

DIGNITY DENIED: RELIGIOUS EXEMPTIONS AND LGBT ELDER SERVICES

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Movement Advancement Project

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

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The Public Rights/Private Conscience Project at the Center for Gender and Sexuality Law at Columbia Law School has a mission to bring legal academic expertise to bear on the multiple contexts in which religious liberty rights conflict with or undermine other fundamental rights to equality and liberty. We undertake approaches to the developing law of religion that both respects the importance of religious liberty and recognizes the ways in which too broad an accommodation of these rights threatens Establishment Clause violations and can unsettle a proper balance with other competing fundamental rights. Our work takes the form of legal research and scholarship, public policy interventions, advocacy support, and academic and media publications. Learn more at <http://www.law.columbia.edu/gender-sexuality/public-rights-private-conscience-project>.

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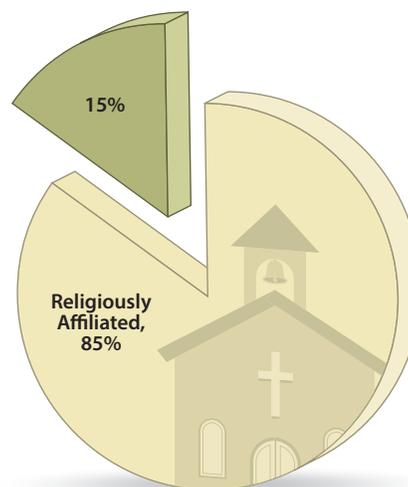
INTRODUCTION

America's population is aging: by 2050, the number of people over the age of 65 will double to 83.7 million.¹ While the public perception of lesbian, gay, bisexual, and transgender (LGBT) people is largely one of a young, affluent community, there are more than 2.7 million LGBT adults who are 50 years or older living in across the country.²

LGBT older adults are vulnerable to discrimination because of their sexual orientation, their gender identity, their age, and other factors like race. LGBT older adults report experiences of discrimination across many areas of life—at work, at the doctor's office, within residential communities and when seeking housing, and when accessing social supports like community centers. In a survey of LGBT respondents who had entered long-term care or had a loved one in long-term care, nearly half had experienced mistreatment in a care facility.³ Twenty-three percent of incidents based on a resident's real or perceived sexual orientation and/or gender identity involved verbal or physical harassment from other residents, while 20% involved refusal to admit or re-admit, or attempted or abrupt discharge of a resident. Fourteen percent of incidents involved verbal or physical harassment by staff.

LGBT older adults, like many older Americans in the United States, rely on a network of service providers as they age—for community programming and congregate meals, for health care, and for housing ranging from independent living to skilled nursing. Research finds that a majority of these services are offered by religiously affiliated organizations. For example, analysis conducted in 2016 by LeadingAge and Ziegler, a Chicago investment bank, revealed that 85% of nonprofit continuing care retirement communities were religiously affiliated, as shown in *Figure 1*.⁴ This includes communities offering housing across the continuum of care from independent living to skilled nursing, and these nonprofit facilities comprise a vast majority of all retirement communities in the United States (80%).⁵ Religiously affiliated facilities also provide the greatest number of affordable housing units that serve low-income seniors.⁶ An analysis by MergerWatch and the ACLU showed that, in 2011, 14% of hospitals in the United States were religiously affiliated accounting for 17% of all hospital beds.⁷ Local service providers are the community agencies responsible for administering other programs, including nutrition assistance funded

Figure 1: The Majority of Continuing Care Retirement Communities are Religiously-Affiliated



Source: LeadingAge and Ziegler, "2016 LeadingAge Ziegler 150," https://www.ziegler.com/z-media/3215/2016-leadingage-ziegler-150-publication_final.pdf.

