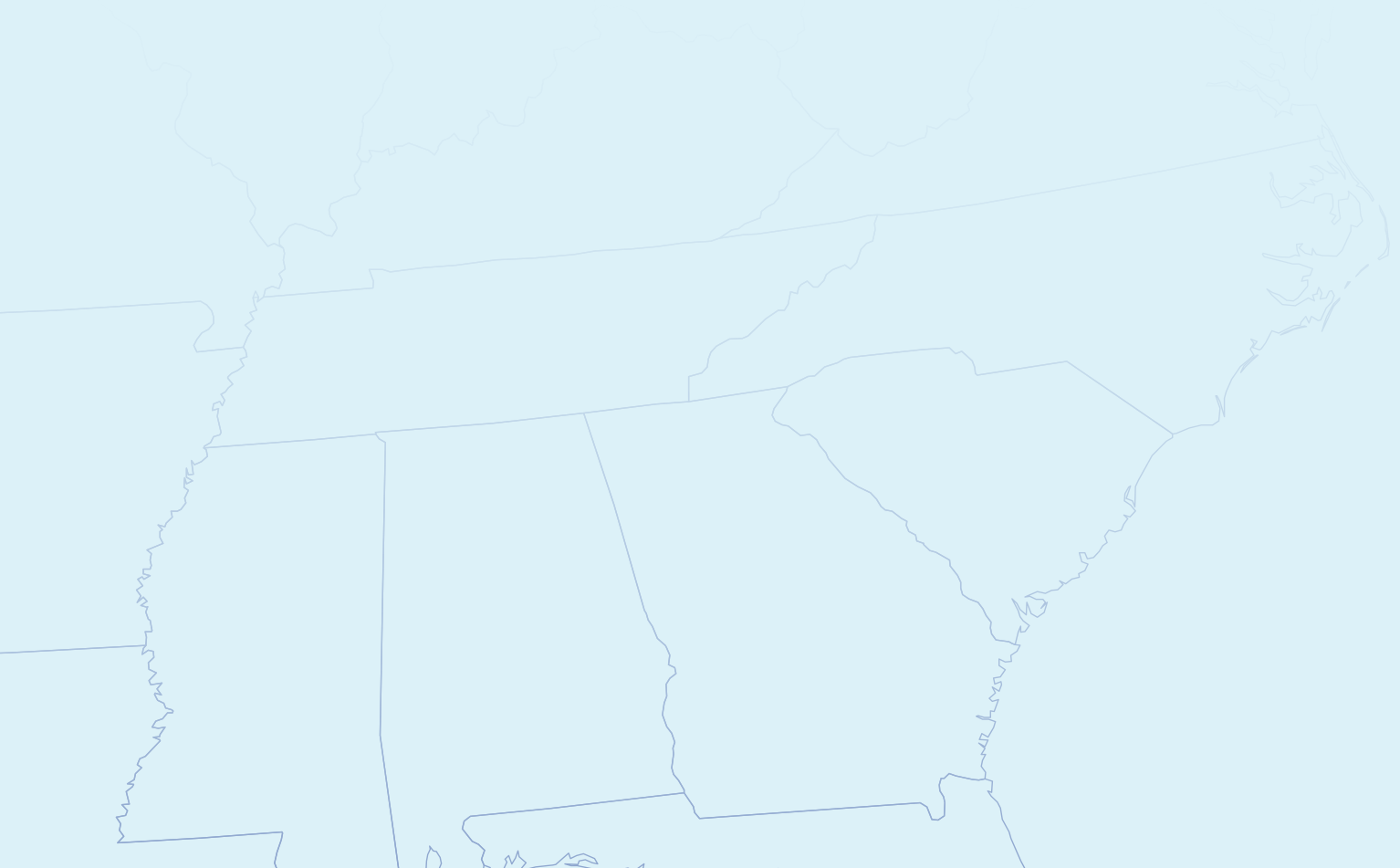


# THE CURRENT WAVE OF ANTI-LGBT LEGISLATION

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## INTRODUCTION

In recent years, a number of states have introduced legislation that could limit the ability of lesbian, gay, bisexual, and transgender (LGBT) people to equally access services. Many of these bills would allow religious small business owners, such as bakers and wedding planners, to refuse to conduct business with a same-sex couple seeking to marry. However, since 2012, a growing number of so called “religious exemption” bills have targeted health care access for LGBT people. These bills threaten to exacerbate anti-LGBT discrimination in health care, and undermine myriad federal government-led efforts to increase awareness of LGBT health disparities and improve access to affirming and competent care for LGBT patients. As such, these bills are a major threat to public health in the United States.

The growing number of anti-LGBT religious exemption bills is part of a new wave of anti-LGBT legislation being introduced in state legislatures across the country. Other types of anti-LGBT bills being introduced are statewide bills that would nullify local nondiscrimination ordinances that include sexual orientation and gender identity, as well as bills that restrict transgender people’s ability to access restrooms. Anti-LGBT health care refusal laws should be understood in a broader context of health care refusal laws—mostly related to abortion, contraception, and sterilization—that date back to the federal Church Amendment of 1973.<sup>1</sup>

This new wave of anti-LGBT legislation is at least the third wave of anti-LGBT legislation aimed at overturning municipal nondiscrimination ordinances or preemptively preventing people from accessing a right then being debated in the courts. The first two waves targeted sexual orientation nondiscrimination laws, starting with the repeal of Boulder, Colorado’s gay rights statute in 1974, and laws and constitutional amendments banning same-sex marriage, civil unions, and domestic partnership starting in the mid-1990s. The current anti-LGBT wave threatens to worsen the discrimination that LGBT people already face in their everyday lives. Many of the new religious exemption bills specifically target health care access for LGBT people. As such, it is essential for the federal government to make clear that this new wave of discriminatory legislation is illegal and unacceptable.

