contributed their time and talent for more than four years. We hope to make this an ongoing project of the subcommittee of the advisory committee.

We dedicate this report to the gay and lesbian judges and attorneys who are no longer with us, but whose work, energy, and courage led to this report.

Hon. Frederick P. Horn, Chair
Access and Fairness Advisory Committee

Hon. Jerold A. Krieger, Chair
Sexual Orientation Fairness Subcommittee

EXECUTIVE SUMMARY

The Access and Fairness Advisory Committee of the Judicial Council established a Sexual Orientation Fairness Subcommittee to address issues of bias as they relate to sexual orientation. The subcommittee was charged with making a written report, including recommendations, to the Judicial Council. This report represents that effort and is the first of its kind in the nation and unique in its approach and results. No other court or entity in the country has undertaken such an extensive review of the issue of sexual orientation fairness in a state court system.

METHODOLOGY

The Sexual Orientation Fairness Subcommittee first conducted five focus groups composed of attorneys in San Jose, San Francisco, San Diego, Sacramento, and Los Angeles.[1] These attorneys were asked to identify barriers, if any, facing gay and lesbian legal professionals and their gay and lesbian clients. The following issues were identified from the input received:

- Sexual orientation bias influencing judicial decision making;
- Lack of knowledge and understanding of sexual orientation issues and nuances;
- Need for preservation of privacy;
- Disrespect and mistreatment due to sexual orientation bias and homophobia;
- Bias in the substantive law and court procedures;
- Exclusion from informal legal system networks;
- Lack of equal employment opportunities/benefits for attorneys and court personnel; and
- Barriers to court accessibility, including lack of substantive law that addresses gay and lesbian relationship issues and language in current court forms that does not reflect the relationship status of gay and lesbian litigants.

Focus group participants agreed that the critical component for improving access to justice for gay men and lesbians is education of judges, lawyers, court personnel, and jurors.

The results of the focus groups helped inform the second phase of the subcommittee's work: determining to what extent, if any, actual or perceived sexual orientation bias exists in the courts. To accomplish this, the subcommittee retained consultants Drs. Dominic J. Brewer and Maryann Jacobi Gray to develop survey instruments to survey two groups: (1) gay and lesbian court users; and (2) court employees, regardless of sexual orientation. Both instruments were designed to meet the following objectives:

- Focus on the California court system;
- Obtain data from every part of the state; and

[1] For a more complete summary of the focus group meetings, see Appendix A, "Focus Group Summaries."

- Emphasize gay and lesbian court users' direct experiences and observations in addition to perceptions.

Thus, the surveys emphasize what actually happened to respondents in addition to what they perceive happens to them or others. Gay men and lesbian court user respondents were asked to report on their most recent contact with California courts as well as one other significant contact since 1990 where sexual orientation became an issue. Fifty-eight percent of the court users receiving the survey completed and returned it, for a total response of 1,225 court users; 1,525 court employees responded to the court employee survey out of approximately 5,500 employees who were sent the survey. Both surveys were distributed in the fall of 1998. Survey responses were returned through early 1999.

Respondents were allowed anonymity so they could answer freely. Anonymity was particularly important given the sensitivity of the research subject: sexual orientation bias.

According to the consultants, being able to identify 2,100 gay men or lesbian court users and having 1,225 respond to the survey is remarkable. Gay men and lesbians constitute a significantly large group in our society that has a "hidden identity"**:** that is, that an individual is gay or lesbian is not always immediately apparent from any outward, physical appearance or surname. Many gays and lesbians choose not to publicly identify their sexual orientation.

The court employee survey generated a number of negative responses to the survey itself. These negative statements underscore some of the findings from the survey, which indicate that some court employees are unconcerned or hostile with respect to sexual orientation issues in the courts.

CHARACTERISTICS OF SURVEY RESPONDENTS

A significant majority of court user survey respondents shared the following characteristics: they were white men; gay; living in an urban area; well educated, with either an undergraduate or graduate degree; affluent, with an income of at least $60,000 a year; and selectively "out," primarily with family and friends and at work. In addition, they had relatively few contacts with the court, typically two to three contacts since 1990; their primary contact was with the criminal or civil court; and their court contact, where sexual orientation became an issue, was most often as a juror, witness, litigant, or attorney.

A significant majority of court employee respondents shared the following characteristics: they were white, heterosexual, married women; earned less than $50,000 a year; had no college degree; and worked full time as permanent court employees. They had worked for the courts for 12 years, including 7 years in the current position, which was court clerk, clerical staff, or mediator; and they had participated in court proceedings at least once a month, with almost half participating on a daily basis. Of the court employee respondents who identified themselves as gay or lesbian, over one-third were totally "out" at work, over one-third were selectively "out" at work, and over one quarter were not "out" at work at all.

SUMMARY OF FINDINGS

The following are the subcommittee's interpretative findings based on the survey results and the analysis of those results, which are set forth in full in the consultant's report found at Appendix C. The subcommittee's findings draw reasonable inferences from the information set forth in the tables, comparing and contrasting the information from those tables. Accompanying each finding are references to the particular tables relied on and analysis that elucidates and provides important context for the finding. Since both the court user and court employee surveys asked about direct observations of the experiences of lesbians and gay men in the California courts, the findings from both surveys are combined and arranged by topic. These findings are not inclusive of all the reasonable inferences that may be drawn from the data but, rather, represent those findings that highlight the most significant areas of concern for the Access and Fairness Advisory Committee.

Interpreting the survey results for sexual orientation bias perceptions and actual biased conduct is difficult. Lesbians and gay men as a group are less visible than other minority groups, such as Blacks[2], Hispanics, and Asians, and women. For the most part, unless gays and lesbians choose to be "out" or unless they are "outed" during the course of a court proceeding, any bias or prejudice held by court participants is difficult to measure. The vast majority of gay men and lesbian court participants are not "out" in court proceedings. Thus, the survey results and findings must be considered with that overlaying context in mind.

The majority of respondents held the perception that they were treated the same as everyone else and treated with respect by those who knew their sexual orientation, which is a positive statement about the courts and judges. This general finding, however, does not completely reflect gay males' and lesbians' experience with the courts. The factor of invisibility, taken into consideration with other survey data, suggests that the experience of many gay men and lesbians in the courts is much less favorable when gays and lesbians have more contact with the courts and when sexual orientation becomes an issue in the court contact. This data is reflected in many of the findings described in this report.

USE OF THE COURTS

Overall Perceptions of Gay and Lesbian Court Users

1. Most lesbian and gay court users believed they were treated the same as everyone else and treated with respect by those who knew their sexual orientation.

Treatment Related to Sexual Orientation

2. Fifty-six percent of the gay and lesbian respondents experienced or observed a negative comment or action toward gay men or lesbians:

[2] *Blacks* refers to African Americans and others of African descent regardless of national origin.

a. **Where the contact with the court was one in which sexual orientation became an issue; or**
b. **With the offending conduct coming most frequently from a lawyer or court employee.**

3. **One out of every five court employee respondents heard derogatory terms, ridicule, snickering, or jokes about gay men or lesbians in open court, with the comments being made most frequently by judges, lawyers, or court employees.**

4. **Lawyers and judges more frequently make the limited number of positive comments or take positive actions toward gay and lesbian court users. Court employees are least likely to make any positive comments.**

5. **Forty-eight percent of court employees who observed negative actions or heard negative comments in open court took no action in response.**

6. **Court employees who took no action in response to negative comments or actions directed at lesbians or gay men in court did so, among other reasons, because:**
   a. **They did not believe the incident was serious enough to intervene;**
   b. **They believed nothing constructive would come from intervening;**
   c. **They feared some form of retaliation; or**
   d. **They feared that they would be thought to be a lesbian or a gay man.**

7. **Of the court employees who intervened upon observing negative actions or hearing negative comments directed at lesbians or gay men in open court, 40 percent reported that the negative comments stopped or decreased in frequency, and 38 percent reported that their intervention had no effect on reducing or stopping the negative comments.**

Disclosure of Sexual Orientation/Responding to Requests for Personal Information

8. **Fifty-six percent of gay and lesbian court users in a contact in which sexual orientation became an issue did not want to state their sexual orientation, and 38 percent felt threatened in the courtroom setting because of their sexual orientation.**

9. **Twenty-nine percent of gay men and lesbians in a contact in which sexual orientation became an issue believed that someone else stated their sexual orientation without their approval, and 25 percent felt forced to state their sexual orientation against their will.**

10. **During their most recent contact with the California courts, 44 percent of gay men and lesbians participated either as a juror or in jury voir dire. When asked to disclose personal information in that context, 48 percent were asked if they were married, and most responded incompletely to that question. Overall, 26 percent of all lesbian and gay court users were asked if they were married.**

Perceptions

11. Fifty percent of lesbian and gay court users believed that the courts are not providing fair and unbiased treatment for lesbians or gay men.

12. Sixteen percent of lesbian and gay court users believed that the courts have been unsuccessful on *all* of the following measures:

- **a. Being available to resolve disputes involving lesbians or gay men;**
- **b. Being open or accessible to lesbians or gay men; and**
- **c. Providing fair and unbiased treatment of lesbians or gay men.**

13. In evaluating the success of the courts in providing access and being available to resolve disputes involving lesbians and gay men, lesbian and gay court employees rated the courts significantly lower than did heterosexual court employees.

14. In a contact with the court in which sexual orientation became an issue, lesbians and gay men had significantly more negative perceptions of fairness in the California courts.

15. When the court contact focused on issues relating to sexual orientation, 26 percent of lesbian and gay court users believed they were not treated the same as everyone else, 30 percent believed they were not treated with respect by those who knew their sexual orientation, and 39 percent believed that their sexual orientation was used to devalue their credibility.

16. In their most recent contact with the California courts, 22 percent of lesbian and gay court users felt threatened in that setting because of their sexual orientation, whether or not sexual orientation became an issue in that contact. However, in another contact when sexual orientation *did* become an issue, 38 percent of lesbian and gay court users felt threatened in the court setting because of their sexual orientation.

17. Lesbian and gay court users believed that their sexual orientation was raised as an issue almost as often when it did not pertain to the case as when it did pertain to the proceedings or to their reason for using the courts.

THE COURT AS A WORKPLACE

Court Employees' Experiences

18. Lesbian and gay employees were at least four times more likely to experience negative actions or comments based on sexual orientation than were heterosexual employees.

19. Forty-two percent of the court employees who experienced a negative incident at work based on their sexual orientation took no action in response.

20. Of those employees who did take some action in response to an incident at work based on their sexual orientation, 49 percent reported that their intervention or action had no effect.

21. One in five lesbian and gay court employees reported experiencing discrimination (as opposed to only negative comments or actions) at their workplace based on their sexual orientation. Two percent of the heterosexual court employees reported being discriminated against based on sexual orientation.

22. Sixty-five percent of the court employees who experienced discrimination based on sexual orientation took some action, of which 56 percent reported that nothing resulted from that action.

23. Of those court employees who reported experiencing discrimination based on sexual orientation but took no action, 46 percent did not take any action because they thought nothing constructive would come of doing so, and 23 percent feared negative consequences.

Court Employees' Intervention

24. Sixty-five percent of court employees who observed a negative action or heard a negative comment outside the courtroom took no action.

25. Court employees who observed a negative action or heard a negative comment outside the courtroom and did not intervene did not do so for the following reasons:

- **a. Sixty-two percent did not feel the incident was serious enough to intervene;**
- **b. Twenty-three percent believed nothing constructive would happen;**
- **c. Eight percent feared some form of retaliation;**
- **d. Fifteen percent never thought of intervening; and**
- **e. Two percent feared they would be thought to be lesbian or gay.**

26. Of those employees who did intervene upon observing negative actions or comments toward lesbians or gay men outside the courtroom, 54 percent reported that the negative actions or comments stopped or decreased in frequency.

Court Employees' Observations/Perceptions

27. Thirty-two percent of court employees heard ridicule, snickering, or jokes about lesbians and gay men in settings other than open court; 28 percent reported hearing negative comments; and 21 percent heard derogatory terms about gay men or lesbians.

28. Ninety-four percent of court employees stated that they believe that the personnel policies of their workplace are fair to lesbians and gay men, and 88 percent believe that lesbians and gay men are treated the same as other employees.

29. **Court employees reported the following perceptions as a gay man or lesbian in the workplace:**
    a. **Twenty-nine percent believe that being open about being a gay man or a lesbian is unsafe;**
    b. **Fifty-eight percent believe it is better if gay men and lesbians are not open about their sexual orientation; and**
    c. **Forty percent acknowledge that jokes or comments are made about lesbians and gay men behind their backs.**

30. **Lesbian and gay court employees believed the courts are less fair to all court users than did heterosexual court employees.**

31. **Heterosexual court employees rated the courts significantly higher in evaluating the success of the courts in providing access, being available to resolve disputes, and providing fair and unbiased treatment of all categories of sexual orientation than did lesbian and gay court employees.**

HIGHLIGHTS OF THE RECOMMENDATIONS

Based on these findings, the Access and Fairness Advisory Committee made recommendations in the following categories: education and training; attitudes, treatment, and users' experiences with the courts; recognizing sexual orientation diversity within the courts; the courts as a workplace; specific access issues, including jury service and specific subject-matter assignments; outreach; and future research. The highlights of the recommendations are summarized here.

TO THE JUDICIAL COUNCIL

1. *Education and Training*: The advisory committee recommends that the Judicial Council widely disseminate this report to the judiciary, court employees, and the public.

2. The advisory committee further recommends that the Judicial Council approve the following statements of policy:

    a. *Education and Training*: All courts should affirm the need for all courts to ensure fairness and access to lesbians and gay men, pursuant but not limited to the requirements of the Standards of Judicial Administration, sections 1 and 1.5, and the Code of Judicial Ethics, canons 2 and 3.

    b. *The Courts as a Workplace*: The Judicial Council endorses the development and implementation of local court personnel policies and practices to eliminate sexual orientation discrimination and bias in the court as a workplace, including effective intervention in incidents of sexual orientation discrimination or bias and the prevention of retaliation against any individual reporting such incidents.

c. *Outreach*: The Judicial Council encourages the local courts to include sexual orientation in their community outreach programs.

REFERRALS TO THE CENTER FOR JUDICIAL EDUCATION AND RESEARCH (CJER)

1. *Education and Training*: The advisory committee recommends that the CJER's fairness education programs encourage judges, including but not limited to those judges with criminal, family, juvenile, and probate assignments, to be sensitive to and aware of sexual orientation diversity issues, which particularly affect these areas.

2. *Education and Training*: The advisory committee recommends that the CJER and the Judicial Administration Institute of California (JAIC) incorporate the findings and recommendations of this report into their educational programs for bench officers and court staff.

3. *The Courts as a Workplace*: The advisory committee recommends that the JAIC and CJER, in association with the Access and Fairness Advisory Committee, develop a training and education program for court staff that would be delivered, on a statewide or regional basis, within six months of permanent employment status to new employees. Current employees would receive instruction through continuing education programs.

TO BE INCORPORATED INTO THE ADVISORY COMMITTEE WORK PLANS

The advisory committee recommends that the following recommendations be incorporated into the work plans of the advisory committee and its subcommittees:

1. *Attitudes, Treatment, and Users' Experiences with the Courts*: The advisory committee will develop means to assist courts in implementing the Standards of Judicial Administration, sections 1 and 1.5, and the Code of Judicial Ethics, canons 2 and 3, and review and revise, as appropriate, any procedures or forms to include sexual orientation issues.

2. *Recognizing Sexual Orientation Diversity Within the Courts*: The advisory committee and State Bar staff will work collaboratively with local bar associations and community groups to develop workshops on judicial selection and the election process that encourage diversity, including sexual orientation diversity, in the appointment and election of judges.

3. *Future Research*: The advisory committee will undertake a comprehensive review of the court process to quantify the extent to which lesbians and gay men face barriers to participation in the legal system. The review should track all recommendations made by this committee and identify any new issues that have arisen in the interim.

INTRODUCTION

The Access and Fairness Advisory Committee of the Judicial Council is pleased to present this report on sexual orientation fairness in the California courts. This report appears to be the first of its kind in the nation. No other court or entity in the country has undertaken such an extensive review of the issue of sexual orientation fairness in a state court system. This report represents the cumulative effort of many individuals and groups over a several year period under the direction of the Sexual Orientation Fairness Subcommittee of the Access and Fairness Advisory Committee of the Judicial Council.

The Sexual Orientation Fairness Subcommittee was appointed by Access and Fairness Advisory Committee chair, Judge Benjamin Aranda III (now deceased), of the Los Angeles County Municipal Court, South Bay Judicial District. Judge Donna Hitchens of the Superior Court of San Francisco County was named subcommittee chair.

As stressed by Chief Justice Ronald M. George during a 1997 speech made to Bay Area Lawyers for Individual Freedom (BALIF), "ensuring fairness and access is a continuing task; thus, the work previously undertaken by specialized advisory committees and task forces was folded into the mandate of the Standing Advisory Committee on Access and Fairness."

The subcommittee's mandate is to examine issues of bias as they relate to sexual orientation and make a written report, including recommendations, to the Judicial Council. To begin its inquiry, the subcommittee conducted five focus group meetings: in San Jose, San Francisco, San Diego, Sacramento, and Los Angeles. These focus groups were composed of attorneys, who were asked to identify barriers, if any, facing gay and lesbian legal professionals and their gay and lesbian clients.

Using information obtained from the focus groups, the subcommittee, with the assistance of survey and research consultants Drs. Dominic J. Brewer and Maryann Jacobi Gray, developed two ground-breaking surveys: one for gay men and lesbian court users and the other for court employees, heterosexual, gay, and lesbian. These surveys focused on the actual experiences of court users and employees as well as the perceptions of court users and employees to determine to what extent, if any, sexual orientation bias exists in the courts.

Identifying gay and lesbian users of the court to survey was a difficult and challenging task that required the assistance of various national and local lesbian and gay advocacy and service organizations. Through the use of these organizations' mailing lists, the subcommittee circulated a flier asking individuals to identify whether they had used the California courts in the past 10 years, and if so, whether they were willing to participate in the survey. As a result of these fliers, questionnaires were sent to 2,100 court users, and 58 percent completed the survey, for a total response of 1,225 court users.

The court employee survey was designed for and sent to employees of the California court system, *regardless of sexual orientation*. Among those included were court clerks, court

reporters, administrators, and attorneys. The survey was distributed to approximately 5,500 employees, of whom 1,525 responded.

The subcommittee analyzed the data from both surveys, with the assistance of the consultants, to ensure statistical accuracy. The extensive data collected is compiled in the consultants' report, attached as an appendix to this report. The subcommittee findings from the survey data highlight actual experiences as well as perceptions of sexual orientation bias in the courts. Some findings show that courts generally treat gay and lesbian court users the same as any other court user. Other findings demonstrate that, in particular situations and under certain circumstances, sexual orientation bias exists.

The subcommittee also included an analysis of the findings to provide valuable and necessary context. Interpreting survey results that address experiences related to sexual orientation is difficult. Lesbians and gay men as a group are less visible than other minority groups, such as Blacks, Hispanics, and Asians, and women. Unless gay men and lesbians choose to make their sexual orientation known, or unless someone else discloses their sexual orientation during the course of a court proceeding, any bias or prejudice held by court participants is difficult to attribute to sexual orientation. The vast majority of gay and lesbian court participants do not disclose their sexual orientation in their contacts with the courts, nor is a court participants' sexual orientation readily apparent. Thus, the survey results and findings must be considered in that context, as well as along with other factors that are unique to lesbians and gay men as a group. The analysis accompanying the findings attempts to provide that context and set forth these other factors that affect the interpretation of the survey results.

The overriding purpose of this report is to provide valuable information regarding the extent of any actual or perceived sexual orientation bias in the courts to the California State Judiciary at the request and direction of the former Chief Justice, the Honorable Malcolm Lucas, and current Chief Justice, the Honorable Ronald George. While there is good news in the survey results, there are areas that deserve the judiciary's attention to ensure that all court users and employees are treated fairly, respectfully, and without fear that their sexual orientation, if known, will result in biased or negative treatment in California courts.

METHODOLOGY OBJECTIVES AND HIGHLIGHTS

By the year 2020, approximately 50 million people will make California their home. This number represents an increase of 66 percent from the 1990 population recorded in the U.S. Census of that year.

Arguably the most diverse state in the nation, California's demographic profile in 2020 will include a white population of 40.5 percent (down 16.5 percent from the 1990 Census), with Hispanics comprising up to approximately 41 percent of the population, and Asian Americans, Pacific Islanders, and Native Americans constituting a total of 12 percent. The smallest minority group in number, Blacks will make up 6 percent of the population. Further, by 2020, the number of different languages and dialects spoken in this state, currently 224, will increase and create added demand for skilled court interpreters.

The multicultural society of the future will also include significant communities of gays and lesbians whose members are found in all the racial categories and many of the language groups referenced in the preceding paragraph. In a 1991 demographic survey commissioned by the California State Bar Association, approximately 4 percent of members under 40 years of age and approximately 3 percent of all bar members identified themselves as gay, lesbian, or bisexual.[3]

In 1994, two publications were released addressing biased treatment and discrimination directed at gay and lesbian attorneys by legal employers. The Bar Association of San Francisco released its *Manual of Model Policies and Programs to Achieve Equality of Opportunity in the Legal Profession*. The manual included specific recommendations to legal employers on achieving equal employment opportunity for lesbian and gay attorneys and law students.

In June 1994, the Los Angeles County Bar Association Committee on Sexual Orientation Bias released its report on sexual orientation discrimination by legal employers in Los Angeles County. The report suggests that sexual orientation bias is a widespread and often virulent problem throughout California. Among Los Angeles legal professionals surveyed, more than 50 percent believe that the work environment is less hospitable for gay and lesbian attorneys than for heterosexual attorneys. Specifically, sexual orientation discrimination is seen as negatively affecting performance evaluations, promotions, career advancement, benefits, and salary.

The backdrop for the continuing discussion of the Access and Fairness Advisory Committee's mandate to examine issues of unfair treatment or bias in the courts was the Los Angeles survey. Consequently, the advisory committee decided it would also monitor sexual orientation bias issues related to access to the judicial system and fairness in the state courts and establish new areas of inquiry, as appropriate. This decision advanced one of the most important goals of the Judicial Council, which is to ensure that all court users are treated equally and fairly regardless of race, ethnicity, culture, sexual orientation, gender, disability, age, or income.

[3] Los Angeles County Bar Association Committee on Sexual Orientation Bias, *Report on Sexual Orientation Bias,* p. 1 (June 1994).

The Sexual Orientation Fairness Subcommittee set, as one of its first priorities, the goal of determining to what extent, if any, sexual orientation bias, either actual or perceived, exists in the courts. To accomplish that objective, after the focus groups had been concluded, the subcommittee retained consultants Drs. Dominic J. Brewer and Maryann Jacobi Gray to work with the subcommittee to develop instruments to survey two groups: court users and court employees.

SUMMARY OF SURVEY OBJECTIVES

Two separate survey instruments were developed and distributed: to gay and lesbian court users and to court employees, regardless of sexual orientation. Underlying the design of both instruments were the following objectives:

- Focus on the California court system;
- Obtain data from every part of the state; and
- Emphasize gay and lesbian court users' direct experiences and observations in addition to their perceptions.

Thus, the surveys emphasize what actually happened to respondents in addition to what they perceive happens to them and to others.

Respondents were allowed anonymity so they could answer freely. Anonymity was particularly important given the sensitivity of the research subject: sexual orientation bias.

COURT USER SURVEY

The court user survey was designed to determine the following about gay or lesbian users of the court: (1) whether they experienced or observed bias, discrimination, ridicule, or discomfort based on sexual orientation while using the courts; (2) whether they had positive experiences based on sexual orientation while using the courts; and (3) whether they believed they were shown the same treatment and respect in the courts as others. These respondents were asked to report on their most recent contact with California courts as well as one other significant contact since 1990 in which sexual orientation became an issue. With the assistance of various national and local lesbian and gay advocacy and service organizations, the subcommittee identified 2,100 court users. Fifty-eight percent completed the survey, for a total response of 1,225 court users.

COURT EMPLOYEE SURVEY

The court employee survey was designed for and sent to employees of the California court system, *regardless of sexual orientation*. Among those included were court clerks, reporters, administrators, and attorneys. The survey was distributed to approximately 5,500 employees, of whom 1,525 responded. Of those, 64 identified themselves as lesbian, gay male, or bisexual.

Despite the smaller sample of lesbian or gay court employee survey respondents, the responses are still statistically significant. Additionally, many of the survey questions asked for court employees' direct observations of the experiences of lesbian and gay persons in the California courts, which are questions that all court employees, regardless of their sexual orientation, were qualified to answer. The survey instrument was designed to determine the following: (1) whether employees observed negative behaviors toward gay men or lesbians in open court or other work settings; (2) whether employees experienced negative actions or heard negative comments directed toward themselves based on their actual or perceived sexual orientation; (3) whether employees experienced discrimination based on their sexual orientation; and (4) whether employees believed that gay men and lesbians are shown equal treatment and respect in the courts. The survey asked court employees to base their responses on experiences over the past year only.

Both survey questionnaires were distributed in the summer and fall of 1998.

SIGNIFICANCE OF RESPONSES RECEIVED

According to the consultants, being able to identify 2,100 gay or lesbian court users and having 1,225 respond to the survey is remarkable. Gay men and lesbians constitute a significantly large group in our society that has a "hidden identity"—that is, that an individual is gay or lesbian is not always immediately apparent by any outward, physical appearance or surname. Many gays and lesbians do not choose to publicly identify their sexual orientation.

The court employee survey itself generated a number of negative responses. These negative statements underscore some of the findings from the survey, which indicate that some court employees are unconcerned or hostile with respect to sexual orientation issues in the courts.

A sampling of the responses is as follows:

- "I have received your survey on sexual orientation and found it to be degrading and offensive. . . . I am sure the Judicial Council could find better use of the talent, time and money that is being wasted on a minority of court personnel."
- "This is the most offensive survey I have ever encountered. . . . Send it to someone who cares."
- "Some of us have *real* jobs—this is a blatant waste of taxpayer money—who cares about this crap!"
- "I decline to answer your survey as I feel it covers a matter that is not appropriate to talk about in the work place."
- "I find it incredible, and as a taxpayer, I am offended, that money is allowed to be spent on such a stupid survey. I can further assure you that, as a court clerk, I have better things to do than keep track of extraneous remarks regarding gays and lesbians."
- "I, as a heterosexual, am getting a little tired of the whole hoo-haw and feel that if any individual thinks he/she is being mistreated, he/she should bring this to the attention of the appropriate authority."

CHARACTERISTICS OF SURVEY RESPONDENTS

COURT USER RESPONDENTS

A significant majority of the respondents to the court user survey shared the following characteristics:

- Were white men (90 percent);
- Were gay (69%);
- Were living in an urban area (66%);
- Were well educated, with either an undergraduate or graduate degree (83%);
- Were affluent, with an income of at least $60,000 a year (48%);
- Were selectively "out," primarily with family and friends and at work (61%);
- Had relatively few contacts with the court, most likely two to three contacts since 1990 (70%);
- Had primary contact with the criminal or civil court (73%); and
- Most recent contact with a California court was most often as a juror (60%); and when contact with the court was one in which sexual orientation became an issue, most often that contact was as a participant, either as a litigant or attorney (32%).

Tables 1 through 3 provide a statistical profile of the court user respondents.

COURT EMPLOYEE RESPONDENTS

A significant majority of court employees who responded to the court employee survey shared the following characteristics:

- Were white heterosexual, married women (93%);
- Were earning less than $50,000 a year (66%);
- Had no college degree (66%);
- Were full-time, permanent court employees (98%);
- Had worked for the courts for 12 years, 7 in the current position;
- Were employed as court clerks, clerical staff, or mediators; and
- Had participated in court proceedings at least once a month, with almost 50 percent participating on a daily basis.

Of court employees who identified themselves as gay or lesbian:

- Over one-third were totally "out"[4] at work;
- Over one-third were selectively "out" at work; and
- Over one quarter were not "out" at work at all.

[4] See the definition of *"out"* in the "Definitions" section, p. 18.

Respondents in the court employee survey were considerably less likely to openly identify themselves as lesbian or gay at work as compared to court users, where 93 percent were totally "out" or selectively "out" in their respective workplaces (although not in the court setting).

FINDINGS[5]

PREFACE

The following are the subcommittee's interpretative findings based on the survey results and the analysis of those results, which are set forth in full in the consultant's report found at Appendix C. The subcommittee's findings draw reasonable inferences from the information set forth in the tables, comparing and contrasting the information from those tables. Accompanying each finding are references to the particular tables relied on and analysis that elucidates and provides important context for the finding. Since both the court user and court employee surveys asked about direct observations of the experiences of lesbians and gay men in the California courts, the findings from both surveys are combined and arranged by topic. These findings are not inclusive of all the reasonable inferences that may be drawn from the data but, rather, represent those findings that highlight the most significant areas of concern for the Access and Fairness Advisory Committee.

