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Bridging the Gap in LGBTQ+ Rights Litigation: A Community Discussion on Bisexual Visibility in the Law

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Bridging the Gap in LGBTQ+ Rights Litigation: A Community Discussion on Bisexual Visibility in the Law

By Nancy Marcus, Bendita Cynthia Malakia, Ann E. Tweedy, and Mya Reid

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THE GENESIS OF BILAW

On August 23, 2013, LGBTQ+ lawyers, law students, scholars, and supportive allies were gathered at the annual LGBTQ Bar Association “Lavender Law” Conference, at a historic juncture between the Supreme Court’s first affirmation of marriage equality in *United States v. Windsor*,¹ and its final definitive marriage equality ruling in *Obergefell v. Hodges*.² At that point in history, the LGBTQ-rights movement was at times divided over the best terminology for referencing same-sex marriage and those who enter into same-sex marriages. Indeed, at the time, many legal and other organizations supporting the LGBTQ+ community still omitted the bisexual+ community in their names and program initiatives.

At the Lavender Law conference, while some conference attendees embraced “gay marriage” semantics, others were concerned that “gay marriage,” unlike the more inclusive “same-sex marriage” and “marriage equality” phrasing, fails to recognize that bisexuals also enter into same-sex marriages and are also harmed by denials of marriage equality rights. During the keynote speech that year, Roberta Kaplan, who had successfully argued *Windsor* to the Supreme Court, staked out her position in that debate, urging conference attendees to stick to the phrase, “gay marriage” because, she declared, “only gays enter into same-sex marriages.”³

1. U.S. v. Windsor, 570 U.S. 744, 775 (2013).

2. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

3. Events described herein are experienced and documented through contemporaneous notes and recollections of author Nancy Marcus. See Nancy C. Marcus, *Bridging Bisexual*

With that simple declaration, the lived lives, the reality of bisexuals inside that conference room and outside its walls who also loved and sought legal recognition of their own same-sex partnerships was implicitly, injuriously erased. It was not the first time those of us in the room had experienced such erasure of our identities by our own queer community, but it was one of the last times a number of bisexual+ lawyers in that room were willing to bite our tongues in the face of bisexual+ erasure.

This time, when moments later, the keynote speech ended and the conference agenda moved on to a broad discussion among conference attendees about how to make the LGBTQ legal community more inclusive, a bisexual conference attendee implored all present to be more affirmative about bisexual+ inclusion.⁴ Other bisexual+ conference attendees in that moment realized they were not alone, and when the formal programming of the day had come to a close, they found themselves in a spontaneous, animated huddle, excitedly affirming the thoughts and feelings that they had all shared but felt alone in up until that moment.⁵ At that moment, in that organic spontaneous coming together of bisexual+ attorneys hungry for recognition and inclusion from their own LGBTQ community, BiLaw was born.⁶

BiLaw is the United States' first national organization of bi+ lawyers, law students, law professors, and our allies, born in that fateful inspired moment in August of 2013.⁷ Entering into its tenth year, the organization has remained over the past decade an organic, free-flowing, and almost completely unfunded group, comprised of passionate volunteer bi lawyers seeking community, inclusion, and greater bisexual+ visibility and support from the LGBTQ-rights movement and beyond.

One of the first accomplishments of BiLaw was to work with the LGBTQ Bar Association to add bisexual+ content to the annual conference programming. The following year, with the support of the LGBTQ Bar Association, the annual "BiLaw Caucus," along with bisexuality-themed conference sessions, was added to the programming. The BiLaw Caucus and bi-themed conference sessions have continued to be included ever since. Soon thereafter, members of BiLaw submitted an amicus brief to the Supreme Court in *Obergefell v. Hodges*, seeking greater bi-inclusivity in the Court's then-pending marriage equality opinion.⁸ BiLaw has continued over the years to informally, though urgently, lobby courts, legislation and regulation drafters, and legal communities for greater bisexual+ inclusion.

Erasure in LGBT-Rights Discourse and Litigation, 22 MICH. J. GENDER & L. 291, 313 (2015).

4. See generally Marcus, *supra* note 3.

5. See *id.*

6. *Id.* at 338.

7. *Id.*

8. Marcus, *supra* note 3, at 338-39.

The annual BiLaw Caucus is attended by many dozen bi+ legal professionals every year, and Lavender Law panel discussions hosted by BiLaw members have addressed numerous issues over the years that affect the bi legal community and our clients, from bisexual+ disparities to intersectionalities between bi+ issues and gender identity, racial justice, and disability justice issues.

THE CONVERSATION SUMMARY

Most recently, at the Lavender Law Conference and Career Fair in the summer of 2021, BiLaw hosted a breakout session called, “Bridging the Gap in LGBTQ+ Rights Litigation: A Community Discussion on Bisexual Visibility in the Law.”⁹ During this session, several panelists representing various LGBTQ+ advocacy organizations and diverse constituency groups participated in a roundtable discussion concerning bisexual+ visibility and bisexual+ erasure in LGBTQ+ rights jurisprudence. The discussion was moderated by Judge Mike Jacobs of the State Court of DeKalb County, Georgia, who is the first openly bisexual judge in the United States.¹⁰ The panelists included Nancy Marcus, co-founder of Bi-Law and professor at California Western School of Law; Imani Rupert-Gordon, executive director for the National Center for Lesbian Rights; Alex Chen, founding director of the LGBTQ+ Advocacy Clinic at Harvard Law School; Sarah Warbelow, legal director at the Human Rights Campaign; Kara Inglehart, attorney at Lambda Legal; Bendita Cynthia Malakia, Global Head of Diversity & Inclusion at Hogan Lovells US LLP and Treasurer of the National LGBTQ+ Bar Association; and Ezra Young, visiting assistant professor at Cornell Law School.¹¹

The discussion began with an overview of the issue of bisexuality erasure and visibility in LGBTQ+ rights litigation and advocacy. As detailed by Professor Marcus and Judge Jacobs in the introductory remarks of the

9. *Bridging the Gap in LGBTQ+ Rights Litigation: A Community Discussion on Bisexual Visibility in the Law, Lavender Law*, LGBTQ+ BAR (Sept. 18, 2022, 8:40 PM), <https://lgbtqbar.org/annual/conference-workshops/bridging-the-gap-in-lgbtq-rights-litigation-a-community-discussion-on-bisexual-visibility-in-the-law/> [https://perma.cc/2KXK-UVVU].

10. Nancy Marcus, *An Interview with Judge Mike Jacobs – The Nation’s First Openly Bisexual Judge*, LGBTQ+ BAR, (Nov. 13, 2018), <https://lgbtqbar.org/bar-news/an-interview-with-judge-mike-jacobs-the-nations-first-openly-bisexual-judge/> [https://perma.cc/HD3H-Z8SE]; Nancy Marcus, *Legally Bi: Finally, A Bi Judge*, BI.ORG (May 18, 2018), <https://bi.org/en/articles/legally-bi-finally-a-bi-judge> [https://perma.cc/776P-8PZ6].

11. Ezra Young is also the vice president of the board of the Jim Collins Foundation, a board member of the African American Policy Forum, a founding board member and past co-chair of the National Trans Bar Association, the former legal director of the African American Policy Forum, the research director of the Columbia Center for Intersectionality and Social Policy Studies, and the director of impact litigation of the Transgender Legal Defense and Education Fund, Inc.; see *Biography*, EZRA YOUNG, ESQ., <https://www.ezrayoung.com/bio> [https://perma.cc/A75G-4N2S] (last visited Sept. 20, 2022).

session, bisexual+ people make up the majority of the LGBTQ+ community, and yet they are navigating an invisible struggle, with their interests being inadequately represented in the legal system, the workplace, or otherwise.¹² Bisexual+ people face a disproportionately high rate of violence against them for being bisexual+.¹³ They are also disproportionately likely to have mental health issues, often reporting depression and anxiety due to identity-based stigma coming from within and outside the LGBTQ+ community.¹⁴ Bisexual+ people are the least likely to self-identify in the workplace, compared to other queer, monosexual identities.¹⁵ Additionally, bisexual+ communities are uniquely exposed to homelessness and lack of health insurance.¹⁶

With that landscape in mind, the roundtable discussion sought to explore the impact of bisexual+ erasure in court opinions on the lived experiences of bisexuals and disparities they face, as described above, as well as methods to remedy this erasure and include bisexual+ communities in the advancement of LGBTQ+ rights.

The session began with a summary of the history of bisexual+ erasure in Supreme Court and lower court opinions. The first instance in modern times occurred in *Romer v. Evans*, in which the Supreme Court addressed a Colorado constitutional amendment that expressly prohibited

12. See generally Marcus, *supra* note 3.

13. Movement Advancement Project, *Invisible Majority: The Disparities Facing Bisexual People and How to Remedy Them*, MOVEMENT ADVANCEMENT PROJECT 1, 20 (2016), <https://www.lgbtmap.org/file/invisible-majority.pdf> [<https://perma.cc/ZJ8Y-5FM5>] (extensively documenting statistical evidence of each of these types of disparities, and proposing policy-based methods of addressing the disparities); *Health Disparities Among Bisexual People*, HUM. RTS. CAMPAIGN FOUND., <https://assets2.hrc.org/files/assets/resources/HRC-BiHealthBrief.pdf?ga=2.241924161.251517611.1592273885-1684528672.1590802494> [<https://perma.cc/S97M-6QFA>] (addressing health disparities faced by bisexuals); Nancy C. Marcus, *Bostock v. Clayton County and the Problem of Bisexual Erasure*, 115 NW. U. L. REV. ONLINE 223, 233 (2020) (discussing how the stigma of bisexual erasure compounds such problems facing bisexual people, such as “lack of community and resources and disproportionately high rates of employment discrimination and pay disparity, mental and physical health problems, suicide and suicidal ideation rates, and violence—including intimate partner violence, domestic violence, rape and sexual assault”).

14. Movement Advancement Project, *supra* note 13, at 13-14; *Health Disparities Among Bisexual People*, *supra* note 13; Marcus, *supra* note 13; Ann E. Tweedy & Karen Yescavage, *Employment Discrimination Against Bisexuals: An Empirical Study*, 21 WM. & MARY J. WOMEN & L. 699, 703-704 (2015) (“Recent health and economic data demonstrate that bisexual men and women have much higher rates of suicide ideation than gay men and lesbians respectively, that bisexual women are more likely to experience frequent mental distress than lesbians and that they have poorer general health than lesbians, and that bisexual men and women are more likely to live in poverty than gay men and lesbians respectively.”).

15. *A Survey of LGBT Americans: Attitudes, Experiences and Values in Changing Times*, PEW RSCH. CTR., 1, 59 (2013) <https://www.pewresearch.org/social-trends/2013/06/13/a-survey-of-lgbt-americans/> [<https://perma.cc/HDM2-WKXU>].

