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Written Testimony of Sarah Warbelow
Legal Director, Human Rights Campaign

To the
U.S. Senate Committee on the Judiciary
Nomination of the Honorable Neil M. Gorsuch to the Supreme Court of the United States
March 23, 2017

Good morning. My name is Sarah Warbelow and I serve as the legal director for the Human Rights Campaign, the nation's largest organization advocating for the civil rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) people. On behalf of the Human Rights Campaign and our nearly 2 million members and supporters nationwide, I am honored to be speaking to you today. However, I am disappointed and distressed to be here to discuss the nomination of Judge Neil Gorsuch to the Supreme Court.

LGBTQ people are no stranger to the Supreme Court. We intimately understand the power of the Court to affirm or deny our most basic rights. We know that the very Court that so many celebrated following the decisions from *Romer v. Evans*¹ to *Obergefell v. Hodges*² also issued *Bowers v. Hardwick*,³ the decision upholding state anti-sodomy laws and providing the highest federal seal of approval for these discriminatory, marginalizing laws that targeted and victimized the LGBTQ community for a generation. We understand that just as our past has been shaped by the men and women who serve on this bench, our future will be tied to them as well. It is because of this that we hold the individuals who receive these lifetime positions to such a high standard. We know that we speak for the generations of LGBTQ people who will be impacted by their decisions. The same transgender students fighting for equal access to an education will grow into the workers who will deserve the same equal treatment on the job from their employers and from their government. If confirmed, Judge Gorsuch could easily serve until 2050 or beyond—transforming the legal and civil rights landscape to reflect the myopic indifference to basic humanity that colors much of his record thus far.

We recognize that Supreme Court Justices aren't always popular. We might not agree with every decision

¹ 517 U.S. 620 (1996).

² 135 S. Ct. 2584 (U.S. 2015).

³ 478 U.S. 186 (1985).

they make. But we must believe in their commitment to reaching impartial judgments based upon fact, not political ideology, cronyism, or bias. And they must agree that LGBTQ people have fundamental rights protected by the Constitution and that we, as individuals and as a community, are entitled to equal treatment under the law. We need a Justice who recognizes our basic equality and shared humanity. Judge Gorsuch has never met this bar.

Time and again, Judge Gorsuch has employed a dangerous brand of Constitutional originalism that ignores the essential contexts and values that are woven throughout each case and the lives they touch. Judge Gorsuch's statements on originalism echo the infamous analogy made by now Chief Justice Roberts in his own nomination hearing. Chief Justice Roberts described the originalist judge's role stating that, "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules."⁴ This simplistic analogy ignores that sometimes the role of the Court is to determine the scope of the rule, to interpret the law faithfully in the spirit with which it was drafted. This is far from "making" the law or engaging in the taboo of "judicial activism." Rather, such determinations actually serve the law when it is most difficult to do so—when it requires the most analysis and the most sincere, bias-free perspective. The Supreme Court is not a game. The American people need a reasoned jurist who will actively engage in Constitutional contextualism. Cases that have reached the Supreme Court are by their very nature complicated and unsettled and cannot be resolved by applying the law by rote.

Constitutional Originalism and the LGBTQ Community

The Supreme Court has consistently recognized that LGBTQ people have Constitutionally protected fundamental rights. We have the right to build relationships without the threat of criminalization, we have the right to raise our children in loving homes, and we have the right to marry. These rights are built on a foundation of landmark privacy cases like *Griswold v. Connecticut*,⁵ which held that in addition to the enumerated rights included in the Constitution, the Bill of Rights also protects liberty interests that "help give them life and substance."⁶ These rights are also deeply rooted in individual autonomy and liberty cases like *Planned Parenthood v. Casey*.⁷ It is here, amidst these rights, that our lives and the substance of them are most recognized and protected.

