

THE ROAD AHEAD: Gender Equality After *Hobby Lobby*

A REPORT FROM
THE ALLIANCE:
State Advocates for Women's Rights & Gender Equality

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THE ALLIANCE is a new collaborative of regional women's rights and gender equality centers across the U.S. We formed the Alliance to strengthen our collective capacity to advance women's rights, reproductive justice and LGBTQ equality, and to produce clear wins on critical issues at the state level. We currently work in 11 of the 50 states, using the law to promote justice for women, LGBTQ persons and families. We are committed to securing tangible wins in the short-term, testing new approaches with potential for longer-term impact, and working at the intersection of women's and LGBTQ rights.

ALLIANCE PARTNERS:

CALIFORNIA WOMEN'S LAW CENTER (CWLC) is a nonprofit public interest law and policy center in Los Angeles specializing in the civil rights of women and girls. Founded in 1989, CWLC breaks down barriers and advances the potential of women and girls through transformative litigation, policy advocacy and education. Current CWLC programs focus on challenging gender discrimination and promoting gender equality in these priority areas: reproductive justice, women's health, domestic violence, LGBTQ rights, Title IX enforcement, campus sexual assault, equal pay, and women veterans' rights.

GENDER JUSTICE is a public interest advocacy organization, founded in 2010, which serves the upper Midwest from its base in Minneapolis-St. Paul. Gender Justice's mission is to eliminate gender barriers, whether linked to sex, sexual orientation, gender identity, or gender expression. Gender Justice makes use of three integrated program areas – impact litigation, policy advocacy, and education – to target the root causes of gender discrimination and highlight the central role that cognitive bias plays in producing and maintaining inequality.

LEGAL VOICE is a regional public interest advocacy organization based in Seattle. Founded in 1978, Legal Voice pursues justice for all women, girls and LGBTQ individuals in the Northwest through groundbreaking litigation, policy advocacy, and educational tools to help individuals and communities understand their rights and the legal system. All Legal Voice advocacy is based on its “Women's Bill of Rights,” which affirms that: All women have the right to equal treatment and to be free from discrimination; to decide when and how to form and maintain their families; to be safe wherever they are; to economic equality and independence; and to be healthy and active.

SOUTHWEST WOMEN'S LAW CENTER (SWLC) is a legal advocacy organization based in Albuquerque. Founded in 2005, SWLC seeks to provide women in New Mexico with the opportunity to achieve their full economic and personal potential by: eliminating gender bias, discrimination and harassment; lifting women and their families out of poverty; and ensuring access to comprehensive reproductive health services and information. SWLC integrates five tools to create social change: legal research, policy analysis, advocacy, community and stakeholder education, and coalition work at the local, state and national levels.

WOMEN'S LAW PROJECT (WLP) is a women's legal advocacy organization with offices in Philadelphia and Pittsburgh. Founded in 1974, WLP's mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. Combining high-impact litigation, public policy advocacy, and community education, WLP has forged an extensive track record of litigation victories, legislative and policy reforms, direct services, and creative collaborations. WLP work has strengthened women's legal status, advanced LGBTQ rights, and promoted gender equality in laws and institutions, in the legal system and in the response of public agencies to women's needs.

PREFACE

This Report was written during a critical period of time in legal history in the United States, a time bracketed by two Supreme Court decisions with great significance for women's rights, LGBTQ rights, and gender equality.

The Alliance: State Advocates for Women's Rights & Gender Equality began work on the strategies in this Report on June 30th, 2014, the day the U.S. Supreme Court released its decision in *Burwell v. Hobby Lobby*, a ruling that drew attention to the number and scope of "religious refusals" in the United States and fed their expansion. And the Alliance was in the midst of finalizing this Report when, on June 26th, 2015, the Supreme Court released its decision in *Obergefell v. United States*, the consolidated cases in which the Court – drawing heavily on reproductive rights precedents and jurisprudence – held that loving, committed, couples in the U.S., regardless of sexual orientation, must be permitted to marry and to have their marriages recognized.

Alliance partners had spent much of 2014-15 devising responses to the already troubling legal landscape exacerbated by *Hobby Lobby*. We therefore immediately recognized both the progress, and the peril, of *Obergefell*. While we are delighted that marriage equality is now the law of the land, and we celebrate that victory, we also know that the decision will lead – indeed, has already led – to an acceleration of proposed laws, policies, and lawsuits to expand the rights of individuals and institutions who object to serving, hiring or including same-sex couples – especially in the states. This, in turn, is certain to accelerate religious refusals in other areas as well, with reproductive health and rights at particular risk.

The current explosion of refusals however, is only part of the picture. Both *Hobby Lobby* and *Obergefell* have significant implications for progress toward gender equality itself. Both rulings reflect and in turn will shape current and future attitudes about gender, not only in law, but in policy and culture as well. And both rulings have implications that will play out in courts and legislatures, primarily at the state level.

This Report focuses on *Hobby Lobby* and begins to explore *Obergefell* in this broader context. We hope that in doing so the Report will serve as a resource for our state and national colleagues who recognize that the struggle for women's rights, LGBTQ rights, full gender equality – indeed, social justice itself – can be won only through creative and concerted advocacy. The Alliance commits to this and welcomes our allies in the fight.

August 2015

ACKNOWLEDGMENTS

The Alliance members send heartfelt thanks to Shira Saperstein for her extensive and invaluable contributions to this Report. We also thank The Moriah Fund and ConwayStrategic for their generous support of Shira's work as Strategic Advisor to The Alliance. Her vision, guidance and expertise have been vital to development of this unique collaboration of state advocates.

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An Alliance Report

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INTRODUCTION

On June 30th, 2014 at 10:00 am Eastern Time, the Supreme Court of the United States handed down its long-awaited decision in *Burwell v. Hobby Lobby*. That decision, holding that closely held private corporations may claim a religious right to refuse to provide their employees with legally mandated benefits, signaled a dramatic shift away from long-standing precedent on the separation of church and state and created new legal means to drastically curtail the health and rights of women, LGBTQ persons, and other marginalized populations. Almost immediately, the ruling spurred lawsuits and introduction of discriminatory legislation throughout the country.

That very day, members of *The Alliance: State Advocates for Women's Rights and Gender Equality* (the Alliance) convened a “Hobby Lobby Summit,” to deconstruct the decision and assess its potential impact on state laws and policies affecting women and LGBTQ communities. Just hours after the decision was released, our attorneys gathered with some key allies to bring our collective expertise and passion for gender equality to bear in analyzing the decision and its wide-ranging implications, and to identify a range of state-based strategies in response.

What follows is a brief Report that summarizes our discussions that day, considers the significance of the *Hobby Lobby* decision for women's rights and gender equality, and lays out our agenda-to-date of state strategies. Our strategies agenda is a work in progress, forged over the year following the *Hobby Lobby* ruling as we have conferred and collaborated to pursue, incubate and test a range of diverse approaches at the state level to both defend and advance women's and LGBTQ rights in the new legal landscape.

We offer this Report and state strategies agenda as a resource for allies in the movements for reproductive rights, health and justice, for LGBTQ equality, and for other progressive change across the country. We invite allies throughout the progressive community to join us in adapting and evolving these and other state strategies as we continue forging a powerful joint effort to combat gender discrimination in all its forms, and to protect women's and LGBTQ rights, health and dignity – now and into the future.

RELIGIOUS REFUSALS: AN ESCALATING PROBLEM

Religious refusals have a long history in the United States. In response to the civil rights movement, for example, reactionary forces made attempts to claim religious exemptions to anti-discrimination laws.¹ And long before the *Hobby Lobby* decision, the religious right used religious refusal claims to undermine women's reproductive health care. But in recent years, religious refusals have escalated.

In particular, as women have gained greater access to health care, and as LGBTQ individuals have gained more equal treatment under the law, conservatives are pushing back to “protect the rights” of employers, workers, and others to refuse to abide by the law, and to act according to their own beliefs, even when this fosters and sustains clear-cut discrimination.

NOW, ACROSS THE UNITED STATES WE SEE:

- » Employees filing cases seeking “conscience-based” workplace accommodations, such as:
 - » The police officer who objects to guarding an abortion clinic²
 - » The counselor who claims a right to proselytize against homosexuality³
 - » The male worker who objects to working with women⁴
- » Pharmacists and other health care providers refusing to dispense birth control, emergency contraception, HIV/AIDS drugs, hormones for transgender persons, psychiatric drugs and other lawfully prescribed medications based on the provider's claim of personal or moral objections
- » Catholic health care systems increasingly acquiring secular systems and invoking conscience claims to impose religious doctrine on patients and deny reproductive health and end-of-life care to a growing number of patients
- » Religiously-affiliated employers firing workers whose relationships, gender identity, or reproductive choices (e.g., pregnancy outside of marriage, divorce, same sex marriage, use of contraception or in-vitro fertilization) they find objectionable
- » Teachers in public schools – and entire public school systems – refusing to teach evolution and substituting creationism in classes

Religious refusals like these were happening before the *Hobby Lobby* decision, but there is no doubt that this Supreme Court opinion dramatically increased their potential for harm, with LGBTQ individuals and women at greatest risk.

1 For example, in *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), the U.S. Supreme Court rejected the argument that a restaurant could refuse to serve black patrons, holding that despite the owner's religious beliefs opposing segregation, the restaurant must serve all patrons. Other examples abound.

2 *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998)

3 *Keeton v. Anderson-Wiley*, 1:10-cv-00099-JRH-WLB (S.D. Ga. June 12, 2012)

4 *Miller v. Drennon*, No. 3:89-1466-0, 1991 WL 325291 (D.S.C. June 13, 1991) aff'd, 966 F.2d 1443 (4th Cir. 1992)

HOBBY LOBBY: A DANGEROUS DECISION

At issue in *Hobby Lobby*, the consolidated cases brought by the owners of the for-profit businesses *Hobby Lobby*, a chain of craft stores, and *Conestoga Wood Specialties*, a cabinet manufacturer, was whether secular, for-profit corporations could refuse to comply with the Affordable Care Act (ACA) requirement that all insurance plans cover contraceptives as part of covered preventive care, simply because the owners of the corporations had religious objections to contraception.

The Supreme Court's conservative majority held that such corporations were entitled to an exemption from the law. In a 5-4 decision, the Court noted that the federal Religious Freedom Restoration Act (RFRA), under which the case was brought, requires the government to prove it has a compelling interest (stronger than just a good reason) for making employers include contraception in their employees' health plans. The Court assumed, but did not expressly decide, there was a compelling interest, but went on to hold that the law was not narrowly enough tailored so as to not infringe on the corporations' constitutional right to religious freedom.

Importantly, this unprecedented decision extended religious freedom protections to for-profit corporations, not just to individuals. For the first time, expanding on its ruling in *Citizens United*, the Supreme Court recognized corporations as "persons" that may hold religious beliefs entitling them to seek exemptions from federal laws, such as the ACA contraceptive coverage requirement.⁵

THE RELIGIOUS FREEDOM RESTORATION ACT (RFRA)

42 U.S.C. §§ 2000bb, was enacted in 1993 in response to the Supreme Court decision *Employment Division v. Smith*, 494 U.S. 872 (1990). In that case, two Native American individuals in Oregon were denied unemployment benefits after they were fired from their jobs for using peyote in their religious ceremonies. The Supreme Court held that because the federal law on controlled substances was neutral toward religion and applied equally to all religions, the law did not discriminate against the two men's exercise of religion. Congress did not like the decision in *Smith*, and enacted a statute to govern analysis of laws that impinge on religious belief.

