

PUTTING CHILDREN AT RISK: HOW EFFORTS TO UNDERMINE MARRIAGE EQUALITY HARM CHILDREN

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Movement Advancement Project

The Movement Advancement Project (MAP) is an independent think tank that provides rigorous research, insight, and analysis that help speed equality for LGBT people. MAP works collaboratively with LGBT organizations, advocates, and funders, providing information, analysis, and resources that help coordinate and strengthen efforts for maximum impact. MAP's policy research informs the public and policymakers about the legal and policy needs of LGBT people and their families.

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PUTTING CHILDREN AT RISK:

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EFFORTS TO UNDERMINE MARRIAGE



States, government officials, and even courts have *refused to recognize* married same-sex couples and LGBT parents' legal relationships to their children.

Businesses, social service agencies receiving taxpayer dollars, and even government agencies and officials are *claiming a right to discriminate* against LGBT families.



THREATEN THE SAFETY AND SECURITY OF CHILDREN RAISED BY SAME-SEX COUPLES

All children deserve the right to a stable, secure family. Undermining marriage equality jeopardizes the security and safety of children raised by same-sex couples.



If a parent-child relationship is not legally established, a non-biological parent can be denied legal recognition as a parent, and a child could be placed with a stranger as opposed to a parent who has cared for them, or a parent may be unable to make medical decisions for their child.



Children could be denied health insurance through a parent if the parent isn't legally recognized.



Healthcare providers, daycares, or government employees could refuse to serve children raised by LGBT parents or married same-sex couples.



Children may stay in foster care if child-placing agencies are permitted to refuse to consider qualified LGBT parents.



INTRODUCTION

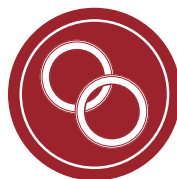
In 2015, in *Obergefell v. Hodges*,¹ the U.S. Supreme Court extended marriage to same-sex couples across the country. For many of these couples and their children, this court ruling brought increased security and confidence that they would be legally recognized as a family and that their children would gain vital protections that had previously been difficult, if not impossible, to secure.^a While the groundbreaking ruling *did* provide recognition and increased legal protections for same-sex couples and the estimated 300,000 children they are raising,² ongoing attempts to undermine marriage equality—and the subsequent inconsistent recognition of same-sex couples and their families at the local, state, and federal levels—pose an ongoing threat, leaving many same-sex couples and their families facing continued discrimination and vulnerability.

Additionally, as same-sex couples seek to create and expand their families through foster care and adoption, they face increasing, legally-sanctioned discrimination in the child welfare system. As a result, the more than 118,000 children in the foster care system who are eligible for adoption³ and awaiting a forever home are often kept in the system rather than given the opportunity to find a home with qualified same-sex couples or individual lesbian, gay, bisexual, and transgender (LGBT) people.^b This is particularly tragic for the more than 20,000 youth who “age out” of the foster care system each year without being adopted,⁴ despite the number of same-sex couples and LGBTQ people who would adopt⁵ from the child welfare system but for discriminatory barriers that discourage or prevent them from doing so.

As those who oppose equality continue to push for laws and regulations that harm LGBT people and same-sex couples, children are directly impacted. What’s more, the net cast by litigation and legislation supporting a right to discriminate is wide and not limited to LGBT parents; this net often catches unmarried parents, single parents, interfaith or interracial families, and many others. In their attempt to not recognize the families of LGBT people, anti-LGBT activists are undermining crucial nondiscrimination laws and parenting protections for millions of Americans, hurting not only parents, but also their children.

CURRENT EFFORTS TO UNDERMINE MARRIAGE AND FAMILY EQUALITY HARM CHILDREN

In the nearly three years since the *Obergefell* decision, there have been two distinct efforts to undermine marriage and protections for LGBT families:



Refusing to recognize LGBT families.

Some government officials, state legislators, and courts have refused to fully recognize the marriages of same-sex couples and the legal ties between those parents and their children, and to deny the rights and benefits that flow from marriage to same-sex couples.



Claiming a right to discriminate.

License-to-discriminate laws, court cases, and agency guidance permitting discrimination by government officials, child welfare providers, healthcare providers, and even private business owners all condone discrimination. This has an especially harmful impact on both existing families and families seeking to form through adoption or other means.



Refusing to Recognize LGBT Families

Refusing to Recognize LGBT Parents. Almost immediately following the *Obergefell* decision in June 2015, some government officials, state legislators, and even state courts pushed back against recognizing married same-sex couples. Some have also refused to recognize people in same-sex marriages as parents to the children they are raising.

Some states refused to issue birth certificates that include both members of a married same-sex couple as parents when they have a child. For example, in

^a For more about the changed landscape for same-sex couples as a result of marriage equality and the 2015 U.S. Supreme Court ruling in *Obergefell*, see pages 8-9.

^b This report focuses on the challenges facing same-sex couples in establishing and maintaining legal ties to the children they are parenting. Individuals in same-sex couples could identify in a variety of different ways related to their sexual orientation (e.g. lesbian, gay, or bisexual) and could identify as transgender or cisgender. The term “queer” is used, particularly by younger people, and may refer to an individual’s sexual orientation, gender identity, or gender expression. This report will primarily use the terms same-sex couples, LGBT people, and LGBT families.