16. Movement Advancement Project, *supra* note 13 at 9; *Health Disparities Among Bisexual People*, *supra* note 13; Marcus, *supra* note 13.

homosexuals, lesbians, and bisexuals from seeking relief from discrimination under Colorado law.¹⁷ The Court held that the amendment was unconstitutional, pursuant to the Equal Protection Clause, but never mentioned bisexual people in its holding.¹⁸ The Court took its cues from the respondents' chief brief, which redefined the class of people affected by the amendment as "only gay people."¹⁹ Ever since, bisexual+ people have been erased from Supreme Court opinions. From the marriage cases like *Obergefell*²⁰ and *Windsor*,²¹ to the Title VII holding in *Bostock v. Clayton*²² and the adoption litigation in *Fulton v. City of Philadelphia*,²³ bisexual+ people have remained invisible in landmark decisions. There is growing concern that this persistent and unchecked erasure could eventually endanger the bisexual+ community.²⁴

The panelists spent a significant part of the session discussing the *Bostock* case. In that case, the Supreme Court addressed whether an employer's termination of an employee due to sexual orientation is a violation of Title VII, which prohibits workplace discrimination based on sex. Unfortunately, the Court limited the framing of its inquiry to "whether an employer can fire someone simply for being homosexual or transgender."²⁵ Ultimately, the Court found that discriminating against gay and transgender people requires an employer to intentionally treat them differently because of their sex.²⁶ Therefore, the Court held, terminating an employee on these grounds is a violation of Title VII.²⁷

Despite the absence of bisexuality in the Court's analysis, all of the participants in the Lavender Law discussion agreed that the *Bostock* holding also applies to bisexual+ people, who are generally understood to be the equal beneficiaries of rights that trickle down from LGBTQ+ rights opinions. Like homosexuality, bisexuality is defined in terms of the sex or gender of the subject of one's attraction. Furthermore, *Bostock* affirmed the Second Circuit's en banc holding in *Zarda*, which ruled that sexual orientation discrimination, in general, is an actionable subset of sex discrimination.²⁸

The group then considered whether the Court's focus on gay and transgender people in *Bostock* was, (1) due to the fact that the litigants were

17. *Romer v. Evans*, 517 U.S. 620 (1996).

18. *Id.* at 635.

19. Brief for Respondents at 11, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

20. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

21. *U.S. v. Windsor*, 570 U.S. 744 (2013).

22. *Bostock v. Clayton*, 140 U.S. 1731 (2020).

23. *Fulton v. City of Philadelphia*, 141 U.S. 1868 (2021).

24. See Marcus, *supra* note 13.

25. *Bostock v. Clayton*, 140 U.S. at 1737.

26. *Id.* at 1743.

27. *Id.* at 1744.

28. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 132 (2d Cir. 2018); see also Marcus, *supra* note 13, at 227.

indeed gay and transgender, or (2) if the absence of other segments of the LGBTQ+ community was symptomatic of a larger issue regarding judges' recognition and understanding of these other identities. The panelists proposed a combination of the two, noting that the identities of the plaintiffs that are most represented in these cases are symptoms in themselves. The LGBTQ+ political movement chooses which cases to uplift, fund, and support as test cases. Most cases illustrate a confined narrative of queerness that is white, middle-class, monosexual and binary. The courts, therefore, apply this narrative when determining which LGBTQ+ issues are worthy of consideration. It is the responsibility of LGBTQ+ rights advocates to intentionally include bisexual+ people in the conversation, uplift the specific ways that bisexual+ people experience discrimination, and invest in pushing the courts to expand their view.

The panelists considered the ways in which perceptions about bisexual+ people and the courts' lack of recognition have influenced each other. There is a consensus that bisexuality is viewed more often as a phase or an option, rather than a true identity. The perception is that bi+ people do not require or deserve particular legal protection.²⁹ These views are perpetuated by the stereotypical media representations of bisexuality, as well as the LGBTQ+ political movement's decisions to solely center monosexual identities. The courts' failure to recognize bisexual+ people underscores the question about the legitimacy of bisexuality within and outside the LGBTQ+ community, and it perpetuates a cycle in which advocates are cautious about bringing bisexual+ plaintiffs and narratives to the forefront of impact litigation and other advocacy, especially in the Supreme Court. Furthermore, judges and juries regularly view bisexuality as a proxy for instability, resulting in harmful decisions in terms of family law and custody, visitation, and foster parenting because of its perceived invalidity. In a criminal context, bisexuality is also viewed as a proxy for deceptiveness, which can result in increased sentences for bisexual criminal defendants. Additionally, in the asylum context, bisexual asylum seekers' lives are at unique risk when their bisexuality is considered not gay enough to warrant asylum.³⁰

These issues potentially expose the limitations of impact litigation as the primary method of legal advocacy for LGBTQ+ rights. Impact litigation is significantly constrained by *stare decisis*, which requires advocates to work by analogy and fight an uphill battle before the court to explain why a marginalized group deserves the same protections as a more normative group. Conservative judges are especially not accepting or willing to

29. See, e.g., Ann E. Tweedy, *A Bisexual Perspective on Law School Hiring*, 31 COLUM. J. GENDER & L. 82, 84-85 (2015) (discussing the prevalence of the view, even among legal academics, of bisexuality as an "illegitimate orientation or a disingenuous way of retaining heterosexual privilege").

30. Marcus, *supra* note 13, at 232.

explore nuance. Even if the opinion is in favor of LGBTQ+ plaintiffs, a conservative judge will most likely write a narrow opinion, which influences the overall structure of later arguments. Court decisions will ultimately be influenced by a growing societal understanding and acceptance, as advocates work to educate the public in smart and effective ways.

When discussing specific harms that stem from a lack of recognition of bisexual+ people in LGBTQ+ rights jurisprudence, the roundtable considered the opportunity for opponents of LGBTQ+ rights to capitalize on the absence of bisexual+ identities in court opinions in order to target them for discrimination in future litigation. One example is the *Bear Creek Bible Church v. EEOC*³¹ case in the Northern District of Texas. Here, the plaintiff employers sought a declaratory judgment stating that *Bostock*'s interpretation of Title VII's prohibition on sex discrimination allowed for employers to fire or refuse to hire bisexual employees as long as the hiring policy applied equally to bisexual men and women.³² The plaintiffs in *Bear Creek Bible Church* were able to pursue this argument because in *Bostock*, the Supreme Court never mentioned bisexuals, but instead repeatedly named gay and transgender people as those protected from sexual orientation discrimination under Title VII.

In November 2021, the court ruled on the plaintiffs' motion for summary judgment, holding that, like hiring discrimination against gay and transgender people, a policy prohibiting bisexual conduct also inherently targets sex, which violates Title VII.³³ Although the employers did not succeed in this case, the *Bear Creek* complaint demonstrates how the Court's failure to recognize bisexual+ people in *Bostock* and other LGBTQ+ rights opinions creates an opening for those who seek to chip away at those rights. Opponents of LGBTQ+ rights and protections are aware that bisexual+ people make up the majority of the LGBTQ+ community. If they can get a court, even for a short period of time, to say that bisexual+ people are not protected by certain anti-discrimination statutes, they can effectively discriminate against much of the bisexual+ community. While the likelihood of lasting success on this front is low, the panelists agreed that advocates must be more vigilant and take proactive steps to ensure that bisexual+ people are protected from any attacks that could stem from their absence in court opinions.

The participants of the Lavender Law roundtable discussion were unanimous in their recognition of the problems created by bisexual erasure, and of the need for long overdue improvement in the centering of bisexual issues, litigants, and competency around bisexuality within the LGBTQ+ advocacy movement. In a historic, affirming, and inspiring chorus of unified

31. *Bear Creek Bible Church & Braidwood Mgmt. v. Equal Emp. Opportunity Comm'n*, 571 F. Supp. 3d 571 (N.D. Tex. 2021) [hereinafter *Bear Creek Bible Church v. EEOC*].

32. *Id.* at 585, 618.

33. *Id.* at 622.

commitment to a new chapter of bisexual+ inclusion, the session concluded with proposed action items, some of which the panelists' organizations have already implemented, to ensure full inclusion of all identities of sexual orientation and gender, particularly bisexual+ people, in LGBTQ+ rights advocacy.

To begin with, there was an overwhelming consensus that advocates must prioritize work that specifically and intentionally benefits the most marginalized in the community. The panelists agreed that members of the LGBTQ+ advocacy movement need to aggressively push for more bisexual+ plaintiffs and work on the issues that disproportionately affect them. In addition, when submitting amicus briefs in support of LGBTQ+ issues, organizations must dedicate some of their arguments to specifically address bisexual+ concerns. Once bisexual+ people see themselves represented in the work of these organizations, they will be more likely to contact them. Representing bisexual+ and non-binary people will continue to move the courts to be more inclusive in their opinions.

In the workplace and within the LGBTQ+ advocacy movement itself, panelists added, it is imperative to center bisexual+ people by increasing hiring and promoting more bisexual+ people to leadership positions. In the political context, another necessary step is to invest in the bisexual+ people that are already in the movement and uplift them as representatives. Further, advocates must push for adequate data collection from the federal government, promoting not only the inclusion of bisexual+ people within federal datasets, but also for more nuanced questions that capture a broad array of bisexual+ identities and lived experiences. Having statistical data to back up claims is critically important to advocating for bisexual+ people, especially when battling the perception that bisexuality is not a valid identity that requires protection. Finally, the judiciary needs to reflect the community as a whole. In order to advance nuanced arguments more successfully for the protections of all segments of the LGBTQ+ community, the movement needs bisexual+ and non-binary judges that can treat those arguments with the recognition and understanding they deserve.

While discussing these specific affirmative steps that should be taken, the roundtable participants strongly affirmed the responsibility of leaders and members of the LGBTQ+ community to be more inclusive. In addition to emphasizing the need for intersectional inclusivity, NCLR Executive Director Imani Rupert-Gordon powerfully noted:

It is going to be our responsibility to make sure that we're being more inclusive. And so, this is a reminder to us that if we want the Court to include our communities, then we have to make sure that we're doing that. And there's no other way around that. We have to do better here.³⁴

34. *Bridging the Gap in LGBTQ+ Rights Litigation*, *supra* note 9.

This first ever roundtable discussion among leaders in the LGBTQ+ advocacy movement was a historic step toward improved and more inclusive advocacy work, not only because it addressed such bisexuality-affirming measures that should be taken up by the LGBTQ+ advocacy movement, but also because it resulted in commitments to work toward such measures with sincere intentionality. It will hopefully be but the first of many such steps.

The full transcript of the exciting and groundbreaking conversation follows.

THE CONVERSATION

Mike Jacobs: Hello everyone, and welcome to “Bridging the Gap in LGBTQ+ Rights Litigation: A Community Discussion on Bisexual Visibility in the Law.” I am Judge Mike Jacobs. I am a trial judge on the State Court of DeKalb County, Georgia in the Metro Atlanta area. My pronouns are he/him, and I am the first openly bisexual judge in the United States. It is wonderful to be here today to moderate this panel discussion with a . . . a roundtable discussion, I should say, with an esteemed group of representatives of the bi+ community and of the major LGBTQIA+ rights organizations.

I do want to start off by saying that I will, from time to time, use the term “bi+” in my moderating of this panel, and that is an umbrella term that is meant to take in all non-monosexual sexual orientations, including bisexual people and pansexual people. And so, when I use that term, it is meant to be fully inclusive of our segment of the broader LGBTQIA community.