RFRA removed the "general applicability" test used in *Smith*, and instituted a different test for courts to use in determining whether a federal law violates a person's free exercise of religion. Under this test, a law discriminates against a person's exercise of religion if it "substantially burdens" that exercise. To preserve the law in question, the government must show that it furthers a "compelling governmental interest," and that the means used to carry out that interest are the least restrictive possible. Therefore, even if a law appears to apply to religions neutrally, if one person's exercise of their religion is substantially burdened, a court can hold the law discriminatory absent that compelling interest.

The Supreme Court held RFRA was unconstitutional as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997); thus, RFRA applies only to federal laws. As a result, many states have passed or are attempting to pass state level RFRA's.

⁵ While the infamous (to some) decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), held that non-profit corporations have First Amendment speech rights, and therefore could not be restricted in their political donations, it did not address religious rights. In a variety of cases since then, the free speech principle has been extended to for-profit corporations, labor unions, and other associations.

In the months leading up to the decision, many well-informed observers, including Alliance partners, anticipated an unfavorable ruling from the Roberts Court. Nonetheless, Alliance members were collectively and viscerally shocked by the conservative majority's *Hobby Lobby* decision. The language and consequences are disturbing, and potentially truly dangerous.

THE DECISION:

- » Privileges religious freedom over public health and subordinates women's rights in an acute, far-reaching way
- » Trivializes the women's health and gender equality issues at stake
- » Fails to protect the conscience rights of employees, such as the women employees of Hobby Lobby and Conestoga Wood, whose right to contraceptive coverage was not even mentioned by the majority in its opinion.

Moreover, while the decision refers to Hobby Lobby as a "closely held corporation," the Court did not define the term, and no part of the opinion suggests that the ruling will apply only to corporations that are closely held as it is currently defined in federal tax law. Indeed, the ruling applied instantly to the vast majority of U.S. corporations (as many as 80% of U.S. corporations would meet that definition of "closely held") and establishes no clear barriers to prevent any corporation from suing under RFRA as "persons" with religious objections.⁶ As a consequence, to the extent that state courts look to federal courts, and especially the U.S. Supreme Court, for guidance in interpreting constitutional and statutory issues, we may be facing copycat rulings as states adopt and interpret their own RFRA's.

THIRD PARTY HARM Overly broad religious exemptions based on religious beliefs impose harms on third parties. One example is business owners refusing to provide insurance coverage for contraception to their employees. Employees in rural areas or other places with limited employment are especially harmed by these types of religious exemptions, as religiously affiliated employers may be their only option for employment.

At least three ways to approach the problem of broad religious exemptions have been identified by progressive scholars. The first is to frame the issue as a "license to discriminate." Under this approach, private parties may refuse to provide services (such as contraceptive coverage) to people (e.g., employees) based on religious objections to those people's actions or identities, resulting in discrimination against those persons. Some advocates have argued that preventing such discrimination against third parties should be considered a compelling state interest that trumps or at least balances free exercise rights.

Second, one could argue that burdens on third parties violate the Establishment Clause of the Constitution by forcing people who do not belong to a certain religion to bear the functionally equivalent costs of adhering to that accommodated faith.

The final approach is to argue that when a State grants religious exemptions, those exemptions violate the State's duty to protect the equality rights of third parties. This is especially harmful because it imposes on third parties the imprimatur of State power and authority based on a religion not their own.

Up to now, third party harm arguments have not been widely used by litigants nor adopted by courts.

⁶ In July 2015, the Administration issued the final rule responding to the Supreme Court's decision in *Burwell v. Hobby Lobby*. These rules extend the accommodation available to religiously affiliated nonprofit employers to closely held for-profit corporations and also set out the process an eligible organization must use to provide notice of its religious objection. 80 Fed. Reg. 41318 (July 14, 2015) (amending 45 C.F.R. §147.131(b)).

GENDER EQUALITY CONFRONTS RELIGIOUS LIBERTY: THE PATH TO *HOBBY LOBBY*

The United States is unusual, if not unique, among nations in the way it both respects religion and requires the government to stand apart from religion. The First Amendment in the Constitution's Bill of Rights prohibits the “*establishment of religion*” (the Establishment Clause) – there can be no state-sponsored church in the U.S. – and protects the “*free exercise of religion*” (the Free Exercise Clause) – the right of all residents to be free from government interference in their religious beliefs and worship. Navigating between these two principles has always been complex, and our courts have struggled to achieve an appropriate balance.

From the Revolutionary War to the present, people have objected, based on their religion, to participating in the taking of others' lives, even to protect the nation. Over time, such “conscientious objectors” were accorded greater freedom from laws they believed conflicted with their faith. At the same time, our courts have acknowledged that a widespread disregard for particular laws, even when that disregard is based on religion, would lead to chaos. As the U.S. Supreme Court asserted in *Reynolds v. United States*, 98 U.S. 145 (1878), in which the Court upheld Utah's prohibition on polygamy, allowing religious liberty to prevail in all instances would “make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself.”⁷ In short, our courts and legislatures have long worked to ensure that people with sincere religious beliefs could not, absent unusual circumstances, refuse to obey laws that apply to all people equally.

The tension between these principles has grown alarmingly acute and divisive in the last several years. Conservatives have gained substantial traction on the issue because they have successfully framed the right to religious refusals as solely an issue of religious liberty. While conservatives focus only on the rights granted by the Free Exercise Clause, progressives argue that we must also consider how religious rights are constrained by the Establishment Clause. If the right balance is struck, progressives assert that all rights will be respected: both the free exercise of religion, and the other rights recognized in the Constitution, including the right to freedom from governmental establishment of religion and the right to equal protection.

Lofty principles aside, these two views invoke practical questions. When should religious adherents have the right to assert that their beliefs trump the laws with which they disagree? Should parents be allowed to choose faith healing over medically necessary care for their children, or homeowners be allowed to ignore zoning restrictions because they “violate” religious

⁷ *Reynolds*, 98 U.S. at 166-167

beliefs? Should anyone be permitted to use religion as an excuse to ignore anti-discrimination laws? Does the Free Exercise clause of the Constitution entitle any individual – or institution – to refuse to obey any laws that are deemed to conflict with particular religious beliefs? These are not always easy questions: even as we wish to uphold the laws, how do we protect the Quaker conscientious objector from going to war, the Sikh firefighter from being forced to shave his beard, or the doctor at a prison from being compelled to administer a lethal injection?

Furthermore, these questions have real-world consequences, and the *Hobby Lobby* decision and the furor that has followed it shine a bright and disturbing light on them. Should secular employers be bound under the ACA to provide coverage for prescription contraception like the IUD? Should pharmacists be able to claim a “conscientious objection” to dispensing emergency contraception? Must bakeries serve all customers equally, including those buying cake for a same-sex wedding? Should religious schools be able to fire non-pastoral employees because they are transgender, or because they used IVF technology to become pregnant? May a pediatrician refuse care to a six-day-old baby because she has lesbian parents?

From our perspective as advocates for women's rights and gender equality, these questions must be assessed in light of whose rights and equality is at stake. Fundamentally, it is the rights of women and LGBTQ individuals that are most often at risk here, and in our view, *there is nothing accidental about this pairing*. The shifting terrain on refusals puts women's rights and LGBTQ equality at stake because, at its core, the *Hobby Lobby* decision is as much about gender equality as it is about religious liberty. **The Hobby Lobby decision is about the far right's resistance to increasing gender equality in society, and its “use-any-tool-available” defense of the rigid and unequal gender roles of yesterday.**

As the NAACP and other civil rights advocates stressed in their *Hobby Lobby* amicus brief, this should sound familiar. Opponents of racial equality pressed hard for religious exemptions during the period when *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Loving v. Virginia*, 388 U.S. 1 (1967) were decided and the 1964 Civil Rights Act was passed. They argued that their rights were being infringed by integration measures because “God's statutes . . . recognize the natural order of the separateness of things.”⁸ But the battle then, as now, was not about any new threat to religious liberty; rather, it was about progress toward equality and a desperate opposition pushing back.

Following *Roe v. Wade*, 410 U.S. 113 (1973) the same kind of pushback occurred. When the Supreme Court declared that women have a fundamental right, though circumscribed to some degree, to decide whether and when to bear a child, those opposed to women's equality mobilized to enact laws to drastically restrict this right. Parental notification and consent requirements, waiting periods, requirements that health providers give biased – and in many cases, false – information to their patients, excessive regulations, and limits on particular procedures without regard to professional medical judgment or the standard of care, are now the law in many states. And a continuing stream of bills to further restrict abortion rights flows unabated, most notably and numerous on the state level.⁹ These laws, which cloak anti-woman,

⁸ Senator Robert Byrd, arguing on the Senate floor against the Civil Rights Act, quoting Leviticus 19:19. 110 Cong Rec. 13,207 (1964).

⁹ From January 2011 to December 2014, 231 abortion restrictions were passed in the states. <http://www.guttmacher.org/media/inthenews/2015/01/05/>

anti-choice beliefs in the mantle of religion and morality, not only chip away at the fundamental constitutional right established under *Roe v. Wade*, they permit persons and entities to refuse lawful services because of religious belief in more and more contexts.

This regressive course was first set with the Hyde Amendment; see *Harris v. McRae*, 448 U.S. 297 (1980), which all but ended Medicaid coverage for abortion. Hyde supporters argue that funding abortion care offends their moral sensibilities.¹⁰ Yet similar taxpayer exemptions are rarely, if ever, available for other government expenses that taxpayers oppose on moral grounds; for example, anti-war taxpayers could not opt out of paying for the war in Iraq, nor can those who oppose vaccines refuse to pay taxes for public health measures, or to support the Centers for Disease Control. This pattern of progress and pushback is not limited to the U.S. – it is global. A recent report from Women's Link Worldwide and the O'Neill Institute noted a pattern of increasing access to abortion in certain Latin American, European, and African states, followed in each case by a surge in claims for “conscientious objection” that is, demands for religious, personal, or moral exemptions.¹¹ In Latin America, the same is true as increasing LGBTQ rights are won: any step toward progress, however limited, is met with cries for religious exemptions.

Some observers suggest that the recent clamor for greater refusal rights in the U.S. is backlash against progress on marriage equality. The movement for marriage equality, in turn, is sometimes understood to be about LGBTQ rights only. *But public discourse in recent years has made clear that the marriage debate is about gender, and patriarchy, writ large.*

Opponents of marriage equality admit that their overarching concern is with what they call “genderless marriage.” Opponents do not want to see marriage transformed into “an inherently genderless institution,” as that would mean the loss of state-sanctioned patriarchal gender roles. Proponents of marriage equality note that this transformation of marriage from an institution that perpetuated patriarchy to a more equitable partnership has already taken place: marriage today in many ways bears no resemblance to marriage 1,000 or even 100 years ago. As Judge Berzon wisely observed in *Latta v. Otter*, the 9th Circuit case striking down Idaho's same-sex marriage ban, giving state sanction only to so-called “man-woman” marriage is unconstitutional both because it denies equality to same-sex couples and because it “patently draw[s] on ‘archaic and stereotypic notions’ about gender.”¹²

Justice Ginsburg drove this point home during oral argument in the Supreme Court marriage equality cases, addressing the attorney representing the states defending same-sex marriage bans:

[Same-sex couples] wouldn't be asking for this relief if the law of marriage was what it was a millennium ago. I mean, it wasn't possible. Same-sex unions would not have opted into the pattern of marriage, which was a relationship, a dominant and a subordinate relationship. Yes, it was marriage between a man and a woman, but the man decided where the couple would be domiciled; it was her obligation to follow him.