Interpreting the survey results for sexual orientation bias perceptions and actual biased conduct is difficult. Lesbians and gay men as a group are less visible than other minority groups, such as Blacks, Hispanics, and Asians, or women. For the most part, unless gays and lesbians choose to be "out," or unless they are "outed" during the course of a court proceeding, any bias or prejudice held by court participants is virtually impossible to measure. The vast majority of gay and lesbian court participants are not "out" in court proceedings. Thus, the survey results and findings must be considered with that overlaying context in mind.

That the majority of respondents hold the perception that they were treated the same as everyone else and treated with respect by those who knew their sexual orientation is a positive statement about the courts and judges. That finding, unfortunately, is not an unqualified statement of gays' and lesbians' experiences with the courts. The factor of invisibility, taken into consideration with other survey data, suggests that the experience of many gay men and lesbians in the courts is much less favorable when gays and lesbians have more contact with the courts and when sexual orientation becomes an issue in the court contact. This data is reflected in many of the findings that follow.

The invisibility of gay men and lesbians in society generally and in the court system in particular makes the finding that nearly one in four respondents believe the court system is not fair for lesbians and gay men a very serious concern. Of equal concern is the finding that lesbians and gay men, when their sexual orientation is known in a court proceeding, more frequently experience bias based on their sexual orientation.

Whether the level of bias and unfair treatment would be greater if gay men and lesbians were more visible either as court participants or court employees is a reasonable inquiry based on the results of this survey. Given the present circumstances, where gay men and lesbians hide, and often feel forced to hide, their identities, lives, and relationships, the extent of bias and unfair

[5] Beginning on p. 25, these findings are annotated with analysis and reference to the supporting survey data.

treatment of gay men and lesbians in the courts cannot be fully documented. Nonetheless, the following findings and survey results give us some important insights about their experiences with the courts.

DEFINITIONS

In these findings, certain words are used with specific meanings that may differ from their common use. To help eliminate any miscommunication, these words are defined here and are used in the report as defined. These definitions also include phrases that survey drafters used in the survey questions and thus are used in reporting the survey results and findings.

"Out" or "outed": Refers to individual gay men and lesbians whose sexual orientation is publicly known in a variety of settings: by family, at work, and/or by friends and colleagues. Normally, being "out" is a voluntary choice, but in some instances, an individual may be "outed" because someone else disclosed his or her sexual orientation.

Positive comments and actions: In those instances where respondents were asked to indicate how often "positive comments or actions" were made about sexual orientation, respondents interpreted those terms to mean comments or actions in which they were treated with respect and received equal treatment during the specific legal proceeding. Respondents did not indicate that "positive comments" were made about their individual sexual orientation, such as "oh, it's great you're a lesbian," or that they were given preferential treatment, such as "since you're gay, you can go to the front of the line." Rather, "positive comments" or "positive actions" were exemplified by the following specific responses: "When interviewing jurors, the judge asked if we were married or had a live-in partner. The atmosphere was very comfortable." "As a lesbian couple, we had a very positive experience with our second-parent adoption. The judge . . . was very warm and supportive."[6]

Another contact: The survey questionnaire invited respondents to answer a series of questions about a contact with a California court *other than* the most recent but occurring since 1990—one in which the user was involved and in which sexual orientation became an issue in some way. Thus, findings that refer to "another contact" refer to this type of court contact. Although fewer lesbian or gay court users responded to this set of questions, and thus, interpreting these results requires some caution, the responses are still statistically significant. Because the two sets of questions (the most recent contact with the California courts and another significant contact) do not provide the same type of respondent profile, differences between them should not be attributed to a change over time or any other single factor.

In-court experience: This phrase refers to experiences by respondents that occurred within the physical confines of the courtroom.

---

[6] *Sexual Orientation Fairness in the Courts, Results from Two Surveys*, January 2000, p. 19.

Out-of-court experience: This phrase refers to experiences by respondents that occurred outside the physical confines of the courtroom but within the parameters of the courthouse, such as hallways, clerks' offices, and judges' chambers.

Courts' openness and accessibility versus availability: In certain survey questions, respondents were asked to rate the courts on their openness and accessibility to lesbians and gay men as well as on the courts' availability to resolve disputes involving lesbians and gay men. The survey drafters chose "openness and accessibility" to mean formal, institutional access to the judicial process. "Availability to resolve disputes" was intended to elicit responses on the success of substantive legal doctrine or court officers to include lesbians' or gay men's issues. However, it is possible that survey respondents defined "access" and "availability" differently than the survey drafters.

A contact in which sexual orientation became an issue: This phrase refers to a court user survey respondent's other recent, significant contact with the California courts. Seventy-four percent of those contacts involved certain issues relating to sexual orientation.

Mean: In the statistical information reported in the analyses, the mean refers to the arithmetic average of a series of numbers or numerical responses. For example, the mean of the five numerical responses 1, 1, 4, 4, and 5 is 3 (1 + 1 + 4 + 4 + 5 = 15; 15/5 = 3).

USE OF THE COURTS

OVERALL PERCEPTIONS OF GAY AND LESBIAN COURT USERS

1. Most lesbian and gay court users believed they were treated the same as everyone else and treated with respect by those who knew their sexual orientation.

TREATMENT RELATED TO SEXUAL ORIENTATION

2. Fifty-six percent of the gay and lesbian respondents experienced or observed a negative comment or action toward gay men or lesbians:
   - **a. Where the contact with the court was one in which sexual orientation became an issue; or**
   - **b. With the offending conduct coming most frequently from a lawyer or court employee.**

3. One out of every five court employee respondents heard derogatory terms, ridicule, snickering, or jokes about gay men or lesbians in open court, with the comments being made most frequently by judges, lawyers, or court employees.

4. Lawyers and judges more frequently make the limited number of positive comments or take positive actions taken toward gay and lesbian court users. Court employees are least likely to make any positive comments.

5. **Forty-eight percent of court employees who observed negative actions or heard negative comments in open court took no action in response.**

6. **Court employees who took no action in response to negative comments or actions directed at lesbians or gay men in court did so, among other reasons, because:**
   a. **They did not believe the incident was serious enough to intervene;**
   b. **They believed nothing constructive would come from intervening;**
   c. **They feared some form of retaliation; or**
   d. **They feared that they would be thought to be a lesbian or a gay man.**

7. **Of the court employees who intervened upon observing negative actions or hearing negative comments directed at lesbians or gay men in open court, 40 percent reported that the negative comments stopped or decreased in frequency, and 38 percent reported that their intervention had no effect on reducing or stopping the negative comments.**

DISCLOSURE OF SEXUAL ORIENTATION/RESPONDING TO REQUESTS FOR PERSONAL INFORMATION

8. **Fifty-six percent of gay and lesbian court users in a contact in which sexual orientation became an issue did not want to state their sexual orientation, and 38 percent felt threatened because of their sexual orientation.**

9. **Twenty-nine percent of gay men and lesbians in a contact in which sexual orientation became an issue believed that someone else stated their sexual orientation without their approval, and 25 percent felt forced to state their sexual orientation against their will.**

10. **During their most recent contact with the California courts, 44 percent of gay men and lesbians participated either as a juror or in jury voir dire. When asked to disclose personal information in that context, 48 percent were asked if they were married, and most responded incompletely to that question. Overall, 26 percent of all lesbian and gay court users were asked if they were married.**

PERCEPTIONS

11. **Fifty percent of lesbian and gay court users believed that the courts are not providing fair and unbiased treatment for lesbians or gay men.**

12. **Sixteen percent of lesbian and gay court users believed the courts were unsuccessful on *all* of the following measures:**
   a. **Being available to resolve disputes involving lesbians or gay men;**
   b. **Being open or accessible to lesbians or gay men; and**
   c. **Providing fair and unbiased treatment of lesbians or gay men.**

13. **In evaluating the success of the courts in providing access and being available to resolve disputes involving lesbians and gay men, lesbian and gay court employees rated the courts significantly lower than did heterosexual court employees.**

14. **In a contact with the court in which sexual orientation became an issue, lesbians and gay men had significantly more negative perceptions of fairness in the California courts.**

15. **When the court contact focused on issues relating to sexual orientation, 26 percent of lesbian and gay court users believed they were not treated the same as everyone else, 30 percent believed they were not treated with respect by those who knew their sexual orientation, and 39 percent believed their sexual orientation was used to devalue their credibility.**

16. **In their most recent contact with the California courts, 22 percent of lesbian and gay court users felt threatened in that setting because of their sexual orientation, whether or not sexual orientation became an issue in that contact. However, in another contact when sexual orientation *did* become an issue or when they were more active participants, 38 percent of lesbian and gay court users felt threatened in the court setting because of their sexual orientation.**

17. **Lesbian and gay court users believed that their sexual orientation was raised as an issue almost as often when it did not pertain to the case as when it did pertain to the proceedings or to their reason for using the courts.**

THE COURT AS A WORKPLACE

COURT EMPLOYEES' EXPERIENCES

18. **Lesbian and gay employees were at least four times more likely to experience negative actions or comments based on sexual orientation than were heterosexual employees.**

19. **Forty-two percent of the court employees who experienced a negative incident at work based on their sexual orientation took no action in response.**

20. **Of those employees who did take some action in response to an incident at work based on their sexual orientation, 49 percent reported that their intervention or action had no effect.**

21. **One in five lesbian and gay court employees reported experiencing discrimination (as opposed to only negative comments or actions) at their workplace based on their sexual orientation. Two percent of the heterosexual court employees reported being discriminated against based on sexual orientation.**

22. Sixty-five percent of the court employees who experienced discrimination based on sexual orientation took some action, of which 56 percent reported that nothing resulted from that action.

23. Of those court employees who reported experiencing discrimination based on sexual orientation but took no action, 46 percent did not take any action because they thought nothing constructive would come of doing so, and 23 percent feared negative consequences.

COURT EMPLOYEES' INTERVENTION

24. Sixty-five percent of court employees who observed a negative action or heard a negative comment outside the courtroom took no action.

25. Court employees who observed a negative action or heard a negative comment outside the courtroom and did not intervene did not do so for the following reasons:

- **a. Sixty-two percent did not feel the incident was serious enough to intervene;**
- **b. Twenty-three percent believed nothing constructive would happen;**
- **c. Eight percent feared some form of retaliation;**
- **d. Fifteen percent never thought of intervening; and**
- **e. Two percent feared they would be thought to be lesbian or gay.**

26. Of those employees who did intervene upon observing negative actions or comments toward lesbians or gay men outside the courtroom, 54 percent reported that the negative actions or comments stopped or decreased in frequency.

COURT EMPLOYEES' OBSERVATIONS/PERCEPTIONS

27. Thirty-two percent of court employees heard ridicule, snickering, or jokes about lesbians and gay men in settings other than open court; 28 percent reported hearing negative comments; and 21 percent heard derogatory terms about gay men or lesbians.

28. Ninety-four percent of court employees stated that they believe that the personnel policies of their workplace are fair to lesbians and gay men, and 88 percent believe that lesbians and gay men are treated the same as other employees.

29. Court employees reported the following perceptions about being a gay man or lesbian in the workplace:

- **a. Twenty-nine percent believe that being open about being a gay man or a lesbian is unsafe;**
- **b. Fifty-eight percent believe it is better if gay men and lesbians are not open about their sexual orientation; and**
- **c. Forty percent acknowledge that jokes or comments are made about lesbians and gay men behind their backs.**

30. Lesbian and gay court employees believed the courts are less fair to all court users than did heterosexual court employees.

31. Heterosexual court employees rated the courts significantly higher in evaluating the success of the courts in providing access, being available to resolve disputes, and providing fair and unbiased treatment of all categories of sexual orientation than did lesbian and gay court employees.

ANNOTATED FINDINGS

USE OF THE COURTS

OVERALL PERCEPTIONS OF GAY AND LESBIAN COURT USERS

1. Most lesbian and gay court users believed they were treated the same as everyone else and treated with respect by those who knew their sexual orientation.

Analysis of 1:

In their most recent contact, 89.2 percent of lesbian and gay survey respondents agreed somewhat or very strongly with the statement, "As far as I could tell, I was treated the same as everyone else," and 80.4 percent of respondents agreed somewhat or very strongly with the statement, "I was treated with respect by those who knew my sexual orientation." In another recent significant contact with the courts, 74.5 percent of the same pool of respondents agreed somewhat or very strongly with the statement, "As far as I could tell, I was treated the same as everyone else," and 70.4 percent of respondents agreed somewhat or very strongly with the statement, "I was treated with respect by those who knew my sexual orientation." (See Tables 10, 18.)

Despite this generally positive finding, several patterns emerged from the data that demonstrate that large numbers of lesbian and gay court users in a variety of contexts had much less favorable experiences and perceptions of fairness in the California courts.

TREATMENT RELATED TO SEXUAL ORIENTATION

2. Fifty-six percent of the gay and lesbian respondents experienced or observed a negative comment or action toward gay men or lesbians:
   - **a. Where the contact with the court was one in which sexual orientation became an issue; or**
   - **b. With the offending conduct coming most frequently from a lawyer or court employee.**

3. One out of every five court employee respondents heard derogatory terms, ridicule, snickering, or jokes about gay men or lesbians in open court, with the comments being made most frequently by judges, lawyers, or court employees.

Analysis of 2–3:

Overall, 56 percent of gay and lesbian court users in a contact in which sexual orientation became an issue reported observing or experiencing a range of negative experiences directed toward themselves or other gay men and lesbians. Specifically, 36 percent heard negative comments about someone else; 29 percent heard negative remarks arising from a case; 23

percent heard negative comments about themselves; 26 percent experienced or heard ridicule, snickering, or jokes about lesbians and/or gay men; and 25 percent heard other negative remarks. Court employee survey responses support and corroborate the court users' experiences, particularly in the category of ridicule, snickering, or jokes.

In their most recent contact, 18 percent experienced or witnessed a negative incident toward lesbians or gay men. These negative courtroom experiences and observations are significantly more common than the negative experiences or observations made by gay and lesbian court users outside the courtroom. For example, only 15.7 percent of gay and lesbian court users observed or experienced ridicule, snickering, or jokes about lesbians and/or gay men in court, whereas 8.4 percent had those experiences out of court; 10.8 percent heard negative comments about someone else in court, and 4.5 percent heard negative comments out of court; 10 percent had negative actions taken against them in court, and 2.7 percent had negative actions taken against them out of court. Court employees, however, observed a larger number of negative comments or actions against lesbians or gay men while outside the courtroom. One-third of court employees observed these negative comments or actions in that setting. (See Tables 16, 29, 34; cf. Tables 7, 8.)

The negative experiences and comments reported occurred most frequently in court and were directed toward a participant, juror, witness, or party. Attorneys and court employees are most often the offending parties, not judges. Even if a judge is not personally behaving negatively toward lesbian or gay court users, the judge may need to address the behaviors and comments of others within his or her courtroom or courthouse. One respondent noted, "I was a jury prospect but it was evident that the defense lawyer didn't want gays on the jury. One of his questions to me during selection was Mr. X, would you say you have more straight friends or gay friends? I was discharged."

As noted by both court users and court employees, the negative comments or actions toward gay men and lesbians often included ridicule, snickering, or jokes about them or use of derogatory terms or comments about lesbians or gay men. These experiences are particularly significant when considered with finding 8, which shows that 56 percent of gay and lesbian court users did not want to state their sexual orientation, and 39 percent felt threatened because of their sexual orientation. One may more easily understand their fear and perception of threat based on their sexual orientation in light of findings 2 and 3, which show that over one-half of the court users and one in five court employees heard or experienced some kind of negative comment or action based on sexual orientation.

4. Lawyers and judges more frequently make the limited number of positive comments or take positive actions toward gay and lesbian court users. Court employees are least likely to make any positive comments.

Analysis of 4:

In their other contact with a California court, fewer than 15 percent of gay and lesbian court users heard or observed positive comments or actions. That percentage dropped to under 3 percent in their most recent contact. Although the occurrences of positive comments or actions

were relatively few in all court contacts by gay men and lesbians, most frequently, lawyers made those positive comments and took these actions, followed by judges. Court employees made positive comments and took positive actions less frequently. (See Tables 9, 17.)

In their most recent contact with the California courts, negative comments outweighed positive experiences by almost three to one. In their other contact, lesbian and gay court users reported over twice as many negative experiences and positive ones (56 percent to 26 percent). Thus, even though gay and lesbian court users heard positive comments, the negative comments and actions likely overshadowed the positive. The frequency of negative comments and actions may provide a basis for gay and lesbian court users to perceive bias when participating in court proceedings. (See findings 11–18 *infra*, on perceptions.) In reporting the data on positive comments, the committee does not suggest that judges are or should be engaged in favoritism toward gay or lesbian court users. Indeed, the open-ended survey responses show that positive comments or actions tended to be those in which gay and lesbian court users were treated with equal respect and fairness. Positive actions or comments included situations where the judge may have expressed support during a second-parent adoption or, in another instance, a survey respondent noted that "[t]he judge and lawyer made a point of notifying my ex that sexual orientation is not an issue in family law."

5. Forty-eight percent of court employees who observed negative actions or heard negative comments in open court took no action in response.

6. Court employees who took no action in response to negative comments or actions directed at lesbians or gay men in court did so, among other reasons, because:
   a. They did not believe the incident was serious enough to intervene;
   b. They believed nothing constructive would come from intervening;
   c. They feared some form of retaliation; or
   d. They feared that they would be thought to be a lesbian or a gay man.

Analysis of 5–6:

Of the court employees who reported observing a negative action or comment in open court, 48 percent took no action, compared with 12 percent who confronted the person who made the comment, 9 percent who discussed the incident with a colleague or co-worker, and 6 percent who took some other action. Over 55 percent of court employees who observed a negative comment or action in open court did not feel the incident was serious enough to intervene; 24.6 percent believed nothing constructive would come of intervening. Seventeen percent failed to take action because they feared some form of retaliation such as being branded a troublemaker or reducing their chances for promotion. A smaller percentage, 16.2 percent, never thought of intervening. Three percent did not take action because they feared other people would believe they were a lesbian or a gay man. (See Tables 31, 33, 36, 38.)

The survey data in isolation makes it difficult to assess objectively why a significant majority of court employees faced with these situations did not believe the incidents serious enough to warrant intervention. However, some of the open-ended comments from the surveys are instructive: "I agreed with the jokes or comments." "The negative comments were completely

valid." "I didn't care." "The jokes didn't bother me." (See *Sexual Orientation Fairness in California Courts, Results from Two Surveys, January 2000*, p. 51.) "In the Central Valley, it's almost understood you are an open target for this type of treatment." These responses indicate that at least some court employees shared the negative opinions of lesbians or gay men. Consequently, they felt no obligation to report the incidents or considered them insignificant. That inference is further reinforced by the finding that many of the court employees stated that it did not even occur to them to report such conduct. Still other court employees may have believed the incidents were wrong, but feared some form of retaliation or believed they would be labeled a lesbian or a gay man. These responses lend additional support to the perception that the California courts do not always treat lesbians and gay men fairly.

7. Of the court employees who intervened upon observing negative actions or hearing negative comments directed at lesbians or gay men in open court, 40 percent reported that the negative comments stopped or decreased in frequency, and 38 percent reported that their intervention had no effect on reducing or stopping the negative comments.

Analysis of 7:

Only 28.8 percent of court employees took some action upon observing negative actions or comments toward lesbians or gay men in open court in the past year, compared with 48.3 percent who took no action at all. (See finding 6.) The actions taken included confronting the perpetrator (12 percent), discussing the incident with a colleague or co-worker (8.8 percent), talking with someone else (1.7 percent), reporting the incident to a superior (1.4 percent), consulting a legal or employment advisor (0.3 percent), or taking some other action (4.4 percent). Only 6.9 percent reported that the person making the negative comment was reprimanded. (See Table 32.)

The intervention was as often ineffective as it was effective. That may be because, of those who observed a negative action or comment, only 1 percent reported the incident to a superior. A possible explanation for this may be that the offending party was a lawyer, and court employees may perceive that their superior does not have the authority to address and rectify the conduct. Most employees chose to discuss the incident with a co-worker, where the possibility of corrective action would be quite low. Thus, in the vast majority of cases, the employee intervention did not remedy the situation.

DISCLOSURE OF SEXUAL ORIENTATION/RESPONDING TO REQUESTS FOR PERSONAL INFORMATION

8. Fifty-six percent of gay and lesbian court users in a contact in which sexual orientation became an issue did not want to state their sexual orientation, and 38 percent felt threatened in that setting because of their sexual orientation.

9. Twenty-nine percent of gay men and lesbians in a contact in which sexual orientation became an issue believed that someone else stated their sexual orientation without

their approval, and 25 percent felt forced to state their sexual orientation against their will.

Analysis of 8–9:

Although 60 percent of gay and lesbian court users felt comfortable stating their sexual orientation, almost as many did not want to state their sexual orientation during their contacts with the California courts. A significant minority (38 percent) felt threatened in the courtroom setting because they were gay men or lesbians. Over one in four gay or lesbian court participants' sexual orientation became known without their knowledge or against their will. (See Table 18.)

Initially, this data appears inconsistent. These responses, however, do not provide the underlying context of why lesbian or gay court users may not have wanted to state their sexual orientation or may have felt threatened, despite the finding that 60 percent said they felt comfortable stating their sexual orientation. There are many reasons why lesbians or gay men may not want to disclose their sexual orientation. Some of those reasons may stem from their personal experiences both inside and outside the courtroom, perceptions by others about the treatment of gay men and lesbians in the courtroom, their own overall comfort level with having their sexual orientation known in any context, or the way society in general perceives and treats gay men and lesbians.

However, other survey data may provide some insight into the degree of reluctance by lesbian and gay court users to disclose their sexual orientation in the courtroom setting. Finding 2 notes that 56 percent of gay and lesbian court users experienced or observed negative comments or actions based on their sexual orientation. Additionally, findings 15–17 set forth lesbian and gay court users' perceptions of unfairness and of feeling threatened in certain court settings based on their sexual orientation. This data also demonstrates a correlation between increased visibility of sexual orientation as lesbians or gay men and increased perceptions of unfair treatment and lack of respect in the courts.

Finally, as finding 18 states, lesbian and gay court users believed that sexual orientation was raised as an issue in a court proceeding when it was not relevant almost as often as when it was relevant. One might speculate that sometimes sexual orientation is being used as a litigation strategy by lawyers, and that judges should be ready to appropriately address this issue in the courtroom. An open response from one respondent provides some support for this speculation: "[A lawyer] questioned potential jurors about whether they would accept unbiased testimony from gay witnesses. The manner of question implied gays were unreliable witnesses, thus placing a bias in the minds of potential jurors." Given the data underlying these findings, it is more understandable that even otherwise openly gay or lesbian court users might have some reluctance at disclosing their sexual orientation in the California courts.

10. During their most recent contact with the California courts, 44 percent of gay men and lesbians participated either as a juror or in jury voir dire. When asked to disclose personal information, 26 percent were asked if they were married, and most

responded incompletely to that question. Overall, 26 percent of all lesbian and gay court users were asked if they were married.

Analysis of 10:

In their most recent contact with the California courts, 26.1 percent of lesbian and gay court users were asked if they were married; 6.8 percent were asked if they had a domestic partner. Forty-six percent of gay men and lesbians participated either as a juror or in jury voir dire; 48.3 percent of those respondents were asked if they were married. (See Tables 5, 6.)

The question of marital status reinforces an assumption that individuals are either "married" in the traditional heterosexual sense or "single." Thus, anyone whose life cannot be described by those categories feels invisible, and the question may, unintentionally or intentionally, create the perception of bias. The question of marital status, unless it is a relevant issue in a case, may undermine the credibility of the judicial process in several ways. First, it deprives the court and/or the lawyers of valuable information about relationships that may be needed or could be used to ensure a fair jury selection or court process. Second, it places gay or lesbian jurors or witnesses in an untenable situation of either disclosing their sexual orientation or answering the question narrowly and specifically in the terms asked, leaving them denying or being incomplete about the reality of their lives. Third, it may create a perception among gay and lesbian court users that their subsequent treatment in the court process may not be fully informed or fair. As one respondent to the survey noted: "All prospective jurors were asked about marital status. I have been in a monogamous relationship 33 years and consider myself married. It would have been wrong to deny my relationship but it would have been legal to do so."

PERCEPTIONS

11. Fifty percent of lesbian and gay court users believed that the courts are not providing fair and unbiased treatment for lesbians or gay men.

12. Sixteen percent of lesbian and gay court users believed the courts were unsuccessful on *all* of the following measures:
- **a. Being available to resolve disputes involving lesbians or gay men;**
- **b. Being open or accessible to lesbians or gay men; and**
- **c. Providing fair and unbiased treatment of lesbians or gay men.**

Analysis of 11–12:

In all their contacts with the California courts, 50.2 percent of lesbian and gay survey respondents rated the courts as somewhat or very unsuccessful in providing fair and unbiased treatment for lesbians and gay men. Similarly, on a 1-to-10 scale, with 10 being highest, they gave the courts a mean rating of 5.23 for fairness to lesbians and gay men, and 6.50 for fairness to people in general. (Higher scores indicate a higher level of fairness.) (See Table 20.)

In all their contacts with the California courts, 28.9 percent of lesbian and gay court users rated the courts as somewhat or very unsuccessful in providing access for lesbians and gay men; 71.9

percent rated the courts as somewhat or very successful. In those same contacts with the California courts, 44.9 percent of respondents rated the courts as somewhat or very unsuccessful in being available to resolve disputes involving lesbians and gay men; 55.1 percent rated the courts as somewhat or very successful.[7] Sixteen percent of lesbian and gay court users believed the courts were neither somewhat nor very successful on *any* of the three dimensions (fair treatment, access, and availability). (See Table 21.)

These findings are not inconsistent with finding 1, which shows that lesbian and gay court users generally perceived the courts as treating them the same as everyone else. Any apparent inconsistency in the survey data may be resolved when one examines the quality and duration of the individual's court contact. The data reflects a correlation between sexual orientation visibility and negative perceptions of the California courts by lesbians, gay men, and bisexuals. This correlation also appears to be a function of the duration of the contact. Consequently, individuals who merely have casual contacts with the courts, for example, paying a traffic ticket or being called for a venire panel, may understandably have more favorable impressions than those with more extended contacts or personal involvement. Findings 15–18 give specific illustrations of this correlation from the survey.

13. In evaluating the success of the courts in providing access and being available to resolve disputes involving lesbians and gay men, lesbian and gay court employees rated the courts significantly lower than did heterosexual court employees.

Analysis of 13:

Court users and court employees were asked the same questions on fair treatment, access, and availability. On a four-point scale, with the higher scores indicating a higher degree of fairness, heterosexual employees and lesbian and gay court employees show different attitudes about the courts' success in providing access and fairness. With respect to the courts' success in providing access for lesbians and gay men, heterosexual employees gave the court a mean score of 3.33, while lesbian and gay court employees gave the court a score of 2.83. Regarding the courts' availability to resolve disputes involving gay men and lesbians, heterosexual employees gave the courts a mean score of 3.19, compared to lesbian and gay employees' score of 2.54. (See Table 52.)

When asked about the success of the courts in providing fair treatment of lesbians and gay men, all court employees (heterosexuals, lesbians, and gay men) gave higher ratings than did lesbian and gay court users (employees rated the courts 3.29 compared to users' rating of 2.42 on a four-point scale, with higher scores indicating a higher degree of fairness). On the questions regarding access and availability to resolve disputes, the lesbian and gay court users and court employees ranked the courts as less successful than did the heterosexual court employees. (With respect to the courts' success in providing access for lesbians and gay men, lesbian and gay users gave the courts a mean rating of 2.79, lesbian and gay employees gave the courts a mean rating of 2.83, and heterosexual employees gave the courts a mean rating of 3.33. Regarding the courts' availability to resolve disputes involving gay men and lesbians, lesbian and gay users

[7] For the distinction between the California courts' openness and accessibility to lesbians and gay men and the courts' availability to resolve disputes, see the "Definitions" section, p. 18, supra.

gave the courts a mean rating of 2.50, lesbian and gay employees gave the courts a mean rating of 2.54, and heterosexual employees gave the courts a mean rating of 3.19.) (See Tables 21 and 52.)

14. In a contact with the court in which sexual orientation became an issue, lesbians and gay men had significantly more negative perceptions of fairness in the California courts.

15. When the court contact focused on issues relevant to sexual orientation, 26 percent of lesbian and gay court users believed they were not treated the same as everyone else, 30 percent believed they were not treated with respect by those who knew their sexual orientation, and 39 percent believed their sexual orientation was used to devalue their credibility.

Analysis of 14–15:

Finding 14 compares lesbian and gay court user survey respondents' most recent contact with the California courts, which tended to be through jury service (60 percent), with another recent, significant contact. In the latter setting, 74.3 percent of those contacts involved certain issues relating to sexual orientation.

In the other recent, significant contact, which tended to focus on sexual orientation issues, 25.5 percent of lesbian and gay court users believed that they were treated differently from everyone else as far as they could tell, whereas 10.8 percent of them believed they were treated differently in their most recent contact.