The Supreme Court's decisions on marriage equality stand on the shoulders of these foundational civil rights cases. In *Obergefell*, the Supreme Court reaffirmed that the right to marry is fundamental.⁸ These cases echo a long line of decisions, including *Griswold* and *Casey*, that have informed our country's understanding of personal autonomy, individual dignity, and our relationships with the government and with each other. In *Obergefell*, Justice Kennedy cited *Loving v. Virginia*,⁹ the historic civil rights case that struck down anti-miscegenation laws, to support his decision that marriage was a fundamental right, holding that "the right to personal choice regarding marriage is inherent in the concept of individual

⁴ See United States Cong. Senate Comm. on Judiciary, *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, 109th Cong. (2005).

⁵ 381 U.S. 479 (1965).

⁶ See *Griswold*, 381 U.S. at 484.

⁷ 505 U.S. 833 (1992).

⁸ See *Obergefell*, 135 S. Ct. at 2599.

⁹ 388 U.S. 1 (1966).

autonomy.”¹⁰ The landmark civil rights case, *Lawrence v. Texas*,¹¹ which struck down state anti-sodomy laws, also recognized LGBTQ people’s fundamental right to privacy and self determination. The *Lawrence* Court acknowledged the stigmatizing and life-changing impact of these laws on LGBTQ people, citing *Casey* that, “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹²

The *Lawrence* Court also held that the Texas anti-sodomy law violated the guarantee of Equal Protection under the 5th and 14th Amendments of the Constitution.¹³ Justice Kennedy’s conclusion to the majority opinion spoke directly to the inclusion of LGBTQ people within these Constitutional protections:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.¹⁴

Other landmark cases detailing the right to Equal Protection under the law for LGBTQ people were not decided in a vacuum, but rather took into account the effect that laws have on real people in their daily lives and in their place in society. In *U.S. v. Windsor*, the Court held that the so-called Defense of Marriage Act (DOMA) violated the guarantee of Equal Protection of the 5th amendment of the Constitution.¹⁵

Justice Kennedy has described the Constitutional evaluation involving the identification and protection of fundamental rights as “an enduring part of the judicial duty to interpret the Constitution...” continuing that “it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect... History and tradition guide and discipline this inquiry but do not set its outer boundaries.”¹⁶ Decisions like *Lawrence* and *Obergefell* illustrate the Court’s longstanding ability incorporate the texture of lived experiences to make the Constitutional connections necessary to ensure true equality under the law. We must demand that any nominee for the Supreme Court exhibit a similar discipline and commitment to interpreting and applying Constitutional and legal standards impartially. We are deeply concerned that Judge Gorsuch’s rote originalism makes him not only ill-equipped to engage in this Constitutional searching, but ideologically opposed to the exercise and the significant, settled case law detailing it.

Judge Gorsuch’s brand of Constitutional originalism denies the complicated underpinnings of our most treasured document. In constructing the Fourteenth Amendment, the drafters were clearly focused on the

¹⁰ See *Obergefell*, 135 S. Ct. at 2599.

¹¹ 539 U.S. 558 (2003).

¹² See *Lawrence*, 539 U.S. at 574 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

¹³ See *Lawrence*, 539 U.S. at 578-79.

¹⁴ *Id.*

¹⁵ See *Windsor*, 133 S. Ct. at 2696.

¹⁶ See *Obergefell*, 135 S. Ct. at 2598.

greatest problem before them—dismantling the institution of slavery and the persistent systemic racism it caused—but they chose to write language that provided a promise to all. Yet many jurists who adhere to Constitutional originalism, such as Justice Antonin Scalia whose approach to Equal Protection Judge Gorsuch has praised, have refused to provide heightened scrutiny to gender discrimination or discrimination based on LGBTQ status.¹⁷ Judge Gorsuch’s record and statements place him squarely in the mold of Justice Scalia, who consistently demeaned and denied the dignity of LGBTQ people from the bench. Justice Scalia found himself in the minority opinion of many of the landmark cases discussed above, including *Lawrence*, espousing a staunch originalist ideology to dehumanize LGBTQ people and deny them rights entitled by the Constitution.