¹⁰ The trend continued with the Weldon Amendment (2004), which permits the federal government to withhold federal funds from any health care provider that “discriminates” against physicians who refuse to provide abortion, contraception, counseling, or other services – even in cases of rape or incest. The Affordable Care Act also singles out reproductive health care by providing that states may ban abortion coverage in insurance marketplaces and may require that premiums collected for, and funds spent on, abortion services be segregated from other insurance funds, thus treating abortion differently from all other health care.

¹¹ <http://www.law.georgetown.edu/oneillinstitute/research/documents/WLWT-388-09English-FINAL.pdf>

¹² *Latta v. Otter*, 771 F.3d 456, 486 (9th Cir. 2014) (Berzon, J., concurring) (internal citations omitted) cert. denied, No. 14-765, 2015 WL 2473531 (U.S. June 30, 2015) and cert. denied sub nom. *Idaho v. Latta*, No. 14-788, 2015 WL 86023 (U.S. June 30, 2015).

In short, as women's rights increased, marriage itself changed in fundamental ways to become more egalitarian.

Justice Ginsburg was prophetic: the Supreme Court's June 26, 2015 decision in *Obergefell v. Hodges*, 576 U.S. __ (2015), reaffirmed the fundamental right to marriage under the Fourteenth Amendment to the Constitution, and held that, as a fundamental right, it must be available to same-sex as well as different-sex couples. This sea change toward LGBTQ equality has resulted in outpourings of joy – and of vitriol and resistance. And that resistance is already kindling intensified efforts to expand religious refusal rights, including by strengthening state RFRA's, and potentially the federal statute as well.¹³

AFTER *HOBBY LOBBY*: THE ROAD AHEAD

While marriage equality is now the law of the land, any assertion that we have achieved full gender equality is absurd in a world where religious refusals targeting women and LGBTQ people are escalating, and where women still earn only 78 cents for every dollar a man earns – shamefully less for women of color – 43% of Americans say they'd be uncomfortable bringing a child to a same-sex wedding, and nearly 32% of college men said they would act on "intentions to force a woman to have sexual intercourse" if they were confident they could get away with it.^{14,15,16}

To keep marching on the road toward gender equality, and to address the opposition's refusals strategy effectively, we must move beyond thinking of women, LGBTQ individuals, and other vulnerable or marginalized populations as distinct interest groups that just happen to be the target of the religious right. Of course, we must respect the ways in which these constituencies differ; for example, "women's issues" and "LGBTQ issues" are not interchangeable. Conversely, neither set of issues is monolithic indeed, they are overlapping and intersecting, and our advocacy must be grounded in that intersectionality, along with the intersectionalities of race, ethnicity, class, disability, and immigration status.

Unfortunately, U.S. anti-discrimination law usually fails to recognize this intersectionality. For example, while women of color may experience discrimination that is based on both their race and sex, courts may insist that plaintiffs choose between race and sex discrimination claims, evaluate those claims differently, or treat them as completely distinct, thus ignoring the

¹³ <http://www.politico.com/story/2015/07/conservatives-regroup-after-gay-marriage-defeat-119984.html>

¹⁴ <http://www.iwpr.org/initiatives/pay-equity-and-discrimination>

<http://www.iwpr.org/publications/pubs/the-gender-wage-gap-2014-earnings-differences-by-race-and-ethnicity>

¹⁵ http://www.glaad.org/sites/default/files/GLAAD_Accelerating_Acceptance.pdf

¹⁶ <http://thinkprogress.org/health/2015/01/11/3610327/college-men-forcible-sex-study/>

intertwined consequences of discrimination and failing to acknowledge these intersections in lived reality.

Yet, despite the often “siloeed” nature of the law, and regardless of the specific focus of particular organizations, we must stay exquisitely aware of the interconnectedness of our work. Only by stepping outside of the “women’s rights” and “LGBTQ rights” silos and dwelling in the interconnectedness of all gender and racial equality issues can we assess and implement the best strategies to carry our collective equality work forward.

The road ahead must also include work on many fronts at once, on both the state and local levels, if we are to address the right wing’s religious refusals agenda effectively. A diversity of strategies – legal and policy advocacy, outreach and education, messaging, community engagement, and cross-sector collaboration – is, indeed, essential to stem the proliferation of religious refusals.

Specifically, to defeat the opposition’s refusals strategy, and achieve the full gender equality we seek, state-based advocates can, and should:

- » Use our litigation and policy expertise to engage directly on the technical legal battles involving RFRA statutes, “conscientious objections,” and claimed or enacted religious, personal or moral exemptions to civil rights laws. This may take the form of *Hobby Lobby* “fixes,” e.g., proposed rulemaking by state agencies to ensure all health care providers meet the medical needs of everyone in their community; legislation to limit the conscience rights afforded institutions; or policies that elevate the rights of patients to receive and providers to give the most appropriate medical care, regardless of the secular or religious nature of the health care entity. This may also include lawsuits challenging new religious exemptions adopted on the state or local level.
- » Employ state legal precedents, constitutions, Equal Rights Amendments, anti-discrimination and human rights statutes, consumer protection laws, etc., to test novel causes of action for challenging religious exemptions, and to establish state protections that go farther than

THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) SERVES AS A CAUTIONARY TALE.

ENDA, pending in the U.S. Congress since 1994, would expressly prohibit discrimination in hiring and employment based on sexual orientation and gender identity by employers with at least 15 employees. In the wake of *Hobby Lobby*, some LGBTQ advocates stepped back from aggressive lobbying for ENDA because it contains a sweeping exemption for religious organizations – and perhaps, given the apparent direction of the Court, for private, for-profit entities claiming religious beliefs.

From a siloeed perspective, it would make sense to advocate for ENDA as a new, stand-alone anti-discrimination statute rather than as an amendment to existing anti-discrimination laws, chiefly Title VII of the 1964 Civil Rights Act (outlawing discrimination based on race, color, religion, sex, or national origin), even if getting that statute passed entails accepting a religious exemption that is far more sweeping than the one found in Title VII.

But from outside the silos, a separate ENDA appears problematic, even if its religious exemption were identical to Title VII’s. This is so for several reasons. Having two stand-alone statutes threatens to undo decades of work educating courts about the full implications of a ban on “discrimination because of sex.” If Title VII is “for women” and ENDA is “for LGBTQ individuals,” how does that manifest practically? Does a lesbian who has been fired sue under Title VII, because she is a woman, or ENDA, because she is lesbian? What about a transman (a person born into a female body who identifies as male): did he experience unlawful discrimination based on his sex, or his gender identity? What message is conveyed if case law teaches that Title VII addresses the complex, interconnected forms of gender discrimination, while ENDA would apply only where LGBTQ discrimination is at issue?

federal law. We can introduce human rights and international principles to assert fundamental rights, including to health care and equal treatment, in legal briefs, and in drafting legislation and policies on the state and local levels.

- » Utilize on-the-ground strategies – community outreach, stakeholder and consumer education, legal representation – to empower individuals to understand and enforce their rights not to be refused information or services because of religious objections, as well as to gather information about how refusals are playing out on the ground, and when and where legal intervention is needed.
- » Pierce the women's rights/LGBTQ silos to advance the gender equality that overly broad religious refusals aim to dismantle, especially forging advocacy partnerships on the hot button gender equality issues targeted by the refusals movement: mounting joint campaigns to advance pro-active abortion and contraception policies, and LGBTQ rights in health care, employment and public accommodations.
- » Build cross-sector collaborations. The reproductive rights movement has often worked separate from the reproductive health movement. The emergence of the reproductive justice movement demonstrates the need to work more comprehensively, and to come together as a reproductive rights, health and justice (RRHJ) community. We must reach out to reproductive justice activists as they work to reshape our communities to bring about a society in which all people can exercise the rights and access the resources they need to thrive and to decide whether, when, and how to have and parent children with dignity, free from discrimination, coercion, or violence – and to do so with the family members of their choice, regardless of gender.¹⁷ Moreover, close ties must be established between RRHJ and LGBTQ advocates. And we should engage a diversity of social justice allies, end-of-life advocates, health care providers, employers, faith groups, and others in our gender equality advocacy.

THE REPRODUCTIVE JUSTICE (RJ) MOVEMENT

seeks to shift current discourse and analysis from an emphasis on "reproductive rights" and/or "reproductive health" to one of "reproductive justice," defined by the SisterSong Women of Color Reproductive Justice Collective as "the right to have children, not to have children, and to parent the children we have in safe and healthy environments." SisterSong, "What is RJ?" http://sistersong.net/index.php?option=com_content&view=article&id=141.

In 2005, Forward Together (then Asian Communities for Reproductive Justice) expanded on this to define reproductive justice as "the complete physical, mental, spiritual, political, economic, and social well-being of women and girls, [which] will be achieved when women and girls have the economic, social and political power and resources to make healthy decisions about our bodies, sexuality and reproduction for ourselves, our families and our communities in all areas of our lives." Asian Communities for Reproductive Justice, "A New Vision for Advancing Our Movement," 2005, <http://strongfamiliesmovement.org/assets/docs/ACRJ-A-New-Vision.pdf>.

These brief descriptions cannot encompass the totality of reproductive justice; for that, we encourage readers to explore the issue through the work of SisterSong, Forward Together, National Latina Institute for Reproductive Health, National Asian Pacific American Women's Forum, New Voices Pennsylvania, Surge NW, Young Women United, and many other outstanding RJ organizations.

¹⁷ Definition of Reproductive Justice, from Law Students for Reproductive Justice <http://lsrj.org/motivation/>

- » Join together to develop communications strategies and context- and community-specific messaging to support our legal and policy advocacy, and change the discourse on “religious freedom.” Although the escalation of religious refusals is playing out in the states, national public opinion research and messaging campaigns have seldom engaged state actors to translate nationally generated messages for local contexts, or partnered with state activists to reach local constituencies. Yet we know that local nuance matters, even when working from well-supported national data.
- » Pursue our advocacy inclusively, and with our minds open to unforeseen opportunities and a wide variety of advocacy partners. We cannot always predict which issue or community on the spectrum of gender equality advocacy will offer the next opportunity for progress; nor can we always anticipate unintended consequences of our advocacy. We should remember past lesbian and gay rights campaigns that excluded transgender allies because their issues were thought to be incendiary, and consider that today transgender rights are moving forward faster than sexual orientation rights in the workplace in some respects, and are resonating powerfully in the public mind. We should remember as well past reproductive health advocacy that failed to include women with disabilities – and that often, the increased women’s health facilities and services won through that advocacy were inaccessible. All gender equality issues are connected, and our states truly are laboratories for mining those connections, if we approach our work inclusively and responsively.

In our view, none of this work is simply defensive or reactive. Arguably, in fact, the right wing’s religious refusals agenda represents a rear-guard action, in response to deep (and bitter) knowledge that society marches ahead – if sometimes grudgingly, and with backward steps – toward justice and equity. If the current surge in religious refusals is the right’s desperate defense against progress on gender equality, then, by definition, all the work above is pro-active, and we progressives are playing offense, on the road to realizing true gender equality.