This panel discussion, or I keep wanting to say panel, but I really mean roundtable because the goal here is to have some give and take among the panelists once we get into the discussion, is aimed at addressing the topic of bisexual visibility and bisexual erasure in LGBTQ+ rights jurisprudence. It is a problem that has its origins, at least in terms of reported Supreme Court cases. If my history serves me correctly, though I am not myself, a constitutional lawyer, I am a mere trial judge, but has its origins in *Romer v. Evans*,³⁵ 1996 case in which the Supreme Court addressed a Colorado constitutional amendment that expressly provided that gay people and bisexual people—the constitutional amendment did use the term bisexual—could not be protected classes under Colorado law.

The Supreme Court struck that down on equal protection grounds,³⁶ but in the course of doing that, did not see fit to use the term “bisexual” even one time, even though the constitutional amendment itself did call us by name.³⁷ And that is a problem that continued through the marriage litigation, culminating in *Obergefell*³⁸ onto *Bostock*,³⁹ and now may have found its way into some specific litigation that is ongoing, that I’m sure will be a topic of discussion

35. *Romer v. Evans*, 517 U.S. 620 (1996).

36. *Id.* at 634.

37. *Id.* at 634 (quoting COLO. CONST., art II § 30b, “Amendment 2 repeals these ordinances to the extent they prohibit discrimination on the basis of ‘homosexual, lesbian or bisexual orientation, conduct, practices or relationships.’”).

38. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

39. *Bostock v. Clayton*, 140 U.S. 1731 (2020).

today. But for a broader introduction of that, and I do want ask her to introduce herself before we get into her presentation, it is my honor to introduce my friend and colleague Nancy Marcus.

Nancy is a Lambda Legal alumna and spent a little time between Lambda and her current work as a professor at California Western School of Law, brand new there, and congratulations, Nancy, on that, spent some time in between though in private practice. And Nancy is one of the founders of BiLaw, which is the organization within the national LGBT Bar that represents the bisexual community and works on producing the bi caucus and the bi breakout session, which is this session for this year's Lavender Law Conference. Without further ado, Nancy, if you can just give a bit more of an introduction of yourself and then introduce us to our topic today.

Nancy Marcus: Thank you so much, Judge. I'm really so delighted that you're spearheading this discussion today. And everybody who's come, I'm really grateful to you all for being here, and to those who are tuning in and listening to the discussion. As Judge Jacobs mentioned, I'm a former Lambda Legal lawyer. I'm currently a professor at California Western School of Law. My pronouns are she/her/hers, and I have been out as bisexual for nearly three decades, and an active LGBTQ rights activist for the same amount of time.

In addition to being a co-founder of BiLaw, I'm the author of a column called *Legally Bi*, which you can find on bi.org. And my legal scholarship as an academic over the years has included a lot of articles on LGBT rights developments from a constitutional law perspective generally, but also specifically on the importance of bisexual inclusion in LGBTQ rights advocacy and cases.

And as a BiLaw founder, we have been working closely with the LGBT Bar and having programming every year, which again, we're very grateful for. We've also written a number of regulatory comments and amicus briefs urging greater bi inclusivity in court opinions and regulations and legislation. And I have been admittedly a squeaky wheel over the years reaching out to LGBT groups, encouraging greater bi inclusivity and visibility and imploring groups to stop using phrases like "gay and lesbian" and "gay and transgender" as an all-encompassing umbrella phrase when it really does omit a lot of people.

And in that vein, I really want to start again by saying just how grateful I am to all the representatives from the LGBTQ legal community here today to engage in this important dialogue that I've

long hoped for, a discussion about how being bi-inclusive in LGBTQ rights litigation and advocacy is so necessary. And again, I'm hugely grateful to Judge Jacobs as well for moderating this discussion.

To begin with, before we move into the roundtable discussion part of this panel, I want to address some of the issues related to the bisexual erasure in Supreme Court opinions and lower court opinions. And I'd like to start by giving a brief summary of the history of bi erasure in Supreme Court opinions, which Judge Jacobs did a great job capturing in summary that the *Romer v. Evans* decision really is an example of.

It came out when I was a law student and I was both elated and crushed at the same time, which is often the case when I read LGBTQ rights opinions, because, especially when Kennedy was writing these beautiful, eloquent affirmations of our rights, I was just bursting with joy and excitement at this affirmation of rights, but then I'd always say, "oh gosh, I did a term search and once again, bisexuals don't exist. Oh well, we know we're covered..." but it's always been kind of a mixed bag for me emotionally reading these opinions over the years.

In *Romer v. Evans*, as Judge Jacobs mentioned, the text of the Colorado amendment actually included bisexuals. It prohibited relief from discrimination based on "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."⁴⁰ However, the plaintiffs, the respondents' chief brief to the court redefined the class of people affected by the amendment as only being gays, not bisexuals. And this is an exact quote from the respondents' brief. "Amendment 2 prevents gay people - and only gay people - from bringing any claim of discrimination under § 24-34-402.5 for relief from discrimination based on homosexual, lesbian, or bisexual orientation."⁴¹

On the one hand, there's this acknowledgement, sure, the text might say bisexual, but this only affects gay people. Why that happened? I don't know, but the Supreme Court followed suit and took its cues from that brief and also erased bisexuals from its opinion and redefined the class of people affected by the amendment as only gays. And bisexual people have, in essence, been erased ever since in Supreme Court opinions, as well as in many lower opinions, and unfortunately too many briefs and oral arguments.

40. *Romer v. Evans*, 517 U.S. at 624.

41. Brief for Respondents at 20, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

I have a chart at the end of my Michigan Journal of Gender and Law article on bisexual erasure that tracks all the mentions of bisexuality in key LGBTQ rights cases. And it's pretty much donuts, zeros across the board for the past quarter century and consistently, the class of people affected by sexual orientation discrimination have too often been defined as just "gays and lesbians."

Now in the marriage cases, *Obergefell, Windsor*⁴², the Prop 8 litigation⁴³ leading up to the Supreme Court decision,⁴⁴ the briefings and opinions did become more inclusive by implication because the phrase generally used was "same-sex couples." And there was no statement that this is only gays and lesbians. Generally, the phrase "same-sex couples" is inclusive, but even in the marriage cases, there is some blatant bi erasure. For example, in Ted Olson's questioning of Sandy Stier during the California Prop 8 trial, Sandy Stier had previously been married to a man, so he felt the need to preemptively question her about that and demanded of his client, and again, this is an exact quote, "How convinced are you that you are gay? You've lived with a husband. You said you loved him. Some people might say, well, it's this and then it's that, and it could be this again. Answer that."⁴⁵

And in response, Stier explained away her previous marriage. She said the only time in her life she'd ever really been in love was in her relationship with Kris Perry, and she disavowed having ever been in love with her ex-husband.⁴⁶ Now, Sandy Stier absolutely has the right to identify as a lesbian. Everybody has the right to self-identity. I'm not questioning that, but what troubles me is the line of questioning itself, and the implication in that line of questioning that if she had been bisexual and had actually loved her husband in the past, that somehow she would be less deserving of marriage equality or of being a plaintiff in LGBTQ impact litigation.

So that kind of bi erasure has continued incessantly for the past quarter century. Since the marriage cases, bisexuals were erased from the face of the *Masterpiece Cakeshop*⁴⁷ decision. A year ago, the Supreme Court's *Bostock v. Clayton County* opinion was even

42. U.S. v. Windsor, 570 U.S. 744, 755 (2013).

43. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

44. Hollingsworth v. Perry, 570 U.S. 693 (2013).

45. Transcript of Proceedings at 166–67, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW).

46. *Id.* at 167 ("Well, I'm convinced because at 47 years old I have fallen in love one time and it's with Kris.").

47. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018).

more blatant in its bisexual erasure repeatedly referring to LGBT people protected by Title VII as just “gay and transgender,” or even worse, “homosexual and transgender” with no mention of bisexuals at all in the ruling or the analysis. And more recently, in the *Fulton v. Philadelphia*⁴⁸ decision, the Supreme Court described those in same-sex couples seeking to be foster parents as only “gays and lesbians.” Again, no mention of bisexuals as also being in same-sex relationships.

There is a real concern among bi people that the longer bi erasure in court rulings and legal discourse continues unchecked, the more dangerous it becomes. And in fact, it’s no longer just a remote possibility that LGBT rights opponents will target bisexuals more explicitly after seeing how we aren’t acknowledged in the text of LGBT rights opinions.

For example, just a few weeks ago on June 7th, a number of churches in Texas filed a complaint in federal court in a case called *Bear Creek Bible Church v. EEOC*.⁴⁹ The complaint capitalizes on Supreme Court’s failure in *Bostock* to explicitly spell out that Title VII also protects bi people.⁵⁰ The Texas churches are seeking a declaratory judgment. And this, again, exact quote from the complaint, “Title VII’s prohibition on ‘sex’ discrimination, as interpreted in *Bostock*, allows any employer...to fire or refuse to hire bisexual employees, so long as the employer regards bisexual behavior or orientation as equally unacceptable in a man or woman.”⁵¹ That’s the declaratory judgment they’re seeking, targeting bisexuals specifically.

Now, to be clear, the arguments that are kind of headlined in that complaint are not ultimately likely to succeed, I don’t think.⁵² In light of *Bostock*’s adamant language rejecting the argument that something isn’t actionable sex discrimination unless the employers only target people of one sex or gender, the Court’s already rejected that. And it’s also important to point out that as much as the Bear Creek Bible Church suggests otherwise, the protections of *Bostock* do apply to bi people. And I’m going to explain that in a minute,

48. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1875 (2021).

49. *See* *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571 (N.D. Tex. 2021).

50. *Id.* at 621 (“Plaintiffs argue that employers are permitted to discriminate against bisexuals because *Bostock* only addresses homosexuality and transgenderism.”).

51. Plaintiffs’ Second Amended Class-Action Complaint at 2, *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571 (N.D. Tex. 2021), ECF No. 45.

52. The plaintiffs’ argument did not succeed on a motion for summary judgment. The court denied this motion, holding that “a policy that prohibits *only* bisexual conduct also inherently targets sex and therefore violates Title VII.” *Bear Creek Bible Church*, 571 F. Supp. 3d, at 622.

but that said, I think it's really important to acknowledge that being erased in the text of *Bostock* and in other LGBT rights opinions can send dangerous signals to those who are seeking to chip away at LGBT rights protections.

Maybe LGBT rights opponents are hoping, like they did when they attacked trans people in the past few years, that the broader LGBT community won't come to the vigorous defense of bi people. But that was a huge miscalculation in their attacks on trans people. The LGBT community has steadfastly focused on fighting against attacks on trans people. And it's my hope that the LGBT community will now be just as unapologetically fierce and vocal at standing up for bi people as well when we are targeted and included in attacks. And the range of LGBT groups participating in today's panel discussion really does give me hope that that's starting to be the case.

Now, in case anybody who's watching this is wondering why it even matters, what's the harm of bisexual people not being explicitly included, recent demographic surveys show that more than twice as many people in younger generations identify as bi or pan than lesbian or gay. And yet, bisexuals face disproportionately high rates of mental and physical health issues, poverty, and violence. And yet, we get almost no attention or resources compared to other LGBT communities, and virtually none of the recognition as I've described in court opinions in LGBT rights litigation.

