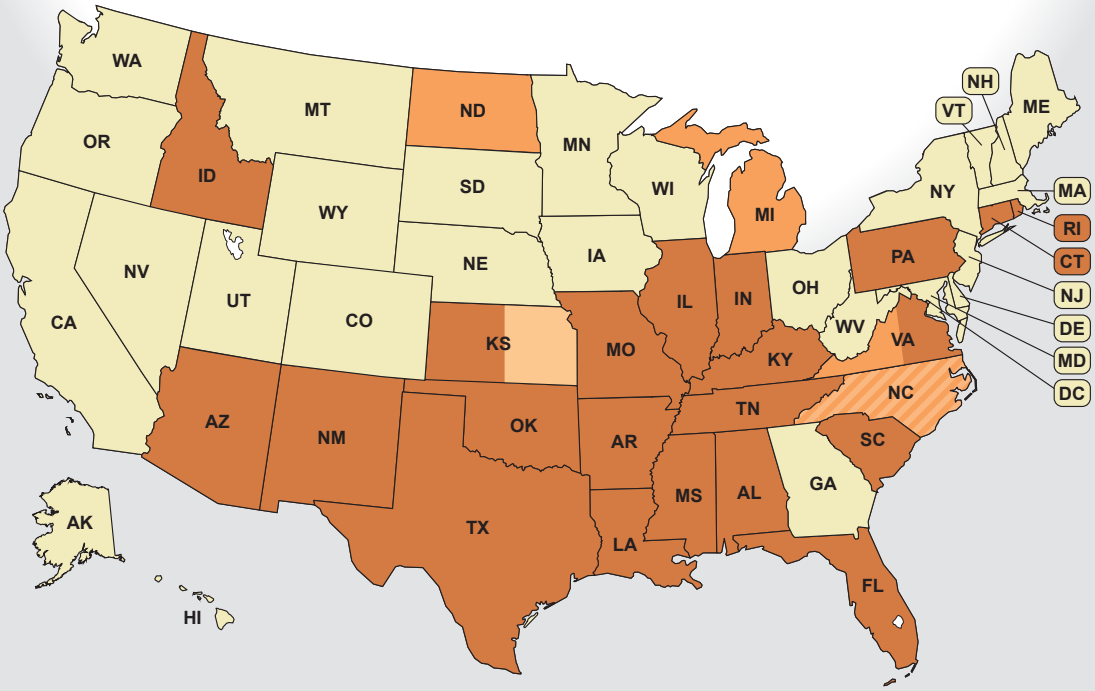
LGBT POLICY SPOTLIGHT:

STATE AND FEDERAL

RELIGIOUS EXEMPTIONS

AND THE LGBT COMMUNITY



43% of the LGBT population

State has broad explicit constitutional or statutory religious exemption law (21 states)

6% of the LGBT population

State has targeted religious exemption that permits state-licensed child welfare agencies to refuse to place and provide services to children and families, including LGBT people and same-sex couples, if doing so conflicts with their religious beliefs (3 states)

3% of the LGBT population

State has targeted religious exemption law that permits state officials to decline to marry couples of whose marriage they disapprove (1 state)

1% of the LGBT population

State has targeted religious exemption that that permits faith-based organizations to deny services to married same-sex couples (1 state)

51% of the LGBT population

State has no broad explicit or targeted religious exemption law (26 states + D.C.)

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SPOTLIGHT REPORT

INTRODUCTION

The First Amendment of the United States Constitution prohibits the federal government from passing any law "respecting an establishment of religion, or prohibiting the free exercise thereof." A series of Supreme Court rulings from the 1960s through 1990 established parameters for when a law unconstitutionally burdened a person's religious exercise. However, some felt that the Supreme Court decisions had inadequately protected religious freedom. In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), establishing a legislative test for laws that burden religious exercise. Under RFRA, the government may only *substantially* burden a person's exercise of religion if the law: 1) furthers a *compelling* government interest; and 2) is the *least restrictive* means of furthering that interest.

In 1997, the Supreme Court found that the federal RFRA did not apply to state laws. In response to that ruling, 21 states have enacted their own explicit RFRA-style "religious exemption" statutes or state constitutional amendments establishing religious exemptions to state law (see map on the cover of this report). This publication will examine the common elements of the state and federal religious exemption laws, review the national landscape of religious exemption legislation and litigation, demonstrate how religious exemption laws have had serious unintended consequences, and examine the impact of broad religious exemption laws on the LGBT community.