STATE STRATEGIES AFTER *HOBBY LOBBY*: FIGHTING REFUSALS AND ADVANCING GENDER EQUALITY

At our *Hobby Lobby* summit, the Alliance partners set to the work of sharpening our state refusals advocacy agenda in the new legal landscape. Even before the decision was issued, Alliance advocates had been working to battle religious and personal refusals in an increasingly broad range of contexts, using a variety of strategies;¹⁸ now, the need was even more urgent.

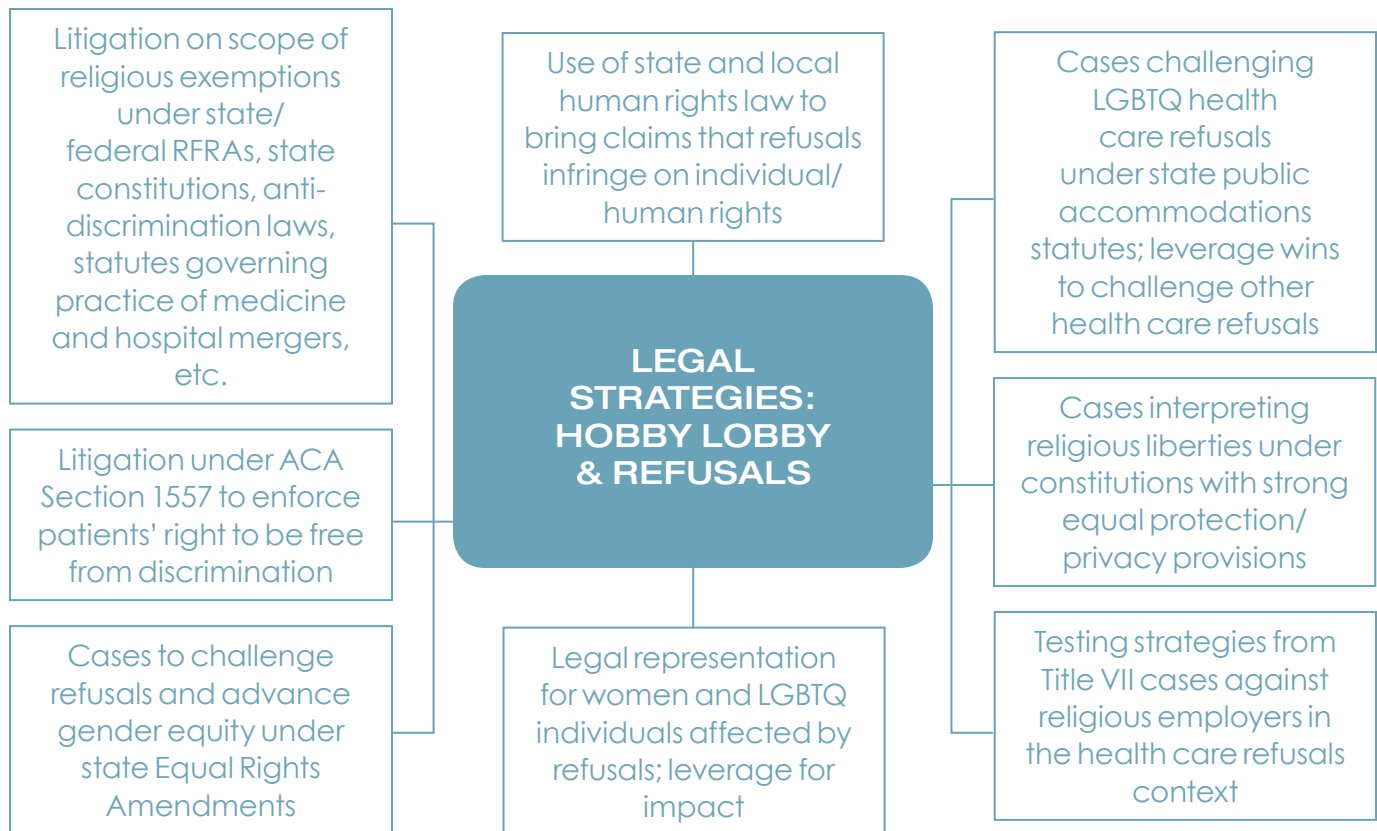
In the year since *Hobby Lobby*, we have been mining effective approaches developed in our states, fleshing out the broad agenda we forged in the immediate shadow of the ruling last summer, and conferring to advance multiple state and local strategies – combining short-term approaches to fight the increase and expansion of refusal claims in the wake of *Hobby Lobby*, with longer-term and innovative approaches to advance gender equality in the legal arenas and social institutions that religious refusals undermine.

We offer the following agenda-in-progress – encompassing approaches we are implementing, testing, or envisioning – to allies in states across the country, as an initial menu of promising strategies that can be adapted to particular state contexts and local realities.

¹⁸ See *Of the States, By the States, For the States: Strategies & Tools for Gender Equality, First Edition, May 2015*, for a comprehensive compilation of the five Alliance organizations' advocacy strategies, models and resources for advancing abortion policy and combating religious refusals: <http://alliance.legalvoice.org/ofbyforthestates.pdf>

IMPACT LITIGATION AND LEGAL REPRESENTATION

Alliance partners pursue public impact cases, bring and join appellate cases to effect systemic change and, where appropriate, ally with governments or other entities to defend progressive laws. We provide legal representation for individuals suffering refusals and gender discrimination, act as the lawyers for local coalitions, and provide technical legal assistance to allies and grassroots campaigns. Our litigation is grounded in our client and community base, draws on our expertise in a range of subject matters, and leverages pro-active opportunities and unorthodox causes of action under state law. Our legal strategies after *Hobby Lobby* are aimed at both pushing back against refusals and advancing gender equality on multiple critical fronts.



ALLIANCE LEGAL STRATEGIES AT WORK

MINNESOTA: LITIGATION USING THE ACA CIVIL RIGHTS PROVISION TO CHALLENGE GENDER DISCRIMINATION IN HEALTH CARE

Gender Justice brought the first case in the U.S. using Section 1557 to challenge discrimination in health care, representing a transgender man who suffered discrimination by Emergency Room providers. This case resulted in a groundbreaking federal court ruling holding that the ACA bans discrimination against transgender patients. Gender Justice and allies are exploring use of Section 1557 to challenge sexual orientation discrimination by a particular health care provider.

WASHINGTON: LITIGATION TO ESTABLISH THAT STATE ANTI-DISCRIMINATION LAW INCLUDES ONLY LIMITED DUTY TO ACCOMMODATE RELIGION

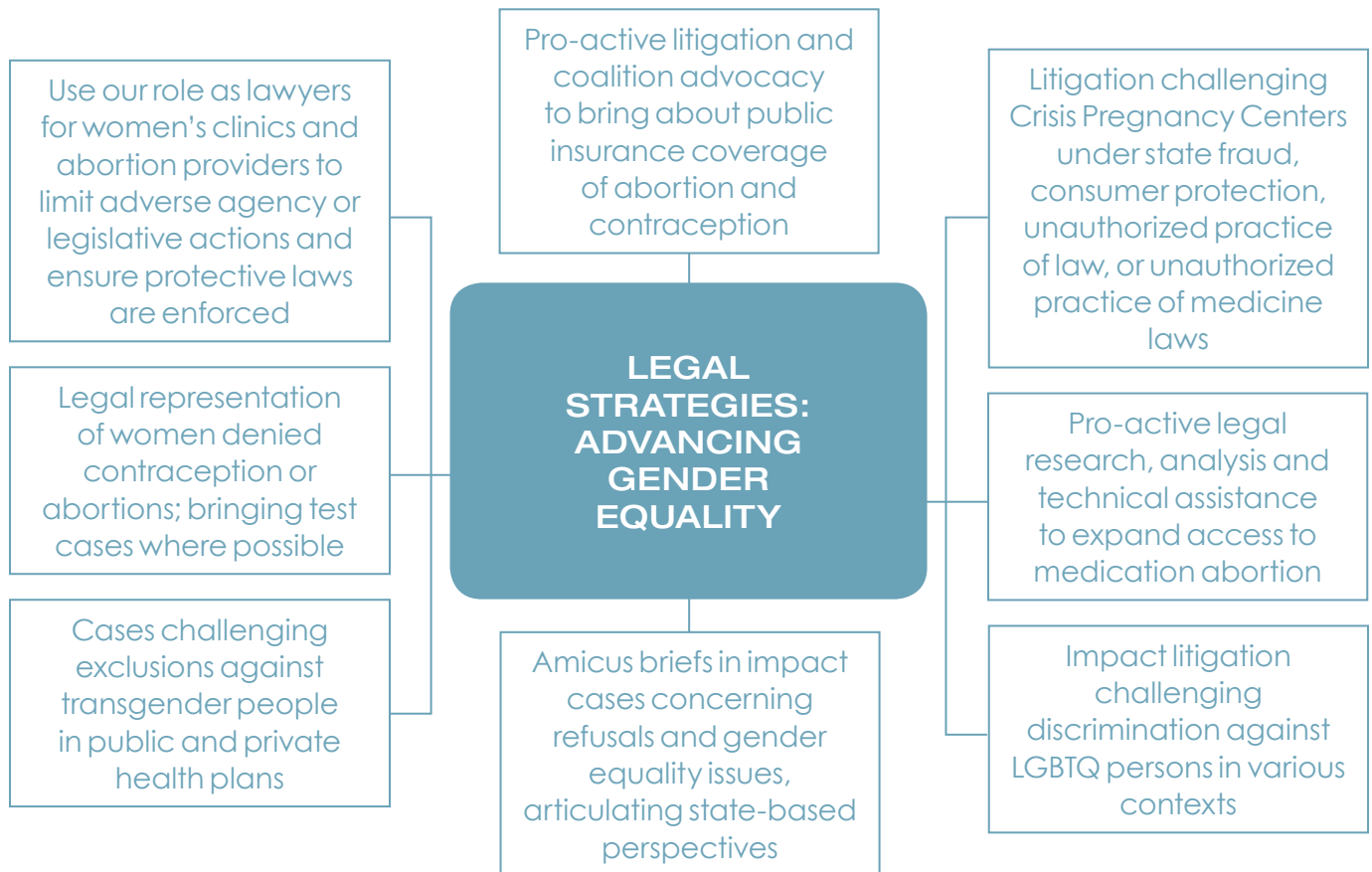
Legal Voice joined an employment law case about workers' dietary restrictions not being accommodated by their employer to ensure that while WA anti-discrimination law should be read broadly to include a duty to accommodate religion, as employees of faith (especially women with socially disfavored faiths) might suffer discrimination, it should not be interpreted to allow for unbridled religious accommodation, which can permit other forms of discrimination by employers, such as refusals of service based on individual beliefs.

WASHINGTON: LITIGATION TO ESTABLISH THE CONSTITUTIONALITY OF STATE PHARMACY RULES ON REFUSALS

Legal Voice has advocated since 2005 in agency rulemaking and federal court to establish and defend WA pharmacy rules requiring all pharmacies to dispense all lawful medications and devices on-site, without delay or discrimination. Anti-choice pharmacists and a pharmacy challenged the rules; Legal Voice represents five women of reproductive age, two of whom were refused emergency contraception, and two HIV positive individuals, who fear discrimination may prevent them from receiving their needed medications, as interveners in this case. In July 2015, the district court's decision that the rules are unconstitutional was reversed by the 9th Circuit with particularly helpful – and precedential – language about the limits of free exercise in the refusals context.

