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# Executive branch actions promoting religious refusal threaten LGBT health care access

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## **In their first few months in office, President Donald Trump**

and Attorney General Jeff Sessions have taken a number of actions, including issuing an executive order, a memorandum, a court brief, and planning documents, that increase the likelihood that lesbian, gay, bisexual, and transgender (LGBT) people will experience discrimination in health care and at the hands of social service providers, private businesses, and government officials. These actions will also likely increase employment discrimination against LGBT people. Combined with the Trump-Pence Administration's systematic rollback of nondiscrimination regulations and interpretations of civil rights laws that provide some legal protections against anti-LGBT discrimination, these moves by the Trump-Pence Administration threaten to undermine progress made in recent years to expand access to culturally competent, affirming health care for LGBT people, and to reduce social discrimination in general.



## Background: State and federal religious refusal legislation

In recent years, a number of states and Congress have considered legislation that could limit the ability of LGBT people to equally access health care, government services, social services, and even employment. While an anti-LGBT law passed in North Carolina in 2016 received a great deal of media attention, evoking boycotts and electoral change that led to repeal of the law, bills also passed in 2016 in Mississippi and Tennessee received less attention, but could prevent LGBT people from accessing health care services.

The religious right has long framed its opposition to abortion, contraception, and sexual orientation nondiscrimination laws as an expression of religious freedom,<sup>1</sup> and framed these policy and cultural changes as a threat to conservatives' freedom of religion.<sup>2</sup> Since religious conservatives' U.S. Supreme Court victory in *Burwell v. Hobby Lobby Stores, Inc.* (2014)—upholding a company's refusal to cover contraception in an employee health plan<sup>3</sup>—and the two pro-same-sex marriage Supreme Court rulings in 2013<sup>4</sup> and 2015,<sup>5</sup> religious conservatives have introduced a slew of state and federal bills that frame refusal to serve LGBT people and/or same-sex couples as the Constitutionally-guaranteed “free exercise” of religion.

While many of these bills would allow small business owners—like wedding planners—to refuse to serve same-sex couples, some “religious exemption” bills have targeted health care access for LGBT people. These bills threaten to exacerbate existing discrimination in health care,<sup>6</sup> and undermine efforts to reduce LGBT health disparities<sup>7</sup> and improve access to culturally competent care.<sup>8</sup>

### State Legislation

Mississippi law HB 1523 allows people to refuse to provide services based on their sincerely held religious belief or moral conviction 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>9</sup> This law allows businesses, individuals, and even government employees to discriminate against LGBT people in a number of ways, such as refusing to provide sexual health care to a gay man, refusing to provide medically necessary gender affirmation treatments to a transgender patient, or denying counseling and fertility services to a lesbian couple, for example.<sup>10</sup> Tennessee law HB 1840 allows therapists and counselors to reject any patient who has “goals, outcomes, or behaviors” that would violate the “sincerely held principles” of the provider.<sup>11</sup>

While Tennessee law HB 1840 is not explicitly anti-LGBT like the Mississippi law, HB 1840 is first and foremost aimed at allowing discrimination against LGBT people. The law 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>12</sup> David Fowler, the president of FACT, testified that transgender students are “abnormal” when speaking in favor of an anti-LGBT bathroom bill in Tennessee.<sup>13</sup> He also filed a lawsuit to challenge the 2015 U.S. Supreme Court decision to legalize same-sex marriage nationwide.<sup>14</sup> The Alliance Defending Freedom, 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>15</sup>