Arkansas, the State refused to place two married same-sex parents on a birth certificate, despite the *Obergefell* ruling requiring it to do so. The State defended its actions all the way to the U.S. Supreme Court, which ordered the state to issue accurate birth certificates to children born to married same-sex couples. The Court affirmed that, “In listing [in *Obergefell*]... ‘the rights, benefits, and responsibilities’ to which same-sex couples, no less than opposite-sex couples, must have access—we expressly identified ‘birth and death certificates.’ That was no accident.”⁶ Although this ruling was issued in June 2017, it took an additional six months for Arkansas to comply and issue birth certificates that properly reflect parentage.

States also have sought to deny parental recognition to LGBT parents during divorce cases when a child was conceived through donor insemination during the marriage. In these cases, states argue that the non-biological parent is not a parent at all. The Mississippi State Supreme Court considered in April 2018 the case of a seven-year-old boy who was conceived using an anonymous sperm donor and born to two women who were married when he was born but have since divorced. A lower court in Mississippi refused to award parental rights to the non-biological mother, holding that the anonymous sperm donor’s parental rights must be terminated in order to do so—despite the court acknowledging that the donor “may never be known, and probably won’t be.”⁷ The Mississippi Supreme Court rejected this argument and affirmed that the non-biological mother has parental rights.

Denying Benefits to LGBT Families. In addition to not recognizing LGBT parents, anti-LGBT activists and some state governments have sought to deny other rights and benefits of marriage to same-sex couples and their children. They argue that the U.S. Supreme Court’s ruling in *Obergefell* doesn’t compel equal treatment for all married couples. Rather, they argue, states are still free to treat married same-sex couples differently, and provide less legal recognition, than married different-sex couples.

In Houston, for example, the city was sued by several taxpayers after it extended benefits to the legal spouses of city employees following the 2015 *Obergefell* ruling. The suit argued that the *Obergefell* ruling did not require that cities extend benefits to married same-sex spouses. A lower court initially ruled that married employees were entitled to equal benefits

A Family’s Story: A Matter of Life and Death

Kinsey Morrison and her moms know all too well the importance of having both parents on a child’s birth certificate—it literally can be a matter of life or death. When Kinsey was just one week old, she had a life-threatening reaction to a vaccine. Because marriage equality was not yet available nationwide, only her birth mother was allowed to be listed on her birth certificate. It was Kinsey’s non-biological mother who took her to the hospital, but the hospital staff would not begin medical care for Kinsey because there was no proof that her non-biological mother “was [Kinsey’s] real mom.” The hospital staff refused to treat Kinsey until her birth mother arrived at the hospital to sign the paperwork. The delay in treatment could have had grave consequences.

Kinsey’s parents have now married and both of their names now appear on the birth certificates of all three of their children. Despite being entitled to all the rights and benefits of marriage, Kinsey’s non-biological mother still faces questions about her legal ties to the children she has raised. When taking Kinsey’s younger sister to the doctor, her non-biological mother was required to show “proof of parenthood.” As Kinsey explains, “[I]f she hadn’t had [my sister’s] birth certificate, they would have been turned away.”

for their spouses no matter whether those spouses were same-sex or different-sex. However, in June 2017, the Texas Supreme Court threw out that ruling, and instead wrote, “The Supreme Court held in *Obergefell* that the Constitution requires states to license and recognize same-sex marriages to the same extent they license and recognize opposite-sex marriages, but it did not hold that states must provide the same publicly-funded benefits to all married persons.”⁸ This decision flies in the face of the U.S. Supreme Court’s rulings in *Obergefell* and subsequent cases, all of which make clear that all rights and benefits of marriage should be extended to same-sex couples.⁹

⁹ An attempt to appeal this Texas decision to the U.S. Supreme Court was denied in December 2017. The Texas Supreme Court remanded the case to the lower court for the parties to more fully develop their claims post-*Obergefell*, so the case is still proceeding through the state-level court system.



Claiming a Right to Discriminate Against LGBT Families

Using Religion to Create a License to Discriminate.

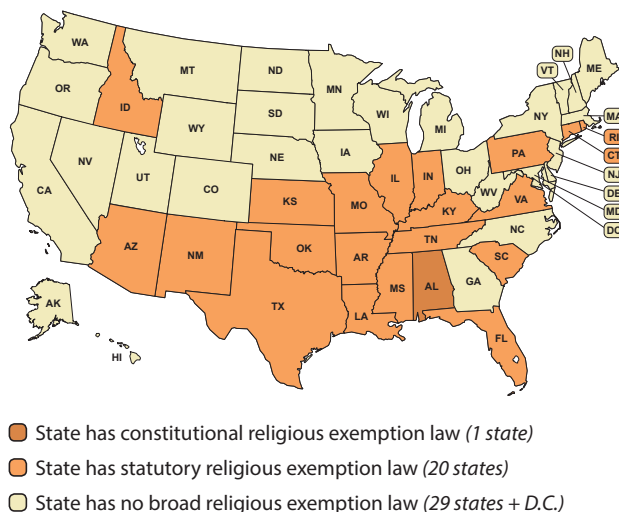
Now that same-sex couples can be legally married nationwide and their families are recognized under the law, anti-LGBT activists are claiming a right to legally discriminate against them. This can be most clearly seen with the proliferation of so called “religious exemptions” injected into federal and state laws and agency rules. Religious exemptions enable discrimination by permitting those who express a religious objection to a law to be exempt from that law. For example, if a business owner objects to same-sex marriage, he or she might not have to serve LGBT people or their families. Often the religious exemptions do not extend to all religious viewpoints, but instead only provide exemptions for those who hold a single narrow viewpoint about the definition of marriage, sexual relationships, and sex. These laws and policies create a license to discriminate against LGBT people and their families that impact many areas of life and can jeopardize the health, safety, and wellbeing of children across the country.

