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“All We Want is Equality”

Religious Exemptions and Discrimination against LGBT People
in the United States

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in the United States**

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Summary

All anybody is trying to do is live their lives and be given the service, be treated with respect as anyone else is treated. All we want is equality.

—Petra E., Biloxi, MS, October 4, 2017

Over the past decade, lesbian, gay, bisexual and transgender (LGBT) people have made significant legal and political gains in the United States, including the freedom to marry. Despite this progress, federal law does not expressly prohibit discrimination based on sexual orientation and gender identity in fields like employment, housing, and access to services, and fewer than half of the states offer explicit protections for LGBT people at the state level. Without these protections, LGBT people across the United States lack clear recourse and redress when they are fired, evicted, or refused service because of their sexual orientation or gender identity.

Against this backdrop of legal vulnerability, lawmakers who oppose marriage for same-sex couples and recent moves to advance transgender equality have led an anti-LGBT charge, pushing for, and often succeeding in getting, new laws that carve out religious exemptions for individuals who claim that compliance with particular laws interferes with their religious or moral beliefs. While LGBT equality is not the only area where exemptions have been debated—particularly as lawmakers have sought to substantially broaden exemptions related to sexual and reproductive healthcare—this report specifically examines a worrying wave of exemptions being introduced to blunt the recognition of LGBT rights across the United States.

The freedom of religion, as well as nondiscrimination, is a significant rights issue, and it is important that governments do not unnecessarily burden the exercise of religious conscience. This is especially important to minority religious groups, whose practices are all too easily trampled on by laws and policies enacted by majorities. But when exemptions to laws to accommodate religious beliefs or practices impinge on the rights of others or core societal values like nondiscrimination, lawmakers should proceed with caution.

Proponents of these laws argue that they properly balance religious freedom with the rights of LGBT individuals. In fact, with few exceptions, the laws as drafted create blanket

exemptions for religious believers to discriminate with no consideration of or even mechanism for consideration of the harms and burdens on others. Because of their narrow focus on the objector, the laws provide little protection for the rights, well-being, or dignity of those who are turned away.

Statements made by legislative supporters of the laws, and in some cases the content of the laws themselves, moreover, make clear that they aim to push back against recent gains toward LGBT equality and to dilute the rights of LGBT people to secure protection from invidious discrimination.

They send a signal that the state governments enacting them accept and even embrace the dangerous and harmful notion that discrimination against LGBT people is a legitimate demand of both conscience and religion. Particularly in states that lack any underlying laws prohibiting discrimination against LGBT people, many of the laws are not “exemptions” so much as a license to discriminate.

In recent years and mostly since 2015, when the US Supreme Court ruled in favor of marriage equality, numerous states have considered and at least eight US states have enacted new laws that permit people to infringe on the rights of LGBT individuals and their families to the extent they believe that discriminating against them is necessary to uphold their own religious or moral beliefs. In 2018, lawmakers in at least six other states will consider similar legislation.

These laws and bills vary in scope. As has been widely publicized, some would permit people to refuse to participate in same-sex wedding ceremonies or to provide goods and services related to such weddings. Others, less widely publicized, would permit child welfare agencies, physical and mental health providers, businesses that serve the public, and other actors to refuse service to LGBT people and other groups. Such legislation immediately endangers LGBT rights. By allowing people to elevate their prejudices above fairness and equality, it also threatens the broader principle that people should not be refused goods and services solely because of who they are.

Together, the failure of most states to enact nondiscrimination protections and the growing number of religious exemption laws leave many LGBT people with little recourse when they encounter discrimination. While these exemptions are almost always couched in the

language of religious freedom or religious liberty, they directly and indirectly harm LGBT people in a variety of ways.

Some laws enable and embolden businesses and service providers to refuse to serve LGBT people, compelling LGBT people to invest additional time, money, and energy to find willing providers; others simply give up on obtaining the goods or services they need. More insidiously, they give LGBT people reason to expect discrimination before it even occurs, and to take extra precautions or avoid scenarios where they might face hostility out of self-preservation.

Such laws also threaten the basic dignity of LGBT people, sending a clear message that their rights and well-being are not valued and are contingent on the goodwill of others. Our interviewees explained that, by enacting religious exemptions to blunt the advancement of LGBT equality, lawmakers sent a powerful signal that they were unequal or unvalued in their community.

Brandiilene Mangum-Dear, a lesbian pastor in Mississippi, described that harm in these words: “We’re not being melodramatic. You’re being treated with disrespect, as a second-class citizen—not even a citizen, an outsider. And after a while, that begins to tear a person down, to hurt them emotionally and spiritually. Rejection is hard for everyone, and we get it over and over.”

This report documents how religiously motivated discrimination against LGBT people can inflict real harm and why state endorsement of this discrimination is dangerous. From August 2017 to January 2018, researchers interviewed 112 LGBT people, service providers, and advocates, primarily in states that have enacted religious exemptions in recent years, about the discrimination that LGBT people have faced because of an absence of comprehensive non-discrimination legislation and the passage of legislation that provides for exemptions based on religious or moral beliefs.

The results of this research indicate that the laws already enacted in eight states and the laws still under consideration in many more do not strike a proper balance between the freedom of religion and the equal rights of LGBT people under the law. And in fact, few if any of these laws even represent a serious attempt to do that. Lawmakers at the federal, state, and local level should work to ensure that LGBT people are protected from

discrimination in employment, education, housing, healthcare, and public accommodations, and should repeal religious exemption laws that give government support to those who would discriminate based on their religious or moral beliefs.

Methodology

Human Rights Watch conducted the research for this report between August 2017 and January 2018. To identify interviewees, researchers conducted outreach through national and state LGBT groups, legal advocates, and service providers who circulated information about the project to their networks. The outreach focused on eight states where statewide exemptions affecting LGBT people had been legislatively enacted at the time the research began: Alabama, Michigan, Mississippi, North Dakota, South Dakota, Tennessee, Texas, and Virginia. Researchers conducted a total of 112 interviews, including 30 individuals who were affected by discrimination and 82 advocates and providers working with affected individuals.

Interviews were primarily conducted by telephone due to the geographic dispersion of the interviewees for the project. Interviews were conducted in person in Mississippi in November 2017, Tennessee in December 2017, and Michigan, Mississippi, and Tennessee in January 2018. No compensation was paid to interviewees. Researchers obtained oral informed consent from interviewees, and notified interviewees why Human Rights Watch was conducting the research and how it would use their accounts, that they did not need to answer any questions, and that they could stop the interview at any time. Interviewees were given the option of using pseudonyms in published materials for the project; where pseudonyms are used in this report, that is reflected in the footnote citation.

I. Background: Progress and Backlash

On June 26, 2015, the US Supreme Court issued its decision in *Obergefell v. Hodges*, which invalidated bans on marriage for same-sex couples across the United States.¹ As marriage equality became a reality, first in individual states and then nationally, lawmakers proposed allowing those with religious or moral objections to refuse or decline to provide a range of goods and services to same-sex couples.

Some of these proposed bills have pertained specifically to wedding-related services, for example, bakers, caterers, florists, calligraphers, photographers, videographers, and venues. Other bills have been far broader, prohibiting the government from denying funds or contracts to organizations that discriminate based on religious (and in some cases “moral”) beliefs in the provision of adoption and foster care services, healthcare, and housing. While many of the bills stalled in state legislatures, at time of writing, at least eight states have enacted them into law and two similar pieces of legislation—the First Amendment Defense Act and the Child Welfare Provider Inclusion Act—are pending in Congress. In the first weeks of the 2018 legislative session, lawmakers were considering similar bills in at least six other states.²

The recent drive for religious exemptions is not born of a neutral concern with religious liberty, but is largely the product of resistance to recent gains in LGBT equality across the United States. The public and legislative debate around these bills has focused on LGBT people exercising their rights, and objections to same-sex marriage, same-sex parenting, same-sex relationships, and recognizing the gender identity of transgender individuals. Proponents of these exemptions have not incorporated protections that would ensure they are not used to discriminate against LGBT people at risk of discrimination. While some of these laws specify that they do not permit discrimination based on race, ethnicity, or national origin, none protect individuals from discrimination based on religion, sex, disability, sexual orientation, gender identity, and other characteristics.³

¹ *Obergefell v. Hodges*, 576 U.S. ____ (2015).

² For a list of religious exemptions under consideration in 2018, see Freedom for All Americans, “Legislative Tracker: Religious Refusal Bills,” <https://www.freedomforallamericans.org/2018-legislative-tracker/legislative-tracker-religious-refusal-bills> (accessed February 6, 2018).

³ See, e.g., South Dakota Senate Bill 149, 2017, <http://www.sdlegislature.gov/docs/legsession/2017/bills/sb149p.htm> (accessed November 22, 2017) (providing that “[n]o provision of this Act may be construed to allow a child-placement agency

When they are carefully designed, religious exemptions can play a valuable role in safeguarding the freedom of religious exercise and belief. The laws that states have introduced in response to recent advances towards LGBT equality, however, tend to tip the scales much too far in one direction, often with complete disregard for the very real harm they are likely to inflict. As this report describes, they are born of hostility to a marginalized group, and display little regard for the rights of those who are turned away. These laws undermine the central principle of non-discrimination protections, deliberately embracing rather than pushing back against the denial of goods and services to individuals simply because of their identity or the services they need. In short, they give license to discriminate.

Addressing Discrimination on the Basis of Sexual Orientation and Gender Identity

Despite gains in LGBT equality in recent years, discrimination against LGBT people remains commonplace in the United States. A survey conducted by the Center for American Progress in January 2017 found that one in four LGBT respondents had experienced discrimination based on sexual orientation or gender identity in 2016.⁴ In an amicus brief filed in late 2017, LGBT organization Lambda Legal noted it had received nearly a thousand reports of discrimination against LGBT people in public accommodations, including in reproductive services, child care, medical services, retail and service establishments, hotels, restaurants, recreational facilities, homeless shelters, transportation services, and funeral services, from 2008 to 2017.⁵

A growing number of US states have sought to address these problems by prohibiting discrimination based on sexual orientation and gender identity in various fields. Evidence suggests that these protections make a difference by deterring discrimination and enabling LGBT people to seek redress when they are discriminated against. Studies

to decline to provide a service on the basis of a person's race, ethnicity, or national origin"); Texas House Bill 3859, 2017, sec. 1, <https://legiscan.com/TX/text/HB3859/id/1622312/Texas-2017-HB3859-Enrolled.html> (accessed November 22, 2017) (providing that "[t]his chapter may not be construed to allow a child welfare services provider to decline to provide, facilitate, or refer a person for child welfare services on the basis of that person's race, ethnicity, or national origin").

