FOREWORD

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This symposium could not possibly be timelier. In the short time since the Supreme Court decided *Burwell* v. *Hobby Lobby Stores*, *Inc*.,[1] those of us who advocate for LGBTQ people have watched and listened, sometimes with dropped jaws, as legislators, state officials, and candidates for office all have invoked "religious liberty" as a purported legal justification to deny goods or services to LGBTQ people. In 2015, for example, we have seen nearly eighty separate bills introduced in state legislatures that purportedly would confirm or expand rights of free exercise or confer religious exemptions from obligations otherwise imposed by law.[2]

Many of us knew this was coming. By the time the Supreme Court decided *Hobby Lobby* in 2014, the LGBTQ rights movement had seen a remarkable string of successes, particularly during the immediately prior decade. In certain fora at least, we had secured legal protections for LGBT kids in school,[3] achieved the dismantling of "Don't Ask; Don't Tell,"[4] won marriage equality[5] and second-parent adoptions,[6] passed laws regulating sexual orientation change efforts,[7] and confirmed the rights of transgender people to appropriate medical care.[8] Demographic data showed that younger generations were increasingly accepting of LGBTQ people, and that they, unlike their parents and grandparents, expected that LGBTQ people should enjoy full citizenship.[9]

These trends frightened our opponents, who view our equal citizenship as an affront or a threat to their own. But our opponents were losing. They were

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1. 134 S. Ct. 2751 (2014).
2. *See*, *e.g.*, Eunice Hyon Min Rho, *The Fight Ahead: What's Next in Attempts To Discriminate Against LGBT People in the Name of Religion*, ACLU.ORG (Oct. 9, 2015), https://www.aclu.org/blog/speak-freely/fight-ahead-whats-next-attempts-discriminate-against-lgbt-people-name-religion.
3. CAL. EDUC. CODE § 200 (West 2000).
4. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.
5. *See*, *e.g.* Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (Mass. 2003).
6. *See, e.g.* Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003).
7. *See*, *e.g.*, N.J. STAT. ANN. § 45:1-54 *et seq*. (prohibiting licensed professional counselors from performing "Sexual Orientation Change Efforts" on minor patients).
8. *Know Your Rights: Healthcare*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, http://www.transequality.org/know-your-rights/healthcare (last visited Nov. 2, 2015).
9. Justin McCarthy**,** *Same-Sex Marriage Support Reaches New High at 55%*, GALLUP **(**May 21, 2014), http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx.

losing at the ballot box, in the courts, and in the legislative chambers. The marriage movement had broadcast images of happy, healthy LGBTQ couples and parents into living rooms and onto computer screens across the nation. People were becoming comfortable with us. No longer could our opponents enlist others in their efforts to denigrate us simply by relying on their old tropes—that we all are predators, mental defects, or perverse. That old message simply was not resonating.

Smart people at the "pro-family" organizations strategized. In light of our successes, they realized that upping the volume of their traditional anti-gay screeds no longer guaranteed that they would get their way. They needed a new narrative, something that would allow them—in the courts, on talk radio, and in their fundraising campaigns—to profess to be "pro" something. The "something" they landed on was "religious liberty."

The choice was brilliant. It seems that most Americans—even atheists—favor religious liberty, at least in the abstract. But the choice also was cynical. Our opponents know full well that LGBTQ people—especially those who are poor, or non-white, or female, or transgender, or gender nonconforming, or young, or elderly, or geographically isolated—face continuing barriers to full equality and economic stability, even in those jurisdictions that formally protect their rights. And yet this new strategy sought to cast the LGBTQ rights movement as the rich, powerful aggressor. Our opponents, previously the standard bearers for majority values, shed that mantle and instead assumed a cloak of minority victimhood. Steamrolling, well-funded homosexual zealots—so the narrative went—were out to get them, ruin their way of life, and take away their bibles.

According to this new narrative, this Plan B, religious rights were under attack. While resistance to LGBTQ progress previously had been premised on the notion that LGBTQ people were outliers whose unnatural ways need not be tolerated under law, let alone protected, this new narrative of religious victimhood turned the tables. This new narrative instructed people who opposed LGBTQ progress and dignity that it is both their religious *and their patriotic* right and obligation to stand up against the tyranny of liberal, anti-religious activists.[10]

This deliberate narrative shift took hold long before *Hobby Lobby* made its way to the Supreme Court.[11] The message is simple, without nuance, and

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10. This new narrative has gained prominence in the 2016 presidential campaign as well. Presidential candidate Sen. Ted Cruz (R., Tex.), for example, held a "Rally for Religious Liberty." *See e.g.,* Emma Margolin, *Cruz Warns of 'War on Faith' at Religious Freedom Rally*, MSNBC.COM (Aug. 21, 2015), http://www.msnbc.com/msnbc/ted-cruz-warns-war-faith-religious-freedom-rally.

