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Modern Legal History 2015: The Road to Obergefell

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MODERN LEGAL HISTORY 2015: THE ROAD TO *OBERGEFELL*

FEATURING: ABBY RUBENFELD* AND REGINA LAMBERT**

*Moderated by Professor Jeffrey Omar Usman****

November 20, 2015

Moderator: Welcome to all of you. Because this is Belmont Law Review's inaugural Modern Legal History event, I wanted to take a minute or two before we move on to the questions to explain the purpose of this series. From this country's inception lawyers have played a critical role in shaping the development of our nation and been at the forefront of important significant national issues. In launching this series, the Belmont Law

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Review hopes to bring the Nashville legal community together to hear from history-making attorneys, like the two who are present tonight, to talk about issues that are at the forefront of our society, to hear their perspectives, experiences, insights, and listen to their stories. The nature of hearing from lawyers about history-making events and transformative legal issues is such that if you come back to this series year after year you're likely to have years that you want to celebrate with the panelists, and you're likely to have years where you may not see things the same way. The purpose of this series in part is, in this world in which things can get frenzied and frenetic, and we exist in sound bites and shouts, to slow things down a little bit. To cool the temperature down and have a meaningful conversation in which we as attorneys use that most important skill we have: the ability to listen.

As we listen to our history-making panelists tonight, we're going to have the opportunity to hear about the road to *Tanco v. Haslam*,¹ one of the most important individual rights constitutional decisions from the United States Supreme Court in the last half-century. We'll have an opportunity to gain from Ms. Rubinfeld's and Ms. Lambert's perspectives and experiences and hear their stories. With that, let's begin with this: Not to make anyone feel old in this room tonight, but there are students here who were born, grew up, and raised in a post-*Romer v. Evans* world.²

Ms. Rubinfeld: Lucky them!

Moderator: Let's try to build in a little bit of context, in terms of the legal community, judicial community, and think about a pre-*Romer v. Evans* time period. Ms. Rubinfeld, you graduated from law school in 1979, moved to Nashville, went back to New York for a few years, and then returned to Nashville in the 1980s. Did you face, within the legal community and when appearing before judges, discrimination because of the views of those attorneys and judges toward you on the basis of your sexual orientation?

Ms. Rubinfeld: Well, the short answer is, yes. But before I explain that, I want to note that one other of our co-counsels, John Farringer, is here in the audience. He was one of the key members of our legal team and helped make this victory possible before the Supreme Court, so I want to recognize him and thank him.

1. *Tanco v. Haslam* (Obergefell v. Hodges), 135 S. Ct. 1040 (2015).

2. In *Romer*, the U.S. Supreme Court ruled 6-3 that a Colorado constitutional amendment that would prevent protected status based on sexual orientation violated the Equal Protection Clause. *Romer v. Evans*, 517 U.S. 620, 624 (1996).

Back to the question, I'm not so sure people were ready for an openly gay attorney in Tennessee when I moved here in 1979. But I think that's part of the reason there's been a lot of change since then. More people have been out, talking about who they are, and talking more about LGBT lawyers and legal issues. When I came here in 1979 it wasn't that visible. And I did have some experiences . . . Mostly, I think, I've been respected and the judges have been nice, but I did have a lot of experiences with judges using what I would consider to be the wrong words to describe my clients—inappropriate phrases; there was a whole educational process.

I did have one horrible experience that I talk about that sums up what the atmosphere was like. I did a divorce in 1979 or 1980 when I was a brand new baby lawyer. It was an agreed divorce. I represented a gay dad against a nongay wife in a plain old regular divorce. The other attorney was a good guy, he was an ACLU kind of guy, and didn't use the issue against my client, which was unusual in those days. We went to get the divorce approved, and for some reason I can't remember now it wasn't a regular judge, but we were in the chambers of this special judge, who actually is an attorney who's still here in town, and he approved the divorce, and everything was cool. Then the other lawyer, who, again, was a nice guy, said to me, "Hey, Abby, do you care if I ask the judge if it would have mattered to him if he knew your client was a homosexual?" In those days no one said gay. I said, "No, that'd be real interesting to know." So the other attorney was sitting with the judge and said, "Your Honor, we're just curious. Now that you've approved the divorce, would it matter to you if you had known Ms. Rubenfeld's client is a homosexual?" And I swear this is what happened: He leaned back in his chair, put his feet up on the desk, leaned against the wall, put his hands behind his head, and said, "No. It wouldn't have mattered to me in ruling on this, but I hate those people. They should all be lined up and shot." And I'm sitting there thinking, "He must not know who I am." [Laughter.] But I didn't want to say anything; I was a baby lawyer, and I didn't want to hurt my client. I didn't know what to do. To this day it still upsets me that I didn't say anything and like, rip him a new one. [Laughter.] But that kind of sums up what the times were like then. That people felt it was okay to say something like that. Nowadays—hopefully—even if someone thought that they wouldn't say it to you. That's the difference in the world. So yes, there were problems in 1979.

Moderator: Ms. Lambert, you started law school in the late 1990s and graduated in 2001. When you were going through law school and entering into the legal community in Knoxville, do you feel like you faced discrimination or negative treatment from members of the legal community on the basis of your sexual orientation?

Ms. Lambert: Abby had a lot more courage than I ever did when I was a young attorney. I don't know that I'd say I was closeted, but I didn't share my sexual orientation, even in law school with my classmates. I was very active at UT Law. I was the Editor in Chief of the Law Review; I had very good, close friendships and relationships there. When I started law school I had been in a relationship at that time for more than a decade, but I never had my partner come to a law school event. Never. I never shared personal experiences. I was very active at school, but I didn't feel comfortable enough—I'm 52, so I went to school when I was in my thirties. I came back as an adult. My experience professionally when I was younger was that you did not share your personal experience if you were homosexual because you could lose your job. And there were many people who did. So it wasn't until my third year of law school that I even shared it with anyone, and even then it was just the executive board from the law review. It was a very positive experience.