⁴ Sejal Singh & Laura E. Durso, "Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways," Center for American Progress, May 2, 2017, <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways> (accessed December 31, 2017).

⁵ Brief of Lambda Legal Defense and Education Fund, Inc. & Family Equality Council, et al. as Amici Curiae Supporting Respondents, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 (U.S. 2017).

suggest that awareness of laws affecting lesbian and gay people is higher and discrimination against lesbian and gay people is lower in municipalities that have inclusive protections in place.⁶ LGBT people take advantage of these protections; available data from states with inclusive protections show that LGBT people file complaints and seek redress for discrimination in employment, housing, and public accommodations at comparable rates to victims of race and sex discrimination.⁷

Nonetheless, people in most US states lack these protections, as neither Congress nor most state legislatures have expressly prohibited discrimination against LGBT people.⁸ At the beginning of 2018, only 19 states and the District of Columbia had explicitly prohibited discrimination based on sexual orientation and gender identity in employment, housing, and public accommodations.⁹ In three other states, narrower protections exist. New Hampshire and Wisconsin prohibit discrimination in employment, housing, and

⁶ Laura G. Barron & Michelle Hebl, “The Force of Law: The Effects of Sexual Orientation Antidiscrimination Legislation on Interpersonal Discrimination in Employment,” *Psychology, Public Policy, and Law*, Vol. 19(2), May 2013, pp. 191-205.

⁷ William B. Rubenstein, “Do Gay Rights Laws Matter? An Empirical Assessment,” *Southern California Law Review*, Vol. 75 (2000), p. 65-120; Christy Mallory & Brad Sears, “Evidence of Employment Discrimination Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008-2014,” Williams Institute, UCLA School of Law, October 2015, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Employment-Discrimination-Complaints-2008-2014.pdf> (accessed January 16, 2018); Christy Mallory & Brad Sears, “Evidence of Housing Discrimination Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008-2014,” Williams Institute, UCLA School of Law February 2016, <https://williamsinstitute.law.ucla.edu/research/discrimination/evidence-of-housing-discrimination-based-on-sexual-orientation-and-gender-identity-an-analysis-of-complaints-filed-with-state-enforcement-agencies-2008-2014> (accessed January 16, 2018); Christy Mallory & Brad Sears, “Evidence Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008-2014,” Williams Institute, UCLA School of Law February 2016, <https://williamsinstitute.law.ucla.edu/research/discrimination/evidence-of-discrimination-in-public-accommodations-based-on-sexual-orientation-and-gender-identity-an-analysis-of-complaints-filed-with-state-enforcement-agencies-2008-2014> (accessed January 16, 2018).

⁸ The Equal Employment Opportunity Commission (EEOC) has found that Title VII’s prohibition on discrimination “because of ... sex” includes discrimination because of a person’s sexual orientation or gender identity. *Macy v. Holder*, No. 0120120821 (EEOC Apr. 20, 2012); *Baldwin v. Foxx*, No. 0120133080 (EEOC July 15, 2015). Some federal courts have agreed, holding that employment discrimination based on sexual orientation and/or gender identity are not permitted under federal law. See, e.g., *Hively v. Ivy Tech Community College*, No. 15-1720 (7th Cir., Apr. 4, 2017); EEOC, “Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII,” https://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm (accessed January 2, 2018). In 2017, the Department of Justice announced that it disagreed with the EEOC and that Title VII does not cover discrimination based on sexual orientation or gender identity. Ryan Thoreson, “US Justice Department Looks to Curtail LGBT Protections,” September 13, 2017, <https://www.hrw.org/news/2017/09/13/us-justice-department-looks-curtail-lgbt-protections> (accessed November 29, 2017). At time of writing, the scope of Title VII is being actively litigated in multiple federal courts, with the Supreme Court declining to hear a case that would resolve the issue. Adam Liptak, “Supreme Court Won’t Hear Case on Bias Against Gay Workers,” *New York Times*, December 11, 2017, <https://www.nytimes.com/2017/12/11/us/politics/supreme-court-gay-workers-bias-case.html> (accessed December 31, 2017).

⁹ Movement Advancement Project, “Non-Discrimination Laws,” http://www.lgbtmap.org/equality-maps/non_discrimination_laws (accessed November 29, 2017).

publications based on sexual orientation, but do not prohibit discrimination based on gender identity.¹⁰ Utah prohibits discrimination on the basis of sexual orientation and gender identity in employment and housing, but not public accommodations.¹¹

With these laws, states have recognized that there is an urgent need to combat discrimination that denies people access to goods and services because of their sexual orientation or gender identity. The enactment of religious exemption laws bucks this trend, signaling a broad acceptance and even an encouragement of service providers who would discriminate against LGBT individuals.

Advances and Struggles in LGBT Equality

As public attitudes across the United States have become more favorable toward LGBT equality in recent years, LGBT people have won significant gains. The Supreme Court's decision in *Obergefell*, which recognized that same-sex couples have a constitutional right to marry, gave those who choose to marry and their families access to a range of economic and legal protections.¹² The Obama Administration took steps to address discrimination against LGBT people, and particularly transgender people, in regulations around healthcare, housing, and education.

In 2014, the Department of Justice adopted the position that employment discrimination based on gender identity is a violation of Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on sex.¹³ In 2016, the Department of Justice and Department of Education's Office of Civil Rights jointly issued guidance that clarified that discrimination against transgender youth constituted sex discrimination and was impermissible under federal law.¹⁴ After a lengthy policy review process, the Department of Defense in 2016 also began allowing transgender people to serve openly in the US military.¹⁵

¹⁰ Ibid.

¹¹ Ibid.

¹² *Obergefell v. Hodges*, 576 U.S. ____ (2015).

¹³ Department of Justice, "Attorney General Holder Directs Departments to Include Gender Identity Under Sex Discrimination Employment Claims," December 18, 2014, <https://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination> (accessed January 29, 2018).

¹⁴ US Department of Justice & US Department of Education, "Dear Colleague Letter on Transgender Students," May 13, 2016, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (accessed September 1, 2016).

¹⁵ Matthew Rosenberg, "Transgender People Will Be Allowed to Serve Openly in Military," *New York Times*, June 30, 2016, <https://www.nytimes.com/2016/07/01/us/transgender-military.html> (accessed January 29, 2018).

While the US Congress has been slower to enact protections for LGBT people, there have been notable advances, including new protections for LGBT survivors of domestic violence in the reauthorization of the Violence Against Women Act (VAWA) in 2013.¹⁶

Yet gains made in recent years have triggered aggressive backlash from opponents of LGBT equality, halting or reversing some recent steps toward LGBT equality. In February 2017, the Trump Administration withdrew the guidance prohibiting discrimination against transgender youth in US schools, arguing that the issue should be left to the states to resolve.¹⁷ In July 2017, President Trump announced on Twitter that transgender people would no longer be able to serve in the US military; while a court order has allowed transgender recruits to enlist in 2018, the ban on military service remains under review by the courts.¹⁸ Under Attorney General Jeff Sessions, the Department of Justice has also reversed course on its interpretation of Title VII. In July 2017, it filed a brief adopting the stance that Title VII does not cover discrimination based on sexual orientation, and in October 2017, it issued a memorandum concluding that it also does not cover discrimination based on gender identity.¹⁹

As LGBT rights come under renewed assault at the federal level, they have also come under attack in state legislatures. Hundreds of anti-LGBT bills were filed in the 2016 and 2017 state legislative sessions.²⁰ While many of these bills sought to restrict recognition of transgender rights or bar transgender people from accessing bathrooms, locker rooms, and other facilities consistent with their gender identity, many others sought to exempt individuals who asserted religious or moral beliefs from complying with the rights and recognition that LGBT people had achieved under the law.

¹⁶ Department of Justice, “VAWA 2013 Nondiscrimination Provision: Making Programs Accessible to All Victims of Domestic Violence, Sexual Assault, Dating Violence, and Stalking,” April 9, 2014, <https://www.justice.gov/archives/ovw/blog/vawa-2013-nondiscrimination-provision-making-programs-accessible-all-victims-domestic> (accessed January 29, 2018).

¹⁷ Ryan Thoreson, “Trump Administration Withdraws Transgender Student Protections,” Human Rights Watch, February 23, 2017, <https://www.hrw.org/news/2017/02/23/trump-administration-withdraws-transgender-student-protections> (accessed January 29, 2018).

¹⁸ Helene Cooper, “Transgender People Will Be Allowed to Enlist in the Military as a Court Case Advances,” *New York Times*, December 11, 2017, <https://www.nytimes.com/2017/12/11/us/politics/transgender-military-pentagon.html> (accessed January 29, 2018).

¹⁹ Ryan Thoreson, “US Justice Department Reverses Position on Transgender Discrimination,” Human Rights Watch, October 5, 2017, <https://www.hrw.org/news/2017/10/05/us-justice-department-reverses-position-transgender-discrimination> (accessed January 29, 2018).

²⁰ American Civil Liberties Union, “Legislation Affecting LGBT Rights Across the Country,” <https://www.aclu.org/other/legislation-affecting-lgbt-rights-across-country> (accessed January 29, 2018).

Religious Exemptions as a Backlash against LGBT Equality in the United States

In recent years—and particularly as marriage equality gained ground in state and federal courts—proponents of exemptions have drafted bills and filed lawsuits that would exempt people who say that their religious or moral convictions are irreconcilably at odds with what generally applicable anti-discrimination laws require of them in some circumstances. In many instances, lawmakers have proposed laws to prevent the government from denying funding, licenses, contracts, and other forms of support to service providers who discriminate based on religious or moral beliefs.