Judge Gorsuch has directly questioned the right to personal autonomy and choice articulated by *Casey*, arguing that it created too great a “risk” to state marriage laws that excluded same-sex couples.¹⁸ I would be remiss if I did not also include that in this statement, Judge Gorsuch accepted whole cloth a quote from Justice Scalia equating marriage for same-sex couples to bestiality and made no effort to distinguish between marriage—one of our society’s most sacred traditions—and criminal, anti-social behavior.¹⁹ Despite reports that Judge Gorsuch is personal friends with individuals who identify as LGBTQ, his choice to embrace this line of reasoning as his own not only targetedly demeans a traditionally marginalized population, but also reveals a level of ignorant indifference that should be considered disqualifying for a lifetime appointment. Marriage equality is settled law and must not be undermined by a radical ideologue hostile to decades of Constitutional history and analysis.

Statutory Interpretation

Statutory interpretation is of the utmost importance to the LGBTQ community. The next person confirmed to the Supreme Court will undoubtedly play a role in assessing whether laws prohibiting sex discrimination also prohibit discrimination because someone thinks that a woman shouldn’t be attracted to other women, or because someone has transitioned from male to female. Numerous federal courts²⁰ and agencies²¹ have recognized that discrimination on the basis of sexual orientation or gender identity is

¹⁷ See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (Scalia, J., dissenting, joined by Justice Thomas and Chief Justice Rehnquist) (arguing that state’s use of peremptory strikes on the basis of gender in jury selection did not violate Equal Protection Clause); *United States v. Virginia*, 518 U.S. 515 (1996) (Scalia, J., dissenting).

¹⁸ Neil Gorsuch, *Liberals’N’Lawsuits*, NAT’L REVIEW ONLINE (Feb. 7, 2005), available at <http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6>.

¹⁹ *Id.*

²⁰ See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (Equal Protection Clause); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); *Rumble v. Fairview Health Serv.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (Affordable Care Act); *Fabian v. Hosp. of Cent. Conn.*, No. 3:12-cv-1154, 2016 WL 1089178 (D. Conn. Mar. 18, 2016).

²¹ See, e.g., Dep’t of Health and Human Serv., Nondiscrimination in Health Programs and Activities, 45 C.F.R. § 92.4 (May 13, 2016); Dep’t of Def., *Guidance for Treatment of Gender Dysphoria for Active and Reserve Component Service Members* (Jul. 29, 2016); Memorandum from Attorney General Eric Holder, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014); Discrimination Based on Sex, 41 C.F.R. § 60-20.2(a) (2016); *Macy v. Holder*, E.E.O.C. App. No. 0120120821, 2012 WL 1435995, at *12 (Apr. 20, 2012).

often unlawful sex discrimination under existing federal laws including Title VII of the 1964 Civil Rights Act and Title IX of the 1972 Education Amendments.

Gorsuch's view on Constitutional originalism suggests he believes that with regard to statutory interpretation, it only matters if the drafters of Title VII specifically intended for it to apply in the manner raised. Even Justice Scalia in *Oncale v. Sundowner Offshore Services, Inc.*²² recognized this was not the proper test for determining the application of a statute in order to effect its remedial purposes. Numerous federal courts have followed in the footsteps of the Supreme Court in *Oncale* and *Price Waterhouse v. Hopkins*²³ by holding that Title VII prohibits discrimination against LGBTQ people. Some critics of the interpretation, though, have reasoned that Congress did not intend to include these protections when the statute was drafted in 1964, which would, according to their view, limit the reach of the statute's protections today. The Equal Employment Opportunity Commission (EEOC) illuminated the flaws in this reasoning:

Congress may not have envisioned the application of Title VII to these situations. But as a unanimous Court stated in *Oncale v. Sundowner Offshore Services, Inc.*, 'statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.' ... Interpreting the sex discrimination prohibition of Title VII to exclude coverage of lesbian, gay or bisexual individuals who have experienced discrimination on the basis of sex inserts a limitation into the text that Congress has not included... Some courts have also relied on the fact that Congress has debated but not yet passed legislation explicitly providing protections for sexual orientation... But the Supreme Court has ruled that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."²⁴

It is imperative that any nominee to the Supreme Court not permit his or her views of what Congress may have meant to override the the words of the statute itself, but rather embrace the reasonable approach to statutory interpretation reflected in Supreme Court precedent historically. For example, although Title VII did not originally explicitly prohibit sexual harassment or sex stereotyping at work as unlawful sex discrimination, the Court has made clear that these protections are ingrained in the fabric of the statute—regardless of the drafters' original intent.²⁵

Judge Gorsuch has also shown an eagerness to carve out sweeping defenses for employers in workplace discrimination cases. This concern is clearly illustrated by a 2009 case in which he joined an opinion finding against a transgender woman alleging employment discrimination under Title VII. In *Kastl v. Maricopa County Community College*,²⁶ an employer refused to allow an employee to use the appropriate

²² 523 U.S. 75 (1998).