Later I started to practice at Bass Berry and Sims in their Knoxville office and in my very first year of practice my partner's brother died unexpectedly. I wasn't sure how to handle that because I had to go to Memphis, but I was working on a big *qui tam* action. I went into work and the partner I was working with, who I just loved dearly, I took him into an office, and I was really truly terrified, but I told him that I had a partner and that her brother had died. And that firm treated me so incredibly well. All I wanted was to be able to leave for two days and for that to be okay, but what they did was they gave me paid leave, as if it was an in-law's death. To this day I have such unbelievable loyalty to Bass Berry and Sims for that treatment. But I didn't expect it.

Moderator: I want to turn the focus to starting to talk about strategy some. In 1986 the U.S. Supreme Court decided *Bowers v. Hardwick*,³ a major setback in the gay and lesbian rights movement in which the Supreme Court upheld a Georgia sodomy law applied to same-sex consensual partners. The initial strategy post-*Bowers*, in challenging laws and arguing for gay and lesbian rights, was clearly a move toward state constitutions and state constitutional rights. Ms. Rubinfeld, you were involved in an important case in the state of Tennessee pursuing that strategy, *Campbell v. Sundquist*,⁴ that took aim at the Tennessee Homosexual Practices Act, the HPA.⁵ In 1993 you brought that challenge and by 1996, the Tennessee Court of Appeals invalidated the HPA. How important was the *Davis v. Davis* decision in 1992, establishing a right to

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

4. *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996).

5. TENN. CODE. ANN. § 29-14-101, *et seq.* (2012). Under the HPA it was a crime to engage in consensual homosexual activity.

privacy under the Tennessee Constitution,⁶ to your decision to proceed in *Campbell*?

Ms. Rubinfeld: It was huge because *Davis* held that our Tennessee Constitution could go beyond the confines of the U.S. Constitution. I call the U.S. Supreme Court case you referenced *Hardwick*, not *Bowers*, because I was very heavily involved in that case; I organized all of the amicus briefs. I have a great picture of me with *Hardwick*'s attorney Kathy Wilde on the steps of the Supreme Court, in our skirts. I need to show that on Twitter on a throwback Thursday! [Laughter.] Me in a skirt—some people won't believe it! But the *Hardwick* case was a devastating loss to all of us who worked on national LGBT issues. We were sure we had won, and not just because the law, to me, was so clearly on our side—I couldn't do this work for all the years I've done it if I didn't believe really strongly in our positions and that the law is on our side. I have to be almost Pollyannaish about it. Plus, at the oral argument of this case we were sure we had won. We went out and celebrated afterward, so sure we had won from the questioning. Which goes to show you: you cannot count on what happens at the oral argument!

Those were pre-internet days so every morning in June at 9 a.m. I'd have to call the Supreme Court to see if they issued the opinion that day. I'll never forget the feeling of calling them and the person on the phone saying, "It's 5-4 and White wrote the opinion." And I said, "Are you sure you have the right case?" Because we knew White was against us and we thought we'd won. And then it was like the bell jar coming over me. I had a mini nervous breakdown, feeling like, "I can't believe we lost this case! What are we ever going to do?" It was devastating in the movement, but it pushed us toward the state constitutions approach. Then in Tennessee we were helped by the fact that the Supreme Court in *Davis* said that our Tennessee Constitution could be interpreted more broadly, which made a huge difference. I brought *Campbell* on my own; no organizations sponsored me, and I used my 40th birthday to raise money for the costs. But it was an important case to bring, and we had to do it at that time. We had to do it under the State Constitution and we were successful here.

Moderator: At the time there was a series of challenges in different states. How much were lawyers in different states coordinating—talking to each other, working together, with this state constitutional law strategy?

Ms. Rubinfeld: I don't think they were talking together nearly as much as we do nowadays. Our national organizations didn't have all the capabilities they do now, so I think people struck out more on their own. One of the

6. *Davis v. Davis*, 842 S.W.2d 588, 600 (Tenn. 1992).

reasons why I filed here was because Kentucky had already won, and it felt like, “If *Kentucky* can do it, surely *we* can.” [Laughter.] But there was some consultation with the national groups. At the time I don’t think the ACLU had their national project, so it was Lambda Legal in New York, GLAD, which is a regional group in New England, and another group called the National Gay Rights Advocates that was in San Francisco. Those three were the gay legal groups around the country. There just weren’t the resources to coordinate, but the groups would reach out and help when they could.

Moderator: Let me ask you a quick practical question in terms of the impact of *Campbell*. You represented a lot of people in family law cases. How did *Campbell* change the argument because of the disputes involving a parent who is gay or lesbian after the Tennessee Court of Appeals invalidated the HPA?

Ms. Rubinfeld: It made *all* the difference in the world. Before that, when I came to Nashville in 1979 after law school, I sure didn’t plan to go into family law. But it was a huge problem in the gay community that so many, particularly lesbians but also gay guys, had had kids in the course of a heterosexual marriage. A lot of people married because they thought if they married, if they tried to do it “the right way,” they would be “okay” and they wouldn’t be gay anymore. Of course that doesn’t work. And then they’d have these kids and this spouse and they would have to resolve a messy situation. But *Campbell* made a huge difference. In those family law cases before *Campbell*, I would spend hours and hours and hours, staying up all night, writing these great briefs—*brilliant* briefs—with all these expert opinions, and I had those national groups helping me. I forgot to mention earlier that the National Center for Lesbian Rights, my favorite group, was around in those days but they were called the Lesbian Rights Project. But I would spend all this time and make all these great arguments, and then I’d sit down after my argument and the other lawyer would stand up and say, “But your Honor, she’s a criminal.” And sit down. And that was the end. We’d lose. My client, she’d lose custody of her kids. I mean, think about that. People who had raised their children from birth, had always been their primary parent, and all of the sudden, simply because of their status as a lesbian, they would lose custody of their kids.

