



**Testimony of Sharon M. McGowan
Chief Strategy Officer and Legal Director, Lambda Legal Defense & Education Fund, Inc.
Former Principal Deputy Chief, Appellate Section,
U.S. Department of Justice Civil Rights Division**

**Testimony before the United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Civil Liberties**

**Hearing on
“Oversight of the Civil Rights Division of the Department of Justice”**

September 24, 2020

Good morning, and let me begin by thanking Chairman Cohen, Ranking Member Johnson, Chairman Nadler, and the other distinguished members of the Committee for the invitation to testify today as part of this incredibly important oversight hearing regarding the Civil Rights Division of the U.S. Department of Justice.

My name is Sharon McGowan, and I currently serve as the Chief Strategy Officer and Legal Director of Lambda Legal Defense & Education Fund, Inc. (“Lambda Legal”), the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender and queer (“LGBTQ”) people and everyone living with HIV through impact litigation, education and public policy work. Immediately prior to joining Lambda Legal, I was proud to serve as the Principal Deputy Chief of the Appellate Section of the Civil Rights Division of the U.S. Department of Justice. I first joined the Civil Rights Division as a line lawyer in the Appellate Section in February 2010. I served in that role for approximately three years. After a stint at the U.S. Office of Personnel Management, I returned to the Justice Department in September 2014, when I was selected for an open Deputy Chief position in the Appellate Section. When the Section’s Principal Deputy Chief retired, I successfully applied for the position, which I assumed in June 2016.

I appear before you today bringing not only my experience as a former career lawyer in the Civil Rights Division, but also my perspective as the Chief Strategy Officer and Legal Director of a national legal organization that serves a community of people who have been specifically targeted by the current administration. Despite important legal and social progress, LGBTQ people still face pervasive discrimination nationwide in employment, education, housing, credit,

public accommodations, and health care.¹ LGBTQ people suffer high rates of violence, including not only hate crimes by private perpetrators, but also discriminatory and abusive treatment by law enforcement and within our criminal justice system more broadly.² I was proud to serve in the Civil Rights Division at a time when it was committed to using its legal and moral authority to address these harmful and destructive forms of discrimination. In particular, I served as the Co-Chair of the Civil Rights Division’s LGBTI Working Group, a collaborative space where lawyers representing the various sections of the Civil Rights Division could identify opportunities for the Department to secure and advance the civil rights of lesbian, gay, bisexual, transgender and intersex individuals. Shortly after the November 2016 election, I made the difficult decision that I would need to leave the Civil Rights Division in order to continue advocating for civil rights in what I felt would be a meaningful way. But many of my former colleagues have chosen to stay. My decision to testify today derives in part from my deep respect for them, and the pain that I have felt as I have seen the Civil Rights Division either sidelined or, in some cases, made to participate in this administration’s relentless campaign to roll back civil rights, not only on LGBTQ issues, but also with respect to police reform, voting rights, and educational opportunity.

I. The Unique Role of the Civil Rights Division

As an attorney in the Civil Rights Division, I took great pride whenever I heard us referred to as “the conscience of the federal government.”³ During my time in the Appellate Section, I witnessed first-hand the many ways in which this was true. First and foremost, and perhaps most obviously to the public, the Civil Rights Division enforces the landmark civil rights statutes enacted to promote equal opportunity in critical spheres of public life, including employment, housing, credit, policing, education, voting and access to public spaces, and to root out discrimination on the basis of race, ethnicity, religion, sex (including sexual orientation and gender identity),⁴ family status, or disability.

The impact and influence of the Civil Rights Division, however, extends far beyond its affirmative litigation docket. With respect to decision-making within the Justice Department itself, the Civil Rights Division – at least during my tenure – would have a seat at the table when significant legal questions were under consideration. For example, in situations when the federal government had been sued for alleged violations of civil rights, or the constitutionality of a federal law or program had been challenged, Civil Rights Division attorneys provided an important counterbalance to the perspective of our colleagues in the Civil Division, whose role

¹ See, e.g., Lambda Legal, *Written Testimony in Support of the Equality Act, H.R. 5*, before the House Committee on Education and Labor (Apr. 22, 2019), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/20190422_lambda-legal-testimony-in-support-of-equality-act-for-house-committee-education-labor.pdf.