11. The Alliance Defending Freedom ("ADF"), founded in 1994, for example, has been the principal author of bills introduced in state legislatures in recent years that

absolute. Anyone can repeat it. Its successful invocation requires no actual knowledge of the First Amendment, or of the Religious Freedom Restoration Act, or of any of the many legal doctrines and theories so expertly dissected by the contributors to this Symposium. This narrative took hold, and set deep roots in the populations our opponents had targeted.

Meanwhile, of course, the LGBTQ rights movement remained largely fixated on winning marriage equality. At the same time our opponents were spreading the myth of religious victimhood, we were telling stories of romantic devotion and domestic tranquility. Our respective narratives were, in some ways, like ships passing in the night. The narratives of love and normalcy we relied upon to win marriage responded to the *old* narrative that claimed we purportedly were sick and depraved; they did not directly counter this *new* narrative that claimed we were deliberately threatening religious freedom.

Hobby Lobby was decided during this unusual time. The LGBTQ rights movement was talking about love and parenting, but our opponents already had pivoted, and were talking about religious liberty.[12] They were preparing for the next fight, their Plan B, while we continued to talk about the last one, the one we were about to win.

Some in our movement who had not focused on the growing strength of the new religious liberty narrative were surprised by the *Hobby Lobby* decision, shocked at the pronouncement that corporations can enjoy free

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purport to protect religious liberty. *See* David Neiwert, *Behind the 'Religious Freedom' Attacks on Gay Rights Lurks a Broad Attack on Civil Rights*, SPLC.ORG (Feb. 28, 2014), https://www.splcenter.org/hatewatch/2014/02/28/behind-%E2%80%98religious-freedom%E2%80%99-attacks-gay-rights-lurks-broad-attack-civil-rights. According to its website, ADF has for many years "defend[ed] religious freedom and oppos[ed] all attempts to compel people to compromise their beliefs or retreat from civil and political life as the price for following their faith." *See Our First Freedom*, ADFLEGAL.ORG, http://www.adflegal.org/issues/religious-freedom/conscience (last visited Nov. 15, 2015).

12. *See*, *e.g.*, Jeremy Tedesco, *Setting the Record Straight: 4 Things You Need To Know About the Hitching Post Case*, ADFLEGAL.ORG (Oct. 25, 2014), http://www.adflegal.org/detailspages/blog-details/allianceedge/2014/10/25/setting-the-record-straight-4-things-you-need-to-know-about-the-hitching-post-case (discussing *Hobby Lobby*'s effect on religious rights of a for-profit company to refuse to provide wedding services to gay couples; posted eight months *prior* to the Supreme Court's decision in Obergefell v. Hodges, 135 S. Ct. 2584 (2015)). Of course, opponents of LGBTQ equality continued discussing these issues through the religious liberty lens *after Obergefell* as well. *See*, *e.g.*, *Religious Liberty After Obergefell: Why Congress Must Act Now To Pass the First Amendment Defense Act*, FRC.ORG (July 16, 2015), http://www.frc.org/university/religious-liberty-after-obergefell-why-congress-must-act-now-to-pass-the-first-amendment-defense-act (posting dated just over two weeks after the release of the *Obergefell* decision).

exercise rights.[13] To them, suddenly, the sky was falling. The dissent authored by Justice Ginsberg—which in its very first sentence describes the majority opinion as one of "startling breadth."[14]—helped fuel this frenzy.

But is the frenzy warranted? Is *Hobby Lobby* really a magic wand our opponents can simply wave in the air in order to roll back gains we have made by exempting themselves from laws that benefit us? This Symposium provides us an opportunity to reflect on that question. To me at least, the answer seems to be "no." As the contributions to this Symposium demonstrate, we advocates (with the help of academics) should be able to lawyer our way around the most thorny aspects of *Hobby Lobby*.

First, as Justice Kennedy emphasized in concurrence, the government's failure to demonstrate that the contraceptive mandate at issue was the least restrictive means to achieve the goal of providing contraception without cost sharing resulted from the unusual fact that the government *already* had devised a different way of doing just that.[15] It will be a rare case in which a litigant seeking a religious exemption happens upon so fortunate a fact.