Ms. Lambert: I lived in Memphis at the time. I moved to Memphis from the Chicago area in the early 80s. In the mid-80s I started to meet and know people who were basically realizing that they were homosexual, but they had been married and had children and they were the people who were being challenged in court and losing their children. I’d heard of Abby long before I’d ever met her, because there was this person in Tennessee who was trying to fight for parents—male or female, mothers or fathers—to be

able to maintain custody of their children. I didn't meet Abby though until I was at UT Law and she came to speak. I think that's probably what helped me feel a little more comfortable. She came and spoke to the law school student body and there was some real positive dialogue that came out of that. That made a difference for me when I was in law school.

Ms. Rubinfeld: I only agreed to go speak there if they got me tickets to a lady Vols game. [Laughter.]

Moderator: Understanding that it's a long road from *Bowers v. Hardwick* to *Obergefell v. Hodges*, how important was the state constitutional law strategy to paving that road?

Ms. Rubinfeld: When we decided to do this case we were one of the first cases after *Windsor*,⁷ which was kind of an invitation to challenge the marriage inequality laws, and we never really considered doing it under state law. We did have a big discussion about whether we should file in state court or federal court raising federal issues, because either way we could end up in the Supremes, the U.S. Supreme Court. But we quickly made a decision not to go to state court because 2013 when we were planning this was when our Tennessee Supreme Court justices and our appellate judges were under attack from a whole section of Republicans in the legislature who were threatening that if the judiciary didn't decide cases a certain way, they wanted them all out of office.⁸ Ultimately there were the contested retention elections, and we didn't want to put our friends—any judges that *were* on our side—we didn't want to put them in the situation of having to decide a controversial issue in the middle of this campaign to throw them out of office. When you do these types of cases you have to be conscious of politics, which I believe unfortunately controls the courts more than the law these days, frankly, and so we had to be conscious of that.

We have a good federal bench here in Middle Tennessee that's made up of all open-minded people who we knew would give us a fair shot and at least listen to us. Regardless of what you may learn in law school, courts and judges aren't always necessarily open-minded like that. You don't always get a fair hearing, and you don't always get judges that are open to you or that are really going to read your briefs. So our federal bench here being really open minded was an important consideration.

7. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

8. For more on the 2014 retention elections, see Alan Blinder, *Conservatives See Potential in Tennessee Judicial Race*, N.Y. TIMES (Aug. 5, 2014), <http://www.nytimes.com/2014/08/06/us/conservatives-target-tennessee-justices-in-expensive-race.html> [<https://perma.cc/569A-4J3Q>].

Ms. Lambert: At that time one of the things that we were trying to determine was whether to challenge this whole ban or merely go for recognition. So that was a bigger part of our strategy.

Ms. Rubinfeld: In retrospect it may sound silly to y'all with the ultimate outcome of the case. But remember, when we were deciding on the strategy it was right after *Windsor*. And we decided that because we all know the Supreme Court doesn't like to do big jumps but prefers to do smaller baby steps, that we would present a limited case as the next small baby step for them after *Windsor*. Going for recognition allowed us to emphasize that our case is limited only to people who got legally married where they lived and then moved to Tennessee for whatever reason. We thought the most sympathetic clients to start with would be those types of people—a military guy who was transferred here, doctors who can get an appointment at a veterinary school together, all people who were legally married and then moved to Tennessee—as opposed to people like me who live in Tennessee and went out of state to get married because we couldn't get married here. We made a specific choice to narrow it and limit it to that one issue, but once it got going the dominoes just fell; we started winning every single case. There were so many wins after *Windsor* across the country before our case even really got moving.

Ms. Lambert: We were also one of the first Southern states to file, and we were conscious of that.

Moderator: How important do you think the *Campbell*-type cases were in getting to *Lawrence*, maybe even to *Obergefell*? For example, when the Court decides *Lawrence v. Texas*,⁹ how important do you think it was to that decision that cases like *Campbell* and others had limited the number of states where consensual same-sex activity was criminalized so that Texas was one of only very few states left?

Ms. Rubinfeld: I think those cases were really important to the Supreme Court in *Lawrence*. A big part of me, given the kind of work I do and all the years I've done it, thinks that the law is the law, that judges should see it the right way and it shouldn't matter if the majority of people disagree. We live in a constitutional democracy, and the majority rules on most things, but we have a Bill of Rights, and the majority can't rule on an issue if it requires them infringing on other people's individual liberties. So to me, it was kind of a no-brainer, but obviously that wasn't the view shared by everyone. I think it really did matter to the Supreme Court when we got there, 17 years later after *Hardwick*, that all these other states had already decriminalized and all these state courts had issued these great opinions all over the

9. *Lawrence v. Texas*, 539 U.S. 558 (2013).

country, including quite a number in the South and in the more conservative parts of the country. I think that made a huge difference.