² See, e.g., Lambda Legal, *Written Testimony for the President’s Commission on Law Enforcement and the Administration of Justice* (June 8, 2020), https://www.lambdalegal.org/in-court/legal-docs/20200608_written-testimony-presidents-commission-law-enforcement-administration-justice; Lambda Legal, *Protected and Served?* <https://www.lambdalegal.org/protected-and-served> (last visited at Sept. 21, 2020).

³ U.S. Dep’t of Justice, *Civil Rights Division* (September 2010), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/division_booklet.pdf.

⁴ *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020).

as the defender of the federal government as employer or administrator of a particular federal policy or program might lead them to discount the negative impact on civil rights that could result from their litigation positions in a particular case. In those moments, the Civil Rights Division attorneys would remind our colleagues that we were the Department of *Justice*, and not just another civil litigation defense firm. We did not rest on these platitudes, however; rather, we would prepare thorough and often exhaustive legal analysis to demonstrate that a position that advanced civil rights was not only a defensible position for the Department to take, but was the best reading of the law at issue. Perhaps the most recent public example of what I am describing occurred this past June, when the U.S. Supreme Court, in a 6-3 decision written by Justice Gorsuch and joined by Chief Justice Roberts, ruled that the federal prohibition on sex discrimination contained in Title VII of the Civil Rights Act of 1964 encompasses discrimination on the basis of sexual orientation and gender identity,⁵ a position that the Civil Rights Division of which I was a part had championed within the Department for many years and which had become the litigation position of the United States until Attorney General Sessions summarily reversed it during the first year of the Trump Administration.

The Civil Rights Division has historically also played an important role in guiding what positions the Department of Justice will take when participating in a case as an amicus, either at its own instigation or in response to a court's invitation, including the Supreme Court. Attorneys from the Civil Rights Division's Appellate Section, in consultation with the relevant litigating section in the Division, advise the Solicitor General, and his or her deputies and assistants, on which cases to pursue, what positions to advance, and how to ensure that the federal government's interest in vindicating civil rights is given adequate consideration during these deliberations.

Less obvious to the public is the role that the Civil Rights Division plays, or at least used to play during my tenure, in advising the rest of the federal government on the civil rights implications of regulatory proposals emanating from other agencies, or legislative proposals coming from, or being sent to, Congress. While the Department of Justice's Office of Legal Policy and Office of Legislative Affairs play a significant role in coordinating the Department's consideration of these proposals, the Civil Rights Division serves as an important watchdog, identifying key issues or collateral consequences for civil rights that might have been overlooked, underappreciated, or undervalued by the entity proposing the change. Civil Rights Division attorneys often have strong relationships with career attorneys at other agencies charged with enforcing our nation's federal civil rights statutes, including attorneys working in the Office of Civil Rights or the General Counsel's offices of executive agencies like the Departments of Education, Housing and Urban Development, or Health and Human Services, as well as independent agencies like the Equal Employment Opportunity Commission ("EEOC"). Furthermore, my experience is that the expertise of the Civil Rights Division has been valued throughout the federal government and therefore sought out more broadly. For example, I was one of the lawyers from the Civil Rights Division invited to consult with the Department of Defense as they undertook the study that led to the implementation of the legislative repeal of Don't Ask, Don't Tell, the law that prohibited open service by gay, lesbian and bisexual servicemembers.⁶

⁵ *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020).

⁶ 10 U.S.C. 654, *repealed by* Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (2010).

II. Role of Current Civil Rights Division in Supporting and Enabling Trump Administration's Anti-LGBTQ Agenda

In light of the significant role that the Civil Rights Division has historically played in working to ensure that federal authority is used to advance civil rights, the action and inaction of the Division over the past three years has been disheartening to witness. The swift nomination of Jeff Sessions to serve as President Trump's (first) Attorney General sent a clear signal as to what was to come with respect to the Justice Department's approach to civil rights. To be sure, many of the troubling events outlined below during the first months of the Trump Administration must be attributed to Attorney General Sessions' longstanding hostility for civil rights. Nevertheless, these past three-plus years will undoubtedly go down as one of the darkest periods in the 63-year history of the Civil Rights Division. While the damage has been more obvious in some areas than others, it is no overstatement to say that the significant reversals of position that have occurred during this time have significantly tarnished the credibility of the Department of Justice generally, and the Civil Rights Division specifically. My testimony will focus on the ways in which the LGBTQ community has been harmed by these actions, but the diminution of the role of the Civil Rights Division will, I fear, have ramifications for many communities for years to come.