In 2015, in response to marriage equality, lawmakers introduced federal legislation that would be far more expansive than existing safeguards for religious liberty. If passed, the First Amendment Defense Act (FADA) would prohibit the federal government from altering the tax status, contracts, and other benefits awarded to a person “on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.”²¹ President Trump has expressed support for FADA and indicated that he would sign the legislation, but as of January 2018, it had not been reintroduced and passed by Congress.²²

In 2017, lawmakers introduced another religious exemption bill at the federal level that specifically pertains to child welfare providers. If passed, the Child Welfare Provider Inclusion Act would prohibit the federal government and state governments that receive federal funding from declining to work with child welfare agencies that discriminate based on religious beliefs or moral convictions.²³ At time of writing, the bill had not been passed by Congress.

²¹ H.R. 2802 – First Amendment Defense Act, 114th Congress (2015-2016), <https://www.congress.gov/bill/114th-congress/house-bill/2802> (accessed January 29, 2018).

²² Nico Lang, “2017 is Shaping Up to be a Banner Year for Anti-LGBT Discrimination,” *LA Times*, January 6, 2017, <http://www.latimes.com/opinion/opinion-la/la-ol-first-amendment-defense-act-trump-20170106-story.html> (accessed November 29, 2017).

²³ H.R. 1881 – Child Welfare Provider Inclusion Act of 2017, 115th Congress (2017-2018), <https://www.congress.gov/bill/115th-congress/house-bill/1881> (accessed January 29, 2018). The sponsors of the bill, like the sponsors of similar legislation at the state level, cite Massachusetts and Illinois as examples of states where faith-based organizations are required to provide services inconsistent with their religious beliefs or lose their funding. Office of Senator James M. Inhofe, “Inhofe, Lankford Cosponsor Bill to Protect Rights of Child Welfare Charities,” April 5, 2017, <https://www.inhofe.senate.gov/newsroom/press-releases/inhofe-lankford-cosponsor-bill-to-protect-rights-of-child-welfare-charities> (accessed January 30, 2018). The

Religious Exemption Laws

At the state level, lawmakers in 2016 and 2017 introduced dozens of bills that would create sweeping exemptions for religious believers in various areas.²⁴ As same-sex couples marry and state and local governments prohibit discrimination in public accommodations, vendors whose products are used in weddings have sought exemptions that would permit them to decline service to LGBT people. As bans that prevented LGBT people from adopting children have been lifted in every state, some adoption and foster care providers who disapprove of same-sex relationships have sought exemptions that would permit them to decline service to same-sex couples. And as federal agencies and professional organizations have sought to ensure that LGBT people are able to access medical care without discrimination, some mental and physical healthcare providers have sought exemptions that would permit them to turn away LGBT clients or decline to provide services they consider objectionable. As noted above, Human Rights Watch is aware of at least eight states that had enacted such exemptions into law prior to the 2018 legislative session.²⁵

These laws are often couched in the rhetoric of religious liberty. Yet they are a stark departure from the approach that has typically been used to balance the rights of religious adherents with the generally applicable laws that protect the rights, safety, health, and

reference is an allusion to Catholic Charities' decision to terminate its adoption and foster care services in Massachusetts, Illinois, California, and Washington, D.C. rather than comply with state laws prohibiting discrimination on the basis of sexual orientation. David Crary, "For Advocates of Gay Adoption, Progress But Also Obstacles," *US News & World Report*, June 17, 2017, <https://www.usnews.com/news/best-states/illinois/articles/2017-06-17/for-advocates-of-gay-adoption-progress-but-also-obstacles> (accessed January 30, 2018).

²⁴ American Civil Liberties Union, "Legislation Affecting LGBT Rights Across the Country," <https://www.aclu.org/other/legislation-affecting-lgbt-rights-across-country> (accessed January 29, 2018).

²⁵ This report examines laws that provide a blanket exemption to some religious objectors in response to actual or anticipated gains in LGBT equality. Other states have exemption laws in place that may also compromise access to healthcare for LGBT people. In 1977, Illinois enacted the Health Care Right of Conscience Act, for example, which prohibits a person, institution, or official for taking action against a person for a "conscientious refusal to receive, obtain, accept, perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care services contrary to his or her conscience." 745 Ill. Comp. Stat. Ann. 70/5, <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2082&ChapterID=58> (accessed February 6, 2018). The law requires facilities to develop written protocols that outline how objections will be addressed, and to have a non-objecting provider at the facility provide the service, refer the patient, or notify the patient about other providers. *Ibid.* Recent amendments requiring objectors to inform patients of their options are being challenged by religious providers in federal court. Steve Schmadeke, "Federal Court Judge Halts Enforcement of Illinois Abortion Notification Law," *Chicago Tribune*, August 4, 2017, <http://www.chicagotribune.com/news/local/breaking/ct-crisis-pregnancy-abortion-notification-law-0804-20170804-story.html> (accessed February 6, 2017). In 2017, Alabama enacted a law providing that a health care provider "has the right not to participate, and no health care provider shall be required to participate, in a health care service that violates his or her conscience when the health care provider has objected in writing prior to being asked to provide such health care services." Alabama House Bill 95, 2017, sec. 4, <https://legiscan.com/AL/text/HB95/id/1498841/Alabama-2017-HB95-Introduced.pdf> (accessed November 22, 2017). The health care services covered by the bill are limited to "abortion, human cloning, human embryonic stem cell research, and sterilization." *Ibid.*

welfare of others. Typically, religious exemptions offer a narrow, defined exception to a generally applicable law. When lawmakers have afforded more general protection to religious exercise, they have done so by balancing that protection with the rights and needs of others—for example, allowing the government to enforce generally applicable laws when it has a compelling reason to do so and only burdens religious exercise to the narrowest extent possible.²⁶

Recent license-to-discriminate laws break from that tradition. They do not create a nondiscrimination rule; instead, they only create the exemption allowing discrimination to flourish. And rather than strike any kind of careful balance between assertions of religious liberty and LGBT equality or other rights and values that could be at stake, many grant a nearly unfettered license to discriminate while brushing aside the rights and freedoms of others. On both fronts, most of these laws bear no resemblance to religious exemptions that are motivated by a concern for human rights and are narrowly drawn to respect the rights of all involved.

A License to Discriminate Under State Law

The religious exemptions that have been considered or enacted by state legislatures take different forms. Some are comprehensive, providing blanket protection for entities that do not wish to provide various services to LGBT people because of their religious or moral beliefs. Others are more narrowly circumscribed, focusing particularly on adoption and foster care services and physical and mental healthcare services.

²⁶ In 1993, for example, Congress passed the Religious Freedom Restoration Act (RFRA), which extended protections for religious exercise beyond those required by the US Constitution. Under RFRA, the federal government may not “substantially burden a person’s exercise of religion” unless the burden furthers a compelling governmental interest and is the least restrictive means of doing so. 42 U.S.C. § 2000b et seq. Because RFRA only applies to the federal government, many states have adopted their own RFRA that mirror these provisions at the state level. This report focuses on laws that depart from this balancing analysis to provide blanket exemptions to religious objectors; it is worth noting, however, that objectors are increasingly seeking to expand state RFRA and invoke the federal RFRA in ways that may jeopardize access to sexual and reproductive healthcare. See, e.g., Catherine E. Shoichet & Halimah Abdullah, “Arizona Gov. Jan Brewer Vetoes Controversial Anti-Gay Bill, SB 1062,” *CNN*, February 26, 2014, <http://www.cnn.com/2014/02/26/politics/arizona-brewer-bill/index.html> (accessed December 31, 2017); Sunnive Brydum, “Arkansas Gov. Signs Revised ‘Religious Freedom’ Act,” *Advocate*, April 2, 2015, <https://www.advocate.com/politics/2015/04/02/arkansas-gov-signs-revised-religious-freedom-act> (accessed December 31, 2017); Tony Cook & Brian Eason, “Gov. Mike Pence Signs RFRA Fix,” *Indy Star*, April 1, 2015, <https://www.indystar.com/story/news/politics/2015/04/01/indiana-rfra-deal-sets-limited-protections-for-lgbt/70766920> (accessed December 31, 2017); *Burwell v. Hobby Lobby Stores*, 573 U.S. ____ (2014); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); Reva Siegel & Doug NeJaime, “Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics,” *Yale Law Journal*, Vol. 124, 2015, pp. 2516-2591.

While these laws are typically characterized as exemptions, the term “exemption” is misleading. Few of the states that have enacted these laws have protections in place that prohibit discrimination based on sexual orientation and gender identity. In most cases, states are enacting “exceptions” allowing providers to discriminate based on religion without first prohibiting anti-LGBT discrimination more generally. In this context, these laws function first and foremost as a license to discriminate, signaling that discrimination against LGBT people is acceptable in the state.

Comprehensive Exemption Laws

- The most sweeping exemption law enacted to date is Mississippi’s HB 1523, enacted in the first legislative session after the Supreme Court’s ruling in *Obergefell v. Hodges*. The law specifies three protected “religious beliefs or moral convictions”: “(a) [m]arriage is or should be recognized as the union of one man and one woman; (b) [s]exual relations are properly reserved to such a marriage; and (c) [m]ale (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”²⁷ It prevents the government from taking “any discriminatory action” against religious organizations or persons that discriminate in a variety of ways against LGBT individuals (and in some cases against unmarried heterosexual individuals) “consistent with a sincerely held religious belief or moral conviction.” The bill explicitly protects extraordinary range of discriminatory conduct, in spheres that range from the conduct of wedding ceremonies and the provision of wedding-related services, the hiring and firing of employees, the rental or sale of housing, child placement services, psychological counseling, fertility or transition-related healthcare and the restriction of access to shared facilities. “Discriminatory action” is defined very broadly so as to preclude most of the avenues the government might use to sanction or withhold government support for such an organization or individual.²⁸ The sponsor of the bill expressly cited the Supreme Court’s decision

²⁷ Mississippi House Bill 1523, 2016, sec. 2, <http://billstatus.ls.state.ms.us/documents/2016/html/HB/1500-1599/HB1523SG.htm> (accessed November 22, 2017).

