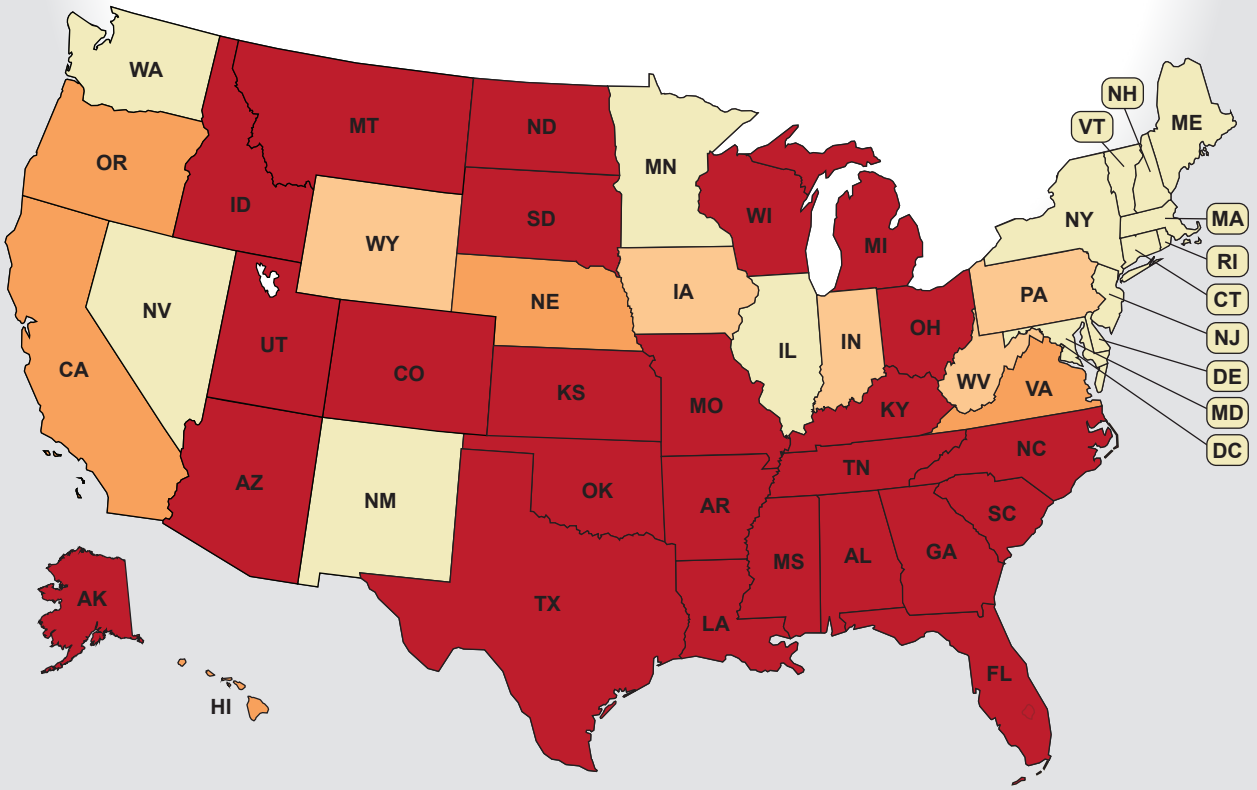
LGBTQ POLICY SPOTLIGHT:

UNDERNEATH OBERGEFELL: A NATIONAL PATCHWORK OF MARRIAGE LAWS



U.S. Territories

- Both a constitutional amendment and statute ban marriage for same-sex couples *(25 states)*
- Only a constitutional amendment bans marriage for same-sex couples *(5 states)*
- Only a statute bans marriage for same-sex couples *(5 states)*
- Neither statute nor amendment ban marriage for same-sex couples *(15 states, DC, and five territories)*

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INTRODUCTION

From 2017 to 2020, the composition of the U.S. Supreme Court drastically changed with the addition of three justices: Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. With these justices joining the Court, the "center" of the court shifted substantially toward the right and a more conservative view. In fact, these three justices, alongside Justices Alito and Thomas and sometimes Justice Robert, constitute a conservative majority on the Court.