THERE ARE MORE THAN 2.7 MILLION

LGBT ADULTS WHO ARE 50 YEARS OR OLDER LIVING ACROSS THE COUNTRY



in part by the federal Administration for Community Living (ACL). According to the ACL, 7% percent of local service providers are faith based.⁸

While many of these religiously affiliated facilities provide quality care for millions of older adults, there is a coordinated effort to pass religious exemption laws, issue executive orders and agency guidance, and to litigate court cases to allow individuals, businesses, and even government contractors and grantees to use religion to discriminate. These laws are particularly worrisome for LGBT elders. Religious exemption laws jeopardize the security and safety of LGBT older adults at a time when they are most vulnerable and most in need.

When providing health care and other elder-specific services, patients should always come first.

This report provides an overview of the most concerning of these religious exemption laws and how they impact LGBT older adults. It is important to note, however, that many of these religious exemption laws have much broader impacts on various vulnerable communities, including LGBT people generally, women, single and unmarried parents, interfaith couples, and people of color.

EVER-GROWING RELIGIOUS EXEMPTION LAWS PUT LGBT ELDERLY AT INCREASED RISK FOR DISCRIMINATION

In a coordinated effort to permit discrimination, federal and state policymakers and activists are working to pass religious exemption laws that aim to give businesses, service and healthcare providers, government workers, and private citizens the wide-ranging right to discriminate against others, deny them needed services, and impose their own religious beliefs on others, so long as they cite the provider’s religious or moral belief as the reason for doing so.

Religiously affiliated organizations provide a large portion of elder services, so these growing state and federal litigation and legislation efforts allow these service providers to exempt themselves from state and federal nondiscrimination laws and to discriminate against LGBT elders.

Recent efforts to create a license to discriminate through religious exemption laws include:



Executive orders and agency guidance permitting discrimination by federal contractors and grantees and even government employees;



State religious exemption laws including four states that permit medical professionals to decline to serve LGBT people;



Increasing permission to deny service to various types of people based on religious beliefs and the potential implications of the *Masterpiece Cakeshop* case being heard before the U.S. Supreme Court;



Court cases permitting discrimination in employee benefit plans that could result in discrimination in pension and insurance benefits.

Executive Orders and Agency Guidance



In October 2017, the U.S. Departments of Justice and Health and Human Services released sweeping religious exemption guidance and regulations. First the Department of Justice guidance instructed all federal agencies to provide significant leeway to staff, federal contractors and grantees seeking religious exemptions from federal laws, rules, and regulations. The Department of Health and Human Services then released regulations allowing any employer or insurance company to refuse to provide contraceptive coverage for religious or “moral” reasons.

Many providers in the aging network receive federal funds—either federal grants, contracts, or reimbursements through Medicare or Medicaid. In 2014, for example, the federal government appropriated \$1.88 billion through the federal Older Americans Act, which provides critical services for nearly 11 million older adults each year, including home-delivered and congregate meals, family caregiver support, in-home assistance, preventive health services, transportation, job training, protection from abuse, and other services.⁹ In the past, recipients of these funds were required to adhere to nondiscrimination laws and regulations as set forth by the U.S. government.

Under this new guidance and regulations, service providers can cite a religious basis for discrimination and likely continue to receive federal funding while simultaneously engaging in discrimination against LGBT elders and others. For example:

- Currently, the Department of Health and Human Services requires all medical facilities receiving Medicaid and Medicare funding to respect the visitation wishes of their residents, regardless of sexual orientation and gender identity.¹⁰ Hospitals that receive federal funding, and are currently required to allow visitation by same-sex partners and spouses, could now refuse to allow such visitation and continue to receive taxpayer funding.
- Social services agencies like health clinics that receive federal funding could continue to receive

that taxpayer funding even if they turn LGBT older adults away from emergency shelters, refuse to provide emergency medical care, or discriminate in the provision of care.

- State and local housing agencies that administer programs, like housing vouchers or loans to assist with purchasing a home, could refuse to offer those services to LGBT older adults and older same-sex couples.
- Residential facilities and hospitals that receive federal Medicaid or Medicare funding could refuse to serve LGBT seniors.