Even though the Supreme Court is not elected, the justices are conscious of what's going on in the country and they don't always want to take action on an issue before they feel like everybody's ready. Timing was a big issue. It was an issue in the *Hardwick* case, and it was an issue in the marriage cases—whether to go forward and whether the Court was ready to hear this now. Before *Hardwick*, it was kind of a toss-up in the discussions. There were a lot of people who were involved in the movement in those days who thought that we shouldn't bring a case at the time; the federal courts weren't ready, the Supreme Court wasn't ready, a majority of states still had criminalization laws, and it just wasn't the time. And then the flipside was that it was the perfect case. Michael Hardwick was arrested in his own home, in his bedroom, having private, consensual sexual activity with another adult. What situation could be more perfect to challenge these laws? And we ended up going forward, but there was a huge debate in the LGBT community about whether that was appropriate. And then of course when we lost all those people gave us so much grief. But I still think we *had* to bring that case. We did it the best we could. And politics controlled. If y'all read that opinion—it's a hateful, horrible opinion. It relies on the Bible, not on the law, and it says horrible things about gay people. Some of the dissents in *Obergefell* do that also, but it's a hell of a lot easier to read that in a *dissent* than in the majority opinion in *Hardwick*. [Laughter.]

Moderator: State criminalization of same-sex consensual activity and state bans on same-sex marriage have largely been supported on theories of moral condemnation. One of the changes you see in judicial decisions is an emphasis on the real-world impact on same-sex couples and on families that involve same-sex partners. What strategy do you use as litigators to move a court from focusing on abstract moral condemnation in cases like *Bowers v. Hardwick* to paying more attention to the real world impact on same-sex partners and families of same-sex partners?

Ms. Lambert: When you were just asking that question, it made me think of Doug Hallward-Driemier, who did our oral argument in front of the Supreme Court. Doug is a former Solicitor General. He is just brilliant, has a brilliant Supreme Court practice, and is a heterosexual man with three children. I teach appellate brief writing and oral arguments at UT Law and an emotional plea is not what you want your students to think about when they're making an oral argument. But after a very law-based, effective argument, Doug had tears in his eyes. It meant something to him because he was thinking about the clients that we were representing. He was really thinking about many people that he had never met and never will meet, but

he knew those six people. He knew those three couples that we walked into the courtroom with that day. And I think it did matter. When I read Judge Daughtrey's dissent from the Sixth Circuit, and when I read the majority—thank goodness—opinion from Justice Kennedy and the Supreme Court, they understood that children, that families—that this was an emotional situation, that it was a relationship situation, and it was something that really mattered to the people involved. I think it did have a persuasion on the courts, ultimately. I don't know that it was from a particular argument so much as from a change in the climate. It's probably from people coming out for decades and from more people knowing someone affected. At some point the perception of how homosexual couples were viewed by our whole society changed significantly.

Ms. Rubinfeld: I think there was an understanding over time that not everyone has the same moral beliefs, and that who decides what's morally appropriate for any individual is really a very personal decision. I agree that more and more people coming out—so that judges, lawyers, the public, whoever, suddenly realized that, “Oh, I have, a gay nephew.” Or you know, “My teacher was gay,” or “my driving instructor”—whomever! All of the sudden people were way more aware of us. But I also think that the mainstream media made a huge difference. Shows like *Queer Eye for the Straight Guy* and *Will & Grace* started normalizing it a bit. It showed that gay people were part of society and were decent, good people, which is a no brainer to some of us, but I think was a revelation to a lot of people. I think that the mass media made a huge difference in changing minds and hearts in this country. And I don't like the media so much myself, but I am very thankful to them.

Ms. Lambert: And Jeffrey, when you talk about morality—and I probably think about this more than I should because I came from a very conservative, Republican, Catholic family. I've had to have many, many conversations with my own siblings—it's ongoing, really—about the separation of church and state. I appreciate that background because it makes it easier for me to have those types of conversations with other people and not be offensive or demeaning to anyone's true religious beliefs. But I think when you can see and understand—and we all do as lawyers and law students—that there is this separation of church and state, that makes it an easier path to marriage equality.

Moderator: When David Boies and Ted Olson filed suit in *Hollingsworth v. Perry* in 2009,¹⁰ challenging Proposition 8 in California,¹¹ they were

10. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

11. CAL. CONST. art. I § 7.5. Proposition 8 was a ballot initiative passed in California in 2008 after the California Supreme Court had otherwise legalized gay marriage). It

breaking from that model of challenging under state constitutions and there was some opposition within the gay and lesbian rights community that there was a danger that this was maybe moving too fast. What were your initial perceptions or sense of whether Boies and Olson were moving too fast in filing that challenge, or did you think it was the right time to file that challenge?

Ms. Lambert: I know that Kate Kendell, the Executive Director of NCLR, who partnered with us on *Tanco* was one of the people who was initially opposed. And what I understand from her is that the resistance was because they didn't want bad law and to risk it being another 17 years before we could get that law off the books. At some point Kate talked to Ted Olson on the phone, and I think he agreed to be an honorary lesbian, so it all worked out. [Laughter.]

The Ted Olson and David Boies story is very meaningful, because you had these two people who were diametrically opposed politically; they were on opposite sides of *Bush v. Gore*.¹² I don't know how many of you remember that. My students sometimes don't know what I'm talking about when I mention hanging chads. [Laughter.] But these two men had such regard for each other's abilities, talents, and legal minds that when Proposition 8 came up—and for whatever reason, Ted Olson's life had been impacted such that he desperately believed that marriage equality was a conservative principle—they got together and worked on this case. It changed so many minds. Olson was able to reach people that so many others would not have been able to.

There's a documentary called "The Case Against 8,"¹³ and it's a background story of that Proposition 8 case. It also follows the plaintiffs and shows the type of things that you will face if you get involved in a national case of that magnitude. I had Sophy and Val, the two plaintiffs who were friends of mine—and who I wanted to agree to get involved in a case that could potentially be very media heavy—come over and watch that documentary so they could get a clue of what they could face.

Moderator: You were both talking about next step challenge after *Windsor*. *Windsor* ends up being the more important domino that falls to open the door in terms of brining other challenges. In *Tanco*, Sophy and Val married in New York State and moved to Knoxville to work at the University of Tennessee College of Veterinary Science. What spoke to you

provided that only marriages between a man and a woman were valid or recognized in California.