To date, 21 states have broad religious exemptions laws that can be used to discriminate against LGBT individuals and their families, as shown in *Figure 1*.⁹ Furthermore, through federal agency guidance as well as state laws, a growing number of individuals and businesses may be emboldened to refuse to serve, care, for or even recognize LGBT people and their families.

Allowing government employees to refuse to serve LGBT people and their families. In October 2017, federal agency guidance released by the Trump Administration and the Department of Justice offered significant leeway to staff and government contractors and grantees to seek exemptions from federal laws, rules, and regulations.¹⁰ For example, a federal employee could refuse to process the Social Security application for a child born to a same-sex couple. Or a government contractor who receives federal funding to provide housing to low-income families could refuse to house a transgender parent and her children. Despite clear laws and policies ensuring equal treatment in these contexts, under this new guidance, employees could simply refuse to act, thus leaving LGBT families to rely on other staff, assuming other such options exist and are accessible.

Figure 1: Twenty One States Have Broad Religious Exemption Laws

These Laws Allow People, Churches, Nonprofits, and Even Businesses To Not Follow State Laws



Source: Movement Advancement Project, “State Religious Exemption Laws,” http://www.lgbtmap.org/equality-maps/religious_exemption_laws.

Similarly, a bill recently introduced in Congress would permit people and nonprofits, including those that receive taxpayer dollars, to discriminate against their employees, customers, and clients—but only if that discrimination is based on federally endorsed beliefs about marriage and sexual relations, including that marriage is between one man and one woman and sex outside of marriage is immoral.¹¹ Because this legislation allows for discrimination related to marriage, it could harm children raised by same-sex couples. This could include allowing nonprofit government grantees to refuse service to married same-sex couples and their children, including homeless shelters or family support services.

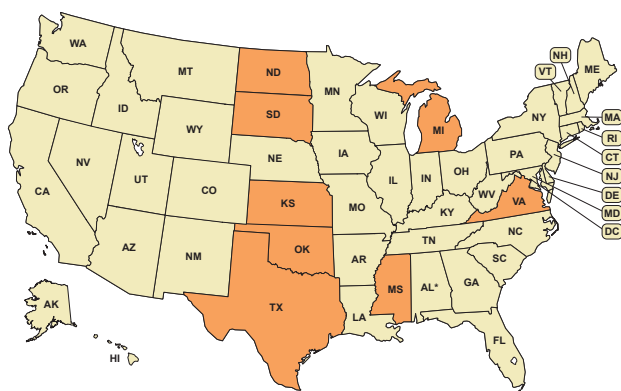
Allowing child welfare organizations to discriminate against families and children. Anti-LGBT activists are not only working to deny LGBT parents their legal rights, they are also working to ensure LGBT people cannot *become* foster or adoptive parents. This hurts all children in the child welfare system.

Child welfare providers should prioritize the best interests of children. Yet many states and the federal government are considering legislation that would allow publicly-funded child welfare providers to prioritize their religious beliefs above the best interest of the children in their care. Some states have already passed these laws, as shown in *Figure 2* on the following page.

These laws allow taxpayer-funded placement agencies to refuse to provide services if doing so would conflict with their personal moral or religious beliefs. This means they can turn away qualified foster and adoptive parents simply because these parents are LGBT or do not otherwise meet the agency's religious litmus test. The agency can even intentionally place LGBT youth in families where they will face rejection, proselytizing, or even conversion therapy or other efforts to change their sexual orientation or gender identity.

To date, eight states have passed legislation permitting taxpayer-funded child service agencies to discriminate, as shown in Figure 2.^{12d} Service agencies do not need to be religiously affiliated to claim exemptions from the protocols, regulations, and laws that govern the provision of child services—they just need to assert that their actions are consistent with a sincerely held religious belief, and five states (Kansas, Michigan, North Dakota, Oklahoma, and Virginia) require that the agency has expressed the belief in a written policy or statement of faith. For example, in 2017, South Dakota passed a law allowing agencies that receive state funding to decline to serve or place children with parents if doing so would “conflict with any sincerely-held religious belief or moral

Figure 2: States Allow Taxpayer-Funded Child Service Agencies to Discriminate



- State permits state-licensed child welfare agencies to refuse to place and provide services to children and families, including LGBT people and same-sex couples, if doing so conflicts with their religious beliefs (8 states)
- State has no religious exemption law related to provision of services (41 states + D.C.)