Similarly, in the other recent, significant contact, which tended to focus on sexual orientation issues, 29.6 percent of lesbian and gay court users felt they were not treated with respect by those who knew their sexual orientation; however, in their primarily jury service contact, 19.6 percent of respondents felt that they were treated disrespectfully by those who knew their sexual orientation.

Finally, in the other recent, significant contact, which tended to focus on sexual orientation issues, 39 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, "My sexual orientation was used to devalue my credibility." In contrast, 13.6 percent of them agreed somewhat or very strongly with the statement, "My sexual orientation was used to devalue my credibility" in their most recent contact. (See Tables 14, 10, and 18, 11, and 19.)

Findings 14 and 15 look at lesbian and gay court users in a proceeding that was heavily focused on certain issues relating to sexual orientation. Running throughout the findings is the correlation between sexual orientation visibility and increased negative perceptions of the California courts. Lesbian and gay court users had more negative perceptions when sexual orientation became an issue in the court contact. Some examples from the survey responses illustrate this connection: "Defendant's lawyer . . . used my relationship and my partner as object of focus to denigrate my loss and income claim and create smoke and mirrors. That would not have been used in non-gay situation." "One defendant was a gay man suing an ex-lover—snickers and comments from jury members."

Moreover, in those situations, lesbian and gay court users believed more often that sexual orientation was used to devalue their credibility, and that they were treated differently and disrespectfully. "A jury member suggested that witness was gay and therefore his testimony could not be trusted." (See *Sexual Orientation Fairness in California Courts, Results from Two Surveys, January 2000*, p. 19.) Another respondent stated, "I was discredited as a witness because they said I was probably 'out at a club or something' before I witnessed the accident."

Similarly, court user survey respondents' other recent significant contact with the California courts tended to be when they were a party, witness, or lawyer in the proceedings (55.1 percent, versus jury service during that contact, 22.2 percent), as compared to their most recent contact, which tended to be through jury service (60 percent). One might speculate that when more lesbian and gay court users played an active role in court, as a witness, party, or attorney, they also had more negative feelings. One possible explanation is that their extended contact and more active role may permit others to learn their sexual orientation. Thus, their added visibility as lesbians or gay men may increase the chances of negative experiences and perceptions. (See Tables 5 and 13, 10 and 18, 11 and 19.)

16. In their most recent contact with the California courts, 22 percent of lesbian and gay court users felt threatened in that setting because of their sexual orientation, whether or not sexual orientation became an issue in that contact. However, in another contact when sexual orientation *did* become an issue or when they were more active participants, 38 percent of lesbian and gay court users felt threatened in the court setting because of their sexual orientation.

Analysis of 16:

In their most recent contact with the California courts, 21.5 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, "I felt threatened because of my sexual orientation." (See Table 10.)

In contrast, when sexual orientation became an issue in the court contact, 37.7 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, "I felt threatened because of my sexual orientation." (See Table 18.)

Taken together, this survey data may demonstrate that increased visibility of sexual orientation as an issue in the court proceeding corresponds to an increased perception of threat.

Because the most recent court contact tended to be one in which sexual orientation was not pertinent to the contact (at least 81.4 percent of those court contacts did not involve sexual orientation issues), that response may be used as a relatively neutral baseline for a comparison with the other significant court contact. The majority of respondents' most recent contact concerned jury service in some manner (60 percent), rather than participation as a party, witness, or lawyer in the proceedings (44.2 percent). Despite the relative neutrality of that court experience, over one-fifth of all respondents (21.5 percent) still felt threatened because of their sexual orientation. However, the number of lesbian or gay respondents who felt threatened because of their sexual orientation nearly doubled (37.7 percent) once sexual orientation became

more significant or they more actively participated in the court contact. Examples of perceptions of threats from the surveys include the following: "I felt intimidated—didn't want them [two clerks and a police officer observed by respondent while in line] to talk about me the way they were talking about other gays—kept my mouth shut." "Death threats and name calling. Not of me but of the lesbians directly involved in the case."

17. Lesbian and gay court users believed that their sexual orientation was raised as an issue almost as often when it did not pertain to the proceedings as when it pertained to their case or to their reason for using the courts.

Analysis of 17:

Finding 17 looks at lesbian and gay court users in both their most recent contact and another recent, significant contact with the California courts. Both questions asked respondents about the connection between their sexual orientation and the court proceedings.

In their most recent contact, 15.3 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, "My sexual orientation was pertinent to the court proceedings," and 11.2 percent of those same respondents agreed somewhat or very strongly with the statement, "My sexual orientation was raised as an issue even though it did not pertain to the case." (See Table 10.)

In another recent, significant contact with the courts, 38.2 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, "My sexual orientation was pertinent to the court proceedings," and 35 percent of those same respondents agreed somewhat or very strongly with the statement, "My sexual orientation was raised as an issue even though it did not pertain to the case." (See Table 18.)

It is not surprising that any anti-gay prejudices, comments, or actions present in the court system would come to the foreground when sexual orientation issues are more important in the court proceeding. Although the same level of anti-gay feeling might exist below the surface of other court experiences, it may not become apparent unless sexual orientation plays a role in the proceeding.

The demographic profile of survey respondents reinforces this inference. Because lesbian and gay survey respondents were predominantly well-educated, relatively affluent, white males (see demographic data at p. 15), it may be assumed that these respondents ordinarily would have the most sophistication and ability to navigate through the judicial system. One typically would expect those individuals to have the most positive experiences and perceptions of the court system. Additionally, since most lesbian and gay court users' sexual orientation is not easily identifiable, one also would expect more negative experiences and perceptions of unfairness when these individuals become visible as nonheterosexual. The survey data illustrates this correlation. (See findings 14–16.)

It also is significant that lesbian and gay court users believed that sexual orientation became an issue in the court proceeding when it was actually not relevant to the court contact almost as often as when it was, in fact, pertinent. (See finding 17.) Given the possible correlation between

the visibility of sexual orientation as an issue in the California courts and respondents' negative experience and perceptions of unfairness, the courts must address two separate and analytically distinct issues. First, the courts must address the negative experiences and perceptions of lesbians or gay men that follow when sexual orientation is legitimately at issue in the court contact. Second, the courts must be prepared to address sexual orientation issues in a court contact even when it is not pertinent to the proceeding.

Finally, given these data patterns, it is not surprising that many lesbian and gay court users believe that the courts are not providing fair and unbiased treatment for lesbians or gay men. (See finding 11.) Similarly, albeit to a lesser degree, lesbian and gay court users also believe that the courts are available neither to resolve their disputes nor to provide access to lesbians and gay men. (See finding 12.) Lesbian and gay court employees echoed these findings and had greater negative perceptions of the ability of the courts to provide access and fairness than did their heterosexual counterparts. (See finding 13.)

THE COURT AS A WORKPLACE

COURT EMPLOYEES' EXPERIENCES

18. Lesbian and gay employees were at least four times more likely to experience negative actions or comments based on sexual orientation than were heterosexual employees.

Analysis of 18:

While 3 percent of heterosexual court employees reported hearing negative comments based on their sexual orientation in the past year, 20 percent of lesbian and gay court employees reported hearing such comments. Just 3 percent of heterosexual employees reported their sexual orientation as being the subject of jokes or ridicule, while 17 percent of lesbian and gay employees reported such incidents. Similarly, almost 3 percent of heterosexual employees reported experiencing negative actions based on sexual orientation, compared with almost 16 percent of lesbian and gay employees. Finally, 16 percent of lesbian and gay employees reported being called derogatory names based on their own sexual orientation, compared with 2 percent of heterosexual employees. This finding illustrates a significant disparity in the personal work experiences of gay and lesbian versus heterosexual employees. (See Table 40.)

19. Forty-two percent of the court employees who experienced a negative incident at work based on their sexual orientation took no action in response.

Analysis of 19:

Of the court employees who experienced some negative comment or action due to their sexual orientation, 42 percent chose to take no action in response, while 25 percent responded by confronting the person responsible for the negative comment or action. Twenty-one percent discussed the incident with a co-worker other than the perpetrator, while 10 percent talked to someone else. Sixteen percent reported the incident to a supervisor. Of the 42 percent of court

employees who chose to take no action in response to a negative incident based on the employees' sexual orientation, a majority did not think the incident was serious enough to warrant a reaction.

Of the court employees who took no action in response to a negative incident based on their sexual orientation, almost 60 percent of court employees reported that they took no action because they felt the incident was not serious enough to warrant intervention. Another 35.7 percent did not believe anything constructive would come from intervening. Almost 24 percent feared being branded a troublemaker, and just fewer than 12 percent took no action out of fear of losing a promotion. Almost 17 percent were unsure about how to intervene, and just over 7 percent did not act out of concern that they would by thought to be gay or lesbian. (See Tables 41, 43).

20. Of those employees who did take some action in response to an incident at work based on their sexual orientation, 49 percent reported that their intervention or action had no effect.

Analysis of 20:

For those employees who chose to take some action in response to a negative work experience based on the employees' sexual orientation, 49 percent reported that their intervention or action had no effect or that nothing happened, while 35 percent reported that the negative comments or actions stopped or decreased in frequency. Approximately 4 percent reported being branded as a troublemaker; one in five reported some other results. Examples of these other responses included the following: "It's like I don't exist anymore." (See *Sexual Orientation Fairness in California Courts, Results from Two Surveys, January 2000*, p. 60.) "Made me feel uncomfortable. Fewer invitations to group lunches, etc." (*Id*.) "People turned to commenting behind my back." (*Id*.) (See Table 42.)

21. One in five lesbian and gay employees reported experiencing discrimination (as opposed to only negative comments or actions) at their workplace based on their sexual orientation. Two percent of the heterosexual employees reported being discriminated against based on sexual orientation.

Analysis of 21:

Although it is not surprising that more lesbian and gay employees perceive that they are being discriminated against based on sexual orientation than do their heterosexual counterparts, it should be of serious concern that 20 percent of gay and lesbian employees experience discrimination at their workplace.[8] Further, if only one-third of the lesbians who identified themselves as gay or lesbian are "out" to their co-workers, it follows that this "out" group would experience a higher percentage of discrimination than employees who hide their lesbian or gay sexual orientation or who are heterosexual. (See Table 44.)

[8] Table 44 indicates that 15.9 percent of lesbian, gay, or bisexual court employees reported experiencing job discrimination. However, because no bisexuals reported that discrimination, that figure understates the experiences of lesbian and gay employees; 18.2 percent of lesbians and 20.7 percent of gay male employees reported job discrimination.

22. Sixty-five percent of the employees who experienced discrimination based on sexual orientation took some action, of which 56 percent reported that nothing resulted from that action.

23. Of those employees who reported experiencing discrimination based on sexual orientation but took no action, 46 percent did not take any action because they thought nothing constructive would come of doing so, and 23 percent feared negative consequences.

Analysis of 22–23:

Although a majority of employees took some action in response to being discriminated against based on their sexual orientation, 56 percent reported that nothing resulted from that action, while 17 percent reported that discrimination stopped or decreased in frequency or severity, 6 percent stated that the discriminator(s) were reprimanded, and 11 percent reported that they were branded as troublemakers or some action was taken against them; 22 percent reported "other" as the effect of action taken in response to discrimination. (See Tables 45, 46.)

Of particular note is that a significant number of respondents (46.2 percent) did not take any action in response to being discriminated against because they thought nothing constructive would come of their action. As significant is the fact that 23.1 percent feared being branded as troublemakers, and that 15.4 percent believed that taking some action would reduce their chances for promotion. (See Tables 45, 47.)

"Other" was indicated as the reason for taking no action for 38.5 percent of the respondents. It is not possible to conclude what "other" represents in this sampling. The statements made by those who chose "other" may indicate a sense by the employees that nothing would result from taking action. This is evidenced by a sampling of the comments received: "Employee would not understand and would not change." "When discrimination is subtle, how do you prove it? You can't; people will just assume you are making an issue out of nothing." (See *Sexual Orientation Fairness in California Courts, Results from Two Surveys, January 2000*, p. 61.)

COURT EMPLOYEES' INTERVENTION

24. Sixty-five percent of court employees who observed a negative action or heard a negative comment outside the courtroom took no action.

25. Court employees who observed a negative action or heard a negative comment outside the courtroom and did not intervene did not do so for the following reasons:

- **a. Sixty-two percent did not feel the incident was serious enough to intervene;**
- **b. Twenty-three percent believed nothing constructive would happen;**
- **c. Eight percent feared some form of retaliation;**
- **d. Fifteen percent never thought of intervening; and**
- **e. Two percent feared they would be thought to be lesbian or gay.**

Analysis of 24–25:

Of those who witnessed a negative action or comment in a setting other than open court, 65 percent took no action, while 14 percent confronted the person who made the comment, 11 percent discussed the incident with a colleague or co-worker, 4 percent reported the incident to a supervisor, and 6 percent took some other action. The vast majority of court employees chose to take no action in response to negative comments that occurred in settings other than open court. (See Table 36.)

Some examples of actions taken by respondents are as follows: "I expressed my displeasure and walked out of the room." (See *Sexual Orientation Fairness in California Courts, Results from Two Surveys, January 2000*, p. 50.) "These occurrences were always in the context of 'jokes,' and I directly said to the person that I don't want to hear any jokes involving any kind of prejudice." (*Id.*)

Of those who observed negative actions or comments in settings other than open court, 62 percent felt intervention was not warranted, while 23 percent believed nothing constructive would come from intervening, and 15 percent never thought of intervening. From findings 24 and 25, it can be difficult to assess objectively the nature of the comments or actions that a majority of these respondents deemed not serious enough to warrant intervention. Some of the open-ended comments made on the surveys about why employees did not intervene are instructive. Some examples are as follows: "I agreed with the jokes or comments." (See *Sexual Orientation Fairness in California Courts, Results from Two Surveys, January 2000*, p. 51.) "The negative comments were completely valid." (*Id.*) "I didn't care." (*Id.*) "The jokes did not bother me." (*Id.*) "In the Central Valley, it's almost understood you are an open target for this type of treatment." From these responses, it appears that at least some respondents shared the negative opinions of lesbians or gay men expressed in the comments or actions they witnessed. (See Table 38.)

26. Of those employees who did intervene upon observing negative actions or comments toward lesbians or gay men outside the courtroom, 54 percent reported that the negative actions or comments stopped or decreased in frequency.

Analysis of 26:

In contrast to finding 7, finding 26 showed that 54 percent of employees who intervened after observing a negative action or comment in settings other than open court reported that the comments or actions stopped or decreased in severity or frequency, demonstrating that intervention by employees does result in a lessening in negative comments or behavior. Just over 35 percent of respondents reported that their intervention had no effect or that nothing happened after intervention. Only 4 percent reported that the person making the negative comments was reprimanded. It is significant that in settings other than open court, a higher percentage of respondents reported that their intervention did result in the comments' decreasing or stopping altogether compared with employees who intervened upon observing comments in open court. Given that a higher percentage of comments overall occur in settings other than open court, it is encouraging that a majority of respondents who intervened when such comments

were made felt that their intervention made a difference. However, as findings 5 and 24 clarify, the majority of respondents failed to intervene when observing a negative action or comment directed at lesbians or gay men. That failure to intervene occurred despite the fact that when employees chose to intervene, the intervention was effective. These two findings clearly indicate a need for education as outlined in the "Recommendations" section of this report. (See Table 37.)

COURT EMPLOYEES' OBSERVATIONS/PERCEPTIONS

27. Thirty-two percent of court employees heard ridicule, snickering, or jokes about lesbians and gay men in settings other than open court; 28 percent reported hearing negative comments; and 21 percent heard derogatory terms about gay men or lesbians.

Analysis of 27:

A significant number of court employees observed negative actions or comments by judges, lawyers, or court employees in work settings other than open court in the year preceding the survey. Over 17 percent reported hearing ridicule, snickering, or jokes one to three times in the year prior to the survey; 6 percent heard ridicule, snickering, or jokes four to six times in the prior year; and 9 percent of respondents heard or observed ridicule, snickering, or jokes about lesbians or gay men more that six times in that same time period. This frequency was similar with respect to negative comments, with 16 percent of employees hearing negative comments about gay men or lesbians one to three times in the preceding year. Six percent heard such comments four to six times, and 6 percent heard negative comments more than six times in the preceding year. (See Table 34.)

28. Ninety-four percent of all court employees stated that they believe that the personnel policies of their workplace are fair to lesbians and gay men, and 88 percent believe that lesbians and gay men are treated the same as other employees.

29. Court employees reported the following perceptions about being a gay man or a lesbian in the workplace:

- **a. Twenty-nine percent believe that being open about being a gay man or lesbian is unsafe;**
- **b. Fifty-eight percent believe it is better if gay men and lesbians are not open about their sexual orientation; and**
- **c. Forty percent acknowledge that jokes or comments are made about lesbians and gay men behind their backs.**

Analysis of 28–29:

The statistics in these findings appear to be contradictory. Most respondents agreed that their written workplace policies were fair to lesbian and gay men and that lesbian and gay employees were treated the same as other employees. However, the disparity comes in the application of those workplace policies. For example, 29 percent of all court employees believe that being

open about being gay or lesbian is unsafe, 58 percent of the employees believe that it is better if gays and lesbians are not open about their sexual orientation, and 40 percent acknowledge that jokes or comments are made about lesbian and gay people behind their backs. Seventeen percent agreed that it is harder to be hired if you are suspected of being lesbian or gay, 13 percent agreed that sexual orientation is used to devalue the credibility of some gay or lesbian employees, and 10 percent agreed that prejudice against gay men and lesbians is widespread at work. Thus, another explanation for the apparent contradiction is that to the extent that a person is not visible or identified as a gay or lesbian, the application of the policy is perceived to be fair. When the gay or lesbian employee is more visible, employees believe that the policies are applied less fairly. Given these results and the reasonable inferences that can be drawn from them, it appears that lesbian and gay employees are often expected to remain closeted about their sexual orientation or to risk suffering discrimination. Note that 93 percent of the respondents to the survey were heterosexual, and 59 percent were legally married, which are facts likely known by co-workers. (See Tables 48, 49.)

30. Lesbian and gay court employees believed the courts are less fair to all court users than do heterosexual court employees.

31. Heterosexual court employees rated the courts significantly higher in evaluating the success of the courts in providing access, being available to resolve disputes, and providing fair and unbiased treatment of all categories of sexual orientation than did lesbian and gay court employees.

Analysis of 30–31:

On a scale of 1 to 10, with higher scores indicating higher levels of fairness, lesbians and gay men rated the courts with a mean score of 6.44 as to fairness to lesbians and gay men and 7.15 as to fairness to people in general. Heterosexuals rated the courts with a mean score of 7.88 in rating the courts as to fairness to lesbians and gay men and 7.98 in rating the courts as to fairness to people in general. (See Table 50.)

On a four-point scale, with the higher scores indicating a higher degree of success, heterosexual employees and gay and lesbian employees have strikingly different attitudes about the courts' success in providing access and fairness. With respect to the courts' success in providing access for lesbians and gay men, heterosexuals gave the court a mean score of 3.33, while lesbians and gay men gave the court a mean score of 2.83. Regarding the courts' availability to resolve disputes involving gay men and lesbians, heterosexuals gave the courts a mean score of 3.19 compared to lesbians and gay men, who gave a mean score of 2.54. Heterosexual respondents believe the courts are fairer toward gay men and lesbians than gay men and lesbians believe. This attitude by heterosexuals, who are the vast majority of employees in the court system, would appear to set a tone in the workplace that is reflected in other findings. (See Table 52.)

RECOMMENDATIONS

Based on these findings, the Access and Fairness Advisory Committee made recommendations in the following categories: education and training; attitudes, treatment, and users' experiences with the courts; recognizing sexual orientation diversity within the courts; the courts as a workplace; specific access issues, including jury service and specific subject-matter assignments; outreach; and future research.

TO THE JUDICIAL COUNCIL

1. The advisory committee recommends that the Judicial Council widely disseminate this report:
    a. To educate judges and court personnel about the public perception that bias and insensitivity toward court users on the basis of sexual orientation exist; and
    b. To ensure the public that their views are taken seriously.

The advisory committee further recommends that the Judicial Council approve the statements of policy described in this section.

EDUCATION AND TRAINING

2. All courts should affirm the need for all courts to ensure fairness and access to lesbians and gay men, pursuant but not limited to the requirements of the Standards of Judicial Administration, sections 1 and 1.5, and the Code of Judicial Ethics, canons 2 and 3.

RECOGNIZING SEXUAL ORIENTATION DIVERSITY WITHIN THE COURTS

3. The local courts should develop a diverse pool of law students, including gay men and lesbians, as applicants for judicial clerkships and student internships in the courts.

THE COURTS AS A WORKPLACE

4. The Judicial Council endorses the development and implementation of local court personnel policies and practices to eliminate sexual orientation discrimination and bias in the court as a workplace, including effective intervention in incidents of sexual orientation discrimination or bias and the prevention of retaliation against any individual reporting such incidents.

SPECIFIC SUBJECT-MATTER ASSIGNMENTS

5. The Judicial Council urges local courts that administer systems of alternative dispute resolution to use neutral parties trained in issues regarding sexual orientation.

OUTREACH

6. The Judicial Council encourages the local courts to include sexual orientation in their community outreach programs.

REFERRALS TO THE CENTER FOR JUDICIAL EDUCATION AND RESEARCH (CJER)

EDUCATION AND TRAINING

7. CJER and the Access and Fairness Advisory Committee, in conjunction with the Administrative Office of the Courts (AOC), should develop methods to familiarize judges and nonjudicial court personnel with California and federal laws relating to sexual orientation fairness and nondiscrimination and implement programs to develop and provide information, training, and education for all persons concerning sexual orientation fairness. The purposes of the program would be to improve access to and fairness in the courts for persons of all sexual orientations and to improve awareness of sexual orientation issues.

8. CJER and the Judicial Administration Institute of California (JAIC) should incorporate the findings and recommendations of this report into their educational programs for bench officers and court staff.

THE COURTS AS A WORKPLACE

9. JAIC and CJER, in association with the Access and Fairness Advisory Committee, should develop a training and education program for court staff that includes sexual orientation bias issues that would be delivered, on a statewide or regional basis, within six months of employment to new employees. Current employees would receive education and training on sexual orientation bias issues on a regular, periodic basis as part of their continuing education programs.

SPECIFIC SUBJECT-MATTER ASSIGNMENTS

10. CJER should include sexual orientation diversity issues and fairness training for judges with specific subject-matter assignments, including but not limited to those judges assigned to criminal, family, juvenile, and probate courts, and, in particular, should include such diversity and fairness training in the orientation programs for judges with new assignments in these areas. Existing bench books for family law bench officers should include sexual orientation issues, as family law issues present significant opportunity for insensitivity or bias to influence decision making.

TO BE INCORPORATED INTO THE ADVISORY COMMITTEE WORK PLANS

The advisory committee recommends that the recommendations described in this section be incorporated into the work plans of the advisory committee and its subcommittees.

ATTITUDES, TREATMENT, AND USERS' EXPERIENCES WITH THE COURTS

11. The advisory committee will direct staff to draft a proposed amendment to section 1(c) of the Standards of Judicial Administration to ensure that retaliation against any individual reporting incidents of discrimination will not be permitted.

12. The advisory committee will consult with the Judicial Council's Rules and Projects Committee to develop the necessary procedures to assist courts in implementing the Standards of Judicial Administration, sections 1 and 1.5, and the Code of Judicial Ethics, canons 2 and 3.

13. The advisory committee will consult with the Judicial Council's Rules and Projects Committee to review and revise, as appropriate, any procedures or forms to address sexual orientation issues. Such review should include the effect, if any, of California registered domestic partnership legislation on existing forms or Rules of Court.

RECOGNIZING SEXUAL ORIENTATION DIVERSITY WITHIN THE COURTS

14. The advisory committee and State Bar staff will work collaboratively with local bar associations and community groups to develop workshops on judicial selection and the election process that encourage diversity, including sexual orientation diversity, in the appointment and election of judges.

15. The advisory committee will direct staff to draft a revision to Standard of Judicial Administration section 1.5 to include court commissioners.

THE COURTS AS A WORKPLACE

16. The advisory committee shall study and report on sexual orientation bias or lack of fairness in the recruitment, hiring, and promotion of court employees.

JURY SERVICE

17. The advisory committee, in conjunction with other appropriate organizations, will develop sample questions for voir dire that appropriately address the issues of domestic partnership and sexual orientation.

FUTURE RESEARCH

18. The advisory committee will undertake a study to determine whether there is bias or unfairness based upon sexual orientation on an institutional basis in cases including but not limited to child custody and visitation, adoption, conservatorships and guardianships, dissolutions, criminal law, and public accommodations. The advisory committee will address these issues in conjunction and cooperation with other Judicial Council standing committees and task forces already established.

19. The advisory committee will undertake data and information collection, independently or in conjunction with other court surveys, to develop baseline data on the current state of the courts' ability to respond to sexual orientation, gender identification, and gender expression issues, including but not limited to:
    a. Surveys of information and attitudes of bench officers and court staff;
    b. Surveys of information and concerns of gay and lesbian bench officers;
    c. Surveys of education and training made available to court personnel and judges in each court;
    d. Surveys of complaint mechanisms; and
    e. Surveys of court users, court personnel, and bench officers to measure the effectiveness of actions taken pursuant to this report.

20. The advisory committee will develop assessment mechanisms to determine the experiences of gay men, lesbians, and persons of diverse gender identification and gender expression with respect to court orders, judgments, settlements, and verdicts.

21. The advisory committee will track the implementation of all recommendations made by this committee and identify any new issues that have arisen in the interim.

Jury Selection and Anti-LGBT Bias

Best Practices in LGBT-Related Voir Dire and Jury Matters

Dec 2015

Lambda Legal
making the case for equality

ghla
Greater Hartford Legal Aid

Bias against people who are lesbian, gay, bisexual or transgender (LGBT) can influence jurors' decisions.[1] Such prejudice can play out in any matter involving LGBT people, including sexual assault, hate crime, intimate partner violence or other criminal cases, as well as discrimination, tort or even contract disputes. But lawyers can conduct effective voir dire to uncover possible bias among prospective jurors. This guide is designed to help practitioners address both express and implicit bias during jury selection, conduct LGBT-inclusive voir dire, and challenge the discriminatory use of peremptory strikes.

CHALLENGES FOR CAUSE

The right to challenge a potential juror for cause as a means of excluding bias is an important component of ensuring due process and a fair trial.[2] Even as attitudes are changing in many parts of the country, some jurors still openly admit anti-LGBT bias in voir dire.[3] Even more troubling, courts will not always excuse for cause a juror who has expressed anti-LGBT views,[4] and may permit those jurors to remain in the pool if they simply state that they can be fair. Advocates should challenge for cause jurors who express anti-LGBT bias, and should remind the court that its factual determination of whether a juror can be fair should be based not only on the juror's verbal claim of impartiality, but also on the juror's "demeanor and credibility," including body language and evidence of discomfort with LGBT issues.[5]

PROXY QUESTIONS TO UNCOVER IMPLICIT BIAS

Even if a juror does not voice prejudices overtly, research suggests that proxy questions can help to uncover anti-LGBT bias.[6] These questions may be more effective than asking jurors directly whether they are biased, or whether they can be fair. In addition, providing jurors with an opportunity to respond privately (via questionnaire or outside of the presence of the other venire persons) may produce more forthcoming responses. Some possible areas of voir dire include:

Association with LGBT People

Studies show that people who have close friends who are LGBT tend to demonstrate less anti-LGBT bias.[7] By contrast, having an LGBT relative is not necessarily a good indicator of a juror's attitudes.[8] Some sample questions to illicit anti-LGBT bias may include:

Examples:

- "Do you have any close friends who are lesbian, gay, bisexual or transgender?"[9]
- "How would you feel if a same-sex couple moved in next door to you?"[10]
- "How would you feel if you had to work closely with someone who was lesbian, gay, bisexual or transgender?"[11]

Political Ideology

Research also demonstrates that jurors who describe themselves as "politically conservative" tend to have more anti-LGBT attitudes.[12]

Example:

- "Politically, are you liberal, middle-of-the-road, or conservative?" [13]

Attitudes on LGBT Rights Issues

Some jury consultants recommend questioning jurors about relatively uncontroversial LGBT rights issues. They reason that these questions will expose the most anti-LGBT jurors, without "outing" strong allies.[14] At a time when attitudes on LGBT issues are in flux, however, the substance of what constitutes a non-controversial question might be highly contingent on the jurisdiction.

Example:

- "Do you think employers should be able to refuse to hire someone because of the person's sexual orientation or gender identity?"[15]
- "How comfortable are you with same-sex couples raising children together?"

Religiosity

Happily, religiosity may become a less useful indicator of anti-LGBT attitudes. Recent surveys demonstrate that support for LGBT rights is growing among some religiously observant groups.[16]

Nonetheless, surveys indicate that jurors who attend religious services every week, or who report that their religious beliefs are "often important" or "always important" in guiding their daily decisions, tend to hold more negative attitudes about LGBT people.[17]

Examples:

- "Do you try to attend religious services at your place of worship every week?"[18]
- "How important are your religious beliefs in guiding your daily decisions?"