²³ 490 U.S. 228 (1989).

²⁴ See *Baldwin v. Foxx*, E.E.O.C. Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015).

²⁵ See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998) (holding same-sex sexual harassment is actionable as sex discrimination under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (holding sex stereotyping is a form of sex discrimination prohibited under Title VII).

²⁶ 325 Fed. Appx. 492 (9th Cir. 2009).

women's restroom following her gender transition despite her provision of government identity documents confirming her gender.²⁷ When she refused to use the men's restroom, she was terminated.²⁸ The court determined that the employer's argument denying the employee access to a gender appropriate facility was not discrimination because it was based on "safety concerns."²⁹ There was no evidence for these "concerns" at all beyond complaints that some individuals were uncomfortable around Ms. Kastl. Social discomfort does not correspond to a genuine safety concern. The Supreme Court has explicitly rejected the idea that discomfort should be a defense to discrimination.³⁰

Bare animus towards the LGBTQ community must never be allowed to cloak itself in false justifications of privacy or safety or comfort. Decried by organizations that support women who have been subjected to sexual assault and intimate partner violence,³¹ individuals bent on denying transgender people equal participation in society have clung to erroneous claims of safety and privacy.³² Supreme Court Justices must be able to discern legitimate government interests from clear hostility to vulnerable minorities.

Use of Religion to Deny Others' Rights

Judge Gorsuch joined the majority opinion in the Tenth Circuit's decision in *Hobby Lobby Stores, Inc. v. Sebelius*,³³ holding that corporations are "persons" that exercise religion for purposes of the Religious Freedom Restoration Act (RFRA) and could use RFRA to obtain an exemption from the Affordable Care Act.³⁴ This set the stage for the Supreme Court's 2014 decision in *Burwell v. Hobby Lobby Stores, Inc.*,³⁵ which altered the application of RFRA and heightened concerns that RFRA will be used to trump laws that prohibit discrimination or ensure access to health care. *Hobby Lobby* turned the concept of religious freedom on its head, creating a mechanism by which some religious beliefs can be imposed upon others, undermining religious pluralism and tolerance. The decision imbues corporations with humanity in ways that conflict with the purpose of a for-profit corporation and sets up the religious views of corporate owners to prevail over the well-founded needs of employees, patients, and customers.

The Tenth Circuit's approach to RFRA's substantial burden question was particularly troubling. It held that a corporation is substantially burdened when it claims merely that it feels "moral culpability" because following the law could allow other people to act in a way which it finds objectionable. This conclusion significantly lowered the bar for establishing a substantial burden under RFRA and morphed this legal

²⁷See *Kastl*, 325 Fed. Appx. at 493.

²⁸ *Id.*

²⁹ *Id.* at 494.

³⁰ See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect").

³¹ See Nat'l Task Force to End Sexual and Domestic Violence Against Women, *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community* (Apr. 21, 2016), available at <http://endsexualviolence.org/files/NTFNationalConsensusStmntTransAccessWithSignatories.pdf>.

³² See Brief for Law Enforcement Officers as *Amici Curiae* Supporting Respondent, *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (2017) (No. 16-273); Brief for American Academy of Pediatrics, et al. as *Amici Curiae* Supporting Respondent, *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (2017) (No. 16-273).

³³ 723 F.3d 1114 (10th Cir. 2013).

³⁴ See *Sebelius*, 723 F.3d. at 1129.