As shown in the map on the cover of this report, 43% of LGBT Americans live in a state with a broad religious exemption law. This percentage may grow over the next few years as a number of state legislatures debate enacting religious exemption statutes. As of August 2015, 17 state legislatures have introduced religious exemption bills in 2015, some states proposing more than one.[1]

RELIGIOUS EXEMPTION LAWS AND THEIR COMPONENTS

Religious Burden

When seeking an exemption from federal law under RFRA, a person must show that the burden imposed by the federal government is a "substantial" one. The Supreme Court has previously decided if a burden is substantial by looking at whether the law in question requires someone to do something that their religion forbids—or if the law prevents someone from doing something that their religion requires.[2]

Some state religious exemption laws have made it much easier to claim a religious burden. Alabama's religious exemption amendment does not require the burden to be substantial, opening the door for exemptions from laws with which someone may merely disagree.[3] In Kansas, a substantial burden can be merely "likely," meaning a person does not need to show that their religious exercise has actually been burdened, just that it *might* be burdened.[4]

Additionally, Kansas has created an expanded definition of "substantial burden" to include withholding of government benefits, exclusion from government programs or facilities, and the assessment of civil, criminal, or administrative penalties.[5] A definition this broad can severely hamper the state government from enforcing a law if someone objects to it on religious grounds. Religious organizations that refuse to follow government regulations or laws have sued to continue to receive public funding, claiming that a denial of taxpayer funding would be considered a burden. In short, broad religious exemption laws open the state up to endless, frivolous lawsuits from those who object to various laws.

Who Is Considered a "Person" (and Therefore Able to Claim a Religious Exemption)

A recent interpretation of the federal RFRA is that it now applies to some private businesses. Traditionally, only individuals and religious communities, including churches and religiously affiliated non-profit organizations, were considered "persons" who could claim a religious exemption. However, the Supreme Court recently decided a high-impact case that expanded the definition of "person" under the federal RFRA.

In *Burwell v. Hobby Lobby*,[6] the Court granted an exemption to three for-profit, closely held corporations.[7] Hobby Lobby, Conestoga Wood, and Mardel claimed that their businesses were run according to their owners' religious principles and that their religious expression was burdened by the requirement in the Affordable Care Act (ACA) that they provide their employees with health insurance that included coverage for some kinds of birth control. The Court agreed, finding that these

types of "closely held" corporations should be able to seek exemptions from federal law based on religious grounds. The Department of Health and Human Services has since promulgated regulations permitting some for-profit companies to apply for an exemption from the ACA's contraception mandate.

Although the Supreme Court decision only applied to the federal RFRA, it is very likely to affect how states interpret who is considered a "person" under their own state religious exemption statutes. In addition to this reinterpretation, some state religious exemption laws have already enshrined a broad definition of "person" into their legislative language. For example, South Carolina's statute defines "person" to include "an individual, corporation, firm, partnership, association, or organization."[8] Kansas' definition is broader: "Person" means any legal person or entity under the laws of the state of Kansas and the laws of the United States."[9]

Compelling Government Interest and Least Restrictive Means

The test established in the federal RFRA requires that the government show a "compelling interest" in passing a law if the law is to substantially burden a person's religious exercise. Generally, this requirement means that the government must have had a necessary reason for passing the law, such as prohibiting racial discrimination.

In the *Hobby Lobby* case, the Supreme Court accepted that the government did have a compelling interest in providing cost-free access to comprehensive healthcare.[10] Continuing its analysis, however, the Court decided that the ACA's contraceptive mandate was not the "least restrictive means" by which the government could achieve its interest. The Court proposed, for example, that the Department of Health and Human Services could pay for coverage of employees' contraception. This ruling created a new, alarming precedent for how the government must comply with the "least restrictive means" component of a religious exemption law; for example, the Court can require the government to create whole new programs and bear the costs of those who wish to exempt themselves from laws.

In addition to this federal ruling affecting how states interpret their own religious exemption statutes, several states have explicitly made it more difficult for the government to show that the law it passed served a compelling interest and that it was the least restrictive means by which to achieve the government's goal. In Kansas, a government interest must be "of the highest order" rather than merely "compelling."[11] This is an extremely high standard, and one that might be difficult to meet. In Kentucky, the state government must prove "by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act."[12] In Missouri, the state government must show that the law in question is "essential to further a compelling governmental interest, and is not unduly restrictive considering the relevant circumstances."[13] Both of these tests are stricter than the standard established in the federal RFRA.