***Religious freedom does not include the freedom to discriminate and cause harm to others.***

Proponents of this wave of legislation claim that these laws merely protect the religious freedom of conservatives. However, municipal and state-level sexual orientation and gender identity nondiscrimination laws—like those repealed and preemptively banned by the anti-LGBT laws passed in North Carolina and elsewhere—do not limit the free exercise of religion on the part of religious conservatives. As legal scholars Douglas NeJaime and Reva Siegel point out in the *Yale Law Journal*, unlike attempts to protect free exercise of religion, such as the right to use peyote as part of a Native American religious practice, these “religious exemption” laws cause real harm to third parties—i.e. LGBT people, same-sex couples, and others who do not conform to particular religious orthodoxies. As a result, these laws inflict both material harm and dignitary harm—harms that exacerbate stigma and marginalization, and reduce social status—on other citizens.<sup>2</sup> Religious freedom does not include the freedom to discriminate and cause harm to others by denying basic services we all need to live.

## THE HISTORY OF “RELIGIOUS EXEMPTION” LEGISLATION FROM THE PEYOTE CASE TO 2016

One of the claims that proponents of “religious exemption” legislation make is that equal rights for LGBT people, including nondiscrimination laws, threaten the religious freedom of conservative Christians. The Christian right has made claims dating back to the 1990s that gay rights are a threat to religious freedom, based in an unfounded idea that conservative and orthodox religions will be forced to recognize and celebrate same-sex unions. During the 1996 Defense of Marriage Act debate, Concerned Women for America falsely claimed that conservative religious congregations would be forced to marry same-sex couples if same-sex marriage was legalized.<sup>3</sup> Important religious exemptions have been given to ensure citizens are not forced to participate in an activity that directly conflicts with their ability to practice their religion, so long as that activity does not impose harm on others. Traditionally, these exemptions were exclusively granted to individuals, such as Iknor Singh, a Sikh-American who requested religious accommodation from the United States Army to allow him to enlist and maintain his beard, long hair, and turban.<sup>4</sup> However, religious exemptions are increasingly being utilized by individuals, corporations, and states to discriminate against LGBT people, under the guise of the First Amendment right to freedom of religion.

On November 17, 1993, President Clinton signed into law the Religious Freedom Restoration Act (RFRA), which “ensures that interests in religious freedom are protected.”<sup>5</sup> The RFRA was enacted after two Native Americans were fired from their jobs because they used peyote in their religious ceremonies. Though the intention of the RFRA was to protect religious communities from infringements on their rights, current religious freedom laws are more often used “as a sword to discriminate against women, gay and transgender people, and others.”<sup>6</sup> In 1997, the U.S. Supreme

Court held that that the RFRA applies strictly to the federal government and not to states or local municipalities.<sup>7</sup> As a result, 21 states have since passed their own RFRA.

Conservatives often point to the 1993 RFRA as the model for current anti-LGBT legislation at the state level. However, anti-LGBT health care refusal laws should also be understood in a broader context of health care refusal laws—mostly related to reproductive health care, such as abortion, contraception, and sterilization—that date back to the federal Church Amendment of 1973.<sup>8</sup>

The Affordable Care Act (ACA) requires that employer health plans cover preventive health care, with contraceptive care included as one of those services.<sup>9</sup> Hobby Lobby Stores, an arts and crafts company, opposed this enforcement of providing contraceptive care to its employees, saying it violated the beliefs of the store owners. In 2012, Hobby Lobby filed a lawsuit in the U.S. District Court for the Western District of Oklahoma, seeking religious exemption from providing contraception to employees.<sup>10</sup> After Hobby Lobby’s request for a preliminary injunction was denied, the U.S. Court of Appeals for the Tenth Circuit granted a hearing, which resulted in the court ordering the government to stop enforcement of the contraception rule on Hobby Lobby. In response, the government brought the case before the U.S. Supreme Court. In *Burwell vs. Hobby Lobby Stores, Inc. (2014)*, the court ruled in favor of Hobby Lobby, giving the corporation a religious exemption from providing contraception as part of employees’ health care plans.<sup>11</sup>

This Hobby Lobby ruling represented a sharp departure from previous First Amendment jurisprudence.<sup>12</sup> Prior to the Supreme Court’s ruling, former Acting Solicitor General Walter Dellinger warned that if Hobby Lobby were to prevail, “we would be entering a new world in which, for the first time, commercial enterprises could successfully claim religious exemptions from laws that govern everyone

else.”<sup>13</sup> Dellinger predicted that “a win for Hobby Lobby could turn out to be a significant setback for gay rights.”<sup>14</sup> In response to the Hobby Lobby decision, 19 members of Congress who had voted in favor of the 1993 RFRA withdrew their earlier support, stating that Congress “could not have anticipated, and did not intend, such a broad and unprecedented expansion of RFRA.”<sup>15</sup> The Hobby Lobby ruling legitimized a for-profit corporation’s claim of religious belief.<sup>16</sup> This ruling represents a departure from previous First Amendment provisions, originally intended to provide religious exemptions for individuals.