²⁸ *Ibid.*, sec. 3. HB 1523 defines “religious organization” broadly to encompass not only houses of worship but also a “religious group, corporation, association, school or educational institution, ministry, order, society or similar entity, regardless of whether it is integrated or affiliated with a church or other house of worship” as well as an “officer, owner, employee, manager, religious leader, clergy, or minister” of these entities. *Ibid.*, sec. 9(4). It defines “person” expansively as well, to include individuals but also a religious organization or “sole proprietorship, or closely held company, partnership, association, organization, firm, corporation, cooperative, trust, society, or other closely held entity.” *Ibid.*, sec. 9(3).

in *Obergefell* and the desire to protect those who believe marriage is between one man and one woman as the motivation for the law.²⁹

Adoption and Foster Care Services

- In 2003, North Dakota enacted a law stating that “[a] child-placing agency is not required to perform, assist, counsel, recommend, facilitate, refer, or participate in a placement that violates the agency’s written religious or moral convictions or policies.”³⁰ Under the law, the state’s department of human services may not deny a child-placing agency a license, grant, or contract based on such an objection.³¹
- In 2012, Virginia enacted a law establishing that “no private child-placing agency shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency’s written religious or moral convictions or policies.”³² The law prevents the state from sanctioning or withholding licensing or support—including contractual relationships—from agencies that refuse to participate in a “placement that violates the agency’s written religious or moral convictions or policies.”³³ At the time of its passage, Senator Adam Ebbin—who opposed the law—told press that his colleagues intended the bill to shield agencies from placing children with same-sex couples. On the day a Senate subcommittee approved the religious exemption, it rejected Ebbin’s bill that would have prohibited discrimination on the basis of sexual orientation and gender identity in adoption and foster care placement.³⁴
- In 2015, Michigan enacted a law stating that “a child placing agency shall not be required to provide any services if those services conflict with, or provide any

²⁹ On the floor of the House of Representatives, the sponsor of the bill explained: “What this bill does in essence is add an additional layer of protection that currently does not exist in the post *Obergefell* decision that came from the Supreme Court in June of 2015, which legalized same-sex marriage throughout the United States, including in a majority of states that had adopted the traditional definition and only recognized marriage as between one man and one woman. What this bill does is provide a layer of protection against state discrimination for simply believing these important principles and acting in accordance therewith.” Remarks of Rep. Philip Gunn, HB 1523, February 19, 2016, at 6:24-7:08, http://law.mc.edu/legislature/bill_details.php?id=4621&session=2016 (accessed January 30, 2018).

³⁰ North Dakota Code sec. 50-12-07.1.

³¹ *Ibid.*, sec. 50-12-03, 50-12-07.1.

³² Virginia Code sec. 63.2-1709.3(A).

³³ *Ibid.*, sec. 63.2-1709.3(B)-(D).

³⁴ Lou Chibbaro Jr., “Va. Senate Panel Approves Anti-Gay Adoption Bill,” *Washington Blade*, February 3, 2012, <http://www.washingtonblade.com/2012/02/03/va-senate-panel-approves-anti-gay-adoption-bill> (accessed January 31, 2018).

- services under circumstances that conflict with, the child placing agency’s sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency.”³⁵ The law prohibits the state or local governments from taking “adverse action” against a child placing agency because of its refusal to provide services on the basis of those religious beliefs.³⁶ In addition to requiring that the child placing agency set out its beliefs in writing, the law requires agencies that decline to provide services to refer the applicant to another agency or a list of agencies maintained by the state.³⁷ As the bill was under consideration, Representative Jeff Irwin, who opposed the bill, stated that “[t]he whole goal of this package is to allow agencies to discriminate against same-sex couples.”³⁸ Representatives of the Michigan Catholic Conference and Michigan Family Forum, who supported the bill, justified it as a preemptive move to prevent adoption and foster-care agencies from having to comply with nondiscrimination laws requiring them to serve same-sex couples.³⁹
- In 2017, South Dakota enacted a law barring the state from discriminating or taking adverse action against a child placement agency because it declines “to provide any service that conflicts with, or provide any service under circumstances that conflict with a sincerely-held religious belief or moral conviction of the child-placement agency.”⁴⁰ The committee debate on the bill focused primarily on religious objections to placing children with same-sex couples.⁴¹ Senator Alan Solano, who co-sponsored the bill, cited the *Obergefell* decision and the decision

³⁵ Michigan House Bill No. 4188, 2015, sec. 2, <http://www.legislature.mi.gov/documents/2015-2016/publicact/htm/2015-PA-0053.htm> (accessed November 22, 2017); see also Michigan House Bill No. 4189, 2015, <http://www.legislature.mi.gov/documents/2015-2016/publicact/htm/2015-PA-0054.htm> (accessed November 22, 2017); Michigan House Bill No. 4190, 2015, <http://www.legislature.mi.gov/documents/2015-2016/publicact/htm/2015-PA-0055.htm> (accessed November 22, 2017).

³⁶ Michigan House Bill No. 4188, 2015, sec. 3, <http://www.legislature.mi.gov/documents/2015-2016/publicact/htm/2015-PA-0053.htm> (accessed November 22, 2017).

³⁷ *Ibid.*, sec. 4.

³⁸ Chad Livengood & Gary Heinlein, “Plan Would Let Adoption Agencies Deny Gay Couples,” *The Detroit News*, March 17, 2015, <http://www.detroitnews.com/story/news/politics/2015/03/17/religious-belief-adoption-bills-stir-controversy/24913253> (accessed January 31, 2018).

³⁹ *Ibid.*; Matt Kaufman, “Preserving the Adoption Option,” Focus on the Family, March 2016, <https://www.focusonthefamily.com/socialissues/citizen-magazine/preserving-the-adoption-option> (accessed January 31, 2018).

⁴⁰ South Dakota Senate Bill 149, 2017, sec. 4, <http://www.sdlegislature.gov/docs/legsession/2017/bills/sb149p.htm> (accessed November 22, 2017).

⁴¹ Dana Ferguson, “Panel Oks Protections for Adoption Agencies that Turn Away Gay Couples,” *Argus Leader*, February 15, 2017, <http://www.argusleader.com/story/news/politics/2017/02/15/panel-oks-protections-adoption-agencies-turn-away-gay-couples/97940660> (accessed January 31, 2018).

- by Catholic Charities to withdraw from adoption and foster care services in Massachusetts, Illinois, California, and Washington, D.C. rather than comply with nondiscrimination laws that protect same-sex couples as the motivation for the law.⁴² Solano co-wrote the bill with Catholic Social Services, an agency which only places children with heterosexual couples.⁴³ Governor Dennis Daugaard signed the bill into law, voicing a hope that it would prevent individuals in a protected class from suing child welfare agencies if they were denied placement.⁴⁴
- In 2017, Alabama enacted a law that bars the state from discriminating or taking adverse action against a child placing agency “on the basis that the child placing agency declines to make, provide, facilitate, or refer for a placement in a manner that conflicts with, or under circumstances that conflict with, the sincerely held religious beliefs of the child placing agency.”⁴⁵ As the bill was debated, Representative Rich Wingo, who sponsored the bill, told press it was necessary to ensure that child welfare agencies are not compelled to place children with same-sex parents.⁴⁶ Representative Patricia Todd, who opposed the bill, remarked that “[t]his bill obviously came about because same-sex marriage is approved.”⁴⁷
 - In 2017, Texas enacted a law that broadly protects religious objections in child welfare services, defined to include not only child placement services but also services for abused or neglected children, counseling for children or parents, and family preservation and support services.⁴⁸ It prevents the state from discriminating or taking adverse action against providers who decline to “provide,

⁴² Nico Lang, “South Dakota Passes ‘Religious Liberty’ Law Allowing Adoption Agencies to Discriminate Against Same-Sex Couples,” *Salon*, March 22, 2017, <https://www.salon.com/2017/03/22/south-dakota-passes-religious-liberty-law-allowing-adoption-agencies-to-discriminate-against-same-sex-couples> (accessed January 31, 2018).

⁴³ Hannah Weikel, “South Dakota Governor Mum on Religious Adoption Protections,” *Rapid City Journal*, March 8, 2017, http://rapidcityjournal.com/news/latest/south-dakota-governor-mum-on-religious-adoption-protections/article_9695da6e-1445-53d7-8bff-e4697938c58d.html (accessed January 31, 2018).

⁴⁴ Hannah Weikel, “South Dakota Governor Signs Religious Adoption Protections,” *US News & World Report*, March 10, 2017, <https://www.usnews.com/news/best-states/south-dakota/articles/2017-03-10/daugaard-plans-to-sign-religious-foster-agency-protections> (accessed January 31, 2018).

⁴⁵ Alabama House Bill 24, 2017, sec. 5, <https://legiscan.com/AL/text/HB24/id/1436343/Alabama-2017-HB24-Introduced.pdf> (accessed November 22, 2017).

⁴⁶ Anna Claire Vollers, “Religious Freedom or Taxpayer-Funded Discrimination? Child Welfare Bill Prompts Debate,” *AL.com*, February 8, 2017, http://www.al.com/news/index.ssf/2017/02/religious_freedom_taxpayer_fun.html (accessed January 31, 2018).

⁴⁷ Trudy Ring, “Alabama Passes ‘License to Discriminate’ Bill on Adoption Agency Licensing,” *The Advocate*, April 26, 2017, <https://www.advocate.com/politics/2017/4/26/alabama-passes-license-discriminate-bill-adoption-agency-licensing> (accessed January 31, 2018).

⁴⁸ Texas House Bill 3859, 2017, sec. 1, <https://legiscan.com/TX/text/HB3859/id/1622312/Texas-2017-HB3859-Enrolled.html> (accessed November 22, 2017).

facilitate, or refer a person for child welfare services that conflict with, or under circumstances that conflict with, the provider’s sincerely held religious beliefs” or provides the children in their care with a religious education.⁴⁹ If a provider declines to provide a service because of religious objections, the government is supposed to ensure that an alternative provider is available in that area or a nearby area.⁵⁰ The provider is supposed to refer the applicant to another service or the list of providers on the state’s website.⁵¹ The law specifies that child welfare agencies may not deny placements based on race, ethnicity, or national origin; Representative Joe Moody introduced an amendment to include sex, religion, sexual orientation, gender identity, and disability as protected grounds, but the legislature rejected it.⁵²

Mental and Physical Health Care

- In 2016, Tennessee enacted a law that states that “[n]o counselor or therapist providing counseling or therapy services shall be required to counsel or serve a client as to goals, outcomes, or behaviors that conflict with a sincerely held religious belief of the counselor or therapist.”⁵³ The law states that providers who refuse services should coordinate a referral to another provider who will see the client.⁵⁴ According to the bill’s sponsor, Senator Jack Johnson, the impetus for the bill was a change in the American Counseling Association’s Code of Ethics which states that counselors should “refrain from referring prospective and current clients based solely on the counselor’s personally held values, attitudes, beliefs, and behaviors.”⁵⁵ In committee, Senator Jeff Yarbrow noted that the public debate on

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Chuck Lindell, “Texas House Sends Religious-Refusal Foster Care Bill to Senate,” *American-Statesman*, May 10, 2017, <http://www.statesman.com/news/update-texas-house-sends-religious-refusal-foster-care-bill-senate/IP7Dmf7PWhnOdJCErJsJk/> (accessed January 31, 2018).