1. Employment

One of the many areas of life in which the Civil Rights Division strives to eliminate discrimination is employment. Among its other areas of jurisdiction, the Employment Litigation Section of the Division enforces the nondiscrimination protections of Title VII of the Civil Rights Act of 1964, including its protections against sex discrimination, against state and local government employers.⁷

In the decades following the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*,⁸ courts increasingly recognized that Title VII's prohibition on sex discrimination encompassed discrimination on the basis of an employee's failure to conform to sex stereotypes. Starting in the mid-2000s with a series of Sixth Circuit public sector employment cases,⁹ courts increasingly affirmed the right of transgender employees to pursue claims of sex discrimination under Title VII when they suffered adverse employment action due to their gender transition or perceived failure to conform to stereotypes.¹⁰ By 2012, the case law supporting this position had reached

⁷ U.S. Dep't of Justice, *Employment Litigation Section*, <https://www.justice.gov/crt/employment-litigation-section> (last visited Sept. 22, 2020).

⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁹ *Smith v. City of Salem Ohio*, 378 F.3d 566 (6th Cir. 2004); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).

¹⁰ See *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Mitchell v. Axcan Scandipharm*, 2006 WL 456173, 2006 U.S. Dist. LEXIS 6521 (W.D.Pa. Feb. 21, 2006); *Tronetti v. Healthnet Lakeshore Hosp.*, 2003 WL 22757935, 2003 U.S. Dist. LEXIS 23757 (W.D.N.Y. Sept. 26, 2003); cf. *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

the point where the full Commission of the EEOC, in connection with its adjudication of a federal sector employment case, reversed the agency's prior stance, and held that Title VII, correctly interpreted, authorized claims where the alleged sex discrimination stemmed from an individual's gender transition or transgender status.¹¹

Two years later, the Department of Justice joined suit. Specifically, on December 15, 2014, Attorney General Eric Holder announced that the official litigating position of the Department of Justice from that point forward would recognize that protections against discrimination in employment on the basis of sex encompassed discrimination against an individual due to their gender identity or transgender status.¹² In practical terms, this decision meant not only that the Civil Division and other components of the Department of Justice would no longer resist this argument should it arise in the context of litigation against the federal government, but it also meant that the Civil Rights Division was now empowered to advance this position in the context of its affirmative litigation. On October 21, 2015, as part of the 63rd Annual Attorney General's Awards Ceremony, a team of Civil Rights Division lawyers, of which I was proud to be a member, received the John Marshall Award for Providing Legal Advice "for guiding the department to its new position regarding Title VII and gender identity."¹³

In one of the many manifestations of his hostility to the civil rights of LGBTQ people, Attorney General Jeff Sessions reversed this position on October 4, 2017.¹⁴ This move came on the heels of the Department of Justice filing a brief in the Second Circuit Court of Appeals for the specific purpose of refuting the EEOC's position that Title VII's prohibition on sex discrimination in employment also precluded discrimination the basis of sexual orientation. Among the brief's signatories was the then-Acting Assistant Attorney General for the Civil Rights Division, Tom Wheeler.¹⁵

Fortunately for civil rights, the Supreme Court repudiated the position of the Justice Department with respect to both sexual orientation and gender identity in its June 2020 decision in *Bostock v. Clayton County*. Yet it would be inappropriate to assume that no harm means no foul. The Civil Rights Division's participation in the Department of Justice's efforts to deny LGBTQ people the protections of our federal employment discrimination statute, and by extension, the statutes that look to Title VII for guidance, will be one of the many stains on the reputation of the Division for years to come.

¹¹ *Macy v. Holder*, EEOC DOC 0120120821 (E.E.O.C.), 2012 WL 1435995.

¹² Dep't of Justice, Attorney Gen. Mem., *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014), <https://www.justice.gov/file/188671/download>.

¹³ Press Release, Attorney Gen. Loretta E. Lynch Hosts the 63rd Annual Attorney General Awards Honoring Department Employees and Others For Their Service (Oct. 21, 2015), <https://www.justice.gov/opa/pr/attorney-general-loretta-e-lynch-hosts-63rd-annual-attorney-general-awards-honoring>.

¹⁴ Dep't of Justice, Attorney Gen. Mem., *Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (October 4, 2017), <https://www.justice.gov/ag/page/file/1006981/download>.

¹⁵ Brief for the United States as *Amicus Curiae*, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), 2017 WL 3277292.