³⁵ 134 S. Ct. 2751 (U.S. 2014).

standard into a subjective standard defined by the claimant. The Tenth Circuit opinion also ignored that the Establishment Clause of the Constitution places important limitations on religious exemptions: the government may not carve out exemptions if they would result in real harm to others.³⁶ At the same time, the Tenth Circuit dismissed the notion that employees would be harmed if their employers deny insurance coverage for vital healthcare.³⁷ This radical departure, altering RFRA and ignoring constitutional limits, could have far reaching consequences that go even further than access to healthcare for large numbers of people, and could even threaten our nation's laws designed to promote equality and combat discrimination.

The immediate aftermath of *Hobby Lobby* raises serious questions for the LGBTQ community about what other types of health care can be denied based on the whims of employers. Judge Gorsuch's vision that providing healthcare equates to moral culpability could very well open up LGBTQ people to even more discrimination. Under this logic, providers could argue that transgender people could be categorically denied access to hormone therapy, employers could pick and choose which employees have access to infertility treatments, and corporate owners could refuse to cover lifesaving medications like PrEP.

Hobby Lobby has inspired litigation around the country that undermines critical nondiscrimination protections for transgender people. Rather than solely fight the common sense legal trend towards determining that laws prohibiting sex discrimination also prohibit discrimination on the basis of gender identity, new efforts have arisen designed to circumvent our nation's laws by arguing that assertion of religious belief permits an individual to be unencumbered by complying with any provision which they consider inconsistent with their world view. The district court decisions in *Franciscan Alliance, Inc. v. Burwell*³⁸ and *EEOC v. Harris Funeral Homes*³⁹ will likely result in these claims only being the tip of the iceberg.

In a direct challenge to the regulation accompanying the nondiscrimination provision contained in the Affordable Care Act, three religiously affiliated health care providers asserted a right under RFRA to refuse to provide necessary medical care to transgender people in *Franciscan Alliance, Inc. v. Burwell*.⁴⁰ In determining that *Franciscan Alliance* and the other parties would likely prevail on their RFRA claim, the district court omitted the prevailing evidence amongst established medical experts that appropriate treatment of gender dysphoria may necessitate a range of medical interventions including hormone therapy and surgery.⁴¹ It is troubling that *Hobby Lobby* is being read to permit the refusal of critical care

³⁶ See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 722, 726 (2005) (A religious exemption “must be measured so that it does not override other significant interests” and may not “impose unjustified burdens on other[s].”); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985) (A religious exemption may not “unyielding[ly] weight[ly]” religious interests “over all other interests” including coworkers who do not share the same religious beliefs.); see also, e.g., *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989).

³⁷ See *Sebelius*, 723 F.3d at 1144-45.

³⁸ *Franciscan Alliance, Inc. v. Burwell*, 2016 U.S. Dist. LEXIS 183116 (N.D. Tex. Dec. 31, 2016).

³⁹ *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2016 U.S. Dist. LEXIS 109716 (E.D. Mich. Aug. 18, 2016).

⁴⁰ See *Franciscan Alliance, Inc.*, 2016 U.S. Dist. LEXIS 183116, at *4. This case also involves eight states as plaintiffs: Texas, Wisconsin, Nebraska, Kansas, Louisiana, Arizona, Kentucky, and Mississippi; however, none of the states made a RFRA claim. *Id.*

⁴¹ See Brief for American Academy of Pediatrics, et al. as *Amici Curiae* Supporting Respondent, *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (2017) (No. 16-273).

for transgender people by entities accepting taxpayer funds for the explicit purpose of providing appropriate medical care to all who seek it.

In *EEOC v. Harris Funeral Homes*, U.S. District Court Judge Sean Cox turned a blind eye to the ways in which religiously motivated sex-stereotyping results in real harm to transgender people.⁴² Aimee Stephens had worked for the funeral home for nearly six years when she informed the owner that she would be transitioning and that when she returned she would be presenting as a woman, including wearing attire consistent with the dress code for women.⁴³ The funeral home owner terminated Stephens' employment based on his belief that sex is an unchangeable characteristic set at birth.⁴⁴ In providing the funeral home a pass from complying with Title VII, Judge Cox cited Supreme Court's decision in *Hobby Lobby* but disregarded the cautionary note contained in the majority opinion:

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction... Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.⁴⁵

Rather, Judge Cox's analysis is more consistent with Judge Gorsuch's view in the Tenth Circuit decision in *Hobby Lobby* that "moral culpability" overrides even compelling government interests. Such a reading will inevitably lead to an increase in the pervasive harms our nation's nondiscrimination laws were designed to eradicate.

