



# We the People

## Why Congress and U.S. States Must Pass Comprehensive LGBT Nondiscrimination Protections

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By Sarah McBride, Laura E. Durso, Hannah Hussey, Sharita Gruberg, and Bishop Gene Robinson  
December 2014

Center for American Progress



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# Introduction and summary

*Our nation's uneven but dogged journey toward truer and more meaningful freedoms for our citizens has brought us continually to a deeper understanding of the first three words in our Constitution: we the people. 'We the People' have become a broader, more diverse family than once imagined. ... We have arrived upon another moment in history when We the People becomes more inclusive, and our freedom more perfect.<sup>1</sup>*

— Judge Arenda Wright Allen, *Bostic v. Schaefer*

Individuals' ability to fully and freely participate in society is fundamental to every person's pursuit of the American Dream. Throughout the 230-year history of the United States, the nation has slowly but steadily expanded access to every vital facet of daily life—from housing to employment to the public marketplace—for communities of Americans who were once excluded. Through exhaustive efforts, each generation has broadened the nation's perception of “we the people.” But despite this progress, too many Americans are still left behind, excluded from the country's most basic legal protections.

Today, it is still legal to fire, refuse housing, or deny service to Americans because of their sexual orientation and gender identity in 29 states.<sup>2</sup> In most states, lesbian, gay, bisexual, and transgender, or LGBT, Americans currently lack explicit protections against discrimination in employment, housing, education, credit, and public accommodations. LGBT individuals and families report unacceptable levels of discrimination in the workplace, when seeking goods or services in their community's places of public accommodation, at school, or when seeking housing.<sup>3</sup> This discrimination leads to disproportionate rates of unemployment, poverty, homelessness, and negative health outcomes for LGBT people and their families.

Forty years ago on the fifth anniversary of the Stonewall Riots in New York, Reps. Bella Abzug (D-NY) and Ed Koch (D-NY) introduced the Equality Act of 1974, the first federal law designed to protect gay, lesbian, and bisexual Americans from discrimination.<sup>4</sup> While fundamentally flawed in its exclusion of protections for transgender Americans, the Equality Act would have provided basic protections

from discrimination based on sexual orientation in employment, housing, and public accommodations. Since the introduction of the Equality Act, only 17 states plus the District of Columbia have passed laws protecting all LGBT residents in employment, housing, and public accommodations—meaning that a majority of the states and the federal government still lack the basic protections for LGBT Americans that are afforded other populations.<sup>5</sup>

As marriage equality continues to spread across the country and inclusion and acceptance of LGBT individuals takes hold, it is past time to ensure basic protections for all Americans to fully participate in society. In 14 states, individuals can legally marry their same-sex partner on Sunday and then legally be fired from their jobs on Monday simply for exercising that right.<sup>6\*</sup> LGBT Americans should not be denied equal access to their communities' marketplaces and the nation's economy simply because of who they are or whom they love.

This report catalogues the multiple areas of public life in which LGBT people are not afforded uniform and explicit protections under federal or state law. It reviews evidence of the discrimination that LGBT Americans face when seeking and attempting to keep jobs, gaining education, securing shelter, applying for loans, or seeking to access public spaces and businesses. The report then outlines the turbulent history of state and federal nondiscrimination protections for both the LGBT community and other protected classes. The report also analyzes opponents' arguments against nondiscrimination protections; in particular, it scrutinizes the discussions around religious-based justification for discrimination and objections to transgender individuals utilizing sex-segregated facilities in accordance with their gender identity.

Based on this analysis, the report recommends the following actions to address discrimination against LGBT Americans in everyday life:

- Congress should pass a comprehensive nondiscrimination bill banning discrimination based on sexual orientation and gender identity in employment, public accommodations, housing, credit, and federal funding.
- State and local governments should pass similar protections for their residents. In addition to federal legislation, these measures are necessary to ensure that LGBT individuals have the same layers of protections and solutions that are available to non-LGBT individuals.

- Congress and state legislatures should appropriate necessary funds for full enforcement of nondiscrimination protections.
- State governments should utilize existing sex and/or gender-identity and sexual-orientation protections to ensure inclusive and respectful treatment of LGBT employees, residents, and customers, including regulations and guidance that ensure transgender individuals will be treated in accordance with their stated gender identity in all facilities, programs, and covered interactions.
- Both government and private institutions should collect more data to fully document and understand the discrimination that LGBT Americans face.
- Private businesses and government entities should establish or expand workplace diversity and competency trainings for employees.
- Congress should amend the Religious Freedom Restoration Act, or RFRA, to clarify that the law cannot be misconstrued to allow discrimination against third parties.

The United States' story is one of an ever-widening circle of access and opportunity. Full and equal access to these facets of life is not only essential for the pursuit of happiness, but also for individuals' civic and civil participation, lives, and well-being. While these basic protections will not eliminate all discrimination that LGBT Americans face in the country, they will provide equality under the law in the protections and remedies afforded to all people, regardless of their sexual orientation or gender identity.

*\*Correction, December 10, 2014: This report incorrectly stated the number of states where individuals can legally marry their same-sex partner and then be fired. The correct number is 14 states.*

# Areas of life

LGBT Americans need immediate action to provide them with explicit and uniform protections from discrimination in all vital aspects of life. This report explores five core areas of life, all of which are central to the American Dream: access to employment, housing, public accommodations, credit, and education. While a later section of this report details the history of such protections, both for the general population and for LGBT Americans, some initial definitions are necessary to establish the areas of life and law documented here.

The first area of life, employment, is the most common area of nondiscrimination law.<sup>1</sup> Federal nondiscrimination law, which does not include explicit protections for LGBT workers, currently defines an employer as an entity “engaged in an industry affecting commerce who has fifteen or more employees for each working day.”<sup>2</sup> Employers are forbidden from discriminating in application procedures, hiring, advancement, termination, pay, training, or other “terms, conditions, or privileges of employment” based on any protected basis, which include race, color, sex, national origin, religion, age, genetic information, and disability.<sup>3</sup> Most states have adopted similar laws, many with broader protected identities, including 18 states with gender identity and 21 states with sexual orientation.<sup>4</sup>

Second, this report explores discrimination in housing. As defined in the most prominent piece of federal shelter nondiscrimination legislation, the Fair Housing Act, housing, or a “dwelling,” is any building or portion of a building that is occupied or intended to be occupied by one or more individuals.<sup>5</sup> Federal law prohibits discrimination in the sale, renting, or financing of such dwellings on the basis of race, color, sex, national origin, religion, disability, and familial status.<sup>6</sup> Similar to employment, most states also have their own versions of the Fair Housing Act that often include more protected classes.<sup>7</sup> For the purposes of this report, discrimination against LGBT individuals in homeless shelters is included within the discussion of public accommodations.

Third, LGBT Americans currently lack nondiscrimination protections in places of public accommodation. Despite daily use of such spaces, many people are unfamiliar with the term “public accommodations” and what it encompasses. A public accommodation is broadly defined as a commercial establishment—whether publicly or privately owned—that creates goods, provides services, or makes its premises available to the public. Examples include hotels, restaurants, sports arenas, retail stores, movie theaters, doctors’ offices and hospitals, and public transportation. Federal law currently prohibits many of those establishments—but not all of them—from discriminating against patrons on the basis of race, color, religion, national origin, and disability.<sup>8</sup>

The precise definition of a public accommodation has been controversial throughout history and has evolved and expanded based both on need and changing judicial precedents.<sup>9</sup> There are currently two federal sources covering public accommodations: the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990, or ADA. Title III of the ADA adds disability to the list of prohibited identities for discrimination in public accommodations<sup>10</sup> and expands upon the definition in the Civil Rights Act, which included inns, hotels, restaurants, and places of entertainment but did not include retail or grocery stores, pharmacies, or clinics.<sup>11</sup> The ADA’s additional and more explicit categories of public accommodations include a long list of businesses, including more than 5 million private establishments.<sup>12</sup> A complicated patchwork of state and local laws provide public accommodations protections for protected identities, typically including race, sex, religion, and national origin. The definitions in state and local protections are traditionally more inclusive than the definition provided in the Civil Rights Act and are more in line with the definition of public accommodations offered in the ADA.<sup>13</sup>

Fourth, Americans’ ability to fully participate in the economy, from starting a business to securing a home, rests on fair and equal access to credit, meaning the ability of a person or organization to borrow money—in the form of loans, mortgages, or lines of credit—with the promise of repayment.<sup>14</sup> Federal law bans discrimination against any individual in the application for or transaction of credit on the basis of race, color, national origin, religion, sex, marital status, age, or the fact that an individual receives public assistance.<sup>15</sup> Unlike most other areas of nondiscrimination law, the Equal Credit Opportunity Act—which is the prevailing federal law—also requires a creditor to give a specific reason for a denial or for granting less than requested.<sup>16</sup>



The final common area of federal nondiscrimination law is federal funding. While seemingly abstract, this area of protection covers a wide range of services, entities, and programs, including many educational institutions, government assistance programs, and many health insurance plans.<sup>17</sup> In this report, there is no specific section dedicated to federal funding. Instead, areas affected by such protections are included throughout the report, including a section dedicated to education. Health care and insurance are included in the section discussing public accommodations, and discrimination in publicly funded housing is contained in the housing section. Prohibitions on discrimination in federal funding include race, color, and national origin;<sup>18</sup> educational institutions that receive government funding also include sex.<sup>19</sup>

These areas—employment, housing, public accommodations, credit, and education—represent the foundations of American life. No definition of “We the people” is truly inclusive and complete until all Americans can participate in every one of these vital areas.