One aspect of this story that must not be forgotten is the Department of Justice's actions with respect to Aimee Stephens, the transgender woman whose case was one of the three decided by the Supreme Court under the *Bostock* caption. The EEOC, the agency with enforcement jurisdiction over employment discrimination cases in the private sector, initially took on Aimee Stephens' case. After investigating Aimee's allegations that her funeral home employer fired her after she came out to him as a woman, the EEOC litigated on her behalf, with great success, for a number of years. After Attorney General Sessions' October 2017 announcement reversing the Department of Justice's litigation position regarding Title VII and its coverage of claims involving anti-transgender discrimination, Aimee and her lawyers with the ACLU intervened out of concern that the federal government, which had been litigating on her behalf, might no longer be a zealous advocate for her.

Although the EEOC stood firm in defending Aimee's rights in the Sixth Circuit Court of Appeals, Aimee's fears came to fruition when the funeral home sought review by the Supreme Court. In a brief signed by the then-Acting Assistant Attorney General for Civil Rights, John Gore, and another Civil Rights Division attorney, the Department of Justice stated in no uncertain terms that it thought the Sixth Circuit was wrong in concluding that Title VII's prohibition against sex discrimination protected Aimee from discrimination due to her gender transition and her failure to conform to her employer's gender stereotypes.¹⁶ And when the case was briefed on the merits, Assistant Attorney General Eric Dreiband was included as one of the signatories, again signaling the endorsement of the Civil Rights Division.

I take heart from the fact that the Supreme Court repudiated the position of the Justice Department, and know that there were many good people in the Civil Rights Division who were celebrating quietly on June 15, 2020. Yet it is still painful, even today, to see the names of Civil Rights Division lawyers on briefs seeking to cut off civil rights protections for LGBTQ people. It symbolizes a betrayal not only of Aimee Stephens, whose rights the federal government had previously gone to court to vindicate, but of all of us who had proudly served in the Civil Rights Division out of a desire to expand, and certainly not to restrict, the promise of equal opportunity. It remains to be seen whether the Division will actually enforce the *Bostock* decision in a meaningful way in the public employment settings where it has affirmative jurisdiction. I am troubled by the fact that the website of the Employment Litigation Section still includes no mention of the fact that its mandate to root out sex discrimination now unquestionably includes sexual orientation and gender identity. Only through meaningful oversight by this Committee can the public have any assurance that the Division will (be allowed to) actually translate the ruling of *Bostock* into meaningful action.

2. Education

Unfortunately, employment is not the only area where the Civil Rights Division has been commandeered in support of this administration's campaign to roll back civil rights for LGBTQ people. Starting almost immediately after President Trump's inauguration, the Department of Justice took aim at transgender students. First, the Department abandoned its defense of an

¹⁶ See Brief for the Federal Respondent in Opposition, *R.G. & G.R. Harris Funeral Homes v. EEOC*, affirmed by, *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020), 2018 WL 5293597.

important guidance document that had been jointly published by the Civil Rights Division and the Department of Education's Office of Civil Rights ("ED OCR") to ensure transgender students' equal educational opportunity, particularly with respect to their right to use sex-segregated restrooms consistent with their gender identity.¹⁷ Specifically, on February 10, 2017, the day after Jeff Sessions' swearing in as Attorney General, the Justice Department withdrew its motion to stay an injunction entered by a federal district court in Texas preventing the federal government from enforcing its position with respect to the rights of transgender students anywhere in the country, rather than limiting relief to the jurisdictions that were parties to the lawsuit.¹⁸ Notwithstanding the Department of Justice's general practice of resisting nationwide injunctions issued by a district court, in this case, as one reporter explained, "[t]he Trump administration has found a nationwide injunction it can live with."¹⁹ This dramatic departure from typical Justice Department protocol in cases challenging government action was the first clear signal that any norms that stood in the way of this administration's anti-LGBTQ agenda would be tossed aside.

Just days later, on February 22, 2017, the heads of the Civil Rights Division and ED OCR, Tom Wheeler and Sandra Battle respectively, officially rescinded the 2016 transgender guidance document, along with another related position statement that ED OCR had issued in 2015.²⁰ And then, notwithstanding the fact that the Civil Rights Division had previously been authorized to file a brief in support of transgender high school student Gavin Grimm in the U.S. Court of Appeals for the Fourth Circuit in 2016, the Solicitor General urged the Supreme Court to remand the case. This left in place a stay of the favorable lower court ruling, the effect of which being that Gavin would be denied access to gender identity-appropriate facilities during the pendency of his litigation.