UNINTENDED CONSEQUENCES OF RELIGIOUS EXEMPTIONS

While the original federal RFRA enjoyed bipartisan support and may have been well-intentioned, the vague legislative language has led to a rapidly increasing number of unintended and often harmful consequences. The effects of this legislation are growing and may take decades to sort out in the courts. As a result, religious exemption legislation now sees bipartisan criticism, though it still enjoys the support of many far-right activists.

In the late 1990s, commercial landlords successfully sued to deny apartments to unmarried couples, arguing that their religious beliefs prevented them from facilitating the "sin of cohabitation."[14] These cases led many organizations and policymakers to pull their support for the Religious Liberty Protection Act, originally designed to extend religious exemptions legislation to the states after the Supreme Court found that the federal RFRA did not apply to the states.[15] The bill did not pass.

After the *Hobby Lobby* ruling, some private employers may now exclude basic contraception from their employee health plans, weighting employers' beliefs above the beliefs or health needs of their employees. In her dissent, Justice Ruth Bader Ginsburg expressed the fear that the *Hobby Lobby* decision paves the way for further harmful medical consequences: that employers would be able to deny coverage for vaccinations, blood transfusions, antidepressants, and more – picking and choosing employee health coverage based not on medical science or best medical practices, but rather based on the employer's religious beliefs.[16]

The *Hobby Lobby* ruling also made it dramatically more difficult for the government to demonstrate that it was complying with the "least restrictive means" test. In an alarming use of the *Hobby Lobby* decision, a federal judge in Utah held that the ruling in *Hobby Lobby* meant that a leader of a religious sect did not have to testify in a case investigating child exploitation and abuse of child labor laws.[17]

The child exploitation case alleges that the leaders of a religious sect in Utah closed local schools and required children to pick pecans at a private ranch. When called to testify, the sect's leader, Vernon Steed, refused, saying he objected to discussing matters internal to the Fundamentalist Church of Jesus Christ of Latter-Day Saints. The judge held that, in light of the Supreme Court's ruling in *Hobby Lobby*, the religious objection by the sect's leader prevents the court from compelling his testimony. Why? The *Hobby Lobby* decision set a new, much higher bar for requiring the government to advance its interests by using the "least restrictive means" possible. Based on the new standard, the judge found that the government "failed to show that forcing Mr. Steed to answer the questions offensive to his sincerely held religious beliefs is the least restrictive means to advance any compelling interest it may have."[18]

While the federal RFRA was never meant to compromise the health and safety of children, religiously affiliated childcare centers have been exempted from health, safety and caregiver training standards in several states.[19] Similarly, in Minnesota, the Catholic Archdiocese of Milwaukee was granted a religious exemption under the federal RFRA to insulate some church funds from lawsuits arising from victims of sexual abuse by clergy.[20] Fortunately, a federal appeals court disagreed, holding that federal bankruptcy code, the law under which the victims of the sexual abuse sued the archdiocese, served a compelling interest for the government. The appeals court also held that the federal RFRA does not apply when the government is not a party to a lawsuit.[21]

These consequences were not part of the original intention of the federal RFRA. While the long-term consequences of this vague legislation remain unclear, what is clear is that religious exemption legislation paves the way for numerous costly lawsuits and opens a can of worms that may take decades to sort out.

IMPACT ON THE LGBT COMMUNITY

Intent

The current increase in religious exemption legislation and litigation across the county is no coincidence. The volume of laws and lawsuits is increasing in reaction to the expansion of the freedom to marry for same-sex couples, the increase in nondiscrimination protections for LGBT people, and the passage and rollout of the Affordable Care Act (ACA), with its mandate that employers cover essential health benefits, including contraception.

Although the language of most religious exemption legislation does not enumerate particular groups of people being targeted for discrimination, the intent is made clear through legislative history and the dialog surrounding these bills. For example, in Indiana, proponents of the recently passed religious exemption legislation discussed how the law would allow business to refuse to serve same-sex couples and would allow adoption agencies to turn away same-sex couples as potential parents.[22] In Michigan, the state legislator who introduced the religious exemption bill explained that he saw it as a companion to proposed nondiscrimination legislation, protecting businesses who did not want to serve lesbian, gay, bisexual, or transgender (LGBT) customers.[23]

Simultaneously, businesses and institutions are capitalizing on the *Hobby Lobby* decision and seeking to expand on the exemptions granted to for-profit businesses by the Supreme Court. Religious universities have demanded exemptions both from the ACA's contraception mandate and the gender identity nondiscrimination requirement recently promulgated by the Department of Education.[24]

Anti-LGBT activists are also trying to pass specific religious exemptions that more clearly target LGBT people. For example:

- Virginia,[25] North Dakota[26] and Michigan[27] have enacted laws allowing private adoption and foster care agencies to discriminate against any parents or children if the agency claims that serving those parents or children would violate its written moral or religious beliefs. These laws allow agencies to deny loving, forever homes to children simply because the parents seeking to adopt them are of a faith tradition with which the agency disagrees, or because the parents are unmarried or a

same-sex couple. Three additional states introduced similar laws in 2015: Texas, Florida, and Alabama.