# LGBT Americans and the workplace

Access to employment lies at the center of American life. It was the promise of opportunity for all—regardless of caste or class—that has led many immigrants from around the world to set off for America. A steady paycheck is central to a family’s financial security, economic mobility, and ability to secure basic necessities such as food, shelter, and health care. Yet across the country, LGBT workers face unacceptably high levels of discrimination in the workplace. In a majority of states and at the federal level, LGBT Americans lack basic, explicit protections from discrimination in accessing and maintaining a job, undermining their chance at achieving the American dream.

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## Hiring and firing

One of the most significant instances of discrimination faced by LGBT applicants occurs at the entry point of employment: hiring.<sup>1</sup> When applying for jobs, LGBT Americans face high rates of rejection compared with equally qualified non-LGBT candidates. A study conducted in Texas found an 11 percent drop in callbacks when applicants applying at a booth in an urban Texas mall wore a “Gay and Proud” hat versus a “Texas and Proud” hat.<sup>2</sup> Another study conducted in New York City found that high-end retail sectors were two times more likely to hire non-transgender applicants than transgender applicants.<sup>3</sup>

Similarly, the mere assumption that an individual is LGBT based on their past work history can play a significant role in the competition for jobs. One study conducted in the Midwest and South found that simply adjusting applicants’ resumes to include treasurer at a “progressive organization” instead of a “gay organization” increased the chance of an interview by 40 percent.<sup>4</sup>

Even when employed, many LGBT people unfortunately still face discrimination. In some instances, this discrimination takes the subtler form of a lack of promotions, while in others, it results in being fired outright. Between 11 percent and 28 percent of lesbian, gay, and bisexual, or LGB, workers report being denied

or passed over for a promotion because of their sexual orientation, and 1 in 10 LGB workers who were out on the job report having been fired from a job in the previous five years because they were lesbian, gay or bisexual.<sup>5</sup> As many as 47 percent of transgender people reported being fired, not hired, or denied a promotion because of their gender identity.<sup>6</sup> Of the 47 percent of transgender people who have been discriminated against, roughly half report being fired from a job they already had simply because of their gender identity.<sup>7</sup>

For example, after years of struggling with her identity, Vandy Beth Glenn decided to transition from male to female in 2007 in order to live authentically. Glenn informed her supervisors at the Georgia General Assembly's Office of Legislative Counsel, where she worked as a legislative editor and proofreader, that she would be transitioning. She provided them with photos of herself and educational pamphlets on how to handle a workplace transition. Upon hearing the news, the head of her office summarily fired her, telling her that being transgender was "immoral."<sup>8</sup>

Vandy Beth Glenn is just one example of the 26 percent of transgender people who have been fired from their jobs simply because of their gender identity.<sup>9</sup> And while the 11th Circuit Court of Appeals later found Glenn's termination to be illegal discrimination,<sup>10</sup> most transgender Americans live in jurisdictions without similar federal court precedents. Similarly, no court has yet found in favor of LGB complainants asserting that workplace discrimination based on sexual orientation constitutes sex discrimination.<sup>11</sup>

When data are broken down by race, LGBT workers of color face higher rates of discrimination than their white counterparts.<sup>12</sup> For instance, black, Latino, multiracial, and Native American transgender workers reported being fired at higher rates than their white transgender counterparts. Thirty-six percent of Native American transgender respondents reported having been fired from a job because of their gender identity. Thirty-two percent of black transgender respondents and 30 percent Latino transgender respondents reported the same.<sup>13</sup>

In one particularly heart-wrenching story, Ashland Johnson, a lesbian woman of color, received a termination letter while lying in the intensive care unit at a local hospital, recovering from blood clots in her lungs. Ashland's boss had discovered that she was a lesbian and subsequently excluded her from meetings, ignored her, and locked her out of her office. She received the termination letter after she had refused to voluntarily resign after several months of working in a hostile workplace.<sup>14</sup> Ashland had no legal recourse because neither the federal government nor the courts protect her on the basis of her sexual orientation.<sup>15</sup>

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## Wages

Many LGBT Americans who are able to secure and maintain a job are still subject to unfair treatment in salary and wages. While it can be difficult to determine the impact of gender versus gender identity versus sexual orientation, it is clear that many LGBT workers face a so-called “wage penalty” relative to their similarly situated non-LGBT white male colleagues. While lesbian and bisexual women tend to fair better than straight women in pay, lesbian and bisexual women still make less than straight men due to the gender pay gap.<sup>16</sup> Gay and bisexual men make 10 percent to 32 percent less than straight men working similar jobs. The pay gap for gay and bisexual men holds true even when controlling for occupation, education, and geographical region.<sup>17</sup>

Transgender people also face a gender difference in their wage penalties. A study that tracked transgender people’s wages through their transition found that transgender men experienced a slight increase in their wages after transitioning from female to male, while transgender women saw a significant pay decrease after transitioning from male to female. In some instances, transgender women saw their pay decrease by as much as one-third.<sup>18</sup> While data comparing wages for transgender and non-transgender people are not available, the disproportionate share of transgender people who live below the poverty line—coupled with high rates of discrimination and unemployment—reveals something about the pay gap.<sup>19</sup> The National Transgender Discrimination Survey found that 15 percent of transgender people reported household incomes of less than \$10,000 dollars per year, compared to only 4 percent of the general population.<sup>20</sup>

LGBT people of color can face “double discrimination” when it comes to important areas of life such as wages.<sup>21</sup> Similar to the wage gap and gender, it is also often difficult to separate the impact of race from the impact of sexual orientation or gender identity when exploring wage penalties. Nevertheless, it is clear that LGBT people of color experience significant wage penalties worse than both their non-LGBT and white counterparts. The average Latina same-sex couple earns roughly \$3,000 less than Latino different-sex couples, while black lesbian couples make \$10,000 less than black different-sex couples.<sup>22</sup> Overall, the median black same-sex couple makes approximately \$20,000 less than the median white same-sex couple.<sup>23</sup>

As a result of these wage penalties, LGBT people of color reported higher rates of poverty when compared to both the general LGBT population and non-LGBT people of color. For instance, black people in same-sex relationships report more than twice the poverty rate of black people in different-sex marriages.<sup>24</sup> Black women in same-sex relationships are more than three times more likely to live in poverty than white women in same-sex relationships, and black men in same-sex relationships are six times more likely to be living in poverty than white men in same-sex relationships.<sup>25</sup> These statistics highlight the compounding negative effects of stigma that can occur at the intersection of race and LGBT identities.

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## Benefits

During the past century, occupational benefits have become an ever-increasing component of worker compensation: 55 percent of Americans now receive their health insurance through their employer or a family member's employer.<sup>26</sup> When provided, employer-based health insurance must be granted to LGBT and non-LGBT workers alike; but LGBT workers routinely face barriers to obtaining equal familial coverage and addressing unmet medical needs.<sup>27</sup>

The inequality surrounding family access to occupational benefits such as health insurance or family medical leave is largely rooted in government-based relationship recognition discrimination.<sup>28</sup> With a growing number of states gaining marriage equality, however, an increasing number of LGB people and their children are able to access the occupational benefits of their spouse or parent.<sup>29</sup> Businesses in non-marriage-equality states, however, can take proactive measures to open up their spousal benefits to same-sex couples that are not legally married. Companies such as Apple, AT&T, General Electric, General Motors, and Boeing have instituted partnership benefits for their LGB employees living in states without marriage equality.<sup>30</sup>

Additionally, the Affordable Care Act's ban on discrimination in insurance based on sexual orientation and gender identity should affect most employer health plans. These regulations, which the U.S. Department of Health and Human Services issued under the Affordable Care Act's sex discrimination clause, will dramatically curb instances of arbitrary denial of insurance because of a person's sexual orientation and gender identity.<sup>31</sup>

Transgender workers and the transgender relatives of non-transgender workers, however, still routinely receive insurance that explicitly or implicitly excludes many serious medical needs. While transgender workers are provided the same plans as their non-transgender colleagues, many employer plans contain blanket exclusions of medical needs related to an individual's transgender identity. These exclusions frequently forbid coverage of care related to gender transition, regardless of whether it has been deemed medically necessary by a health care provider.<sup>32</sup> Unfortunately, the Affordable Care Act has not yet been interpreted to include a ban on these discriminatory exclusions, although a number of states—most notably, Oregon and Washington, D.C.—are leading the way toward ensuring that transgender people have access to the health care they need.<sup>33</sup> This report discusses these insurance exclusions in greater detail in chapter four, “LGBT Americans and the Public Square.”