Note: Alabama has a similar law, but the license to discriminate is only available to child service agencies that do not receive government funding.

Source: Movement Advancement Project, “State Religious Exemption Laws,” http://www.lgbtmap.org/equality-maps/religious_exemption_laws.

^d The Alabama law applies only to child welfare agencies that do not receive government funding.

conviction of the child-placement agency.” Texas passed a similar law in 2017 permitting child-serving agencies to discriminate against qualified foster and adoptive parents and children in care, and deny care to children in need, based on a religious belief. Oklahoma and Kansas became the most recent states to pass this legislation in May 2018.

Facing Discrimination at Every Turn: A Tennessee Family's Experience

When A.S. became pregnant, she wanted to deliver at home with a midwife due to her medical history. A.S. and her spouse R.S. investigated and made initial calls. But then, “excitement quickly turned to doubt, embarrassment, and sadness when the first midwife turned us down... [saying] her midwifery practice was a part of her ministry and therefore she was not comfortable working with a same-sex couple. While I had experienced similar situations when we were planning our wedding, this felt more profound ... it was now affecting our child. As we ... were turned down by every midwife for the same reason, I felt utterly powerless and began to wonder if we would be able to find a qualified provider at all. My access to quality medical care, and that of our unborn child, was greatly reduced because of who I love. Our son was discriminated against before he was ever born.”

Later when the couple sought out a childbirth class, they again faced discrimination. The instructor said they should do private classes because “she didn’t feel the other couples in a group class would accept” a same-sex couple. But private classes were too expensive, leaving A.S. and R.S. with “the sense of powerlessness.”

And when their son was two, the couple chose a childcare facility attended by many neighboring children, only to have history repeat. “When our son was denied an application because he had two Moms, we were heartbroken. He had been very excited about going to school with his friends and didn’t understand when we had to tell him he couldn’t. These events altered the bonds he had formed with the neighborhood children from birth and his personal connection with his community.”

Source: Adapted from “Brief of *Amici Curiae* Lambda Legal Defense and Education Fund, Inc., Family Equality Council, et al., In Support of Respondents.” <https://www.aclu.org/legal-document/charlie-craig-and-david-mullins-v-masterpiece-cakeshop-lambda-legal-defense-and>.

Colorado and South Carolina deliberated similar legislation in 2018. The potential for abuse of this legislation is far-reaching, as agencies and individual workers—like all Americans—have a very broad range of beliefs, and these laws legally prioritize those religious and moral beliefs over the best interests of children.

A bill introduced in the U.S. House of Representatives would similarly permit a child welfare service provider to deny services to families or youth in its care on the basis of a moral or religious belief. This bill also states that if a state took action against such an agency to enforce the state's own nondiscrimination laws or policies, the state would have its federal funding cut.¹³

Allowing government officials to refuse to issue marriage licenses. In an effort to restrict access to marriage licenses for same-sex couples, several states have permitted government officials to refuse to issue marriage licenses. North Carolina passed a law permitting magistrates to refuse to marry couples whose marriages they disapproved of by opting out of performing any marriages.¹⁴ The law was challenged in federal court, but the lawsuit was dismissed for procedural reasons without ruling on the constitutionality of the North Carolina law.¹⁵ Mississippi has a similar law, as shown in *Figure 3*.

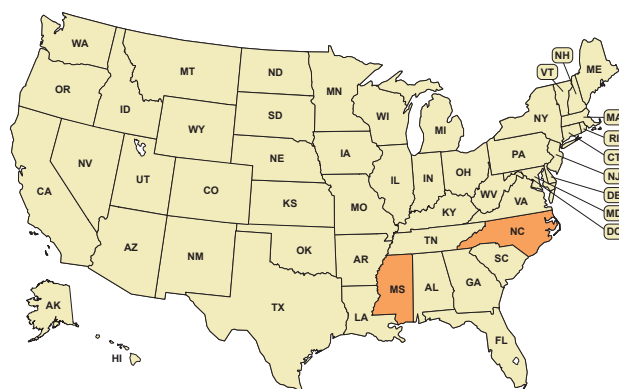
Allowing businesses to refuse to serve LGBT families and children. LGBT parents, and especially their children, face harm when the fact of their legal marriage can lead them to face additional discrimination from daycares, pediatricians, stores, restaurants, and more.

Discrimination by businesses. The United States currently lacks a federal law protecting people from discrimination in public accommodations based on sexual orientation and gender identity, and only 19 states and the District of Columbia have such protections. This means that in most parts of the country, LGBT parents and their children can legally be refused service, ranging from being kicked out of a restaurant to being denied a spot at a daycare.

And while many states lack explicit protections against discrimination, Mississippi has taken steps to condone discrimination against LGBT families with a law that permits private businesses to deny services to married same-sex couples.¹⁶

The *Masterpiece Cakeshop* case, which was heard by the U.S. Supreme Court in December 2017, has the potential to upend decades of nondiscrimination laws. On the surface, this case involves a business that is open to the public but refused to sell a wedding cake to a couple because they are

Figure 3: Two States Allow Government Officials to Refuse to Issue Marriage Licenses



- State has targeted religious exemption law that permits state and local officials to decline to marry couples of whose marriage they disapprove (2 states)
- State has no religious exemption law related to issuing marriage licenses (48 states + D.C.)