12. *Bush v. Gore*, 531 U.S. 98 (2000).

13. THE CASE AGAINST 8 (Ben Cotner & Ryan White 2014).

in terms of Val and Sophy being the right plaintiffs? Dr. Tanco's name will forever be immortalized in the caption of *Tanco v. Haslam*. What made you feel like these were the right plaintiffs?

Ms. Lambert: I was out of the country when *Windsor* was decided and when I came back, that's when I knew. My life literally changed because of *Windsor*. I never thought in my lifetime that the U.S. Supreme Court would talk about homosexuals and dignity in the same sentence. It changed my life. And I thought: whatever I can do to get involved I'm going to do it. And I saw in *The Tennessean* there was a headline from Abby Rubinfeld, who I'd seen speak before, that she was going to sue the State of Tennessee. I contacted Abby because I'm a decent legal writer and I wanted to see what I could do to help and she said, "Let's bring a case together." Then NCLR came in.

But I'll tell you, when we decided that it was going to be recognition, that made it very difficult; if we were just looking for people who were Tennessee residents who left the state to get married and came back, there's tons of us! Tons of us! But people who got transferred for some legitimate reason that other people could relate to, it wasn't like there were that many people.

I am the stereotypical lesbian with dogs so I have vet friends, which is how I met Sophy and Val. It's like hanging out with your pediatrician. [Laughter.] So I met Sophy and Val about a year earlier. They were both very inspiring, wonderful women. It had nothing to do with family at the time—I mean they were a family, but they didn't have children—and I talked with them about it. They say that I spent 20 minutes telling why they should be involved in the case and two hours telling them why they shouldn't. I'm really grateful they remember it that way because it's a daunting thing. You can't un-Google yourself. If I remember, the day they accepted was the day we found out Val was pregnant, which changed things. Abby was the person who had the experience and the understanding, NCLR had the experience too, and Sherrard and Roe had the everything—

Moderator: You had an amazing team come together.

Ms. Lambert: We did!

Moderator: You had Maureen Holland out of Memphis, Sherrard and Roe, a well-established Nashville law firm with a group of talented lawyers including Tom Farringer, Phil Cramer, Scott Hickman, and the Tennessee Bar Association President Bill Harbison. How did you all come together to form a team of so many talented litigators?

Ms. Rubinfeld: When the *Windsor* case was decided, I guess *The Tennessean* doesn't have a lot of a gay people they can call, so, they called me. [Laughter.] They asked what I thought about the case, and then they asked, "Is there going to be a marriage challenge in Tennessee?" What was I going to say? Of course I said, "Hell yes there will be!" And then the next thing I knew there was a headline on their website, and it said, "Rubinfeld to Sue State." At that point I had no plans, no team, no plaintiffs, but just knew we needed to bring a suit. And then, coincidentally, Regina saw that and she wrote me—we didn't know each other before this—she wrote me a really heartfelt, personal email about her situation and what *Windsor* meant and said she wanted to be involved. I wrote her back to say, "Great! It's you and me, then. We are doing this case!" [Laughter.] This was before we even put together a team.

I immediately called the NCLR, because they're my favorite—and I think the best—national gay legal group, and they have worked with me for years, since the 70s, on any kind of case that I needed here in Tennessee. I feel like some of the national groups want to discount the South, but NCLR has never been like that. I called their legal director, Shannon Minter and said, "We can't leave the South behind! We can't just file marriage challenges now in the easy states. We've got to file them everywhere, and we want to do one here." And he was like, "Absolutely. We're in."

So we had them, but we needed a law firm, because we're solos, and we don't have the resources to really fight the State on our own—we'd like to think that we do, but when it really comes down to doing all the pleadings and drafting and all that, we really don't as solos. We had originally talked to a firm out of Memphis that had a big name partner who's very involved in both the national and state bar associations and who is a friend of mine. I called him, and he was really excited, really wanted to do it, and then, just given the nature of the issue one of his partners didn't think the firm should be involved, and since my friend is a partner in a big firm he had to respect his other partners and so he backed out. So we didn't know what to do. I was on the phone with Regina and we were so worried and at a loss because we knew we had to have a firm.

Ms. Lambert: I love this part of the story. Many of you are probably familiar with Sherrard and Roe. Bill Harbison, who is the current Tennessee Bar Association President, has a son named Jay who is a practicing attorney in town. At the time Jay was the 2L boyfriend of my teaching assistant who had just graduated from UT Law and was heading off to Chattanooga to clerk. We were in the very beginning of planning the case, and I was going to take her to dinner to wish her luck with the clerkship. But Abby and I had a call with the team that evening that was supposed to be at 4 but got backed up to 6 p.m. I got permission from Abby and the team for my

TA and her boyfriend Jay to listen in on the call, because I thought it would be a learning experience for them. At the end of that call is when we found out that the Memphis attorney was not going to be able to play a piece in this. And this guy who's sitting there, Jay—

Ms. Rubinfeld: —whom we didn't really know—

Ms. Lambert: —whom we didn't really know, said, "My dad will do it." [Laughter]. I did not know who his father was, and I thought he was charming, but that we don't volunteer our parents. [Laughter.]

Ms. Rubinfeld: When we were on the phone about it, Jay was like, "No, no, seriously, my dad will do it, I'll call him right now. [Laughter.] So he did, and Bill was like, "Yeah we'll do it." And you asked me if I knew Bill Harbison and I was like, "Oh my gosh, *Bill Harbison?*"

Ms. Lambert: By Monday we had this exceptional, amazing firm of Sherrard and Roe 100% in.