As some of my past law review articles have detailed, being denied the basic respect of equal recognition just in the face of LGBT rights litigation and court opinions can compound those disparities that bi people face, and there can be real harms to bi people being not acknowledged or understood. And an example of this in a legal context is judges and juries have sometimes viewed bisexuality as a proxy for instability, and the result has been harmful decisions in terms of family law and custody, visitation, foster parenting, because bisexuality is not understood as valid and viewed as a proxy for instability; also viewed as a proxy for deceptiveness in a criminal context, which can result in increased sentences of criminal defendants for a bisexual. And in an asylum context, it can be a matter of life and death when bisexuality is not viewed as valid and bisexual asylum seekers are not viewed as gay enough to warrant asylum, and then things like that.

And these aren't just hypotheticals, these are the things that are really happening when courts and adjudicators don't understand bisexuality as valid. And the more bisexuals are left out of legal discourse, briefs and opinions, the more this is likely to continue, and

our lives and rights are endangered. As the *Bear Creek Bible Church* complaint illustrates, the Supreme Court's bisexual erasure in *Bostock* and other cases can open the door to increased attacks specifically on bi people as well.

And another harm of bi erasure is not just that it hurts bi people, but I really believe it undermines the integrity of the LGBT rights arguments themselves that are based on principles of equal dignity, equal respect, those second-class status, right? But if we're doing that to ourselves, well, that's kind of harmful to LGBTQ advocacy in a broader sense as well.

So having addressed why bisexual erasure is harmful, let me turn back to the *Bostock* opinion. *Bostock* is just one of many court opinions that fails to acknowledge that bisexuality even exists, but it's also one of the most blatant examples of bisexual erasure in a Supreme Court opinion. The holding, as I described, only describes the rights of "gay and transgender" people in a Title VII context and there's some irony in this because the additional irony that's represented by *Bostock* is that on the one hand, *Bostock* is an opinion based on principles of textualism. That was the basis of the holding. But on the other hand, bisexuals are not mentioned in the text of the court's holding. But we're told by some in the LGBT rights community, "Don't worry about it. It's a non-issue. Doesn't matter that you weren't in the text of the holding. Surely, it wasn't the intent of the court or anyone else to exclude us. And so, future courts won't read the holding that literally and narrowly." There's some irony in that because it is a textualism-based opinion.

That said, I firmly believe that bisexuals are nonetheless protected by the holding as I've continuously had to reassure bi people who come up to me and ask me about that. I have an essay published in Northwestern University online "Bostock vs. Clayton [County] and the Problem of Bisexual Erasure".⁵³ And in that essay, I do provide kind of a blueprint for combating the argument that bisexuals are not protected. It's really important to understand why we are.

Some of the reasons why I believe that we are protected by *Bostock* despite the fact we're not mentioned by name is that, first of all, the textualism focus of *Bostock* really is about textualism in *statutory* interpretation. So that does not carry over to how you look at a court opinion and what the actual opinion is doing. There's no parallel canons requiring that court holdings be interpreted solely

53. See Marcus, *supra* note 13.

based on their words in a holding read out of context, and they shouldn't be. It's absolutely relevant that in *Bostock*, the Court was affirming the Second Circuit en banc *Zarda*⁵⁴ holding and that holding, in turn, generally ruled sexual orientation discrimination is an actionable subset of sex discrimination, not just as applied to gay people.⁵⁵

Another reason why *Bostock* applies to bisexuals is that there's really nothing in the analysis by the court that limits it to gay and transgender people, and there's stuff in the analysis that I think indicates otherwise. There's actually a section in the majority opinion at *Bostock* that emphasizes flexibility in labels. And the Court said that "Title VII prohibits all forms of sex discrimination . . . however they may manifest themselves or whatever labels might attach to them."⁵⁶ So that flexibility in labels, I'd like to think, is a signal that the court didn't mean for its holding to be limited only to gay and transgender people, or perhaps even limited to a Title VII context.

Another reason why I believe *Bostock* applies to bi people is...the Court explains that in its analysis, homosexuality is "inextricably bound up with sex."⁵⁷ You can't separate the sex from the . . . homosexuality referring to the sex of people that you're attracted to.⁵⁸ Same thing with bisexuality, both sexual orientations are defined in terms of which sexes or genders someone's attracted to.

Another cynical reason why I think we're covered by *Bostock* is because we've always been covered by LGBT rights opinions even though they don't name us. That's just really generally been understood to be the case. We get the trickle-down rights. Don't like it, but it really hasn't been a big issue.

But on a less cynical note, one of the reasons that bisexuals are protected by *Bostock* is because bisexuals can exemplify how sexual orientation is a form of sex discrimination.

In *Bostock*, as the Court had described, the employees had argued that in determining whether a plaintiff's sex caused the discrimination against them for Title VII purposes, the employers argued, and

54. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

55. *Id.* at 112 ("We now conclude that sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination.").

56. *Bostock v. Clayton*, 140 U.S. 1731, 1747 (2020).

57. *Id.* at 1742.

58. *Id.* at 1741 ("[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."); *Id.* at 1742 ("[T]o discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.").

this is an actually incorrect analysis, but they argued that sexual orientation must be the sole motivating factor, which isn't actually the case.⁵⁹ Supreme Court pointed out that's the wrong standard. You can have multiple contributing factors in the Title VII sex discrimination case, but even under such a single cause analysis, bisexuals are not only just protected, but we illustrate rather perfectly why sexual orientation is a primary contributing factor, why sexual orientation discrimination is a part of sex discrimination.

Here's how that works. In the case of a bisexual employee discriminated against because of her or her partner's sex, it can be argued that every factor of the discrimination really is constant other than sex. If a bisexual female employee with a female partner is discriminated against because of her romantic relationship, but a male bisexual employee with a female partner is not similarly discriminated against, sex is the only variance between the two scenarios. Sexual orientation is held constant.

Similarly, if I, as a bisexual employee, am discriminated against when my partner is female, but not when I have a male partner, again, sex is the only thing that changed from one scenario to the next. Everything else remained constant, including my sexual orientation, which was bisexual all along. So, even under the strictest of causation tests, bisexuals can provide a clear depiction of sexual orientation discrimination being a form of sex discrimination.

So, I would love to see such arguments being spelled out more proactively by advocates instead of waiting for attacks on bisexuals like in the *Bear Creek Bible Church* complaint. Consider for a second that including bisexuals in discourse is actually strategically helpful. It's a way to deconstruct harmful and rigid black and white dichotomies, same as being transgender. Fluidity in both gender and sexual orientation, I think, is actually really important to honest legal discourse and not having the court paint us into rigid boxes and dichotomies that don't really fit reality in a lot of cases. So I think that including bisexuals can strengthen legal arguments. And including bisexuality in legal discourse, I think it's just one way to reverse the trend of omitting bi people from LGBT rights litigation.

I'd love to hear from those on the ground what other approaches to improve bi inclusion you think could be taken. Again, I'm really encouraged by the turnout of wonderful panelists representing a

59. *Bostock*, 140 U.S. at 1748. ("At bottom, the employers' argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action for Title VII liability to follow. And, as we've seen, that suggestion is at odds with everything we know about the statute.").

broad cross-section of the LGBTQ rights community here today. And even just showing up, recognizing this is an important topic is wonderful. It's heartwarming. It's a signal that you do care about including bi people and defending us against attacks from our opponents. So with every ounce of my being, I thank you for that. And in that vein, I'm going to end my introduction and move this into a broader discussion among the roundtable panelists about this important issue.

Mike Jacobs: Let me next go around the virtual table and have our esteemed panelists introduce themselves. In that regard, I'm going to leave all of the introducing to each of you, but I will ask you to keep it to about thirty seconds each. And if you do identify as a member of the bi+ community, please do make that clear as well, because the first question that I'm going to ask is one that is specifically directed to our bi+ identifying panelists. So I will start with Imani.

Imani Rupert-Gordon: Hi, my name's Imani Rupert-Gordon. My pronouns are she, her and hers, and I'm the executive director for the National Center for Lesbian Rights. We are a legal organization that works to achieve civil and human rights for all LGBTQ people and our families. We do this through impact litigation, legislation, public policy, and public education. It's our thought that, by working with the most underrepresented groups within already underrepresented groups, everyone's lifted up from that. Thanks so much for having me.

Mike Jacobs: Alex.

Alex Chen: Hi, everybody. My name is Alex Chen. I use he/him pronouns. And I am the founding director of the LGBTQ+ Advocacy Clinic at Harvard Law School. Similarly to NCLR, we do a mix of impact litigation, policy and legislative advocacy and public education work at the national and local levels. And I myself am a Asian trans man. I would probably consider myself homoflexible and therefore a bi+ ally rather than a member of the community. But I think that we at the clinic view working with marginalized folks within the LGBTQ+ community and historically underrepresented communities as a really critical part of making sure that LGBTQ+ advocacy work continues to have relevance for our community and for future generations. And we view supporting bi+ people as a very important part of that. And so we're very happy to be here.

Mike Jacobs: Sarah.

Sarah Warbelow: Hi, I'm Sarah Warbelow. I'm the legal director at the Human Rights Campaign. We also work on policy, litigation, and public education. And I am a bisexual person.

Mike Jacobs: Kara.

Kara Ingelhart: Hi, my name is Kara Ingelhart. My pronouns are she and her. I am a bi attorney at Lambda Legal, where we also do impact litigation, public policy, and community education. Our work involves LGBTQ people and, also explicitly, protections for people living with HIV and all those communities most affected by HIV.

Mike Jacobs: Bendita.

Bendita Cynthia Malakia: Thanks for having me. My name is Bendita Cynthia Malakia. My pronouns are she/her/hers and I serve as the Global Head of Diversity & Inclusion at Hogan Lovells and as Treasurer of the National LGBTQ+ Bar Association. We are the national bar association for LGBTQ+ legal professionals and allies and the home of the Lavender Law Annual Conference and Career Fair. I identify as a Black bisexual woman and have made it my vision to transform the trajectories of the disenfranchised so that we might live better lives. I'm also the parent to a 17-month-old foster child, and a Capricorn. I appreciate being here.

Mike Jacobs: And Ezra.

Ezra Young: Hi, everyone. My name's Ezra Young. I use he/him pronouns. I'm a visiting assistant professor of law at Cornell Law School, where I teach courses on constitutional law and transgender rights. In a previous life I was an impact litigator, narrowly focusing on transgender rights. My research interests are primarily transgender rights or something I call critical trans legal theory, as well as innovative equitable remedies. But as a Latino, transgender, bisexual man, I have a personal stake in making sure that bi people are better integrated within the discourse and within our court cases and within the trajectory of LGBT rights.

Mike Jacobs: So my first question is this, from a bi+ person's perspective, what are the specific harms that come from a lack of recognition of bi+ people in LGBTQ+ rights jurisprudence? In other words, what harms come to the bi+ community from not being recognized in the case law around LGBTQ rights that has unfolded from the Supreme Court over the decades? And I'll start that question with Bendita.

Bendita Cynthia Malakia: Thank you, Judge Jacobs. Well, it's hard to tell whether the law influences culture or culture influences the law, but bi-erasure is real, as Nancy explained, and the myths and misperceptions related to bisexual people is reinforced by the lack of recognition legally. What we know in our lived experience is that we are viewed as not being a real, true, fundamental identity. We are viewed as being a transitory phase. We are viewed as having an option. Thus, people don't necessarily feel like we deserve that particular legal protection. And those two things should not be mutually exclusive. I also agree with Nancy's view that this lack of recognition lends legitimacy to critiques within the LGBTQ+ community that makes it even more challenging, especially with respect to the comments that bi individuals are not inclusive of broader trans identities. All of these narratives make it easier to continue to sideline and erase bi+ individuals.