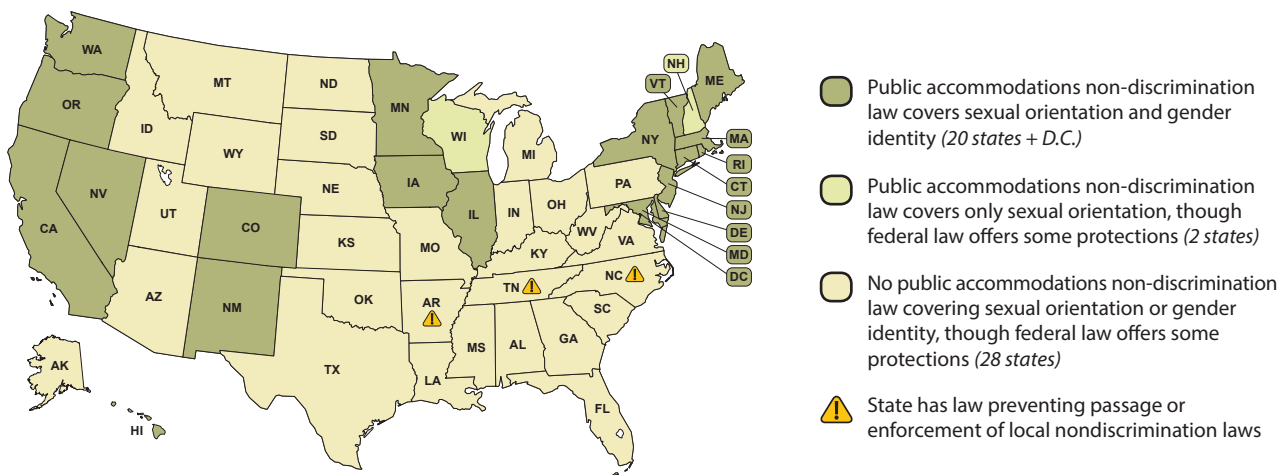
Source: Movement Advancement Project, "State Religious Exemption Laws," http://www.lgbtmap.org/equality-maps/religious_exemption_laws.

gay. But, in reality, this case is about whether laws against discrimination can continue to be enforced without sweeping exemptions. A loss in *Masterpiece* could not only open the door to much wider-ranging forms of discrimination, but could further create a license to discriminate not just against LGBT people—but also against people of color, interracial couples, women, minority faiths, people with disabilities, and others. In short, it could lead to the erosion of the Civil Rights Act and nondiscrimination protections across the country. A ruling in favor of the bakery could mean that any business owner who opposes marriage for same-sex couples, or thinks that parenting by LGBT people is wrong, could refuse to serve them or their children.

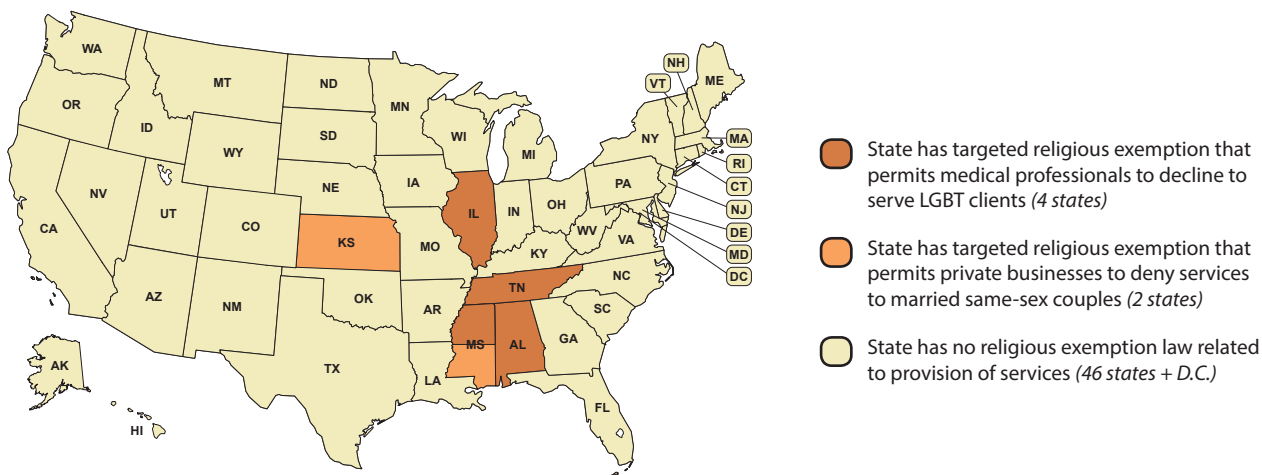
Discrimination in health care. At the federal level, opponents of fairness and equality are working to allow medical professionals to refuse to serve LGBT individuals and their families. A 2018 proposed rule released by the Department of Health and Human Services would grant broad exemptions to healthcare providers who want to choose which procedures to perform (such as fertility care or transition-related services) and which patients to serve (such as LGBT people and their children) based on their religious beliefs.¹⁷ This rule would make it possible for physicians to deny care to a child because she has two fathers, for example. Currently, four states allow medical professionals to decline to provide non-emergency care to patients based on their personal religious beliefs, as shown in *Figure 4* on the following page.