Jurors may be challenged for cause or removed with a peremptory strike if they exhibit anti-LGBT bias, even if it is rooted in religious or moral beliefs. However, whether striking a juror based solely on religious affiliation violates the U.S. Constitution is an open question, and a number of states bar the practice.[19]

ETHICAL CONSIDERATIONS FOR ATTORNEYS

Rules of professional conduct and judicial canons prohibit bias and discrimination in court and can be used to pursue fairness in jury selection. Under the ABA Model Rules of Professional Conduct, adopted in most states, a lawyer may not "engage in conduct that is prejudicial to the administration of justice."[20]

Comment 3 to MRPC 8.4 states that "A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates [this rule] when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate [this rule]."

Judicial canons in many states prohibit bias and discrimination on the basis of sexual orientation and/or gender identity and expression. While not all state canons and codes explicitly include sexual orientation and/or gender identity and expression, they all require that judges not show bias or prejudice and demand the same of court staff. Additionally, a growing body of law interprets prohibitions against discrimination on the basis of sex to include bars against discrimination based on gender identity or sexual orientation.

Relevant Code of Judicial Conduct

Rule 2.3 of Canon 2 of the Code of Judicial Conduct states:

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

DEALING WITH STANDARD VOIR DIRE QUESTIONS

Marital Status Questions

As a result of the Supreme Court ruling in *Obergefell v. Hodges*, same-sex couples may marry nationwide. Nevertheless, research shows that standard voir dire questions regarding marital status (**"Are you single, married, or divorced?"**) often make LGBT people uncomfortable, cause them to feel excluded, and taint their perceptions of the legal system and the case in front of them.[21]

Unless specifically relevant to a case, the marital status inquiry may undermine the credibility of the judicial process in several ways:

- By failing to reach information on household members, it may deprive the court and lawyers of valuable information about relationships necessary or useful for a fair jury selection or court process.
- If there are follow-up questions that would disclose the

sex of the spouse, marital status questions may force LGBT jurors to disclose their sexual orientation.

- The marital status question may foster a perception among LGBT court users that their subsequent experiences in courts may not be fully informed or fair.

Where voir dire is broad enough to encompass all close relationships, LGBT potential jurors may feel validated and believe that the judicial system is accessible.[22]

Though people may now access marriage without discrimination based on sexual orientation, some jurisdictions also have alternative relationship recognition statuses such as civil unions and domestic partnerships, so the standard question should *at a minimum* include those statuses.

Examples:

- "Are you single, married, in a civil union, divorced..."
- "Do you have a spouse, domestic partner, significant other..."

The best approach may be to focus on the point or goal behind the question and directly ask about it. Typically, the marital status inquiry seeks to capture who else is living within the home or is otherwise in a position to influence the potential juror's opinions, experiences and conceptions of the persons and events at trial.

Example:

"In the following questions I will be using the terms 'family,' 'close friend' and 'anyone with whom you have a significant personal relationship.' The terms 'family' and 'anyone with whom you have a significant personal relationship' include a domestic partner, life partner, or anyone with whom you have an influential or intimate relationship that you would characterize as important."[23]

INVOLUNTARY OUTING AND VISIBILITY AS LGBT

The landscape of legal, political and social acceptance has changed significantly since privacy concerns led one commentator to counsel against asking about sexual orientation and by extension relationship status.[24] Yet, despite the general improvement in legal protections and courtroom dynamics, increased visibility of LGBT people in society and the decrease in jurors' privacy concerns, those changes are likely to be regional.

Choosing whether to reveal one's sexual orientation is very different from being forced to disclose it, and losing control of that decision can produce significant anxiety.[25] One empirical study showed that most lesbian and gay jurors who were out in all other aspects of their lives still did not want to have their sexual orientation disclosed in court.[26] Moreover, a significant number felt compelled to disclose their sexual orientation against their will due to questioning in court.[27] Accordingly, during voir dire, lawyers are well advised to avoid pressing potential jurors to disclose their sexual orientation involuntarily.

EXPERIENCES OF LGBT PEOPLE IN COURT

In 2012, Lambda Legal, with the help of more than 50 supporting organizations, completed a national survey to assess how well courts and other government institutions are protecting and serving LGBT people and people living with HIV.[28] The results show some of the ways the promise of fair and impartial proceedings is tainted by bias against LGBT people and individuals living with HIV.

As is often the case, respondents with multiple marginalized identities—that is, LGBT people who are also low-income, people of color or disabled—reported significantly higher instances of discrimination.

Nineteen percent (19%) of people who responded reported hearing a judge, attorney or other court employee make negative comments about a person's sexual orientation, gender identity or gender expression.

Sixteen percent (16%) of respondents indicated that their own sexual orientation or gender identity was raised when it was not relevant.

Fifteen percent (15%) of respondents reported having their HIV status raised when it was not relevant.

USING PEREMPTORY CHALLENGES TO ADDRESS ANTI-LGBT BIAS

In addition to challenges for cause, attorneys have a limited number of peremptory strikes (usually 3 to 6), which can be used to remove jurors whom they perceive to be biased, even if that perception may not sustain a challenge for cause.

Eliminating a juror for cause can be difficult for a variety of reasons:

- Jurors may be reluctant to reveal the extent of their biases;
- Judges may place limitations on the scope of voir dire;
- Judges may be disinclined to dismiss many jurors for cause; and
- If given the right to object and question, opposing counsel may attempt to rehabilitate the juror.

As mentioned previously, even when an attorney establishes a clear record during voir dire that a prospective juror holds anti-LGBT attitudes, some judges may nevertheless attempt to rehabilitate the juror by asking if the individual can set those prejudices aside and neutrally consider the facts. Given some of the limitations placed on the use of for-cause challenges, peremptory strikes are not only valuable, but may serve as a last opportunity for counsel to remove jurors who harbor anti-LGBT bias.

Of course, while peremptory challenges generally can be made without giving any reason, they are "subject to the commands of the Equal Protection Clause."[29] In the 1986 case of *Batson v Kentucky*, the Supreme Court held that peremptory challenges cannot be used to systematically strike otherwise qualified jurors from the panel on the basis of race.[30] Since then, the Court has prohibited the use of peremptory challenges on account of a jurors' sex in *J.E.B v Alabama*,[31] or any other classification subject to heightened judicial scrutiny.[32] *Batson* has been extended to apply to criminal defense attorneys as well as prosecutors[33] and private civil litigants.[34]

CHALLENGING LGBT-BASED PEREMPTORY STRIKES

LGBT people have suffered a long history of discrimination in both the public and private spheres. As with other groups targeted with invidious discrimination, far too often discrimination against LGBT people has found its way into the courtroom, denying them equal access to justice and an equal opportunity to participate in civic life.

The Supreme Court has not expressly ruled on whether the Equal Protection Clause of the U.S. Constitution precludes using peremptory challenges to strike prospective jurors on the basis of sexual orientation or gender identity. However, in the 2014 case *SmithKline Beecham Corp. v. Abbott Labs,* the Ninth Circuit Court of Appeals became the first federal court to rule that jurors cannot be disqualified based on their sexual orientation.[35]

The unanimous three-judge panel—relying on the Supreme Court's ruling in *U.S. v Windsor*—held that discrimination based on sexual orientation is subject to heightened scrutiny, and that equal protection prohibits exercising peremptory strikes based on sexual orientation.[36] The court remanded for a new trial based on its finding that, where attorneys struck a man from the jury venire after he made several references to his male partner during voir dire, the record established a prima facie case of intentional discrimination. This broad and significant ruling applies to all federal courts in the Ninth Circuit and thousands of state courtrooms, and should provide persuasive precedent in other federal and state courts.

At the federal level, existing statutory law explicitly bars discrimination in jury selection on the basis of race, color, religion, sex, national origin and economic status.[37]

Even in a jurisdiction without clear statutory authority or binding precedent, counsel should be prepared to object early and often to the opposing party's use of peremptory challenges to strike jurors based on their sexual orientation or gender identity. Counsel should also elicit the factual record necessary to preserve the issue for appeal and provide the court with briefing to support a determination that these discriminatory challenges violate federal and state constitutional guarantees.

SUPPORTING A *BATSON* CHALLENGE BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY

Counsel should draw upon the Ninth Circuit decision in *SmithKline Beecham Corp. v. Abbott Labs* and the Supreme Court's logic and reasoning in *Batson* and its progeny to challenge the use of peremptory strikes based on sexual orientation and gender identity.[38]

Sexual Orientation

With its ruling, the Ninth Circuit noted, "Gays and lesbians may not have been excluded from juries in the same open manner as women and African Americans, but our translation of the principles that lie behind *Batson* and *J.E.B.* requires that we apply the same principles to the unique experience of gays and lesbians."[39] The court went on to examine the history of discrimination faced by gays and lesbians and, looking to the issue of juror exclusion, notes:

> "Strikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals. They tell the individual who has been struck, the litigants, other members of the venire, and the public that our judicial system treats gays and lesbians differently. They deprive individuals of the opportunity to participate in perfecting democracy and guarding our ideals of justice on account of a characteristic that has nothing to do with their fitness to serve."

The court recognizes the need to ensure that "individuals are not excluded from our most fundamental institutions because of their sexual orientation" and that to allow such discrimination in jury selection demeans the dignity of the individual and undermines the integrity of the courts.[40]

In addition to the decision in *SmithKline*, counsel may draw upon recent rulings that recognize that bans on sex discrimination include discrimination based on sexual orientation.[41]

Gender Identity

It is clearly established that the rule of *Batson* is violated when a peremptory challenge is used to strike a juror based on sex.[42] Many jurisdictions and agencies have confirmed that bans against sex discrimination prohibit differential treatment for failing to conform to gender stereotypes, for gender transition, and for discrimination based upon gender identity or being transgender,

since gender identity and sex are inherently related.[43] As several courts have held with respect to gender identity, "governmental acts based upon gender stereotypes—which presume that men and women's appearance and behavior will be determined by their sex—must be subjected to heightened scrutiny because they embody 'the very stereotype the law condemns.'"[44] Thus, failing to apply *Batson* to prohibit discriminatory peremptory challenges based on gender identity violates core equal protection principles.

State Protections

Counsel may also consider state constitutional guarantees of equal protection and guarantees related to trial by jury when making out a *Batson* challenge. For example, in *People v. Wheeler,* the Supreme Court of California held that the right to an impartial jury under the California Constitution prohibits the use of peremptory strikes to exclude jurors simply based on their membership in a "cognizable group." The court concluded that the statutory right to peremptory challenges must give way to the constitutional right.[45] In *People v. Garcia*, the California Court of Appeal applied *Wheeler* to peremptory strikes on the basis of sexual orientation.[46] This ruling was later codified and extended to explicitly ban gender-identity challenges.[47]

MAKING A *BATSON* CHALLENGE

When faced with the opposing party's use of a peremptory challenge to eliminate a juror on the basis of sexual orientation or gender identity, counsel should object and follow the three-step approach outlined in *Batson*.

Batson Step 1

First, the party challenging the peremptory strike must assert that the strike was improperly exercised by demonstrating that the totality of the relevant facts "raise an inference" of purposeful discrimination. It is best to request to be heard at the bench and out of the earshot of jurors to avoid affecting the impartiality of potential jurors. Counsel's burden is one of production, not persuasion.[48] Purposeful discrimination does not need to be the most likely explanation, or even more likely than not; rather it must be supported by sufficient evidence to allow a judge to draw an inference that discrimination has occurred.[49] There are no bright-line tests for determining what evidence will suffice.[50] States have been afforded some discretion in determining how to make this showing, and counsel should become familiar with jurisdiction-specific requirements.[51]

Counsel should carefully make out a record based on all relevant circumstances, which may include:

- Numerical data that demonstrate a discriminatory pattern of elimination;
- The line of questioning used by the strike's proponent;
- Deviation from a previous line of questioning;
- A lack of questioning; and/or
- Evidence of similar characteristics shared by the stricken juror and a party.[52]

Batson Step 2

Once the court determines that the party challenging the peremptory strike has made out its prima facie case, the burden shifts to the striking party to present a neutral explanation for the challenge. Some possible neutral reasons might include the prospective juror's occupation, education, family connections to a party, attitudes, personal beliefs, and prior litigation experience. However, even if the striking party produces only a "frivolous or utterly nonsensical" justification for its strike, the case does not end—it merely proceeds to step three.[53]

Batson Step 3

Finally, the party challenging the strike must convince the court that the explanation given by the striking party is a pretext for "purposeful discrimination."[54] If a violation is found, the trial judge will decide whether the juror will be returned to the pool or if a new jury pool or panel may be needed.[55] Counsel should make sure to elicit the factual record necessary to preserve the issue for appeal in the event that a violation is not found. That said, the broad discretion provided means that few cases are reversed based on a claim that the trial judge erred during jury selection.[56]

In developing a complete record of the challenge, be sure to[57]

- Maintain full and accurate notes on each juror;
- Make the challenge right away;
- Request a judge to hear and rule on the challenge if one is not present during voir dire, in order to ensure the decision is subject to appellate review;
- Request a court reporter and state for the record all facts supporting the challenge;
- If the challenge is denied, be sure to object again on the record before the jury is sworn in (doing so outside the presence of the jury).

CONCLUSION

Bias and discrimination in the context of jury selection are particularly harmful, as they reinforce historical invidious discrimination in the court system, interfere with the litigants' right to a fair trial, and undermine the integrity of the judicial system. Developing effective voir dire techniques will help protect the rights and dignity of LGBT prospective jurors while identifying harmful anti-LGBT prejudice that could taint a verdict. While this resource is intended to help attorneys and courts navigate voir dire and other jury matters, it is important to remember that best practices will require a contextualized and localized approach.

Principal Authors:

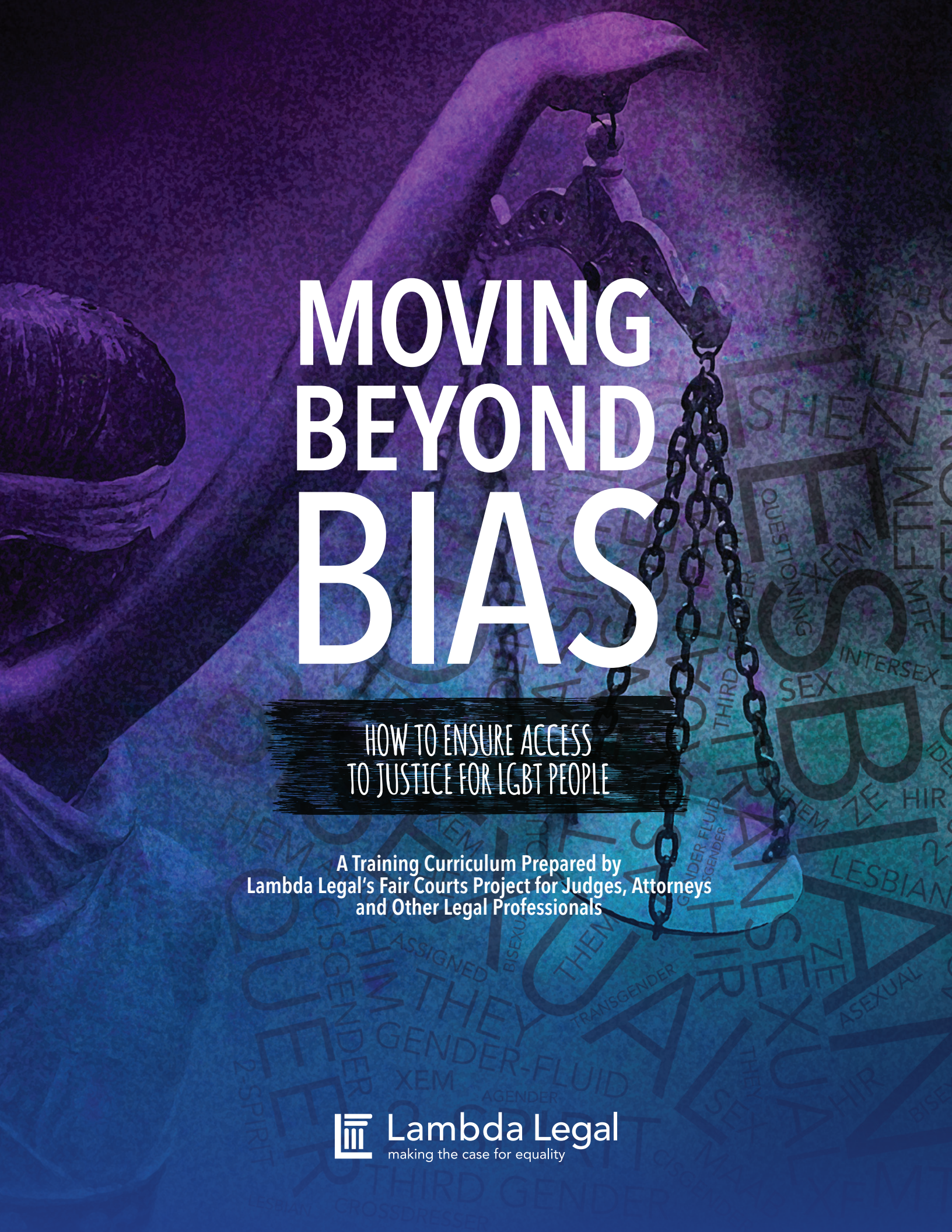
Todd Brower, Professor of Law, Western State University College of Law

Eric Lesh, Fair Courts Project Manager, Lambda Legal

Giovanna Shay, Litigation and Advocacy Director, Greater Hartford Legal Aid

Special thanks to Lousene Hoppe, Hayley Gorenberg, Jon W. Davidson, Leslie Gabel-Brett, Thomas Ude and Tara Borelli.

1. *See* Jennifer M. Hill, *The Effects of Sexual Orientation in the Courtroom: A Double Standard,* 39 J. Homosexuality 93, 102 (2000); Bradley H. White & Sharon E. Robinson Kurpius, *Effects of Victim Sex and Sexual Orientation on Perceptions of Rape*, 46 Sex Roles 191, 198 (2002); Shane W. Kraus & Laurie L. Ragatz, *Gender, Jury Instructions, and Homophobia: What Influence Do These Factors have on Legal Decision Making in a Homicide Case Where the Defendant Utilized the Homosexual Panic Defense?,* 47 Crim. L. Bull. 237, 240 (2011).
2. *People v. Rhodus*, 870 P.2d 470 (Colo. 1994).
3. Giovanna Shay, *In the Box*: *Voir Dire on LGBT Issues in Changing Times*, 37 Harv. J.L. & Gender 407 (2014).
4. *See* Shay, *supra* n. 3.
5. *See* Shay, *supra* n. 3; Aaron M. Clemens, *Executing Homosexuality: Removing Anti-Gay Bias from Capital Trials*, 6 Geo. J. Gender & L. 71, 97 (2005).
6. Cynthia Lee, *The Gay Panic Defense*, 42 U.C. Davis L. Rev. 471, 566 (2008).
7. Jill M. Chonody, *Measuring Sexual Prejudice Against Gay Men and Lesbian Women: Development of the Sexual Prejudice Scale (SPS*), 60 J. Homosexuality 895 (2013).
8. Sean Overland, *Strategies for Combating Anti-Gay Sentiment in the Courtroom*, The Jury Expert, March 2009, at 4, *available at* http://www.thejuryexpert.com/wp-content/uploads/OverlandAntigaybiasTJEMarch09.pdf, archived at http://perma.cc/QP8X-SVMX.
9. Drury Sherrod & Peter M. Nardi, *Homophobia in the Courtroom: An Assessment of Biases Against Gay Men and Lesbians in a Multiethnic Sample of Potential Jurors, in Stigma and Sexual Orientation: Understanding Prejudice Against Lesbians, Gay Men, and Bisexuals*[24] (Gregory M. Herek ed., 1998).
10. Overland, *supra* n.7.
11. Sherrod & Nardi, *supra* n 8.
12. Overland, *supra* n.7.
13. Sherrod & Nardi, *supra* n.8.
14. Overland, *supra* n.7.
15. Overland, *supra* n.7 .
16. See October 2014 Quinnipiac University poll, *available at* http://www.quinnipiac.edu/institutes-and-centers/polling-institute/national/release-detail?ReleaseID=1961
17. Overland, *supra* n. 7.
18. Sherod & Nardi, *supra* n. 8.
19. Daniel M. Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?* 9 Buff. Crim. L. Rev. 139 (2005-2006).
20. MRPC 8.4 (d) (2014).
21. Todd Brower, *Twelve Angry—and Sometimes Alienated—Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 Drake L. Rev. 669, 690, 699-700 (2011).
22. Brower, *supra* n. 20.
23. California Rules of Court, standard 3.25(c)(11) (Voir dire in civil cases).
24. Paul R. Lynd, Comment, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause & Peremptories*, 46 UCLA L. Rev. 231, 269 (1998).
25. Brower, *supra* n. 20, 687.
26. Dominic J. Brewer & Maryann Jacobi Gray, *Sexual Orientation Fairness in California Courts* (2000).
27. Brower, *supra* n. 20.
28. Lambda Legal, *Protected & Served?* (2012), available at http://www.lambdalegal.org/protected-and-served.
29. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).
30. *Batson v. Kentucky*, 476 U.S. 79 (1986).
31. *J.E.B. v. Alabama*, 511 U.S. 127 (1994).
32. *J.E.B. v. Alabama*, 511 U.S. at 128-129.
33. *Georgia v. McCollum*, 505 U.S. 42 (1992).
34. *Edmonson v. Leesville Concrete Co.*, Inc. 500 U.S. 614 (1991).
35. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014).
36. *SmithKline Beecham Corp. v. Abbott Labs.* 740 F.3d 471.
37. 28 U.S.C. § 1862.
38. Brief for Lambda Legal and Twelve Other Legal and Public Interest Organizations as Amicus Curiae, *SmithKline Beecham Corp. v. Abbott Labs., available at* http://www.lambdalegal.org/in-court/legal-docs/smithkline_20120328_amicus-brief
39. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d at 485.
40. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d at 485.
41. See, e.g. *Baldwin v. Foxx*, App. No. 0120133080, 2015 WL 4397641(EEOC, July 15, 2015); *Videckis v. Pepperdine University*, 2015 U.S. Dist. LEXIS 167672 (C.D. Calif.)
42. *J.E.B. v. Alabama*; *Duren v. Maryland* 439 U.S. 57.
43. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008)
44. *Glen v Brumby*, 663 F.3d 1312, 1315 (11th Cir. 2011) (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994)).
45. *People v Wheeler*, 22 Cal.3d 258, 272 (1978).
46. *People v Garcia*, 77 Cal.App.4th 1269 (2000).
47. CAL. CIV. PROC. CODE § 231.5 (West 2006).
48. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d at 476
49. *Johnson v. California*, 545 U.S. 162, 170 (2008)
50. *Batson v. Kentucky*, 476 U.S. at 96-97 (declining to specify what type of evidence the challenging party must offer to establish a prima facie case.)
51. *Johnson v California*, 545 U.S. 162, 168 (2005).
52. William C Slusser, *et al., Batson, J.E.B., AND PURKETT; A Step-by-Step Guide to Making and Challenging Peremptory Challenges in Federal Court*, 37 S.Tex.L.Rev. 127 (1996).
53. *Johnson v California*, 545 U.S. at 171.
54. *Snyder v. Louisiana*, 552 U.S. 472, 476–77 (2008).
55. *People v. Wheeler*, 22 Cal. 3d 258, 282 (1978).
56. Hon. David Baker, *Civil Case Voir Dire and Jury Selection*, 1998 Fed. Cts. L. Rev. 3 (Mar. 1998).
57. Claire F Rush, *How to Make and Defend Against a Batson Challenge, DRItoday*, March 14, 2012, *available at* http://dritoday.org/feature.aspx?id=299


MOVING
BEYOND
BIAS
HOW TO ENSURE ACCESS
TO JUSTICE FOR LGBT PEOPLE
A Training Curriculum Prepared by
Lambda Legal's Fair Courts Project for Judges, Attorneys
and Other Legal Professionals
Lambda Legal
making the case for equality

ABOUT **MOVING BEYOND BIAS**

This curriculum was created to provide a model for educating judges, attorneys and other legal professionals about sexual orientation, gender identity and the needs of LGBT people in the legal system. **It is intended to be used in conjunction with the accompanying PowerPoint presentation.** Systemic bias and discrimination impede access to justice in the courts for LGBT people and people living with HIV; this is especially true for transgender people, people of color and others with multiple marginalized identities. Such biases are greatly reduced in the face of information about the lives of LGBT people.

CONTENTS

ABOUT LAMBDA LEGAL

Founded in 1973, Lambda Legal is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and everyone living with HIV through impact litigation, education and public policy work.

ABOUT THE FAIR COURTS PROJECT

Lambda Legal's Fair Courts Project works to advance an independent, diverse and well-respected judiciary that upholds the constitutional and other legal rights of LGBT people and everyone living with HIV. The communities that Lambda Legal represents depend upon fair and impartial courts to ensure access to justice.

PREPARING FOR YOUR TRAINING

REVIEW THE CURRICULUM

Be sure to read through this guide and the accompanying PowerPoint slides in advance of the training and familiarize yourself with both. They can be used as is or modified according to the specific kind of legal audience and/or jurisdiction of the participants. The entire training will take two to two and a half hours to complete. However, shorter trainings using only a portion of the material are also feasible.

RESOURCES TO BE FAMILIAR WITH BEFORE THE TRAINING

- *Protected and Served?* www.lambdalegal.org/protected-and-served
- *Know Your Rights in Court*, www.lambdalegal.org/know-your-rights/in-court
- M. Dru Levasseur, Esq., *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 VT. L. REV. 943 (2015), lawreview.vermontlaw.edu/wp-content/uploads/2015/05/39-4-06_Levasseur.pdf.
- "Jury Selection and Anti-LGBT Bias: Best Practices in LGBT-Related Voir Dire and Jury Matters," www.lambdalegal.org/know-your-rights/article/in-court-jury
- Interact Advocates for Intersex Youth, *Intersex 101: A Beginner's Guide*, www.interactadvocates.org/wp-content/uploads/2017/03/INTERSEX101.pdf
- The terminology defined throughout this guide

RESOURCES TO HAND OUT TO PARTICIPANTS

- Postcards about *Protected and Served?* (Lambda Legal can provide)
- Palm cards about *Know Your Rights in Court* (Lambda Legal can provide)
- Two-page summary of Protected and Served?
- A printout of "Jury Selection and Anti-LGBT Bias: Best Practices in LGBT-Related Voir Dire and Jury Matters" (if appropriate for the audience; Lambda Legal can provide copies in advance or visit www.lambdalegal.org/know-your-rights/article/in-court-jury)
- Terminology Activity Sheet (if using) (Appendix B)
- Evaluation Form (Appendix C)

RESOURCES TO POST IN THE ROOM

- Trainers' names and contact information (can be listed in a PowerPoint)
- Lambda Legal Help Desk number: 1-866-542-8336
- Web address of *Know Your Rights in Court* on the Lambda Legal website (www.lambdalegal.org/know-your-rights/in-court)
- Web address of the court section of *Protected and Served?* on the Lambda Legal website (www.lambdalegal.org/protected-and-served/courts)

COMPLETE LIST OF WHAT YOU'LL NEED FOR THE TRAINING

- ✔ Resources to hand out
- ✔ PowerPoint presentation
- ✔ This guide
- ✔ A computer and projector (with sound capability)
- ✔ Name tags with space for name and pronouns

Other considerations before the training:

- Remember to consider the space where the training will be held. The comfort of participants is very important for ensuring an environment where people can learn. Make sure to provide participants with information on how to submit requests for accommodations, such as access to a nearby restroom, for instance, or printed slides for those unable to view the PowerPoint presentation. Follow up with facility or training organizers to ensure such accommodations will be provided.
- Think about all your technology needs before the presentation. For instance, you'll be playing a video during the training, so you'll need to make sure there are speakers loud enough for participants to hear the video.
- Keep in mind that there may be people with a range of identities in the room. There may or may not be people who are gay, lesbian, bisexual, transgender, intersex or have other identities that will be discussed during the training in the room. Make time for participants to ask questions and share their own stories if they choose, but don't rely on participants who are LGBT to be representative of their communities.
- There will be people in the room with a range of familiarity with the issues being discussed, so remember to use vocabulary that everyone will understand, defining terms as you go.
- Make sure you have a good grasp of best practices and are able to guide discussions toward them.
- Prepare for difficult questions. Discussing gender identity and sexual orientation can elicit a range of responses from people. You may want to think about what is in the news locally, nationally or globally. Be prepared for the possibility that there may be frustration or hostility coming from one participant or more. If you ever feel you are not able to answer a particular question, feel free to reach out to Fair Courts Project Attorney Ethan Rice at erice@lambdalegal.org or (212) 809-8585 ext. 242.

TRAINER NOTES

INTRODUCTIONS & EXPECTATIONS

INTRODUCTION OF TRAINER

SLIDE #1 (1-2 minutes)

Add your own name, title, pronouns and contact information to the slide ahead of time.

Tell participants who you are, including your pronouns, organization, etc. Explain what brings you to this work as a trainer/educator.