Following the Hobby Lobby ruling, religious exemption served as a framework for legislation at the state level. In 2014, Arizona’s Senate Bill (SB) 1062 proposed giving any individual or legal entity an exemption from any state law if it substantially burdened their exercise of religion.<sup>17</sup> Arizona lawmakers put forth SB 1062 in reaction to a 2013 New Mexico Supreme Court ruling that determined a photography company discriminated against a same-sex couple by refusing to photograph the couple’s marriage ceremony.<sup>18</sup> SB 1062 expanded the definition of “person” in Arizona’s original RFRA from “a religious assembly or institution” to also include “any individual, association, partnership, corporation, church...estate, trust, foundation or other legal entity.”<sup>19</sup> While Arizona Governor Jan Brewer vetoed this “religious freedom” bill in 2014, similar bills were introduced in states around the country.

In 2015, Indiana’s SB 101 passed, “allowing individuals and companies to assert that their exercise of religion has been, or is likely to be, substantially burdened as a defense in legal proceedings.”<sup>20</sup> Governor Mike Pence signed this bill into law, evoking a firestorm of controversy. In an effort to reduce national criticism directed toward the state of Indiana, one week later, the Governor signed into law amendments to SB 101.<sup>21</sup> While the changes made to SB 101 did not establish LGBT people as a protected class of

citizens statewide, they did weaken the law by making clear that the RFRA “does not authorize a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public.”<sup>22</sup> Despite the backlash that Indiana received as a result of SB 101, Arkansas followed suit, passing SB 975.<sup>23</sup> The law states that “government shall not substantially burden a person’s exercise of religion” unless there is a “compelling governmental interest.”<sup>24</sup> The RFRAs in Indiana and Arkansas were passed as a growing number of states legalized same-sex marriage. They represent a departure from RFRAs that were passed prior to the Hobby Lobby decision in that they could potentially allow individuals and businesses to discriminate against same-sex couples and LGBT people based on religious objections. For example, under these laws, a conservative Christian bakery owner could decline to provide wedding cakes for same-sex marriages based on religious beliefs.

### **RELIGIOUS EXEMPTION BILLS TARGETING LGBT PEOPLE’S ABILITY TO ACCESS HEALTH CARE**

Recent religious exemption legislation has shifted from focusing primarily on same-sex marriage to focusing specifically on health care. For example, in 2012, Michigan Senator John Moolenaar introduced SB 975, which stated that health care providers could decline to provide any services and treatments to patients based solely on a “matter of conscience.”<sup>25</sup> In Florida, HB 401 was introduced in 2015. This bill expanded on Florida’s existing RFRA by allowing health care facilities and providers to refuse to “administer, recommend, or deliver a medical treatment or procedure that would be contrary to the religious or moral convictions or policies” of the facility or health care provider.<sup>26</sup> In effect, these bills would have allowed health care providers to cite religious or moral objections in order to refuse to provide services to LGBT individuals, and others

who may not conform to certain religious or moral beliefs, without any sort of recourse or liability. While both the Michigan and Florida bills died in the respective state legislatures, other states have passed anti-LGBT religious exemption legislation with a specific focus on health care.

On April 5, 2016, Mississippi Governor Phil Bryant signed Mississippi HB 1523, a law that would permit discrimination based on three specific religious beliefs or moral convictions: that “marriage is or should be recognized as the union of one man and one woman; sexual relations are properly reserved to such a marriage; and male (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”<sup>27</sup> HB 1523 does not only explicitly target LGBT people, but also anyone else who may violate the belief that sexual relationships are reserved for heterosexual marriage, such as single mothers or unmarried heterosexual couples. Governor Bryant and other supporters of the law have strongly defended it as a necessary means to prevent government from interfering with people trying to exercise their religious beliefs

**Mississippi HB 1523, signed into law in April 2016, permits individuals and businesses to discriminate against LGBT people in a variety of ways.**

regarding same-sex marriage.<sup>28</sup> While a large portion of HB 1523 is centered on marriage equality for same-sex couples, by allowing public employees to refuse to issue marriage licenses and for-profit businesses to refuse wedding-related goods

or services to same-sex couples, the bill goes much further than that. According to analysis by Lambda Legal, HB 1523 permits individuals and businesses to discriminate against LGBT people in a variety of ways, such as:

- Refusing foster care and adoption services.
- Banning transgender students and workers from using bathrooms in accordance with their gender identity.
- Denying housing and employment from religious organizations.
- Denying medically necessary gender transition-related treatments, counseling, or services to transgender people.
- Denying psychological services, counseling, or fertility treatments to LGBT individuals, same-sex couples, or unmarried couples.<sup>29</sup>

Because of the harm and discrimination that HB 1523 could cause, some legal experts have called the law unconstitutional. According to a report by the Columbia University School of Law and signed by 10 law professors, HB 1523 is unconstitutional because it “violates the Establishment Clause by impermissibly accommodating religion in a way that harms third parties.”<sup>30</sup> The Establishment Clause of the First Amendment forbids the government from favoring any one particular religion, and with the Supreme Court decision in *Estate of Thornton v. Caldor* in 1985, it has been understood that the Establishment Clause restricts accommodations for religious beliefs if those accommodations would create meaningful harm for others. According to the analysis of the legal experts in the report, HB 1523 violates the Establishment Clause because it allows for individuals and organizations to discriminate against and cause harm to same-sex couples, LGBT people, and people who have sex outside of marriage, in order to accommodate a very specific set of religious beliefs.