Figure 4: Few States Have Explicit Protections Against Discrimination—And Some Condone Discrimination

4a: Only 19 States and D.C. Have Laws Prohibiting Discrimination in Public Accommodations Against LGBT People



4b: Several States Permit Businesses and Healthcare Providers to Discriminate Against LGBT People and Their Families



Note: The governor of New Hampshire is considering signing legislation that would prohibit discrimination based on gender identity. The legislation has not been signed as of the publication of this report.

Source: Movement Advancement Project, "State Religious Exemption Laws," http://www.lgbtmap.org/equality-maps/religious_exemption_laws; "Public Accommodation Nondiscrimination Laws," http://www.lgbtmap.org/equality-maps/non_discrimination_laws.

Family Story: Parents Told They Did Not “Qualify”

Fatma Marouf and Bryn Esplin married in 2015 and moved to Texas, where Fatma works as a law professor and Bryn teaches at a medical school. As the director of an immigration law clinic, Fatma learned about work happening in her community to help unaccompanied refugee children, and the couple began to take steps to become foster parents through Catholic Charities of Fort Worth, a sub-grantee of the U.S. Conference of Catholic Bishops. However, in a call with the chair of the board for Catholic Charities of Fort Worth, Fatma and Bryn were told that foster parents must “mirror the holy family,” and that the couple did not “qualify” to foster a child. Their denial came despite the fact that in receiving a federal contract from the U.S. Office of Refugee Resettlement, grantees agree to follow the law and agency policies, including not discriminating against same-sex couples who are prospective foster and adoptive families.

In February 2018, the couple, represented by Lambda Legal, filed a lawsuit against the federal government and the U.S. Conference of Catholic Bishops for unlawfully funding child welfare agencies that provide federal taxpayer-funded services related to caring for unaccompanied refugee children.^e

^e Lambda Legal, “Marouf v. Azar,” <https://www.lambdalegal.org/in-court/cases/marouf-v-azar>.

LEGAL LANDSCAPE FOR CHILDREN RAISED BY SAME-SEX COUPLES

Prior to the U.S. Supreme Court's ruling in *Obergefell*, same-sex couples in many states across the country faced significant challenges in establishing legal ties to their children. In some states, even legally married same-sex couples were not both recognized as parents of the children they were raising, and in many more states, access to second-parent or stepparent adoption (mechanisms often used to establish legal parentage to a non-biological child) was entirely unavailable to same-sex couples.

Today, same-sex couples can marry in every state and county in the United States, and that legal recognition has resulted in increased stability for the estimated 300,000 children being raised by same-sex couples in the United States. The U.S. Supreme Court ruling in *Obergefell* not only established marriage equality, but it also held that same-sex couples are entitled to the full set of legal rights and benefits that flow from marriage. Following the *Obergefell* decision and subsequent ability of same-sex couples nationwide to marry, the legal landscape for LGBT parents who choose to marry has vastly changed:

1. **Parental Presumption for Children Born to Married Couples.** Under the so-called "parental presumption" or "marital presumption," when a legally married couple has a child, they are both automatically presumed to be the legal parents of the child. Post-*Obergefell*, this presumption should now be applied equally to different-sex and same-sex parents who are married at the time the child is born. Take the example of a married different-sex couple using an anonymous sperm donor to conceive a child. When that child is born, both the mother and her husband are presumed to be the child's parents, even though the husband has no biological relationship to the child.^f

The same should now hold true for married same-sex couples: if a woman in a same-sex couple gives birth to a baby, her wife is also presumed to be that child's parent. Importantly, parental presumption is a legal assumption

derived through a state statute, and it does not require a court judgment. Therefore, legal advocates strongly advise same-sex couples to nonetheless obtain a confirmatory adoption or court order to ensure that their relationship to their child is legally recognized.

2. **Both Parents Listed on a Child's Birth Certificate.**

A birth certificate is a meaningful and important document that is frequently used as evidence of a child's parents. As a result of marriage equality and the related parental presumption described above, when a child is born to a married same-sex couple, both parents should now be listed on the birth certificate. However, while a birth certificate can be used to prove parentage, it does not itself legally establish a parent-child relationship. Therefore, couples are strongly advised to obtain an adoption decree or other court judgment establishing their parentage rather than rely solely on a birth certificate and the parental presumption.

3. **Access to stepparent adoption.** A stepparent adoption allows a spouse to become a full legal parent without terminating the parenting rights of their spouse. It aims to give permanent legal and financial protections to children who rely emotionally and economically on an adult caregiver whose legal parentage is not already established. Usually, the procedures for a stepparent adoption are streamlined and simpler than for other types of adoptions and do not require a home study, though laws vary by state. The simplicity of this process for married different-sex couples makes this one of the most common kinds of adoption in the United States.