NEW MEXICO: LEVERAGING INDIVIDUAL REFUSAL TO COMPEL POLICY CHANGE NATIONWIDE

Representing a woman who was refused birth control by a pharmacist in Albuquerque, SWLC notified the company District Office that this practice was unlawful under NM law, and collaborated with ACLU of NM to negotiate with the corporate office and publicize the story. As a result, the company changed policy nationwide to require pharmacies to provide seamless service to customers seeking birth control, and to place pharmacists with objections at stores with double staffing.



ALLIANCE LEGAL STRATEGIES AT WORK

MINNESOTA: LITIGATING THE BOUNDARIES OF TITLE VII & MN HUMAN RIGHTS ACT RELIGIOUS EXEMPTIONS

Gender Justice is using Title VII and the MN Human Rights Act in a first case of its kind to challenge a religious employer's refusal to offer trans-inclusive health care benefits to its employees; they are also working with OutFront Minnesota to establish the correct interpretation of religious exemptions under Title VII and the MHRA in a case involving a transgender employee who was fired by her religious employer for coming out as trans.

PENNSYLVANIA: USING THE STATE ERA TO CHALLENGE LGBTQ DISCRIMINATION

Together with the ACLU of PA, Women's Law Project represented a public employee whose same-sex domestic partner was denied health care benefits. The employee claimed that this denial violated PA's Equal Rights Amendment; this claim survived a motion to dismiss.

PENNSYLVANIA: USING MUNICIPAL LAW TO CHALLENGE TRANS DISCRIMINATION

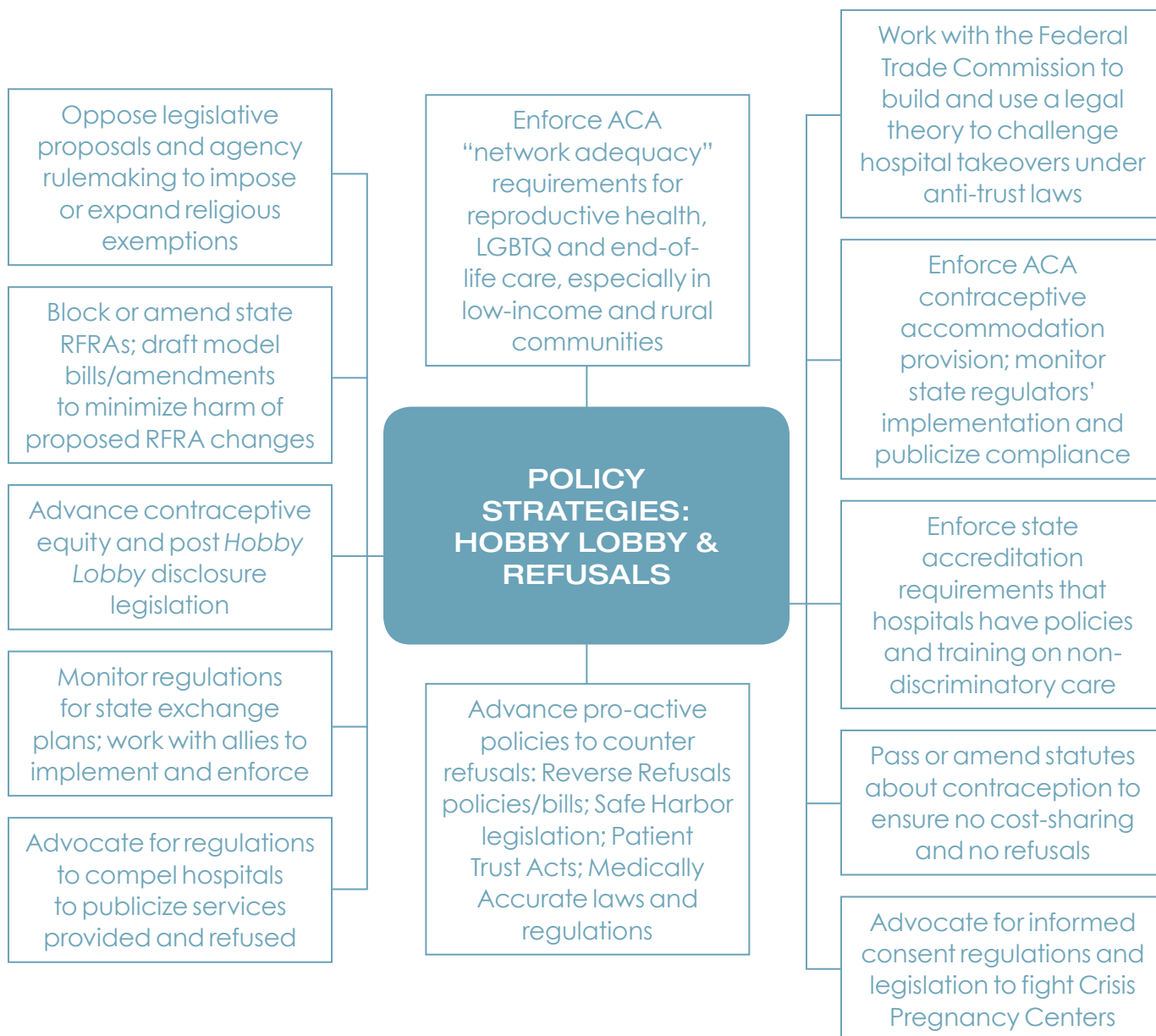
Women's Law Project represents an LGBTQ university student organization in a legal challenge under Pittsburgh's Fair Practices Ordinance to the University of Pittsburgh's policies that illegally exclude and stigmatize transgender students and faculty.

THE ALLIANCE: COLLABORATIVE AND RESEARCH TO MAP STATE-BY-STATE LEGAL BARRIERS TO MEDICATION ABORTION ACCESS

The Alliance is collaborating with national allies to conduct legal research to increase understanding of state laws affecting abortion self-induction, particularly through the use of medication, and to identify state-by-state opportunities to enhance access to medication abortion with respect to information relay and drug distribution, limiting legal risks, and protecting/supporting those who get ensnared in the criminal or civil justice system.

POLICY ADVOCACY

Alliance partners engage in extensive policy advocacy, including work with state legislatures, administrative agencies, the executive branch, and local and municipal governments, to draft and advocate for laws and policies that will block expansion of refusals, and advance gender equality. Once progressive laws are passed, we work with a diversity of community allies to ensure implementation and enforcement, and to hold the line against right wing efforts to repeal or erode protections that are designed to thwart overly broad refusals, and to block policies advancing gender equality.



ALLIANCE POLICY STRATEGIES AT WORK

NEW MEXICO: CAMPAIGN TO BLOCK BILLS WITH RFRA COMPONENTS

Southwest Women's Law Center and allies in the NM Coalition for Choice organized an extensive campaign to defeat anti-abortion bills with RFRA components that would have allowed any provider, hospital or pharmacy to refuse reproductive health services for any moral or religious objection. The successful campaign included targeted messaging and talking points; pre-session legislator education; a press conference with doctors, patients and religious leaders; a grassroots lobby day; and mobilization of 100 community members to the bill hearings.

WASHINGTON: DEPARTMENT OF HEALTH RULEMAKING ON HOSPITAL POLICY TRANSPARENCY

Legal Voice participated in rulemaking by the WA Department of Health to require that hospitals disclose their policies, including on non-discrimination, reproductive health care, and end-of-life care.

CALIFORNIA: ATTORNEY GENERAL RULEMAKING ON HOSPITAL MERGER TRANSPARENCY

California Women's Law Center participated in rulemaking by the CA Attorney General to increase transparency and accountability in hospital mergers throughout the process, by requiring merger documents to be published on the Internet.

WASHINGTON: NETWORK ADEQUACY RULES TO ADDRESS HEALTH CARE RESTRICTIONS RESULTING FROM HOSPITAL MERGERS

As the Office of Insurance Commissioner engages in rulemaking on health plan network adequacy to conform with the ACA, Legal Voice has advocated for health plan rules to incorporate provisions ensuring that consumers have access to a full range of health care, including reproductive health care services, and to address specific concerns about restricted access resulting from hospital takeovers.

CALIFORNIA: LANDMARK CONTRACEPTIVE EQUITY ACT

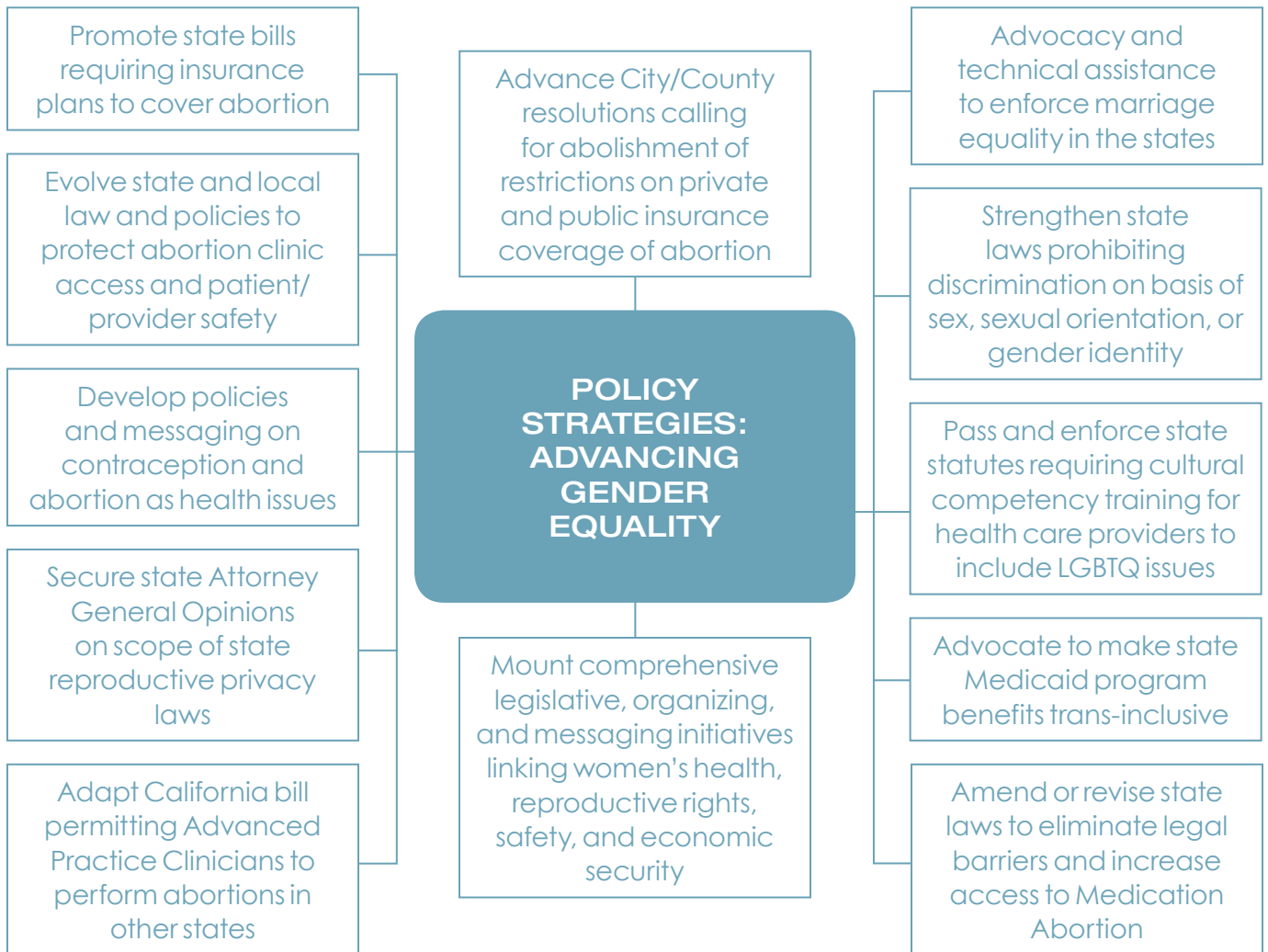
National Health Law Program and CA Family Equity Council co-sponsored this model bill mandating coverage for all FDA-approved contraception without cost sharing, delays or denial. California Women's Law Center joined allies statewide to support its passage in 2014; the law goes into effect January 2016. Alliance partners are conferring to adapt the CA model in contraceptive coverage advocacy in MN, NM, OR and WA.