Second, the majority opinion describes its own limits, in a manner that expressly suggests a path for resisting religious liberty defenses to employment discrimination claims, and that may provide a roadmap for resisting other exemption claims as well. In responding to Justice Ginsberg's concern that employment discrimination could be cloaked as religious practice, Justice Alito for the majority pooh poohs the notion, observing that the government has a "compelling interest in providing an equal opportunity to participate in the workforce without regard to race," and that workplace discrimination prohibitions are "precisely tailored" to achieve that end.[16] The EEOC recently issued a decision holding that employment discrimination based on sexual orientation constitutions sex discrimination prohibited under Title VII.[17] It

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13. Lambda Legal Education and Defense Fund, Inc. filed an amicus brief on the merits in *Hobby Lobby* that two other advocacy organizations joined. *See* Burwell v. Hobby Lobby Stores, Inc., SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/sebelius-v-hobby-lobby-stores-inc/ (last visited Nov. 2, 2015). With the exception of that brief, however, the traditional players in the LGBTQ rights arena, including the organization for which I work, were largely absent from, and silent with regard to, the litigation that led to the decision.

14. *See Hobby Lobby,* 134 S. Ct. at 2787 (Ginsberg, J., dissenting). *See also id.* at 2804-05 (listing additional instances in which private businesses had claimed a religious right to exemption from employment and public accommodation laws and asking whether the majority's reasoning would require courts to confirm those exemptions).

15. *See id.* at 2786 (Kennedy, J., dissenting).

16. *See id.* at 2783.

17. Complainant v. Anthony Foxx, Sec'y of the Dep. of Transp., App. No. 0210133080 (EEOC July 15, 2015), *available at* http://www.americanbar.org/

seems fairly straightforward to argue that if the government has a compelling interest in preventing employment discrimination based on race, it has a similarly compelling interest in preventing discrimination based on sex, and therefore discrimination based on sexual orientation as well. If this argument holds up—and it should—then a significant potential arena for religion-based discrimination will be foreclosed.

Third, *Hobby Lobby* was about the right of a *private* person—in that case a close corporation—to claim a religious exemption. It wasn't about whether *government* functionaries can decline to perform *government* functions on account of their personal religious convictions. That particular form of "religious liberty" claim—as exemplified by the shrill clamor of many whose jobs include issuing marriage licenses—can be especially obnoxious and harmful. LGBTQ people do and probably should expect some degree of private disapproval, but official governmental denigration works a unique and painful harm.[18] *Hobby Lobby* provides no shelter for government officials who would use their positions to deny us services or benefits to which we are entitled.[19]

That is, *Hobby Lobby* provides no *doctrinal* shelter. Indeed, I predict that we can lawyer our way around virtually all of the frightening elements of the decision. But let's go back for just a bit to the discussion of this new narrative about religious liberty. Remember that this new narrative *pre-dated* the *Hobby Lobby* decision.[20] Viewed through this lens, it is apparent that *Hobby Lobby* didn't activate, or even kick start, the belief that religion should excuse compliance with laws requiring fairness for LGBTQ people. It merely *reflected* that narrative, and gave it additional strength.

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content/dam/aba/administrative/sexual_orientation/eeoc-lgbt-title-vii-decision .authcheckdam.pdf.

18. *Cf. Obergefell v. Hodges,* 135 S. Ct. 2584, 2606 (2015) ("Dignitary wounds [resulting from unequal government treatment] cannot always be healed with the stroke of a pen.").

19. Religious liberty claims by government functionaries seeking to avoid compliance with their duties are not faring well in the courts in any event. A federal court in Kentucky, for example, recently ordered a county clerk to issue marriage licenses despite her religious objections. *See* Miller v. Davis, Civ. Action No. 15-44-DLB, 2015 WL 4866729 (E.D. Ky. August 12, 2015) (Memorandum Opinion and Order). And the Board of Professional Conduct of the Supreme Court of Ohio recently issued an opinion holding that judges may not, consistent with that state's code of judicial conduct, decline to perform marriages on account of personal, moral, or religious beliefs about same-sex marriage. *See* Supreme Ct. of Ohio, Bd. of Prof. Conduct, *Opinion 2015-1*, *Judicial Performance of Civil Marriages of Same-Sex Couples*, SC.OHIO.GOV (Aug. 7, 2015), https://www.sc.ohio.gov/Boards/BOC/Advisory_Opinions/2015/Op_15-001.pdf.

20. *See supra* note 11.

And this, I believe, is the greatest danger of the *Hobby Lobby* decision: the fact that it strengthened the religious liberty *narrative*, not that it strengthened the *doctrine*. As an advocate for LGBTQ people in the Deep South, I am convinced that a strong narrative pitting religion against LGBTQ equality is far more dangerous, to more people, than virtually any conceivable doctrinal shift regarding religious liberty or religious exemptions.