INTRODUCTION OF PARTICIPANTS

SLIDE #2 (if time allows, depending on size of audience and time allowed for training)

Keep introductions to a few minutes total unless the trainer feels the participants need to become more acquainted with each other.

Ask participants to introduce themselves to the group and the trainer. If it is a particularly large group, have them introduce themselves to the people around them.

Have participants state their name, pronouns, role in the organization/court/office and one expectation or hope they have for today's training. It is important for participants to state their pronouns.

EXPECTATIONS FOR EVERYONE

SLIDE #3 (2-3 minutes)

If discussing particular expectations mentioned by participants or the trainer might help increase participants' comfort as well as their participation, talk about them here. Open it up to the group to see if anyone has any other needs and whether everyone agrees with these expectations. Make it fun! Let everyone know these are intended to create a safe space where everyone feels comfortable to talk and ask questions.

- Confidentiality: Personal stories, identities and experiences that are shared by participants or trainers should stay in the room unless others explicitly allow for this information to be shared. On the other hand, concepts, terminology and best practices should be shared widely with colleagues, family and friends.

- Respect: One person speaks at time.
  - » Respect each other by understanding that everyone comes to this with a different set of experiences.
  - » Avoid generalizations about groups of people during discussions and when asking questions.
  - » Let people know that you are willing to take questions throughout the presentation but may wait to answer some questions a little later if it helps to keep the presentation on track. Mention any other housekeeping matters at this point.

Note: It is helpful to ask if people have questions they want to address after each section is complete.

GOALS OF THE TRAINING (1-2 minutes)

Explain that participants will:

- Be introduced to and better understand terminology related to sexual orientation, gender identity and gender expression.
- Better understand the experiences of LGBT people.
- Leave with new strategies for working with LGBT people in the legal system.
- Gain a better picture of the challenges that LGBT people may have in the courtroom and when working with attorneys and court staff.
- Leave with new resources to better engage with LGBT people in your legal work.

CONCEPTS & TERMINOLOGY

Slide #5-8 (10-15 minutes)

SLIDE #5 Explain that there are some definitions to review in order to ensure all participants are on the same page. Go over some very basic definitions needed to have this discussion. Explain the definitions of "sexual orientation," "gender identity" and "gender expression." Explain that each person has a sexual orientation, gender identity and gender expression. That each of these is a spectrum rather than a binary of gay or straight, male or female, masculine or feminine (respectively). There are individuals who are not on the binary for each of these categories. Explain that the following are not correlated to each other.

Sexual orientation is a person's romantic, physical and/or sexual attraction to same-sex and/or different-sex people. Sexual orientations include: gay, lesbian, bisexual and others.

Gender identity, also called "brain sex," is one's deeply felt internal sense of being male, female, both, or neither. It is the primary determinant of sex.

Gender expression refers to the way a person expresses gender through dress, grooming habits, mannerisms and other characteristics.

SLIDE #6 Have participants say out loud what they believe each letter on this slide stands for. It is a helpful way to get engagement and break down the barriers people have to saying these words out loud. Many people will not know what all of these stand for or what the words mean. So go through them all and take questions.

L - Lesbian - Refers to a woman who is primarily attracted romantically and/or sexually to other women.

G - Gay - A term that can be used to describe either a male whose primary sexual and romantic attraction is to other males or to reference anyone whose primary sexual and romantic attraction is to a person who is the same sex as themselves.

B - Bisexual - A sexual orientation or identity describing one's sexual, romantic and/or affectional attraction to people of the same sex and people of different sexes. Many bisexual-identified people are attracted to a spectrum of gender identities or expressions and recognize a non-binary gender paradigm.

T - Transgender - An umbrella term that refers to people who have a gender identity different than the sex they were assigned at birth. It can also apply broadly to people who transgress gender norms. Transgender people may or may not undergo a medical transition.

Q - Queer - An umbrella term used by people who reject conventional categories such as LGBT or embrace a political identity as "queer" in addition to being LGB and/or T. It also may include straight or cisgender people who embrace a non-normative or counter-normative sexual identity. Offensive when used as an epithet.

Q - Questioning - A process of exploration for people who may be unsure of their sexual orientation or gender identity. Most often used when discussing youth.

I - Intersex - An umbrella term used to describe a wide range of natural bodily variations. Intersex people are born with sex characteristics that do not fit typical binary notions of bodies designated "male" or "female." In some cases, intersex traits are visible at birth, while in others they are not apparent until puberty. Some intersex variations may not be visibly apparent at all. Some people who are intersex identify as binary; others do not.

A - Asexual - Describes people who do not experience sexual attraction. Unlike celibacy, which denotes the purposeful abstention from sex that one would otherwise enjoy, asexuality is an intrinsic lack of interest in sexual activity. Many asexual people experience romantic and affectionate feelings towards others but do not desire to express those feelings in a sexual way. Other asexual people are uninterested in romantic relationships and focus instead on forming platonic bonds. Like any community, asexual people are diverse.

2-S - Two-spirit - A term that refers to historical and current First Nations or Native American people whose individual spirits blend male and female. This term has been reclaimed by some in Native American LGBT communities to honor their heritage and provide an alternative to the labels gay, lesbian, bisexual or transgender.

Note that there is not universal agreement on identity terminology and that some of these terms can still be used as slurs, but that it is important to recognize that even if you may be unfamiliar or uncomfortable with an identity, if someone tells you they identify as such and asks to be referred to as such, you should respect the person's right to self-determination and self-identification.

SLIDE #7

Explain the definitions of "sex assigned at birth" and "cisgender."

- **Sex assigned at birth** is the sex designation given to someone at birth, usually by a medical professional and generally based on appearance of external genitalia.
- **Cisgender** refers to people who have a gender identity that is the same as the sex they were assigned at birth.

Provide an example or examples to further explain sexual orientation, gender identity and gender expression. Examples could include: an individual who has a gender identity of female and a traditionally feminine gender expression, is exclusively attracted to other women and was assigned male at birth. She is likely a transgender woman who is a lesbian (although it's up to her to tell us what her identities are).

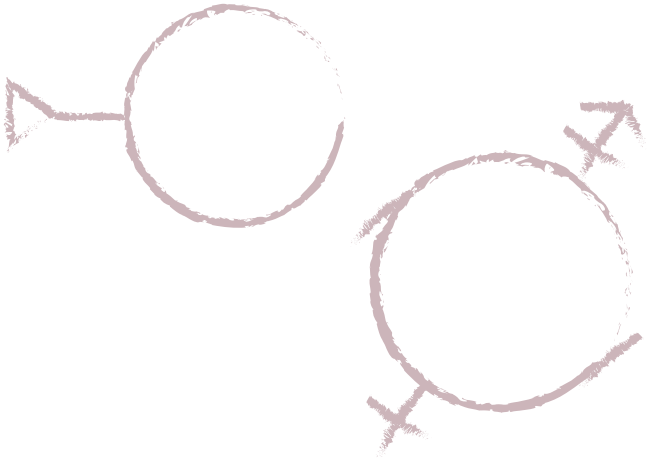
SLIDE #8

The Trans* Umbrella. Review the terms in this slide with the audience, explaining that the terms on top of the umbrella are identities that may or may not identify as trans. Under the umbrella on the left side are terms that are associated with non-binary identities, and on the right side are terms that are associated with binary trans identities.

Crossdresser - A person who wears clothing traditionally worn by members of a different sex. Crossdressers are often comfortable with the sex they were assigned at birth and do not wish to transition. While crossdressing is a form of gender expression, it is not necessarily tied to sexual orientation or erotic activity. Many crossdressers are heterosexual and/or cisgender.

Agender - Literally "without gender." Some agender people identify as having no gender and others with a non-binary identity.

Third Gender - Third gender or third sex is a concept in which individuals are categorized, either by themselves or by society, as neither man nor woman. It also describes a social category present in societies that recognize three or more genders.



Genderqueer – A term used by some people who identify their gender as being somewhere on the continuum between, or outside of, the binary gender system. Genderqueer people may or may not also identify as transgender. This should only be used if the individual identifies as genderqueer.

Gender-fluid – A term used by people who identify their gender as fluid within a spectrum of gender identities and expression.

Gender-nonconforming - A term used to describe people who do not meet society's expectations of gender roles. Not all gender-nonconforming people are transgender and not all transgender people are gender-nonconforming.

Non-binary - Describes gender identities that do not fit within the binary of male or female. Refers to a spectrum of gender.

They, Them, Ze, Hir, Xe, Xem are pronouns that some individuals use if they have gender identities that do not fit in with the binary of male or female.

Transsexual - An older term that originated in the medical and psychological communities. Still preferred by some people who have changed—or seek to change—their bodies through medical interventions (including but not limited to hormones and/or surgeries). Unlike transgender, transsexual is not an umbrella term, and many transgender people do not identify as transsexual.

MTF - Male to Female - Initials or phrase no longer considered appropriate to describe someone who is transgender, as it focuses on the sex assigned at birth and insinuates that a transgender person was a male who became a female, instead of a woman who was assigned the incorrect sex at birth. Some people still do use this term to describe themselves.

FTM - Female to Male - Initials or phrase no longer considered appropriate to describe someone who is transgender, as it focuses on the assigned sex at birth and insinuates that a transgender person was a female who became a male, instead of a male who was assigned the incorrect sex at birth. Some people still use this term to describe themselves.

MAAB or FAAB - Male Assigned at Birth or Female Assigned at Birth.

She, Her, He, Him - Binary pronouns used by many people who are female or male, respectively.

CULTURAL COMPETENCY

SLIDE #9 (10 minutes)

Ask participants: "How can learning about lesbian, gay, bisexual and transgender people increase access to justice, fair outcomes and trust being placed in the court and legal system?"

After taking two or three responses, explain that LGBT people and people living with HIV are involved in the legal system in many capacities. While a transgender person may access the courts for a name change, for instance, or a court order changing their sex designation, they may also be involved in family law cases, criminal cases, probate cases and many other kinds.

Next, emphasize that many LGBT people and people living with HIV report negative experiences in the courts. Empirical studies by judicial commissions and bar associations have found that bias related to sexual orientation, for instance, significantly and negatively impacted court users' court system experiences in California and New Jersey.[1]

Slides #10-14 Present selected data from *Protected and Served?*, Lambda Legal's 2012 survey

SLIDE #10 At Slide #10, explain that Lambda Legal conducted a survey in 2012 of 2,376 people who identified as one or more of: LGB, questioning, queer, same-gender-loving (a term, most often used in communities of color, to describe people with same-sex attractions), other sexual orientation, transgender, two-spirit, genderqueer, gender-nonconforming, other gender identity, HIV-positive. The findings presented are taken from this national survey.[2]

SLIDE #11 Review percentage of study respondents who heard negative comments about sexual orientation, gender identity, gender expression and HIV status in court. For instance, 19% of those surveyed heard a judge, attorney or other court employee make negative comments about a person's sexual orientation, gender identity or gender expression. And 6% heard negative comments about an individual's HIV status.

1. *See* Todd Brower, *Twelve Angry—And Sometimes Alienated—Men: the Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 Drake L. Rev. 669, 674 (Spring 2011) (examining empirical studies in California and New Jersey that evaluated the experiences of lesbians and gay men with the court system).
2. For more information about how the survey was conducted visit: https://www.lambdalegal.org/protected-and-served/summary#HOW THE SURVEY WAS CONDUCTED

SLIDE #12 Point out clearly that individuals with intersecting marginalized identities face bias and discrimination at higher rates. While 19% of all respondents heard negative comments, 28% of low-income people, 30% of people of color, 33% of transgender and gender nonconforming people, 53% of transgender and gender nonconforming people of color and 66% of transgender women responding to the survey heard negative comments about sexual orientation or gender identity in court.

SLIDE #13 Among court-involved respondents, 16% reported that their LGBT identity was raised in court when sexual orientation and gender identity were not relevant to the case;

11% reported that their sexual orientation or gender identity was made known in court against their will;

15% reported having their HIV status raised in court when it was not relevant to the case.

SLIDE #14 At Slide #14, point out that only 28% of transgender and gender non-conforming people surveyed "generally trust" the courts. Overall trust in the courts across survey respondents was lower than trust in the police.

Explain to participants that these findings support what is known anecdotally and what Lambda Legal and other organizations hear from Help Desk callers, namely that implicit and explicit bias and lack of understanding about LGBT people, HIV, gender identity and expression and sexual orientation remain serious issues impacting courts at all levels throughout the country.

EXPERIENCES OF LAMBDA LEGAL CLIENTS

SLIDE #15 **(2-3 minutes)**

- Tell the story of Daunn Turner to illustrate a specific example of a transgender person facing bias in the courts:

  While applying for a name change at the Will County, Illinois Courthouse, Daunn Turner, a transgender woman, was subjected to discrimination from the Chief Judge. She was denied a ruling on her request for the name change, denied a fee waiver based on her low-income status and, despite requests to be called either "Daunn" or "Miss Turner," was told that she would be referred to as "Mister" until she had "that surgery." When she asked the Chief Judge if she could appeal the decision, the Chief Judge claimed he was the final decision maker, and that she should ask for money from friends on her upcoming birthday to fund the court fees for a name change.

ICEBREAKER EXERCISE

SLIDE #16 (10-15 minutes including report-back)

Have participants break into pairs (or triads if there is an odd number of people). Ask participants to share their first memory of gender (e.g. being a gendered person, recognizing that a gender binary exists in the world, noticing societal distinctions or expectations based on gender, etc.).

Allow 2.5 minutes for each person to share a story with their partner. Provide participants with an indication of when they should switch stories and also give a 30-second wrap-up warning.

Ask for a volunteer who would like to share their memory/story with the group. Depending on time, take two or three volunteers and/or share your own story or memory.

Wrap up the exercise by asking if any participants want to share about the experience of going through this exercise. Were there any surprises or interesting takeaways?

Note: Participants often raise a wide range of memories or experiences including, but not limited to, toys, clothing, sports teams, gym class, bathrooms, genitalia, etc.

FOCUS ON GENDER IDENTITY & INTERSEX STATUS

SLIDES #17-29 (15-20 minutes)

SLIDE #17 Ask who in the room has a gender identity. Take a few responses and then explain that everyone in this room—cisgender, transgender, intersex—has a gender identity. You are the gender you know yourself to be, not because of your genitals but because of your gender identity. For most people it's aligned, so they haven't necessarily been aware of their gender identity, but that is why you are the gender you are too.

Reiterate that gender identity is a "spectrum" or "universe of possible identities." Note that the federal government recognized non-binary identities in the rule implementing section 1557 of the Affordable Care Act: "Gender identity means an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth. The way an individual expresses gender identity is frequently called 'gender expression,' and may or may not conform to social stereotypes associated with a particular gender. A transgender individual is an individual whose gender identity is different from the sex assigned to that person at birth."[3]

SLIDE #18 Explain that medical science has identified at least nine defining characteristics that inform or determine sex, including but not limited to:[4]

- Chromosomes (There are more than just xx and xy possibilities for human sex chromosomes, including x 0[single x] and xxy.)
- Gonads (testes or ovaries)
- External Morphologic Sex (external genitals, such as penis, clitoris, vulva)
- Internal Morphologic Sex (internal organs, such as uterus, vagina, Fallopian tubes, seminal vesicles, prostate)
- Fetal Hormones (prenatal hormones produced by gonads)
- Pubertal Hormones (explain that most people have testosterone and estrogen in varying degrees)
- Secondary sex characteristics (such as facial hair or breasts)
- Sex of assignment and rearing (the sex assigned at birth and that the individual was raised consistently with)
- Most importantly, the primary determinant of sex is **gender identity** or **brain sex**

Explain each one of these and highlight that science is confirming what transgender people have

3. 45 C.F.R§ 92.4 (2016).

4. Trainers should be familiar with, M. Dru Levasseur, Esq., Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights, 39 VT. L. REV. 943 (2015), http://lawreview.vermontlaw.edu/wp-content/uploads/2015/05/39-4-06_Levasseur.pdf. Trainer should also review some of the cases and other sources cited in this law review article such as: Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 ARIZ. L.REV. 265, 278 (1999), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896307 (listing seven medically recognized factors composing a person's gender, including "personal sexual identity"); Julie A. Greenberg & Marybeth Herald, You Can't Take It With You: Constitutional Consequences of Interstate Gender Identity Rulings, 80 WASH. L.REV. 819, 825–26 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=823764 (discussing eight factors that contribute to a person's sex, including gender identity). The nine determinants of sex, a number frequently used by advocates, comes from Dr. Walter Bockting's testimony in *Schroer v. Billington* (described in Gender Identity Defines Sex (citation above)), an employment discrimination case against the Library of Congress. These nine are: chromosomal sex, gonadal sex, fetal hormonal sex (prenatal hormones produced by the gonads), internal morphologic sex (internal genitalia, i.e., uterus, testes), external morphological sex (external genitalia, i.e., penis, clitoris, vulva), hypothalamic sex (i.e., sexual differentiations in brain development and structure), sex of assignment and rearing, pubertal hormonal sex and gender identity.

known from their own experience, that "brain sex" or what advocates refer to as "gender identity," one's deeply felt inner sense of being male, female or another gender, is the primary determinant of one's sex. Explain that research indicates gender identity is an immutable characteristic and has a biological basis.[5] Like so-called "conversion therapy" that is aimed at "changing" one's sexual orientation, therapies that have been aimed at changing a person's gender identity are inappropriate, ineffective and harmful.

SLIDE #19 Explain what "intersex" means. Explain that many people who are intersex have a gender identity that is the same as the sex they were assigned at birth. But others do not.

Intersex is not a gender identity. People who are intersex may be male, female or nonbinary. Some intersex people are transgender and some are cisgender.

- **Intersex** - An umbrella term used to describe a wide range of natural bodily variations. Intersex people are born with sex characteristics that do not fit typical binary notions of bodies designated "male" or "female." In some cases, intersex traits are visible at birth, while in others they are not apparent until puberty. Some intersex variations may not be visibly apparent at all. Many people who are intersex identify as either male or female; others do not.

SLIDE #20 On June 10, 2016, a Circuit Court Judge in Multnomah County, Oregon issued what is believed to be the first court order in the United States recognizing "non-binary" as the legal sex designation of an individual, to Jamie Shupe.[6] The second court order of this type issued in the U.S. was granted in California on September 26, 2016 to Sara Kelly Keenan, an intersex individual who uses female pronouns.[7] Recently, New York City issued Sara a birth certificate reflecting "intersex" in the box marked for sex designation.

Explain here that there are other countries that recognize sex designations outside of male and female. For example, in India transgender people have the right to legal recognition of their identity as male, female or third gender.[8] The third gender is generally called hijras. Hijras generally identify themselves as neither men nor women, though some may identify themselves as transgender women. Trainer can add more examples.

5. *See* Julie A. Greenberg & Marybeth Herald, You Can't Take It With You: Constitutional Consequences of Interstate Gender Identity Rulings, 80 WASH. L.REV. 819, 830-832 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=823764
6. https://thelawworks.wordpress.com/2016/06/10/oregon-judge-grants-sex-change-to-non-binary.
7. http://www.nbcnews.com/feature/nbc-out/californian-becomes-second-us-citizen-granted-non-binary-gender-status-n654611.
8. See, *National Legal Services Authority v. Union of India,* http://supremecourtofindia.nic.in/outtoday/wc40012.pdf.

SLIDE #21 Use the example of Lambda Legal's intersex client Dana Zzyym to explain one of the barriers intersex and nonbinary people can have to participating fully in society.[9] Dana was born with ambiguous sex characteristics, but Dana's parents and doctor decided to raise them as a boy and, as a child, Dana had irreversible and medically unnecessary surgeries. Because Dana does not identify as male or female, they were unable to obtain a passport to travel for the International Intersex Forum in Mexico City in 2014. Dana sought to have an "X" gender marker listed on their passport, a practice that is recognized by the International Civil Aviation Organisation, the UN agency that sets international travel document standards. Most countries that offer a third gender marker option use X for their passports. Dana was denied a passport with an "X," however, and was told they must choose either "male" or "female." Lambda Legal filed a complaint in the District of Colorado asserting that the U.S. State Department is violating the Due Process and Equal Protection clauses of the U.S. Constitution, as well as the federal Administrative Procedure Act, by denying Dana a passport that accurately reflects their gender.

SLIDES #22 & 23 Transition to a discussion of terms to avoid. The slides fully explain the terms and why they should be avoided.

SLIDE #24 Note that there is a shortage of data showing how many people in the U.S. are transgender.[10] Nonetheless, a June 2016 report from The Williams Institute (citation in footnote) estimates that 1.4 million people or 0.6% of the U.S adult population is transgender. A good source for information about the experiences of transgender individuals is the 2015 "U.S. Trans Survey" conducted by the National Center for Transgender Equality, which received responses from 27,715 transgender adults.[11]

SLIDE # 25 Define the term "gender dysphoria." Explain that if a court is addressing cases with issues that are specific to transgender people, this term may be used. Review statements by the American Psychological Association [12]and the American Medical Association[13] showing that treatments generally described as part of "gender transition" have been found to be medically necessary and appropriate for transgender people.

9. http://www.lambdalegal.org/in-court/cases/co_zzyym-v-kerry.
10. Flores, A.R., Herman, J.L., Gates, G.J., & Brown, T.N.T. (2016*). How Many Adults Identify as Transgender in the United States?* Los Angeles, CA: The Williams Institute, available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf
11. http://www.ustranssurvey.org/report
12. American Psychological Association, Resolution on Transgender, Gender Identity and Gender Expression Non-discrimination, August 2008, available at http://www.apa.org/about/policy/transgender.aspx
13. American Medical Association, Removing Financial Barriers to Care for Transgender Patients, Resolution 122 (A-08), available at http://www.tgender.net/taw/ama_resolutions.pdf

- **Gender dysphoria** - A clinical psychiatric diagnosis, first listed in the *DSM-V*, that describes an intense, continuous distress resulting from an individual's sense of the inappropriateness of their assigned sex at birth. In previous versions of the DSM, gender dysphoria was known as gender identity disorder (GID).

SLIDE #26

Explain what "**gender transition**" means.

"Transition" or "gender transition" describes the time when a person begins to living as the sex with which they identify rather than the sex they were assigned at birth. Transition **may or may not** include medical or legal aspects such as taking hormones, having surgeries or correcting the sex designation on identity documents. Social transition is the most important aspect for transgender people, and sometimes the only one. Social transition refers to a transgender person living socially as their true self, which may include such things as:

- Use of a different name
- Use of different pronouns
- Transformations of the physical appearance (e.g. wearing different clothing, adopting a different haircut)
- Use of a bathroom that corresponds with gender identity
- Other differences in social role, living situation, etc. (e.g. moving to a college dorm whose residents are members of the person's true sex)

SLIDE #27

Transition to addressing myths about transgender people. Explain that transgender people have individualized experiences: There is no one narrative. Some transgender people seek to medically transition by taking hormones or having surgeries or both. Some do not. Some transgender people socially transition by telling family and/or friends to use different pronouns or a different name when referring to them and this is the only transition they need. Explain that it is not appropriate to have a person's transgender status or their sex designation dependent upon a certain medical procedure.

SLIDE #28

Explain that not all transgender people need or want to have surgeries to bring their bodies in line with societal expectations of their gender identity. Transgender people must be respected as who they are, whether or not they have had medical procedures. It isn't appropriate to ask cisgender people about their genitals and it is not appropriate to ask transgender people about theirs. Unless the case is about health care or it is about issuing an order related to the individual's sex in a jurisdiction that requires information about medical procedures, it is not okay

to ask these questions. Explain that a person's transgender status has been established as private medical information protected by the U.S. Constitution. The Second Circuit held "the Constitution does indeed protect the right to maintain the confidentiality of one's transsexualism."[14]

SLIDE #29

VIDEO (7 minutes and 16 seconds)
Show Lambda Legal's "I Believe in Me" video featuring Donisha McShan. After the video is over, ask if there are questions or if anyone has anything they'd like to discuss.

14. *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) additionally the court said, ("[T]he excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond a doubt.").

TRAINER NOTES

FOCUS ON SEXUAL ORIENTATION

SLIDES #30-36 (15 minutes)

SLIDE #30 Transition to the concept of sexual orientation and reiterate that gender identity and sexual orientation are two distinct, but intersecting, aspects of human identity. Ask how many people think they have a sexual orientation? Explain that everyone has a sexual orientation, a romantic, physical or sexual attraction to same-sex or different-sex people or no attraction to anyone (asexual). The spectrums shown in the graphic show romantic and sexual orientations as separate orientations. Most people still use sexual orientation to describe their romantic attractions, but some people have romantic attractions that do not coincide with their sexual attractions or lack sexual attractions or romantic attractions completely.

SLIDE #31 Explain that the best estimates have found that approximately 3.5% of adults in the United States identify as lesbian, gay or bisexual. This is over 8 million adults.[15] As of October 2015, 486,000 same-sex couples were married, or 45% of all same-sex couples.[16]

SLIDE #32 Review what terminology to avoid. Explain that "homosexual" is an outdated and clinical term and that "gay" or "lesbian" is preferable to use for someone who identifies as having exclusively same-sex attraction. Also note that language changes and evolves. Note that this training is merely providing a baseline for terminology to be used or avoided. There are differences of opinion regarding all terminology, and individuals may differ in the language they use to explain their identities and the definition they give to those terms. Explain that some people may use certain terms to describe themselves that they do not wish others to use. It is important to use the language that someone wishes you to use.

EXPERIENCES OF LGBT PEOPLE IN THE COURTS

SLIDE# 33 Discuss custody, adoption and immigration cases as examples of where bias toward LGBT people can create real harms in court. Focus on bisexual individuals and how attitudes toward their sexual orientation have caused harms in these types of cases. [17]

15. Gates, G.J. (2011). *How many people are lesbian, gay, bisexual, and transgender?* Los Angeles, CA: The Williams Institute, available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf

16. Gates, G. J., Brown, T. N. T. 2015. Marriage and Same-sex Couples after *Obergefell*. Los Angeles, CA: Williams Institute, UCLA School of Law. http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/marriage-and-same-sex-couples-after-obergefell/

17. *See,* Nancy C. Marcus, *Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation,* 22 Mich. J. Gender & L. 291 (316-318). Available at: http://repository.law.umich.edu/mjgl/vol22/iss2/2. This section and examples are taken from this journal article.

Custody and Adoption - A Mississippi Court of Appeals held: "[I]n addition to the mother's bisexual lifestyle, the chancellor was disturbed at the mother's lack of financial and emotional stability. He was extremely concerned that the mother quit a well-paying full time job to move to Gulfport to start a business. The chancellor was most impressed with the father's ability to provide a stable environment for his daughter in the form of an established home in which she would have her own bedroom and would be living in a traditional family environment. As in *Weigand* and *Thompson*, although the morality of the mother's lifestyle was one important factor to the chancellor's decision, it was not the sole factor; thus, there was no clear error and the chancellor did not abuse his discretion in awarding custody to the father."[18]

Immigration - In *Garcia-Jaramillo v. INS*, the immigration board rejected a man's marriage as a sham marriage after asking "an inordinate number of questions concerning [his] homosexuality" and found that because of his past homosexual inclinations, his opposite-sex marriage must be a sham. The immigration board never addressed the possibility that the man might be bisexual.[19]

SLIDE #34 Discuss Alabama Supreme Court Chief Justice Roy Moore's concurring opinion in Ex Parte H.H. In Re: D.H v. H.H.[20] D.H., the mother of three children, agreed that the father of the children would have primary custody following their divorce and the relocation of the father to Alabama. Later D.H. petitioned to modify custody, the trial court denied the motion and the Court of Civil Appeals reversed the trial court's order. The mother's same-sex relationship was an issue at all stages of the case. This case went all the way to the Supreme Court of Alabama, where Justice Roy Moore wrote a concurring opinion "specifically to state that the homosexual conduct of a parent—conduct involving a sexual relationship between two persons of the same gender—creates a strong presumption of unfitness that alone is sufficient justification for denying that parent custody of his or her own children or prohibiting the adoption of the children of others." Additional language from the opinion includes: "Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated. Such conduct violates both the criminal and civil laws of this State and is destructive to a basic building block of society—the family. It is an inherent evil against which children must be protected."

Encourage participants to think about the impact of having a judge who has already denied the request before them to write separately about their family and their ability to raise their children based on their sexual orientation alone.

18. *S.B. v. L.W.*, 793 So. 2d 656, 661 (Miss. Ct. App. 2001).
19. *Garcia-Jaramillo v. INS*, 604 F.2d 1236 (9th Cir. 1979).
20. *Ex Parte H.H. In Re: D.H v. H.H.,* 830 So.2d 21(2002), http://caselaw.findlaw.com/al-supreme-court/1303306.html

SLIDE #35

RECAP AND INTERSECTIONS OF GENDER AND SEXUAL ORIENTATION

Ask participants to explain each term. Ask for examples of sexual orientations you have covered. Ask how they correlate with each other. Explain that one's gender identity or gender expression does not determine one's sexual orientation and reiterate that these are distinct aspects of human identity. They intersect in the sense that a person of any gender identity and with any gender expression can have any sexual orientation. Give examples such as a transgender lesbian woman or a cisgender straight man whose gender expression may be perceived as feminine by mainstream social definitions. Remind participants once again at this point that one's anatomy does not define one's gender identity or one's sexual orientation. Reiterate that none of us know anyone's identity until and unless they tell us. Our perceptions and assumptions may be correct or incorrect and we should always respect each person's identity (including name, pronouns, etc.) according to what they tell us it is.