Also in April 2016, the Tennessee legislature passed HB 1840, which states that therapists and counselors would be allowed to reject any patient if that patient had “goals, outcomes, or behaviors” that would violate the “sincerely

held principles” of the provider.<sup>31</sup> The original bill stated that counselors would be able to deny treatment to patients based on “sincerely held religious beliefs,” but the wording was amended to “sincerely held principles,” which broadened the scope of potential discriminatory action that the bill would permit.<sup>32</sup> For example, Art Terrazas, the director of government affairs for the American Counseling Association, said that passage of the bill could mean that a therapist opposed to war or U.S. military policy could refuse to treat a veteran with post-traumatic stress disorder.<sup>33</sup> However, the bill was first and foremost aimed at allowing discrimination against LGBT people seeking mental health services in Tennessee. HB 1840 was created thanks to the lobbying efforts of the Family Action Council of Tennessee (FACT) and the Alliance Defending Freedom (ADF), two large anti-LGBT activist organizations.<sup>34</sup> David Fowler, the president of FACT, has previously said that transgender students are “abnormal” in a testimony in favor of an anti-LGBT bathroom bill in Tennessee.<sup>35</sup> He also filed a lawsuit to challenge the U.S. Supreme Court decision to legalize same-sex marriage.<sup>36</sup> The ADF, formerly known as the Alliance Defense Fund, is a Christian organization that is currently pushing state-level religious exemption legislation and bills restricting transgender people’s access to restrooms across the nation.<sup>37</sup>

Not only is HB 1840 blatantly discriminatory, it also is designed to address a problem that does not exist, and it violates the ethics and principles of all major counseling professional groups. The bill specifically overrides the American Counseling Association’s 2014 revised Code of Ethics, which states that professional counselors may not refuse clients based on gender identity and sexual orientation.<sup>38</sup> Under this bill, professional mental health care providers who violate the Code of Ethics by refusing to treat LGBT patients would be protected against disciplinary action from the American Counseling Association. The Family Action Council claims that the bill is necessary in

order to defend Christian therapists and counselors who might be “forced” to counsel, and thereby affirm, LGBT patients because of the American Counseling Association’s Code of Ethics. However, before the bill was introduced, there were no complaints brought to the Tennessee Counseling Association or any other counseling association about any such concerns.<sup>39</sup> Dianne Bradley, a licensed marriage and family therapist and director of the Counselor Education Program in Franklin, TN, stated that “House Bill 1840, now known as ‘Hate Bill 1840,’ is an attempted solution to a problem that does not exist.”<sup>40</sup> Despite the objections of many mental health professionals and counseling organizations due to the bill’s discriminatory nature, HB 1840 passed through both the Tennessee Senate and House. Governor Bill Haslam signed HB 1840 into law on April 27, 2016.

### **MISSISSIPPI AND TENNESSEE LAWS CREATE ADDITIONAL BARRIERS TO LGBT PEOPLE’S ABILITY TO ACCESS HEALTH CARE**

Overall, this anti-LGBT religious exemption legislation harms LGBT people, who already experience significant discrimination in health care. Surveys of both patients<sup>41</sup> and providers<sup>42</sup> indicate that prejudicial treatment occurs in clinical settings, and anti-LGBT attitudes among providers are widespread. Anti-LGBT discrimination in health care takes the form of health care providers using harsh or abusive language, blaming patients for their health status, being physically rough or abusive, or refusing care outright.<sup>43</sup>

LGBT people are also disproportionately burdened by health disparities. For example, gay and bisexual men experience high rates of HIV and sexually transmitted diseases,<sup>44</sup> lesbian and bisexual women are less likely to be routinely screened for cervical cancer,<sup>45</sup> and transgender people experience high rates of minority stress and mental health burden.<sup>46</sup> LGBT people experience many barriers in

accessing health care, including lack of providers trained to address the specific health care needs of LGBT people,<sup>47</sup> and a lack of access to culturally competent health care, including preventive services.<sup>48</sup> Experiencing discrimination in health care causes LGBT people to not seek subsequent care, and to mistrust medical providers.<sup>49,50</sup>

A number of federal initiatives have been launched in order to address the health disparities and discrimination that LGBT people face. For example, the Department of Health and Human Services' Healthy People 2020 initiative, the Institute of Medicine, and the Joint Commission have all called for steps to be taken to address LGBT health disparities. Education and cultural competency training efforts to improve medical and behavioral health care for LGBT people are underway across the country. In 2011, the Health Resources and Services Administration at the Department of Health and Human Services funded the National LGBT Health Education Center to train staff at community health centers across the U.S. in providing affirming, competent care to LGBT patients. In 2014, the American Association of Medical Colleges published a guide that provides strategies for educating medical professionals in LGBT and intersex health disparities; ensuring inclusion and equality in health care for these populations; developing professional competency objectives to improve health care for LGBT and intersex people; and integrating these competencies into medical school curricula.<sup>51</sup> A number of peer-reviewed articles examining medical,<sup>52</sup> nursing,<sup>53</sup> and pharmacy<sup>54</sup> school curricula have called for greater inclusion of LGBT concerns in professional training programs. In 2015, the American College of Physicians published the second edition of *The Fenway Guide to Lesbian, Gay, Bisexual and Transgender Health*, a medical reference guide.<sup>55</sup> The new wave of anti-LGBT religious exemption legislation threatens to undermine all the various efforts currently underway to address the

discrimination and disparities faced by LGBT people in health care.