And so I think that it's really incredibly important that people like us continue to raise and elevate these issues so that the lived experiences of ourselves and others, whether it's in the workplace or more broadly in society, improve. We can't address issues like the fact that we have the least amount of open self-identification in the workplace than homosexual identities and other monosexual identities. We can't address our precarious living situation and the homelessness that's involved in the bisexual community, our lack of health insurance. All these other issues are really challenging to address when we haven't definitively said that it's real. And so, one of our top priorities as a community is to convince the courts to be open and affirmative that we are a true identity by recognizing us in these opinions, and I think all of us have a role in helping to do that.

Mike Jacobs: Ezra.

Ezra Young: Sure. So I very much agree with exactly what Bendita and Nancy already so thoroughly outlined. I'd add to that that I think part of the problem is that the LGBT political movement is sort of a precarious alliance of people who don't honestly always have a lot in common, but for political reasons we come together and we try to push for our rights together. One of the problems is for the last several decades, not every organization that's here, not anyone in particular who's here but just generally more broadly speaking, for the past several decades bisexuals and transgender people have not had enough support within the community to actually forefront our interests as the interest of the community. When we went for gay marriage, when we went for *Romer*, when we went for everything that we've ever gone for, we've chosen,

whether consciously or not, to not uplift and center the experience of bisexuals. And the best that we have to hope for is that the Supreme Court will somehow read the tea leaves and understand that we are part of this community when our own community does not recognize us.

I think for a true change, it goes far beyond what Nancy has been hammering the drum for a very long time. Not that we don't need that. We do, but we actually need a centering of bisexuals within our community and within our legal strategy. I think if we are unable to get to that moment, we can't expect the courts to think otherwise. The courts, as much as Obama and Biden are trying, are still mostly white cisgender people from a very narrow life experience. They're not going to get this unless we help them. And unfortunately, as much as I love writing law review articles, as great a writer as Nancy is, those are only going to get us so far if the movement doesn't actually have buy-in and doesn't actually invest in us.

Mike Jacobs: Sarah.

Sarah Warbelow: Yeah, I certainly agree with everything that's been said. I will also say, a little maybe more on the nose, that this question of legitimacy by the failure of the courts to recognize bi people influences not only how the straight community views us but, frankly, lesbian, gay people view us as well. And so it is sort of that othering, not just external to our communities but into all our communities as well. It also perpetuates a cycle in which advocates are cautious when they approach, particularly the Supreme Court. They're nervous. They don't include bi people. Then the courts don't include bi people, and then they're nervous all over again. So the next time you go to approach the courts, I hear advocates say, "Well, we didn't have to include it last time. We don't need to include it at this time." We could rock the boat. And so, it is this terrible hamster wheel that I think the legal community has gotten on that we need to break out of.

Mike Jacobs: Kara, I did hear you say that you identify as bi+, correct?

Kara Ingelhart: That's correct. Thank you, Judge.

Mike Jacobs: Then you're next.

Kara Ingelhart: Thank you. I think my colleagues here have really well articulated the gauntlet of the issues here and the harms that face bi folks when they're erased from opinions. And I think Bendita really well spoke to the chicken and the egg problem. I

think when the law perhaps isn't inclusive of LGBTQ folks, when it's not in the jurisprudence, representation in the broader culture really matters even more. And what representation is left then, I think is the media's and entertainment's representation of bi folks, and that's extraordinarily rare, but when it's there, it speaks to sort of the stereotypes that Nancy and Bendita have already lifted up. And so the only representation available doubles down on harmful narratives. And so that's unfortunate.

And I think, though it's been stated here, it's worth also emphasizing the representation metric impact once again. The most recent Williams Institute data shows that more than 50% of the LGB community identifies as bi, but I think most of us still feel like the invisible minority both intra-community but also extra-community spaces, which exacerbates all of the statistical harms and issues that are so hard to come forward and seek help for, and to identify intentional and nuanced solutions to them. But I think to Ezra and to everybody's point so far, there's some difficulties with impact litigation that is seeking class-wide relief to be able to access a set of tools that is precise and nuanced as well. And so I think naming that is helpful in these conversations.

Mike Jacobs: And Nancy, you touched on the topic in your opening, but do you have anything to add?

Nancy Marcus: Yeah. I absolutely embrace Ezra's constructive criticism of my scholarship as not going far enough, because I agree with him. When I wrote pieces in the past saying, "Just say the B word. Please just say the B word," I was really asking for the bare minimum. But in fact, we need a lot more than that. We need to be included in the face of impact litigation. We need to be included in the discourse. We need to be visible in organizations. I mean, saying the B word is really just the bare minimum. And not covering up like Ted Olson did with Sandy Stier, not trying to explain away, "Oh, this person was married to me and we're going to have to. . ." like that's a liability. No, we should be embraced as actually strengthening legal argument and exploring how that's the case. And if you don't get that, come and talk to us and we can flesh it out. So I think just more discussions like we're having today are really, really important. So, yeah, I would add that.

Mike Jacobs: I'd like to ask a question of the advocates next, and this is going to be a more general question, though I do promise I will get more specific as we get deeper into the discussion. But the question is this, what affirmative steps does each of your LGBTQIA+ rights advocacy organizations take to ensure full

inclusion of all identities in terms of sexual orientation and gender identity, the entire LGBTQIA+ rainbow, if you will, in your advocacy work? And we'll start that question with Imani.

Imani Rupert-Gordon: Thank you so much, Judge. I really appreciate everything that we've heard so far. And really, at NCLR, I think a lot of what is said is what we're trying to do. And so, one of the things that we think about is intersections of identity, because anytime we're going to be talking about any sort of bi erasure or any sort of discrimination or exclusion of communities, we know this is going to have a unique effect on those that are marginalized in other ways as well. And so we know that bi erasure is particularly hard on folks of color and people with other intersecting multiple identities.

And so often the assumption is that because LGBTQ people face discrimination so we're less likely to discriminate, and this is absolutely untrue. Racism, sexism, ableism, and all oppressions exist even within the LGBTQ community. And as folks have pointed out, our community does not necessarily center the experiences, of the people that are the most underrepresented, namely folks that are bisexual and folks that are transgender.

But one of the ways that we see racism showing up in our community is through what we expect our community to look like. And it's widely documented that people of color are much less likely to hold leadership positions. Even in LGBTQ organizations, there are pay disparities, health disparities, and very clear and negative outcomes in every category based on race. And we see this disparity represented in cases as well. I know that in one of NCLR's cases, we represented bisexual softball players that were kicked off of the team because they were considered to be straight. When the players explained that they were bisexual, the response was that, "This is a gay softball league, not a bisexual softball league."

This is obviously something that is incredibly painful and one of the ways that our community marginalizes and erases bisexual identities and also continues to make it more difficult for bisexual people to be openly bisexual, which creates this cycle which obviously affects the community in horrible ways. But there are a couple of things here. So, as an LGBTQ advocacy organization that was suing a gay softball league, we weren't very popular in the community. And that's a problem on its own because as a movement, we have to be able to talk about centering the most underrepresented, and supporting members of our community when the discrimination is coming within our community. And that's

something that we have to be doing. And so that was something that we recognized.

So we see that bi-erasure causes negative and disproportionate outcomes. And we see this with bisexual folks, we see these with transgender folks, we see it with people with underrepresented identities within already underrepresented identities. But there was something else that was important here, and I wanted to name that, and that is that the bisexual players that were kicked off the team, they were Black. And these Black players weren't the only bisexual members on the team. There were other bisexual players on the team, and those players were white. And that really called into question what we consider belonging in our community, what that looks like and what that means.

And so when we talk about intersectionality, so often we think it's talking about how difficult it is when there's a person of color, someone with multiple underrepresented identities. But when we're talking about intersectionality, we're actually talking about how these intersections of identities work together and interact with systems that make a very different experience for that person. And when a Black bisexual person is seen as different and has a different set of rules than a white bisexual person on the same team, that is an intersectional problem and that's an intersectional fail. And so we have to think about this problem in this particular instance as biphobia but also as racism. And so, a way that we look at this is how to look at intersections of identities so that we're paying attention to erasure in our communities, but also the way that oppression works and creates a multiple jeopardy between folks that experience discrimination in multiple ways.

Mike Jacobs: Alex.

Alex Chen: Yeah. I mean, I think that Imani really just set the stage perfectly in terms of how we ought to be thinking about bi+ representation as a part of the wider work of making sure that our LGBTQ+ civil rights movement is moving into the future and is continuing to work on issues that are of vitality and importance to people in the community. And at the clinic, the way we really try to think about it is really that this is a LGBT movement that is moving from being a first-generation civil rights movement, in our view, to a second-generation civil rights movement. And what we mean by that is it's moving from a movement that's primarily been focused on achieving formal equality to one that needs to look at the fact that there might be some formal equality on the books, but

there's a real disparity in whether or not that is actually being enforced and lived in the real life experiences of people.

And so we're really thinking more about, let's look at structural reform, systemic reform. Let's look at the fact that we might have Title VII protections now, but 95% of the time plaintiffs lose Title VII cases. How does bi+ fit into that? By thinking about the fact that it's not just that it's a part of the community that should be represented. Bi+ people, as several people on the panel have already talked about, face disproportionate kinds of discrimination because of the nature of invisibility of the identity, right? So for example, bi+ people are disproportionately likely to have mental health issues and to report suffering from depression and anxiety and from identity-based stigma, both from outside of the LGBTQ community but also, as many people have said, within the LGBTQ+ community.

So for example, one of the cases that we're working on that really touches on this issue is a case that we're partnering with the Center for Constitutional Rights, where we're challenging the way that a major metropolitan city is treating homeless people who are LGBTQ+ within that. And within the context of that plaintiff outreach, we've talked to a lot of folks, including several bisexual plaintiffs, who've reported that the kinds of mental stressors that they've experienced having that identity and being within the system has been something which has contributed to a really negative and deleterious experience within that system.

And when you're doing that kind of systemic reform work, one of the challenges, as Imani kind of touched upon, is that work that disproportionately helps poor people, people with mental health issues, people who are marginalized, people who are Black and brown, is not work that is rewarded by traditional institutional systems or by the media. It's harder to get press attention. It's harder to get that sexy headline. It's harder to get certain kinds of donors and foundations interested in the work. But that's also why the work is so important, because it is affecting those members of the community that for so long have not been able to get attention and have not been able to get resources. So we really see representing more bi+ plaintiffs as part of that, right?

So I think, yes, it's important to do things like make sure that bisexual people are explicitly named. It's important to make sure that there is more usage of the term even when the plaintiffs themselves or the cases themselves doesn't exclusively or even directly touch on bi+ issues, we should be talking about the bisexual community.

But I think that's only a really small step compared to real representation in things like being plaintiffs in these cases, but also in terms of thinking about what issues disproportionately affect this community that we should be working on because they disproportionately affect this community.

And for us, we also think of that very intersectionally. Especially with younger people, there are a lot more non-binary plaintiffs, and there are a lot more people who have lots of different terms that they use for their sexual identities, right? Whether they call themselves bi, or pan, or different terms like that. I think that there can be this way that because of the structures of impact litigation and what we perceive to be the bifurcated or isolated nature of the identitarian civil rights framework, we're supposed to smooth our plaintiffs out and not talk about those things. So, "Don't talk about the fact that you're pan."