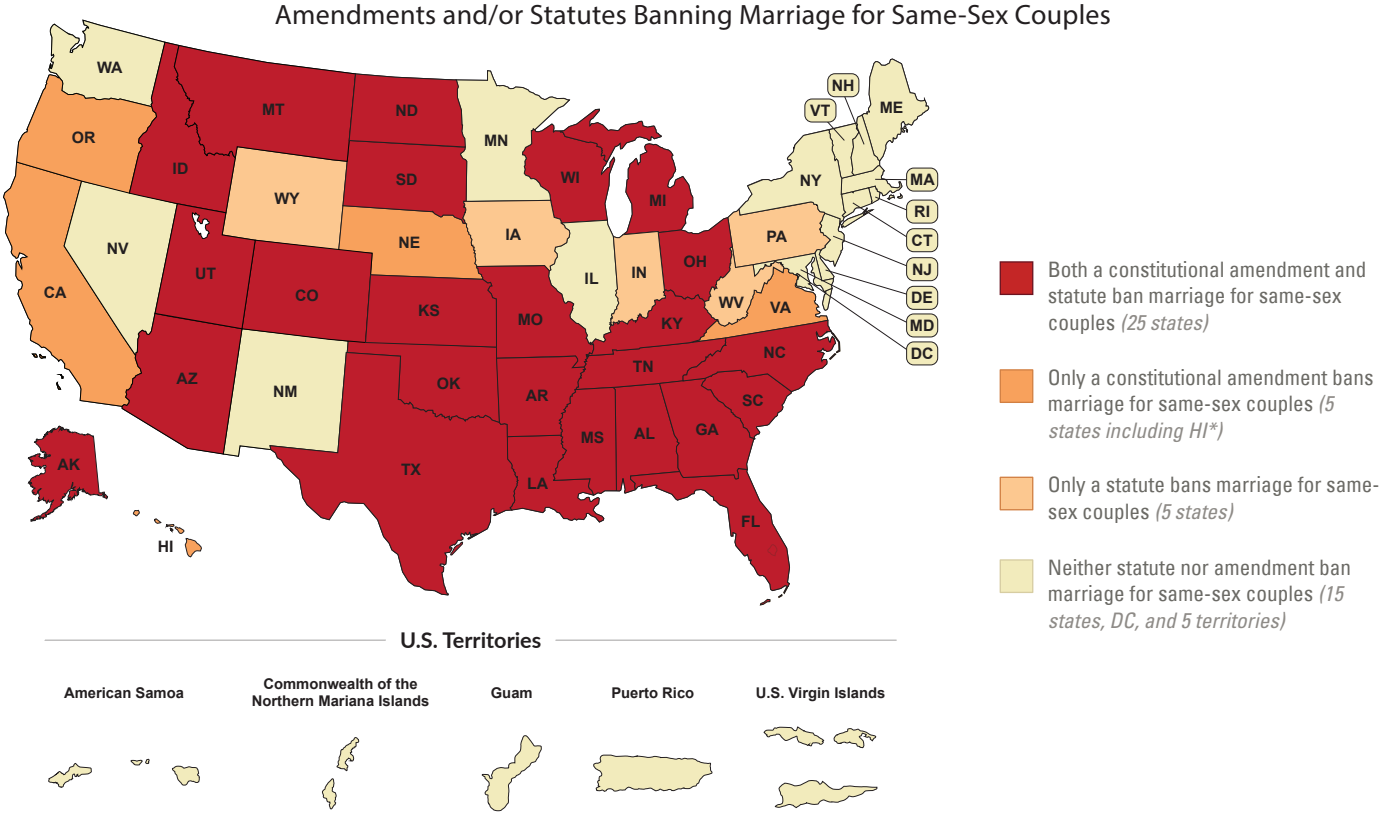
The new conservative Court is bringing change. The Court in the past two years has signaled a desire to consider cases that would have previously been denied based on precedent. For example, this Court has ruled on–or agreed to hear–cases about voting rights, abortion, the ability to limit access to guns, taxpayer funding of religious schools, the death penalty, free speech on social media, nondiscrimination protections, COVID-related limits on gatherings and vaccination requirements, and affirmative action. Together, these cases constitute threats to nearly half a century of Court precedent, demonstrate an increasingly political orientation of the Court, and signal a willingness to weigh in on so-called "hot topics" that are contested between the right and more progressive communities. The Court's willingness to take these cases has also emboldened far right efforts to reshape American society by passing legislation that past Courts would have struck down as unlawful or unconstitutional, but that this Court is willing to uphold.