Altogether 10 states have some form of religious refusal legislation that could authorize discrimination against LGBT people.<sup>16</sup> Seven of these 10 states have religious refusal laws that permit state-licensed child welfare agencies to refuse to place children with or provide services to LGBT people and same-sex couples if doing so would conflict with their religious beliefs.<sup>17</sup> For example, Michigan passed a package of three bills in 2015 that allow publicly funded adoption organizations to refuse to serve people without penalty if the organization cites sincerely-held religious beliefs.<sup>18</sup> Two states have religious exemption laws that allow businesses to refuse to serve married same-sex couples, and three allow state and local officials to refuse to marry same-sex couples.<sup>19</sup> Four states—Mississippi, Tennessee, Alabama, and Illinois—have religious refusal laws that allow medical professionals to refuse to serve LGBT people.<sup>20</sup> The laws permitting health care providers to refuse to provide services based on religious beliefs in Alabama and Illinois are more limited in scope compared to the Mississippi and Tennessee laws. The Alabama law allows health care providers to refuse to provide services specifically related to abortion, sterilization, stem cell research, and cloning based on religious beliefs.<sup>21</sup> The Illinois law previously allowed health care providers to refuse to provide services based on religious beliefs, but the law was amended in 2016 such that providers or organizations that refuse to provide services based on religious beliefs must provide patients with referrals to other providers or organizations that will perform the procedures.<sup>22</sup> While the Illinois and Alabama laws may not be as blatantly anti-LGBT compared with the Tennessee and Mississippi laws, it is clear that anti-LGBT religious refusal laws are becoming more and more common in states across the country.

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Several other state legislatures have recently introduced, but not passed, religious refusal legislation. 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>23</sup> In Florida, HB 401 was introduced in 2015. This bill expanded on Florida's existing Religious Freedom Restoration Act (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>24</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 these bills did not pass

through the state legislatures, they are part of the growing trend of anti-LGBT legislation being introduced across the country. More than 100 anti-LGBT bills were introduced in 29 states in 2017.<sup>25</sup>

## Federal Legislation

The First Amendment Defense Act, a bill that may be introduced during the 115th Congress, would also enable anti-LGBT discrimination in health care.<sup>26</sup> As introduced in the last session, the bill would prohibit the federal government from taking “discriminatory action” against individuals or businesses that “on the basis that such person believes or acts in accordance with a religious belief or moral conviction that: (1) marriage is or should be recognized as the union of one man and one woman, or (2) sexual relations are properly reserved to such a marriage.”<sup>27</sup> The bill has the support of President Trump, Vice President Pence, Attorney General Sessions,<sup>28</sup> and the Republican Party.<sup>29</sup> This bill would allow people and businesses to refuse to serve or otherwise discriminate against people based on the religious belief that marriage is only between a man and a woman and that sexual relations are properly reserved to such a marriage. This would authorize widespread discrimination by individuals, service providers, and businesses against same-sex couples and LGBT people. It could also authorize discrimination against single parents, children of single parents, and unmarried heterosexual couples.

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The Attorney General’s October 2017 memo authorizes faith-based health and service providers to discriminate against LGBT people in services and hiring.

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## HHS Strategic Plan

In September 2017, the U.S. Department of Health and Human Services released a Draft Strategic Plan FY 2018–2022.<sup>30</sup> The plan makes extensive mention of faith and faith-based organizations. In contrast to the last HHS Draft Strategic Plan for FY 2014–2018, which had several references to LGBT health disparities, the current draft strategic plan makes no mention of LGBT health.<sup>31</sup> Faith-based organizations can play an important role in health care. For example, Black churches have played a major role in promoting HIV screening and raising awareness of HIV. However, many of the specific points regarding faith-based organizations included in the Draft Strategic Plan echo religious refusal legislation described above, such as the directives that HHS will:

- “Vigorously enforce laws, regulations, and other authorities, especially Executive Order 13798 of May 4, 2017, Promoting Free Speech and Religious Liberty, to reduce burdens on the exercise of religious and moral convictions, promote equal and nondiscriminatory participation by faith-based organizations in HHS-funded or conducted activities, and remove barriers to the full and active engagement of faith-based organizations in the work of HHS through targeted outreach, education, and capacity building;”

- “Implement Executive Order 13798 of May 4, 2017, Promoting Free Speech and Religious Liberty, and identify and remove barriers to, or burdens imposed on, the exercise of religious beliefs and/or moral convictions by persons or organizations partnering with, or served by HHS, and affirmatively accommodate such beliefs and convictions, to ensure full and active engagement of persons of faith or moral convictions and of faith-based organizations in the work of HHS;”
- “Promote equal and nondiscriminatory participation by persons of faith or moral conviction and by faith-based organizations in HHS-funded, HHS-regulated, and/or HHS-conducted activities, including through targeted outreach, education, and capacity building.”