For married same-sex couples, stepparent adoption is used in two ways. First, as with different-sex couples, it is a mechanism that allows blended families to establish legal ties—

^f In addition to parental presumption statutes, some states also have specific laws pertaining to assisted reproduction, establishing parentage when a married couple uses donor sperm to conceive a child. Generally, such laws state that if a woman uses donor sperm to conceive a child and her spouse consents, then the spouse is considered a legal parent.

Under the law of some states, a parental presumption may be rebuttable in some circumstances. For example, if someone else knew themselves to be the child's biological parent, they would have a course of action to legally establish parentage. Absent such a rebuttal, as would be the case in the example of a sperm donor who has already waived their parental rights, the law assumes both members of the married couple are the parents.

such as when a woman marries another woman who had a child from a prior relationship. The stepparent in this scenario could legally adopt her spouse's child, ensuring that both members of the same-sex couple are legal parents to the child. Second, stepparent adoption is critical for LGBT parents who used a donor to conceive a child and want to ensure that both parents have a legal connection to this child, given that (at least) one parent is not biologically related to the child. In this scenario, both parents are married and should therefore already have legal parenting rights under parental presumption as described above. However, stepparent adoption provides an additional legal tool to secure those rights and ensure that both parents are legally recognized as the child's parent in a way that is much harder to challenge in court. As with any court order, an adoption decree that was validly issued is legally recognized across state lines and grants full parenting rights.

4. Equal Access to Joint Adoption. While a stepparent or second parent adoption allows a second adult to establish legal ties to their spouse's child, a joint adoption allows two people to adopt a child together at the same time, such as when a couple adopts a child through the child welfare system. All states permit married couples to jointly adopt a child, though some states privilege married couples over other family types, including single or unmarried parents. Equal access to joint adoption is critical for ensuring that LGBT people can form families and secure legal ties to children they adopt. Prior to marriage equality, same-sex couples faced challenges in obtaining a joint adoption in some states. In those states, often one parent could legally adopt the child, and then the other parent could either remain legally unrelated to the child or would petition for a second parent adoption, depending on whether their state allowed second parent adoptions. Thus, prior to *Obergefell*, often a child of a same-sex couple would have a legal tie to only one parent, leaving the child and the non-biological parent vulnerable in the event of death or dissolution of the relationship.

5. Security and Stability in Times of Crisis.

Marriage affords couples added security in the case of the death or disability of one member of the couple. Rather than being considered a legal stranger, as many same-sex couples were before marriage equality, a widowed same-sex spouse is entitled to the same rights as different-sex spouses to inheritance, access to Social Security benefits, and other benefits. For children, this stability is crucial not only for financial security, but also for the continued emotional and legal connection to a parent. Prior to *Obergefell*, if LGBT parents found themselves in times of crisis and without legal ties between themselves and their child, they were at risk of their child being placed with a distant relative, rather than remaining in the custody of the only surviving parent the child had known, but to whom the child lacked legal ties—simply because the law would not recognize their relationship to their own child.

CONCLUSION

The basic needs of all children are the same: love, safety, and security. To meet these needs, parents must be able to legal decisions about their children's care and future, and the need to have equal access to the legal and social safety net provided when a parent becomes disabled or dies. Yet for the estimated 300,000 children being raised by same-sex couples and the two million children with an LGBT parent, as well as children being raised by single parents, by interfaith or interracial couples, and other families, these vital protections are at risk because of efforts to undermine parental recognition and to permit widespread discrimination against LGBT people and their children.

RECOMMENDATIONS

The three years since the U.S. Supreme Court ruling in *Obergefell* have presented challenges for LGBT people and their families. To address these issues, this report outlines the following high level recommendations that would help ensure the safety and security of children raised by LGBT families and protect them from discrimination.

Pass fully inclusive nondiscrimination laws at the federal, state, and local level. These laws and ordinances should include protections in employment, housing, and public accommodations, prohibit discrimination based on both sexual orientation and gender identity, and not contain religious exemptions. At the federal level, the passage of the Equality Act would prohibit discrimination in these areas and in federal funding.¹⁸ Similar state and local laws are also imperative in many parts of the country. These nondiscrimination laws would ensure that LGBT people can provide for themselves and their families, find stable and safe housing, and live their lives with protection against discrimination and harassment.

States should modernize their parenting laws in accordance with the Uniform Parentage Act of 2017. The Uniform Parentage Act (UPA) is a suggested model law that provides a legal framework for establishing parentage. States may choose to adopt the UPA, in whole or in part, but are not required to do so. Included in the 2017 update are changes that provide for parental recognition for the many ways that LGBT-headed families form, including ensuring the equal treatment of children born to same-sex couples by making language related to parental presumption and assisted reproduction

gender neutral and establishing *de facto* parents as legal parents.¹⁹ To date, Rhode Island and Vermont have introduced legislation to modernize their parentage laws in accordance with the 2017 update, and Washington has enacted the legislation.²⁰

Pass laws such as the Every Child Deserves a Family Act.²¹ This bill would prohibit child welfare agencies that receive federal funding from discriminating against any potential foster or adoptive family on the basis of sexual orientation, gender identity, or marital status; further, it would prevent discrimination against any foster youth because of their sexual orientation or gender identity. In addition to federal legislation, state laws, federal and state regulations, and administrative rules and policies should be enacted to prohibit discrimination against parents and children in the child welfare system.