Ms. Rubinfeld: It made a big difference because they were awesome. Bill always tells us that the only issue the firm had was how to limit the number of people that would be involved, because everyone in the firm wanted to work on the case, but then they would never make a living—they would be like us solos! [Laughter.] So they had to limit it to the four guys who worked with us. And what a great bunch of four guys they were. They made all the difference in the world in this case. If we hadn't had them, we wouldn't have won.

Moderator: You end up before Judge Trauger here at the U.S. District Court for the Middle District of Tennessee. When you were going before Judge Trauger was there one central theme or a central point you wanted to get across in your argument? Was there a leading edge to your argument or a point you wanted to make?

Ms. Lambert: Actually, I think at that time we didn't yet have our case in front of Trauger, but we had a preliminary injunction. Val, the biological mother of the Knoxville plaintiffs, was due in March to give birth. And Sophy, the way that the current law stood, was a legal stranger to her child. So if there were any complications—which I guess any first-time mother, or any anytime mother, is concerned about when they give birth to their child—if something had complicated that pregnancy or that delivery and Val, the biological mother, wasn't able to make any decisions, Sophy would not be permitted to. We were very concerned about that and both of the mothers were very concerned about that. So the preliminary injunction was granted 10 days before Amelia was born. I was always calm with them, but

I just kept thinking, “Induce!” Because I didn’t know how long it would last. I knew the State would attempt to get a stay. That’s really where everything stopped for us, when that baby was born before the 6th Circuit granted a stay.

Ms. Rubinfeld: We made a conscious choice, a strategic decision, that we would seek a preliminary injunction. We talked about seeking summary judgment because it seemed obvious we should get summary judgment, but at that point the queue of cases going to the Supreme Court was narrowing down. They weren’t taking the cases that had already been decided our way because there wasn’t a split in the circuits, so we wanted to be on track to be able to appeal quickly. We decided to do the preliminary injunction because that would be appealable right away.

An interesting story about that is we filed for a preliminary injunction in November, and Judge Trauger just sat on it. She didn’t act, and we were getting worried. The baby was due in March. By February when she still hadn’t ruled we had a number of conference calls and we finally decided to do what most lawyers never do: we filed a motion asking for the status of the case. You know, “Hurry up, your Honor!” But we wrote this really respectful motion because she had sat on this thing since November and now it’s February. The next day after we filed that motion, she issued the best “screw you” decision ever in the history of the law. It was only two sentences. And it was the *next* day! The whole opinion was something like, “The plaintiffs have asked the Court to determine the status of the case. The status of the case is that the Court is working on it.” [Laughter.] We were like, “Ok, then.” But she ruled before the baby was born, and she ruled in a timeframe such that when she denied the State’s request for a stay they didn’t have time to appeal to the 6th Circuit before the birth. So both parents are on the birth certificate. It was the first time in Tennessee that both same-sex parents were on an original, official birth certificate. It was pretty cool. And it protected them. Regina herself got Office of Vital Records to do that.

Moderator: You end up before the 6th Circuit.¹⁴ You have a panel that has Judges Cook, Daughtrey, and Sutton. You end up with Judge Sutton and Judge Daughtrey, two of the most brilliant minds on the court representing two very different ways of looking at the law, who write opinions that are usually about the best reflections of those two differing views of looking at the law. You end up with a circuit split. What was your first reaction when you got your decision back from the 6th Circuit?

14. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

Ms. Lambert: I had just finished teaching a class around 4 p.m. that Thursday afternoon. You become addicted to your phone—not that you’re not already, like we all are—but when you’re waiting for a decision, you’re just constantly checking. That day I saw I had missed 20-some calls and however many emails and I knew the decision was in. So I pulled the car over. It really felt . . . I knew there was a possibility we would lose. We didn’t leave thinking there was no chance of losing or anything, but it still did not feel good. It was real families and real lives. I’ve been asked by people, “Are you so glad you had the chance to go to the Supremes?” or “that you lost at the 6th?” And the answer is an absolute, resounding, “No!” You don’t want to lose a case, ever! There was about a day where I just wanted to go home and sit. By the next day we started to flip it around and see the silver lining. The team had conference calls and started to regroup and think about the next steps and you could see that there was a new route. It wasn’t that we weren’t aware of the option of appealing to the Supreme Court, but it took me a night to get to that point.

Ms. Rubinfeld: I felt the same way. It was very upsetting. I didn’t think Judge Sutton would be persuaded. At the argument he seemed open—I don’t think he really was—but he seemed open to both sides and I thought he would do the right thing. But Judge Cook—

Ms. Lambert: Posner had come out in the meantime.

Ms. Rubinfeld: Right. We thought that the 7th Circuit and Posner’s opinion would make a difference.¹⁵ There had been all these circuit and district court decisions our way so we hoped that they would join the crowd and do the right thing. And plus, it was also upsetting because on all the Listservs I’m on with all the attorneys practicing or involved in LGBT law, everyone was celebrating the opportunity to go to the Supreme Court. I had to send that email asking if they couldn’t at least mention that they were sorry we lost our case. But then, as Regina noted, we began to understand the implications.

For a long time we thought that we would not be the ones going to the Supreme Court. During the delay in getting our preliminary injunction ruling, many cases bypassed us that had been filed long after ours. But they were getting decisions and were going up to the appellate court and getting far ahead of us in line to the Supremes. But then the Supremes ended up denying all them. So when we eventually lost in the 6th, yeah, there’s this huge silver lining, which was that we could go to the Supremes.

15. *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).

But that meant this whole big debate about timing. We knew we wanted it to happen during the 2014-2015 term. We didn't want to wait. No one knows how long RBG will be around,¹⁶ or any other justices who might be on our side. So we wanted the decision to be now, in the term that had already begun. But to do that we had to work back from the end of the term to their last conference so we could know when we'd need to file so that they'd have time to consider our cert petition. You normally have 90 days to do a cert petition. By then, all four of our states in the 6th Circuit were coordinating, having conference calls, and all working together. And we all filed our petitions within seven days, which is really amazing. A Supreme Court certiorari petition is pretty expensive and detailed. We did it in seven days. If we had filed ours just an hour earlier the case could've been called *Tanco v. Haslam*—which would have been so much easier for everyone to pronounce! [Laughter.] But Ohio beat us by an hour.