The language of the Draft Strategic Plan FY 2018–2022, namely that HHS will “vigorously enforce” and “affirmatively accommodate” religious beliefs, closely mirrors the language of state and federal religious exemption legislation that is being used to discriminate against LGBT people under the guise of religious freedom.

The Draft Strategic Plan FY 2018–2022 states that HHS should “strengthen partnerships between...faith-based and community organizations to educate and train the workforce to provide high-quality, culturally competent care.” We believe that this is important work, and that faith-based organizations can play a key role in providing cultural competency education. However, given that the motivation for much of the religious refusal legislation and executive branch actions is opposition to legal equality for same-sex couples and LGBT people, an expansion of the role of faith-based service providers in health care and training of health care, elder care, and other service providers is a cause for concern, especially in the absence of sexual orientation and gender identity nondiscrimination regulations and laws at the federal level.

## Attorney General Sessions’s Religious Liberty Memo

On October 6, 2017 Attorney General Jeff Sessions issued a “Memorandum for all executive departments and agencies.” The memo implements an executive order issued by President Trump in May 2017.<sup>32</sup> In the memo, Attorney General Sessions states very strongly that “free exercise” of religion, guaranteed by the First Amendment to the U.S. Constitution, protects actions far beyond worship in a church, synagogue, mosque, temple, or other house of worship:

Religious liberty is not merely a right to personal religious beliefs or even to worship in a sacred place. It also encompasses religious observance and practice. Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law. Therefore, to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity, including employment, contracting, and programming.<sup>33</sup>

In the memo, Sessions argues that the Free Exercise Clause “protects the right to perform or abstain from performing certain physical acts in accordance with one’s beliefs.” This protection “encompass[es] aspects of observance and practice, whether or not central to, or required by, a particular religious faith.”

These freedoms apply to “private associations, and even businesses” as well as individuals and religious organizations.<sup>34</sup> Within the memo, the sections of greatest concern to LGBT people include the following:

...individuals and organizations do not give up their religious-liberty protections by providing or receiving social services, education, or health care; by seeking to earn or earning a living; by employing others to do the same; by receiving government grants and contracts; or by otherwise interacting with federal, state, or local governments.<sup>35</sup>

This section, in the fourth of 20 principles outlined in the memo, ostensibly protects the right of individuals and organizations to discriminate against LGBT people and same-sex couples in health care and social services, including health care and services funded by government contracts. It could also be seen as protecting the right of government employees in a wide range of fields to refuse service to LGBT people, same-sex couples, unmarried heterosexual couples, and single-parent families.

At a number of other points in the memo, Attorney General Sessions elaborates on this point:

Government may not exclude religious organizations as such from secular aid programs. RFRA [The Religious Freedom Restoration Act of 1993] prohibits the federal government from substantially burdening a person’s exercise of religion, unless the federal government demonstrates that application of such burden to the religious adherent is the least restrictive means of achieving a compelling government interest. RFRA applies to all actions by federal administrative agencies, including rulemaking, adjudication or other enforcement actions, and grant or contract distribution and administration.<sup>36</sup>

The Trump Administration, in an *amicus curiae* (friend of the court) brief submitted in support of Masterpiece Cake Shop in Denver, Colorado—which refused to make a wedding cake for a gay couple, in violation of Colorado’s state nondiscrimination law—stated that while the state has a “fundamental, overriding interest” in eliminating racial discrimination, “The same cannot be said for opposition to same-sex marriage. The Court has not similarly held that classifications based on sexual orientation are subject to strict scrutiny or that eradicating private individuals’ opposition to same-sex marriage is a uniquely compelling interest.”<sup>37</sup> Clearly the Trump Administration does not consider prohibiting anti-gay or anti-LGBT discrimination to be a compelling government interest. In the wedding cake case, it is clearly siding with a business that discriminated in providing a public accommodation to a gay couple based on religious belief. It appears from the October 2017 memo that it would also support discrimination against LGBT people by a religious organization providing a social service or health care with federal funds.