State Religious Exemption Laws



Twenty-one states across the country have laws that mirror the federal “Religious Freedom Restoration Act” (RFRA) that allow people, churches, nonprofit organizations, and sometimes corporations to seek exemptions from state laws that conflict with their religious beliefs, as shown in *Figure 2a*.¹¹ While many of these laws are written in a broad way and establish a test for determining when an individual’s religious exercise is substantially burdened by a state law, several states have recently passed more targeted RFRA laws that call out particular types of businesses where discrimination may be

Figure 2: Religious Exemptions Laws by State

Figure 2a: Many States have RFRA-Like Religious Exemption Laws

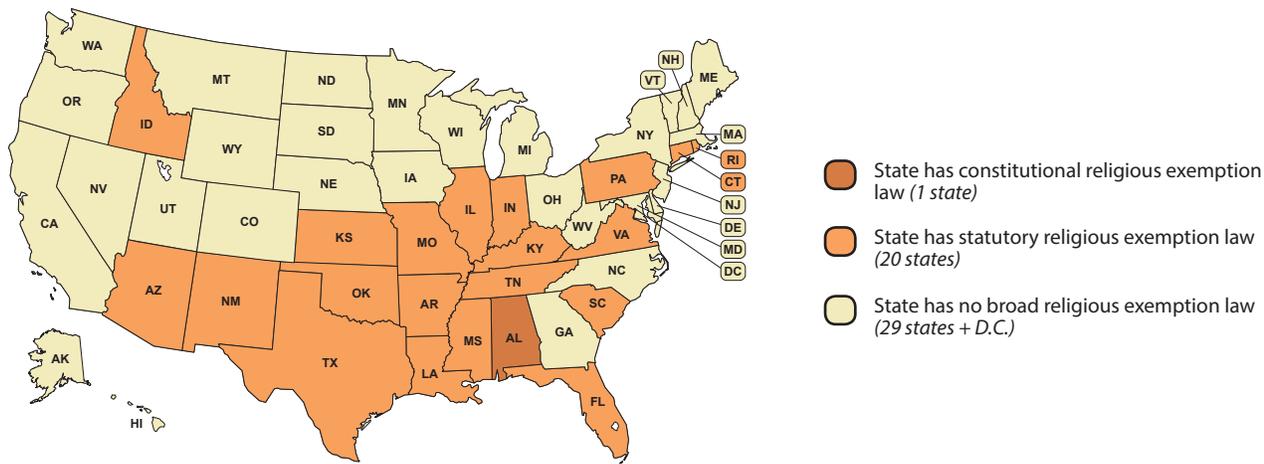
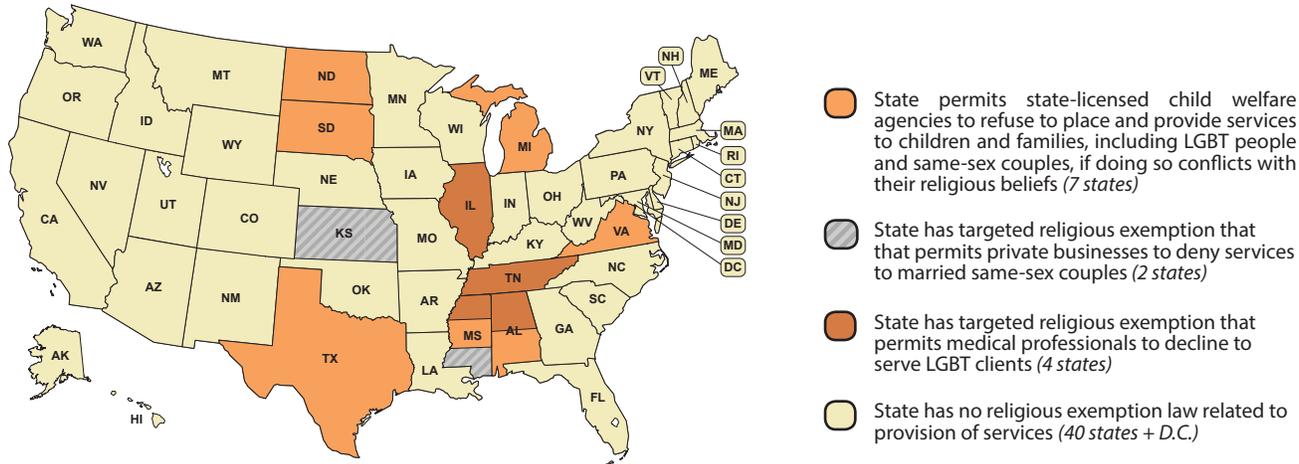