Four years later, Gavin Grimm's case is still working its way through the courts. Fortunately, his right to equal educational opportunity, including access to appropriate restrooms, was vindicated yet again by the U.S. Court of Appeals for the Fourth Circuit in an August 2020 decision applying the Supreme Court's Title VII analysis from *Bostock* to the context of Title IX, the federal statute proscribing discrimination because of sex in education.²¹

¹⁷ U.S. Dep't of Justice, Civil Rights Division & U.S. Dep't of Education, Office for Civil Rights, *Dear Colleague Letter on Transgender Students* (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (marked "Rescinded").

¹⁸ Defendants-Appellants' Notice of Withdrawal of Motion for Partial Stay Pending Appeal and Joint Motion to Cancel Oral Argument, *Texas v. U.S.*, No. 16-11534 (5th Cir., filed Feb. 10, 2017). Specifically, Texas and twelve other states sued the U.S. Departments of Education, Justice and Labor, and the EEOC to enjoin prevent them from enforcing various federal government policies seeking to protect transgender people from discrimination.

¹⁹ Josh Gerstein, *Feds Drop Request to Rein in Ban on Obama Transgender Policy*, Politico (Feb. 11, 2017, 11:32 AM) <https://www.politico.com/blogs/under-the-radar/2017/02/feds-obama-transgender-policy-234928>.

²⁰ U.S. Dep't of Justice, Civil Rights Division & U.S. Dep't of Education, Office for Civil Rights, *Dear Colleague Letter on Transgender Students* (Feb. 22, 2017) (withdrawing statements of policy and guidance), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>

²¹ See *Grimm v. Gloucester Cnty. Sch. Bd.*, --- F.3d. ---, 2020 WL 5034430 (4th Cir. 2020). Notably the Eleventh Circuit Court of Appeal reached the same conclusion in a similar case involving restroom access by a transgender boy, Andrew Adams, also relying on the Supreme Court's analysis in *Bostock*. See *Adams v. Sch. Bd. of St. John's Cnty, Fl.*, 968 F.3d 1286 (11th Cir. 2020).

In the midst of all this, the Civil Rights Division has nevertheless continued to be coopted in the service of this administration’s insatiable desire to further marginalize and humiliate transgender young people. In perhaps its most recent shameful example, the Civil Rights Division filed a Statement of Interest arguing that the trans-inclusive policies of the Connecticut Interscholastic Athletic Conference (CIAC) violates federal law, and demanding that Connecticut apply a scientifically and legally unmoored “biological sex” standard to ensure that transgender athletes are precluded from participating in sex-segregated athletic programs consistent with their gender identity. In addition to advancing profoundly damaging and incorrect legal analysis, the brief was perhaps most shocking with respect to its willful and persistent reference to transgender girls as “biological boys who publicly identify with the female gender.”²²

While one has come to expect such deeply disrespectful and dehumanizing language from Alliance Defending Freedom, the anti-LGBT organization pushing this case, such language in a filing from the federal government, and from the Civil Rights Division in particular, is shameful. Yet such language appeared again in a Statement of Interest filed by the Civil Rights Division in defense of an Idaho statute that would categorically bar transgender female athletes from participating in women’s sports.²³ Fortunately, the federal district court in Idaho entered an order on August 17, 2020, preliminarily enjoining enforcement of this law due to grave concerns about the ways in which it would violate not only the rights of transgender female athletes, but also the rights of any female student who might be required to “verify” her sex under the terms of the statute.²⁴

While the Civil Rights Division has turned its mission to promote equal educational opportunity on its head with respect to LGBTQ students, it is important to note that other groups are suffering as well as a result of the Division’s distorted approach to civil rights. Perhaps the most noteworthy examples have been the deployment of Civil Rights Division attorneys to support efforts to strike down admissions programs at Harvard, Yale and other colleges and universities that take race into consideration as one of many factors in their effort to promote racial diversity.²⁵ Reversing this damage will not be easy, but oversight by this Committee brings this harm into the light, which is an essential first step.

3. Public Accommodations

Another area where the Civil Rights Division has become complicit in this administration’s assault on the LGBTQ community is in the arena of public accommodations. Remarkably, the Justice Department has inserted itself into multiple cases involving the enforcement of state and

²² United States’ Statement of Interest, *Soule v. Connecticut Ass’n of Schools, Inc.*, No.3:20-cv-201 (D. Conn. filed March 24, 2020) ECF No. 75.