- A North Carolina law enacted in June 2015 excuses magistrates, state officials, and registers of deeds from performing or recording any marriage with which the magistrate or register disagrees on religious grounds.[28] The bill is exceedingly broad, permitting any magistrate to turn away any couple for religious reasons, though once the magistrate does so, they cannot perform any marriages for a six-month period.[29]
- In July 2015, the governor of Kansas signed an executive order permitting faith-based organizations, including those serving homeless people and children in foster care, to deny services to married same-sex couples.[30] The executive order also prohibits the state from taking any action, such as denying a license or tax-exempt status, against organizations that refuse to serve same-sex couples. Kansas already has an exceedingly broad religious exemption law and faith-based organizations would likely have already had the right to refuse service, but this order makes clear that same-sex couples and LGBT people are targets of discrimination.
- Policymakers in Michigan in 2011 attempted to add clauses to anti-bullying laws to provide exemptions for students who bully and claim that bullying behavior is based on an expression of their religious beliefs.[31]

Uncertainty

Religious exemption laws create uncertainty for businesses, for LGBT people, and for all Americans. When each person or business is encouraged, in essence, to pick and choose which laws do and do not apply to them, the protections built by the rule of law are undermined for everyone.

For example, in some states, a religious exemptions law can be used as a defense in a civil suit between private parties.[32] This means that if someone sues a person or a business for not following the law—by illegally turning them away from a place of business, for example—the defendant can use their state's religious exemption law as a defense to their actions without first going to court to ask for an exemption. This creates deep uncertainty for people who may face discrimination.

Uncertainty in the law also makes it difficult for law enforcement and state and local governments to enforce the law. In his analysis of a proposed religious exemption law in Georgia, Republican former state Attorney General Michael J. Bowers wrote:

> *"The proposed RFRA is full of uncertainties making law enforcement and administration difficult. . . . Allowing each person to become a law unto his or herself destroys uniformity of the law and creates mass uncertainty on the part of law enforcement, state and local officials, and professional educators confronted by those challenging the applicability of laws or policies on religious grounds."*[33]

CONCLUSION

The original federal RFRA may have been passed with good intentions, but the Supreme Court's interpretation of the law in *Hobby Lobby*—alongside states' ever-increasing roster of religious exemptions, both broad and targeted—raise serious concerns about how these vague exemptions are being used to harm others, interfere with law enforcement, and undermine the rule of law. And while proposed religious exemption legislation usually does not explicitly mention the LGBT community or any other community being targeted for discrimination, the timing of the conversation and the explicitly anti-LGBT rhetoric used to justify these exemptions makes it clear that religious exemptions are being used as a vehicle to harm LGBT individuals and their families.