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## Hostile office climates

The hardships endured by LGBT people in the workplace extend beyond unfair policies or discriminatory practices by supervisors. LGBT workers are commonly subject to offensive and hurtful comments, and they are frequently held to a double standard regarding workplace interactions and behaviors. This harassment and hostility has very real negative consequences for both LGBT workers and businesses.

According to a recent study by the Human Rights Campaign, 53 percent of LGBT workers hide their sexual orientation or transition history in the office.<sup>34</sup> Paradoxically, 81 percent of non-LGBT people report that LGBT people should not have to hide their identities at work. Less than half of the non-LGBT respondents in that survey, however, feel comfortable hearing about an LGBT coworker's social or dating life, and a full 70 percent say that it is unprofessional to talk about one's sexual orientation or gender identity in the workplace.<sup>35</sup> Yet at the same time, 84 percent of non-LGBT respondents reported talking about their own social lives, and 65 percent reported talking about their dating or married lives.<sup>36</sup> This double standard for LGBT workers can inhibit trust and rapport between coworkers while diminishing productivity and company loyalty.<sup>37</sup>

This unwelcoming environment becomes openly hostile when LGBT workers are subject to either direct or indirect taunting, jokes, or outright harassment. The same Human Rights Campaign survey found that 62 percent of LGBT workers report hearing jokes about lesbian or gay people, 43 percent report hearing jokes about bisexual people, and 40 percent report hearing jokes about transgender people. Additionally, roughly 25 percent of LGBT respondents reported hearing overtly anti-LGBT biases espoused in the workplace in a non-joking manner.<sup>38</sup>

Between 7 percent and 41 percent of LGB workers report having their office or workplace vandalized or being verbally or physically harassed in the workplace because of their sexual orientation.<sup>39</sup>

While an ever-increasing number of companies and businesses are incorporating LGBT-inclusive nondiscrimination policies, less than half of LGBT workers think those policies are uniformly enforced. In fact, 48 percent of LGBT workers agreed with the statement that “enforcement of the [LGBT] nondiscrimination policy depends on the supervisor’s own feeling toward LGBT people,” demonstrating the importance of ensuring appropriate enforcement of nondiscrimination policies and taking additional steps to improve workplace climates.<sup>40</sup>

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## Impact on businesses and workers

These experiences of discrimination and hostility result in negative consequences for employees, businesses, and, potentially the broader economy. Despite having higher educational attainment overall, many LGBT workers self-select out of entire fields or careers. For instance, research shows that gay men are much less likely than straight men to work in male-dominated professions such as public safety, transportation, architecture, engineering, construction, or repair.<sup>41</sup> While research has yet to reveal the source of these decisions in career fields, data do show that LGBT inclusivity plays a role in LGBT workers’ decisions about where they work.<sup>42</sup> By self-selecting out of organizations and potentially entire career fields that are viewed as less welcoming, LGBT workers are effectively forced to withhold their talents and skills from entire sectors of the American economy simply because of their sexual orientation or gender identity.

Finally, discrimination and hostility also have a negative impact on business outcomes. Fifteen percent of LGBT people in one survey reported staying home from work because of a hostile environment, 22 percent reported searching for a different job, and 30 percent reported feeling depressed or unhappy at work.<sup>43</sup> A Williams Institute report found that LGBT-inclusive workplace policies and climates result in myriad positive outcomes for workers and businesses, including lower health insurance costs, increased creativity among employees, higher job satisfaction, lower rates of job turnover, and better workplace relationships

between co-workers or with a supervisor.<sup>44</sup> It is likely that these employee-level benefits translate into improved outcomes for LGBT-inclusive businesses. In addition, at least one study has demonstrated that LGBT-supportive business practices can yield more business from current customers and new customers looking to do business with socially responsible companies.<sup>45</sup>

In order to continue to succeed, the American economy must utilize the talents and skills of all workers. Too many LGBT Americans, however, are left unemployed or underemployed simply because of their sexual orientation or gender identity.<sup>46</sup> The pervasive discrimination discussed in this chapter results in negative impacts for LGBT Americans and private businesses alike.



# LGBT Americans and the public square

Over the past 40 years, 17 states have passed sexual-orientation and gender-identity protections in public accommodations. These states were responding to the very real experiences of discrimination that many LGBT people endure in health care, businesses, homeless shelters, and government services. Despite the proliferation of these laws in many states, and the expansion of federal protections in some public accommodations through administrative action, LGBT Americans still face significant challenges and barriers to equal access to America's resources, economy, and public life.

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## Health care

Some of the most potentially harmful discrimination that LGBT Americans face comes from medical providers, including some first responders, hospitals, and other medical professionals. While progress has been made banning discrimination by federally funded medical providers, no explicit, universally binding protections exist nationwide.<sup>1</sup>

One of the most troubling instances of discrimination in a medical setting occurred in Washington, D.C., in 1995. Tyra Hunter, a transgender woman, died when an emergency medical technician, or EMT, refused to provide her with life-saving care at the site of a car accident after he found out that she was transgender. Hunter was denied care by the EMT and his colleagues for several minutes as the EMT screamed "This [expletive] ain't no girl ... it's a [racial slur], he's got a [expletive]!"<sup>2</sup> According to a posthumous medical report, Hunter had an 86 percent chance of survival had she received proper medical care from the EMTs and the hospital.<sup>3</sup>

While Tyra Hunter's story dates back almost 20 years and is a particularly egregious example of discrimination and its consequences, LGBT individuals still face pervasive discrimination in publicly available medical services. More recently, the National Transgender Discrimination Survey reported additional anecdotal experiences of this kind of discrimination. In one case, a transgender

man was left untreated in the emergency room for two hours after workers discovered his breasts after he undressed. In another case, a transgender patient with numerous broken bones and wounds was refused emergency care after being delivered to the emergency room by ambulance.<sup>4</sup>

A 2010 study by Lambda Legal—a nonprofit organization that focuses on the LGBT community—found that 70 percent of transgender respondents and nearly 56 percent of lesbian, gay, and bisexual respondents reported experiencing at least one instance of discrimination or patient profiling when attempting to access health services. This discrimination can include blame for their health state because of presumed behavior or risk based on the patient’s identity. Those experiences included being refused care outright, health care providers refusing to touch them, providers using excessive precautions or derogatory language, patients being profiled or receiving blame for their health issues, or receiving “physically rough or abusive” care from health care workers.<sup>5</sup>

Racial discrimination and income status further exacerbate discrimination in medical care for LGBT people. LGBT people of color report higher instances of discrimination and barriers to care in every category compared to white LGBT people, including outright refusal of care and unequal treatment.<sup>6</sup> Roughly one in three low-income transgender and gender-nonconforming respondents to the Lambda Legal survey reported being refused necessary medical care because of their gender identity.<sup>7</sup> The National Transgender Discrimination Survey found that 24 percent of all transgender respondents were denied equal treatment at a doctors’ office or hospital and 13 percent were denied equal treatment in emergency rooms.<sup>8</sup>

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## Transgender exclusions in insurance coverage

Transgender individuals seeking to receive transition-related care also face widespread discrimination, as most insurance policies contain transgender-related exclusions that deny transgender patients medically necessary transition-related care. These common exclusions typically forbid coverage of any “services, drugs, or supplies related to sex transformation.”<sup>9</sup> Despite widely accepted medical consensus<sup>10</sup> on the necessity of these treatments, many of the services denied to transgender people for transitioning are services that health insurance plans otherwise cover for non-transgender patients.<sup>11</sup>

The harm of these exclusions often extends beyond the denial of transition-related care. The exclusions are sometimes applied to deny basic medical services unrelated to a transgender person's transition. For instance, a transgender woman in New Jersey was initially denied coverage for a routine mammogram after the insurance company determined she would not have needed the mammogram had she not transitioned, therefore her insurance would not cover it due to their exclusion of care "related to changing sex."<sup>12</sup>

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## LGBT people on main street