Citing the 2014 U.S Supreme Court ruling in the Hobby Lobby case, Sessions states that private businesses can deny contraception coverage to their employees if this violates their “religious precepts.”<sup>38</sup> By this logic, a company could also refuse to provide sexual health care, such as an HIV or STI test, or pre-exposure prophylaxis for HIV prevention, to a gay man or to anyone else engaging in sex outside the context of heterosexual marriage. It could also refuse to assist a lesbian couple with fertility assistance, or deny a transgender employee access to gender-affirming health care.



After noting that, under the 1964 Civil Rights Act, RFRA, and the Free Exercise Clause of the Constitution, religious organizations “may choose to employ only persons whose beliefs and conduct are consistent with the organization’s religious precepts,”<sup>39</sup> Sessions states that religious organizations should be able to accept federal government grants and discriminate in hiring for programs funded by those grants.

[T]he federal government may not condition receipt of a federal grant or contract on the effective relinquishment of a religious organization’s hiring exemptions or attributes of its religious character. Religious organizations are entitled to compete on equal footing for federal financial assistance used to support government programs. Such organizations generally may not be required to alter their religious character to participate in a government program...nor effectively to relinquish their federal statutory protections for religious hiring decisions.<sup>40</sup>

The October 6, 2017 Sessions memo authorizes faith-based organizations to discriminate in hiring based on their religious beliefs, even in programming paid for by U.S. tax dollars and traditionally provided by secular non-profit organizations. The May 2017 Trump Executive Order, as interpreted and implemented through Sessions’s October 2017 memorandum, clearly authorizes and encourages anti-LGBT discrimination in health care and access to other services, at the hands of both private nonprofits and government agencies. Religious organizations could receive grants to provide various forms of health care and social services from the U.S. Department of Health and Human Services and other agencies, even if they discriminate in the provision of these services. Because there is, according to the Trump-Pence Administration, no compelling government interest in prohibiting discrimination against LGBT people and same-sex couples, even government employees who object to homosexuality, bisexuality, and/or being transgender could discriminate in the provision of taxpayer-funded health care and social services.

## **The HHS Request for Information implementing the Sessions religious liberty memo**

A Request for Information (RFI) issued by the Department of Health and Human Services on October 25, 2017 applies the October 6, 2017 DOJ memo in HHS programming and funding. The RFI reiterated the Administration’s view that religious organizations could receive funding from HHS to provide health care and other services even if they discriminate in providing care and services and in hiring based on their religious views. The Administration would allow government-funded organizations to refuse to hire someone who does not act in accordance with particular religious beliefs. This could include someone who doesn’t regularly attend religious services, is married to a person of the same sex, undergoes a gender transition, gets divorced, uses birth control, or is pregnant and unmarried. Employment is a very basic social determinant of health. People who can’t find work struggle to afford basic needs such as food and shelter. All of this can affect an individual’s health. The Department should reject such efforts. HHS grantees and contractors should not be allowed to discriminate against those whom they serve and employ.

