TIPPING THE SCALES: THE COORDINATED ATTACK ON LGBT PEOPLE, WOMEN, PARENTS, CHILDREN, AND HEALTH CARE

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MAP
movement advancement project

This report was authored by:

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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INTRODUCTION

The freedom of religion is one of our nation's most fundamental values. That is why it is protected by the First Amendment to the U.S. Constitution. And while religious freedom is one of our country's fundamental values, that freedom doesn't give anyone the right to harm, discriminate against, or impose their beliefs on others.

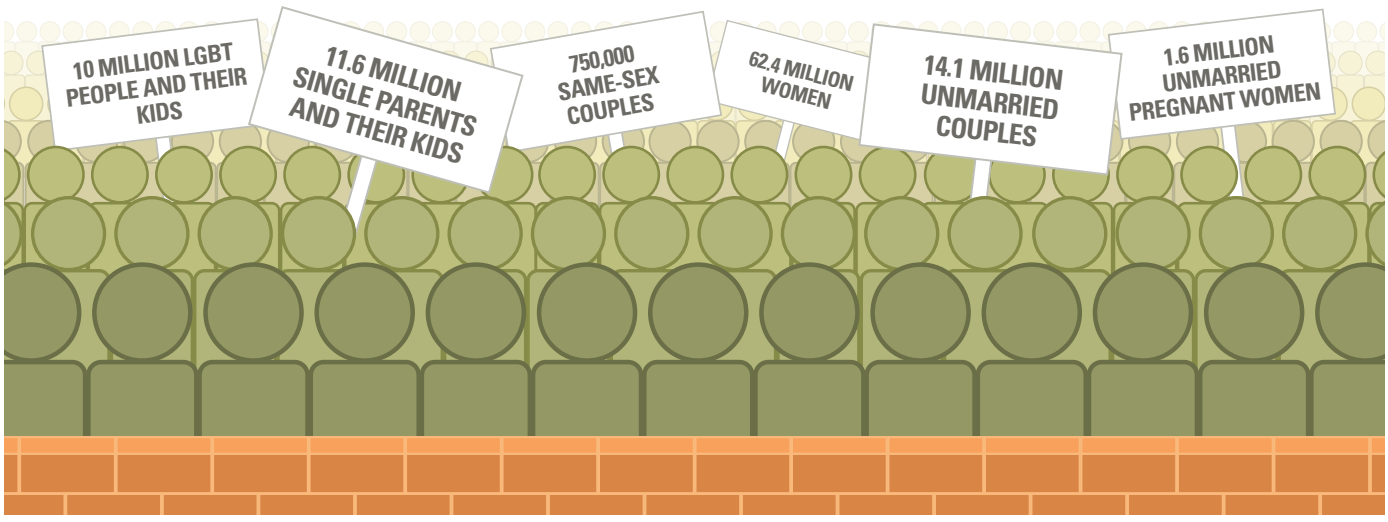
There has been a troubling shift over the past few years in our nation's legal treatment of religious freedom and when and how citizens should be exempted from laws and regulations that conflict with their religious beliefs. Historically, religious exemptions took the form of broad laws used to balance the government's and public's interest in passing legislation with the burden such laws placed on minority religious faiths and their practitioners. In order to be exempt from a law, an individual or religious community would both have to show that the law unduly burdened their faith and that the government didn't have a compelling reason for the law.

Today, the federal government and state legislatures across the country are passing insidious, targeted religious exemption laws that promote a singular religious viewpoint and 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 their religious or moral belief as the reason for doing so.

The ultimate impact of these expanding religious exemptions—occurring at the federal level through executive orders and policies, legislation, and Supreme Court cases, and at the state level through legislation, policy, and litigation—is to push religious exemptions far beyond the right to exercise religion freely without government interference. Rather, they seek to provide a right to individuals, companies, and even government employees, grantees, and contractors to deny services, to discriminate, or to otherwise exempt themselves from federal and state laws in an expanding number of areas ranging from providing employee health benefits to county clerk's offices to doctors' offices to the placement of children seeking forever homes.

This coordinated effort ultimately harms millions of Americans—lesbian, gay, bisexual, and transgender (LGBT) people and their children; unmarried couples and single parents and their children; individuals who may need access to comprehensive reproductive health services; interfaith couples; and many more.