Taking *Hobby Lobby* to the obvious extreme, consistent with the concept that no individual or even for-profit corporation should be required to follow a law that leads it to feel "moral culpability" for the actions of others, President Trump is considering signing a "religious freedom" executive order,⁴⁶ while Congress and state legislatures are considering the adoption of similar extreme legislation. These proposals would allow individuals, organizations, and closely held for-profit corporations to decline to recognize the marriages of same-sex couples—and in some instances the existence of transgender people—when doing so conflicts with religious or moral beliefs. To date, Mississippi is the only jurisdiction to enact such a law.⁴⁷ U.S. District Court Judge Carlton Reeves in *Campaign for Southern Equality v. Bryant III*⁴⁸ found the Mississippi law violates both the Establishment Clause as well as the 14th Amendment.⁴⁹ It is deeply concerning that Judge Gorsuch may have the opportunity to determine the ultimate outcome in this case given his clear efforts to shape doctrine around "moral culpability."

⁴² See *Harris Funeral Homes, Inc.*, No. 14-13710, 2016 U.S. Dist. LEXIS 109716, at *61.

⁴³ *Id.* at *8.

⁴⁴ *Id.* at *24.

⁴⁵ *Id.* at *49.

⁴⁶ See Ian Lovett, et al., *Trump Draft Order Would Expand Religious Rights, Could Allow Denial of Services to Gays*, Wall St. J., Feb. 5, 2017, <https://www.wsj.com/articles/draft-of-executive-order-proposes-expanding-legal-protections-on-religious-grounds-1486071114>.

⁴⁷ See Protecting Freedom of Conscience From Government Discrimination Act, Miss. Code Ann. § 11-62-5 (2016).

⁴⁸ 2016 U.S. Dist. LEXIS 83036 (S.D. Miss. June 27, 2016).

⁴⁹ See *Bryant III*, 2016 U.S. Dist. LEXIS 83036, at *24.

Threats to Progress Attained by LGBTQ Community

Efforts to exploit RFRA and the First Amendment in order to establish a broad right to refuse to acknowledge the humanity of LGBTQ people reflect only a segment of the litigation working its way through the courts with the end goal of undermining the basic protections that currently exist for LGBTQ community. Areas of the law that the majority of Americans view as settled, including marriage equality, are being litigated and debated by groups who are emboldened that a Supreme Court Justice like Judge Gorsuch will re-open settled law. In short order, the Supreme Court will be asked to determine the full scope of marriage equality and the application of gender specific language to LGBTQ people.

Recently, in *Smith v. Pavan*,⁵⁰ the Arkansas Supreme Court reversed a lower court's decision directing the Arkansas Department of Health to list both same-sex parents on their child's birth certificate, the same process that applies to different-sex couples.⁵¹ This ruling tries to limit the scope of *Obergefell*—despite the fact that the Supreme Court of the United States specifically listed birth certificates as one of the governmental rights, benefits, and responsibilities that marital status confers.⁵² The ruling places burdens on same-sex couples that opposite-sex couples do not experience, including forcing same-sex couples to enter into legal proceedings to assert parental rights. Distressingly, it denies children the full benefits of parental recognition in an effort to penalize the parents.

In Texas, the state supreme court reversed itself by agreeing to hear *Pidgeon v. Turner*,⁵³ a case it had previously rejected. At issue is whether the City of Houston overreached by providing spousal benefits to married same-sex couples on the same terms as opposite-sex couples.⁵⁴ Two Houston residents claim that “*Obergefell* may require States to license and recognize same-sex marriages, but that does not require States to give taxpayer subsidies to same-sex couples,” despite the fact that the city provides these same spousal benefits, such as healthcare, to opposite-sex couples.⁵⁵