## OTHER ANTI-LGBT LEGISLATION

Religious exemption bills that target LGBT people's ability to access health care are only part of a new wave of anti-LGBT legislation. As some states are advancing the rights of LGBT citizens through bills aimed at reducing bullying in schools, simplifying the process of changing names and gender markers on identity documents, and mandating LGBT cultural competency training for medical and social service providers, more and more anti-LGBT bills are introduced in opposition to this progress. In 2015, state lawmakers introduced at least 125 anti-LGBT bills.<sup>56</sup> As of February 2016, more than 175 anti-LGBT bills had been filed in 32 states.<sup>57</sup> Election year politics may give lawmakers even more incentive to push anti-LGBT legislation in 2016. In addition to discriminatory religious exemption legislation, other anti-LGBT bills, such as bills that nullify local nondiscrimination ordinances inclusive of sexual orientation and gender identity, are being introduced in state legislatures across the country.

### ***Anti-LGBT laws passed in North Carolina and Arkansas echo Colorado's anti-gay Amendment 2, passed in 1992 and struck down as unconstitutional by the U.S. Supreme Court in 1996.***

Recently, some states have passed laws that nullify or preemptively ban local ordinances prohibiting discrimination on the basis of sexual orientation and gender identity. Arkansas's SB 202, passed in February 2015, prohibits counties or municipalities from passing a nondiscrimination ordinance "that creates a protected classification or prohibits discrimination on a basis not contained in state law."<sup>58</sup> Because sexual orientation and

gender identity are not protected under Arkansas state law, SB 202 prohibits local governments from passing nondiscrimination ordinances that provide protection for LGBT people. Similarly, North Carolina's House Bill (HB) 2,<sup>59</sup> which passed and was signed into law in March 2016, negates all local nondiscrimination ordinances in favor of state law, which does not encompass sexual orientation or gender identity.

The banning and rescinding of local nondiscrimination laws in North Carolina's HB 2 and Arkansas's SB 202 echoes a similar statewide anti-gay initiative passed in Colorado in 1992. Various Colorado municipalities had passed ordinances banning discrimination based on sexual orientation. In response, Colorado voters adopted Amendment 2 to the state constitution, prohibiting the state and all local government entities from enacting, adopting, or enforcing any law or policy against discrimination on the basis of sexual orientation.<sup>60</sup> In the 1996 *Romer v. Evans* case, the U.S. Supreme Court struck down Amendment 2 in a 6-3 ruling. Amendment 2 was found to be in violation of the Equal Protection Clause of the Fourteenth Amendment, which provides that no state shall deny to any person within its jurisdiction "the equal protection of the laws."<sup>61</sup> This set a precedent for the equal protection rights of gay, lesbian, and bisexual people under the U.S. Constitution.<sup>62</sup> Arkansas' SB 202, North Carolina's HB 2 and Colorado's Amendment 2 all intended to nullify local nondiscrimination ordinances. However, unlike Colorado's Amendment 2, Arkansas' SB 202 and North Carolina's HB2 do not directly reference LGBT people. While Colorado's Amendment 2 was specifically designed to repeal and preempt sexual orientation nondiscrimination ordinances, the Arkansas and North Carolina bills were created under the guise of improving commerce by standardizing nondiscrimination law across the state. The architects of these bills were careful to word the laws in such a way to avoid the legal precedent set by *Romer v. Evans*, which determined over 20

years ago that singling out sexual orientation nondiscrimination ordinances was unconstitutional.<sup>63,64</sup>

In addition, HB 2 also bans transgender people from using public restrooms in accordance with their gender identities.<sup>65</sup> These types of anti-transgender bathroom bills are a growing trend, with at least half a dozen states in the South, Midwest and Great Plains regions of the U.S. considering anti-transgender bathroom bills in recent months.<sup>66</sup> Many of the new anti-transgender bathroom bills introduced in 2016 focus specifically on children in schools by restricting the use of school bathrooms and locker rooms based on sex at birth rather than gender identity.<sup>67</sup> Supporters of anti-transgender bathroom bills claim that these bills are necessary to prevent men from entering women's bathrooms to sexually harass or abuse the women using the facilities, but there is no evidence to support these claims. In reality, it is transgender people who disproportionately suffer from discrimination and abuse in public accommodations. Studies have shown that discrimination and harassment in public accommodations is common among transgender people, and this discrimination is linked to negative physical and mental health outcomes.<sup>68</sup> It also negatively impacts transgender people's education, employment, and ability to participate in public life.<sup>69</sup>