MOUNTING RELIGIOUS EXEMPTIONS IMPACT MILLIONS OF AMERICANS, INCLUDING:



TIPPING THE SCALES FOR RELIGIOUS EXEMPTIONS TO THE LAW

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MOUNTING LEGISLATION AND LITIGATION CREATE MORE AND MORE WAYS IN WHICH RELIGION CAN BE USED AS AN EXCUSE NOT TO FOLLOW THE LAW

FEDERAL GOVERNMENT AGENCIES, EMPLOYEES, CONTRACTORS AND GRANTEES

An executive order and subsequent guidance from the Department of Justice instructs federal agencies to provide significant leeway to staff and government contractors and grantees seeking religious exemptions from federal laws, rules and regulations.

PROPONENTS OF ONE VIEW OF MARRIAGE

The First Amendment Defense Act would permit companies, nonprofits, and federal workers to discriminate against their employees and customers clients based on a single, federally endorsed belief about marriage and sexual relations.

CHURCHES THAT LOBBY

Repeal of the Johnson Amendment would allow churches to maintain their tax exempt status while using nonprofit funds to support legislation and political candidates.

CHILD SERVICES PROVIDERS

New laws allow taxpayer funded child-placement agencies to prioritize their religious beliefs over the best interest of children.

MEDICAL PROFESSIONALS

Healthcare providers may deny service to LGBT people, deny comprehensive women's health care and more.

PUBLIC SERVANTS

Government employees may decline to marry couples of whose marriage they disapprove.

CONSUMER BUSINESSES

Businesses may deny services to married same-sex couples, transgender people and more.

HEALTH INSURANCE & BENEFIT PLANS

Organizations can create insurance and employee benefit plans that don't adhere to federal standards for all employers, including allowing any employer or insurance company to refuse contraceptive coverage.

MOUNTING LEGISLATION AND LITIGATION

There is an orchestrated effort in the United States to undermine nondiscrimination protections, the provision of comprehensive health care, and the regulations and protocols administering social services by inserting religious exemptions into the laws establishing and enforcing these protections and access to services and programs. These exemptions are being enacted through litigation or legislation at the state and federal level, by executive branches, legislatures, policy, and courts, as described below.

Trump Administration Executive Order and Agency Guidance

In May 2017, President Trump signed an executive order "promoting free speech and religious liberty."[1] The executive order was vague in its implications but it ordered three actions by federal agencies. First, it instructed the Internal Review Service not to take action against religious organizations that endorse candidates in violation of the Johnson Amendment (see page 4 for more about this amendment). Second, it instructed several federal agencies to issue guidance and regulations allowing "conscience-based objections" to the requirement in the Affordable Care Act that insurers provide coverage of women's preventive services, including contraception. Finally, it requested that the Department of Justice review other regulations and policies with an eye toward increasing religious exemptions.

Following these instructions, in October 2017, the U.S. Department of Justice issued sweeping new guidance instructing federal agencies to provide significant leeway to staff and government contractors and grantees seeking religious exemptions from federal laws, rules and regulations.[2]

Among the potential implications of this guidance:

- Federal government employees could **refuse to provide services to taxpaying citizens** based on their religious beliefs, jeopardizing benefits for LGBT people, unmarried couples, single parents, women, and religious minorities.
- Federal agencies would be **unable to enforce nondiscrimination requirements** for contractors or grantees. A federal contractor could discriminate in hiring or refuse to hire an individual because they don't meet a religious litmus test. A social service agency receiving federal funding could deny service to unmarried couples, single parents, or LGBT people and continue to receive such funding.

As instructed in the executive order, the U.S. Department of Health and Human Services also released new regulations in October that allow any entity with a religious or "moral" opposition to contraception to be exempt from the requirement in the Affordable Care Act (see page 7 for more about these new regulations).

The First Amendment Defense Act

The so-called federal First Amendment Defense Act (FADA), first introduced in Congress in 2015,[3] is legislation that would permit people, companies, nonprofit organizations, and even federal government workers to discriminate against their employees, customers, and clients—but only if that discrimination is based on one or both of two would-be federally endorsed beliefs about marriage and sexual relations: 1) marriage between one man and one woman; and 2) sex is reserved for such marriages. In short, with FADA, the federal government would endorse a single religious viewpoint held by a minority of Americans and would then create a widespread, national license to discriminate based on that viewpoint.