Discrimination against LGBT individuals extends beyond hospitals and doctor's office and includes areas of daily life such as stores and restaurants. A survey of gay and lesbian New York residents conducted by one of the state's LGBT advocacy organization, Empire State Pride Agenda, found that 27 percent reported experiencing inappropriate treatment or hostility in a place of public accommodation, while 6 percent had been denied service outright when eating at a restaurant, entering a store, or staying at a hotel. Another survey found that one in five transgender respondents had been denied equal treatment at a hotel or restaurant because of their gender identity.<sup>13</sup>

Recently, a number of same-sex couples have reported being denied publicly available wedding services or goods. The most famous case involved an Albuquerque photography business that denied its services to Vanessa Willock, a lesbian woman from New Mexico, for her upcoming wedding.<sup>14</sup> Other examples include florists and bakers who similarly discriminated against same-sex couples in states such as Washington and Colorado.<sup>15</sup> Most states with marriage equality currently have public accommodations nondiscrimination protections. But as marriage equality spreads across the country, same-sex couples in 14 states are now in the precarious spot of being able to legally marry while lacking protections from discrimination for being gay or lesbian.<sup>16</sup>

Transgender individuals are particularly vulnerable in places of public accommodation. More than 50 percent of transgender individuals reported being verbally harassed or disrespected in a place of public accommodation, according to the National Transgender Discrimination Survey. The same survey found that nearly one in three transgender people reported being denied equal treatment in a retail store, many of which segregate products based on gender.<sup>17</sup> One transgender respondent to this survey stated that she had "been asked to leave stores and restaurants mainly due to the reaction of other customers."<sup>18</sup>

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## Transgender people and sex-segregated facilities

Throughout daily activity and the use of public accommodations, every individual needs to access a sex-segregated facility at one point or another. Whether restrooms or locker rooms, these spaces pose a potentially serious risk to transgender people. Use of facilities in accordance with one's gender identity not only affirms the reality of that identity, but also improves the safety and privacy of transgender individuals in those settings.

Transgender people attempting to utilize public restrooms report staggering rates of prejudice and violence. One survey of transgender and gender-nonconforming individuals in Washington, D.C., found that 70 percent of respondents had reported being verbally harassed, denied access, or physically assaulted in public restrooms.<sup>19</sup> Another study found that 54 percent of transgender respondents reported adverse health effects as a result of trying to avoid using public restrooms.<sup>20</sup> When transgender individuals are forced into restrooms that conflict with their gender identity and presentation, it also effectively removes their privacy by revealing their transgender status.

A transgender woman in Rosedale, Maryland, was severely beaten by two women after she attempted to use a public restroom at her local McDonalds in 2011. Video of the incident showed the two women kicking the 22-year-old until she appeared to suffer a seizure.<sup>21</sup> While nondiscrimination protections may not stop all potential violence or harassment that transgender and gender-nonconforming individuals face in public restrooms, they provide a much-needed basic layer of protection in accessing and utilizing facilities in accordance with one's gender identity and signal that transgender people should be treated with dignity.

In a review of debates about local ordinances or state legislation banning discrimination based on gender identity and expression in public accommodations, opponents typically attempt to seize on protections in these facilities to rebrand and reframe the nondiscrimination protections as a so-called "bathroom bill." Opponents will frequently claim that such legislation will allow for "men dressing up as women" to enter women's restrooms in order to hurt or assault female occupants.<sup>22</sup> Recently, opponents of the Equal Rights Ordinance in Houston, Texas, came to call the proposed nondiscrimination law the "Sexual Predator Protection Act."<sup>23</sup>

In the more than two decades since the first state passed nondiscrimination protections on the basis of gender identity in public accommodations, there have been no known instances of sexual assault or violence in sex-segregated facilities as a result of these protections.<sup>24</sup> These nondiscrimination laws have not changed the fact that it is illegal to enter a restroom—or any facility—to harm or harass people. These nondiscrimination protections have not changed the illegality of actions ranging from voyeurism to rape. In every instance, these laws have been implemented successfully without any reported increase in public safety incidents related to the laws.

In Maine, which instituted gender-identity protections in 2005, the executive director of the state’s Human Rights Commission was quoted as saying that there was “no factual basis” for the fears surrounding sexual assault.<sup>25</sup> Similarly, law-enforcement officers in other jurisdictions with protections found no increase in rape or sexual assaults stemming from gender identity and expression nondiscrimination laws.<sup>26</sup> Delaware Deputy Attorney General Patricia Dailey Lewis, head of the division of the Delaware Department of Justice tasked with combatting child predators, testified before the state senate’s judiciary committee that “to suggest that children are going to be attacked [because of this law] is offensive and exploitative to children and to the parents that seek to protect them.”<sup>27</sup>

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## Discrimination at the hands of law enforcement

The discrimination that LGBT individuals face in places of public accommodation is not limited to the private marketplace. Transgender respondents in the National Transgender Discrimination Survey reported their third-highest level of unequal treatment in government agencies and offices when compared to different categories of public accommodations. In fact, the highest reported rates of physical assaults against transgender individuals were perpetrated by law enforcement, according to that same survey.<sup>28</sup> Another report by BIENESTAR—a Latino community service and advocacy organization—surveyed more than 200 Latina transgender women in the Los Angeles area and found two-thirds reported experiencing verbal abuse from law enforcement, while another 21 percent experienced physical assault and 24 percent experienced sexual assault.<sup>29</sup>

Monica Jones, a transgender Arizonian, was arrested in April 2014 after she accepted a ride to a neighborhood bar by undercover police officers. Jones was charged and found guilty of “manifesting prostitution,” despite that fact that she did not actually engage in prostitution and was targeted by the officers.

Following her conviction, Jones was subsequently housed in a male prison. The apparent profiling of Jones has led to the assertion that she was arrested for merely “walking while trans”<sup>30</sup> and was a victim of law enforcement’s persistent profiling of trans women of color as sex workers.<sup>31</sup>

When this profiling leads to incarceration, the consequences are particularly significant for LGBT people, particularly for LGBT people of color, as they are often segregated, mistreated, and harassed by prison staff and fellow inmates.<sup>32</sup> While recent regulations under the Prison Rape Elimination Act forbid prison-housing decisions based solely on genitalia and require voluntary placement in protective custody, LGBT individuals are still frequently housed in solitary confinement for a period of time.<sup>33</sup> Many transgender inmates are also housed in facilities based on biological sex, as opposed to their gender identity.

Unfortunately, most state LGBT public accommodation laws have not been interpreted to include prisons.<sup>34</sup> Some broader state definitions of public accommodations have been interpreted to include prisons; for instance, the expansive definition in the Americans with Disabilities Act, or ADA, is one of the few public accommodations or public entities laws that has been uniformly interpreted to include jails.<sup>35</sup>

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## Homeless shelters

Among the most vulnerable individuals in our society are those who rely on places of public accommodation not just for goods and services, but also for shelter. An average of 40 percent of homeless youth in the United States may be LGBT.<sup>36</sup> But despite making up nearly half of the youth population served by homeless shelters, LGBT homeless individuals of all ages face discrimination and barriers to access from homeless service providers, including shelters, across the country. The discrimination faced by homeless LGBT people seeking services is a result of both blatant discrimination based on sexual orientation or gender identity, as well as barriers that disproportionately exclude LGBT people.

A 2007 National Gay and Lesbian Task Force report found alarming instances of discrimination among LGBT homeless youth in several Detroit homeless shelters. In fact, some youth were denied access to shelters if they did not dress and present themselves in accordance with their gender assigned at birth. Another Michigan facility required LGBT youth to dress in orange to identify them and separate them from the other youth residing in the shelter.<sup>37</sup>

In the recent report, “Seeking Shelter: The Experiences and Unmet Needs of LGBT Homeless Youth,” the Center for American Progress reported that one in five LGBT homeless youth were unable to access short-term services and shelters, with another 16 percent unable to get assistance with long-term housing. LGBT youth reported rates that were double those reported by non-LGBT homeless youth. In most instances, these disparities were caused by rules and regulations that affected LGBT youth more than their non-LGBT counterparts, ranging from clothing requirements to outright bans on sex between residents, which disproportionately affects lesbian, gay, and bisexual individuals as shelters are usually segregated by sex.<sup>38</sup>

In other instances, overt discrimination toward LGBT individuals kept them from gaining access to homeless shelters. In 2013, a transgender Washington, D.C., resident was denied access to the John L. Young Women’s Shelter because of her gender identity. When she attempted to get a bed for the night, the transgender woman was told, “we don’t do transgenders [sic] here. You have to leave.”<sup>39</sup> After filing suit against the shelter under D.C.’s Human Rights Act, a D.C. Superior Court judge issued an order requiring the shelter to end its exclusion of transgender women.<sup>40</sup>

Whether in spaces of daily use or facilities that provide life-saving care or shelter in times of need, LGBT Americans deserve equal protection from discrimination in public accommodations. The discrimination faced by LGBT people and their families currently excludes far too many Americans from spaces and services that are central to full participation in American life and the economy.