⁵³ Tennessee Senate Bill 1556, 2016, sec. 1(a), <https://legiscan.com/TN/text/SB1556/id/1319613/Tennessee-2015-SB1556-Draft.pdf> (accessed November 22, 2017).

⁵⁴ Ibid.

⁵⁵ Remarks of Sen. Jack Johnson, SB 1556, January 27, 2016, at 2:35-7:35 http://tnga.granicus.com/MediaPlayer.php?view_id=278&clip_id=11417 (accessed January 31, 2018); American Counseling Association, *2014 ACA Code of Ethics*, 2014, sec. A.11.b, <https://www.counseling.org/resources/aca-code-of-ethics.pdf> (accessed January 31, 2018).

the bill “has been very much focused on issues of same-sex marriage,”⁵⁶ and Senator Rusty Crowe noted that although same-sex couples can now marry, the bill could exempt religious objectors from having to counsel them.⁵⁷ Members of the Tennessee Association of Marriage and Family Therapists testified against the bill, stating that it was unnecessary in light of established referral mechanisms within the profession and would open the door to discrimination.⁵⁸

The framing and scope of these exemption laws differ in many respects, but are alike in several fundamental ways. First, they endorse blatantly discriminatory practices without clear limitations or meaningful safeguards. Second, they are motivated to a large degree by hostility to recent advances in LGBT equality; on their face they invoke only a concern for religious liberty but the public debate around and legislative history of many of these laws show quite clearly the animus and the discriminatory intent that underpin them. Third, they do not strike a careful balance—or even suggest that any serious attempt was made to do so—between religious exercise and the purposes of the underlying law from which the exemption is carved out, a feature of rights-respecting approaches to religious exemptions. Fourth, they often show no regard whatsoever for the harms that the discrimination they legitimize might inflict on those who are turned away from a range of important services and for the nondiscrimination principle itself.

These laws are directly harmful, and they take on added importance because of the larger message they send. By enacting these laws, states send a clear signal that discrimination against LGBT people is permissible—and that message has serious consequences at a time when discrimination against LGBT people remains all too common in the United States.

⁵⁶ Remarks of Sen. Jeff Yarbro, SB 1556, February 10, 2016, at 54:49-54:54
http://tnga.granicus.com/MediaPlayer.php?view_id=278&clip_id=11609 (accessed January 31, 2018).

⁵⁷ Remarks of Sen. Rusty Crowe, SB 1556, January 27, 2016, at 2:35-7:35
http://tnga.granicus.com/MediaPlayer.php?view_id=278&clip_id=11417 (accessed January 31, 2018).

⁵⁸ Remarks of Tennessee Association of Marriage and Family Therapists, SB 1556, February 10, 2016, at 53:52-54:03
http://tnga.granicus.com/MediaPlayer.php?view_id=278&clip_id=11609 (accessed January 31, 2018).

II. The Human Impact of Legalized Discrimination

Proponents of exemptions that allow for anti-LGBT discrimination have framed them in terms of religious liberty, foregrounding how these laws might exempt businesses and service providers from laws and regulations that they find objectionable. The assumption seems to be that the resulting harms to LGBT individuals, or to the core value of equality, are insubstantial. As detailed below, however, the exemptions come at a high price.

To understand the harm, it is important to look at the larger context in which such laws are being considered, including pre-existing anti-LGBT discrimination and how exemption laws can encourage such discrimination, particularly in states without nondiscrimination protections. Anti-LGBT religious exemption laws are likely to exacerbate mistreatment because, both on their face and in the political discourse that surrounds them, they tend to legitimize and signal official acceptance of discrimination against LGBT people. And by restricting the state's ability to prohibit, sanction, or even discourage discrimination, the laws undermine the core principle of nondiscrimination law: that people should not face adverse treatment simply because of who they are.

Denying Goods and Services

Already, LGBT people often face discrimination by service providers who deny them goods and services. Where discrimination against LGBT people is permitted, because nondiscrimination laws do not exist, these problems tend to be worse. The following pages describe the tangible, human impact of such discrimination—which will likely worsen as a result of religious exemption laws—on the people who bear the brunt of it.

Incidents of Refusals

In states without nondiscrimination protections, individuals told Human Rights Watch that they had been denied access to goods and services because of a provider's religious beliefs. Leiana C., a 39-year-old lesbian woman in Mississippi, recalled an incident that occurred around 2012 when she and her wife were seeking a fertility doctor:

There were none in our area, so I called a doctor in Mobile to make an appointment. The receptionist answered, and as we were setting up an

appointment, she asked if my husband would be coming. And I said, well, no, my wife will be coming. And she said, “oh, well he’s not going to see you, he only treats married couples.” And I hung up the phone, I was kind of in shock. And then I thought, well, wait a minute, and I called back. A different lady answered the phone, and so I asked, am I understanding correctly that you won’t serve my wife and I, and she said, “It’s his religious belief that he only treats straight married couples. He doesn’t treat single women either.” And I said, look, I’m in the same position as a straight married woman, and she laughed and said, ‘Well, I don’t know what goes on back there, but I don’t know how two women can make a baby. She just laughed at me. I asked her if we could get a referral, and she said “I really don’t know who else would want to treat you.”⁵⁹

After the incident, Leiana and her wife gave up on the process for more than a year, fearing similar treatment from other providers. It was not until a lesbian friend recommended a doctor whose services she had used that they decided to try again. The couple are now the parents of a three-year-old, and Leiana is pregnant with their second child. Recalling the incident with the first provider, she said, “I felt angry but I also felt desperate. My passion to have a family was so strong, and to realize that one person’s beliefs could just overrule that—you just feel desperate.”⁶⁰

Tanya P., a 33-year-old woman in Tennessee, recalled the difficulties she faced obtaining affirming care for her transgender daughter in 2016. To obtain identity documents for her daughter that reflected her gender identity, Tanya needed to submit a note from her daughter’s doctor affirming that she was undergoing appropriate clinical treatment. At the time, her daughter was already obtaining that treatment, had socially transitioned, and was seeing a therapist. Nonetheless, her pediatrician refused to provide a letter stating that information, citing his religious beliefs:

He didn’t feel it was the right thing to do, to have ID documents saying female. [But] that’s not his call to make. And he made a long speech about his religion, which is quite uncomfortable... He professed his faith, he said

⁵⁹ Human Rights Watch interview with Leiana C., Biloxi, MS, November 26, 2017.

⁶⁰ Ibid.

he's a man of God... It's not him giving permission, or condoning it, it's literally just saying, yes, I referred her to an endocrinologist, yes, she's seeing a therapist. But there was something about it he felt he couldn't support, like it would bother his own conscience or something.⁶¹

After repeated attempts to obtain the letter, Tanya ended up taking her daughter to see a different provider in Nashville—three hours away—who provided the letter and enabled the family to update her daughter's identity documents.⁶²

Tanya's experience is not unique. One pediatrician in Alabama recounted various difficulties that patients had encountered with providers who refuse care on religious grounds. In one incident, the mother of a gay teenage boy called a pediatric practice about his upcoming checkup “and she said, ‘we’ve seen you our whole life and our son is gay and we just wanted to make sure it wouldn’t be an issue.’ And the pediatrician said, ‘you need to understand this is a Christian-based office and we may not be a good fit for your family any longer.’ And this happens all the time.”⁶³ In another case in Michigan, lesbian couple Krista and Jami Contreras brought their newborn infant to the pediatrician for her first check-up, and were told that the pediatrician had decided she could not see the infant—who was six days old—because of her religious objections.⁶⁴

LGBT individuals have also experienced religious refusals in child welfare services. Recently, the American Civil Liberties Union of Michigan filed suit challenging the state's practice of granting contracts and funding to child welfare agencies that discriminate against same-sex couples. The suit was filed after two sets of prospective parents—Kristy and Dana Dumont and Erin and Rebecca Busk-Sutton—contacted religiously affiliated agencies in the state about adopting children from foster care and were informed the agencies did not work with same-sex couples.⁶⁵ The Dumonts wanted to provide a foster home to an older child; they contacted the two agencies in their county that have older children eligible for foster placement and were told the agencies would not work with them

⁶¹ Human Rights Watch phone interview with Tanya P. (pseudonym), Knoxville, TN, October 20, 2017.

⁶² *Ibid.*

⁶³ Human Rights Watch phone interview with Karen D. (pseudonym), Birmingham, AL, September 7, 2017.

⁶⁴ Abby Phillip, “Pediatrician Refuses to Treat Baby with Lesbian Parents and There's Nothing Illegal About It,” *Washington Post*, February 19, 2015, <https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it> (accessed November 29, 2017).

⁶⁵ Complaint in *Dumont v. Lyon*, No. 2:17-cv-13080 (W.D. Mich. Sept. 20, 2017).

as a same-sex couple.⁶⁶ The Busk-Suttons were interested in adopting a child with special needs and were initially told by one agency that they would receive an information packet in the mail; when the packet did not arrive, they called to inquire and were told the agency does not specialize in same-sex couples.⁶⁷ While the religiously affiliated agencies offered names of providers in neighboring counties, both couples expressed concern about traveling up for the trainings and visits associated with becoming foster parents and potentially taking an older foster child or a child with special needs out of a county where they are currently receiving services.⁶⁸

While many religious exemptions focus on healthcare or child welfare services, religious objections have motivated discriminatory refusals in a wide range of contexts. In a lawsuit filed in 2017, for example, Jack Zawadski sued a Mississippi funeral home for breach of contract and emotional distress, alleging that the home had agreed to transport and cremate the body of his late husband, Robert Huskey, only to renege on the verbal contract when they found out they were a same-sex couple.⁶⁹ Zawadski and his family had to hurriedly identify another crematorium that could accept the body, and ultimately had to cancel Huskey's memorial service and transport his body to a crematorium 90 miles away.⁷⁰

As Zawadski's case illustrates, refusals can occur in circumstances where LGBT people urgently need services and cannot readily access alternatives in the event that they are turned away.