WASHINGTON: ENSURING COMPREHENSIVE HEALTH CARE THROUGH MODEL REPRODUCTIVE PARITY ACT & FORMAL ATTORNEY GENERAL OPINION

Legal Voice led advocacy for this first bill in the U.S. to require all health insurance policies that cover maternity care to also cover abortion care, and worked with allies to assist a state senator in winning a formal WA Attorney General opinion reinforcing state law requiring public hospital districts that provide maternity care benefits, services or information to provide substantially equivalent abortion care.

PENNSYLVANIA: PRO-ACTIVE PATIENT TRUST ACT

This bill was introduced as part of the 3rd phase of the PA Agenda for Women's Health. It will prohibit government directives that require medical providers to give patients information that is not medically accurate or to practice medicine in a manner not in accordance with evidence-based standards.



ALLIANCE POLICY STRATEGIES AT WORK

OREGON: COMPREHENSIVE WOMEN'S REPRODUCTIVE HEALTH BILL

Legal Voice provided legal and strategy support to OR and national allies working to advance a comprehensive state bill requiring no-cost public and private coverage for contraception, abortion, and pre-natal and post-partum care. As the bill did not pass in 2015, Legal Voice is working with OR advocates on additional policy strategies for no-cost coverage through private and Medicaid plans, and legislative drafting and strategy to reintroduce the comprehensive bill in OR and share the model with other state advocates.

NEW MEXICO: MAXIMIZING ELIGIBILITY FOR ABORTION & CONTRACEPTION COVERAGE UNDER MEDICAID

As NM moved to overhaul its Medicaid program and implement Medicaid Expansion under the ACA, Southwest Women's Law Center engaged in administrative advocacy and policymaker education that ensured maximum eligibility levels for coverage of pregnancy, abortion and family planning care, and that no restrictions were placed on abortion care for the expansion population.

NEW MEXICO: SAFE SCHOOLS INITIATIVE

SWLC collaborated with Equality NM Foundation, Transgender Resource Center and other NM allies to develop The NM Safe Schools for All Students Act to bring NM anti-bullying policies into compliance with state and federal law, and is preparing to publish a policy paper on bullying in NM schools.

CALIFORNIA: EXPANDING THE STATE CIVIL CODE DEFINITION OF GENDER

California Women's Law Center is mobilizing its base to support a proposed amendment to the CA Civil Code that would expand the definition of "gender" to include an individual's "gender identity" and "gender expression."

WASHINGTON: ENDING TRANSGENDER EXCLUSIONS IN HEALTH PLANS

Legal Voice has successfully advocated to stop private and public health plans in WA from refusing to cover medically necessary care for transgender people, and has won coverage for transition-related care under a self-insured plan for a client who was denied such services on the grounds that it was "cosmetic."

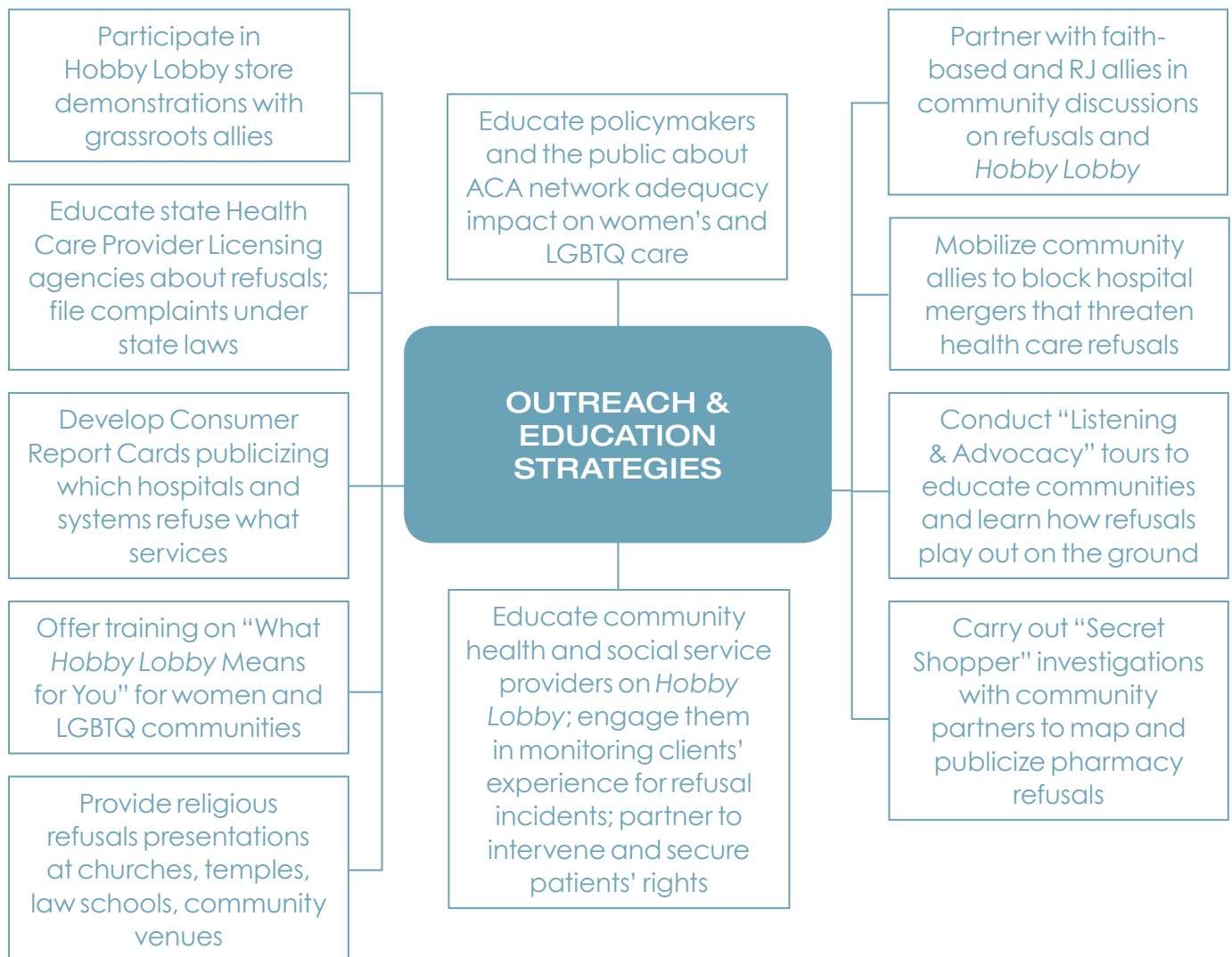
THE ALLIANCE: WOMEN'S EQUALITY AGENDAS IN 4 STATES

Women's Law Project, Gender Justice, California Women's Law Center, and Legal Voice are working with key allies in their states to advance comprehensive legislative agendas on women's health and economic security:

- Pennsylvania Agenda for Women's Health (since 2013)
- Minnesota Women's Economic Security Agenda (since 2014)
- A Stronger California (launched 2015)
- Washington Women's Health Agenda (launched 2015)

COMMUNITY OUTREACH/ MOBILIZATION AND STAKEHOLDER/CONSUMER EDUCATION

Passing progressive laws and policies is critical to winning true gender equality, but is not enough. Individuals and communities need to know about and understand the laws governing their lives, and the rights and obligations that flow from them. Advocates need to know where intervention is required to ensure enforcement of progressive policies and address gaps in protections. The Alliance partners are committed to engaging a range of allies in monitoring and challenging overly broad refusals, and to working with diverse communities and populations to make laws promoting gender equality and social justice meaningful for all.



ALLIANCE OUTREACH AND EDUCATION STRATEGIES AT WORK

MINNESOTA: REPRODUCTIVE JUSTICE FORUM ON HOBBY LOBBY

Gender Justice partnered with Law Students for Reproductive Justice, Pro Choice Resources and other community allies to present a forum on *Hobby Lobby* that emphasized the importance of using a Reproductive Justice lens both to understand the decision and to frame responses.

CALIFORNIA: COMMUNITY DISCUSSION ON FAITH, REPRODUCTIVE JUSTICE & HOBBY LOBBY

California Women's Law Center co-sponsored this community forum with Planned Parenthood Young Professionals, National Council of Jewish Women, and faith leaders working on reproductive justice issues throughout Los Angeles.

PENNSYLVANIA: ACA FORUMS FOR YOUNG WOMEN & WOMEN OF COLOR

Women's Law Project responded to *Hobby Lobby* by partnering with community groups to co-host forums to reach young women and women of color with information and resources on their rights under the new health care law.

WASHINGTON: HOBBY LOBBY & REFUSALS "SALONS"

Prior to the *Hobby Lobby* ruling, Legal Voice hosted educational discussions for supporters about public opinion research on emerging voters' attitudes toward religious refusals. In the aftermath of the decision, a salon on the cases and decision drew extensive participation.

CALIFORNIA: LOCAL HOBBY LOBBY STORE PROTEST

California Women's Law Center staff and Board members participated in a Burbank, CA Hobby Lobby store protest with 25 ally organizations, to raise awareness about Hobby Lobby's discrimination against women employees and to encourage shoppers to patronize other craft stores.

NEW MEXICO: KNOW YOUR REFUSALS RIGHTS EDUCATION FOR LGBTQ COMMUNITIES

SWLC shared a Law Fellow with the Transgender Law Center and ACLU of NM who conducted outreach and education to address the knowledge gap in LGBTQ communities about religious refusals, and what is legal/illegal for medical providers and employers to refuse.

NEW MEXICO: LGBTQ HEALTH SUMMIT ON NON-DISCRIMINATION UNDER THE ACA

Southwest Women's Law Center partnered with the LGBTQ Health Collaborative to educate health providers and advocates on discrimination and refusals in health care, especially in the trans community, and non-discrimination protections under the ACA. Following the Summit, Collaborative partners successfully advocated for an LGBTQ Health Disparities Task Force in the state Department of Health.

PENNSYLVANIA: SECRET SHOPPER OUTREACH & PHARMACIST EDUCATION

Following newly issued guidance from the PA Board of Pharmacy requiring refusing pharmacists to ensure seamless provision of Emergency Contraception, Women's Law Project staff and interns phone-canvassed 404 pharmacies in Western PA and made in-person visits to 27 that did not stock EC to discuss the requirement, after which most pharmacies ordered EC, and those that would not agreed to refer customers seeking it.