# LGBT Americans and housing

While some states have taken measures to protect LGBT people from housing discrimination, in the majority of states, it is still legal to refuse housing to an individual based on their sexual orientation or gender identity. Currently, 21 states and the District of Columbia protect against housing discrimination based on sexual orientation.<sup>1</sup> Eighteen states and the District of Columbia protect against housing discrimination based on gender identity.<sup>2</sup> Among those with protections for gender identity—a person’s deeply felt psychological identification as a man, woman, or some other gender—all but Illinois, Iowa, and Vermont protect against gender expression discrimination—the external manifestation of a person’s gender identity—as well. This patchwork of legal protections places many LGBT people at risk of housing discrimination. Furthermore, since most local housing enforcement is funded through federal initiatives, states with anti-discrimination protections lack the resources to meaningfully enforce these laws.<sup>3</sup>

The location where one lives affects a number of well-being and stability indicators, including access to quality schools to economic opportunities.<sup>4</sup> Consequently, housing discrimination not only limits where people can live, but it also limits their opportunities to thrive.

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## Types of housing discrimination

Housing discrimination against LGBT people takes many forms. In the rental market, discrimination may take the form of a landlord refusing to rent to LGBT people, verbally harassing tenants because of their sexual orientation or gender identity, charging LGBT tenants higher rent, or even refusing to show an apartment to two same-sex individuals who the landlord assumes are a couple. In the sale of housing, discrimination also includes falsely denying that a house is for sale or refusing to sell a house. In lending, it can include refusing to make a loan because of someone’s sexual orientation or gender identity, setting different terms or conditions for taking out a loan, or even refusing to provide information regarding a loan.



Even worse, if landlords, realtors, lenders, or neighbors know LGBT people's sexual orientation or gender identity, LGBT people risk facing hostility, property damage, and even physical violence. For example, the Federal Bureau of Investigation, or FBI, found that nearly one-third of hate crimes motivated by sexual orientation occur either in or near a residence.<sup>5</sup> The National Coalition for Anti-Violence Program's 2013 hate violence report found nearly half of the incidents of hate violence against LGBT and HIV-affected people occurred in private residences.<sup>6</sup> Thus, an individual's ability to access their choice of safe housing is critical for the well-being of LGBT people.

Discrimination against LGBT people in housing can take more obvious forms, such as a landlord explicitly saying that same-sex couples cannot rent an apartment or treating prospective buyers with hostility because of their gender identity—both clear examples of disparate treatment. Discrimination can also be seen in facially neutral policies that have a disproportionately discriminatory effect, or disparate impact, on a protected class.<sup>7</sup> For classes protected under fair housing laws, recognizing disparate impact as discrimination is critical for meaningful protection from discrimination. Where housing protections are enumerated for protected classes, more blatant forms of discrimination may be less common.<sup>8</sup> A 2012 study by U.S. Department of Housing and Urban Development, or HUD, found that, while discrimination against racial and ethnic minorities is not as blatant as it was in the 1960s, it now tends to take forms that are more difficult for victims to detect in an individual incident. For example, in the study, black homebuyers were shown 18 percent fewer homes than white homebuyers.<sup>9</sup> Disparate impact is more difficult to detect on an individual level but is still a form of discrimination that prevents access to housing.

Even among the Fair Housing Act's protected classes, there are an estimated 4 million annual fair housing law violations. However, the number of reported incidents is much lower.<sup>10</sup> There are a number of explanations for low reporting rates, including not recognizing treatment as discrimination, not knowing where to get assistance, fearing retaliation for reporting, or believing nothing will be done about the discrimination. In the case of discrimination based on sexual orientation or gender identity, the lack of protections means that there may in fact be no legal recourse.

The majority of fair housing complaints come from a concentrated set of states. Sixty percent of all complaints reported to National Fair Housing Alliance, or NFHA, members come from 3 of HUD's 10 regions.<sup>11</sup> However, these regions have the greatest number of private fair housing agencies and receive greater Fair Housing Initiatives Program, or FHIP, funding relative to other states, thus yielding better

enforcement and education services.<sup>12</sup> The result of more fair housing assistance is that people in these regions are more likely to report discrimination because they have more access to fair housing services, not necessarily that these regions have higher rates of discrimination. However even with more FHIP-funded efforts, discrimination against LGBT people may still be underreported. Only 5 out of 150, or 3 percent, of FHIP grants in 2012 and 2 out of 131 grants, or 1.5 percent, in 2013 explicitly included discrimination based on sexual orientation and gender identity in their description of groups the grantees serve.<sup>13</sup>

Fortunately, NFHA collects information about instances of discrimination perpetrated against LGBT people, providing some information about the existence of housing discrimination against LGBT people, even though they are not a protected class under the Fair Housing Act. Since sexual orientation and gender identity are not listed as protected classes in the Fair Housing Act, people who experience discrimination based on these grounds may not be aware that the treatment they experienced is discrimination and, as a result, they do not report it. In 2013, NFHA members reported 268 complaints of discrimination based on sexual orientation, compared with 3,656 complaints based on race and 169 based on color.<sup>14</sup> This number is up from 175 complaints in 2012 and 101 in 2011.<sup>15</sup> NFHA members received 27 complaints based on gender identity or expression in 2013, down from 45 complaints in 2012. HUD and the Fair Housing Assistance Program, or FHAP, began investigating complaints of sexual-orientation and gender-identity discrimination in 2012 under the legal theory that such discrimination qualifies as sex discrimination because the unfair treatment is the result of biased assumptions about how people of a certain gender should behave. In 2013, HUD investigated 15 such complaints, and FHAP agencies investigated 72 complaints.<sup>16</sup> Data on the resolution of these investigations were unavailable at the time of writing this report.

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## Rental properties

The most prevalent area of housing discrimination is the rental market. In 2013, private fair housing groups reported 16,694 complaints of discrimination in the rental market, compared with 472 complaints in real estate sales and 1,078 complaints in mortgage lending.<sup>17</sup> Since housing discrimination can be difficult to detect in an isolated instance, the most common method for testing housing discrimination is paired testing. This method uses equally qualified people seeking to buy or rent a property to systematically measure discrimination based on a particular characteristic of interest. The people in the test differ based on the type of discrimination being tested.<sup>18</sup>

In 2012, HUD conducted the first national matched-pair test examining discrimination in the rental housing market against gay men and lesbians relative to the treatment of different-sex couples. The investigation found that different-sex couples were consistently favored over same-sex couples in each of the 50 metropolitan markets tested.<sup>19</sup> The study used 7,000 email tests to determine whether same-sex couples are discriminated against when responding to rental units advertised online. Two nearly identical emails were sent in response to rental advertisements: one was from a different-sex couple and the other from a same-sex couple. Different-sex couples were favored over male same-sex couples in 15.9 percent of tests and over female same-sex couples in 15.6 percent of tests.<sup>20</sup>

The Michigan Fair Housing Commission conducted 120 paired tests in 2005 in which similarly situated testers posed as same-sex or different-sex couples looking to buy or rent a home or obtain a mortgage.<sup>21</sup> To make the impact of sexual-orientation-based discrimination easier to detect, the same-sex couples possessed higher incomes, larger down payments, and better credit, thus making them better candidates. Despite having better credentials, the study found that the different-sex couples were treated more favorably than the same-sex couples in 27 percent of all tests conducted. The disparity was even more pronounced in rental tests, with discrimination against the same-sex couple occurring in 33 percent of cases.<sup>22</sup> In Detroit, one landlord even told testers, “No drugs, prostitution, homosexuality, one-night stands.”<sup>23</sup> The study also found that different-sex couples experienced more favorable rental rates, greater levels of encouragement to apply, and lower application fees.