ENDNOTES

[1] National Conference of State Legislatures, "2015 State Religious Freedom Restoration Legislation," July 15, 2015, http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx.
[2] *See* Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987) and Sherbert v. Verner, 374 U.S. 398 (1963).
[3] Alabama Religious Freedom Amendment, Ala. Const. art I, § 3.01.
[4] K.S.A. 60-5301-05.
[5] *Id*.
[6] Burwell v. Hobby Lobby, 573 U.S. ____ (2014), formerly Sebelius v. Hobby Lobby and Sebelius v. Conestoga Wood.
[7] "Closely-held" corporations are businesses in which 50% or more of the shares are held by five or fewer people. Approximately 90% of American companies are closely-held. *See* Venky Nagar, Kathy Petroni, & Daniel Wolfenzon, "Governance Problems in Closely-Held Corporations," Journal of Financial and Quantitative Analysis, University of Washington, vol. 46, issue 4, Aug. 2011, https://www0.gsb.columbia.edu/mygsb/faculty/research/pubfiles/4049/Governance%20Problems%20in%20Closely%20Held%20Corporations.pdf.
[8] S.C. Code Ann. §§1-32-10 to -60.
[9] K.S.A. 60-5301-05.
[10] Burwell v. Hobby Lobby, 573 U.S. ____ (2014), formerly Sebelius v. Hobby Lobby and Sebelius v. Conestoga Wood.
[11] K.S.A. 60-5301-05.
[12] 13 RS HB 279 (not yet codified).
[13] Mo. Ann. Stat. §§ 1.302-.307.
[14] *See e.g.* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996) (plurality opinion).
[15] *See* Brief of Christian Legal Society, et al. as Amici Curiae Supporting Respondents, Burwell v. Hobby Lobby, 573 U.S. ____ (2014) (Nos. 13-354 & 13-356).
[16] Burwell v. Hobby Lobby, 573 U.S. ____ (2014) (J. Ginsburg dissenting).
[17] Perez v. Paragon Contractors, No. 2:13CV00281-DS (D. Utah, Sept. 11, 2014) (order granting witness's motion to sustain objections to questions posed during subpoena testimony).
[18] *Id*.
[19] RaceForward, "National Report on States' Childcare Licensure Reveals Inadequacies in Oversight, Funding," April 22, 2009, https://www.raceforward.org/press/releases/national-report-states%C3%A3%C2%A2%C3%A2%E2%80%9A%C2%AC%C3%A2%E2%80%9E%C2%A2-childcare-licensure-reveals-inadequacies-oversight.
[20] Listecki v. Official Committee of Unsecured Creditors, Nos. 13-2881, 13-3353, 13-3495 (7th. Cir 2015).
[21] *Id*.
[22] Zack Ford, "Conservatives Admit the Truth on Indiana 'Religious Liberty' Bill," *Think Progress*, January 6, 2015, http://thinkprogress.org/lgbt/2015/01/06/3608286/indiana-license-to-discriminate.
[23] Jonathan Oosting, "Michigan House Speaker Jase Bolger seeks to pair gay rights bill with 'religious freedom' act," *mlive*, November 12, 2014, http://www.mlive.com/lansing-news/index.ssf/2014/11/bolger_proposes_religious_free.html.
[24] *See* Robert Barnes, "Supreme Court sides with Christian college in birth control case," Washington Post, July 3, 2014, http://www.washingtonpost.com/politics/courts_law/2014/07/03/622f7b12-02f8-11e4-8572-4b1b969b6322_story.html and Daniel Borgen, "Breaking: Department of Education Grants George Fox Religious Exemption; Says College Can Refuse Trans Students On-Campus Housing," July 11, 2014, http://www.pqmonthly.com/breaking-department-education-grants-george-fox-religious-exemption-says-college-can-refuse-trans-students-campus-housing/20071.
[25] Va Code Ann. § 63.2-1709.3 (2012).
[26] N.D. Cent. Code § 50-12-07.1.
[27] 2015 Mich. Pub. Acts 53, 54 and 55 (amending 1973 Mich. Pub. Acts 116 (Mich. Comp. Laws § 722.111 - 722.128), 1939 Mich. Pub. Acts 288 (Mich. Comp. Laws 710.21 - 712B.41), and 1939 Mich. Pub. Acts 280 (Mich Comp. Laws 400.1 - 400.119b)).
[28] S.B. 2, 2015 Sess. (N.C. 2015).
[29] Mark Joseph Stern, "North Carolina May Soon Let Clerks Refuse Marriage Licenses to Gay and Interracial Couples," *Slate*, June 2, 2015, http://www.slate.com/blogs/outward/2015/06/02/north_carolina_law_lets_magistrates_refuse_marriage_licenses_to_gay_and.html.
[30] Kansas Executive Order 15-05 of July 7, 2015, Preservation and Protection of Religious Freedom, https://governor.ks.gov/media-room/executive-orders/2015/07/07/executive-order-15-05.
[31] Paul Brandeis Raushenbush, "Leave Religion Out Of Michigan's Anti-Bullying Bill," *Huffington Post*, November 8, 2011, http://www.huffingtonpost.com/paul-raushenbush/michigan-bullying-law_b_1082162.html.
[32] *See, e.g.*, Utah Code Ann. §§63L-5-201 and Indiana Sec. 1.IC34-13-9.
[33] Dyana Bagby, "Mike Bowers: Only purpose of proposed Georgia 'religious freedom' bills is 'unequivocally an excuse to discriminate' against LGBT people, others," *The GA Voice*, February 24, 2015, http://thegavoice.com/michael-bowers-purpose-proposed-georgia-religious-freedom-bills-unequivocally-excuse-discriminate-lgbt-people-others.

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; but the online maps are updated daily.

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