SLIDE #36-43

ETHICAL CONSIDERATIONS

Review the Model Rules of Judicial Conduct and the Model Rules of Professional Conduct that relate to bias and discrimination, if appropriate for the audience. You may want to skip this if you're using codes and rules that are specific to the jurisdiction. If a jurisdiction does not have codes that are as inclusive as the Model Code and Model Rules, you may want to review these instead and point out that the jurisdiction is falling behind national standards. However, even if they are not as explicit as the Model Code or Rules, clarify that all ethical guidelines that require impartiality—or refraining from conduct that prejudices the administration of justice—include within their meaning a prohibition of bias or prejudice.

Depending on the audience, it may be helpful to bring printed copies of relevant judicial canons, ethical codes for attorneys and rules for court personnel from the jurisdiction where the training is taking place. Read aloud relevant sections of codes, rules and/or canons to participants (again depending on audience). You may wish to add information about ethical rules of the particular jurisdiction to Slide #43.

Emphasize that judges have an ethical duty to ensure that everyone in their courtroom treats all court users with fairness, dignity, courtesy and respect and that court officers may not treat court users with bias, discrimination or disrespect. Stress that attorneys have an ethical responsibility to avoid manifesting bias or prejudice in the course of representing a client, including on the basis of sex or sexual orientation. Lambda Legal's "Know Your Rights in Court" provides information on how to file a complaint against a judge, http://www.lambdalegal.org/know-your-rights/in-court/complaint-against-judge. Individuals can also call Lambda Legal's Help Desk if they experience bias or discrimination in the courtroom, http://www.lambdalegal.org/help. This section of the website also has links to each state's judicial canons and professional ethical codes for attorneys, http://www.lambdalegal.org/know-your-rights/in-court-resources/in-court/incourts.

TRAINER NOTES

COURT SCENARIOS

Exercise and Discussion

(30 minutes total for full discussions within small groups and with the larger group as well)

SLIDE #44 It is most useful to provide scenarios that relate to the particular experience of the audience you are training. The scenarios in Appendix A can be used as is or modified to make them more specific and more engaging for the particular audience. Provide various scenarios to pairs, triads or small groups, depending on the size of the audience. Try to match scenarios to participants' roles in the courthouse if possible, although this won't always be practical, depending on size of the group. It can also be helpful to have participants think about a scenario from the perspective of different people involved in the scenario.

Ask for a volunteer from each group to report back on each of the scenarios.

Scenarios are included in Appendix A at the end of this document, one per page for easy printing.

Guide the conversation into a dialogue about best practices according to the participants' responses.

BEST PRACTICES

SLIDES #45-57 (10-15 minutes)

SLIDE #45 Explain that best practices in court or in legal offices require thinking about each step of the process and how it could impact LGBT people and people living with HIV.

SLIDE #46 Explain that explicit bias and disrespect must be responded to immediately.

SLIDES #47 & #48 Affirming gender means using the pronouns that the court user designates. Make sure not to address this in a public forum. There is nothing that prevents the use of pronouns that do not correspond with what is listed on someone's identity documents. It is modern judicial practice for courts to routinely use correct names and pronouns for transgender litigants.[21] Explain ways to avoid using gendered language and dress codes.

SLIDE #49 Affirming name in use. Explain that it is best practice and a part of ensuring that court users are treated fairly and respectfully to refer to the names they are using (also called preferred names), even if these are not legal names. Explain that if a transgender person has had a legal name change, it must be used and respected. This does not always happen. Explain that not only is it disrespectful to address people by incorrect names and pronouns, it can also create an atmosphere that contributes to unlawful harassment or discrimination by others.

SLIDES #50 - #54 Review best practices information in the slides.[22]

SLIDE #55 Discuss transgender individuals' right to access restrooms consistent with their gender identity. Discuss nondiscrimination laws in jurisdictions that require this such as Iowa, Colorado and Maine and any laws specific to the jurisdiction.[23] The trainer should briefly discuss the *Lusardi* case, an Equal Employment Opportunity Commission ruling that now requires employers to allow transgender employees to use the restrooms consistent with their gender identity.[24]

SLIDE #56 Wrap up before questions by bringing participants back to why these best practices are important: Disrespect and bias impact access to the courts. When people do not have trust in the court to be able to fairly judge them because of who they are, everyone loses.

21. Here are some citations that can be used in training if desired: *Carman v. Colvin*, 2016 WL 4153613 (N.D. Iowa Aug. 4, 2016) (at *1, noting that the "claimant identifies as a person of transgender status. . . . [C]ourt respectfully honors this request and from this point forth will refer to claimant using only female pronouns.") (at FN 4, " All of these professionals, with the exception of social worker Ivy Clausen, used male pronouns in referring to claimant. The court has adjusted these references to reflect a female pronoun."); *United States v. Bradley E. Manning*, United States Army Court of Criminal Appeals, Army 20130739 (Mar. 4, 2015) (ordering that feminine or gender neutral pronouns must be used going forward in the case) http://www.chelseamanning.org/wp-content/uploads/2015/03/Order_030515.pdf; *Lonnie Clark Williams Jr. v. Paramo*, 775 F.3d 1182, at FN 1 (9th Cir. Jan. 5, 2015) ("Williams identifies as a transgender woman, and we refer to her as a woman even though she is classified as male in the prison records."; *De'Lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013) (Plaintiff was an incarcerated transgender woman. Court used female pronouns to refer to her in the order.); *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011) (Plaintiff was a transgender woman civilly committed to a treatment center. Court used female pronouns to refer to her in the order.); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (Plaintiff was a transgender woman who brought a Title VII employment discrimination claim against employer. Court used female pronouns throughout order.) There are many others that can be provided if assistance is needed for your particular jurisdiction.
22. For additional information related to the best practices on these slides see http://www.lambdalegal.org/know-your-rights/in-court/faq and http://www.lambdalegal.org/protected-and-served/courts (Key Recommendations section).
23. See, *Transgender Rights Toolkit: Equal Access to Public Restrooms*, http://www.lambdalegal.org/sites/default/files/2015_equal-access-to-public-restrooms-fs-v5.pdf
24. *Lusardi v. Dep't of the Army,* https://www.eeoc.gov/decisions/0120133395.txt

Q&A AND CLOSING

Questions and answers, optional terminology exercise and training feedback (see Appendix B and C).

SLIDE #57

Close with enough time to field any remaining questions.

ADDITIONAL RESOURCES FOR TRAINERS AND PARTICIPANTS:

The Report of the 2015 U.S. Transgender Survey. National Center for Transgender Equality, available at www.ustranssurvey.org/report

Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care, Children's Rights, Lambda Legal and Center for the Study of Social Policy, available at www.lambdalegal.org/publications/safe-havens

Transgender Rights Toolkit: A Legal Guide for Trans People and Their Advocates, Lambda Legal, available at www.lambdalegal.org/publications/trans-toolkit

Tips for Lawyers Working with Transgender Clients or Coworkers, Transgender Law Center, available at transgenderlawcenter.org/resources/employment/tips-for-lawyers-working-with-transgender-clients-and-coworkers

Tips for Communicating with Transgender Clients in Prisoners' Rights Cases, Sylvia Rivera Law Project, available at srlp.org/resources/tips-for-communicating-with-transgender-clients-in-prisoners-rights-cases/

Resources: Legal Issues and Decisions, InterACT, available at interactadvocates.org/resources/intersex-resource-topics/legal-issues-and-decisions/

APPENDIX A

Scenarios

Trainers should direct participants to form small groups in order to review and discuss the following courtroom scenarios. Provide each group with a scenario and let participants know they will report back to the larger group after the discussion. See page 25 for further instructions.

SCENARIO ONE

A judge who was appointed to the bench three months ago is sitting in the courtroom finishing a few things at the conclusion of a docket. While the judge is reading, she overhears several court officers discussing a colleague. At one point she hears an officer say, "He is gay. I know he is. These gays think they can do whatever they want now. I wish things could go back to the way they were, when we didn't have to hear anything about gays. I don't want to know about it." The judge does not acknowledge these comments in any way. She continues her work. She believes that the court officers are testing her because they know she has a son who is gay. The judge believes the only other people in the courtroom are a court reporter and clerk. She doesn't know if the others heard the comments.

What is the judge's ethical responsibility in this circumstance?

_____

What would be an appropriate response from the judge?

_____

What are some of the reasons the judge should address this statement by the court officer?

_____

_____

What may be the impact if she doesn't address this?

_____

Take a moment to discuss what the other individuals present may feel in this situation.

_____

_____

SCENARIO TWO

A litigant is in court in front of a judge for the first time. The judge says, "Good morning, sir" to the litigant. The litigant corrects the judge, saying, "It's ma'am, your honor."

How should the judge handle this situation?

If there are attorneys representing the litigant and the opposing party, how should they handle this situation?

How could this have been avoided?

Who could have taken the actions to prevent this?

SCENARIO THREE

During jury selection, attorney for the plaintiff and attorney for the defendant question potential jurors in the presence of a judge. One attorney regularly asks jurors if they are married. As a follow-up question for those that answer "yes," the attorney asks female jurors, "What does your husband do for work?" The attorney asks male jurors, "What does your wife do for work?"

How might all of these questions fail to get to the answers the attorney is looking for?

_____

_____

What may this type of questioning lead potential jurors to feel they must disclose to other potential jurors, the judge or court staff?

_____

_____

_____

Why may that be problematic?

_____

_____

How may these questions make potential jurors feel?

_____

_____

What are potential ways to reframe these questions that get the answers needed?

_____

_____

_____

SCENARIO FOUR

An attorney is representing clients at arraignment hearings in criminal court. As the attorney begins to discuss the case with the new client, the client says, "You should know that I am transgender."

What questions should the attorney ask the client at this initial interview?

Since this may be a very short initial interview, what may the attorney need to follow up on at the next available opportunity to speak with the client?

What information may the attorney need to bring to the attention of the court and the prosecuting attorney?

How should the attorney bring this information to the court and prosecuting attorney? What should the attorney consider before doing this?

SCENARIO FIVE

A judge begins a hearing on a juvenile delinquency matter and calls the parties on the case, including the parents of the child, to come to the front of the courtroom. With the child comes a woman that the judge recognizes as the child's mother from an earlier hearing. Another woman comes to the front with the mother and child that the judge does not recognize. The judge says, "I just want the child and the parents here at this time. You can take a seat for now. Thank you." The woman is also the child's mother.

How may the judge have handled this situation in the moment to have prevented the other mother from being excluded?

What practices could be put in place to prevent this situation from occurring at all?

Who in the courtroom could help implement these practices?

SCENARIO SIX

A transgender woman calls the court clerk's office to determine how she can obtain additional copies of the final order granting her name change. She says, "Hello, my name is Angela Smith. I'm trying to find out how I can get more copies of my name change order." The clerk that answers the phone asks for her previous name, because Ms. Smith doesn't have the case number available, and the court categorizes these cases by the legal name before the name change is granted. Ms. Smith's previous name was a traditionally male name. Once the clerk hears the previous name and pulls up the files, the clerk says, "Hold on, Mr. Smith. Let me find someone who can answer your question." Ms. Smith says, "Oh, I'm Ms. Angela Smith. Thank you." When the next person answers the phone they say, "How can I help you, sir?" Ms. Smith says, "This is Ms. Angela Smith. I'm female." In the background she can hear people laughing. The clerk lets her know how to obtain additional copies of her name change order. After the call, Ms. Smith is upset. She feels that the court employees were intentionally using the wrong pronouns and honorifics. She also feels that the court employees were talking to each other about her and this is why they were laughing.

How could the court employees have handled this differently?

_____

_____

_____

What protocols could be put in place to prevent this from happening? Think about this starting from when the name change case initiated all the way through to this post-hearing request.

_____

_____

_____

What if the employees weren't laughing at Ms. Smith at all? How does the appearance of bias impact court users?

_____

_____

_____

APPENDIX B

Additional Activity

TERMINOLOGY EXERCISE (around 15 minutes with some discussion)

This can be used to add more interaction with the group. It can also be used as a type of pre-test to gauge the participants' knowledge of the subject area.

The trainer will explain that the training will use many terms regarding LGBT people that may be unfamiliar to the participants. The trainer will also explain that using correct and respectful language is an integral part of cultural competence. The trainer will hand out the LGBT Cultural Competency Terminology Activity Sheet and provide 5-7 minutes for participants to complete it, stressing that participants aren't expected to know all the terminology. The training is meant to cover the definitions. After 5-7 minutes, trainer should go through the answers to the activity sheet and then allow for any questions or discussion related to the activity.

TRAINER NOTES

TERMINOLOGY HANDOUT

Please take a few minutes to fill in the blanks to the best of your knowledge.

Do not feel pressured as we will go over this together as a group.

The purpose of this activity is to learn the definitions to the various terms that are most commonly used. Please note that some terms may change over time.

We greatly appreciate your time and participation.

Please use these terms to fill in the blanks below:

Sexual orientation Transgender man Gender-nonconforming
Transgender Gender expression Sex assigned at birth Gender identity
Gender queer Lesbian Cisgender Bisexual Transgender women
Transgender Queer/Questioning Gay

1. What does LGBTQ stand for? _____, _____, _____, _____, _____.

2. _____ means behaving in a way that does not match social stereotypes about female or male gender, usually through dress or physical appearance.

3. _____ refers to people who have a gender identity that is the same as the sex they were assigned at birth.

4. _____ refers to the way a person expresses gender through dress, grooming habits, mannerisms, activities, etc.

5. _____ refers to who a person is physically and emotionally attracted to.

6. _____ is a person's inner sense of being a man, a woman, both or neither.

7. _____ is an umbrella term encompassing many persons across the gender spectrum, but particularly those who feel their sex assigned at birth does not match their gender identity.

8. _____ is a term used to refer to the classification of an individual as female, male or intersex generally based only on external genitalia.

9. _____ _____ is a term used by some people who may or may not identify as transgender, but who identify their gender as somewhere on the continuum beyond the binary male/female gender system.

10. _____ is a term used to describe individuals who were assigned the male sex at birth but who are female.

11. _____ is a term used to identify a person who was assigned the female sex at birth but who is male.

APPENDIX C

EVALUATION FORM FOR TRAINING PARTICIPANTS

Trainer should provide the evaluation form below to each participant after the training.

MOVING BEYOND BIAS

Ensuring Access to Justice for LGBT People

PLEASE GIVE US YOUR FEEDBACK!

1. As a result of attending this session, I now have a better understanding of the various terms listed below. Please circle the number that best represents your understanding of each term based on a scale of 1-10 (1 = does not understand term at all; 10 = fully understands.)

   a. Gender Identity

   1 2 3 4 5 6 7 8 9 10

   b. Gender Expression

   1 2 3 4 5 6 7 8 9 10

   c. Sexual Orientation

   1 2 3 4 5 6 7 8 9 10

   d. On a scale of 1-10, I now have a better idea of how LGBT people, people living with HIV and gender-nonconforming people can or might have faced discrimination in the courts.

   1 2 3 4 5 6 7 8 9 10

   e. This session contributed directly to understanding of certain professional responsibilities and ethical obligations. Please circle one of the following choices below.

      a. Strongly Agree
      b. Agree
      c. Indifferent
      d. Disagree

e. Strongly Disagree

2. This session will help promote effective court practices and procedures. Please circle one of the following choices below.

   a. Strongly Agree
   b. Agree
   c. Indifferent
   d. Disagree
   e. Strongly Disagree

3. This session will help promote fairness, integrity and impartiality in the court system by furthering the elimination of bias and prejudice. Please circle one of the following choices below.

   a. Strongly Agree
   b. Agree
   c. Indifferent
   d. Disagree
   e. Strongly Disagree

4. What other topical areas would you like our Continuing Judicial Education or CLEs to cover?

_____

5. Are you leaving this session today with any other outstanding questions that did not get answered? If so, please write your question(s) below.

_____

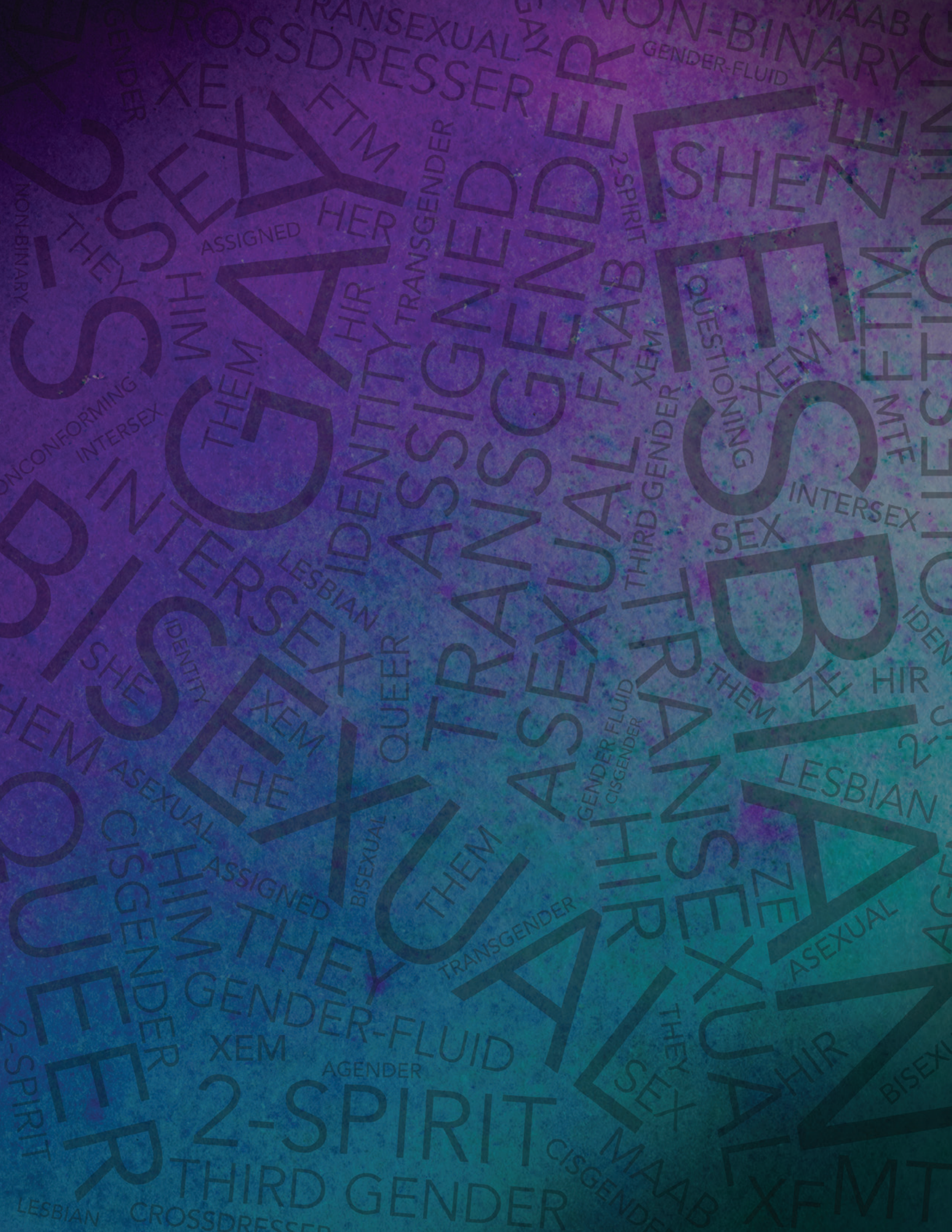
_____

6. Please write any additional feedback, comments or suggestions on the presentation (including format, content, and facilitator).

_____

_____

Participants: Please return this form to the presenter at the end of the program. Presenters: Please send a copy of this evaluation to erice@lambdalegal.org or by mail to Ethan Rice, Fair Courts Project Attorney, Lambda Legal, 120 Wall Street, 19th Floor, New York, NY 10005.


SEXUAL
QUEER
TRANSGENDER
ASEXUAL
BISEXUAL
2-SPIRIT
INTERSEX
NON-BINARY
GENDER-FLUID
CISGENDER
THIRD GENDER
AGENDER
CROSSDRESSER
LESBIAN
THEY
HIM
HER
HIR
ZE
XEM
FTM
MTF
FAAB
MAAB
SEX
QUESTIONING
ASSIGNED
IDENTITY
PANSEXUAL
TRANSSEXUAL
GENDER-QUEER
NON-CONFORMING

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MASTERPIECE CAKESHOP, LTD., ET AL. *v.* COLORADO CIVIL RIGHTS COMMISSION ET AL.

CERTIORARI TO THE COURT OF APPEALS OF COLORADO

No. 16–111. Argued December 5, 2017—Decided June 4, 2018

Masterpiece Cakeshop, Ltd., is a Colorado bakery owned and operated by Jack Phillips, an expert baker and devout Christian. In 2012 he told a same-sex couple that he would not create a cake for their wedding celebration because of his religious opposition to same-sex marriages—marriages that Colorado did not then recognize—but that he would sell them other baked goods, *e.g.,* birthday cakes. The couple filed a charge with the Colorado Civil Rights Commission (Commission) pursuant to the Colorado Anti-Discrimination Act (CADA), which prohibits, as relevant here, discrimination based on sexual orientation in a "place of business engaged in any sales to the public and any place offering services . . . to the public." Under CADA's administrative review system, the Colorado Civil Rights Division first found probable cause for a violation and referred the case to the Commission. The Commission then referred the case for a formal hearing before a state Administrative Law Judge (ALJ), who ruled in the couple's favor. In so doing, the ALJ rejected Phillips' First Amendment claims: that requiring him to create a cake for a same-sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion. Both the Commission and the Colorado Court of Appeals affirmed.

Held: The Commission's actions in this case violated the Free Exercise Clause. Pp. 9–18.

(a) The laws and the Constitution can, and in some instances must, protect gay persons and gay couples in the exercise of their civil rights, but religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. See *Obergefell* v. *Hodges*, 576 U. S. ___, ___. While it is unexceptional

that Colorado law can protect gay persons in acquiring products and services on the same terms and conditions as are offered to other members of the public, the law must be applied in a manner that is neutral toward religion. To Phillips, his claim that using his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation, has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. His dilemma was understandable in 2012, which was before Colorado recognized the validity of gay marriages performed in the State and before this Court issued *United States* v. *Windsor*, 570 U. S. 744, or *Obergefell*. Given the State's position at the time, there is some force to Phillips' argument that he was not unreasonable in deeming his decision lawful. State law at the time also afforded storekeepers some latitude to decline to create specific messages they considered offensive. Indeed, while the instant enforcement proceedings were pending, the State Civil Rights Division concluded in at least three cases that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. Phillips too was entitled to a neutral and respectful consideration of his claims in all the circumstances of the case. Pp. 9–12.

(b) That consideration was compromised, however, by the Commission's treatment of Phillips' case, which showed elements of a clear and impermissible hostility toward the sincere religious beliefs motivating his objection. As the record shows, some of the commissioners at the Commission's formal, public hearings endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, disparaged Phillips' faith as despicable and characterized it as merely rhetorical, and compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. No commissioners objected to the comments. Nor were they mentioned in the later state-court ruling or disavowed in the briefs filed here. The comments thus cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case.

Another indication of hostility is the different treatment of Phillips' case and the cases of other bakers with objections to anti-gay messages who prevailed before the Commission. The Commission ruled against Phillips in part on the theory that any message on the requested wedding cake would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the cases involving requests for cakes depicting anti-gay marriage symbolism. The Division also considered that each bakery was willing to sell other products to the prospective customers, but the Commission found Phillips' willingness to do the same irrelevant. The State Court of

Syllabus

Appeals' brief discussion of this disparity of treatment does not answer Phillips' concern that the State's practice was to disfavor the religious basis of his objection. Pp. 12–16.

(c) For these reasons, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. The government, consistent with the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520. Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.*, at 540. In view of these factors, the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of his religious beliefs. The Commission gave "every appearance," *id.*, at 545, of adjudicating his religious objection based on a negative normative "evaluation of the particular justification" for his objection and the religious grounds for it, *id.*, at 537, but government has no role in expressing or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. The inference here is thus that Phillips' religious objection was not considered with the neutrality required by the Free Exercise Clause. The State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. But the official expressions of hostility to religion in some of the commissioners' comments were inconsistent with that requirement, and the Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. Pp. 16–18.

370 P. 3d 272, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, ALITO, KAGAN, and GORSUCH, JJ., joined. KAGAN, J., filed a concurring opinion, in which BREYER, J., joined. GORSUCH, J., filed a concurring opinion, in which ALITO, J., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 16–111

MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS *v.* COLORADO CIVIL RIGHTS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 4, 2018]

JUSTICE KENNEDY delivered the opinion of the Court.

In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop's owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages—marriages the State of Colorado itself did not recognize at that time. The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.

The Commission determined that the shop's actions violated the Act and ruled in the couple's favor. The Colorado state courts affirmed the ruling and its enforcement order, and this Court now must decide whether the Commission's order violated the Constitution.

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek

goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.

One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.

The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.

Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality. The reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions. The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might

have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause; and its order must be set aside.

I

A

Masterpiece Cakeshop, Ltd., is a bakery in Lakewood, Colorado, a suburb of Denver. The shop offers a variety of baked goods, ranging from everyday cookies and brownies to elaborate custom-designed cakes for birthday parties, weddings, and other events.

Jack Phillips is an expert baker who has owned and operated the shop for 24 years. Phillips is a devout Christian. He has explained that his "main goal in life is to be obedient to" Jesus Christ and Christ's "teachings in all aspects of his life." App. 148. And he seeks to "honor God through his work at Masterpiece Cakeshop." *Ibid.* One of Phillips' religious beliefs is that "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman." *Id.*, at 149. To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.

Phillips met Charlie Craig and Dave Mullins when they entered his shop in the summer of 2012. Craig and Mullins were planning to marry. At that time, Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception for their family and friends in Denver. To prepare for their celebration, Craig and Mullins visited the shop and told Phillips that they were interested in ordering a cake for "our wedding." *Id.*, at 152 (emphasis deleted). They did not mention the design of the cake they envisioned.

Phillips informed the couple that he does not "create" wedding cakes for same-sex weddings. *Ibid.* He explained, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings." *Ibid.* The couple left the shop without further discussion.

The following day, Craig's mother, who had accompanied the couple to the cakeshop and been present for their interaction with Phillips, telephoned to ask Phillips why he had declined to serve her son. Phillips explained that he does not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage, and also because Colorado (at that time) did not recognize same-sex marriages. *Id.*, at 153. He later explained his belief that "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into." *Ibid.* (emphasis deleted).

B

For most of its history, Colorado has prohibited discrimination in places of public accommodation. In 1885, less than a decade after Colorado achieved statehood, the General Assembly passed "An Act to Protect All Citizens

in Their Civil Rights," which guaranteed "full and equal enjoyment" of certain public facilities to "all citizens," "regardless of race, color or previous condition of servitude." 1885 Colo. Sess. Laws pp. 132–133. A decade later, the General Assembly expanded the requirement to apply to "all other places of public accommodation." 1895 Colo. Sess. Laws ch. 61, p. 139.

Today, the Colorado Anti-Discrimination Act (CADA) carries forward the state's tradition of prohibiting discrimination in places of public accommodation. Amended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation as well as other protected characteristics, CADA in relevant part provides as follows:

> "It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." Colo. Rev. Stat. §24–34–601(2)(a) (2017).

The Act defines "public accommodation" broadly to include any "place of business engaged in any sales to the public and any place offering services . . . to the public," but excludes "a church, synagogue, mosque, or other place that is principally used for religious purposes." §24–34–601(1).

CADA establishes an administrative system for the resolution of discrimination claims. Complaints of discrimination in violation of CADA are addressed in the first instance by the Colorado Civil Rights Division. The Division investigates each claim; and if it finds probable cause that CADA has been violated, it will refer the matter to the Colorado Civil Rights Commission. The Commission,

in turn, decides whether to initiate a formal hearing before a state Administrative Law Judge (ALJ), who will hear evidence and argument before issuing a written decision. See §§24–34–306, 24–4–105(14). The decision of the ALJ may be appealed to the full Commission, a seven-member appointed body. The Commission holds a public hearing and deliberative session before voting on the case. If the Commission determines that the evidence proves a CADA violation, it may impose remedial measures as provided by statute. See §24–34–306(9). Available remedies include, among other things, orders to cease-and-desist a discriminatory policy, to file regular compliance reports with the Commission, and "to take affirmative action, including the posting of notices setting forth the substantive rights of the public." §24–34–605. Colorado law does not permit the Commission to assess money damages or fines. §§24–34–306(9), 24–34–605.