WASHINGTON: CONSUMER REPORT CARD ON HOSPITAL POLICIES AND HEALTH CARE REFUSALS

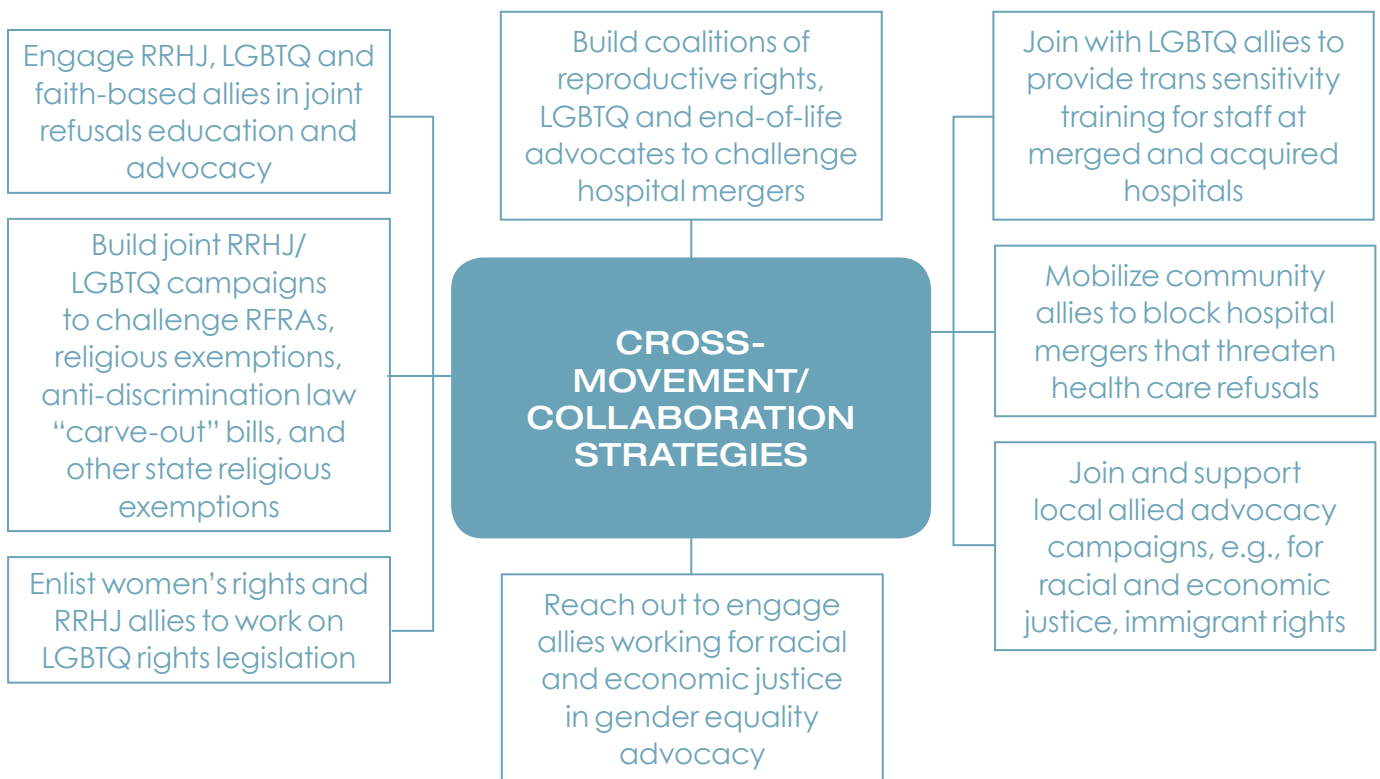
Following an unprecedented expansion of religiously-affiliated health care systems in WA State, and adoption of WA rules requiring hospitals to disclose what services they do and do not provide, Legal Voice and allies are preparing Consumer Report Cards to expose health care refusals, and publicize what hospitals statewide report about their services and policies.

PENNSYLVANIA: COMMUNITY CAMPAIGN TO BLOCK HOSPITAL MERGER

Women's Law Project participated in a successful community-based campaign to persuade Abington Hospital in suburban Philadelphia to reject a proposed merger with a Catholic health system. The merger would have eliminated abortion and other reproductive health services.

CROSS-MOVEMENT AND COLLABORATION STRATEGIES

Progressive advocates ignore the connections and intersections between areas of the law and among constituent populations at our peril. Progressives must join together to explore ways to cross-fertilize and collaborate in our advocacy for gender equality. Alliance members are engaged in a multiplicity of efforts to build and strengthen cross-movement partnerships, coalitions and networks; to share strategies and lessons learned; and to build state advocacy infrastructure across organizations and movements.



ALLIANCE CROSS-MOVEMENT & COLLABORATION STRATEGIES AT WORK

THE ALLIANCE: CROSS-MOVEMENT & STATE-BASED REFUSALS STRATEGIES

The Alliance provided technical assistance to ConwayStrategic on promising models for cross-sector collaboration, and short- and long-term cross-movement building strategies to fight religious exemptions in our states. Southwest Women's Law Center and Gender Justice also provided assistance in organizing regional cross-movement convenings, in the Southwest and the upper Midwest.

WASHINGTON: HOSPITAL ACCOUNTABILITY COALITION

Legal Voice is an initial convener of this coalition engaging diverse advocates, providers and citizen groups working together to protect reproductive health, LGBTQ access to health care, and end-of-life care threatened by religiously affiliated hospital expansions. Coalition advocacy has included comments on proposed rules, meetings with hospital officials on terms of proposed transactions, and technical assistance for community activists challenging the imposition of religious doctrine to restrict hospital care.

NEW MEXICO: TRANS SENSITIVITY TRAINING FOR CATHOLIC HOSPITAL STAFF

Southwest Women's Law Center partnered with Transgender Resource Center to develop and provide trans sensitivity trainings for the recently merged Catholic-secular hospital system in northern NM.

PENNSYLVANIA: GROUNDBREAKING REPORT ON LINK BETWEEN SEX BIAS & WOMEN'S HEALTH

Women's Law Project conducted an extensive examination of the relationship between women's health and sex bias, the economic and safety consequences of health care restrictions, and the politicization of reproductive health care and the adverse health outcomes of limited access to abortion, contraception and maternity care. It published its findings in the groundbreaking report: "Through the Lens of Equality: Eliminating Sex Bias to Improve the Health Of Pennsylvania's Women." The report includes targeted interventions to overcome sex bias and improve women's health in PA and nationwide.

PENNSYLVANIA: CROSS-SECTOR CAMPAIGN ON SECOND PARENT ADOPTION RIGHTS

Women's Law Project led the successful campaign to win second-parent adoption rights in PA, mobilizing women's organizations and reproductive rights advocates in support of LGBTQ non-discrimination legislation.

CALIFORNIA: RJ COALITION JOINS ECONOMIC JUSTICE ALLY'S ADVOCACY

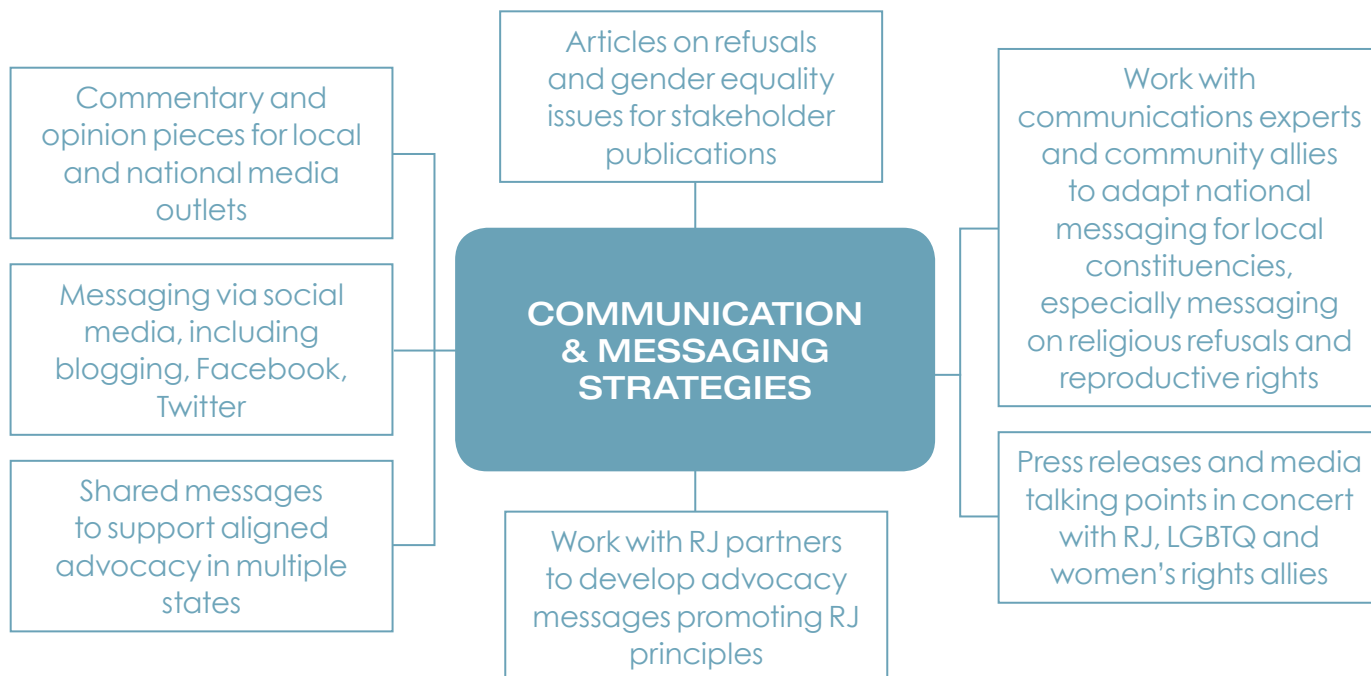
California Women's Law Center and allies in the Reproductive Justice Coalition of Los Angeles joined the CA Work & Family Coalition in collaborative advocacy to ensure paid sick days are included in legislation to increase the minimum wage in the City of Los Angeles.

NEW MEXICO: REPRODUCTIVE RIGHTS & LGBTQ RIGHTS GROUPS SUPPORT EACH OTHER'S ADVOCACY

Southwest Women's Law Center, Planned Parenthood of NM and other reproductive rights and women's groups have mobilized their base in support of marriage equality and transgender health care coverage advocacy, and Equality NM Foundation has mobilized its LGBTQ base in support of the Coalition for Choice campaign to defeat proposed abortion bans in NM.

COMMUNICATIONS AND CONTEXT/COMMUNITY-SPECIFIC MESSAGING ON REFUSALS AND GENDER EQUALITY

Advocates in the reproductive rights, health and justice and the LGBTQ rights communities have long been committed to developing and disseminating compelling, accessible messages to support our advocacy and influence public discourse on gender equality. Despite limited resources for communications outreach, Alliance members have found low-cost ways to ensure that our values, issues and goals reach a variety of audiences in clear and persuasive ways.



ALLIANCE COMMUNICATION & MESSAGING STRATEGIES AT WORK

THE ALLIANCE: REVERSE REFUSALS OPINION PIECE FOR NATIONAL AUDIENCE

Legal Voice's attorney published a Huffington Post opinion piece on expanding conscience clauses to recognize a provider's right to provide reproductive and other health services.