This Court likely will remain ideologically conservative for a generation. If it continues to seize opportunities to revisit decades of precedent, it is possible that marriage equality and the recognition of the marriages of same-sex couples could be threatened or eroded. Most notably, there are two potential ways in which this could occur. First, the Court could expand religious freedom doctrine under the Constitution, carving loopholes in the protections afforded to LGBTQ people through nondiscrimination laws and marriage equality. There would be little states could do to blunt the impact of constitutional rulings of that nature. Second, the Court could revisit and weaken or overturn *Obergefell*, the 2015 U.S. Supreme Court case that established the right for same-sex couples to marry nationwide, which, in turn, is critical for establishing parenting ties to children, filing a joint tax return and accessing vital Social Security benefits, and to being able to make medical decisions for loved ones.

While the overturning or weakening of precedents like *Roe v. Wade* would have serious impacts on access to reproductive health care, it would not necessarily jeopardize the ruling in *Obergefell*. Many legal scholars and theorists think it is unlikely that *Obergefell* will be reversed. *Obergefell* relied on the recognition of the freedom to marry in *Loving v. Virginia*, which preceded *Roe*, as well as the guarantee of equal protection, rather than the privacy precedents that followed *Roe*. The Court also might be less interested in revisiting *Obergefell* given the increase in public acceptance of marriage equality since the case was decided. Moreover, even if the Court were to overturn *Obergefell*, the marriages entered by same-sex couples following *Obergefell* or earlier, judicial decisions should not be at risk. Those marriages were lawfully entered under controlling law at the time and are supported by significant reliance interests and rights to due process. There also may be no one who would have standing to challenge the validity of such existing marriages.

This short brief does not explore the legal theories by which the Court might decide to expand religious exemptions or consider a direct challenge to *Obergefell*. Rather this brief focuses on the existing state legal landscape for marriage equality, which could become more relevant if *Obergefell* were overturned. If that were to occur, absent potential federal statutory protections of marriage equality, state law would play a dominant role in the ability of same-sex couples to marry and to have their marriages recognized by other states. This brief offers an analysis of state marriage statutes and constitutional amendments related to marriage for same-sex couples. In many states, if *Obergefell* were overturned, existing state statutes and amendments banning marriage would go back into effect.

Figure 1: A Majority of U.S. States Have Currently Unenforceable Constitutional Amendments and/or Statutes Banning Marriage for Same-Sex Couples



Note: * Hawai'i's constitution states that the legislature is permitted to restrict marriage to one man and one woman, not that only those marriages can be recognized.

2022 LEGAL LANDSCAPE: MARRIAGE EQUALITY IN THE STATES

At the time of the U.S. Supreme Court's ruling, the national landscape for marriage for same-sex couples was mixed. Same-sex couples could marry in 37 states and the District of Columbia. In some of these states, such as Massachusetts and Iowa, state supreme courts had invalidated bans on marriage for same-sex couples, and as a result, couples were able to marry. There were other states, such as Illinois, Maryland, New York, and Washington, that had passed marriage equality legislation or had successful ballot measures extending marriage to same-sex couples. In 21 of these states, couples were able to get married because of lower federal court rulings striking down state-level bans that were handed down prior to *Obergefell*.

If the U.S. Supreme Court were to revisit the *Obergefell* decision, access to marriage equality could once again depend entirely on where a person lives and the laws in that state. Today, the policy landscape for state marriage laws can be broken into four major categories, as shown in both *Figure 1*.

1. **Fifteen (15) states, the District of Columbia, and all five U.S. territories have no statutes or constitutional amendments prohibiting marriage between people of the same sex.** Notably, three of these states took legislative action to codify marriage equality after a state supreme court ruling (Connecticut, Nevada, and New Jersey). The other 11 states and the District of Columbia passed marriage equality legislation and/or ballot measures. These 15 states, the District of Columbia, and all five U.S. territories would continue to allow same-sex couples to marry regardless of whether the U.S. Supreme

Court overturned its ruling in *Obergefell*. Three states also have statutory language (Delaware, Illinois, and New York) and one state has constitutional amendment language (Nevada) specifying that marriages between people of the same sex must be treated the same as those of different-sex couples.

All five U.S. territories lack statutory or constitutional bans on marriage for same-sex couples. American Samoa, the Northern Mariana Islands, and the U.S. Virgin Islands do, however, continue to have gendered marriage statutes. Following the U.S. Supreme Court ruling, both Guam (in August 2015) and Puerto Rico (2020) updated their marriage statutes to be gender neutral.