The Iowa Civil Rights Act, which protects people from housing discrimination based on sexual orientation, was invoked in a June 2013 verdict in favor of a male same-sex couple who was subjected to harassment based on their sexual orientation by their apartment complex’s management. Every day for as long as the couple lived in the apartment complex, the on-site maintenance technician made derogatory statements and offensive gestures toward them. The couple complained to the management company, which did nothing to end the harassment. Forced to endure the daily torment or move, the couple moved out of the complex after two months of harassment. A jury awarded the couple \$72,000 and required the management company to change its complaint process and train all staff regarding their obligations under civil rights laws.<sup>24</sup>

Paired testing has not yet been conducted to study incidents of housing discrimination against transgender people. Such testing is needed to provide insight into systemic housing discrimination against this community. Nevertheless, a groundbreaking study on discrimination against transgender people by the National Center for Transgender Equality and the National LGBTQ Task Force found that 19 percent of survey respondents were refused a home or apartment and 11 percent had been evicted because of their gender identity.<sup>25</sup>

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## Housing sales and lending

From refusing to sell a house to denying a loan, discrimination against LGBT people in housing sales and lending excludes them from a critical component of building wealth: homeownership.<sup>26</sup> In addition to discrimination in rental markets, the aforementioned Michigan study found discrimination in one out of four sales tests and 20 percent of mortgage lending tests.<sup>27</sup> Since the study only examined discriminatory practices at the beginning of the process, it is possible that discrimination in sales and lending could occur at later states in the transactions, which would not be reflected in this study. Only 59 percent of LGBT people own a home, making them 10 percent less likely to be homeowners than the general population.<sup>28</sup> In California, same-sex couples are 11 percent less likely to be homeowners than different-sex married couples, and lesbian, gay, and bisexual individuals are 23 percent less likely to be homeowners than their straight peers.<sup>29</sup>

Although paired testing has not yet been conducted to determine discrimination against transgender people, the National Center for Transgender Equality and the National LGBTQ Task Force study on discrimination against transgender people found only 32 percent of respondents reported being homeowners, compared with 65 percent of the general population.<sup>30</sup>

Discrimination in the sale of homes is not the only form of discrimination that prevents LGBT people from homeownership. The credit section of this report gives a detailed look at how a lack of protection from discrimination make home loans unavailable to LGBT people, which in turn prevents them from buying a home.

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## Housing insecurity

Discrimination places LGBT people at increased risk of housing insecurity. Despite the persistent stereotype that gay men and lesbians are wealthy, LGBT people are in fact at greater risk of poverty than non-LGBT people.<sup>31</sup> Compared with the general population, transgender people have twice the rate of extreme poverty and double the rate of unemployment.<sup>32</sup> A Williams Institute study found that 29 percent of LGBT people “did not have enough money to feed themselves or their families in the past year.”<sup>33</sup> Moreover, the lack of family recognition that LGBT people face in many states negatively affects their financial well-being by denying certain family-based tax credits or access to safety-net programs.<sup>34</sup> And while legal recognition for same-sex relationships is reaching more states, LGBT people still lack legal protection from discrimination—such as employment discrimination—thus contributing to higher poverty rates.<sup>35</sup>

LGBT people living in poverty have limited housing options, and these options are further limited by the fact that it is legal to discriminate against an individual based on sexual orientation and gender identity in more than half of the United States. Moreover, moving can be expensive and difficult. While Section 8 vouchers—a federal program to help people access housing through affordable rental housing or subsidized rent—can be portable, relocating may not be a feasible option because of moving fees or a tight housing market where few, if any, units accept these vouchers. Consequently, LGBT people who are dependent on housing assistance cannot easily relocate to a state with protections against discrimination.<sup>36</sup>

Discrimination in housing and the resulting housing insecurity is even more pronounced for those living at the intersection of multiple marginalized groups. Even though the Fair Housing Act protects against discrimination based on race, color, and national origin, LGBT people of color report significantly higher rates of housing discrimination than their white counterparts. The National Transgender Discrimination Survey found that 37 percent of transgender African Americans reported being evicted because of their gender identity, compared with 8 percent of transgender white respondents. Transgender Latino respondents, 29 percent were outright refused a home or apartment, compared with 15 percent of transgender white respondents.<sup>37</sup> Nearly half of non-citizen transgender Latinos and Latinas were refused housing due to discrimination, and more than one-quarter were evicted. Among transgender Asian American and Pacific Islanders, 21 percent reported that they were refused housing because of discrimination.

The combination of poverty and discrimination makes LGBT people particularly vulnerable to experiencing homelessness. In San Francisco, in 2013, 29 percent of people experiencing homelessness identified as LGBT.<sup>38</sup> Nationally, it is estimated that 40 percent of homeless youth are LGBT.<sup>39</sup> These risks are particularly acute for transgender people. One-fifth of respondents to the National Transgender Discrimination Survey reported experiencing homelessness at some point in their lives due to their gender identity, and nearly 2 percent were currently experiencing homelessness—nearly double the rate of the general U.S. population.<sup>40</sup>

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## Senior housing

Today, there are an estimated 3 million LGBT people who are 65 or older.<sup>41</sup> A lifetime of discriminatory laws preventing relationship recognition and permitting discrimination has left “the first out generation” vulnerable to housing insecurity.<sup>42</sup> A 2014 survey of LGBT older people ages 45 to 75 found that 13 percent were discriminated against on the basis of sexual orientation when searching for housing and 25 percent were discriminated against due to their gender identity.<sup>43</sup> The survey also found discrimination was more pronounced for LGBT older people of color, with 24 percent of LGBT older people of color reporting housing discrimination on the basis of race or ethnicity.<sup>44</sup>

These issues are even more pronounced in senior housing, such as retirement communities and assisted living facilities, where there are no national safeguards against discrimination in the application process or staff mistreatment on account of seniors’ sexual orientation or gender identity. In 2013, the Equal Rights Center conducted matched-pair testing of older couples seeking senior housing and found discrimination against same-sex couples in 48 percent of tests.<sup>45</sup> In some states without anti-discrimination protections for sexual orientation in housing, such as Arizona, discrimination was found in nearly 80 percent of tests.<sup>46</sup> Another survey of LGBT seniors found that 23 percent of respondents experienced verbal or physical harassment from other residents related to their sexual orientation or gender identity and 20 percent were refused admission or abruptly discharged from senior housing for the same reason.<sup>47</sup>

Buildings that cater to LGBT seniors are opening up around the country, but there are not enough units to meet rising demand. For example, the John C. Anderson Apartments in Philadelphia have a 100-person waiting list.<sup>48</sup> And while LGBT-specific housing developments may be preferable for some LGBT seniors,

not all want or are able to afford to move into these communities. Nationwide protections are needed to prevent LGBT seniors from facing discrimination and housing insecurity—no matter where they live.

The fact that it is legal to refuse LGBT people access to housing in more than half of the United States violates the spirit of the Fair Housing Act, and national safeguards against housing discrimination based on these characteristics are critical. Passing the Fair Housing Act in 1968 was the beginning, not the end, of ensuring broad and inclusive protections against housing discrimination. In recognition of LGBT people’s particular vulnerability to housing discrimination, policymakers must expand protections to include sexual orientation and gender identity.

# LGBT Americans and access to credit

In comparison to other areas of civil rights law such as employment and housing, the importance of protections in accessing credit may appear relatively small. However, discrimination in this process has potentially wide-ranging effects given the significant linkages among obtaining credit, finding and keeping affordable housing, accessing reliable transportation, and securing well-paying and stable jobs. Research demonstrates that discriminatory practices make particular communities more vulnerable to threats to credit, and these vulnerabilities likely extend to LGBT communities. While there have been few empirical analyses quantifying the incidence of discrimination based on sexual orientation or gender identity in applications for credit, there are clear opportunities for stigma and institutional discrimination to result in mistreatment of LGBT people.

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## How credit applications are assessed

The process of obtaining different types of credit—from mortgages to business loans and credit cards to student loans—occurs through multiple types of institutions that act as lenders. Lenders may take the form of banks, retail stores, or short-term lenders, each of which is regulated by different state or federal laws. One’s ability to obtain credit and the terms under which that credit is obtained are determined through credit scoring—a mathematical process that compares an applicant’s information to data from millions of other individuals to assess the likelihood that the applicant will be able to pay back a loan on time. There are a number of factors that contribute to a credit score, including:<sup>1</sup>

- History of paying bills, including whether one pays on time
- Number, type, and age of accounts
- Whether any collection actions have been taken against an individual
- Whether one has ever filed for bankruptcy
- The degree of outstanding debt, including a comparison of the amount of debt relative to one’s credit limit
- Any new applications for credit



In addition, other factors not present in one's credit report may affect the extension of credit. When applying for a mortgage loan, for example, the size of the down payment, one's income, and one's other debts may be included in the analysis. Different lenders utilize different systems to make determinations using these data, although they are generally analyzed through automated systems that are meant to produce objective decisions. However, LGBT people may be subject to mistreatment and discrimination during personal interactions with loan officers.

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## Existing credit nondiscrimination protections

The Equal Credit Opportunity Act, or ECOA, outlines factors that may not be used to determine whether an individual may obtain credit or to vary the terms of that credit, including race, color, religion, national origin, sex, marital status, age, or use of public assistance.<sup>2</sup> However, creditors may obtain such demographic information for use by federal agencies to enforce existing nondiscrimination laws.