²³ United States’ Statement of Interest, *Hecox v. Little*, No. 1:20-cv-184 (D. Idaho, filed June 19, 2020) ECF No. 53.

²⁴ Mem. Decision and Order, *Hecox v. Little*, No. 1:20-cv-184 (D. Idaho, filed Aug. 17, 2020) ECF No. 63.

²⁵ See, e.g., United States’ Statement of Interest, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (Harvard Corp.)*, 397 F.Supp.3d 126 (D. Mass. 2019), ; Civil Rights Division, *Letter to Counsel for Yale University Re: Notice of Violation of Title VI of the Civil Rights Act of 1964* (August 13, 2020), <https://www.justice.gov/opa/press-release/file/1304591/download>.

local nondiscrimination laws prohibiting anti-LGBTQ discrimination to advance arguments intended to constitutionally immunize the denial of service to LGBTQ people based on an individual's religious or moral objections to, most notably, same-sex marriages.

The most prominent example of the Civil Rights Division's endorsement of these efforts was its co-signing of the brief filed on behalf of the United States in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* in September 2017.²⁶ The brief was noteworthy for the ways in which it attempted to contort First Amendment jurisprudence to create an exemption for businesses engaged in anything "sufficiently artistic," which in their view could include a cake designed with custom colors or frosting, and with any proximity to a same-sex marriage.²⁷ But even more disturbing, particularly in a brief co-signed by the Civil Rights Division, were the arguments that "it cannot be said" that a state has a "fundamental, overriding interest" in eliminating sexual orientation discrimination, at least when it comes to anything related to marriage.²⁸ In fact, in its brief, the Department of Justice attempted to argue that a state's prior legal prohibition on marriage by same-sex couples somehow rendered its interest in rooting out sexual orientation discrimination less – rather than more -- compelling.²⁹

Fortunately, the Supreme Court did not endorse this troubling argument. Even though the Court ultimately ruled in favor of the bakery, in doing so, it did not disturb well-settled law. While acknowledging that "religious and philosophical objection are protected," the Court specifically reaffirmed that "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."³⁰

Nevertheless, the Civil Rights Division has continued to pursue this dangerous line of argument in other cases involving business owners who hold themselves out as open to the public, but then claim an artistic or religious entitlement to deny services to same-sex couples. Most recently, the Division filed a Statement of Interest supporting a preemptive challenge to a Louisville civil rights ordinance brought by Chelsey Nelson,³¹ a wedding photographer who claims that the public accommodations ordinance requiring equal service irrespective of sexual orientation violates her First Amendment right to not photograph "anything that conflicts with [her] religious conviction that marriage is a covenantal relationship before God between one man and

²⁶ Brief of the United States as *Amicus Curiae*, *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), 2017 WL 4004530.

²⁷ *Id.* at *24.

²⁸ *Id.* at *32.

²⁹ *Id.* at *32-33.

³⁰ *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) (citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam)).

³¹ United States' Statement of Interest, *Chelsey Nelson Photography, LLC v. Louisville/Jefferson County Metro Gov't*, No. 3:10-cv-851 (D. Ky., filed Feb. 27, 2020) ECF No. 38.

one woman.”³² Again, one may not be surprised to hear such arguments advanced by an organization like Alliance Defending Freedom, which proudly seeks out individuals to represent who are willing to assist in ADF’s efforts to gut laws that protect LGBTQ people from discrimination in the marketplace and public square. But it is another thing entirely for the Justice Department to deploy Civil Rights Division attorneys to undermine a local nondiscrimination ordinance. It is not simply disturbing; rather, it is an inappropriate and profoundly misguided allocation of resources, warranting oversight by this Committee and calls for accountability.