In the *Kitchen v. Herbert*⁶⁰ case recently, the plaintiff, which was one of the Tenth Circuit cases . . . which stated a case of marriage equality, I recently listened to a really fascinating interview where the plaintiff talked about how he was actually in a poly relationship with his partner at the time, but they tucked that away because it was complicating the marriage equality narrative, but it was actually a really important part of his lived experience. So there's all these ways that we nip and tuck our plaintiffs and sort of exclude the very complex lived experience that they have.

And so, for example, on that note of poly work, bi+ people are represented within the poly community, and LGBTQ+ people as a whole are represented within the poly community. And that's an area of work that the clinic is really excited about embarking on. We've co-founded the Polyamory Legal Advocacy Coalition with Chosen Family Law Center that's working to expand domestic partnership rights and non-discrimination rights for poly folks across Massachusetts, California, and other states. Right? And we've successfully passed three domestic partnership ordinances in Massachusetts, in Cambridge, Arlington, and Somerville over the course of 2020.

And so that type of work is the type of work that is pushing the boundaries of what LGBT+ work looks like in a way that has a disproportionate benefit to people who are the most marginalized in their communities, the people who most need concrete rights and benefits, things like healthcare, family visitation, inheritance

60. See *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

rights. Right? So I think of bi+ inclusion as part of that wider vision of expanding the framework of what LGBTQ+ work should look like so that we can continue to materially improve people's lives in a way that is meaningful to them. And I think that that's the way of looking at it that I feel like has the momentum to go forward into the future in a genuinely transformative way.

Sarah Warbelow: I'd love-

Alex Chen:to the future in a genuinely transformative way.

Sarah Warbelow: I'd love, if you don't mind, to touch a little bit on this issue of data collection.

Mike Jacobs: Absolutely.

Sarah Warbelow: You know, this is a huge problem. We don't have adequate data collection, certainly not from the federal government, but even when we as organizations are doing data collection, one of the challenges is the small sample sizes. And therefore it becomes really hard to tease out how people are experiencing everything from poverty to health disparities. When we are then looking at bisexual people who are Black or Brown, when we are looking at bisexual people who are in relationships with people of the same sex versus bisexual people who are in relationships with people of a different sex. And so we lose this nuance, and it's really been a struggle because as we're advocating for policy reform and ultimately even through the courts as well, having that statistical data to back up the claims that individuals are making is so critically important. It is a huge loss, and we need to be doing more to be advocating with the federal government for not just inclusion of bi people within federal datasets, but more nuanced questions that capture a broader array of bi people, bi+ people's identities and lived experiences.

Mike Jacobs: And Kara?

Kara Ingelhart: I would certainly agree with that. And I think that the nuanced data collection that needs to be done extends beyond bi+ people, but also people who identify as non-binary, and certainly people who identify as multiracial. I think we'd be remiss if we didn't mark the fact that the federal government really likes to put people in one singular box if they are trying to suss out minority lived experience, which is exacerbating all the problems that we're talking about here and speaks to Alex's point about like kind of smoothing people out for the legal system. I always say this, it starting to sound like, I don't know, a bumper sticker, but the law in the United States was intentionally designed to protect the rights of

people who are absent of all of these identity monikers that we're talking about, right: white, cisgender, straight men.

And so it's really difficult when our work is so typically trying to compare and contrast our plaintiffs and classes of people to that sort of normative group and it becomes more difficult to suss that out. But I think something that's really exciting is seeing the evolution of how we are being inclusive in our litigation from the time when the movement perhaps took inclusive steps, but maybe not for necessarily the direct intent of protecting bi people. So for instance, case in point, all the organizations represented here recoiled at the moniker, the "gay marriage," putting that tag on marriage equality and pushed against it. And any notion that we were seeking some kind of different kind of marriage, but few of the arguments that we made at the time included the disrespect to bisexuals inherent in the use of that term.

And I think some of that was probably because of fear of things getting lost in that code switching, which is sort of the very essence of what we do as lawyers. So not only are we code switching for like non-legalese regular citizens into a legal setting, which is extraordinarily complicated to talk about somebody's lived experience in terms of legal harms, but we are also code switching from talking about our clients with LGBTQ+ identities or HIV+ identities to a largely monolithic body of folks who don't have that same lived experience, who do not have a reference point for the type of harms and discrimination that LGBTQ people face. And so, that in and of itself is changing though, because of cases like *Bostock*, because of cases like *Obergefell*. And I have seen in my time at Lambda, just six years, going from pleadings on behalf of trans clients that identified them as and counterpoint to non-transgender people and trying to educate courts about these very basic terms, to it not being so necessary anymore to go into long explanations of what non-transgender means and just use the more accurate term "cisgender," right?

That is becoming more and more frequent as we are making courts more familiar. The labor needed to get your opposing counsel to correctly gender your trans client who's perhaps incarcerated in a solo sex facility that doesn't match their gender identity, is no longer assumed to be necessary, right? Courts will find it disrespectful if you misgender a client, and our cases for instance that represent discrimination on a basis of sexual orientation are no longer so monolithically represented by monosexual people. Lambda has a case called *Marouf vs. U.S. Conference of Catholic*

Bishops and HHS,⁶¹ which is based on a fact pattern in Texas that's similar, but distinguishable from *Fulton*, the recent Supreme Court decision out of Pennsylvania. In that case, we have a same-sex married couple seeking to foster refugee children and they were denied based on their lack of reflection of the "holy family," something like that, as a religious-based discrimination, but the couple very ardently and importantly identified as a "same-sex couple," not a lesbian couple.⁶²

And it's important to them in all of our media representation of them that we accurately portray them, including obviously in the court papers as well. And so there is a lot of progress being made if it's nuanced and hard to lift up in some spaces. And I think that representing bi+ folks and representing nonbinary folks is really going to continue to move the courts and be more inclusive in these opinions that we're building upon each other.

Nancy Marcus: Speaking of building upon. Can I build upon that for just a second?

Mike Jacobs: Sure.

Nancy Marcus: I'm really loving this discussion about expanding the framework and how we discuss these issues because I do have a bit of, I have a lot of love for Justice Kennedy's opinions, and when you think about *Lawrence*⁶³ and *Bowers*,⁶⁴ and why *Bowers* was overturned, there was this recognition that the *Bowers* court really messed up in part because they reframed the issue in that case. . . . [T]he sodomy bans, an issue in *Bowers*, were not specific to gay people. And yet that's exactly how the court, the *Bowers* majority framed it like, "Well, there's no fundamental right to homosexual sodomy,"⁶⁵ and the dissent, which was then followed years later by the majority in *Lawrence* said, "Well, wait a minute, you don't frame things in terms of [] specific people. You frame things in terms of the overarching rights that are at issue here."⁶⁶

61. *See Marouf v. Azar*, 391 F. Supp. 3d 23 (D.D.C. 2019).

62. *Id.* at 28.

63. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

64. *See Bowers v. Hardwick*, 478 U.S. 186 (1986).

65. *Id.* at 191 ("Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.").

66. *Lawrence*, 539 U.S. at 564 ("We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.").

So the issue is not, is there a right to homosexual sodomy? The issue is, is there a right to personal dignity and liberty and freedom in one's most intimate life choices?⁶⁷ So I think part of what we can do, and this actually does move away from my previous, just say "the B word," and instead of being obsessed with saying "the B word," while I would love to see "the B word more," what I would love even more is to stop obsessing about which classes of people are we talking about? No, that's not the issue. The issue is what's the class of rights we're talking about? What are the overarching rights that we are all entitled to? And that makes room for the intersectionality discussions that are so critical about the various harms that are happening to people. So instead of trying to pigeonhole this person is more entitled to be the face of litigation and trying to like pigeonhole people into that traditional, acceptable cis white male model of litigation and discourse, we open the doors to recognizing everybody is a part of this. Everybody's entitled to the rights we're talking about and to reframe, things not in terms of classes of people, but in classes of rights and harms and protections, if that makes sense.

Mike Jacobs: I want to turn at least for a short while to *Bostock* itself. And I have an answer to this question, but I am not here to answer questions, but my guess is that the responses to this question from the advocates, and this is going to be a jump ball question so I'm just going to toss it out there and then someone will need to jump on it. My guess is that your responses will be very much like what I have in my head in terms of what I think the response to this question is, and it is this: *Bostock* of course was a case, or not a case, it was three cases that literally were about discrimination against gay and transgender people. The litigants, the plaintiffs in the cases were either gay or transgender.

And so the question is this, is the lack of any mention in *Bostock* of any segment of the LGBTQ+ community, other than gay and transgender people, simply a function of the fact that the litigants involved in the cases in fact were gay and transgender people, or is it symptomatic of a larger problem with respect to lack of recognition and understanding of the LGBTQ+ community by non-LGBTQ+ judges? Or is it some combination of the two. Anyone?

Ezra Young: I'll jump in. I think it's a function of both. Again, these were cases that were heavily funded by our orgs, pumped up

67. *Lawrence*, 539 U.S. at 558 ("The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons.").

by scholars, myself included, Nancy included, because they were the test cases to be brought. But really the movement pretty much chose the cases to bring, they chose the courses to get behind. They chose the arguments, the narrative frames, both in the media and the court. And I think it was only predictable that the court would come out thinking that the case might, on some level, just be about gay people, whatever that means, and trans people because that's basically what we told them these cases were about. If we had brought a bisexual case, which we could have, we could have funded one. There were many floated out there. I know Lambda had a few, I think NCLR had a few. It's just they didn't work their way up as high.

It could have looked different. The discussion could have been different. It wouldn't have had to be just, Nancy's brilliant argument that bisexuals demonstrate why sexual orientation discrimination is sex discrimination. That's brilliant and it works, but it wouldn't have to be a supportive argument. It wouldn't have to be, "Oh, and then we can take out the general rule that judges can't rewrite statutes because they hate a certain group of people" and say, well of course that applies to bisexuals. That is true. It's just that kind of labor wouldn't need to be done. And it's the same problem with *Bostock* uplifting a certain version of gay queerness or white queerness, right? All the plaintiffs were white. They were all roughly middle class. They all came from a certain sort of background, which most of our cases do. And for that reason, for a long time, the court, that's how they conceptualize what queer life in America looks like.

And it's not an accident, it's not because impact litigation can't be nuanced. Impact litigation's nuanced. We got to marriage equality being the goal because we had nuanced arguments for why it should be the goal. That was a conscious choice until we reckon with those conscious choices. Until we reckon with the fact that most of the leaders in our community have certain backgrounds or look a certain way and prioritize certain issues, we're never going to get there.

Imani Rupert-Gordon: I would just add, I really appreciate everything that you said. You know, I also just want to say we really do have to be thoughtful about the cases we use and there's no getting around that. And I think that a couple of weeks ago when we heard the *Fulton* decision, I think there's something we learned there because many of us were surprised because we were expecting to hear a decision around the intersection of civil rights and religious liberty, and instead we got a narrow decision specifically around a

contract between Catholic Social Services and City of Philadelphia. And I think we can learn something there because the court doesn't usually generalize about how the decision is going to apply in related situations. And Ezra, you made a really good point about this earlier, that it's not for them to necessarily. These are folks that are from our community and don't understand the nuance.