Figure 2b: Several States Have Targeted License-to-Discriminate Laws



Source: Movement Advancement Project, “LGBT Equality Maps: State Religious Exemption Laws”, accessed October 16, 2017, http://www.lgbtmap.org/equality-maps/religious_exemption_laws.

permitted. As shown in *Figure 2b* on the previous page, two states (Kansas and Mississippi) have laws that permit private businesses to deny service to married same-sex couples, while four states (Illinois, Tennessee, Mississippi, and Alabama) have laws that allow medical professionals to decline to serve LGBT people. Mississippi’s law, passed in 2016, went into effect in October 2017 after legal challenges. It allows individuals, businesses, healthcare providers, and nonprofit organizations, many of whom provide crucial services to older adults, to discriminate against LGBT people, unmarried couples, single parents, and others.

States are increasingly working to pass this type of legislation. More than 40 bills were introduced in the 2016-2017 state legislation cycle that would have created a license to discriminate for individuals, government employees, government contractors and grantees, healthcare professionals, adoption and foster care agencies, and those providing marriage-related services.¹²

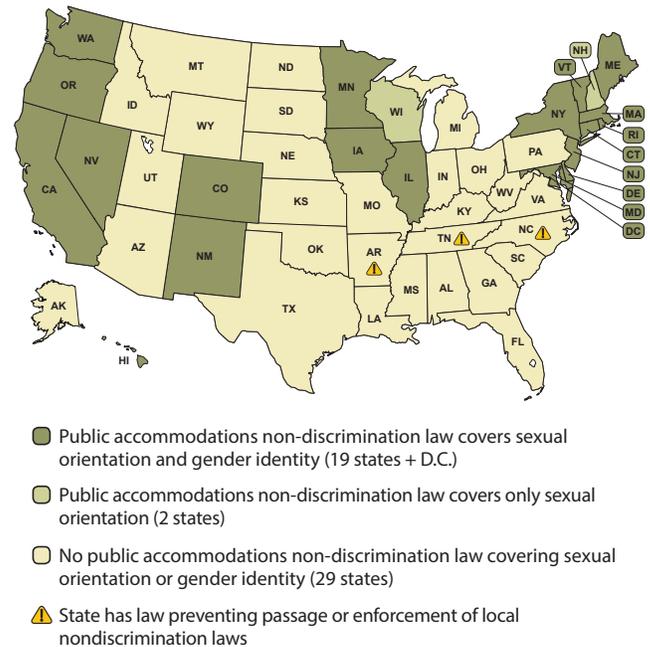
For LGBT older adults who rely on community-based programming, health care, meals, and housing, state laws that permit discrimination are incredibly worrisome. Imagine, for example, a transgender older adult living in a small town in Mississippi with only one senior living facility operated by a religious nonprofit. If that facility refuses to provide competent, caring health care—or even refuses to offer a room—to that transgender elder, rather than the law protecting a vulnerable senior, the law would make such discrimination legal. Likewise, religiously-affiliated residential living facilities could flatly refuse to treat married same-sex couples as they do other same-sex couples. Yet they could continue to receive state funding while ignoring federal and state nondiscrimination laws.