## **The Trump-Pence Administration’s amicus curiae brief in the Masterpiece Cake Shop case before the U.S. Supreme Court**

A U.S. Supreme Court ruling in favor of Masterpiece Cake Shop would carve out a First Amendment exception to nondiscrimination law. The case involves a baker who refused to make a wedding cake for a gay couple in violation of Colorado’s state nondiscrimination law, which includes sexual orientation. The Trump Administration’s amicus curiae brief argues that, “just as the government may not compel the dissemination of expression, it equally may not compel the creation of expression.”<sup>41</sup> The brief goes on to justify, in great detail, why baking a cake for a same-sex wedding is “a personal endorsement and participation in [a] ceremony and relationship.” The Trump Administration’s argument extends further to include other businesses: “a jewelry designer who creates custom wedding rings for a couple could be fairly characterized as an active participant in the wedding celebration, as he creates and enables a key symbolic element of the ceremony.”<sup>42</sup> If bakers are granted the right to discriminate against LGBT customers, other professions will likely follow suit, applying this same logic to their own businesses.

An ever-growing list of exceptions to nondiscrimination law has enormous repercussions for the ability of LGBT people to access a wide range of public accommodations, businesses, and services, including health care. The arguments set forth in the Trump Administration’s amicus brief are based on the notion that Colorado’s public accommodations law is obligating Masterpiece Bake Shop to participate in an “expressive event” by baking a wedding cake for a same-sex couple. However, this case is not simply about a wedding cake. Rather, Masterpiece Cake Shop’s refusal to serve its customers is about whether religious bigotry will be allowed to take precedent over existing nondiscrimination statutes.

## **The Trump-Pence Administration’s dismantling of Obama-era nondiscrimination regulations and recent jurisprudence**

In May 2016, the U.S. Department of Health and Human Services Office of Civil Rights (OCR) published a final rule implementing Section 1557, the Affordable Care Act’s primary nondiscrimination provision.<sup>43</sup> The 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 Title IX of the Education Amendments of 1972. While the rule does not explicitly include sexual orientation, it does state that discrimination based on sex stereotyping is prohibited, and that some forms of anti-gay/lesbian/bisexual discrimination may be classified as a form of sex stereotyping. While this rule had major potential to reduce discrimination in health care for transgender people and, to a lesser extent, gay, lesbian and bisexual people, it was enjoined nationwide by a federal district court judge on December 31, 2016. The order prohibited the Department of Health and Human Services from enforcing the nondiscrimination rule’s gender identity component.<sup>44</sup>

The 2016 Republican Platform took a strong stance against interpreting sex discrimination under Title IX to encompass anti-gay and anti-transgender discrimination and sex stereotyping. It also opposed gender identity public accommodation nondiscrimination laws.<sup>45</sup> In May 2017, the U.S. Department of Justice (DOJ), under the leadership of Attorney General Jeff Sessions, requested that the federal courts “remand this matter to HHS and stay this litigation [seeking to overturn the December 2016 injunction blocking the rule] pending the completion of rulemaking proceedings.”<sup>46</sup> The DOJ sought “the opportunity to reconsider the regulation at issue,” including “the reasonableness, the necessity, and the efficacy” of the Section 1557 nondiscrimination regulation related to gender identity.<sup>47</sup> Clearly the Trump Administration and the Department of Justice are seeking to reverse this important Obama-era nondiscrimination regulation.

The Trump Administration has taken other moves to oppose and reverse nondiscrimination protections for transgender people. In February 2017, the DOJ and the Department of Education notified the U.S. Supreme Court that they were ordering schools across the U.S. to ignore 2016 guidance issued by President Obama’s Department of Justice and Department of Education stating that discrimination on the basis of gender identity in schools is prohibited under Title IX.<sup>48,49</sup> In August 2017, President Trump issued a memo barring the U.S. military from enlisting transgender troops, banning funding for gender affirmation surgery, and giving Defense Secretary General James Mattis six months to determine how to treat transgender service members already serving in the military. The move was partially blocked by a federal court in October 2017.<sup>50</sup>

In October 2017, Attorney General Sessions reversed long-standing DOJ policy of interpreting Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination, to also prohibit gender identity-based discrimination.<sup>51</sup> A number of federal court rulings and Equal Employment Opportunity Commission rulings have found that Title VII’s prohibition of sex discrimination encompasses some forms of gender identity and sexual orientation discrimination.<sup>52</sup> In 2014, then Attorney General Eric Holder stated in a memorandum that the DOJ would interpret Title VII to encompass gender identity discrimination.<sup>53</sup>

## Legal and Constitutional concerns

The recent wave of religious refusal executive branch actions and legislation, done in response to the *Windsor* and *Obergefell* U.S. Supreme Court rulings upholding the right of same-sex couples to marry, allows for discrimination

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Attorney General Sessions states that religious organizations should be able to discriminate in hiring and services for programs funded by federal grants.