Though not yet passed into law, the Tennessee General Assembly is advancing legislation to require statutes to be read in gender specific terms.⁵⁶ Thus terms such as “mother”, “father”, “husband”, and “wife” would be only understood to apply exactly as written no matter the consequences. In Tennessee, like many other states, a rebuttable presumption of parentage is established to increase the chances that a child will have two legal parents who are responsible for the child's welfare.⁵⁷ Were one of the advancing bills to pass, a child born to a mother married to a man who is not the biological father will be presumed to be the child of the man for all legal purposes, but a child born to a mother married to a woman who is not a biological parent will not automatically have the same legal protections. In addition, a woman would be responsible for the debt her husband accrued prior to the marriage but her husband would not be liable

⁵⁰ 2016 Ark. 437 (S. Ct. Ark. Dec. 8, 2016).

⁵¹ See *Pavan*, 2016 Ark. 437, at *10.

⁵² *Id.* at *10 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (U.S. 2015)).

⁵³ No. 15-0688, 2017 Tex. LEXIS 554 (Tex. Jan. 20, 2017).

⁵⁴ See Brief for Petitioner at 3-4, *Pidgeon v. Turner*, No.15-0688 (Tex. Sep. 10, 2015).

⁵⁵ *Id.* at 5.

⁵⁶ See, e.g., H.B. 33, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017)(requiring the words husband, wife, mother, and father be given their natural and ordinary meaning); S.B. 1085, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017)(requiring undefined words be given their natural and ordinary meaning).

⁵⁷ See Tenn. Code Ann. § 36-2-304 (2017).

for the debts she accrued. Other states are considering even more direct attacks on *Obergefell*.⁵⁸

Approach to Civil Rights

Finally, Judge Gorsuch's categorical dismissal of the historic role of the courts to protect civil rights and promote equality is distressing. Judge Gorsuch has stated that, "American liberals have become addicted to the courtroom... as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide."⁵⁹ This statement from a Supreme Court nominee is deeply troubling. Judge Gorsuch's failure to recognize the powerful, and longstanding role of the courts to protect individual and civil rights coupled with a record that often ignores the constitutional rights and personhood of some of our nation's most vulnerable people reveals a dangerous vision of the Court. Judge Gorsuch's statement reveals that he has divided cases, issues, and plaintiffs into two categories—those who deserve justice from the courts and those who don't. While Judge Gorsuch has not hesitated to assign personhood and rights of for-profit corporations like Hobby Lobby, he has failed to recognize these same qualities in actual human beings—including those who are LGBTQ.

Demanding justice and protection of our Constitutional rights from the Supreme Court is not, as Judge Gorsuch has described it, an "addiction."⁶⁰ We are not misusing or abusing the courts when we demand that they perform their function as envisioned by our founders. We are merely acting as full citizens under the law, ensuring that the systems designed to safeguard our Constitution and our democratic way of life do just that. This "addiction" is bolstered by a century of life-changing civil rights cases whose outcomes had proven to be unachievable by any other means, including *Brown v. Board of Education*,⁶¹ *Loving v. Virginia*, and *Roe v. Wade*. If demanding equal treatment under the law and respect for fundamental rights under the Constitution is an addiction, then it is to the betterment of our nation.

Conclusion

The American people expect and deserve a Supreme Court Justice who is committed to serving our system of Constitutional democracy and who understands the critical role of the Court in supporting it. We need a Justice who will not shy away from the facts and context that color the cases that come before the Court, but will instead embrace an expansive analysis that reflects the true spirit and intent behind the laws he or she is tasked with interpreting. Judge Gorsuch's record and testimony this week reveal that he is not this Justice. For these reasons, the Human Rights Campaign opposes his nomination.

⁵⁸ See, e.g., S.B. 64, 100th Gen. Assemb., Reg. Sess. (Ill. 2017)(creating the "Religious Freedom Defense Act" prohibiting the state government from taking action against an individual who believes or acts under a religious belief that marriage is between one man and one woman); H.B. 205, 99th Gen. Assemb., Reg. Sess. (Mo. 2017)(allowing an individual authorized to solemnize marriages to refuse to do so for marriages that conflict with the individual's religious beliefs).

⁵⁹ See Gorsuch, *supra* note 18.

⁶⁰ *Id.*

⁶¹ 347 U.S. 483 (1954).