Impacts of Refusals

When LGBT people are refused service, this discrimination has material and psychological consequences. Some individuals will obtain the good or service they sought, but will face additional costs: finding an alternative provider can require time, energy, and money, which can prove discouraging or even prohibitive.

⁶⁶ Human Rights Watch phone interview with Kristy and Dana Dumont, Dimondale, MI, January 29, 2018.

⁶⁷ Human Rights Watch interview with Erin Busk-Sutton, Detroit, MI, January 18, 2018.

⁶⁸ *Ibid.*; Human Rights Watch phone interview with Kristy and Dana Dumont, Dimondale, MI, January 29, 2018.

⁶⁹ Emanuella Grinberg, "Funeral Home Refused to Cremate Gay Man, Lawsuit Alleges," *CNN*, May 2, 2017, <http://www.cnn.com/2017/05/02/health/mississippi-funeral-home-gay-couple-lawsuit/index.html> (accessed November 29, 2017).

⁷⁰ *Ibid.*

In an interview with Human Rights Watch, one same-sex couple noted that they had been turned away from three different foster care agencies because of their sexual orientation. In 2015, the couple had applied to an agency in Texas, which responded in an email that they would not work with them and that the couple was not a good fit for the agency. In 2016, the couple applied to another agency in Texas, which approved their paperwork and scheduled a home visit. Upon meeting the couple in person and realizing that they were a same-sex couple, the caseworker terminated the home visit after five minutes and notified them the agency did not work with same-sex couples. In the hopes of starting a family elsewhere, one of the men accepted a job in Tennessee. Upon arriving in the state, they applied to a third agency that would work with them but would not place boys in their care, saying that the couple could not provide a sufficiently masculine influence. In their fourth attempt, the couple found an agency that worked with same-sex couples, and is in the process of adopting two siblings who have thrived under their care as foster children. As one of the men, CJ, said: “We’ve always wanted to have kids, I work with kids with autism. We’re married, we have excellent income, our jobs are stable. The only reason we couldn’t adopt was because we’re a same-sex couple.”⁷¹

Refusals create barriers to accessing mental and physical healthcare as well. Persephone Webb, an activist in Tennessee, noted:

In the trans community, we already face this fatigue in finding a mental health provider. It’s so difficult around here. You make phone call after phone call. We’re not taking new patients. We’re not taking your insurance. You basically have to interview them every time you call. Are you familiar with transgender issues? And just from asking that question, it’s hard to tell if you’re not accepting new patients because of that. And there’s no way to know. And after a while, you can imagine, some people just give up. It took me a year to find someone I’ve been seeing.⁷²

KT Hiestand, a psychologist in Memphis who largely works with LGBT individuals, echoed this assessment. “What I hear from my clients over and over and over again is how difficult

⁷¹ Human Rights Watch interview with Chris and CJ P., Nashville, TN, January 8, 2018.

⁷² Human Rights Watch interview with Persephone Webb, Knoxville, TN, December 8, 2017.

it was to find a therapist. Some, particularly the trans folks, were simply refused—were told, oh, I don't treat that. And the therapists didn't help them to find someone who could.”⁷³

The lack of access can be particularly acute in rural areas. In rural East Tennessee, one transgender woman described trying for years to find access to therapy and hormones, eventually ordering hormones online rather than obtaining them from a medical provider. When she was ultimately able to obtain access to care, it was by traveling to a clinic in Asheville, NC, more than an hour away from her home.⁷⁴ In her practice, Hiestand noted that she worked with clients who traveled more than two hours to obtain LGBT-affirming counseling.⁷⁵

Rhonda L., the mother of a transgender teenager in Tennessee, recalled how even available alternatives in the urban area could be prohibitively difficult:

The general pediatrician—we wanted to go to their office for hormone injections, and they said they weren't comfortable doing that. So we have to go to Children's Hospital, to the endocrinologist's office, which means he misses more school and we miss more work. It's two hours total time, every three weeks. To use the pediatrician that [my son] has used for the past three years, it'd take 30 minutes total. So we're going to learn to do the injections ourselves.⁷⁶

Other individuals simply will not obtain the service at all, forgoing whatever they needed because of the rejection. One lesbian woman in Mississippi recalled that, after their first son was born, she and her partner returned to the OB-GYN they had worked with to discuss having a second child. To their surprise, the OB-GYN burst into tears, and informed them that the practice had instituted a policy after the previous insemination stating they would no longer be inseminating couples who were not married. At the time, same-sex couples could not marry in Mississippi, and the couple did not know of other providers who would

⁷³ Human Rights Watch interview with KT Hiestand, Memphis, TN, January 12, 2018.

⁷⁴ Human Rights Watch interview with Kate R. (pseudonym), East Tennessee, December 10, 2017.

⁷⁵ Human Rights Watch interview with KT Hiestand, Memphis, TN, January 12, 2018.

⁷⁶ Human Rights Watch interview with Rhonda L. (pseudonym), Knoxville, TN, December 9, 2017.

assist with the procedure. Ultimately, the couple only had their first child and did not try for a second.⁷⁷

Finally, even where LGBT people are ultimately able to obtain needed services elsewhere, incidents of discrimination can be psychologically traumatic and degrading. Rhonda L. said her transgender son had experienced hostility or overt religiosity from multiple healthcare professionals, including a pediatrician, dentist, gastrointestinal specialist, and pulmonologist. She described how these incidents affected him, making him unwilling to seek medical care even when it was urgently needed:

There are a lot of tears, there's almost like not breathing, like hysterical. Very physically upsetting, stomach upset, nausea, vomiting, not eating. We went to the emergency room for a migraine because he got so stressed at school, because of the bathroom. He didn't even want to go to the emergency room because he was so panicked about going—the anxiety alone made it so he doesn't want to go. And he has serious migraines—he loses feeling in his hands and can't see. Like, he needs to be seen.⁷⁸

Added Harms of Religious Exemptions

As the incidents described above help illustrate, the absence of laws prohibiting discrimination based on sexual orientation and gender identity leaves LGBT people vulnerable to mistreatment, including mistreatment motivated by moral or religious convictions. Many of the incidents above occurred prior to the introduction of religious exemption laws, but were legally permissible because the state lacked any law providing protection from discriminatory treatment.

Many interviewees pointed out that religious exemption laws exacerbate their legal vulnerability in multiple ways. First, exemptions expressly licensed religious refusals in particular domains. As Kathy Garner, a 57-year-old lesbian woman in Mississippi, noted, “It’s not like they couldn’t have done this stuff before... but laws like HB 1523 have emboldened people, and they have a list of what they can do now.”⁷⁹ By specifying areas

⁷⁷ Human Rights Watch interview with Paula M. (pseudonym), Hattiesburg, MS, November 27, 2017.

⁷⁸ Human Rights Watch interview with Rhonda L. (pseudonym), Knoxville, TN, December 9, 2017.

⁷⁹ Human Rights Watch interview with Kathy Garner, Hattiesburg, MS, November 27, 2017.

where personal beliefs can be imposed on others without consequence, the laws signal that discrimination is acceptable to those who may otherwise hesitate to refuse service.

Second, as statutory provisions, religious exemption laws can override other protections that may exist for LGBT people. In Mississippi, for example, the cities of Jackson and Magnolia have nondiscrimination laws that protect sexual orientation and gender identity; the statewide imposition of HB 1523 allows religious objectors in those cities to cite the state law excusing them from compliance. As statutory provisions, these exemptions can also override administrative policies and practices that departments of health or child welfare have adopted to combat discrimination.

Finally, interviewees emphasized that the scope of religious exemptions is poorly understood, and many people perceive these exemptions as blanket permission to discriminate based on religious beliefs. Chris Sanders, the Executive Director of the Tennessee Equality Project, suggested:

Truly, I do believe that because of the bills, there are people in the state who don't believe same-sex marriage is legal. It confuses people when negative bills are introduced in Tennessee. A few years ago, we had the "don't say gay" bill, and there are people who think that because it was introduced that it passed. I suspect there are straight people who think we can't get married in Tennessee, so they turn legitimate married couples away. The negative bills matter even when they don't pass.⁸⁰

David Dinelli, an attorney with the Southern Poverty Law Center, echoed this assessment. "My observation from being in the Deep South is that it almost doesn't matter what the law says. This narrative has taken hold, and now people are doing things that in no way would be authorized by the law itself."⁸¹

⁸⁰ Human Rights Watch phone interview with Chris Sanders, Nashville, TN, August 28, 2017.

⁸¹ Human Rights Watch phone interview with David Dinelli, Montgomery, AL, August 9, 2017.

Discouraging Access to Services

As noted above, most states in the US do not specifically prohibit discrimination on the basis of sexual orientation and gender identity, and discrimination against LGBT people remains widespread. Religious exemptions not only license the kinds of refusals discussed above, but encourage people to expect and fear discrimination and adapt accordingly.

In addition to discrimination they had experienced, interviewees told Human Rights Watch about the discrimination they feared because of their lack of legal protections. As one gay man and adoptive father in Texas explained, “there’s the actual discrimination, and then there’s the feeling that you’re going to be discriminated against.”⁸² Harvey F., a gay man in Jackson, MS, described that as “the number one fear—it’s that little thumb on you... I’m going to hold you down just a little. I’m going to make sure you’re not exactly equal. I’m not going to tell you where or when that’s going to matter, but I’m going to make sure you know it can happen.”⁸³ Lisa Henderson, a counselor in Tennessee, described how this occurred in practice:

I had two clients who are LGBT ask me after the bill passed—and they knew I’d been fighting against it—they still asked, now that you don’t have to care for me, do you still want to? And that’s a heartbreaking thing to be asked by someone you’d been seeing for a long time. One I’d been seeing about 6 months and one I’d been seeing off and on for about 5 years. And they still felt insecure because of the bill.⁸⁴

In part, concerns about discrimination were motivated by past mistreatment that LGBT people had faced at the hands of service providers. In the context of these incidents, religious exemptions gave a tacit stamp of approval to the mistreatment that LGBT interviewees had come to fear or expect. Kevin R., a 55-year-old cisgender gay man living near Gulfport, MS, recounted an incident that occurred when he went for a colonoscopy in the summer of 2017. When the doctor discovered he was gay, the doctor began using female pronouns for him, even after Kevin’s husband corrected him. The doctor proceeded to make crude comments about hemorrhoids and making assumptions about the couple’s

⁸² Human Rights Watch phone interview with Thomas L. (pseudonym), Fort Worth, TX, August 31, 2017.