Work to defeat child welfare license-to-discriminate laws and other religious exemptions laws at the federal and state level. These harmful laws restrict the families eligible to adopt and increase the time that children spend in government care. Other religious exemptions laws condone discrimination against LGBT people in many areas of life ranging from employment, health care, housing, and places of business and public accommodation. Rather than passing these laws that allow businesses, child welfare providers, and others to discriminate, states should ensure that all children, regardless of who their parents are, can live healthy and secure lives free from harmful discrimination.

Advocate at the federal and state level for nondiscrimination provisions in government contracts. Prohibiting taxpayer dollars from being used to discriminate ensures that all people are treated fairly by agencies that are contractors of the state or federal governments.

ENDNOTES

- ¹ *Obergefell vs. Hodges*, 576 U.S. ____ (2015), https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf.
- ² Data from the 2015 American Community Survey, conducted by the Census Bureau, show that 17.2% of cohabiting same-sex couples are raising children. Assuming that each of these couples is raising, on average, two children, there are approximately 300,000 children currently being raised by same-sex couples. Data from the Gallup Daily Tracking poll shows that 29% of LGBT people are raising children. A conservative estimate of the number of children being raised by LGBT people, assuming just one child being raised by these LGBT people, would be approximately 2 million children have an LGBT parent.
- ³ Administration for Children and Families, “Trends in Foster Care and Adoption,” October 20, 2017, <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.
- ⁴ Administration for Children and Families, “The AFCARS Report, No. 24,” October 20, 2017. <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.
- ⁵ Gary J. Gates, M.V. Lee Badgett, Kate Chambers, and Jennifer Macomber. “Adoption and Foster Care by Gay and Lesbian Parents in the United States,” The Williams Institute, March 2007, <https://williamsinstitute.law.ucla.edu/research/parenting/adoption-and-foster-care-by-gay-and-lesbian-parents-in-the-united-states/>.
- ⁶ *Pavan v. Smith*, 582 U.S. ____ (2017), https://www.supremecourt.gov/opinions/16pdf/16-992_868c.pdf.
- ⁷ Lambda Legal, “*Strickland v. Day*,” https://www.lambdalegal.org/news/ms_20171129_divorce-decree-mom-over-sperm-donor.
- ⁸ *Pidgeon v. City of Houston*, Supreme Court of Texas, No. 15-0688 (2017), <http://projects.statesman.com/documents/?doc=3882885-TSC-Marriage-Ruling>. Note that the case was remanded back to the lower court for review and the issue is expected to proceed through the lower state courts again.
- ⁹ Movement Advancement Project, “State Religious Exemption Laws,” current as of March 1, 2018, http://www.lgbtmap.org/equality-maps/religious_exemption_laws.
- ¹⁰ Office of the Attorney General, “Memorandum for All Executive Departments and Agencies re: Federal Law Protections for Religious Liberty,” October 6, 2017, <https://www.justice.gov/opa/press-release/file/1001891/download>.
- ¹¹ “First Amendment Defense Act,” introduced March 8, 2018, https://www.scribd.com/document/373318007/FADA#from_embed.
- ¹² Kansas, SB 284 (2018); Michigan, MI Comp. Laws § 710.23g (2015); Mississippi, HB 1523 (2016); North Dakota, ND Century Code §50-12-07.1 (2003); Oklahoma, SB 1140 (2018); South Dakota, SB 149 (2017); Texas, HB 3859 (2017); Virginia, Va. Code Ann § 63.2-1709.3 (2012). Alabama passed a similar law in 2017, but it applies only to child welfare agencies that do not receive government funding. Ala. HB 24 (2017).
- ¹³ H.R. 1881 (115th Congress), “Child Welfare Provider Inclusion Act of 2017,” <https://www.congress.gov/bill/115th-congress/house-bill/1881>.
- ¹⁴ North Carolina, Senate Bill 2 / S.L. 2015-75, Magistrates Recusal for Civil Ceremonies, 2016, <https://www.ncga.state.nc.us/gascripts/BillLookup/BillLookup.pl?Session=2015&BillID=SB2&submitB%20utton=Go>.
- ¹⁵ *Ansley v. Warren*, 861 F.3d 512 (4th Cir 2017).
- ¹⁶ Miss. HB 1523 (2016).
- ¹⁷ Proposed Rule: “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,” January 26, 2018, <https://www.federalregister.gov/documents/2018/01/26/2018-01226/protecting-statutory-conscience-rights-in-health-care-delegations-of-authority>.
- ¹⁸ H.R. 2282, <https://www.congress.gov/115/bills/hr2282/BILLS-115hr2282ih.pdf>.
- ¹⁹ National Conference of Commissioners on Uniform State Laws, “Uniform Parentage Act (2017),” September 2017, http://www.uniformlaws.org/shared/docs/parentage/UPA2017_Final_2017sep22.pdf.
- ²⁰ Uniform Law Commission, “Parentage Act (2017),” [http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act%20\(2017\)](http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act%20(2017)).
- ²¹ S.303, <https://www.congress.gov/115/bills/s1303/BILLS-115s1303is.pdf>.



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