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against LGBT people under the guise of “free exercise” of religion. Unlike other free exercise laws—such as the Religious Freedom Restoration Act of 1993, which protected American Indians’ right to ritually use peyote—these religious refusal laws and executive branch actions cause real harm to third parties. As Douglas NeJaime and Reva Siegel point out in *The Yale Law Review*, these laws inflict both material harm and dignitary harm—harms that exacerbate stigma and reduce social status—on other citizens.<sup>54</sup>

The U.S. Constitution bars HHS from crafting “affirmative” accommodations within its programs if the accommodations would harm program beneficiaries. The Constitution dictates that “an accommodation must be measured so that it does not override other significant interests,”<sup>55</sup> “impose unjustified burdens on other[s],”<sup>56</sup> or have a “detrimental effect on any third party.”<sup>57</sup>

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Government-sanctioned and -funded discrimination against LGBT people and same-sex couples violates the due process of law and equal protection of the laws guaranteed by our Constitution.

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Religion has been invoked to cause third party harm by denying LGBT people access to health care. For example, LGBT individuals have been denied appropriate mental health services and counseling<sup>58</sup>; a newborn was denied care because her parents were lesbians<sup>59</sup>; transgender patients have been denied transition-related medical care<sup>60</sup>; and an individual was denied his HIV medication,<sup>61</sup> all because of someone else’s religious beliefs. LGBT people already experience widespread discrimination in health care,<sup>62</sup> and this discrimination acts as a barrier to seeking necessary routine and emergency care.<sup>63</sup> All of this contributes to the health disparities that disproportionately burden LGBT people.<sup>64</sup> A health care provider’s religious beliefs should never determine the care a patient receives. In order to make meaningful progress in reducing these health disparities to “enhance and protect the health and well-being of all Americans,” as is the mission of the U.S. Department of Health and Human Services, it is essential that anti-LGBT discrimination in health care be addressed explicitly.

In addition to causing third party harm, the recent wave of anti-LGBT religious refusal legislation and actions also violates the Establishment Clause of the First Amendment. Our nation’s courts have ruled that, under this clause, the government is prohibited from passing laws that favor one religion over another, or laws that favor religion over non-religion.<sup>65</sup> In the *Estate of Thornton v. Caldor* ruling, the U.S. Supreme Court struck down a Connecticut statute which gave workers the absolute right to refuse to work on the Sabbath. The U.S. Supreme Court ruled that this law violated the Establishment Clause because it impermissibly advanced religion by requiring employers to conform business practices without exception to accommodate a particular religious belief that was not even practiced by all employees.<sup>66</sup>

The recent wave of anti-LGBT religious refusal legislation and actions also violates the Establishment Clause by impermissibly advancing religion,

and burdening LGBT people by forcing them to accommodate certain religious beliefs or practices to their personal detriment. A group of legal scholars from several Mississippi law schools and from Columbia University School of Law wrote, regarding Mississippi's HB 1523, that "HB 1523 violates the Establishment Clause by impermissibly accommodating religion in a way that harms third parties...the law strips Mississippians of applicable antidiscrimination protections in order to accommodate the preferences of religious individuals and institutions."<sup>67</sup> The legal scholars go on to say that the law grants "public and private actors broad immunities that allow them to discriminate against Mississippians based on a specific set of religious beliefs...although [the beliefs] are far from universal, even among religious individuals or denominations."<sup>68</sup> Anti-LGBT religious refusal laws violate the Establishment Clause by advancing certain religious beliefs and practices in a way that harms those who do not have the same religious beliefs.