PENNSYLVANIA: CAMPAIGN FOR WOMEN'S HEALTH MEDIA & MESSAGING

Women's Law Project collaborates with Keystone Progress, Planned Parenthood PA Advocates, New Voices: Women of Color for Reproductive Justice, AccessMatters, and the Clara Duvall Reproductive Freedom Project of the ACLU of PA, to lead this constituent education campaign linking women's health, reproductive rights and economic security in PA, aimed at reframing the debate around women's health, shifting public opinion about abortion and mobilizing supporters. WLP acts as Communications Co-Director of the Campaign, developing and coordinating messaging for each bill in the PA Agenda for Women's Health, including ready-made social media content, and ensuring all messages are legally accurate, unified, and aligned with national campaigns where possible.

NEW MEXICO: COLLABORATIVE OPINION PIECE ON REPRODUCTIVE JUSTICE & #BLACKLIVESMATTER

Southwest Women's Law Center collaborated with Young Women United to develop an op-ed published in the Albuquerque Journal on anti-choice efforts to co-opt the #BlackLivesMatter movement.

WASHINGTON: BAR JOURNAL ARTICLE ON WORKING WITH TRANS CLIENTS

Legal Voice published an article for the King County Bar Journal on cultural competency in working with transgender clients.

CONCLUSION: CHALLENGES AND OPPORTUNITIES IN THE STATES

After last year's Supreme Court ruling in *Hobby Lobby*, the frontier for advocacy against overly broad refusals moved even more squarely to the states, where we have seen an explosion of local efforts to enact ever-broader refusal provisions for religious entities, along with exemptions from anti-discrimination laws, and state RFRA bills, RFRA-like policies, and entirely new religious exemptions.¹

The Court's June 26, 2015 decision in *Obergefell v. United States*, holding that states cannot deny the right to marriage to same sex-couples nor refuse to recognize marriages performed in other jurisdictions, has heaped even more fuel on the refusals fire, despite the strong protections for churches and other religious entities already enshrined in the Constitution and in case law.²

Individuals and organizations claiming threats to their religious liberty are sounding a cacophony of protests, objections, and horror stories, backed by a well-organized and well-funded national movement to further expand overly broad refusal rights, state-by-state, locality-by-locality, and in more and more contexts. State advocates must be empowered to respond creatively, thoughtfully and effectively if we are to stanch the post-*Hobby Lobby* tide in the states and stop the opposition from advancing local refusals strategies before they spread to other states – and to the federal level.

But state-level work is not only where the fight is, it is also where there are opportunities for progress. Especially given the culture of deadlock at the federal level and conservative control of the U.S. Congress and many federal courts, certain states may offer a more welcoming environment for affirmative advocacy. As the Alliance strategies menu shows, there are many pro-active state strategies already in play, and in some states we see that *Hobby Lobby* has energized progressive governors and legislatures to work for new state protections against overly broad refusal policies. We are also seeing, and participating in, promising cross-movement collaborations between reproductive rights, health and justice advocates and LGBTQ activists, and between these groups and advocates working on immigrant rights, economic justice and racial discrimination and oppression.

In the wake of *Hobby Lobby*, and to protect against the backlash unleashed by *Obergefell*, we must leverage the broad arsenal of strategies that state advocates are developing to challenge refusal claims arising in state and local contexts. We must capitalize on the ability of state advocates to take calculated risks and test unorthodox advocacy strategies, including those that may not succeed in the short-term, but that enable us to set the terms of the debate and

¹ See National Women's Law Center summer 2015 report, *The Hobby Lobby "Minefield": The Harm, Misuse, and Expansion of the Supreme Court Decision*, for examples of how the decision has been used by individuals and institutions to refuse to abide by the law.

² The Court in *Obergefell* relied heavily on the long line of privacy and autonomy cases, such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972) that constitute the bulwark of precedent in the reproductive health and rights context. This reliance strongly reinforces the need for our cross-movement work.

promise to move us forward through learning and innovation. And critically, we must leverage the collective power of advocates for RRHJ and LGBTQ equality and work more strategically together – in the short-term as we fight state RFRA targeting one, both, and potentially other communities, and in the long-term to forge intersectional strategies that will prevent spurious religious freedom arguments from undermining progress on all our rights, thus moving us ahead, toward true and complete gender equality.

STATE-BASED ADVOCACY: RECOMMENDATIONS TO FUNDERS

We believe a strong state advocacy infrastructure is essential if we are truly to take the offensive and secure wins at the state level that will change the national debate. Our losses in the states over recent years, though devastating, both demand a shift in our movement, and create an opportunity to make the case among movement stakeholders for the critical importance of investment in state-based legal advocates as well as in national and grassroots organizations. We encourage national funders to:

INVEST IN THE STATES and in **STATE-BASED** organizations – They know the advocacy terrain, the players, the state legal avenues, and the opportunities for impact. State-based advocates can sometimes take risks that would be inadvisable if undertaken by national actors.

SUPPORT A VARIETY OF STRATEGIES – Each state is different, and a localized approach is critical to success in individual states, and in blocking the trickle-up effect of regressive policymaking nationwide.

FUND WORK AT THE INTERSECTIONS – Funding silos undermine support for integrated work. At a minimum, make sure that RRHJ and LGBTQ communities are not working at cross purposes, but also develop common and/or coordinated strategies that are optimum for both.

BUILD STATE CAPACITY – Invest in state-based organization infrastructure and leadership development. We need to build state-based advocacy organization infrastructure right now, but we also need to build a pipeline for law and policy leaders in the future, especially to ensure that our organizations and our allies better reflect the changing demographics of this country.

PROVIDE SEED FUNDING AND SUSTAINED MULTI-YEAR GENERAL SUPPORT – This is critical if we are to take the risks we need to take to change law, policy and political discourse on gender equality and religious refusals, and sustain work that is necessarily long-term.

APPENDIX A: ABOUT THE ALLIANCE

The Alliance: State Advocates for Women's Rights & Gender Equality is a groundbreaking collaboration among five law and policy centers working in 11 states – Legal Voice in the Northwest, Gender Justice in the upper Midwest, Women's Law Project in Pennsylvania, Southwest Women's Law Center in New Mexico, and California Women's Law Center.

WE FORMED THE ALLIANCE out of an urgent need to build in-state legal capacity to fight the assault on women's rights and LGBTQ equality in the states. The absence of a progressive state-based legal advocacy infrastructure has allowed the opposition to escalate a decades-long, state-by-state strategy to erode and stigmatize reproductive health care, and promote increasingly broad rights to refuse health care, employment and services based on personal beliefs – especially to women and LGBTQ individuals – as well as seed regressive policy on the local level for promotion in Washington, D.C.

WE WORK STRATEGICALLY TOGETHER to leverage our unique role as state-based legal advocates working at the intersection of women's and LGBTQ rights, to secure tangible wins in the short-term and to test new approaches. We combine pro-active policymaking with creative defense, and ground our advocacy in diverse grassroots and client communities. We harness opportunities for pro-active advocacy in our states, and maximize our impact by coordinating multi-state efforts and collaborating on synergistic state initiatives.

THE ALLIANCE IS A NOVEL COLLABORATION, as far as we know. We are equal partners pursuing aligned, broad issue advocacy agendas to advance gender equality in the states. We work actively and strategically together to maximize our impact, build on each other's strengths, and elevate effective state strategies.

AMONG OUR FIRST PRIORITIES FOR JOINT WORK has been to leverage the current Alliance states – WA, PA, OR, NM, NE, MT, MN, ID, IA, CA, AK – as legal and policy laboratories for incubating state strategies to combat religious refusals and advance gender equality in the post-*Hobby Lobby* landscape. A sample of our work together so far:

- » An Alliance attorney workgroup reviewed the scholarly literature on religious refusals, mapped the landscape of refusals advocacy nationwide, and developed a *Hobby Lobby* briefing for all Alliance partners
- » We compiled and analyzed all five Alliance organizations' track records of state strategies to combat religious refusals to identify best practices, promising approaches, and aligned efforts on which we can build
- » We gathered together with key national allies to craft, then evolve a coordinated agenda of state strategies to combat religious refusals targeting women and LGBTQ individuals in the post-*Hobby Lobby* landscape

- » We held (and continue to hold) monthly conference calls to confer on refusals-related developments and strategies in play, move promising state strategies across states, and advance joint advocacy
- » We completed our first publication, *Of the States, By the States, For the States: Strategies & Tools for Gender Equality*³, a unique publication that includes a comprehensive chronology of Alliance state advocacy efforts to combat refusals, along with links to advocacy tools developed over the years: bills and model legislation; statutory language; court rulings, briefs and pleadings; legal research and novel causes of action; stakeholder education resources; and press releases, news coverage and talking points with tailored messaging. We are strategically disseminating *Of the States, By the States, For the States*, as a resource for state-based lawyers, advocates, grassroots activists and allies working to combat refusals and advance gender equality

OUR PRIORITIES GOING FORWARD will continue to include cross-issue and movement advocacy to combat religious refusals, to obstruct the state-by-state erosion of abortion access, and to promote gender equity in law and policy. In addition, we will be collaborating on a range of economic justice issues, with an emphasis on advancing state strategies that address the intersecting economic and health care needs of pregnant and parenting women.

We are proud of our work together to date, and excited about future collaboration across our broad issue agendas to advance women's rights, LGBTQ equality, and economic and racial justice policymaking in the states.

For more information on the Alliance and its five partner organizations, please contact us!

³ See *Of the States, By the States, For the States: Strategies & Tools for Gender Equality, First Edition, May 2015*, for a comprehensive compilation of the five Alliance organizations' advocacy strategies, models and resources for advancing abortion policy and combating religious refusals: <http://alliance.legalvoice.org/ofbyforthestates.pdf>

APPENDIX B: ALLIANCE CONTACTS

AS OF JULY 2015

Please contact us for further information, technical assistance in adapting our strategies in other states, and additional partnership opportunities.

CONTACTS FOR THE ALLIANCE:

Lisa M. Stone, Convening Partner
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APPENDIX C: ALLIANCE *HOBBY LOBBY* SUMMIT PARTICIPANTS

JUNE 30 – JULY 1, 2014, SEATTLE, WA

ALLIANCE MEMBERS

California Women's Law Center

- » Betsy Butler, *Executive Director*
- » Cacilia Kim, *Senior Staff Attorney*

Gender Justice

- » Lisa Stratton, *Co-Founder and Executive Director*
- » Jill Gaulding, *Co-Founder and Legal Director*

Legal Voice

- » Lisa Stone, *Executive Director*
- » Janet Chung, *Legal and Legislative Counsel*

Southwest Women's Law Center

- » Pamelya Herndon, *Executive Director*
- » Paige Duhamel, *Staff Attorney*

Women's Law Project

- » Carol Tracy, *Executive Director*
- » Sue Frietsche, *Senior Staff Attorney*

Alliance Program Director

- » Jenifer McKenna, *Gender Equity & Non-Profit Development Consultant*
Co-Founder California Women's Law Center

Facilitator/Advisor

- » Shira Saperstein, *Conway Strategic*

Allies and Outside Experts

- » Sabrina Andrus,
Executive Director
Law Students for Reproductive Justice
- » Susan Berke Fogel,
Director, Reproductive Health
National Health Law Program
- » Professor Stewart Jay,
Pendleton Miller Endowed Chair of Law
University of Washington School of Law
- » Zachary Jones
Perkins Coie, Seattle WA

NOTES:

A REPORT FROM

THE ALLIANCE:

State Advocates for Women's Rights & Gender Equality

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