Despite these protections, there are other pieces of information related to these protected classes that lenders may obtain and utilize in determining credit. For example, lenders may consider individuals' immigration status to assess whether they will be in the country long enough to repay the loan. Additionally, lenders may ask for information about individuals' marital status—even though protections exist on this factor—if they are applying for a joint account or if they live in a community property state. In community property states—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin—money earned by an individual in a married relationship belongs to both spouses. Furthermore, if someone applies for credit with a spouse, information about that person can be requested if the spouse will use the account or if the spouse's income, alimony, or child support payments are being used to make the credit determination.<sup>3</sup>

Currently, neither the ECOA nor any other form of federal legislation prohibits discrimination in credit on the basis of sexual orientation and gender identity. At the state level, only 18 states and the District of Columbia have credit nondiscrimination laws that include sexual orientation and gender identity, with an additional three states that cover sexual orientation only.<sup>4</sup> As a result, it is legal in many jurisdictions for a lender to deny credit to LGBT individuals based on their sexual orientation or gender identity, to refuse to allow same-sex couples to file joint applications, or to offer unfavorable loan terms.<sup>5</sup>

Unfortunately, there are limited data available to define the scope of credit discrimination among LGBT communities. This is due partly to the lack of collection of sexual-orientation and gender-identity data that would allow for routine evaluations of lending practices. While further research is needed to fully understand where and how often discrimination and harassment affect access to credit for LGBT individuals, existing information suggests that the lack of nondiscrimination protections presents an unfair barrier for LGBT communities.

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## Mortgage applications and housing

In the United States, the ability to buy a house is closely linked to the ability to secure a mortgage. Similar to their different-sex counterparts, same-sex couples who are homeowners are more likely to have a mortgage than own their homes outright,<sup>6</sup> demonstrating the need to protect LGBT people from discrimination in the lending process. Based on the information gathered during the credit application process and the likelihood of personal interactions between loan officers and LGBT applicants, disparate treatment of individuals based on their actual or perceived sexual orientation or gender identity or expression may occur. Given the continued stigmatization of LGBT identity and same-sex relationships in the United States, the possibility of disparate treatment in the lending market is very real.<sup>7</sup>

Analyses based on data available under the Home Mortgage Disclosure Act show that pairs of same-sex borrowers were denied mortgages at higher rates than different-sex pairs in which a man was the primary applicant, although at approximately the same rate as different-sex pairs in which a woman was the primary applicant. Additionally, the rate at which same-sex pairs had applications that were withdrawn or incomplete was higher than different-sex pairs in which a man was the primary applicant.<sup>8</sup> These data do not provide insight into the reason for rejected or incomplete applications and are not limited to same-sex couples, as they may also include pairs of same-sex borrowers who are relatives, business partners, or otherwise involved. Nevertheless, they highlight a trend that merits further exploration.

A survey of LGBT individuals in Anchorage, Alaska, reveals more direct evidence of credit discrimination. The survey showed that a small but disturbing percentage of respondents reported being denied a loan or line of credit on the basis of sexual orientation, gender identity, or gender presentation when otherwise qualified.<sup>9</sup> While the survey was specific to one city, individual cases from other locations suggest that the problem extends further.

For instance, a Florida Bank of America branch denied Patty Snyder a mortgage in 2012 after she listed her same-sex partner's mother as her co-signer. The bank justified the denial on the grounds that the relationship between Snyder and her partner's mother was not recognized. Snyder filed a complaint with Department of Housing and Urban Development, or HUD, which prohibits discrimination on the basis of sexual orientation, gender identity, and marital status in Federal Housing Authority-insured loans under its 2012 Equal Access Rule. HUD reached a settlement with Bank of America in 2013, highlighting the agency's ability to take action in cases of discrimination.<sup>10</sup> However, such protections remain unavailable for individuals pursuing the many types of conventional mortgages and other loans not under HUD's jurisdiction, including car loans or small business loans.

A same-sex couple in California filed a similar case against Bank of America in 2012 for refusing to take the incomes of both individuals into account in determining their eligibility for a loan modification on their home. Bank of America cited their lack of a legal relationship under California law. The couple alleged that the bank's actions constituted discrimination on the basis of sexual orientation in violation of the state's civil rights act.<sup>11</sup> While details on the outcome of this case are unavailable, it provides compelling evidence both for further collection of data, as well as clear protections for LGBT individuals, regardless of what type of mortgage or loan they seek.

This unfair treatment in mortgage applications has a cyclical effect on access to other types of loans because only some financial transactions contribute to a person's credit score. For example, paying one's mortgage on time builds credit, while paying rent or utility bills frequently does not, giving preference to those who are financially able to purchase a home despite an equal degree of responsible behavior.<sup>12</sup> There is some evidence indicating that LGBT individuals are less likely to be homeowners than their non-LGBT counterparts,<sup>13</sup> meaning that the different treatment of rent payments and mortgage payments has a disparate, negative impact on the ability of LGBT people to build credit.

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## Gender markers and application materials

National Transgender Discrimination Survey data indicate a high likelihood that transgender and gender non-conforming people will be mistreated when presenting documentation that does not appear to match their gender presentation. In that survey, more than 40 percent of respondents reported problems when presenting incongruent identification in the ordinary course of life, including 40 percent reporting harassment and 3 percent reporting assault.

Obtaining identification documents that include the correct name and gender markers is a burdensome process for transgender individuals in most states. Only an estimated 67 percent of transgender people have been able to update at least one identity document and only roughly half of those respondents have been able to update all identity documents and records. The remaining one-third have no identity documentation consistent with their gender identity.<sup>14</sup> As a result, requirements that identity documents must be obtained and referenced as part of the credit application process can result in discrimination against people based on gender identity or expression.

While all individuals have the right to keep credit accounts after legally changing their name,<sup>15</sup> situations in which individuals must present specific or multiple documents to verify their identity, combined with inflexible policies or personal bias by loan officers, create an opportunity for discrimination. Additionally, a lack of data collection that is inclusive of gender identity makes the extent to which transgender people experience difficulties in maintaining accounts after obtaining updated identification unclear.

*Rosa v. Park West Bank*, a case litigated in 2000 by Gay and Lesbian Advocates and Defenders, or GLAD, provides a glimpse of how discrimination based on gender identity and expression can unfold.<sup>16</sup> After looking at the identification cards presented by a transgender individual in Massachusetts, a bank loan officer at Park West Bank refused to provide her with a loan application unless she went home to change and returned in more traditionally masculine clothing. While the Federal Appeals Court ultimately agreed that the applicant could pursue a claim of sex discrimination under the Equal Credit and Opportunity Act,<sup>17</sup> the case highlighted the barriers that transgender and gender-nonconforming applicants face and the need for explicit protections in statute, beyond court interpretations of what constitutes sex-based discrimination. Although there has been progress in the several years since the case was litigated—including the passage of legislation in Massachusetts prohibiting discrimination in credit on the basis of gender identity or expression—national research indicates that harassment and discrimination against transgender individuals persists in all spheres of life.<sup>18</sup>

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## Economic insecurity

LGBT people may also be at a disadvantage in applying for credit as a result of occupational and economic insecurity. For example, 2010 American Community Survey data show that within several racial minority subgroups, members of same-sex couples report higher unemployment rates than their different-sex counterparts, including among African American couples (9 percent versus 7 percent), Latino couples (7 percent versus 6 percent), and American Indian and Alaska Native couples (12 percent versus 6 percent). Unemployment rates for individuals in same-sex couples within these racial minority groups were also higher than for individuals in white same-sex couples at 4 percent.<sup>19</sup> Lacking a stable income can negatively affect one's ability to secure a loan, and the greater proportion of same-sex couples of color who are unemployed puts them at a relative disadvantage.

Additionally, available research demonstrates a greater vulnerability to poverty based on sexual orientation, even when controlling for other factors.<sup>20</sup> Transgender people report strikingly high levels of economic instability, despite the presence of protective factors such as greater educational attainment.<sup>21</sup> There is evidence of wage disparities based on sexual orientation,<sup>22</sup> which are even more pronounced for LGB people of color.<sup>23</sup> Survey research also finds that LGB people and same-sex couples are more likely to report receiving support from public assistance programs.<sup>24</sup> Given evidence that lower-income families are charged higher interest rates than families of higher incomes,<sup>25</sup> this discrimination increases the costs of borrowing money among families who can least afford to pay it back. Difficulty in obtaining credit can also arise from medical debt. Data from a nationally representative survey of low- and middle-income LGBT adults show that 3 in 10 respondents carried medical debt in the year prior to the survey. Additionally, 37 percent of bisexual respondents and nearly 50 percent of African American respondents reporting having unpaid medical bills.<sup>26</sup> Historically, medical debt has been treated akin to other kinds of debt, which unfairly lowered the credit scores of those affected, including significant numbers of LGBT people. A May 2014 report from the Consumer Financial Protection Bureau has sparked some changes to the role of medical debt in credit score formulas, but the impact of these changes may take several years to unfold.<sup>27</sup>

As a result of the obstacles to obtaining credit for low-income people, the many LGBT individuals experiencing economic instability, unemployment, and accumulated medical debt have inadequate access to loans and other lines of credit.