III. Conclusion

The dramatic shifts in the priorities and positions of the Civil Rights Division over these past nearly four years have done significant damage not only in the areas of employment, education, and public accommodations, but in other areas as well. Moreover, it is not simply the LGBTQ community that has suffered from these reversals. As the Committee’s other witnesses will likely explain in greater detail, the action and inaction of the Justice Department, including the Civil Rights Division specifically, has diminished voting rights,³³ hamstrung efforts to address police misconduct in meaningful ways,³⁴ and made communities with, or perceived as having, high percentages of new arrivals to this country even more vulnerable.³⁵

The Civil Rights Division has been referred to as the “crown jewel” of the Justice Department.³⁶ The damage done to its luster during this administration should pain anyone who cares about equal opportunity and justice under law. We know that other divisions and components of the Justice Department have been diminished in stature due to political interference and demands for subservience to an agenda that put the interests of favored individuals ahead of the interests of the country. But just as we think about the need to repair, rebuild, and restore agencies like the FBI, our national security divisions, and other important government agencies whose duty to

³² Dylan Lovan, *U.S. Justice Department Backs Louisville Photographer Challenging Fairness Ordinance*, Courier Journal (Feb. 28, 2020), <https://www.courier-journal.com/story/news/local/2020/02/28/u-s-justice-department-backs-kentucky-photographer-gay-rights-case/4901976002/>.

³³ *Compare* Brief of the United States as *Amicus Curiae*, *Ohio A. Phillip Randolph Institute v. Husted*, 838 F.3d 699 (6th Cir. 2016) 2016 WL 3923034 *with* Brief of the United States as *Amicus Curiae* Supporting Petition, *Husted v. A. Phillip Randolph Institute, et al.*, 138 S. Ct. 1833 (2018) 2017 WL 3485554.

³⁴ Dep’t of Justice, Attorney Gen. Mem., *Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities* (November 7, 2018), <https://www.justice.gov/opa/press-release/file/1109681/download>.

³⁵ For example, the section of the Civil Rights Division formerly known as the Office of Special Counsel for Immigration-Related Unfair Employment Practices is now called the Immigrant and Employee Rights Section, and describes its U.S. Workers Initiative, started in 2017, as “target[ing], investigat[ing], and (where appropriate) bring[ing] enforcement actions against employers that intentionally discriminate against U.S. workers due to a preference for temporary visa workers.” <https://www.justice.gov/crt/immigrant-and-employee-rights-section> (last visited Sept. 21, 2020). While targeted oversight could certainly bring more concrete information to light on this question, one can surmise that the willingness of individuals to cooperate with the Justice Department in rooting out abusive immigration-related employment practices has plummeted in the current environment.

³⁶ *See, e.g.*, Sally Q. Yates, Deputy Attorney Gen., Remarks at the Civil Rights Division Awards Ceremony (Dec. 7, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-civil-rights-division-awards>.

uphold their constitutional oath against threats foreign and domestic has been tested, so too must we turn our attention to the civil rights components of the federal government, starting first and foremost with the Civil Rights Division of the Department of Justice. For in order for this country to achieve its fullest potential, we need to revive and fortify the Civil Rights Division so that it can once again attract and retain bold and brilliant attorneys whose commitment to civil rights surpasses partisan loyalties.

When President Trump named Jeff Sessions as his nominee for Attorney General shortly after his election, I made the personal call that, in order to keep the ball moving down the field toward the goalposts of civil rights, I would need to change team uniforms. It was an incredibly difficult decision, and one that brought me no joy and a few tears. In the days leading up to my departure, I spoke with many of my colleagues whom I knew were planning to stay. I encouraged them to keep fighting, and reminded them to keep their focus on all of the people who would be counting on the Civil Rights Division to still have their backs.

The day I submitted my resignation, January 30, 2017, started off as a sad day for me personally, but within hours, it was clear that this day would go down as one of the darkest days in the history of the Justice Department. For as it turns out, just a few hours after I sent the email to my Section Chief resigning my position, Sally Yates was fired as Acting Attorney General after announcing that the Department of Justice would not defend President Trump's Muslim ban. Until that moment, I had doubts about whether I was acting too hastily, and questioned whether I should try to find a way to continue advancing civil rights from within the Justice Department. From that moment on, I never doubted myself again about whether I had made the right decision.

The Department of Justice that I knew, and for which I have mourned on so many occasions since that day, was the Department of Justice that Sally Yates believed in and sought to defend, and it is a place where many dedicated people continue to work today. Many of them have been tested in unimaginable ways and put in situations that no federal civil servant committed to serving our country and upholding our Constitution should have to endure.

Therefore, it is not only on my own behalf, but on theirs as well, that I appear before you today. I was incredibly proud to serve in the Civil Rights Division of the U.S. Department of Justice, and I am deeply invested in the Division being a place where I could once again encourage people committed to civil rights to consider working. In my view, oversight is not only welcome, but is in fact absolutely necessary to bringing us closer to that day.

I thank you for this opportunity to share my experience and perspective, which I hope will be useful to the Committee.