Hobby Lobby, touted by our opponents as a resounding Supreme Court endorsement of the new narrative they had spun, emboldened those who would rely on this narrative to thwart our progress. We know this from the simple fact that so many religious liberty bills were introduced in state legislative sessions this year.[21] We also know it from those at the Southern Poverty Law Center and elsewhere who follow the activities of extreme anti-gay organizations, including those that have been designated as hate groups by the SPLC. And those of us that perform outreach and advocacy in those places that are most resistant to LGBTQ equality, including for example the Deep South, know it from our own experience.

The danger of this strengthening narrative is that it can take on a life of its own, untethered to any actual, incremental doctrinal changes. Eventually, the strengthening narrative can be seen by those to whom it appeals as authorizing virtually any action or declination that can be justified as premised on, or even just consistent with, religious beliefs. Let me provide some post-*Hobby Lobby* examples gleaned from my own work in the Deep South:[22]

- A transgender high school student is told he must dress as a girl to be included in the yearbook. The reason? Community members could be offended and they have religious freedom.
- A gay middle schooler is bullied and seeks protection from his teacher. The teacher says she would love to help but she is afraid to trample on the other students' religious freedom.
- A gay employee endures constant harassment from co-workers who leave bible quotes and handwritten notes on his desk urging him to repent. His supervisor refuses to intervene because the other employees have religious freedom.

21. *See supra* note 2.

22. Because these examples are based on actual client experiences or client inquiries, I have modified details so as not to reveal confidences or identities. Nonetheless, the gist of these examples remains accurate.

Quite obviously, none of these justifications for bad behavior would hold up in court. But the point here is that that doesn't really matter. LGBTQ people, especially the most vulnerable among us, don't live our lives on the pages of the U.S. Reports, or even the more pedestrian Federal Supplement, or even in unpublished decisions available only on Westlaw. Many of us—including the three people described in the anecdotes described above—live in places where the new narrative broadcast by our opponents has taken hold and become the master narrative. Good post-*Hobby Lobby* lawyering in a few select cases will not change that. It certainly will not insulate the many thousands of LGBTQ people who probably most need protection from the quotidian "religious freedom" barbs, slights, and denigrations they are sure to endure.

Professor Sepper notes in her contribution to this Symposium that those who advocate in favor of religious liberty-based exemptions sometimes point to the small number of reported cases involving exemptions as proof that granting them will have little effect on LGBTQ people as a whole. But she offers a wise warning.

> While predicting the incidence of objection is no easy task, one should hesitate to extrapolate from the number of existing legal cases. Most people do not look for legal recourse when they experience discrimination, particularly in housing and public accommodations, the very areas of focus for gay-rights-related exemptions.[23]

Professor Sepper's warning, at least from the standpoint of this advocate, is entirely correct. And it is precisely why we cannot measure *Hobby Lobby's* effect on LGBTQ antidiscrimination law and policy simply by awaiting the next federal court decision on religious exemptions and parsing its holding for its doctrinal implications.

Hobby Lobby was a *reflection* of a seismic shift in our opponents' strategy to deny us dignity and to resist our gains; it wasn't the cause and it won't be the principal weapon. To be sure, the decision lent further credence to the new, cynical narrative that religious freedoms are at risk, and it emboldened those who would relegate us to second-class status. But smart lawyers can manage the doctrinal challenges of that decision, and we will. The more difficult challenge, I predict, will be the work we must do to blunt the false narrative that those of us who seek equality and dignity for LGBTQ people threaten

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23. Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 121, 154-55 (2015) (citations omitted).

other people's religious liberties.[24] This Symposium takes an important step in that direction by exploring the doctrinal and political and policy implications of the decision. The next step, in which we all should engage, is exploring the ways in which we can counter the narrative that *Hobby Lobby* reflects. Absent a concerted effort in that regard, I fear that all the good lawyering that this Symposium embodies and enables won't do enough to better the lives of LGBTQ people whose stories never will be told in our federal courts.

24. *Cf.* Ira C. Lupu, *Moving Targets:* Obergefell, Hobby Lobby, *and the Future of LGBT Rights, 7* ALA. C.R. & C.L. L. REV. 1*,* 4 (2015) ("My overarching thesis is that the political impact of *Hobby Lobby* may be much greater than its legal impact. In the adjudicative process under federal law, I predict that *Hobby Lobby* will prove to be little or no impediment to full recognition of LGBT rights . . . ").