FADA would prevent the federal government from acting against certain individuals or organizations who discriminate or otherwise act based on those beliefs. Among the actions it would prohibit the federal government from taking are: revocation of tax-exempt status; prohibition of receipt of federal grants, contracts, or loans; termination of a federal worker's employment; and exclusion from federal programs.

The implications of FADA are wide reaching:

- **Social services agencies** like homeless shelters and health clinics that receive federal funding could continue to receive that taxpayer funding even if they refuse to offer services to lesbian, gay, bisexual or transgender (LGBT) people, unmarried pregnant women, unmarried parents, or the children of such parents. This could mean turning families away from emergency shelters or refusing to provide emergency medical care.

- **Adoption or foster care agencies** receiving federal funds could deny unmarried couples, single people, LGBT people, or same-sex couples the opportunity to adopt or foster. They could choose to leave a child in a government group home rather than allow her to be adopted by an otherwise qualified person or couple.
- **State and local housing agencies** that administer programs like housing vouchers, loans to assist with purchasing a home, and more could refuse to offer those services to same-sex couples, unmarried couples, or single parents.
- **Hospitals** that receive federal funding, and are currently required to allow visitation by same-sex partners and spouses, could refuse to allow such visitation and continue to receive taxpayer funding.

FADA could permit any person or entity, regardless of whether they receive federal contracts or grants, to use FADA to shield themselves from federal government action to enforce existing laws. This has potentially staggering consequences, including:

- Employers could be able to make employment decisions, including **firing or refusing to hire** LGBT individuals, unmarried people, single parents, or single pregnant women and a) would not lose their federal grants and b) could be immune from enforcement actions by agencies like the Equal Employment Opportunity Commission (EEOC) or under Title VII of the Civil Rights Act of 1964, the federal law that prohibits employment discrimination.
- Employers could **refuse to provide health insurance coverage and other benefits** required under federal law, including reproductive health coverage, equal access to retirement benefits, or other employment benefits to unmarried employees or to same-sex spouses or partners.
- Employers could **deny federal Family and Medical Leave Act (FMLA)** leave to an unmarried employee who is caring for a new child or to an employee seeking leave to care for a same-sex spouse, and the Department of Labor, which enforces the provisions of FMLA, may be unable to compel the employer to adhere to the law.
- Landlords and home sellers could **refuse to rent** to or sell to unmarried couples, single parents, or LGBT people in violation of federal law and the Department of Housing and Urban Development may not be able to take enforcement action.

If government employees, organizations, and businesses can decide whom to hire, fire, and serve based on their religious beliefs, not only is this akin to government-sanctioned discrimination against its own citizens, but the possibilities for abuse and unintended consequences abound. FADA sends a message to companies and agencies that discrimination is condoned and encouraged by the federal government. At the same time, polls show that businesses and the public are opposed to discriminatory laws. By creating and endorsing a narrow set of federally-sanctioned religious belief, in violation of the Constitution, FADA gives those beliefs, and those who hold them, preferential treatment under the law.

Repeal of the Johnson Amendment

The Johnson Amendment[4] passed by Congress in 1954, prohibits direct lobbying or endorsement of political candidates by tax-exempt organizations including nonprofits and churches. Current efforts to repeal this law would create an unprecedented exemption from the IRS tax code for those with certain beliefs, and stand in direct violation of the U.S. Constitution, which prohibits promoting any one religious viewpoint. By permitting organizations to use tax-free money to further a very specific set of beliefs, and only those beliefs, the federal government would be favoring the establishment of certain beliefs over others.

Religious Exemptions in Adoption and Foster Care Services

Child-services organizations should prioritize the best interests of children. Yet legislation has been passed and is being considered in many states and by the federal government to allow child-placement agencies that receive government funding to refuse to provide services if doing so would conflict with their personal moral or religious beliefs. Services agencies do not need to be religiously affiliated to claim exemptions from the protocols, regulations and laws governing the provision of child services. The potential impact of these laws on the provision of child services is breathtaking:

- An agency that provides family support and family reunification services could **refuse to assist a family** with two dads or a family with a transgender child.
- A child welfare service provider could **refuse to place a child** who lost her family with a bisexual aunt, even if the placement were in the best interest of the child, and the federal government could not deny their license, contract, or funding.
- Agencies could **refuse to place LGBT youth** with accepting parents, but could instead place them with parents who intend to force them into conversion therapy.
- An agency investigating a claim of child endangerment could **decide that corporal punishment is appropriate for children**, and not a reason for family services to become involved.