⁸³ Human Rights Watch interview with Harvey F., Jackson, MS, November 27, 2017.

⁸⁴ Human Rights Watch phone interview with Lisa Henderson, Nashville, TN, December 13, 2017.

sexual practices. Kevin filed a complaint with the state board, but had not received a response three months later.⁸⁵ Petra E., a transgender woman in Biloxi, MS, recalled calling medical providers and explaining that she's transgender, "and asked if they'll take care of a trans person who has the cold or flu, and they say no. I won't ask them about hormone therapy or anything, just common symptoms. They say, oh, we don't deal with that stuff here."⁸⁶

Many interviewees indicated they altered their behavior because of these concerns. Bill S., a gay man in his fifties in Jackson, MS, said that he and his fiancé were getting married two weeks later, but were not notifying his family and were having the wedding in North Carolina. When asked why they were doing the ceremony out of state, he said, "People here continue to push this idea that it's against religion to be gay.... I want to do it out of here. There's no place here for it."⁸⁷

Advocates and service providers told Human Rights Watch that, in response to religious exemption laws, they had seen a spike in LGBT people taking preemptive steps to avoid experiencing discriminatory refusals and contacting them for referrals to providers who were known to be friendly. Lisa Scheps, a transgender advocate in Texas, noted that "I know of people who don't even try for fear of being rejected. Now that there are laws out there that say, yeah, it's okay to discriminate, a lot of people just say, yeah, I don't go shopping in Williamson County. And that's true of any of the rural counties in Texas. Once you leave the confines of the urban environment, you get scared as you imagine."⁸⁸ Karla B., a lesbian woman in Mississippi, bluntly explained, "I don't put myself in a position to be discriminated against."⁸⁹

Research from the Center for American Progress indicates that LGBT people who face discrimination are more likely to fear or expect discrimination in the future. Krista Contreras, whose newborn daughter had been refused service by a pediatrician who had religious objections to same-sex couples, described how that experience lingered nearly three years after the refusal: "I just interviewed a new pediatrician, and you have to ask—

⁸⁵ Human Rights Watch phone interview with Kevin R. (pseudonym), Pass Christian, MS, November 11, 2017.

⁸⁶ Human Rights Watch phone interview with Petra E., Biloxi, MS, October 4, 2017.

⁸⁷ Human Rights Watch interview with Bill S. (pseudonym), Jackson, MS, November 27, 2017.

⁸⁸ Human Rights Watch phone interview with Lisa Scheps, Austin, TX, October 4, 2017.

⁸⁹ Human Rights Watch interview with Karla B. (pseudonym), Biloxi, MS, November 26, 2017.

we're a two-mom family, are you okay with that? And they're like, you don't have to ask that. People think it's crazy that I'm asking that, but no, we do have to ask... Every new team she's on, every new school we go to, I feel that nervousness, because it's there, lurking around the corner, and you just don't know. The pediatrician was the place I least expected it.”⁹⁰

In response to religious exemptions, LGBT organizations and supportive providers have done their best to fill the gaps created by discriminatory refusals. In response to the religious exemption for counselors in Tennessee, for example, the Tennessee Equality Project created a “Counseling Unconditionally” directory listing affirming healthcare providers.⁹¹ Other interviewees noted that they shared information informally, so LGBT people in their area came to know which doctors would see them as patients or which judges would deal with LGBT family law issues fairly.

It is important to note that, while these initiatives can alleviate gaps in service, they are not a sufficient substitute for full equality under the law. Many LGBT organizations do not have the resources to compile and maintain lists of affirming providers. Where they are developed, such lists tend to be ad hoc and non-exhaustive, as they rely on providers who are known to advocates to be reliably LGBT inclusive. A provider with competency with one population—for example, adult gay men—may not be similarly equipped to serve the needs of another—for example, transgender youth. The approach is particularly limited insofar as known providers are often concentrated in urban areas, with the result that LGBT people who live in rural areas may have to travel hundreds of miles to reach a provider who they know will serve them. And because these lists typically list only a fraction of the providers in a given state, the roster of providers can be quickly overwhelmed by demand.

In Tennessee, where state law allows counselors to decline to see LGBT patients based on their religious beliefs, researchers at the University of Tennessee have studied how these refusal laws impact self-concealment and psychological distress. One researcher on the project noted:

⁹⁰ Human Rights Watch interview with Krista and Jami Contreras, Oak Park, MI, January 18, 2018.

⁹¹ Human Rights Watch phone interview with Leticia Flores, Knoxville, TN, October 17, 2017.

Some people had been turned away. Some said, the session stopped. “After today’s session, I’m going to have to refer you to someone else, I’m not comfortable providing services to you.” One person kept pushing, and finally the therapist said, “You’re a homosexual, and I’m a Christian, and providing services would be a tacit endorsement of your homosexuality.” And then the session ended. And she wasn’t seeking therapy for that—she had depression and was dealing with some work stuff, and happened to mention her partner, and was turned away.⁹²

The research additionally found that, when those who strongly identified with the LGBT community were aware of the law, they were more likely to conceal their sexual orientation or gender identity, and were more likely to experience psychological distress, even without personally experiencing an incident of discrimination. Patrick Grzanka, a professor of psychology at the University of Tennessee, noted that “They’re saying, I don’t know if this is going to affect me personally, but it makes me feel worse about my state, and it makes me feel less safe.”⁹³

The inability or reluctance to seek out and obtain services can have serious consequences for LGBT people, who often are both less able to access services and in greater need of the services that religious exemptions deny them. Research suggests that LGBT individuals are at higher risk for physical and mental health issues than non-LGBT individuals, due in part to the chronic stress and stigma they encounter.⁹⁴ Exemptions not only jeopardize LGBT people’s access to physical and mental health services, but may exacerbate stress and stigma as individuals encounter or come to anticipate discrimination in the public sphere.⁹⁵ Exemptions in the realm of adoption and foster care also jeopardize access to services that LGBT people need; according to data collected by the US Census Bureau in 2013, same-sex couples are almost three times more likely than heterosexual couples to adopt or foster children.⁹⁶

⁹² Human Rights Watch interview with Elliott Devore, Knoxville, TN, December 8, 2017.

⁹³ Human Rights Watch phone interview with Patrick Grzanka, Knoxville, TN, September 11, 2017.

⁹⁴ Brief of Ilan H. Meyer, PhD., and Other Social Scientists and Legal Scholars Who Study the LGB Population as Amici Curiae Supporting Respondents, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 (U.S. 2017), p. 21-22.

⁹⁵ *Ibid.*, p. 26.

⁹⁶ Gary J. Gates, “Demographics of Married and Unmarried Same-Sex Couples: Analyses of the 2013 American Community Survey,” Williams Institute, March 2015, <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-March-2015.pdf> (accessed January 2, 2017).

Healthcare providers expressed concern about how fears of discrimination were affecting the mental and physical health of LGBT populations in their states. One pediatrician in Alabama observed:

For LGBTQ identified folks in this area of the country, their overall quality of health will not be the level they're entitled to. We often see kids who haven't seen a pediatrician in 5, 6, 7 years, because of fear of being judged, on the part of either their immediate family or them. They may live in households where family members don't accept their identity or orientation... And that stress is absolutely an adverse childhood event, that shame and marginalization within your own family.

Kelley Blair, who runs the Diversity Center in Oklahoma City, OK, noted a similar phenomenon for adults at her practice, which specifically caters to the LGBTQ community:

A lot of people have never been to therapy. And they may be 30 or 40 years old. They've waited a very long time to come in for services. They delay transitioning until they're 40 or 50 years old. Some haven't gone to a primary care health provider for basic things, basic healthcare issues. Our trans males haven't gone in for pap smears until they're 30 or 40 years old, some haven't had basic HIV/AIDS screenings. And that's because of the discomfort they feel with a general practitioner.⁹⁷

Harms to Dignity

The harms of religious exemptions are not limited to outright refusals or deterring LGBT people from seeking goods and services. Interviewees in states with LGBT-targeted religious exemption laws in place also emphasized the harms to dignity and stigma that the laws impose on LGBT individuals and families.

Interviewees explained that, by enacting religious exemptions to blunt the advancement of LGBT equality, lawmakers sent a powerful signal that they were unequal or unvalued in their community. Brandiilene Mangum-Dear described that harm in these words: "We're

⁹⁷ Human Rights Watch phone interview with Kelley Blair, Oklahoma City, OK, November 17, 2017.

not being melodramatic. You're being treated with disrespect, as a second-class citizen—not even a citizen, an outsider. And after a while, that begins to tear a person down, to hurt them emotionally and spiritually. Rejection is hard for everyone, and we get it over and over. Even in small things—disapproving looks, hateful stares. It adds up, and it's damaging."⁹⁸

Leticia Flores, a professor of psychology at the University of Tennessee, noted that this is particularly dangerous for LGBT youth, observing that “especially for people who are developing a sense of agency, I think being erased is incredibly harmful. In a way, it's saying adults don't care about them and are not going to take care of them.”⁹⁹

While this message could be received from those who discriminated based on their faith generally, some interviewees indicated it was particularly injurious when it was endorsed by the state:

It sends the message that the state is supportive of your homophobia. And you are allowed to act on your urges rather than educate yourself about what you're afraid of, and learn. You're okay as you are, homophobic, and they're not okay. We've picked a side. And we've picked a side based on your base religious beliefs, which is such a big thing here in Mississippi.... The state has given you that permission, to say, yes, your religious beliefs are not only good, but they're right. And someone who says something otherwise is not correct.¹⁰⁰

⁹⁸ Human Rights Watch phone interview with Brandiilnye Mangum-Dear, Hattiesburg, MS, October 10, 2017.