It is going to be our responsibility to make sure that we're being more inclusive. And so, this is a reminder to us that if we want the Court to include our communities, then we have to make sure that we're doing that. And there's no other way around that. We have to do better here. And again, it's part of that larger intersectional problem because when we were talking about, you know, obviously *Bostock* is going to extend to bisexual people, but we want to make sure that whenever we're talking about something, that if we want to be intersectional, we have to make sure to include the folks that we're talking about and the people that are experiencing the most marginalization are included. If we remember where the term intersectionality, came from, they are talking specifically about the experiences of a black woman that was experiencing discrimination based on race and gender simultaneously. It's the simultaneous discrimination that we are considering.

And so when it came up that she needed to sue on the basis of both of these identities, the law didn't protect her. There were no protections in place for someone that would need to sue based on both of those identities. We want to make sure that this doesn't happen to bisexual folks. So often when we think something is including bisexual people, we're talking about including bisexual people in so much as they are considered to be gay people, and that is the way that the protection exists. But there are very specific ways that bisexual folks experience discrimination. And if we're not including bisexual folks in the specific ways that bisexual people are experiencing discrimination, they're not going to be supported in the judgments because they're not going to be presented. And so that's something else that we need to consider.

Sarah Warbelow: I also think it's a little bit of function of who's writing these opinions, right? I mean, if we had a Supreme Court that looked very different and it had been a Justice Ruth Bader Ginsburg who was writing the majority opinion, we might have seen a very different opinion. I suspect it actually would've included words like sexual orientation, more so than bisexual, but I think you take my point, whereas having a very conservative justice write the majority opinion, influences the overall structure of the arguments, a willingness to be accepting of nuance, willing to

explore nuance, even if the plaintiffs before the court are in fact gay and transgender. I think who is writing that opinion is indicative of the type of decision that we're going to get, even when it is a favorable opinion.

Alex Chen: Yeah. I think I would just add that a lot of the problems that everyone is correctly identifying stem from the way that our movement has privileged impact litigation, right? And so impact litigation is probably the branch of the legal advocacy work that all of our organizations does that is the most constrained by all of these different structural aspects, right? I mean, we work in this common law system, which works by analogy, and you're supposed to always explain why your group is like some other group versus if you use legislation for example, you can just define the statutory group and you can define it to include people like bisexual people. And so then it's just a question of you have to move it through politics and that is a different, also large task, but it's a task that sort of lends itself to different tools and the different tools have different sort of advantages and disadvantages.

And of course, we have made tremendous strides through impact litigation. And I'm not going to say that we haven't, but I think that it's only also happened in tandem with a tremendous amount of social and cultural advocacy that this movement does. And when I teach my course on gender identity, sexual orientation law, one of the questions that my students always ask me is, you know, is it impact litigation that drives social change or the other way around? And I say, "Well, why don't you take the course and tell me what you think at the end of it?". But my personal opinion is that in this area, LGBTQ+ advocacy, the law is handmade into social and cultural change.

And so I think a huge part of the work that we need to be doing going forward, especially with a more hostile judiciary, it's an opportunity for this movement to get its sea legs a little bit, stretch out our limbs, and sort of walk around and work on some of these other things that we don't work on as much: state based litigation, federal and state based political advocacy, administrative advocacy.

We've done plenty of that work, but I think this is a time to pivot into those directions and that's a perfect time to also try and surface all these different kinds of marginalized communities in a political and cultural way as a force. And we all have to be thinking about who are we platforming, what are we saying is our agenda? How are we putting that out in the public? Because that I think is going

to have just as big a role as our impact litigation for the next, like, couple of decades just given the composition of federal judiciary. So I think those are decisions that are more within our power actually and just as important.

Nancy Marcus: If I can jump in, I totally agree but I also would caution that I have gotten just as fierce resistance in a legislative context, as I have had in impact litigation context. An example of that is the panic defense bills. Okay. Bisexuals face a disproportionately high rate of violence against them for being bisexual. Bisexuals are also victims of the panic defense, and yet persistently the title of these bills are the “gay and transgender panic defense” bills. And again, I have been a squeaky wheel. I’ve initiated so many conversations, both with groups and with legislative staff themselves begging them, because the text of the bills say they don’t specify this only applies to gay and transgender people. It says you can’t use somebody’s sexual orientation or their gender identity as a factor in mitigating the charges brought against you criminally when you attack someone.

So if the text of the bill is broadly written in terms of sexual orientation and gender identity, why can’t the title of the bills? And yet the title of the bills consistently are “gay and transgender panic defense.” So are the headlines and the media reports and the advocacy groups’ discussions of them. But the National LGBT Bar Association has been wonderful. They get it, they hear me, they’ve been responsive. And so you’ll see the National LGBT Bar is great about being more inclusive in how they describe these bills, but most other groups, and the response I get is, “Well, this is how it’s always described, this is how it’s always been,” just it’s kind of an unthinking unwillingness to move beyond just “this is how it’s always been.” So the kind of resistance I’ve gotten to bi inclusivity is not just in an impact litigation context, it happens legislatively as well.

Ezra Young: I just want to add one thing to that. Oh, sorry... So Alex, I love your push for legislation. More positive legislation’s always great, but there are limits to legislation. Racism in America did not end when we passed the Civil Rights Act of 1964. Everyone knows why we passed it, everyone knows what the expectations were, and yet here we are today and we’re still reckoning with the same exact problems. It comes down to enforcement, it comes down to how our groups invest and push the courts to read things, and it ultimately comes down to us no longer making excuses for why things are the way they are. We are complicit in the way this world is. We might not all be the ones pulling all the levers of

power right now in the United States, but our community has been complicit every damn step of the way.

If we want it to change, we actually have to change. It has to not be a reflexive excuse. It needs to be a reckoning with how we got here, what we can do to change it, and meaningfully doing the change now; not waiting, not waiting for a new presidential administration, not waiting for another new Supreme Court. We got a conservative court who handed down the biggest, most important LGBT rights victory we have ever had last year in *Bostock*. Our community didn't expect it because we weren't reading the cards right. We didn't think to ask for so much, right? We need to change that mentality. We need to ask for more. We need to push ourselves to actually reckon with what's going on.

Mike Jacobs: And I'm going to end the session with a question about how we take concrete steps to do exactly that. So I want everyone thinking at this point about what the action plan is for the future, but I do want to play off of *Bostock* a little bit in the interim and Imani mentioned, I mean, everyone here agrees its correct that the rationale of *Bostock* applies with equal force to a bisexual person in the employment discrimination context, correct? I see everyone's head nodding yes. So that brings me to the Texas case. There is widespread agreement at this roundtable that that is in fact the case and so, does the *Bear Creek Bible Church* case in Texas mean that the current state of LGBTQ+ rights case law has created an opening for arguments in favor of discrimination against bisexual people? Is that case kind of the progeny of at least the jurisprudence, and the lack of mention of bisexual people at this point, given that everybody seems to agree that although *Bostock* doesn't mention bisexual people, it would apply with equal force to bi+ people.

That's also a jump ball.

Kara Ingelhart: So yes, I think I heard those questions, does it apply equally to bisexual people, which we all nodded along to, and does *Bear Creek* create some kind of, I don't know, spotlight on the issues of the language, but does it simultaneously create an exception? No? I think really quickly, I'd love to go back just to the last question because I think it also answers this one in some way, too. So the last question, you know, was the lack of the use of bi in the language of the opinion in *Bostock* because of plaintiffs being, not representative being gay or trans, or was it the court like themselves. And I think what I heard was sort of my answer reflected amongst all-. And I think what I heard was sort of my answer

reflected amongst all of my colleagues here. So yes, yes, but also. So yes, the plaintiffs they were trans and gay, yes. The justices really lacked some literacy as really evidenced if you go back and listen to the recording, which I fully recommend doing it. It plays like a highlight reel of a podcast. And then also the nuance question that every single person touched on in a different way, and I would emphasize that though we're all, I think, lawyers and policy people on this call, the call to consider the fact that most Americans, when polled prior to the decision, believed that there already was nationwide protections for LGBTQ people, is incredibly valuable into Ezra's point. We need to think smarter about how we educate the public and therefore trickle it up to the court.

And that's sort of the same in this, kind of wild, off the rails, argument made in the *Bear Creek* complaint here. They're just really out of step with what people understand to be the case, both now based on the "but-for" rule set out by Gorsuch, which clearly talks about sex stereotyping that bi people, as Nancy has highlighted in her articles, are just emblematic examples of, right? So I think something we should consider in our policy work, that's going to be really tough to do in these states, but also in our impact litigation, is to harness our brilliant comms colleagues in ways to better educate this nuance that's yes, nuance because the media is so black and white, gay and trans, but it's not that complicated to understand bi people, and we're fun, and we will give quotes for your stories.

So I just think referencing that other toolbox piece there, while there is some sort of intransigence in the courts, but also institutionally the Supreme Court, there's real effort to bring people together to make really narrow opinions. We need to leverage the general population's understanding of the rights and rights we deserve.

Mike Jacobs: And I should probably ask my question in a more general way. What does the *Bear Creek* case say about the current state of LGBTQ+ rights jurisprudence in the employment discrimination realm? What does its existence at this moment in time mean, with respect to the bi+ community?

Sarah Warbelow: Well, I would argue that it's an intentional choice to try to narrow the decision as much as possible. That's not to say that I think it'll be successful, particularly with respect to the bi+ community, but our opponents are very aware that bi people make up the majority of the LGBTQ community. They know that. And if they can get a court, even for a short period of time, to say

that bisexual people are not covered, that means that they can discriminate up against a whole lot of us in the employment context. It also means that they're more likely to be successful in trying to say that transgender status should be interpreted as narrowly as possible to not include anybody, but somebody who is binary transgender. And so it is a strategy on their part to divide the LGBTQ community and to single out as many of us as possible for unfavorable treatment under the law. That being said, I don't think they're going to succeed, but it is a conscious choice.

Mike Jacobs: Anyone else on that one?

Ezra Young: I just say that lawyers make stupid arguments all the time in court and inside counsel and all of us know this, having practiced law for a while. I think what will really be important here is figuring out what the response is from the community; if our organizations actually rise up, and strongly respond, and push this down and reject this argument. And thus far, there hasn't been a huge uprising, and that's something that speaks volumes.

Mike Jacobs: Moving now to a question that I'd like to see get some more thorough treatment. We have about fifteen minutes left in our session. And so this is one that I'm going to send around to everybody. And the question is this: what are the concrete steps that LGBTQ+ rights advocates can take to ensure that future legal advocacy on behalf of the LGBTQ+ community is fully inclusive, really of everyone, but also inclusive in terms of how we collectively in the broader community identify in terms of sexual orientation and gender identity? But for purposes of this panel, specifically more inclusive of bi+ people. What are the concrete steps that can be taken by advocates in the future? And let me start that question with Bendita.

Bendita Cynthia Malakia: Mike, I will highlight a few things that have been noted by all the fierce advocates who are closer to litigation and pure advocacy from that forefront. And by saying that we need to focus on picking bi+ plaintiffs and in the context of writing amicus briefs, making sure that we provide some specific air time that addresses bisexual issues. I don't see enough in amicus briefs where our organizations are focused on. . . We can be focused on the broader community, inclusivity across the board is really important, but I rarely see specific airtime being given to bisexuality and that positioning specifically. I'm very thankful to Nancy for highlighting the National LGBTQ Bar's work and trying to get the message out there that the panic defense bills that we've

been working so hard to fight for over decade, also include a broader swath of this “OG” community.