Moderator: You got cert granted. You're going up before the U.S. Supreme Court. In preparing for arguments were there any particularly difficult strategic decisions? You've talked about timing, but what about once you had cert granted and you knew you were going up? When you were formulating the written argument, strategizing about oral argument presentation, were there any points of particular strategic difficulty?

Ms. Lambert: Without getting into great detail, there were four states that were granted cert at the same time. There were four or five national organizations and four state legal teams—

Ms. Rubinfeld: —37 lawyers.

Ms. Lambert: 37 lawyers! But the Supremes allotted us all only two oralists. It was challenging, but I think it worked beautifully. Looking back, to get that many people in that big of a deal to negotiate and compromise and keep their eye on the big goal is not easy. But it worked out fantastically. I don't think it could have played out better than to have the two people we had go before the Supremes.

Ms. Rubinfeld: It wasn't easy. We had a lot of discussions. First we tried to get the Supremes to reconsider and let us do more than two people, but they were adamant: it could only be the two people. Not two people from each state, but two people overall from 37 lawyers, three national organizations, six cases, and four states. We had to pick two people. That's lots of big egos. [Laughter.]

16. RBG refers to U.S. Supreme Court Ruth Bader Ginsburg. *See, e.g.*, Irin Cameron & Shana Knizhnik, *Notorious RBG: The Life and Times of Ruth Bader Ginsburg* (Dey Street Books 2015).

There were two questions the Supremes wanted answered. We decided Michigan and Kentucky would pick the person to argue the first, and Ohio and Tennessee would pick the person to argue the second question. Each group had a moot-off where each state nominated a person to participate. We brought in judges and then picked who the oralists would be. Lawyers have to be pretty confident in themselves, so there were some disputes, but we worked it all out.

Then there was also the politics. As an activist who has been in the movement for 36 years as a lawyer, I don't mind saying that there was no way we were going to have two straight, white men arguing the biggest gay rights case in the history of the world [Laughter.] That would just not look good to our community. Not these days. When we did *Hardwick*, we asked Larry Tribe to argue for us because we didn't have any openly gay litigators who had had Supreme Court experience. And besides, you can't beat Larry Tribe. Nowadays there's a number of openly gay litigators with Supreme Court experience who were ready and willing to do it. It's not like we were limited to a homogenous group people. And maybe not everyone would agree, but in my mind we had to have at least one gay person arguing. And it worked out really well. We had a man and a woman, a gay person and a straight person. It worked out perfectly.

Ms. Lambert: The woman who ended up arguing the first issue presented, Mary Bonato, was actually the lawyer who won the first state case to recognize gay marriage in Massachusetts in 2003.¹⁷ So it was really poignant to have that bookend—from the beginning to the end, the first to the last, and to have a woman be one of the oralists. And then Doug, I don't think anyone could've done a finer job.

Ms. Rubinfeld: Yeah, our guy Doug, it was his sixteenth Supreme Court argument because he'd been at the U.S. Solicitor General's office. He called it his "sweet 16." I got to sit next to him at counsel table, which was the coolest thing ever. His voice broke during his rebuttal when he was telling the personal story about our plaintiffs. His voice broke and he had *tears*. Like, our straight, white guy that was arguing this was just crying during his argument before the Court. [Laughter.] It was totally awesome. He's a great guy. If y'all haven't listened to the arguments, you really should because it was just an amazing display.¹⁸

17. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

18. Audio and transcripts of the oral arguments may be found at the Supreme Court's website. Oral Argument Audio, Question 1, *Obergefell v. Hodges*, 135 S. Ct. 1040 (2015), https://www.supremecourt.gov/oral_arguments/audio/2014/14-556-q1; Oral Argument Audio, Question 2, *Obergefell v. Hodges*, 135 S. Ct. 1040 (2015), https://www.supremecourt.gov/oral_arguments/audio/2014/14-556-q2; Oral Argument

Moderator: I wanted to ask you a couple of additional questions that are somewhat beyond the case. One of the things I want to tackle with you is, the TBA has created a new section, the LGBT section. There are young lawyers, new lawyers—law students, even—who, going out into practice, may be concerned about how firms respond to them on the basis of sexual orientation. How important is this new section and the TBA’s increasing emphasis on diversity in terms of LGBT issues to changing firm culture in Tennessee? In terms of what kind of environment graduates and new lawyers are going to go into?

Ms. Lambert: It’s important to me. I’m seeing such a different environment, at least at UT School of Law. Even while we were working on this case, I had so many students . . . There was a parallel last spring when we were working on our brief and I was teaching brief writing. My students were writing an appellate brief, and we were writing an appellate brief. They were preparing for oral arguments, and we were preparing for oral arguments. It made me realize that the atmosphere, the whole climate, was very different and much more supportive. It didn’t matter what political affiliation anyone was, it had nothing to do with conservative or liberal, and it didn’t have anything to do with what your religious beliefs were. There’s been a real change in the environment and the culture of equality and inclusion and diversity, as well as in terms of valuing that diversity. I’ve just seen recently on the LSAC web page they have an LGBT diversity section. For me, at least, it used to be that I did not want *anybody* to know. When I applied to law school, being outed as gay was the worst thing imaginable. Now it’s scholarship-type material! [Laughter.] But the actual appreciation for diversity, period, and then recognizing the value of it has changed so much and been so important.