C

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips in August 2012, shortly after the couple's visit to the shop. App. 31. The complaint alleged that Craig and Mullins had been denied "full and equal service" at the bakery because of their sexual orientation, *id.*, at 35, 48, and that it was Phillips' "standard business practice" not to provide cakes for same-sex weddings, *id.*, at 43.

The Civil Rights Division opened an investigation. The investigator found that "on multiple occasions," Phillips "turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception" because his religious beliefs prohibited it and because the potential customers "were doing something illegal" at that time. *Id.*, at 76. The investigation found that Phillips had declined to sell custom wedding cakes to about six other

same-sex couples on this basis. *Id.*, at 72. The investigator also recounted that, according to affidavits submitted by Craig and Mullins, Phillips' shop had refused to sell cupcakes to a lesbian couple for their commitment celebration because the shop "had a policy of not selling baked goods to same-sex couples for this type of event." *Id.*, at 73. Based on these findings, the Division found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission. *Id.*, at 69.

The Commission found it proper to conduct a formal hearing, and it sent the case to a State ALJ. Finding no dispute as to material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple's favor. The ALJ first rejected Phillips' argument that declining to make or create a wedding cake for Craig and Mullins did not violate Colorado law. It was undisputed that the shop is subject to state public accommodations laws. And the ALJ determined that Phillips' actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage as Phillips contended. App. to Pet. for Cert. 68a–72a.

Phillips raised two constitutional claims before the ALJ. He first asserted that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed. The ALJ rejected the contention that preparing a wedding cake is a form of protected speech and did not agree that creating Craig and Mullins' cake would force Phillips to adhere to "an ideological point of view." *Id.*, at 75a. Applying CADA to the facts at hand, in the ALJ's view, did not interfere with Phillips' freedom of speech.

Phillips also contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First

Amendment. Citing this Court's precedent in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), the ALJ determined that CADA is a "valid and neutral law of general applicability" and therefore that applying it to Phillips in this case did not violate the Free Exercise Clause. *Id.*, at 879; App. to Pet. for Cert. 82a–83a. The ALJ thus ruled against Phillips and the cakeshop and in favor of Craig and Mullins on both constitutional claims.

The Commission affirmed the ALJ's decision in full. *Id.*, at 57a. The Commission ordered Phillips to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples." *Ibid.* It also ordered additional remedial measures, including "comprehensive staff training on the Public Accommodations section" of CADA "and changes to any and all company policies to comply with . . . this Order." *Id.*, at 58a. The Commission additionally required Phillips to prepare "quarterly compliance reports" for a period of two years documenting "the number of patrons denied service" and why, along with "a statement describing the remedial actions taken." *Ibid.*

Phillips appealed to the Colorado Court of Appeals, which affirmed the Commission's legal determinations and remedial order. The court rejected the argument that the "Commission's order unconstitutionally compels" Phillips and the shop "to convey a celebratory message about same sex marriage." *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 283 (2015). The court also rejected the argument that the Commission's order violated the Free Exercise Clause. Relying on this Court's precedent in *Smith*, *supra*, at 879, the court stated that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability" on the ground that following the law would interfere with religious practice or belief. 370 P. 3d, at 289. The

court concluded that requiring Phillips to comply with the statute did not violate his free exercise rights. The Colorado Supreme Court declined to hear the case.

Phillips sought review here, and this Court granted certiorari. 582 U. S. ___ (2017). He now renews his claims under the Free Speech and Free Exercise Clauses of the First Amendment.

II

A

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell* v. *Hodges*, 576 U. S. ___ (2015), "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Id.*, at ___ (slip op., at 27). Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. See *Newman* v. *Piggy Park Enterprises, Inc.*, 390 U. S. 400, 402, n. 5 (1968) (*per curiam*); see also *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 572 (1995) ("Provisions like these are well within the State's usual power to enact when a legislature has reason to

believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments").

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law. See Tr. of Oral Arg. 4–7, 10.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in

his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Phillips' dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of service all occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages performed in its own State. See Colo. Const., Art. II, §31 (2012); 370 P. 3d, at 277. At the time of the events in question, this Court had not issued its decisions either in *United States* v. *Windsor*, 570 U. S. 744 (2013), or *Obergefell*. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.

At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. Indeed, while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases involving other bakers' creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned

gay persons or gay marriages. See *Jack* v. *Gateaux, Ltd.*, Charge No. P20140071X (Mar. 24, 2015); *Jack* v. *Le Bakery Sensual, Inc.*, Charge No. P20140070X (Mar. 24, 2015); *Jack* v. *Azucar Bakery*, Charge No. P20140069X (Mar. 24, 2015).

There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying "no goods or services will be sold if they will be used for gay marriages," something that would impose a serious stigma on gay persons. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

B

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

That hostility surfaced at the Commission's formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips' case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the

state." Tr. 23. A few moments later, the commissioner restated the same position: "[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise." *Id.*, at 30. Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.

On July 25, 2014, the Commission met again. This meeting, too, was conducted in public and on the record. On this occasion another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated:

> "I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others." Tr. 11–12.

To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetori-

cal—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's anti-discrimination law—a law that protects discrimination on the basis of religion as well as sexual orientation.

The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission's decision did not mention those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 540–542 (1993); *id.,* at 558 (Scalia, J., concurring in part and concurring in judgment). In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.

Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

As noted above, on at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the

words of the Division, the requested cake included "wording and images [the baker] deemed derogatory," *Jack* v. *Gateaux, Ltd.*, Charge No. P20140071X, at 4; featured "language and images [the baker] deemed hateful," *Jack* v. *Le Bakery Sensual, Inc.*, Charge No. P20140070X, at 4; or displayed a message the baker "deemed as discriminatory, *Jack* v. *Azucar Bakery*, Charge No. P20140069X, at 4.

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips' willingness to sell "birthday cakes, shower cakes, [and] cookies and brownies," App. 152, to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers' conscience-based objections as legitimate, but treated his as illegitimate—thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed the disparity

only in passing and relegated its complete analysis of the issue to a footnote. There, the court stated that "[t]his case is distinguishable from the Colorado Civil Rights Division's recent findings that [the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed" when they refused to create the requested cakes. 370 P. 3d, at 282, n. 8. In those cases, the court continued, there was no impermissible discrimination because "the Division found that the bakeries . . . refuse[d] the patron's request . . . because of the offensive nature of the requested message." *Ibid.*

A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. Just as "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. See *Matal* v. *Tam*, 582 U. S. ___, ___–___ (2017) (opinion of ALITO, J.) (slip op., at 22–23). The Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs. The court's footnote does not, therefore, answer the baker's concern that the State's practice was to disfavor the religious basis of his objection.

C

For the reasons just described, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

In *Church of Lukumi Babalu Aye, supra*, the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose

regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. *Id.*, at 534. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.*, at 547.

Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.*, at 540. In view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs. The Commission gave "every appearance," *id.*, at 545, of adjudicating Phillips' religious objection based on a negative normative "evaluation of the particular justification" for his objection and the religious grounds for it. *Id.*, at 537. It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires.

While the issues here are difficult to resolve, it must be concluded that the State's interest could have been

weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

III

The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated.

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

The judgment of the Colorado Court of Appeals is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 16–111

MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS *v.* COLORADO CIVIL RIGHTS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 4, 2018]

JUSTICE KAGAN, with whom JUSTICE BREYER joins, concurring.

"[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Ante*, at 9. But in upholding that principle, state actors cannot show hostility to religious views; rather, they must give those views "neutral and respectful consideration." *Ante*, at 12. I join the Court's opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation. I write separately to elaborate on one of the bases for the Court's holding.

The Court partly relies on the "disparate consideration of Phillips' case compared to the cases of [three] other bakers" who "objected to a requested cake on the basis of conscience." *Ante*, at 14, 18. In the latter cases, a customer named William Jack sought "cakes with images that conveyed disapproval of same-sex marriage, along with religious text"; the bakers whom he approached refused to make them. *Ante*, at 15; see *post*, at 3 (GINSBURG, J., dissenting) (further describing the requested cakes). Those bakers prevailed before the Colorado Civil Rights Division and Commission, while Phillips—who objected for

religious reasons to baking a wedding cake for a same-sex couple—did not. The Court finds that the legal reasoning of the state agencies differed in significant ways as between the Jack cases and the Phillips case. See *ante,* at 15. And the Court takes especial note of the suggestion made by the Colorado Court of Appeals, in comparing those cases, that the state agencies found the message Jack requested "offensive [in] nature." *Ante*, at 16 (internal quotation marks omitted). As the Court states, a "principled rationale for the difference in treatment" cannot be "based on the government's own assessment of offensiveness." *Ibid.*

What makes the state agencies' consideration yet more disquieting is that a proper basis for distinguishing the cases was available—in fact, was obvious. The Colorado Anti-Discrimination Act (CADA) makes it unlawful for a place of public accommodation to deny "the full and equal enjoyment" of goods and services to individuals based on certain characteristics, including sexual orientation and creed. Colo. Rev. Stat. §24–34–601(2)(a) (2017). The three bakers in the Jack cases did not violate that law. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA's demand that customers receive "the full and equal enjoyment" of public accommodations irrespective of their sexual orientation. *Ibid.* The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious

belief.*

I read the Court's opinion as fully consistent with that view. The Court limits its analysis to the *reasoning* of the state agencies (and Court of Appeals)—"quite apart from whether the [Phillips and Jack] cases should ultimately be distinguished." *Ante*, at 15. And the Court itself recognizes the principle that would properly account for a difference in *result* between those cases. Colorado law, the Court

---

*JUSTICE GORSUCH disagrees. In his view, the Jack cases and the Phillips case must be treated the same because the bakers in all those cases "would not sell the requested cakes to anyone." *Post*, at 4. That description perfectly fits the Jack cases—and explains why the bakers there did not engage in unlawful discrimination. But it is a surprising characterization of the Phillips case, given that Phillips routinely sells wedding cakes to opposite-sex couples. JUSTICE GORSUCH can make the claim only because he does not think a "wedding cake" is the relevant product. As JUSTICE GORSUCH sees it, the product that Phillips refused to sell here—and would refuse to sell to anyone—was a "cake celebrating same-sex marriage." *Ibid.*; see *post*, at 3, 6, 8–9. But that is wrong. The cake requested was not a special "cake celebrating same-sex marriage." It was simply a wedding cake—one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike. See *ante*, at 4 (majority opinion) (recounting that Phillips did not so much as discuss the cake's design before he refused to make it). And contrary to JUSTICE GORSUCH'S view, a wedding cake does not become something different whenever a vendor like Phillips invests its sale to particular customers with "religious significance." *Post*, at 11. As this Court has long held, and reaffirms today, a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait. See *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402, n. 5 (1968) (*per curiam*) (holding that a barbeque vendor must serve black customers even if he perceives such service as vindicating racial equality, in violation of his religious beliefs); *ante*, at 9. A vendor can choose the products he sells, but not the customers he serves—no matter the reason. Phillips sells wedding cakes. As to that product, he unlawfully discriminates: He sells it to opposite-sex but not to same-sex couples. And on that basis—which has nothing to do with Phillips' religious beliefs—Colorado could have distinguished Phillips from the bakers in the Jack cases, who did not engage in any prohibited discrimination.

says, "can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Ante*, at 10. For that reason, Colorado can treat a baker who discriminates based on sexual orientation differently from a baker who does not discriminate on that or any other prohibited ground. But only, as the Court rightly says, if the State's decisions are not infected by religious hostility or bias. I accordingly concur.

SUPREME COURT OF THE UNITED STATES

No. 16–111

MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS *v.* COLORADO CIVIL RIGHTS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 4, 2018]

JUSTICE GORSUCH, with whom JUSTICE ALITO joins, concurring.

In *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, this Court held that a neutral and generally applicable law will usually survive a constitutional free exercise challenge. 494 U. S. 872, 878–879 (1990). *Smith* remains controversial in many quarters. Compare McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990), with Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992). But we know this with certainty: when the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 546 (1993).

Today's decision respects these principles. As the Court explains, the Colorado Civil Rights Commission failed to act neutrally toward Jack Phillips's religious faith. Maybe most notably, the Commission allowed three other bakers to refuse a customer's request that would have required them to violate their secular commitments. Yet it denied

the same accommodation to Mr. Phillips when he refused a customer's request that would have required him to violate his religious beliefs. *Ante,* at 14–16. As the Court also explains, the only reason the Commission seemed to supply for its discrimination was that it found Mr. Phillips's religious beliefs "offensive." *Ibid.* That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all. Because the Court documents each of these points carefully and thoroughly, I am pleased to join its opinion in full.

The only wrinkle is this. In the face of so much evidence suggesting hostility toward Mr. Phillips's sincerely held religious beliefs, two of our colleagues have written separately to suggest that the Commission acted neutrally toward his faith when it treated him differently from the other bakers—or that it could have easily done so consistent with the First Amendment. See *post,* at 4–5, and n. 4 (GINSBURG, J., dissenting); *ante,* at 2–3, and n. (KAGAN, J., concurring). But, respectfully, I do not see how we might rescue the Commission from its error.

A full view of the facts helps point the way to the problem. Start with William Jack's case. He approached three bakers and asked them to prepare cakes with messages disapproving same-sex marriage on religious grounds. App. 233, 243, 252. All three bakers refused Mr. Jack's request, stating that they found his request offensive to their secular convictions. *Id.*, at 231, 241, 250. Mr. Jack responded by filing complaints with the Colorado Civil Rights Division. *Id.*, at 230, 240, 249. He pointed to Colorado's Anti-Discrimination Act, which prohibits discrimination against customers in public accommodations because of religious creed, sexual orientation, or certain other traits. See *ibid.*; Colo. Rev. Stat. §24–34–601(2)(a)

(2017). Mr. Jack argued that the cakes he sought reflected his religious beliefs and that the bakers could not refuse to make them just because they happened to disagree with his beliefs. App. 231, 241, 250. But the Division declined to find a violation, reasoning that the bakers didn't deny Mr. Jack service because of his religious faith but because the cakes he sought were offensive to their own moral convictions. *Id.*, at 237, 247, 255–256. As proof, the Division pointed to the fact that the bakers said they treated Mr. Jack as they would have anyone who requested a cake with similar messages, regardless of their religion. *Id.*, at 230–231, 240, 249. The Division pointed, as well, to the fact that the bakers said they were happy to provide religious persons with other cakes expressing other ideas. *Id.*, at 237, 247, 257. Mr. Jack appealed to the Colorado Civil Rights Commission, but the Commission summarily denied relief. App. to Pet. for Cert. 326a–331a.

Next, take the undisputed facts of Mr. Phillips's case. Charlie Craig and Dave Mullins approached Mr. Phillips about creating a cake to celebrate their wedding. App. 168. Mr. Phillips explained that he could not prepare a cake celebrating a same-sex wedding consistent with his religious faith. *Id.,* at 168–169. But Mr. Phillips offered to make other baked goods for the couple, including cakes celebrating other occasions. *Ibid.* Later, Mr. Phillips testified without contradiction that he would have refused to create a cake celebrating a same-sex marriage for any customer, regardless of his or her sexual orientation. *Id.,* at 166–167 ("I will not design and create wedding cakes for a same-sex wedding regardless of the sexual orientation of the customer"). And the record reveals that Mr. Phillips apparently refused just such a request from Mr. Craig's mother. *Id.,* at 38–40, 169. (Any suggestion that Mr. Phillips was willing to make a cake celebrating a same-sex marriage for a heterosexual customer or was not willing to sell other products to a homosexual customer,

then, would simply mistake the undisputed factual record. See *post,* at 4, n. 2 (GINSBURG, J., dissenting); *ante,* at 2–3, and n. (KAGAN, J., concurring)). Nonetheless, the Commission held that Mr. Phillips's conduct violated the Colorado public accommodations law. App. to Pet. for Cert. 56a–58a.

The facts show that the two cases share all legally salient features. In both cases, the effect on the customer was the same: bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service intending only to honor a personal conviction. To be sure, the bakers *knew* their conduct promised the effect of leaving a customer in a protected class unserved. But there's no indication the bakers actually *intended* to refuse service *because of* a customer's protected characteristic. We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). So, for example, the bakers in the first case would have refused to sell a cake denigrating same-sex marriage to an atheist customer, just as the baker in the second case would have refused to sell a cake celebrating same-sex marriage to a heterosexual customer. And the bakers in the first case were generally happy to sell to persons of faith, just as the baker in the second case was generally happy to sell to gay persons. In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.

The distinction between intended and knowingly accepted effects is familiar in life and law. Often the purposeful pursuit of worthy commitments requires us to accept unwanted but entirely foreseeable side effects: so, for example, choosing to spend time with family means the foreseeable loss of time for charitable work, just as opting for more time in the office means knowingly forgoing time

at home with loved ones. The law, too, sometimes distinguishes between intended and foreseeable effects. See, *e.g.,* ALI, Model Penal Code §§1.13, 2.02(2)(a)(i) (1985); 1 W. LaFave, Substantive Criminal Law §5.2(b), pp. 460–463 (3d ed. 2018). Other times, of course, the law proceeds differently, either conflating intent and knowledge or presuming intent as a matter of law from a showing of knowledge. See, *e.g.,* Restatement (Second) of Torts §8A (1965); *Radio Officers* v. *NLRB*, 347 U. S. 17, 45 (1954).

The problem here is that the Commission failed to act neutrally by applying a consistent legal rule. In Mr. Jack's case, the Commission chose to distinguish carefully between intended and knowingly accepted effects. Even though the bakers knowingly denied service to someone in a protected class, the Commission found no violation because the bakers only intended to distance themselves from "the offensive nature of the requested message." *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 282, n. 8 (Colo. App. 2015); App. 237, 247, 256; App. to Pet. for Cert. 326a–331a; see also Brief for Respondent Colorado Civil Rights Commission 52 ("Businesses are entitled to reject orders for any number of reasons, including because they deem a particular product requested by a customer to be 'offensive'"). Yet, in Mr. Phillips's case, the Commission dismissed this very same argument as resting on a "distinction without a difference." App. to Pet. for Cert. 69a. It concluded instead that an "intent to disfavor" a protected class of persons should be "readily . . . presumed" from the knowing failure to serve someone who belongs to that class. *Id.,* at 70a. In its judgment, Mr. Phillips's intentions were "inextricably tied to the sexual orientation of the parties involved" and essentially "irrational." *Ibid.*

Nothing in the Commission's opinions suggests any neutral principle to reconcile these holdings. If Mr. Phillips's objection is "inextricably tied" to a protected class,

then the bakers' objection in Mr. Jack's case must be "inextricably tied" to one as well. For just as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths. In both cases the bakers' objection would (usually) result in turning down customers who bear a protected characteristic. In the end, the Commission's decisions simply reduce to this: it *presumed* that Mr. Phillip harbored an intent to discriminate against a protected class in light of the foreseeable effects of his conduct, but it declined to presume the same intent in Mr. Jack's case even though the effects of the bakers' conduct were just as foreseeable. Underscoring the double standard, a state appellate court said that "no such showing" of actual "animus"—or intent to discriminate against persons in a protected class—was even required in Mr. Phillips's case. 370 P. 3d, at 282.

The Commission cannot have it both ways. The Commission cannot slide up and down the *mens rea* scale, picking a mental state standard to suit its tastes depending on its sympathies. Either actual proof of intent to discriminate on the basis of membership in a protected class is required (as the Commission held in Mr. Jack's case), or it is sufficient to "presume" such intent from the knowing failure to serve someone in a protected class (as the Commission held in Mr. Phillips's case). Perhaps the Commission could have chosen either course as an initial matter. But the one thing it can't do is apply a more generous legal test to secular objections than religious ones. See *Church of Lukumi Babalu Aye,* 508 U. S., at 543–544. That is anything but the neutral treatment of religion.

The real explanation for the Commission's discrimination soon comes clear, too—and it does anything but help

its cause. This isn't a case where the Commission self-consciously announced a change in its legal rule in all public accommodation cases. Nor is this a case where the Commission offered some persuasive reason for its discrimination that might survive strict scrutiny. Instead, as the Court explains, it appears the Commission wished to condemn Mr. Phillips for expressing just the kind of "irrational" or "offensive . . . message" that the bakers in the first case refused to endorse. *Ante,* at 16. Many may agree with the Commission and consider Mr. Phillips's religious beliefs irrational or offensive. Some may believe he misinterprets the teachings of his faith. And, to be sure, this Court has held same-sex marriage a matter of constitutional right and various States have enacted laws that preclude discrimination on the basis of sexual orientation. But it is also true that no bureaucratic judgment condemning a sincerely held religious belief as "irrational" or "offensive" will ever survive strict scrutiny under the First Amendment. In this country, the place of secular officials isn't to sit in judgment of religious beliefs, but only to protect their free exercise. Just as it is the "proudest boast of our free speech jurisprudence" that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive. See *Matal* v. *Tam*, 582 U. S. ___, ___ (2017) (plurality opinion) (slip op., at 25) (citing *United States* v. *Schwimmer*, 279 U. S. 644, 655 (1929) (Holmes, J., dissenting)). Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom. See *Church of Lukumi Babalu Aye, supra*, at 547; *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 715–716 (1981); *Wisconsin* v. *Yoder*, 406 U. S. 205, 223–224 (1972); *Cantwell* v. *Connecticut*, 310 U. S. 296, 308–310 (1940).

Nor can any amount of after-the-fact maneuvering by

our colleagues save the Commission. It is no answer, for example, to observe that Mr. Jack requested a cake with text on it while Mr. Craig and Mr. Mullins sought a cake celebrating their wedding without discussing its decoration, and then suggest this distinction makes all the difference. See *post,* at 4–5, and n. 4 (GINSBURG, J., dissenting). It is no answer either simply to slide up a level of generality to redescribe Mr. Phillips's case as involving only a wedding cake like any other, so the fact that Mr. Phillips would make one for some means he must make them for all. See *ante,* at 2–3, and n. (KAGAN, J., concurring). These arguments, too, fail to afford Mr. Phillips's faith neutral respect.

Take the first suggestion first. To suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in Mr. Jack's case while penalizing Mr. Phillips—is irrational. Not even the Commission or court of appeals purported to rely on that distinction. Imagine Mr. Jack asked only for a cake with a symbolic expression against same-sex marriage rather than a cake bearing words conveying the same idea. Surely the Commission would have approved the bakers' intentional wish to avoid participating in that message too. Nor can anyone reasonably doubt that a wedding cake without words conveys a message. Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding. See 370 P. 3d, at 276 (stating that Mr. Craig and Mr. Mullins "requested that Phillips design and create a *cake to celebrate their same-sex wedding*") (emphasis added). Like "an emblem or flag," a cake for a same-sex wedding is a symbol that serves as "a short cut from mind to mind," signifying approval of a specific "system, idea, [or] institution." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 632 (1943). It is precisely that approval that Mr. Phillips intended to withhold in keeping

with his religious faith. The Commission denied Mr. Phillips that choice, even as it afforded the bakers in Mr. Jack's case the choice to refuse to advance a message they deemed offensive to their secular commitments. That is not neutral.

Nor would it be proper for this or any court to suggest that a person must be forced to write words rather than create a symbol before his religious faith is implicated. Civil authorities, whether "high or petty," bear no license to declare what is or should be "orthodox" when it comes to religious beliefs, *id.,* at 642, or whether an adherent has "correctly perceived" the commands of his religion, *Thomas, supra,* at 716. Instead, it is our job to look beyond the formality of written words and afford legal protection to any sincere act of faith. See generally *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 569 (1995) ("[T]he Constitution looks beyond written or spoken words as mediums of expression," which are "not a condition of constitutional protection").

The second suggestion fares no better. Suggesting that this case is only about "wedding cakes"—and not a wedding cake celebrating a same-sex wedding—actually points up the problem. At its most general level, the cake at issue in Mr. Phillips's case was just a mixture of flour and eggs; at its most specific level, it was a cake celebrating the same-sex wedding of Mr. Craig and Mr. Mullins. We are told here, however, to apply a sort of Goldilocks rule: describing the cake by its ingredients is *too general*; understanding it as celebrating a same-sex wedding is *too specific*; but regarding it as a generic wedding cake is *just right*. The problem is, the Commission didn't play with the level of generality in Mr. Jack's case in this way. It didn't declare, for example, that because the cakes Mr. Jack requested were just cakes about weddings generally, and all such cakes were the same, the bakers had to pro-

duce them. Instead, the Commission accepted the bakers' view that the specific cakes Mr. Jack requested conveyed a message offensive to their convictions and allowed them to refuse service. Having done that there, it must do the same here.

Any other conclusion would invite civil authorities to gerrymander their inquiries based on the parties they prefer. Why calibrate the level of generality in Mr. Phillips's case at "wedding cakes" exactly—and not at, say, "cakes" more generally or "cakes that convey a message regarding same-sex marriage" more specifically? If "cakes" were the relevant level of generality, the Commission would have to order the bakers to make Mr. Jack's requested cakes just as it ordered Mr. Phillips to make the requested cake in his case. Conversely, if "cakes that convey a message regarding same-sex marriage" were the relevant level of generality, the Commission would have to respect Mr. Phillips's refusal to make the requested cake just as it respected the bakers' refusal to make the cakes Mr. Jack requested. In short, when the same level of generality is applied to both cases, it is no surprise that the bakers have to be treated the same. Only by adjusting the dials *just right*—fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views—can you engineer the Commission's outcome, handing a win to Mr. Jack's bakers but delivering a loss to Mr. Phillips. Such results-driven reasoning is improper. Neither the Commission nor this Court may apply a more specific level of generality in Mr. Jack's case (a cake that conveys a message regarding same-sex marriage) while applying a higher level of generality in Mr. Phillips's case (a cake that conveys no message regarding same-sex marriage). Of course, under *Smith* a vendor cannot escape a public accommodations law just because his religion frowns on it. But for any law to comply with the First Amendment and

Smith, it must be applied in a manner that treats religion with neutral respect. That means the government must apply the *same* level of generality across cases—and that did not happen here.

There is another problem with sliding up the generality scale: it risks denying constitutional protection to religious beliefs that draw distinctions more specific than the government's preferred level of description. To some, all wedding cakes may appear indistinguishable. But *to Mr. Phillips* that is not the case—his faith teaches him otherwise. And his religious beliefs are entitled to no less respectful treatment than the bakers' secular beliefs in Mr. Jack's case. This Court has explained these same points "[r]epeatedly and in many different contexts" over many years. *Smith*, 494 U. S. at 887. For example, in *Thomas* a faithful Jehovah's Witness and steel mill worker agreed to help manufacture sheet steel he knew might find its way into armaments, but he was unwilling to work on a fabrication line producing tank turrets. 450 U. S., at 711. Of course, the line Mr. Thomas drew wasn't the same many others would draw and it wasn't even the same line many other members of the same faith would draw. Even so, the Court didn't try to suggest that making steel is just making steel. Or that to offend his religion the steel needed to be of a particular kind or shape. Instead, it recognized that Mr. Thomas alone was entitled to define the nature of his religious commitments—and that those commitments, as defined by the faithful adherent, not a bureaucrat or judge, are entitled to protection under the First Amendment. *Id.,* at 714–716; see also *United States* v. *Lee*, 455 U. S. 252, 254–255 (1982); *Smith*, *supra,* at 887 (collecting authorities). It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons

sacramental bread is *just* bread or a kippah is *just* a cap.

Only one way forward now remains. Having failed to afford Mr. Phillips's religious objections neutral consideration and without any compelling reason for its failure, the Commission must afford him the same result it afforded the bakers in Mr. Jack's case. The Court recognizes this by reversing the judgment below and holding that the Commission's order "must be set aside." *Ante,* at 18. Maybe in some future rulemaking or case the Commission could adopt a new "knowing" standard for all refusals of service and offer neutral reasons for doing so. But, as the Court observes, "[h]owever later cases raising these or similar concerns are resolved in the future, . . . the rulings of the Commission and of the state court that enforced the Commission's order" in *this* case "must be invalidated." *Ibid.* Mr. Phillips has conclusively proven a First Amendment violation and, after almost six years facing unlawful civil charges, he is entitled to judgment.

SUPREME COURT OF THE UNITED STATES

No. 16–111

MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS *v.* COLORADO CIVIL RIGHTS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 4, 2018]

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part and concurring in the judgment.

I agree that the Colorado Civil Rights Commission (Commission) violated Jack Phillips' right to freely exercise his religion. As JUSTICE GORSUCH explains, the Commission treated Phillips' case differently from a similar case involving three other bakers, for reasons that can only be explained by hostility toward Phillips' religion. See *ante,* at 2–7 (concurring opinion). The Court agrees that the Commission treated Phillips differently, and it points out that some of the Commissioners made comments disparaging Phillips' religion. See *ante,* at 12–16. Although the Commissioners' comments are certainly disturbing, the discriminatory application of Colorado's public-accommodations law is enough on its own to violate Phillips' rights. To the extent the Court agrees, I join its opinion.