Most of my work that I’m directly involved with is an advocacy on a different front. And that’s with respect to the workplace and the context of legal organizations in assisting bi+ individuals in making their mark. And what we understand in JEDI work, “justice, equity, diversity and inclusion” work, is that while inclusion is really important, where we are in our organization, and where a lot of you play, is in the justice space and trying to transform our laws and systems to make sure that the landscape does end up being truly inclusive where it wasn’t created that way.

In our workplaces, in our organizations, though, our real opportunity is the equity. And sometimes equity and inclusion are juxtaposed and can be at odds with one another. And so I would encourage us, at least in that advocacy context, to consider how we are focusing specifically on bisexuality, sometimes putting that at the forefront, sometimes putting other identities on the back burner until we’re able to increase visibility such that other people think about us when they start constructing their programs or workforce initiatives, creating policy, and then doing all the other things that we do to try to support LGBTQ+ people in the workplace.

Coming as a DEI professional, I think, and I was also grateful to Nancy, even though she mentioned that she probably could have gone further than saying, we need to just think about bisexual people, but honestly, where we are in our workplaces, is that we just need to be asking the question when we talk about LGBTQ+, how does this impact bisexual people? And so my challenge to my global diversity and inclusion team and for members of our ERG and other networks, is that in the context of research reports, programming, and other work related to the queer community, that they are specifically asking themselves, how does this include bisexual and pan-identities and how does this include trans people? And the goal is that you either need to include representation, whether it’s a report or an event, or we need to specifically explain why we haven’t. And in just doing that ends up helping to make some progress in the context of our particular work.

What’s really interesting to me is when I’m working with clients and within my organization, people seem to be other than with respect to the tumult currently with Stonewall in the UK, people seem to be really, really comfortable with trans issues, at least in larger organizations, but uncomfortable completely, or completely disregarding bi+ issues. And I think the data collection point as Sarah

mentioned earlier, speaks to this a little bit. My biggest weapon as external counsel is to be able to combine and partner with corporate counsel to be able to advocate for the lawyers and the business services professionals in my organization and more broadly. Not being able to disseminate that information owing to data privacy and other restrictions and not having mandatory self-identification, and I understand how that cuts multiple ways, but it makes it really challenging for me to use the best weapon at my disposal to advocate for bisexual people. And so it's really hard to do that in the abstract.

Lastly, on the trans/bi dynamic in the workplace, because this is where a lot of the arguments that I'm seeing, not only my clients come to me asking for advice with respect to LGBTQ+ identity, is that they've claimed that they're more comfortable with trans issues, number one, because they feel like they're less likely to know a trans person than a bisexual person, so it feels like a more abstract issue. We can get on board when we don't actually have to deal with anybody specifically and get proximate to the issue.

But the other issue is that there are a couple of really neat, quick, handy things that we've come up with to allow people to say that they've aligned with the trans community. You can add your pronouns to signature blocks and when you introduce yourself to meetings or events. You can expand identification from a gender perspective to include non-binary and transgender identity. But people don't know what to do with bisexuality. We haven't given anybody an easy tool with which to demonstrate and show up for our communities. And so I think one of the things that we need to start doing, I think, is advocate. And I'm not suggesting that we ought to take the easy way out, and we ought to have these little tick-the-box, check mark perfunctory exercises to demonstrate allyship and advocacy. But I do think we need to, in addition to identifying the problem, we need to be very specific about how people can help identify the exact issues that we have that goes above just pure recognition and visibility.

Mike Jacobs: Alex, concrete steps.

Alex Chen: Yeah, I mean, I think a lot of people here have made really excellent points about just how many different kinds of challenges there are as we press forward on including bi+ people across all spectrums of our advocacy and within our own organizations. And I guess what I would say is, jumping off of my earlier remarks, that I think for our organization, what we're really looking to do is really focus on the visibility in our impact litigation going forward,

and really make an aggressive affirmative push to look for those types of plaintiffs, right? Because the problem is also that because bi+ people feel like they're not represented within what they see the community doing, they're less likely to reach out to the organizations as well. And so putting out a call to lots of different kinds of grassroots community organizations at the state and local levels to say, we are looking for bi+ plaintiffs, we are looking for non-binary plaintiffs, we are looking for people of color and we want to represent them.

So we are actually trying to sort of ask for folks to share their stories and just to try and be in spaces, which I think post-COVID will be a little bit easier, be in spaces where we are connecting with those community members and we're talking to them. I will say that I have met more folks from the bi+ community who have reached out to us for representation through just our poly work alone, that we've received inquiries from our entire general hotline, right? And so even that small piece of advocacy that we're doing there has already invited a lot of folks to view us as somebody that would be interested in representing them in cases. And so for us, I think a big part of it is going to be a push to make sure that that representation is there, because I think it's also going to change what kinds of issues people are bringing to us and what kinds of issues we're going to litigate about.

So I think for us a really big part of our advocacy going forward is, A) doing that affirmative outreach work and then, B) choosing cases where the issues that face this community are more disproportionately represented in what we're talking about, so that we can also illustrate, it's not just a matter of that facial representation, but it's a matter of diversity representation in the issues that are affecting the community and making sure that we are actually seeking remedies that are appropriate. So, I think for us, that is something that we're really going to be pushing for.

And I think on a parallel sort of process track engaging in workplace inclusion policies, which is something that Bendita was talking about, really thinking about doing that affirmative outreach as well when it comes to hiring and when it comes to making sure that folks know that this is a value of ours, that we want more folks with this identity to be working for our organization and we want them to apply for these positions so that they're part of the pool. So, I think both of those things are equally important, the representation component in who works at these organizations and what policies do we have to support the people who work at these organizations. And then also, how do we make sure that we are doing affirmative

work to make sure that an underrepresented community is more represented in the legal work that we do.

Mike Jacobs: Sarah?

Kara Ingelhart: [Crosstalk 01:26:33] Sorry, did you say Sarah or Kara?

Mike Jacobs: It rhymes with Kara. Sarah first.

Sarah Warbelow: Sure. So look, I do think organizations need to invest more in bi leadership throughout the organization. You know, it's great to do hiring and we absolutely need to hire more bi people, but we also need to invest in the bi people who are in our movement. Three years ago, I became only the second ever, as far as I can tell, bisexual person to testify before Congress, and the person who had testified before me as a bisexual person did so in the '90s. So that's a really long dearth of bisexual people being out on the forefront, representing organizations, representing our movement and, you know, I was incredibly lucky to have the full support of the leadership at my organization. That's not to say we don't give opportunities. It's about giving more of opportunities to more people so that we really do see a diversity of faces and voices and life experiences. And of course that when we do that testimony that our being bi is a part of that testimony, right? It's not just, oh, by the way, you happen to be a bi person who testified, but rather it is part of the central story and our experience.

Mike Jacobs: And Kara.

Kara Ingelhart: Thanks, sorry for the rhyming error. If I can co-sign everything Sarah, Alex and Bendita said, I will. So I will just add that foundationally, I think Bendita spoke on this, but it would be important to make all these things happen more easily to make sure that we do the internal education with our colleagues and boards and everyone that we work with, these fundamental points about the lived experience of bi folks, just to make sure we're always setting that level playing field and to restore those. So when we are onboarding and orienting new colleagues, that literacy is maintained throughout our organizational culture.

Mike Jacobs: Imani.

Imani Rupert-Gordon: I completely agree with all of this. We have to bring more cases that include bisexual people. We have to make sure that the examples that we use are including bisexual folks, because if we did a better job of including members of the LGBTQ community, then we'd get better results and better solutions. We

also need to talk about unique ways that bisexual people are experiencing discrimination. I really appreciate what everyone has said here, and I really appreciate Nancy's point because honestly, just trying to be better when the bar is so low gets you somewhere, but we really need to do much better than that. We need to find the unique ways that bisexual people are being discriminated against and why there are disproportionate outcomes. And if we get that, we're all going to be better.

And then also, I wanted to just say to the last question too, is that, and I think this is important, we really just want to put a fine point that the *Bostock* decision absolutely includes bisexual people. And we want to make sure that we say this, because while this is an important thing that we're talking about, so often when we're talking about our communities, we're worried that we are going to be left out, because we've been left out before. And I just also, while we're having this conversation, want to be really clear that that's true.

We see cases, like the *Bear Creek* case that came up, but *Bostock* is not saying that if you apply homophobic and transphobic policies equally to men and women, that you're not violating Title VII. That is not what's happening here. *Bostock* specifically rejects that. So we should feel pretty confident going into this. So, I just wanted to say that. But we still need more inclusion, we need more representation, and we need to make a concerted effort to include plaintiffs that represent our entire community.

Mike Jacobs: Ezra.

Nancy Marcus: Can I just say-

Mike Jacobs: We've got Ezra and then we'll get. . . Nancy, I'm going to let you have the last word.

Ezra Young: Okay. Thank you. So I cosign everything everyone said, I'd just like to extra underscore Bendita's comments. I think a key piece of the puzzle here is making sure that our workplaces, our organizations and our institutions include and center, at least some of the time, bisexuals. It's not going to happen, the change that we want, the change that we need, is not going to happen as the result of trickle-down rights. That is never how it has worked for any group; it is not going to work for bisexuals that way. We actually, actually need to proactively be inclusive and take meaningful steps to do it, and stop saying we'll do it later.

Mike Jacobs: And Nancy.

Nancy Marcus: I am so incredibly grateful to all of you. This conversation is exactly what I've been hoping would happen for the past decade. And so among all of the things that you've all listed that are critically important, I think one of the most important things is to just continue this dialogue and to have conversations like this. Not to have it stop today, but to really make a conscious effort to keep this dialogue going, because you're all amazing. Your insights are spot on, and I'm so moved right now that we have this conversation, and I'm hoping it will continue. So thank you. Thank you. Thank you.

Mike Jacobs: And thank you from me to everyone as well. This was really, in terms of the bi+ panels that we have done for Lavender Law over the years, this was a groundbreaking one in that it was a conversation about inclusion and advocacy. And in that regard, to everyone who participated here, thank you. And it certainly gives me tremendous hope for greater inclusion in the future.

One other thing that I just note that I should have mentioned at the outset, is that, you know, of course it is also important for our judiciary to be reflective of society as a whole. And in that regard, though, when I came out publicly in 2018, I became the first openly bisexual judge in the nation. The New York judiciary runs an anonymous survey that asks a number of questions regarding identity, including race and gender identity, but they ask about sexual orientation as well. And in case you had not noticed, this year's survey includes five judges in New York state who responded that they are bisexual. And so while it is important that the advocacy work that is done by our advocates here reflect the community as a whole, it is also important that the judiciary reflect the community as a whole. And it does seem that the future is bright in both regards.

So thank you everyone. Imani, Alex, Bendita, Sarah, Kara, Ezra and absolutely Nancy, who worked with me to organize this roundtable discussion. I look forward to seeing all of you at Lavender Law, well virtually, at the end of July this year, but hopefully in person in the years to come. Thank you everyone.

Nancy Marcus: Thank you, Judge. You're wonderful.

ENDS [01:34:47]