A bill introduced in the U.S. House of Representatives would permit a child welfare service provider to deny services to families or youth in its care on the basis of a moral or religious belief.[5] Meanwhile, in 2017, South Dakota passed a law that allows agencies receiving state funding to decline to serve or place children with parents if doing so would "conflict with their religious or moral beliefs."[6] Texas passed a law in June 2017 that would permit child-serving agencies to deny care to children in need, including health care, based on a religious belief.[7] And the governor of Alabama signed a law in May 2017 that prohibits the state from refusing to license any provider of "child-placing services" that declines to provide a child-placing service that conflicts with their religious beliefs.[8] Four other states introduced similar legislation in 2017.

The potential for abuse of this legislation is far-reaching, as agencies and individual workers—like all Americans—have a very broad range of beliefs, and these laws legally prioritize those religious and moral beliefs over the best interests of children.

Religious Exemptions in Health Care

A broad set of religious exemptions often called "conscience clauses" arose in the healthcare context after the Supreme Court's decision in *Roe v Wade*.[9] Nearly every state and the federal government now has a specific law that allows healthcare entities to refuse to treat a woman seeking an abortion.[10] Some state laws reach other reproductive health services like birth control, and in fact several states also permit pharmacists to deny medically necessary prescriptions for birth control and still retain their license.[11] These laws have serious consequences for women's health and often leave women with no viable options for the care they need. And these exemptions only permit medical providers, facilities, health insurance companies, and other healthcare entities who object to abortion care and contraception to exempt themselves from the provision of care, raising a singular religious viewpoint above others.

Forty-eight states and D.C. permit parents to opt out of vaccinating their children before attending school,[12] leaving those children who have compromised immune systems vulnerable to many deadly preventable diseases.[13] Eighteen states also allow "philosophical" exemptions for those who object to immunizations because of personal, moral, or other beliefs that aren't necessarily part of a specific faith tradition.[14]

Government Officials Refusing to Certify Marriages

Since the U.S. Supreme Court ruled in 2015 that the freedom to marry was available to all couples, regardless of gender, some individual clerks and judges have refused to marry or issue marriage licenses to couples of whose marriages they disapprove. Kim Davis, a county clerk in Kentucky, became a very visible example when she refused to issue marriage licenses for same-sex couples following the Court's decision.[15] Davis was held in contempt of court for her refusal to perform a vital function of her job, and in response, the Kentucky legislature passed a law that removes country clerks' names from marriage licenses.[16]

North Carolina passed a law permitting magistrates to refuse to marry couples whose marriages they disapproved of by opting out of performing any marriages.[17] The law was challenged by same-sex couples, but upheld in federal district court. As of publication, the case is pending in the 4th Circuit federal court.[18]

Since the *Obergefell* decision extending the freedom to marry nationwide, a number of judges have also refused to marry same-sex couples. A judge in Oregon has been accused of developing a scheme

to avoid marrying same-sex couples; he instructed his clerks to investigate whether couples wishing to marry before him were of the same-sex, in which case his clerks were to say that the judge was not available.[19] Lambda Legal's amicus brief in the case argues that the judge is in violation of the Oregon Code of Judicial Conduct for refusing to marry some couples based on their sexual orientation.[20] In Wyoming, a judge claimed that presiding over same-sex weddings violated her religious freedom; the Wyoming Supreme Court censured her, ruling that performing marriages is an essential function of a judge's job.[21]

Houses of worship and clergy have the constitutionally protected freedom to decide which marriages they will and won't perform in their faith traditions. No church or pastor could be forced to perform a marriage that goes against their religious teachings or beliefs—including, for example, marriages of same-sex couples, interfaith marriages, or marriages of people previously divorced. But permitting clerks, magistrates, and judges to refuse to marry same-sex couples based on religious beliefs is a clear violation of the Constitution's Equal Protection clause, and a clause of the First Amendment prohibiting federal laws from establishing any religion.

Denial of Service

In states with nondiscrimination laws that prohibit businesses from refusing service to people based on their sexual orientation and gender identity, some business owners are suing for the right to refuse service because of their religious beliefs. Currently, 19 states and D.C. prohibit discrimination in places of public accommodation, including shops, doctors' offices, banks, and restaurants on the bases of sexual orientation and gender identity.[22] Two more states prohibit discrimination on the basis of sexual orientation only.