***In reality, it is transgender people who disproportionately suffer from discrimination and abuse in public accommodations.***

The Obama Administration has taken a public stance against bills that limit restroom access for transgender Americans. The Department of Justice filed suit against the state of North Carolina, stating that implementation of HB 2 is discriminatory against transgender people and violates Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Violence Against Women Reauthorization Act of 2013.<sup>70</sup> Furthermore, on



May 13, 2016, the Department of Justice and the Department of Education released joint guidance stating that schools receiving federal money may not discriminate against students based on gender identity under Title IX.<sup>71</sup> The guidance explicitly states that both federal agencies consider a student's gender identity as a student's sex for the purposes of enforcing Title IX.<sup>72</sup> As such, schools are obligated to treat students consistent with their gender identity, allow students to participate in sex-segregated activities, and allow them to access sex-segregated bathrooms and locker rooms consistent with their gender identity.<sup>73</sup> While the guidance does not add requirements to applicable law, it explains how the Department of Education and the Department of Justice will determine if schools are compliant with the legal requirements set forth by Title IX.<sup>74</sup> Schools that continue to discriminate against transgender students could expose themselves to litigation and loss of federal funding.<sup>75</sup>

## **UNDERSTANDING THE CURRENT WAVE IN RECENT HISTORICAL PERSPECTIVE**

The current wave of anti-LGBT legislation sweeping many states in the South and Midwest is comprised of: 1) bills that repeal local/municipal sexual orientation and gender identity nondiscrimination laws; 2) bills that affirm a right of religious conservatives to opt out of providing services to LGBT people, same-sex couples, and others who might violate their religious beliefs; and 3) anti-transgender restroom bills. This is at least the third wave of anti-LGBT legislation aimed at overturning municipal nondiscrimination ordinances or preemptively preventing people from accessing a right then being debated in the courts. The first wave involved ballot campaigns to repeal or prevent the passage of sexual orientation nondiscrimination laws. These ballot campaigns occurred from 1974 until the early 2000s.<sup>76</sup> The second wave was the slew of state anti-same-sex marriage laws and

constitutional amendments passed starting in the mid-1990s, and ballot campaigns to ban state recognition of same-sex marriage put forth by anti-gay activists from the early 2000s through 2012.<sup>77,78</sup> Many of these laws and amendments also outlawed more limited forms of partner recognition—domestic partner benefits and registries, and civil unions.<sup>79</sup>

As with previous waves of anti-LGBT legislation, the current wave is being framed as embodying common sense. “No men in women’s bathrooms” read signs in favor of repealing Houston’s gender identity nondiscrimination provision in 2015.<sup>80</sup> In 1977, anti-gay activist Anita Bryant, who successfully pushed the repeal of sexual orientation nondiscrimination laws around the country, said, “If gays are granted rights, next we’ll have to give rights to prostitutes and to people who sleep with St. Bernards and to nail biters.”<sup>81</sup> And from the early 1990s to the present, anti-same-sex marriage activists have stated that “marriage is between one man and one woman.”<sup>82</sup> In fact, the issues involved in these three struggles over nondiscrimination in employment and housing and access to social institutions and public accommodations are much more complex than these allegedly “common sense” framings of the issues convey. These so-called “common sense” claims are not fair, accurate, or compassionate.

## **THE THREAT TO LGBT PEOPLE’S HEALTH**

This new wave of anti-LGBT legislation, and especially the growing trend of health care-focused religious exemption legislation, is problematic for many reasons. First, studies have already shown that LGBT people experience significant physical and mental health disparities,<sup>83</sup> as well as discrimination in accessing health care.<sup>84</sup> Laws that permit health care providers to refuse to treat LGBT patients based on religious objections will only increase the barriers that LGBT people already experience in seeking health care. Second, these laws threaten to undermine the many efforts

ongoing at the state and federal levels to reduce LGBT health disparities. Education and cultural competency training efforts to improve medical and behavioral health care for LGBT people<sup>85</sup> across the country have the support of the American Medical Association, the Association of American Medical Colleges,<sup>86</sup> the American College of Physicians,<sup>87</sup> the American Psychiatric Association, and other organizations. Increasingly health care systems—including the nation’s health centers, the Veterans’ Health Administration, and the Centers for Medicare and Medicaid Services through their Equity Plan and the Meaningful Use incentive program—are promoting the collection of sexual orientation and gender identity data in health care settings.<sup>88</sup> These new religious exemption laws go against the many efforts that are underway to reduce discrimination and improve LGBT health outcomes. They may undermine efforts to encourage more patients to disclose their sexual orientation and gender identity to health care providers.