Ms. Rubinfeld: When I was studying for the bar in 1979, my study buddy was Carol Solomon who later became a judge here. One day when we were studying she came in very distraught because she had been called in for an interview, and she was concerned about how she’d be perceived because she was divorced. And I was like, “How do you think I feel? What’s going to happen to me? I’m openly gay!”

Transcript, Question 1 Obergefell v. Hodges, 135 S. Ct. 1040 (2015), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-556q1_15gm.pdf [<https://perma.cc/L4HT-CN52>]; Oral Argument Transcript, Question 2, Obergefell v. Hodges, 135 S. Ct. 1040 (2015), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-556q2_8m58.pdf [<https://perma.cc/6GUU-VDEP>].

I think it makes a huge difference for young lawyers who are LGBT to see that we are accepted as part of the profession and that their sexual orientation doesn't have to hurt them. That said you do still have to be conscious. The reality is that there are still firms around the country that aren't going to be okay with you being gay, and you have to decide if you personally can put up with that to earn whatever money or prestige you're going to get at that firm. But these days there are so many more firms that are more open and welcoming to LGBT attorneys. I also think it's really important to the nongay legal community to see that diversity includes all these different groups, including us. We're mainstream now, or we should be, and it's happening more and more.

Moderator: One of the concerns that nonlawyers have when they hear about *Obergefell* is that one of the consequences of the Supreme Court decision would be that priests, ministers, rabbis, imams, or other religious leaders are going to be forced to conduct marriages inside their churches and synagogues that are inconsistent with religious beliefs. Ms. Lambert, I was struck by something you said in an interview about this. If there were some hypothetical law that would force a priest, minister, rabbi, imam, or other religious official to marry somebody in contravention with their religious beliefs, which side would we find you defending?

Ms. Rubinfeld: No brainer.

Ms. Lambert: First of all, unless our Constitution implodes or something, that could never happen. But if it did, I would be on the side of religious freedom. Because I believe we do have, and should have, a separation of church and state. I'm sure that I was overly sensitive to that issue at the time, because the day that we won our Supreme Court case—the *day* that we won—my sister, who is a year younger than I am, shared a post online about how, “Today, five men in suits threw the Constitution into the trash.” So I really think about this a lot. And I try constantly, not in a judgmental or angry way, but I consciously try to reach across that aisle on separation of church and state to make it clear that I support and respect religious freedom and that this is not crossing any line in that area.

Ms. Rubinfeld: I might not like it, but I would defend any church that said, “We don't want to perform these weddings.” This case has nothing to do with that. It's only about civil marriage. Churches can still do whatever they want. If they don't want to marry same sex couples or mixed religion couples—the synagogue I'm a member of didn't want to perform a marriage between a Jew and a non-Jew. They would do same sex marriages as long as both parties were Jewish. [Laughter.] But I would defend a church that didn't want to perform weddings that were against their

religious beliefs. They have an absolute right under our Constitution to choose to do that. There's just no question about that.

Moderator: Ms. Rubinfeld, the last two questions of the night are for you.

Ms. Rubinfeld: Are they going to be trick questions? [Laughter.]

Moderator: They are not going to be trick questions! This may date you, but you've been in this cause of gay and lesbian rights for more than a few years. When you first started litigating these cases in the early 1980s, when you first started arguing for gay and lesbian rights, did you think you would live to see the day that the U.S. Supreme Court would recognize marriage equality?

Ms. Rubinfeld: No. I never, ever thought that I would see marriage equality in my career. I never thought that this would happen. Sodomy law reform I thought I would see, but I never thought I would see marriage equality. It happened so fast.

Moderator: With everything you've done in the cause of gay and lesbian rights over the years, how does it feel to be sitting here, knowing the Supreme Court has reached that conclusion?

Ms. Rubinfeld: It still makes me want to cry just thinking about it. Especially having worked on and lived through the *Hardwick* case and reading that opinion where the U.S. Supreme Court was so dismissive, so disrespectful, so dehumanizing, and having lived through all that . . . When *Lawrence* was decided, *that* made me cry. At the time, I talked to every person that had worked on *Hardwick*—of course a lot of the men in particular had died from the AIDS epidemic—but any of the people that I talked to who had worked on *Hardwick*, they all had the same reaction: we were all beside ourselves crying, so grateful that we had been vindicated and there was finally language in the books to overcome this hateful, horrible language in the *Hardwick* opinion. And then to get to the point where the Supreme Court is talking about our equal dignity and our families—I can't even put into words how much that means to me as a lawyer who works in this system and believes really deeply in our Constitution. I think our country has the best Constitution and the best governmental set up of any country in the world. But in my lifetime it hasn't always worked so well for everyone. You can go through a lot of examples where those “five men in suits” misapplied the Constitution. There's been a lot of decisions that haven't been the way I wanted, and so to know now that our system is working to recognize us as people and to recognize our humanity . . . It makes me want to cry just saying that right now. It's incredible.

Moderator: We've had the opportunity this evening to hear from two history-making attorneys. Our panelists have been incredibly generous in sharing their time. They've also given us an example of courage and dedication to a cause. If all of us as attorneys brought the same level of courage and dedication in the pursuit of a cause that we believed in as Ms. Rubinfeld and Ms. Lambert, it would be a credit to our profession.

Please join me in thanking them for being here and also for their example of their courage and dedication.

[Applause.]

Ms. Rubinfeld: I also want to say that all of y'all can do the same thing. One person can make a huge difference. All you have to do is be involved. It doesn't matter if you're a solo, if you work for a big firm, or you work for the government. You can give money, you can volunteer, there's tons of stuff you can do, whatever your cause is. You truly as an individual can make a difference, and you should. I think that's our obligation as lawyers. We've got a lot of power as attorneys, and we have an obligation to make it work better, so please join us in doing that, whatever your issue is.