In early 2017, the Washington Supreme Court ruled that a flower shop was in violation of the state's non-discrimination law when it refused to provide flowers for a same-sex couple's wedding.[23] The florist argued that because of her religious beliefs, she should be able to refuse to serve same-sex couples who are marrying. The court countered that when she entered the commercial sphere, she agreed to abide by Washington's laws, including its nondiscrimination laws.[24] Arlene Flowers is appealing the Washington court's decision to the U.S. Supreme Court.

In Colorado, a baker is arguing a similar case: that he should be permitted to refuse service to same-sex couples based on his religious beliefs.[25] Colorado has a law that prohibits places of public accommodation from discriminating on the bases of sexual orientation and gender identity, but the baker is arguing that he has an "artistic" free speech right under the First Amendment to refuse to bake for same-sex weddings.[26] 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, who agreed in June 2017 to take the case.

The 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 such discrimination. In 2013, a taxi driver in Chicago told two men to leave the taxi after he saw them kissing. Lambda Legal sued the taxi company under the Illinois Human Rights Act, which prohibits discrimination on the basis of sexual orientation in places of public accommodation including taxis, and settled out of court.[27] Conversely in Michigan, which does not prohibit discrimination in places of public accommodation, a pediatrician was able to legally turn away an infant for a newborn checkup because the baby had two mothers.[28]

A majority (56%) of Americans oppose allowing small business owners to refuse service to gay and lesbian people, even if doing so goes against the business owner's religious beliefs.[29]

Discriminatory Health Insurance Coverage and Employee Benefits

Several court cases and recently released executive orders and regulations have created broader religious exemptions in the context of health insurance coverage and employee benefits. The impact of these actions is that millions of Americans may lose access to vital benefits ranging from pension benefits for same-sex couples and unmarried couples to reproductive health care for millions of women.

Executive Order and Regulation on Provision of Contraception and Other Essential Health Benefits

A May 2017 presidential executive order directed federal agencies to consider new regulations that would allow "conscience-based objections" to the Affordable Care Act requirement that health insurance plans provide coverage of women's preventive services, including birth control.[30] In October 2017, three federal agencies released interim final rules permitting any employer or university with a "sincerely held religious belief" or moral objection to deny coverage for contraceptive benefits to employees and students.[31] These rules jeopardize contraceptive coverage for the more than 62.4 million women in the United States who became eligible for coverage through the Affordable Care Act.

Exemptions for Private Companies

A related U.S. Supreme Court case, *Burwell v. Hobby Lobby*, decided in June 2014, was brought by three private, for-profit companies who sued for the right to be exempted from the requirement of offering contraceptive coverage to their employees under the Affordable Care Act (ACA).[32] The Supreme Court found in favor of the companies, opening a new class of entities—private, for-profit, "closely-held"[a] companies—that can be exempt from federal laws for "religious purposes."

The *Hobby Lobby* ruling and President Trump's 2017 rule allowing any employer to get out of the ACA's contraception requirement are both further signals of the recent, dangerous acceleration of religious exemptions.

Exemptions to Employee Benefit Plan Oversight

The Employee Retirement Income Security Act (ERISA) sets minimum standards for employee health, pension, and other benefit plans, and protects employees who participate in employer plans. ERISA's "church plan" exemption permits employer plans traditionally established and maintained by a church to avoid the reporting, disclosure, and funding requirements that other plans must adhere to.

In 2017, the Supreme Court ruled that "church plans" neither must be established by nor maintained by a church to qualify for the exemption.[33] Now, a plan maintained by a "principal-purpose organization," such as a religiously affiliated hospital, qualifies as a "church plan"[34] and isn't required to abide by the federal standards for ERISA plans. The implications of this cases are enormous—three federal Circuit Courts had ruled in the reverse, and religiously affiliated employers employ hundreds of thousands, if not millions of employees across the country. Their employee health insurance 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.

[a] "Closely-held" corporations are businesses in which 50% or more of the shares are held by five or fewer people.