***Recent religious exemption laws go against the many efforts that are underway to reduce discrimination and improve LGBT health outcomes.***

Supporters of these new laws may equate the provision of health care services with the provision of other services or goods, like wedding cakes. They argue that providers of these services should not have to compromise their religious beliefs by serving LGBT people if those people can find the same services elsewhere. The weakness of that argument is that it protects the interests of individuals who want to decline to provide vital services at the expense of people who are struggling to access these services.<sup>89</sup> Furthermore, there are fundamental differences between this new wave of legislation, which includes a focus on health care, and previous waves of legislation, which were

primarily targeted at marriage equality. Health care providers are specifically trained to provide essential services to improve the health and wellbeing of the people that they serve. As such, it is expected that those who choose to enter into the field of health care are professionally bound to use their considerable expertise and influence to improve the health of all who seek services, regardless of personal convictions. These new laws set a dangerous precedent of allowing health care providers to put their personal beliefs before their professional obligation to “do no harm” by refusing to treat LGBT people.<sup>90</sup> As NeJaime and Siegel demonstrate convincingly in their 2015 Yale Law Journal article, a religious minority individual’s wearing a turban or using peyote does not cause third party harm, and burden of such an accommodation is spread throughout society.<sup>91</sup> In contrast, laws that embolden a health care provider to refuse to provide HIV prevention counseling to a gay man, fertility services to a lesbian couple, or substance use counseling to a transgender person cause very real harm to specific individuals and families because of their membership in a stigmatized minority group. Such practices undermine public health, and in our view violate the right of LGBT individuals to equal protection of the laws.

***Health care providers should not put their personal beliefs before their professional obligation to “do no harm” by refusing to treat LGBT people.***

## MAY 2016 OCR REGULATION PROTECTS AGAINST DISCRIMINATION IN HEALTH CARE

On May 4, 2016, the U.S. Department of Justice announced that HB2, North Carolina's anti-LGBT law, violates the 1964 Civil Rights Act's sex discrimination provision.<sup>92</sup> Close to \$5 billion in federal funding may be at risk if North Carolina does not suspend or repeal the law, according to the Williams Institute at UCLA Law School.<sup>93</sup>

Nine days later, the Office of Civil Rights at the federal Department of Health and Human Services (OCR) published a final rule implementing the nondiscrimination provision of the Affordable Care Act (ACA) under Section 1557. This rule states that discrimination based on gender identity is prohibited in health facilities, programs and activities receiving federal funding, as it constitutes a form of sex discrimination banned by the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. The rule also states that discrimination based on sex stereotyping is prohibited.<sup>94</sup>

***“HHS supports prohibiting sexual orientation discrimination as a matter of policy.”***

***Office of Civil Rights, HHS***

***May 2016***

The OCR nondiscrimination regulation offers potent protections to transgender individuals who experience discrimination in health care. Such discrimination is widespread,<sup>95</sup> and has been shown to be a barrier to accessing preventive, routine health care as well as emergency care.<sup>96</sup> While the rule's coverage of sexual orientation was somewhat less explicit and robust, it could also offer protections for gay, lesbian and bisexual individuals who experience discrimination. In its release accompanying the final rule, OCR stated:

While the final rule does not resolve whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination under Section 1557, the rule makes clear that OCR will evaluate complaints that allege sex discrimination related to an individual's sexual orientation to determine if they involve the sorts of stereotyping that can be addressed under 1557. HHS supports prohibiting sexual orientation discrimination as a matter of policy and will continue to monitor legal developments on this issue.<sup>97</sup>

In the final rule, HHS OCR cited a number of recent Equal Employment Opportunity Commission (EEOC) rulings that “discrimination on the basis of sexual orientation necessarily involves sex-based considerations,”<sup>98</sup> and stated:

For all of these reasons, OCR concludes that Section 1557's prohibition of discrimination on the basis of sex includes, at a minimum, sex discrimination related to an individual's sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes. Accordingly, OCR will evaluate complaints alleging sex discrimination related to an individual's sexual orientation to determine whether they can be addressed under Section 1557. OCR has decided not to resolve in this rule whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination under Section 1557. We anticipate that the law will continue to evolve on this issue, and we will continue to monitor legal developments in this area. We will enforce Section 1557 in light of those developments and will consider issuing further guidance on this subject as appropriate.

In addition to EEOC rulings, a number of federal court rulings have found that sex stereotypes include stereotypical gender roles and the belief that women should only date or marry men, while men should only date or marry women. For instance, in *Terveer v. Billington* a federal court ruled that a gay man experienced sex discrimination because his “sexual orientation is not consistent with [his supervisor's] perception of acceptable gender roles” and because his “orientation as homosexual had removed him from [his supervisor's] preconceived definition of male.”<sup>99,100</sup>

## STEPS NEEDED TO FURTHER PROTECT GAY, LESBIAN, AND BISEXUAL PATIENTS

Given the growing threat posed by state anti-LGBT legislation that targets access to health care, it is essential that the federal government further clarify in the near future that anti-gay, lesbian and bisexual discrimination in health care is also illegal and unacceptable. We encourage LGBT equality advocates and those working to make health care more affirming and equitable for LGBT patients to encourage gay, lesbian, and bisexual patients who experience discrimination in health care to contact these LGBT legal organizations: Lambda Legal<sup>101</sup> and the ACLU LGBT Rights Project.<sup>102</sup> It is also important to inform the LGBT community and health care providers across the country about these new federal nondiscrimination requirements.

***GLB patients who experience discrimination in health care should contact Lambda legal or the ACLU.***

Rep. Joseph Kennedy III (D-MA) and Rep. Bobby Scott (D-VA) introduced an amendment to the federal Religious Freedom Restoration Act (RFRA) on May 18, 2016.<sup>103</sup> The Do No Harm Act would prohibit RFRA exemptions that would cause third-party harm, and would restore the proper balance between religious liberty, on the one hand, and civil and legal rights, on the other, that were intended to be codified and preserved by the original RFRA.<sup>104</sup> If passed, this amendment would help to ensure that individuals are not forced to follow the religious beliefs of others, putting them at risk of discrimination and harm. We encourage Congress to adopt this legislation.