2. **Five states have statutes, but not constitutional amendments, prohibiting marriage between people of the same sex.** Were *Obergefell* overturned, four of these state statutes would be enforceable again. Iowa is the single exception because, prior to *Obergefell*, the state's supreme court invalidated the state's statute banning marriage for same-sex couples based on the state's constitution, although the statutory restriction remains on the books. Legislation would need to be passed to remove these statutes.

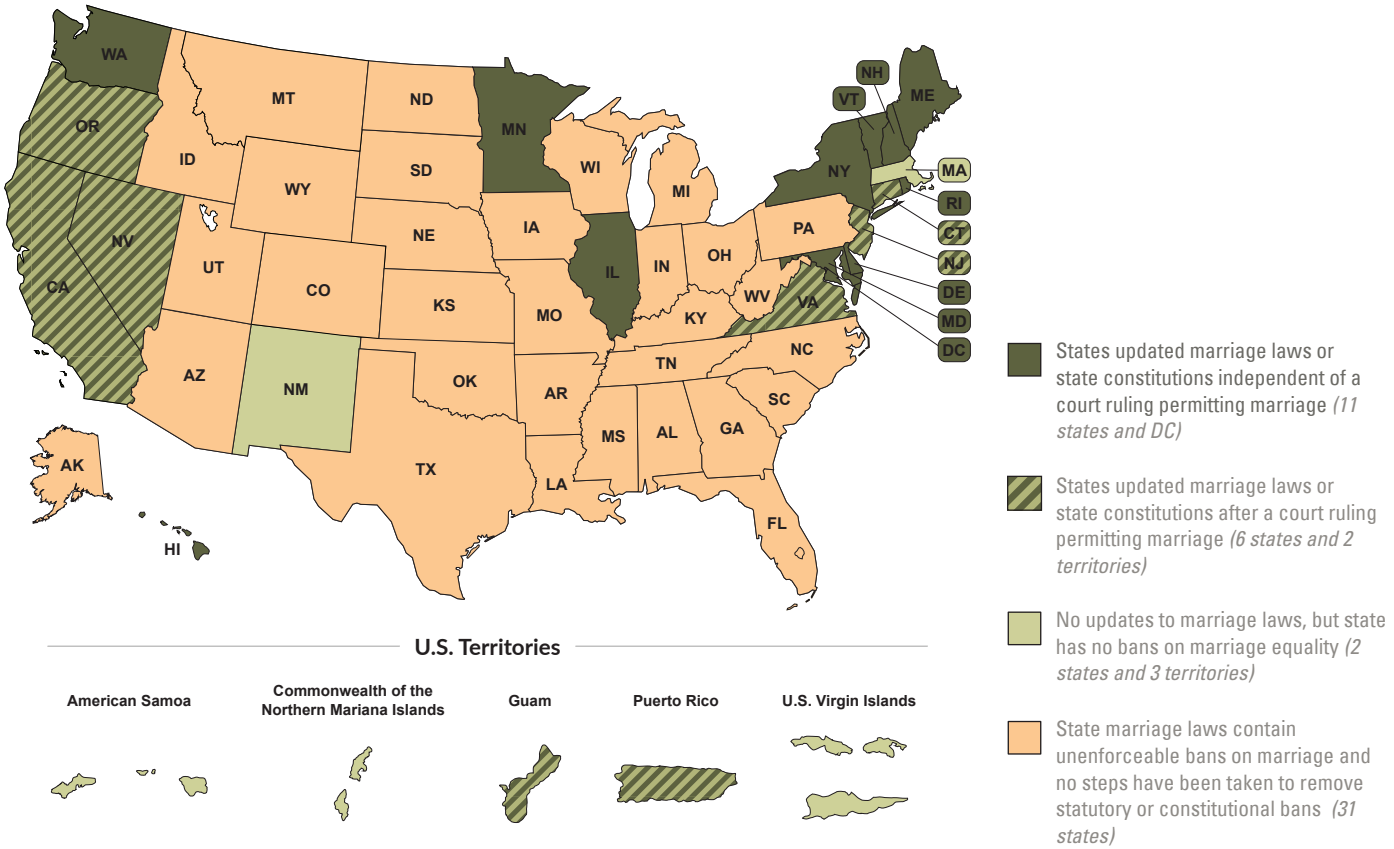
3. **Five states have constitutional amendments, but not statutes, prohibiting marriage between people of the same sex.** If *Obergefell* were to be overturned, at least some of these state constitutional amendments would become enforceable and could not be undone by statute alone. California's constitutional amendment was overturned by a final judgment prior to and independent of *Obergefell*, and it is likely the state would continue to allow same-sex couples to marry, which is now guaranteed by statute, and no one would have standing to challenge the state permitting and recognizing such marriages. The Hawai'i state constitution provides that the legislature has the authority to limit marriage to one man and one woman, but not that it must, and the state also now has a statute explicitly allowing for marriage between two people of the same sex.