The History of the First Amendment and the Religious Freedom Restoration Act

A series of Supreme Court rulings through 1990 established parameters for when a law unconstitutionally burdened a person's religious exercise under the First Amendment. If an individual or religious group felt that a certain law created a *substantial burden* on their *sincerely held religious beliefs*, they could sue the government in court. The Court would then decide if the law did indeed create a substantial burden, and if so, whether it was still constitutional to enforce the law because it served a compelling public interest without reaching too broadly. For example, among the key landmark cases landmark cases in the protection of religious freedom are the following:

- In 1940, the Court held in *Cantwell v. Connecticut* that a state could not require Jehovah's Witnesses seeking to proselytize to apply for permits if non-religious solicitors were not required to obtain permits.[35]
- In *Sherbert v. Verner* in 1963, the Supreme Court held that denying a Seventh-day Adventist unemployment benefits for refusing to work on Saturday, an important day in their faith, was a violation of their free exercise of religion.[36]
- In a 1972 case, *Wisconsin v. Yoder*, the Supreme Court held that a Pennsylvania law requiring compulsory education violated Amish parents' free exercise of religion.[37]

Over many years, the Supreme Court's interpretation of the First Amendment became stricter. In these latter cases, the Court outlined that that a generally applicable law that is religiously neutral—that is, a law that did not explicitly invoke religion or target a specific religion—did not violate the First Amendment even if the law burdened a party's free exercise of religion. If the law touched on religion and was determined to be burdensome, then the Court balanced individual rights against the government's interest.

An example of this newer standard is the 1982 decision that Amish business owners must pay Social Security and unemployment taxes, despite their sincerely held belief that paying taxes is sinful.[38] In his opinion, Chief Justice Burger wrote: "To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."[39] In the late 1980s, the Supreme Court decided several important religious freedom cases under this new standard in favor of the government, including two cases restricting Native Americans' sacred rituals and access to sacred grounds.[40]

> *To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.*
>
> - Chief Justice Buger
> *United States v. Lee*, 455 US 252 (1982)

The Court's consistent rulings against the claims of religious minority groups prompted Congress to pass the Religious Freedom Restoration Act of 1993 (RFRA), with the intention of providing expanded protections for religious beliefs and practice. Unfortunately, the legislation was overly broad and has been interpreted and extrapolated far more broadly and more dangerously than ever intended.

Not only are all laws now subject to legal challenge, including religiously-neutral laws, RFRA requires the government to show a compelling interest for passing a law and to prove that it pursued that interest in the manner *least burdensome* to religion. These added hurdles made it difficult for federal laws to succeed against a challenge of religious freedom.

Since 1997 when the Supreme Court ruled that the federal RFRA did not apply to state laws,[41] 21 states enacted their own versions of RFRA, many creating state-level copies of the federal law and often even expanding its reach and application.[42] The overbroad religious protections provided by RFRA federally are now also embedded in almost half of states.

CONCLUSION

The First Amendment to the U.S. Constitution protects the freedom of religion. Yet a concerted effort is underway to use the freedom of religion to give people the right to impose their beliefs on others, to harm others, and to discriminate in many areas of life. This report highlights the ways in which federal and state laws seek to create a license to discriminate for government employees and organizations that receive taxpayer dollars. Courts are increasingly receptive to arguments made on behalf of people and companies that wish to impose their religious beliefs on their employees, and even on customers. And recent guidance and regulation from the federal government demonstrates the sweeping implications of creating a license to discriminate—from hiring and firing, to workplace benefits, to child welfare agencies, county clerks, and even doctor's offices. The majority of Americans don't support using religion as a guise for the right to discriminate. A 2017 poll by PRRI found that 56% of Americans oppose allowing small businesses to refuse goods and services to LGBT people, and more than two-thirds (68%) oppose allowing agencies that receive federal funding to refuse to place children in loving homes headed by LGBT people.[43] Efforts to create a broad license-to-discriminate goes against core American values—values like fairness, not discriminating, and treating others the way one would like to be treated.

ENDNOTES

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[32] *Burwell v. Hobby Lobby*, 573 U.S. 22 (2014).

[33] *Advocate Health Care Network v. Stapleton*, U.S. Docket No. 16-74, June 2017.

[34] Advocate Health Care Network v. Stapleton, Docket No. 16-74, June 2017.

[35] Cantwell v. Connecticut, 310 US 296 (1940).

[36] Sherbert v. Verner, 374 US 398 (1963).

[37] Wisconsin v. Yoder, 406 US 205 (1972).

[38] United States v. Lee, 455 US 252 (1982).

[39] United States v. Lee, 455 US 252 (1982).

[40] *See* e.g. Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988) and Employment Division, Department of Human Resources of Oregon vs. Smith, 494 U.S. 872 (1990).

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