While Phillips rightly prevails on his free-exercise claim, I write separately to address his free-speech claim. The Court does not address this claim because it has some uncertainties about the record. See *ante,* at 2. Specifically, the parties dispute whether Phillips refused to create a *custom* wedding cake for the individual respondents, or whether he refused to sell them *any* wedding cake (including a premade one). But the Colorado Court of Appeals

resolved this factual dispute in Phillips' favor. The court described his conduct as a refusal to "design and create a cake to celebrate [a] same-sex wedding." *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 276 (2015); see also *id.,* at 286 ("designing and selling a wedding cake"); *id.,* at 283 ("refusing to create a wedding cake"). And it noted that the Commission's order required Phillips to sell "'*any* product [he] would sell to heterosexual couples,'" including custom wedding cakes. *Id.,* at 286 (emphasis added).

Even after describing his conduct this way, the Court of Appeals concluded that Phillips' conduct was not expressive and was not protected speech. It reasoned that an outside observer would think that Phillips was merely complying with Colorado's public-accommodations law, not expressing a message, and that Phillips could post a disclaimer to that effect. This reasoning flouts bedrock principles of our free-speech jurisprudence and would justify virtually any law that compels individuals to speak. It should not pass without comment.

I

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits state laws that abridge the "freedom of speech." When interpreting this command, this Court has distinguished between regulations of speech and regulations of conduct. The latter generally do not abridge the freedom of speech, even if they impose "incidental burdens" on expression. *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 567 (2011). As the Court explains today, public-accommodations laws usually regulate conduct. *Ante,* at 9–10 (citing *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 572 (1995)). "[A]s a general matter," public-accommodations laws do not "target speech" but instead prohibit "the *act* of discriminating against individuals in the provision of publicly available goods, privileges,

and services." *Id.,* at 572 (emphasis added).

Although public-accommodations laws generally regulate conduct, particular applications of them can burden protected speech. When a public-accommodations law "ha[s] the effect of declaring . . . speech itself to be the public accommodation," the First Amendment applies with full force. *Id.*, at 573; accord, *Boy Scouts of America* v. *Dale*, 530 U. S. 640, 657–659 (2000). In *Hurley*, for example, a Massachusetts public-accommodations law prohibited "'any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation.'" 515 U. S., at 561 (quoting Mass. Gen. Laws §272:98 (1992); ellipsis in original). When this law required the sponsor of a St. Patrick's Day parade to include a parade unit of gay, lesbian, and bisexual Irish-Americans, the Court unanimously held that the law violated the sponsor's right to free speech. Parades are "a form of expression," this Court explained, and the application of the public-accommodations law "alter[ed] the expressive content" of the parade by forcing the sponsor to add a new unit. 515 U. S., at 568, 572–573. The addition of that unit compelled the organizer to "bear witness to the fact that some Irish are gay, lesbian, or bisexual"; "suggest . . . that people of their sexual orientation have as much claim to unqualified social acceptance as heterosexuals"; and imply that their participation "merits celebration." *Id.,* at 574. While this Court acknowledged that the unit's exclusion might have been "misguided, or even hurtful," *ibid.*, it rejected the notion that governments can mandate "thoughts and statements acceptable to some groups or, indeed, all people" as the "antithesis" of free speech, *id.,* at 579; accord, *Dale*, *supra,* at 660–661.

The parade in *Hurley* was an example of what this Court has termed "expressive conduct." See 515 U. S., at 568–569. This Court has long held that "the Constitution

looks beyond written or spoken words as mediums of expression," *id.*, at 569, and that "[s]ymbolism is a primitive but effective way of communicating ideas," *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 632 (1943). Thus, a person's "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Texas* v. *Johnson*, 491 U. S. 397, 404 (1989). Applying this principle, the Court has recognized a wide array of conduct that can qualify as expressive, including nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag.[1]

Of course, conduct does not qualify as protected speech simply because "the person engaging in [it] intends thereby to express an idea." *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968). To determine whether conduct is sufficiently expressive, the Court asks whether it was "intended to be communicative" and, "in context, would reasonably be understood by the viewer to be communicative." *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 294 (1984). But a "'particularized message'" is not required, or else the freedom of speech "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U. S., at 569.

Once a court concludes that conduct is expressive, the

---

[1] *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 565–566 (1991); *Texas* v. *Johnson*, 491 U. S. 397, 405–406 (1989); *Spence* v. *Washington*, 418 U. S. 405, 406, 409–411 (1974) (*per curiam*); *Schacht* v. *United States*, 398 U. S. 58, 62–63 (1970); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 505–506 (1969); *Brown* v. *Louisiana*, 383 U. S. 131, 141–142 (1966) (opinion of Fortas, J.); *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 633–634 (1943); *Stromberg* v. *California*, 283 U. S. 359, 361, 369 (1931).

Constitution limits the government's authority to restrict or compel it. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'" and "tailor" the content of his message as he sees fit. *Id.,* at 573 (quoting *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 16 (1986) (plurality opinion)). This rule "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley*, *supra*, at 573. And it "makes no difference" whether the government is regulating the "creati[on], distributi[on], or consum[ption]" of the speech. *Brown* v. *Entertainment Merchants Assn.*, 564 U. S. 786, 792, n. 1 (2011).

II

A

The conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive. Phillips considers himself an artist. The logo for Masterpiece Cakeshop is an artist's paint palate with a paintbrush and baker's whisk. Behind the counter Phillips has a picture that depicts him as an artist painting on a canvas. Phillips takes exceptional care with each cake that he creates—sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding. Examples of his creations can be seen on Masterpiece's website. See http://masterpiececakes.com/wedding-cakes (as last visited June 1, 2018).

Phillips is an active participant in the wedding celebration. He sits down with each couple for a consultation before he creates their custom wedding cake. He discusses their preferences, their personalities, and the details of their wedding to ensure that each cake reflects the couple

who ordered it. In addition to creating and delivering the cake—a focal point of the wedding celebration—Phillips sometimes stays and interacts with the guests at the wedding. And the guests often recognize his creations and seek his bakery out afterward. Phillips also sees the inherent symbolism in wedding cakes. To him, a wedding cake inherently communicates that "a wedding has occurred, a marriage has begun, and the couple should be celebrated." App. 162.

Wedding cakes do, in fact, communicate this message. A tradition from Victorian England that made its way to America after the Civil War, "[w]edding cakes are so packed with symbolism that it is hard to know where to begin." M. Krondl, Sweet Invention: A History of Dessert 321 (2011) (Krondl); see also *ibid.* (explaining the symbolism behind the color, texture, flavor, and cutting of the cake). If an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding. The cake is "so standardised and inevitable a part of getting married that few ever think to question it." Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 95 (1987). Almost no wedding, no matter how spartan, is missing the cake. See *id.,* at 98. "A whole series of events expected in the context of a wedding would be impossible without it: an essential photograph, the cutting, the toast, and the distribution of both cake and favours at the wedding and afterwards." *Ibid.* Although the cake is eventually eaten, that is not its primary purpose. See *id.,* at 95 ("It is not unusual to hear people declaring that they do not like wedding cake, meaning that they do not like to eat it. This includes people who are, without question, having such cakes for their weddings"); *id.,* at 97 ("Nothing is made of the eating itself"); Krondl 320–321 (explaining that wedding cakes have long been described as "inedible"). The cake's purpose is to mark the beginning of a

new marriage and to celebrate the couple.[2]

Accordingly, Phillips' creation of custom wedding cakes is expressive. The use of his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage clearly communicates a message—certainly more so than nude dancing, *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 565–566 (1991), or flying a plain red flag, *Stromberg* v. *California*, 283 U. S. 359, 369 (1931).[3] By forcing Phillips to create custom wedding cakes for same-

---

[2]The Colorado Court of Appeals acknowledged that "a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage," depending on its "design" and whether it has "written inscriptions." *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 288 (2015). But a wedding cake needs no particular design or written words to communicate the basic message that a wedding is occurring, a marriage has begun, and the couple should be celebrated. Wedding cakes have long varied in color, decorations, and style, but those differences do not prevent people from recognizing wedding cakes as wedding cakes. See Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 96 (1987). And regardless, the Commission's order does not distinguish between plain wedding cakes and wedding cakes with particular designs or inscriptions; it requires Phillips to make any wedding cake for a same-sex wedding that he would make for an opposite-sex wedding.

[3]The dissent faults Phillips for not "submitting . . . evidence" that wedding cakes communicate a message. *Post,* at 2, n. 1 (opinion of GINSBURG, J.). But this requirement finds no support in our precedents. This Court did not insist that the parties submit evidence detailing the expressive nature of parades, flags, or nude dancing. See *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 568–570 (1995); *Spence*, 418 U. S., at 410–411; *Barnes*, 501 U. S., at 565–566. And we do not need extensive evidence here to conclude that Phillips' artistry is expressive, see *Hurley*, 515 U. S., at 569, or that wedding cakes at least communicate the basic fact that "this is a wedding," see *id.,* at 573–575. Nor does it matter that the couple also communicates a message through the cake. More than one person can be engaged in protected speech at the same time. See *id.*, at 569–570. And by forcing him to provide the cake, Colorado is requiring Phillips to be "intimately connected" with the couple's speech, which is enough to implicate his First Amendment rights. See *id.,* at 576.

sex weddings, Colorado's public-accommodations law "alter[s] the expressive content" of his message. *Hurley*, 515 U. S., at 572. The meaning of expressive conduct, this Court has explained, depends on "the context in which it occur[s]." *Johnson*, 491 U. S., at 405. Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are "weddings" and suggest that they should be celebrated—the precise message he believes his faith forbids. The First Amendment prohibits Colorado from requiring Phillips to "bear witness to [these] fact[s]," *Hurley*, 515 U. S., at 574, or to "affir[m] . . . a belief with which [he] disagrees," *id.,* at 573.

B

The Colorado Court of Appeals nevertheless concluded that Phillips' conduct was "not sufficiently expressive" to be protected from state compulsion. 370 P. 3d, at 283. It noted that a reasonable observer would not view Phillips' conduct as "an endorsement of same-sex marriage," but rather as mere "compliance" with Colorado's public-accommodations law. *Id.,* at 286–287 (citing *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 64–65 (2006) (*FAIR*); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 841–842 (1995); *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 76–78 (1980)). It also emphasized that Masterpiece could "disassociat[e]" itself from same-sex marriage by posting a "disclaimer" stating that Colorado law "requires it not to discriminate" or that "the provision of its services does not constitute an endorsement." 370 P. 3d, at 288. This reasoning is badly misguided.

1

The Colorado Court of Appeals was wrong to conclude that Phillips' conduct was not expressive because a rea-

sonable observer would think he is merely complying with Colorado's public-accommodations law. This argument would justify any law that compelled protected speech. And, this Court has never accepted it. From the beginning, this Court's compelled-speech precedents have rejected arguments that "would resolve every issue of power in favor of those in authority." *Barnette*, 319 U. S., at 636. *Hurley*, for example, held that the application of Massachusetts' public-accommodations law "requir[ed] [the organizers] to alter the expressive content of their parade." 515 U. S., at 572–573. It did not hold that reasonable observers would view the organizers as merely complying with Massachusetts' public-accommodations law.

The decisions that the Colorado Court of Appeals cited for this proposition are far afield. It cited three decisions where groups objected to being forced to provide a forum for a third party's speech. See *FAIR*, *supra*, at 51 (law school refused to allow military recruiters on campus); *Rosenberger*, *supra*, at 822–823 (public university refused to provide funds to a religious student paper); *PruneYard*, *supra*, at 77 (shopping center refused to allow individuals to collect signatures on its property). In those decisions, this Court rejected the argument that requiring the groups to provide a forum for third-party speech also required them to endorse that speech. See *FAIR*, *supra*, at 63–65; *Rosenberger*, *supra*, at 841–842; *PruneYard*, *supra*, at 85–88. But these decisions do not suggest that the government can force speakers to alter their *own* message. See *Pacific Gas & Elec.*, 475 U. S., at 12 ("Notably absent from *PruneYard* was any concern that access . . . might affect the shopping center owner's exercise of his own right to speak"); *Hurley*, *supra*, at 580 (similar).

The Colorado Court of Appeals also noted that Masterpiece is a "for-profit bakery" that "charges its customers." 370 P. 3d, at 287. But this Court has repeatedly rejected the notion that a speaker's profit motive gives the gov-

ernment a freer hand in compelling speech. See *Pacific Gas & Elec.*, *supra*, at 8, 16 (collecting cases); *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 761 (1976) (deeming it "beyond serious dispute" that "[s]peech . . . is protected even though it is carried in a form that is 'sold' for profit"). Further, even assuming that most for-profit companies prioritize maximizing profits over communicating a message, that is not true for Masterpiece Cakeshop. Phillips routinely sacrifices profits to ensure that Masterpiece operates in a way that represents his Christian faith. He is not open on Sundays, he pays his employees a higher-than-average wage, and he loans them money in times of need. Phillips also refuses to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween—even though Halloween is one of the most lucrative seasons for bakeries. These efforts to exercise control over the messages that Masterpiece sends are still more evidence that Phillips' conduct is expressive. See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256–258 (1974); *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U. S. ___, ___ (2015) (slip op., at 15).

2

The Colorado Court of Appeals also erred by suggesting that Phillips could simply post a disclaimer, disassociating Masterpiece from any support for same-sex marriage. Again, this argument would justify any law compelling speech. And again, this Court has rejected it. We have described similar arguments as "beg[ging] the core question." *Tornillo*, *supra*, at 256. Because the government cannot compel speech, it also cannot "require speakers to affirm in one breath that which they deny in the next." *Pacific Gas & Elec.*, 475 U. S., at 16; see also *id.,* at 15, n. 11 (citing *PruneYard*, 447 U. S., at 99 (Powell, J., con-

curring in part and concurring in judgment)). States cannot put individuals to the choice of "be[ing] compelled to affirm someone else's belief" or "be[ing] forced to speak when [they] would prefer to remain silent." *Id.,* at 99.

III

Because Phillips' conduct (as described by the Colorado Court of Appeals) was expressive, Colorado's public-accommodations law cannot penalize it unless the law withstands strict scrutiny. Although this Court sometimes reviews regulations of expressive conduct under the more lenient test articulated in *O'Brien*,[4] that test does not apply unless the government would have punished the conduct regardless of its expressive component. See, *e.g., Barnes*, 501 U. S., at 566–572 (applying *O'Brien* to evaluate the application of a general nudity ban to nude dancing); *Clark*, 468 U. S., at 293 (applying *O'Brien* to evaluate the application of a general camping ban to a demonstration in the park). Here, however, Colorado would not be punishing Phillips if he refused to create any custom wedding cakes; it is punishing him because he refuses to create custom wedding cakes that express approval of same-sex marriage. In cases like this one, our precedents demand "'the most exacting scrutiny.'" *Johnson*, 491 U. S., at 412; accord, *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 28 (2010).

The Court of Appeals did not address whether Colorado's law survives strict scrutiny, and I will not do so in the first instance. There is an obvious flaw, however, with

---

[4] "[A] government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968).

one of the asserted justifications for Colorado's law. According to the individual respondents, Colorado can compel Phillips' speech to prevent him from "'denigrat[ing] the dignity'" of same-sex couples, "'assert[ing] [their] inferiority,'" and subjecting them to "'humiliation, frustration, and embarrassment.'" Brief for Respondents Craig et al. 39 (quoting *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 142 (1994); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 292 (1964) (Goldberg, J., concurring)). These justifications are completely foreign to our free-speech jurisprudence.

States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, *supra*, at 414. A contrary rule would allow the government to stamp out virtually any speech at will. See *Morse* v. *Frederick*, 551 U. S. 393, 409 (2007) ("After all, much political and religious speech might be perceived as offensive to some"). As the Court reiterates today, "it is not . . . the role of the State or its officials to prescribe what shall be offensive." *Ante,* at 16. "'Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.'" *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 55 (1988); accord, *Johnson*, *supra*, at 408–409. If the only reason a public-accommodations law regulates speech is "to produce a society free of . . . biases" against the protected groups, that purpose is "decidedly fatal" to the law's constitutionality, "for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Hurley*, 515 U. S., at 578–579; see also *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 813 (2000) ("Where the designed benefit of a content-based speech

restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails"). "[A] speech burden based on audience reactions is simply government hostility . . . in a different guise." *Matal* v. *Tam*, 582 U. S. ___, ___ (2017) (KENNEDY, J., concurring in part and concurring in judgment) (slip op., at 4).

Consider what Phillips actually said to the individual respondents in this case. After sitting down with them for a consultation, Phillips told the couple, "'I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings.'" App. 168. It is hard to see how this statement stigmatizes gays and lesbians more than blocking them from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say "God Hates Fags"—all of which this Court has deemed protected by the First Amendment. See *Hurley*, *supra*, at 574–575; *Dale*, 530 U. S., at 644; *Snyder* v. *Phelps*, 562 U. S. 443, 448 (2011). Moreover, it is also hard to see how Phillips' statement is worse than the racist, demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions. Concerns about "dignity" and "stigma" did not carry the day when this Court affirmed the right of white supremacists to burn a 25-foot cross, *Virginia* v. *Black*, 538 U. S. 343 (2003); conduct a rally on Martin Luther King Jr.'s birthday, *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123 (1992); or circulate a film featuring hooded Klan members who were brandishing weapons and threatening to "'Bury the niggers,'" *Brandenburg* v. *Ohio*, 395 U. S. 444, 446, n. 1 (1969) (*per curiam*).

Nor does the fact that this Court has now decided *Obergefell* v. *Hodges*, 576 U. S. ___ (2015), somehow diminish Phillips' right to free speech. "It is one thing . . . to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share [that view] as bigoted" and unentitled to

express a different view. *Id.*, at ___ (ROBERTS, C. J., dissenting) (slip op., at 29). This Court is not an authority on matters of conscience, and its decisions can (and often should) be criticized. The First Amendment gives individuals the right to disagree about the correctness of *Obergefell* and the morality of same-sex marriage. *Obergefell* itself emphasized that the traditional understanding of marriage "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." *Id.*, at ___ (majority opinion) (slip op., at 4). If Phillips' continued adherence to that understanding makes him a minority after *Obergefell*, that is all the more reason to insist that his speech be protected. See *Dale*, *supra*, at 660 ("[T]he fact that [the social acceptance of homosexuality] may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view").

* * *

In *Obergefell*, I warned that the Court's decision would "inevitabl[y] . . . come into conflict" with religious liberty, "as individuals . . . are confronted with demands to participate in and endorse civil marriages between same-sex couples." 576 U. S., at ___ (dissenting opinion) (slip op., at 15). This case proves that the conflict has already emerged. Because the Court's decision vindicates Phillips' right to free exercise, it seems that religious liberty has lived to fight another day. But, in future cases, the freedom of speech could be essential to preventing *Obergefell* from being used to "stamp out every vestige of dissent" and "vilify Americans who are unwilling to assent to the new orthodoxy." *Id.,* at ___ (ALITO, J., dissenting) (slip op., at 6). If that freedom is to maintain its vitality, reasoning like the Colorado Court of Appeals' must be rejected.

SUPREME COURT OF THE UNITED STATES

No. 16–111

MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS *v.* COLORADO CIVIL RIGHTS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 4, 2018]

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting.

There is much in the Court's opinion with which I agree. "[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Ante,* at 9. "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Ante,* at 10. "[P]urveyors of goods and services who object to gay marriages for moral and religious reasons [may not] put up signs saying 'no goods or services will be sold if they will be used for gay marriages.' " *Ante,* at 12. Gay persons may be spared from "indignities when they seek goods and services in an open market." *Ante,* at 18.[1] I

[1] As JUSTICE THOMAS observes, the Court does not hold that wedding cakes are speech or expression entitled to First Amendment protection. See *ante,* at 1 (opinion concurring in part and concurring in judgment). Nor could it, consistent with our First Amendment precedents. JUSTICE THOMAS acknowledges that for conduct to constitute protected expression, the conduct must be reasonably understood by an observer to be communicative. *Ante,* at 4 (citing *Clark* v. *Community for Creative*

strongly disagree, however, with the Court's conclusion that Craig and Mullins should lose this case. All of the above-quoted statements point in the opposite direction.

The Court concludes that "Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires." *Ante,* at 17. This conclusion rests on evidence said to show the Colorado Civil Rights Commission's (Commission) hostility to religion. Hostility is discernible, the Court maintains, from the asserted "disparate consideration of Phillips' case compared to the cases of" three other bakers who refused to make cakes requested by William Jack, an *amicus* here. *Ante,* at 18. The Court also finds hostility in statements made at two public hearings on Phillips' appeal to the Commission. *Ante,* at 12–14. The different outcomes the Court features

---

Non-Violence, 468 U. S. 288, 294 (1984)). The record in this case is replete with Jack Phillips' own views on the messages he believes his cakes convey. See *ante,* at 5–6 (THOMAS, J., concurring in part and concurring in judgment) (describing how Phillips "considers" and "sees" his work). But Phillips submitted no evidence showing that an objective observer understands a wedding cake to convey a message, much less that the observer understands the message to be the baker's, rather than the marrying couple's. Indeed, some in the wedding industry could not explain what message, or whose, a wedding cake conveys. See Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 100–101 (1987) (no explanation of wedding cakes' symbolism was forthcoming "even amongst those who might be expected to be the experts"); *id.,* at 104–105 (the cake cutting tradition might signify "the bride and groom . . . as appropriating the cake" from the bride's parents). And Phillips points to no case in which this Court has suggested the provision of a baked good might be expressive conduct. Cf. *ante,* at 7, n. 2 (THOMAS, J., concurring in part and concurring in judgment); *Hurley* v. *Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 568–579 (1995) (citing previous cases recognizing parades to be expressive); *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 565 (1991) (noting precedents suggesting nude dancing is expressive conduct); *Spence* v. *Washington*, 418 U. S. 405, 410 (1974) (observing the Court's decades-long recognition of the symbolism of flags).

do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below.

I

On March 13, 2014—approximately three months after the ALJ ruled in favor of the same-sex couple, Craig and Mullins, and two months before the Commission heard Phillips' appeal from that decision—William Jack visited three Colorado bakeries. His visits followed a similar pattern. He requested two cakes

> "made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red 'X' over the image. On one cake, he requested [on] one side[,] . . . 'God hates sin. Psalm 45:7' and on the opposite side of the cake 'Homosexuality is a detestable sin. Leviticus 18:2.' On the second cake, [the one] with the image of the two groomsmen covered by a red 'X' [Jack] requested [these words]: 'God loves sinners' and on the other side 'While we were yet sinners Christ died for us. Romans 5:8.' " App. to Pet. for Cert. 319a; see *id.,* at 300a, 310a.

In contrast to Jack, Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.

One bakery told Jack it would make cakes in the shape of Bibles, but would not decorate them with the requested messages; the owner told Jack her bakery "does not discriminate" and "accept[s] all humans." *Id.*, at 301a (internal quotation marks omitted). The second bakery owner

told Jack he "had done open Bibles and books many times and that they look amazing," but declined to make the specific cakes Jack described because the baker regarded the messages as "hateful." *Id.*, at 310a (internal quotation marks omitted). The third bakery, according to Jack, said it would bake the cakes, but would not include the requested message. *Id.*, at 319a.[2]

Jack filed charges against each bakery with the Colorado Civil Rights Division (Division). The Division found no probable cause to support Jack's claims of unequal treatment and denial of goods or services based on his Christian religious beliefs. *Id.*, at 297a, 307a, 316a. In this regard, the Division observed that the bakeries regularly produced cakes and other baked goods with Christian symbols and had denied other customer requests for designs demeaning people whose dignity the Colorado Antidiscrimination Act (CADA) protects. See *id.*, at 305a, 314a, 324a. The Commission summarily affirmed the Division's no-probable-cause finding. See *id.,* at 326a–331a.

The Court concludes that "the Commission's consideration of Phillips' religious objection did not accord with its treatment of [the other bakers'] objections." *Ante,* at 15. See also *ante,* at 5–7 (GORSUCH, J., concurring). But the cases the Court aligns are hardly comparable. The bakers would have refused to make a cake with Jack's requested message for any customer, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked goods they would have sold anyone else. The bakeries' refusal to make Jack cakes of a kind they would not make for any customer scarcely resembles Phillips' refusal to serve Craig and Mullins: Phillips would *not* sell

---

[2]The record provides no ideological explanation for the bakeries' refusals. Cf. *ante,* at 1–2, 9, 11 (GORSUCH, J., concurring) (describing Jack's requests as offensive to the bakers' "secular" convictions).

to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others. When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied. Cf. *ante,* at 3–4, 9–10 (GORSUCH, J., concurring). Colorado, the Court does not gainsay, prohibits precisely the discrimination Craig and Mullins encountered. See *supra,* at 1. Jack, on the other hand, suffered no service refusal on the basis of his religion or any other protected characteristic. He was treated as any other customer would have been treated—no better, no worse.[3]

The fact that Phillips might sell other cakes and cookies to gay and lesbian customers[4] was irrelevant to the issue Craig and Mullins' case presented. What matters is that Phillips would not provide a good or service to a same-sex

---

[3] JUSTICE GORSUCH argues that the situations "share all legally salient features." *Ante,* at 4 (concurring opinion). But what critically differentiates them is the role the customer's "statutorily protected trait," *ibid.*, played in the denial of service. Change Craig and Mullins' sexual orientation (or sex), and Phillips would have provided the cake. Change Jack's religion, and the bakers would have been no more willing to comply with his request. The bakers' objections to Jack's cakes had nothing to do with "religious opposition to same-sex weddings." *Ante,* at 6 (GORSUCH, J., concurring). Instead, the bakers simply refused to make cakes bearing statements demeaning to people protected by CADA. With respect to Jack's second cake, in particular, where he requested an image of two groomsmen covered by a red "X" and the lines "God loves sinners" and "While we were yet sinners Christ died for us," the bakers gave not the slightest indication that religious words, rather than the demeaning image, prompted the objection. See *supra,* at 3. Phillips did, therefore, discriminate *because of* sexual orientation; the other bakers did not discriminate *because of* religious belief; and the Commission properly found discrimination in one case but not the other. Cf. *ante,* at 4–6 (GORSUCH, J., concurring).

[4] But see *ante,* at 7 (majority opinion) (acknowledging that Phillips refused to sell to a lesbian couple cupcakes for a celebration of their union).

couple that he would provide to a heterosexual couple. In contrast, the other bakeries' sale of other goods to Christian customers was relevant: It shows that there were no goods the bakeries would sell to a non-Christian customer that they would refuse to sell to a Christian customer. Cf. *ante,* at 15.

Nor was the Colorado Court of Appeals' "difference in treatment of these two instances . . . based on the government's own assessment of offensiveness." *Ante,* at 16. Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display. As the Court recognizes, a refusal "to design a special cake with words or images . . . might be different from a refusal to sell any cake at all." *Ante,* at 2.[5] The Colorado Court of Appeals did not distinguish Phillips and the other three bakeries based simply on its or the Division's finding that messages

---

[5]The Court undermines this observation when later asserting that the treatment of Phillips, as compared with the treatment of the other three bakeries, "could reasonably be interpreted as being inconsistent as to the question of whether speech is involved." *Ante,* at 15. But recall that, while Jack requested cakes with particular text inscribed, Craig and Mullins were refused the sale of any wedding cake at all. They were turned away before any specific cake design could be discussed. (It appears that Phillips rarely, if ever, produces wedding cakes with words on them—or at least does not advertise such cakes. See Masterpiece Cakeshop, Wedding, http://www.masterpiececakes.com/wedding-cakes (as last visited June 1, 2018) (gallery with 31 wedding cake images, none of which exhibits words).) The Division and the Court of Appeals could rationally and lawfully distinguish between a case involving disparaging text and images and a case involving a wedding cake of unspecified design. The distinction is not between a cake with text and one without, see *ante,* at 8–9 (GORSUCH, J., concurring); it is between a cake with a particular design and one whose form was never even discussed.

in the cakes Jack requested were offensive while any message in a cake for Craig and Mullins was not. The Colorado court distinguished the cases on the ground that Craig and Mullins were denied service based on an aspect of their identity that the State chose to grant vigorous protection from discrimination. See App. to Pet. for Cert. 20a, n. 8 ("The Division found that the bakeries did not refuse [Jack's] request because of his creed, but rather because of the offensive nature of the requested message. . . . [T]here was no evidence that the bakeries based their decisions on [Jack's] religion . . . [whereas Phillips] discriminat[ed] on the basis of sexual orientation."). I do not read the Court to suggest that the Colorado Legislature's decision to include certain protected characteristics in CADA is an impermissible government prescription of what is and is not offensive. Cf. *ante,* at 9–10. To repeat, the Court affirms that "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Ante,* at 10.

II

Statements made at the Commission's public hearings on Phillips' case provide no firmer support for the Court's holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one. See App. to Pet. for Cert. 5a–6a. First, the Division had to find probable cause that Phillips violated CADA. Second, the ALJ entertained the parties' cross-motions for summary judgment. Third, the Commission heard Phillips' appeal. Fourth, after the Commission's ruling, the Colo-

rado Court of Appeals considered the case *de novo*. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips' case is thus far removed from the only precedent upon which the Court relies, *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993), where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council, see *id.,* at 526–528.

* * *

For the reasons stated, sensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance of the Colorado Court of Appeals' judgment. I would so rule.