4. **Twenty-five states have BOTH statutes and constitutional amendments limiting the ability of same-sex couples to marry.** In these states, were *Obergefell* to be overturned, both the statutes and the constitutional amendments would be in effect. This means that before same-sex couples could marry in these states, the state would either need to grant the right to marry through a new state constitutional amendment (thus overriding the state statute), or the state would need to repeal the existing constitutional ban and then pass a new state statute granting marriage. Figure 1 shows the current bans on marriage equality in place.

Figure 2 shows the states that have taken steps to explicitly permit marriage for same-sex couples. Overall, 17 states and the District of Columbia have updated their state laws to explicitly affirm the right to marriage for same-sex couples. These efforts take different shape depending on the state and the laws governing marriage. Two additional states, Massachusetts and New Mexico, and three territories never had statutory or constitutional bans to update; so following court rulings permitting marriage, no updates took place.

- **Eleven states and the District of Columbia** updated their laws or state constitutions without the prompting or requirement of a court ruling. These states are shown in dark green in Figure 2.
- **Six states and two territories updated their laws or state constitutions following a court ruling extending** marriage to same-sex couples, as shown in dark green stripes in Figure 2. These states are:
  - Connecticut, which, following the state supreme court's ruling in 2008 extending marriage to same-sex couples, passed a law in 2009 updating all statutory references to marriage with gender neutral language.
  - California passed legislation in 2014 repealing the existing law banning marriage for same-sex couples and updating state marriage laws to be gender neutral. California's constitutional ban on marriage remains in place but was held unconstitutional in a final judgement before, and independently of, *Obergefell*.
  - Oregon, which in 2015 and 2016 passed laws making the state's marriage statutes gender neutral and also affirming that all the benefits afforded to different-sex married couples must be made available to same-sex married couples. Oregon's constitutional ban on marriage, however, remains in place.

Figure 2: States With Modernized Marriage Laws Explicitly Permitting Marriage for Same-Sex Couples



Note: California and Iowa still have bans on marriage for same-sex couples, which are currently unenforceable and were ruled unconstitutional independent of *Obergefell*. Oregon and Virginia also have constitutional amendments banning marriage, though they are currently unenforceable as a result of *Obergefell*.

- Guam, in August 2015, passed marriage equality legislation.
- Nevada, where in November 2020 voters overturned the state's existing constitutional ban on marriage and amended the constitution to recognize marriage "regardless of gender." The measure passed with 62% of voters.
- Virginia passed legislation in 2020 repealing the statutory bans on both marriages and civil unions between people of the same sex. The state continues to have a constitutional amendment banning marriage (see below for a discussion of the repeal effort).
- Puerto Rico, in 2020, updated its family code to remove gendered language.
- New Jersey in 2022 passed legislation that updated the marriage statutes to be gender neutral.

BOTTOM LINE: Not counting California and Iowa, which have bans that were ruled unenforceable prior to *Obergefell*, and Oregon and Virgina, where constitutional bans remain in place but are unenforceable because of *Obergefell*, **there are 16 states, the District of Columbia, and all five territories without barriers to marriage equality for same-sex couples and where a drastic overturning of precedent by the U.S. Supreme Court would not alter the ability of couples to marry.**[1]