State government leaders across the U.S. can also take steps to reduce anti-LGBT discrimination in health care by passing nondiscrimination legislation that covers public accommodations, including health care. This would remove an important barrier to LGBT people's ability to access the quality care they need and deserve.

Most mainstream health professional associations have taken clear stances in support of LGBT equality and against anti-LGBT in health care and in other domains.<sup>105</sup> It is imperative that these associations speak out against the latest wave of anti-LGBT laws, especially those that target health care. Religious freedom does not include the freedom to discriminate in health care.

## POSTSCRIPT IN THE WAKE OF THE ORLANDO MASSACRE

This issue brief was initially set to be released on June 13, 2016—just one day after the deadliest mass shooting in modern U.S. history, with at least 49 people dead and another 53 wounded.<sup>106</sup> The full significance of this devastating act of violence targeting members of the LGBT community will continue to be debated. However, one thing is quite clear, this massacre did not occur in isolation. Acts of violence and hate are committed against LGBT people every single day—especially against people of color, gay men, and transgender women.<sup>107</sup> The role that discriminatory laws and anti-LGBT political rhetoric play in emboldening some to engage in violence should be acknowledged. Kristen Becker of The Advocate states, “at a Florida dance club, religious- and state-sanctioned hate reached its natural conclusion...this is the trickle-down hate effect.”<sup>108</sup>

As outlined in this brief, lawmakers around the country have spent years pushing anti-LGBT legislation through state legislatures. In 2015, state lawmakers introduced 125 anti-LGBT bills.<sup>109</sup> As of February 2016, more than 175 anti-LGBT bills had already been filed in 32 states.<sup>110</sup> Those same lawmakers have expressed their sympathy for the victims of this tragedy

without acknowledgment of the role their votes, speeches, and signatures played in creating hostile political environments for LGBT communities in their respective states. Governor Pat McCrory, who signed North Carolina’s HB2 into law in March 2016, ordered flags to be lowered and released this statement: “Those who died were innocent victims of an inexcusable act of violence.”<sup>111</sup> Governor Bill Haslam, who signed Tennessee’s HB 1840 into law in April 2016, announced that flags would be flown at half-staff in “memory of victims of violent attack in Orlando.”<sup>112</sup> Marco Rubio rightly condemned the Orlando massacre, even stating that, “we have seen the way radical Islamists have treated gays and lesbians in other countries”<sup>113</sup>, referring to the execution of men accused of homosexual behavior by ISIS.<sup>114</sup> However, Senator Rubio failed to acknowledge his own track record of opposing any attempt to legalize equal treatment for LGBT people and same-sex couples in the United States. For example, Rubio threatened to oppose his own immigration bill if it included protections for bi-national same-sex couples.<sup>115</sup> In a statement to CNN, Rubio said, “if this bill has in it something that gives gay couples immigration rights and so forth, it kills the bill. I’m gone. I’m off it.”<sup>116</sup> Rubio also supports the First Amendment Defense Act, which would allow government employees to use religious liberty as a defense for discriminating against LGBT people.<sup>117</sup> While these leaders’ statements denounce gun violence and terrorism, there is a clear dissonance between these statements of support for the Orlando massacre victims and their families and the active participation of politicians in making states like North Carolina, Tennessee, and Florida less accepting, more discriminatory places for LGBT individuals.

***Marco Rubio threatened to oppose his own immigration bill if it included protections for bi-national same-sex couples.***

Many of the laws outlined in this brief were written, enacted, and enforced in Southern states. Signed into law on March 10, 2016, Florida’s HB 43 expanded the state’s pre-existing religious freedom protections, stating that “churches...or certain individuals may not be required to solemnize any marriage or provide services, accommodations, facilities, goods, or privileges for related purposes if such action would violate sincerely held religious beliefs.”<sup>118</sup> It is in these states where LGBT people bear a disproportionate burden—from a lack of legal protection<sup>119</sup>, the refusal of mental health services<sup>120</sup>, and significant barriers to accessing health care.<sup>121</sup> LGBT Southerners are also more likely to be people of color.<sup>122</sup> Nationwide, LGBT people of color, transgender women, and gay men are at increased risk of violence, especially homicide.<sup>123</sup> Despite this, the struggle continues to maintain spaces that allow people to be and love themselves and one another without fear. Statewide laws that repeal municipal nondiscrimination ordinances or that legalize anti-LGBT discrimination in health care can make LGBT people feel unsafe in public restrooms, in a therapist’s office, or while seeking to access some other basic service. The Orlando mass murder has made many LGBT people feel unsafe in gay bars and nightclubs—institutions created to serve as a refuge from a homophobic world. While enabling discrimination and committing mass violence are two very different things, they both make our community feel unsafe.

Since the enactment of the 1993 RFRA, the concept of religious freedom has been grossly distorted. Religious freedom does not give individuals the right to discriminate against others and cause them harm. Religious freedom can no longer be used as a guise for discriminatory legislation that impacts the emotional and physical wellbeing of LGBT people every day.

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## ACKNOWLEDGEMENTS

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