In addition to violating the Establishment Clause of the First Amendment to the U.S. Constitution, government-sanctioned and -funded discrimination against LGBT people, same-sex couples, and potentially others, such as unmarried single mothers, violates the due process provisions of the Fifth and Fourteenth Amendments, and violates the equal protection provision of the Fourteenth amendment. The Fifth Amendment states, "No person shall be...deprived of life, liberty, or property, without due process of law..."<sup>69</sup> The Fourteenth Amendment states:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>70</sup>

Several important U.S. Supreme Court cases have found discriminatory laws to violate the equal protection and due process rights of gay, lesbian, and bisexual people. In *Romer v. Evans* (1996) the Court ruled against a Colorado state constitutional amendment that prevented the state from passing legislation or adopting policies that prohibited discrimination based on sexual orientation, and that overturned existing municipal nondiscrimination statutes.<sup>71</sup> Writing for the majority, Justice Anthony Kennedy ruled that Colorado's Amendment 2, passed by a majority of voters in a 1992 ballot campaign, violated the equal protection clause of U.S. Constitution. The Court ruled that Amendment 2 was not motivated by a rational state interest, but rather by "animus" toward gay men, lesbians, and bisexual people. The Court ruled that Amendment 2 singled out homosexual and bisexual persons, imposing harm by denying them the right to seek and receive specific legal protection from discrimination. "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."<sup>72</sup>

The two landmark marriage equality decisions, *United States v. Windsor* (2013) and *Obergefell v. Hodges* (2015), both appealed to due process and equal protection principles in striking down federal nonrecognition of same-sex marriages, and state nonrecognition, respectively. In *Windsor*, Justice Kennedy, writing for the majority, found that the federal nonrecognition provision of the 1996 Defense of Marriage Act violated the equal liberty of persons protected by the Fifth Amendment's due process and equal protection principles.<sup>73</sup> In *Obergefell*, Justice Kennedy, writing for the majority, ruled that the right of same-sex couples to marry is guaranteed by the equal protection and due process clauses of the Fourteenth Amendment.<sup>74</sup>



## Conclusion

It is important that language in the Attorney General's religious liberty memo regarding faith-based organizations and religious beliefs not be interpreted to mean that those providing health care and other services with HHS funding can discriminate against LGBT people or same-sex couples, or to refuse to provide care to them based on religious beliefs. Free exercise of religion does not include the right to discriminate against others. Instead, discrimination on the basis of sexual orientation and gender identity in health care should be explicitly prohibited by HHS regulation. It is important that all people be able to access health care and related services. Given the proliferation of religious refusal laws around the country, the U.S. government must underscore the importance of ensuring that all people be able to access health care and related services. "[L]iberty and justice for all" means "all," not only heterosexual and non-transgender people. Organizations that would deny services to LGBT people or same-sex couples, or that would refuse to hire LGBT people to provide health and human services that are not of a religious nature, should not be able to utilize HHS funding in order to do so.

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Free exercise of religion does not include the right to discriminate against others. Instead, discrimination on the basis of sexual orientation and gender identity in health care should be explicitly prohibited by HHS regulation.

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The focus of HHS programs should be to assist individuals in need of critical services and support by increasing access to health care, supporting individual decision making and informed consent, and prohibiting discrimination in the provision of human services. Given the significant threat posed to the health and well-being of millions of vulnerable individuals, as well as the lack of any statutory authority for doing so, HHS should abandon this attempt to allow providers, health plans, or other entities to be able to use religion to engage in taxpayer-funded discrimination. Instead, we urge HHS to turn its focus to addressing health disparities and ensuring equal access to services regardless of race, color, national origin, religion, sex, gender identity, sexual orientation, age, or disability. Religious freedom does not include the freedom to discriminate and cause harm to others by denying basic services we all need to live—including health care. We should all oppose executive branch actions and laws that enable and authorize discrimination in health care against LGBT people.

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