EFFORTS TO MODERNIZE STATE LAWS TO EXPLICITLY PERMIT MARRIAGE FOR SAME-SEX COUPLES

A growing number of state legislators have introduced legislation that would update marriage statutes or amend state constitutions to strip out currently unenforceable discriminatory language. The recent interest in avenues to "shore up" the ability of same-sex couples to marry followed and is likely tied to the election of President Trump and his reshaping of the U.S. Supreme Court to be a majority conservative court. In addition to Nevada in 2020 and New Jersey in 2022 (described above), both of which successfully updated their laws, in 2020 Virginia passed legislation repealing the statutory bans on both marriages and civil unions between people of the same sex. This legislation was one of many LGBTQ-focused laws, including comprehensive nondiscrimination legislation, that were passed by the legislature. Virginia's constitutional ban, passed in 2006, remains in place and would trump the new legislative language if *Obergefell* were overturned. In 2021, the legislature passed a resolution calling for a constitutional amendment to remove the marriage ban. Virginia state law requires that the state legislature must pass the resolution again in 2022 before the measure can be put to voters. However, the November 2021 election saw partisan control of the state legislature shift to Republicans for the 2022 session, so the repeal of the constitutional ban is now in question. In the past two years, at least 10 other states have seen legislation introduced to repeal statutory bans on marriage for same-sex couples or started the process to repeal constitutional bans on marriage, though no other states have seen progress to date on these efforts.[2] Notably, in three of these states (Indiana, Iowa, and Pennsylvania), an update to ensure access to marriage equality for same-sex couples would only require legislation passed by the legislature–not a constitutional repeal, as they lack constitutional bans.

IMPLICATIONS OF EXISTING PATCHWORK OF STATE MARRIAGE LAWS

The 2015 U.S. Supreme Court decision in *Obergefell* was the culmination of more than 30 years of work by LGBTQ advocates to advance marriage equality in state legislatures, at the ballot, and through the courts. The decision remains in place and has been affirmed by the U.S. Supreme Court in questions about related rights derived from marriage, including the ability of married same-sex couples to be legally recognized as parents to their children. At the same time, the current politicization of the Court and willingness to take up 'hot button' issues like access to abortion and affirmative action that have longstanding precedent, as well as the shift to the right, has some people concerned, especially given the emboldened efforts by conservative lawmakers and leaders to pass extreme legislation that is clearly designed to test the courts and given that conservative think tanks and lawmakers continue to include marriage equality as a target for their efforts.

That most states still have statutory and constitutional bans on the books, despite being currently unenforceable, could be a problem if *Obergefell* were to be overturned (which, as noted above, is not something that some scholars think is likely to occur). Eliminating those existing bans is challenging, however. The process for amending state constitutions is arduous and requires not only legislative action but also approval from voters. And many of the states that still have statutory bans on the books are places where efforts to pass nondiscrimination protections for LGBTQ have faced substantial barriers.

[1]It is important to note, however, that American Samoa, the Northern Mariana Islands, and the U.S. Virgin Islands all refused to permit same-sex couples to marry prior to the 2015 U.S. Supreme Court (and even after, as described in this spotlight report), despite not having clear statutory or constitutional bans on marriage. Also, Hawai'i has a constitutional amendment allowing the legislature to restrict marriage, but that does not itself restrict marriage.

While there are many steps that would need to happen for these bans to be enforceable again, their existence continues to signal the extent to which marriage equality remains a politicized issue. This is evident in efforts in many states, and under the former Trump administration, to insert religious exemptions that, while still permitting same-sex couples to marry, mean that a growing number of individuals, businesses and taxpayer-funded agencies, and even government officials can refuse to recognize the marriages of same-sex couples. Conservative think tanks and lawmakers continue to include marriage equality as a target for their efforts.

The ability of same-sex couples to marry is a fundamental right that extends far beyond simply gaining a marriage license. Marriage confers incredibly important benefits, including the ability to visit a spouse in the hospital and make medical decisions, the ability to stay living in a family home if a spouse dies, federal recognition for things ranging from Social Security benefits to tax filing as married couples, and a long list of parenting-related rights and benefits. The state patchwork of marriage laws that limited the ability of same-sex couples to marry prior to 2015 remains largely in place. Were the Court to overturn the *Obergefell* decision, the ability of couples to marry could again fall to the states, where a majority of states still have in place both bans in the law and in state constitutions.

[2]These states include Florida, Indiana, Iowa, Kansas, Michigan, Mississippi, Nebraska, Pennsylvania, Texas, and Wisconsin.

ABOUT THIS SPOTLIGHT

This report is part of an ongoing series that will provide in-depth analyses of laws and policies tracked at the Movement Advancement Project's "Equality Maps," found at www.lgbtmap.org/equality-maps. The information in this report is current as of the date of publication.

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