⁹⁹ Human Rights Watch phone interview with Leticia Flores, Knoxville, TN, October 17, 2017.

¹⁰⁰ Human Rights Watch interview with Harvey F., Jackson, MS, November 27, 2017.

III. Legal Obligations

Proponents of sweeping religious exemptions have typically couched their claims in the language of religious freedom or religious liberty. International human rights law recognizes the importance of those rights, but also elaborates their limits, particularly where their exercise threatens to negatively impact the fundamental rights of others. Not only does the US carry obligations under international law to respect these limits and safeguards, but more broadly the jurisprudence developed under international human rights law offers sound guidance to legislators seeking to strike a careful balance between rights that seem to stand in tension with one another.

Harmonizing Equality and the Freedom of Thought, Conscience and Religion

The United States is party to the International Covenant on Civil and Political Rights (ICCPR), which guarantees equal protection under the law as well as the freedom of thought, conscience, and religion.

Article 26 of the ICCPR states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹⁰¹ The UN Human Rights Committee, which provides authoritative guidance on the ICCPR, has determined that this provision also prohibits discrimination on the basis of sexual orientation and gender identity.¹⁰²

Article 18(1) of the ICCPR recognizes the right to freedom of thought, conscience and religion, which includes both the "freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."¹⁰³

¹⁰¹ ICCPR, art. 26.

¹⁰² UN Human Rights Committee, *Toonen v Australia*, CCPR/C/50/D/488/1992 (March 31, 1994), <http://hrlibrary.umn.edu/undocs/html/vws488.htm> (accessed October 20, 2016).

¹⁰³ ICCPR art. 18(1).

The Human Rights Committee has emphasized that Article 18 "does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice," but—recognizing that religious exercise may affect others—does permit limited restrictions on the freedom to manifest one's religion or beliefs.¹⁰⁴ Under Article 18(3), states may regulate the manifestation of religion or belief if, and only if, such regulations "are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."¹⁰⁵

The UN Human Rights Committee has clarified that the freedom of thought, conscience, and religion does not protect religiously motivated discrimination against women, or racial and religious minorities.¹⁰⁶ It has urged states considering restrictions on the manifestation of religion or belief to "proceed from the need to protect all rights guaranteed under the Covenant, including the right to equality and non-discrimination."¹⁰⁷

Other Rights at Risk from Religious Exemptions

The religious exemptions being introduced to license discrimination in child welfare services, physical and mental healthcare, and public accommodations not only impinge upon the rights of LGBT individuals to equal treatment, they also jeopardize the enjoyment of several other rights as well.

Nondiscrimination More Broadly

While the religious exemption laws examined in this report were introduced as a result of gains that LGBT people have made in attaining nondiscrimination protections and the

¹⁰⁴ Human Rights Committee, General Comment 22, "Article 18: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies," 1994, UN Doc. HRI/GEN/1/Rev.1, paras. 3-4.

¹⁰⁵ ICCPR art. 18(3); see also art. 5(1) ("Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.").

¹⁰⁶ See Human Rights Committee, General Comment 28, "Article 3 (The Equality of Rights Between Men and Women)," March 29, 2000, UN Doc. CCPR/C/21/Rev.1/Add.10, para. 21 ("Article 18 may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience, and religion."); Human Rights Committee, General Comment 22, "Article 18: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies," 1994, UN Doc. HRI/GEN/1/Rev.1, para. 2 ("The committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community."); *ibid.* at 7 (noting that "no manifestation of religion or belief may amount to ... advocacy of national, racial, or religious hatred that constitutes incitement to discrimination" and that "States parties are under the obligation to enact laws to prohibit such acts.").

¹⁰⁷ Human Rights Committee, General Comment 22, "Article 18: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies," 1994, UN Doc. HRI/GEN/1/Rev.1, para. 8.

ability to adopt, marry, and form families under state and federal law, many of the exemptions being introduced at the state level are not limited to religious objections related to sexual orientation and gender identity. As critics have pointed out, many bills would broadly preclude states from taking action against religious objectors who operate according to their religious principles to the detriment of other groups as well, and potentially authorize forms of discrimination based on race, ethnicity, sex, religion, nationality, disability, veteran status, HIV status, and other classifications. States that enact these laws relinquish their ability to ensure that state funding and contracts support services available to all qualified recipients, and give a free pass to potentially sweeping discrimination under the color of state authority.

Right to Health

Exemptions that deny or deter people from seeking healthcare services jeopardize the right to health. The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹⁰⁸ The ICESCR obligates governments to ensure the right to health is enjoyed without discrimination based on race, sex, religion, or “other status,” which the Committee on Economic, Social and Cultural Rights interprets to include sexual orientation and gender identity.¹⁰⁹ The United States has signed but not ratified the ICESCR.¹¹⁰ When states enact laws allowing healthcare providers to deny service based on their personal objections to an individual’s sexual orientation or gender identity, they undermine the right to health. Individuals may be denied services outright; have difficulty finding services of comparable quality, accessibility, or affordability; or avoid seeking services for fear of being turned away.

The Committee on Economic, Social and Cultural Rights has noted that the right to health is threatened both by direct discrimination and by indirect discrimination, in which laws appear neutral on their face but disproportionately harm a minority group in practice.¹¹¹ To promote the right to health, the Committee has thus urged states to “adopt measures,

¹⁰⁸ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976, art. 12.

¹⁰⁹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 20: “Non-Discrimination in Economic, Social and Cultural Rights”, U.N. Doc. E/C.12/GC/20, July 2, 2009, para. 32.

¹¹⁰ Vienna Convention on the Law of Treaties (1980), 1155 U.N.T.S. 331, art. 18.

¹¹¹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 20: “Non-Discrimination in Economic, Social and Cultural Rights”, U.N. Doc. E/C.12/GC/20, July 2, 2009, para. 10.

which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.”¹¹² As a state that has signed but not ratified the ICESCR, the US is legally obligated only to refrain from actions that undermine the object and purpose of the treaty. However, the ICESCR and the jurisprudence of the Committee remain a useful and authoritative guide to the kind of state action necessary to advance and protect the right to health.

Children’s Rights

States that permit child welfare agencies to educate or place children according to the agency’s religious beliefs can jeopardize the rights of children in their care. The United States is the only UN member state that has not ratified the Convention on the Rights of the Child (CRC), which provides an authoritative understanding of children’s rights globally and the measures needed to ensure they are respected and protected.¹¹³ The CRC specifies that the best interests of the child should be a primary consideration in all actions concerning children, whether taken by public or private social welfare institutions, and should be the paramount consideration where adoption is concerned.¹¹⁴ When states enact blanket religious or moral exemptions, they permit providers to elevate their convictions over the best interests of children in their care. Permitting child welfare agencies to turn away qualified parents because of their sexual orientation or gender identity, for example, limits the options available to children in need of placement and may delay or deny foster or adoptive placements for those youth. Moreover, exemptions may pose a particular threat for LGBT youth who are in the care of agencies that harbor religious objections to LGBT people.

As the CRC explains, states should ensure children do not face discrimination of any kind, and should protect children from discrimination based on the opinions or beliefs of the child’s legal guardians.¹¹⁵ Furthermore, adoption and foster placement should be attentive to continuity in the child’s upbringing and to the child’s identity and background.¹¹⁶

¹¹² *Ibid.*, para. 11.

¹¹³ Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990. The United States has signed but not ratified the CRC.

¹¹⁴ CRC, arts. 3(1), 21.

¹¹⁵ CRC, art. 2.

¹¹⁶ *Ibid.*, art. 20.

Recommendations

To the US Congress:

- Enact the Equality Act or other legislation which would prohibit discrimination based on sexual orientation and gender identity in employment, education, healthcare, housing, and public accommodations.
- Enact the Do No Harm Act, which would not allow the Religious Freedom Restoration Act to be used to carve out exemptions from federal laws and protections regarding nondiscrimination, labor, children’s rights, and healthcare.
- Enact the Every Child Deserves a Family Act, which would prohibit child welfare agencies that receive federal financial assistance from discriminating against foster parents based on sexual orientation, gender identity, and marital status.
- Reject the First Amendment Defense Act, the Child Welfare Provider Inclusion Act, and other legislation that permits discrimination against LGBT people based on a provider’s asserted religious beliefs.

To the US Department of Justice:

- Ensure that existing conscience protections are not misused to excuse or justify discrimination on the basis of race, sex, religion, sexual orientation, gender identity, and other classifications.

To State Legislatures:

- Enact legislation prohibiting discrimination based on sexual orientation and gender identity in employment, education, healthcare, housing, adoption and foster care, and public accommodations.
- Repeal religious exemptions that require the state to continue licensing, funding, or otherwise supporting providers who discriminate against others according to their beliefs.

To State Human Rights Commissions:

- Affirm that discrimination based on sexual orientation and gender identity is unacceptable and investigate incidents of discrimination based on those grounds.

- Ensure that existing conscience protections are not misused to excuse or justify discrimination on the basis of race, sex, religion, sexual orientation, gender identity, and other classifications.

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“All We Want is Equality”

Religious Exemptions and Discrimination against LGBT People in the United States

In the wake of the Supreme Court’s 2015 marriage equality ruling, lawmakers across the United States introduced dozens of bills that would permit moral or religious objectors to decline to serve LGBT people. In at least eight states, exemption bills have been enacted into law, creating a license to discriminate based on sexual orientation and gender identity.

“All We Want is Equality,” based on interviews with 30 people affected by discrimination and 82 advocates and service providers, documents how such laws license discrimination, discourage people from accessing services, and harm the dignity of LGBT people. It urges lawmakers at the state and federal level to strengthen nondiscrimination protections for LGBT people and repeal sweeping exemptions that put the rights and well-being of marginalized groups at risk.

(above) As part of a campaign organized by the Tennessee Equality Project, a coffee shop in Knoxville, TN, displays a sticker pledging that it does not discriminate against LGBT people.

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(front cover) In response to the state’s “license to discriminate” bill, Steve Long displays a sticker welcoming LGBT customers to his restaurant in Jackson, MS, on October 2, 2017.

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