Denial of Service and the *Masterpiece* Case



There are 19 states and the District of Columbia with nondiscrimination laws that prohibit businesses and service providers from refusing service to people based on their sexual orientation and gender identity as shown in *Figure 3*. Yet in these states, some business owners and service providers are suing for the right to refuse service to customers, citing their religious beliefs as the rationale for discrimination.

Figure 3: A Minority of States Have Laws Prohibiting Discrimination in Public Accommodations



Source: Movement Advancement Project, “LGBT Equality Maps: Nondiscrimination Laws,” accessed October 16, 2017, http://www.lgbtmap.org/equality-maps/non_discrimination_laws.

In Colorado, a baker is arguing that he should be permitted to refuse service to same-sex couples based on his belief that marriage should only be between one man and one woman.¹³ Colorado has a law that prohibits places of public accommodation (which include businesses like a bakery) from discriminating on the bases of sexual orientation and gender identity. The Colorado Civil Rights Commission determined that the baker unlawfully discriminated against the couple. However, the baker challenged the Commission’s determination, and is arguing that he has an “artistic” free speech right under the First Amendment to refuse to bake for same-sex weddings.¹⁴ The Colorado Appeals Court ruled that the baker must comply with Colorado law, and the state Supreme Court agreed. The baker filed for review by the U.S. Supreme Court, which agreed in June 2017 to take this case, referred to as *Masterpiece*.

This case has far reaching implications: should the Supreme Court rule in favor of the baker, it would open the door for businesses large and small, across the country, to refuse service to customers even if state law prohibits discrimination by businesses. The implications for LGBT elders, who already face significant discrimination in places of public accommodation, are staggering:

- An older LGBT person could be denied any service that might remotely be seen to include a “creative” element, including long-term care, programming at senior centers, congregant meal sites, and even health care.
- And of course, businesses could refuse to provide even the most basic services like serving a meal to an LGBT elder or, as has happened recently, refusing an LGBT widow or widower service in a funeral home.¹⁵

Discrimination in Employee Benefits Plans



Many federal laws, including those prohibiting discrimination in employment and those regulating employee benefit plans, contain exemptions for religious organizations whose day-to-day operations are religious in nature, like a house of worship or a parochial school. For example, such religious organizations are permitted to hire co-religionists under federal employment laws, but not discriminate on other bases such as race or disability.

But some religiously affiliated service providers—including very large organizations like Catholic hospital systems—argue that their religious affiliation makes them eligible to be treated as a religious organizations and thus eligible for these same exemptions. For example, in 2017, the U.S. Supreme Court ruled in favor of a religiously affiliated hospital system in a case focused on whether the hospital could qualify as having a “church plan” under federal law regulating employee benefits.¹⁶ The Court ruled that “church plans” neither must be established, nor maintained, by a church to qualify for the exemption.¹⁷ Rather, a plan maintained by a “principal-purpose organization,” such as a religiously affiliated hospital, qualifies as a “church plan.”

The implications of this case are enormous. Religiously affiliated employers have hundreds of thousands, if not millions of employees across the country. Their employee health and pension plans may now not be subject to federal oversight, leaving employees without a right to seek recourse if an employer doesn’t abide by federal law. For example, a “principal-purpose organization” could decline to offer pension benefits to the same-sex spouse of an employee.

CONCLUSION

Religious exemption laws and policies are increasing in their number and breadth. These laws create a license to discriminate across many areas of life and leave many populations vulnerable to discrimination, including LGBT people, unmarried couples, single parents, and interfaith couples.

Religious exemptions can be particularly harmful for older LGBT adults. A substantial portion of elder healthcare providers, services agencies and organizations are religiously affiliated and they provide a large share of older-adult-specific services like assisted living, nursing, and food assistance, frequently with federal, state, and local taxpayer dollars.

These providers must be willing and able to provide their services to all older adults, instead of being allowed to mistreat or exclude some older adults needing help simply because those adults are LGBT.

ENDNOTES

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