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## The intersection between race and LGBT identity in access to credit

While the law states that race, color, religion, national origin, sex, marital status, age, or use of public assistance may not be used to discriminate against credit applicants, there is evidence of remaining unfair and predatory lending practices that disproportionately harm communities of color. The lack of evidence on the impact of discrimination based on sexual orientation and gender identity on one's ability to obtain credit precludes drawing firm conclusions about systematic differential treatment of LGBT people. However, they are more likely to identify as people of color than non-LGBT people, meaning that existing research on race-based credit discrimination may shed light on the experiences of a significant share of the LGBT community.<sup>28</sup>

Research shows racial disparities in credit scores,<sup>29</sup> which can be explained in part by discriminatory lending practices and limited opportunities to build credit. Numerous studies have shown that African Americans and Latinos have lower credit scores overall than whites.<sup>30</sup> There is also evidence that applicants of color are pushed toward higher-cost products through the geographic clustering of office branches or targeted advertising practices.<sup>31</sup> For instance, high-cost payday and auto title lenders are largely located in low-income communities and communities of color, putting financially vulnerable consumers in danger of losing their vehicles or becoming trapped in a cycle of growing debt.<sup>32</sup>

Although many of the worst practices from the subprime mortgage lending market have been addressed through regulatory mechanisms put in place after the 2008 housing crisis, previous research showed that borrowers of color were more likely to be rejected, offered less favorable mortgage loan terms, or referred to subprime lenders compared to white borrowers.<sup>33</sup> For example, a 2000 study showed that black applicants across the income spectrum were nearly three times more likely to get a loan from a subprime lender compared to other applicants.<sup>34</sup> Audit research conducted before the 2008 regulations showed that black applicants are less likely to be referred to a lender's prime borrowing division, are less likely to receive a quote for a loan, and when given a quote, are shown higher interest rates than white applicants with similar characteristics.<sup>35</sup> These practices place an unfair burden on people of color and LGBT communities, making it harder for them to get ahead.

Access to credit is critical for LGBT individuals who are committed to building better and more prosperous lives for themselves and contributing to the national economy—including purchasing new homes, securing access to necessary transportation, or embarking on a new business enterprise. As long as it is legal for creditors to treat the identities and relationships of LGBT applicants differently than those of other applicants, however, LGBT individuals' ability to secure adequate and affordable credit remains uncertain. Furthermore, ongoing disparities in credit access for people of color and low-income people have a disproportionately negative impact on LGBT individuals. Addressing these difficulties will require policy changes to ensure equitable treatment for all individuals seeking credit, as well as concerted attention to better understand the disparate experiences of LGBT people.

# LGBT Americans and education

A high-quality education is vital to the success of today's young people. When education works well, it offers opportunities for social development, skill building, critical thinking, and preparation for civic engagement. Unfortunately, the educational system earns a failing grade in meeting the needs of LGBT students. A patchwork of state and federal protections leaves too many LGBT young people vulnerable to discrimination during a time when they need consistent support and affirmation as they form their personal identities and develop life goals.

While strides made by the U.S. Department of Education have offered important and groundbreaking protections for transgender students under Title IX of the Education Amendments of 1972, the continued omission of sexual orientation and a lack of clarity about what constitutes discrimination on the basis of gender identity mean that the work must continue. Furthermore, protections that apply only to programs receiving government funding or that contain religious exemptions ignore the needs of students at many private and religiously affiliated schools. Only explicit nondiscrimination protections on the basis of sexual orientation and gender identity that apply to all students—in elementary, secondary, and higher education and in public as well as private schools—can ensure equal access to the full benefits of education for LGBT young people.

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## LGBT families and early education

Policymakers are increasingly acknowledging the importance of promoting access to and investing in early childhood programs, which research has shown produces long-term benefits both to individuals and society. Children who receive high-quality early education are less likely to drop out of school, get tracked into special education programs, and be arrested for a violent crime, and they are more likely to attend college.<sup>1</sup> It is critical to recognize young children's right to early educational opportunities—and this right should extend to all children, regardless of their sexual orientation and gender identity or that of their family members.



Few protections currently exist to ensure that the children of same-sex couples can attend the same preschools as their peers. In June 2014, the U.S. Department of Health and Human Services' Administration for Children and Families issued guidance to Head Start grantees clarifying eligibility guidelines for families of same-sex couples in conjunction with the Supreme Court's *United States v. Windsor* decision—which struck down the federal ban on same-sex marriage—and further advising grantees that “family support and parent engagement activities should be inclusive and supportive of single, coupled, and married LGBT parents.”<sup>2</sup> However, no federal legislation explicitly prohibits discrimination on the basis of sexual orientation or gender identity in early education programs, and even fewer protections exist for private programs. As a result, young children suffer the consequences of adult prejudice. For instance, a religious preschool in New Mexico denied a three-year-old from enrolling, citing the relationship between his two fathers.<sup>3</sup> In less extreme circumstances, LGBT parents must make the difficult choice between placing their children in programs that are not accepting of their family or struggling to provide an early education that is welcoming but more expensive or located further away.<sup>4</sup>

Many early education programs would also benefit from a better understanding of how to support the self-expression of transgender and gender-nonconforming children during an important period of child development. When early childhood providers lack the tools to provide affirming care, the effect can be harmful. Anecdotal evidence provides a glimpse of the restrictions that some young transgender and gender-nonconforming children experience in early education programs, including teachers who refuse to let children learn to spell their preferred name,<sup>5</sup> discourage them from dressing with clothing designated for boys or girls only,<sup>6</sup> deny them access to sex-segregated spaces,<sup>7</sup> or not allow into their program children who refuse to identify with their sex assigned at birth.<sup>8</sup>

While additional research is needed to fully understand the experiences and needs of LGBT children and families in early educational settings, they deserve equal access to affordable and quality preschool programs, whether privately run or administered by the state or federal government. Enacting nondiscrimination protections in education, public accommodations, and programs receiving government funding is an important step to ensure that all young children receive nurturing and supportive opportunities to learn during their early years.

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## Discrimination in K-12 schools

Elementary and secondary school represents a unique environment in which young people should have a safe space to learn and mature, develop skills to engage with the world around them, and establish the confidence to put these skills into action. Instead of finding a welcoming space to tackle the challenges that accompany academic enrichment and personal growth, however, LGBT students find significant barriers to reaching their full potential. Too many students attend school without nondiscrimination policies that include sexual orientation and gender identity. On the federal level, Title IX provides some protections to transgender and gender-nonconforming students, but these do not apply to private K-12 schools that do not receive government funding. Only 13 states plus the District of Columbia have nondiscrimination laws that specifically protect LGBT students, while Wisconsin has protections based on sexual orientation alone. However, many of these state laws also do not apply to private schools. While some states have specific legislation protecting students from discrimination in education, others define education as a form of public accommodation.<sup>9</sup>

With few existing protections, LGBT young people and those perceived as LGBT experience troubling rates of violence and harassment in school settings, exclusion from school and extracurricular activities, and inequalities in treatment by school personnel. Denying LGBT students an equal opportunity to pursue education and obtain diplomas contributes to negative health outcomes and decreased well-being, including high rates of suicide attempt, school drop-out, poor mental health, and homelessness.<sup>10</sup>

## Bullying, harassment, and school safety

A sense of safety is a prerequisite for personal and academic success. For this reason, the U.S. Department of Education has stated that certain types of harassment—including gender- and race-based harassment—may constitute discrimination if it is sufficiently “severe, persistent, or pervasive” to affect the student’s education or create a hostile environment.<sup>11</sup> For many LGBT students, attending school means feeling constantly under threat. The statistics are disturbing: A survey of LGBT middle and high school students conducted by the Gay, Lesbian and Straight Education Network, or GLSEN, in 2013 found that more than half of respondents reported feeling unsafe at school as a result of their sexual orientation, and more than one-third reported feeling unsafe because of how they express their gender.<sup>12</sup> Three-quarters of LGBT students said they frequently hear the

word “gay” used negatively at school. One-third of LGBT students report physical harassment at school based on their sexual orientation, and 17 percent report assault.<sup>13</sup> Finally, nearly 60 percent of LGBT students reported experiencing sexual harassment at school.<sup>14</sup> Physical and verbal harassment presents a similar problem for significant numbers of students with LGBT family members.<sup>15</sup>

There is little doubt that such harassment creates an environment that makes it more difficult for LGBT students to learn. Research shows that higher levels of victimization among LGBT youth are correlated with lower GPAs.<sup>16</sup> The effects of bullying and harassment reach beyond students who have been victimized directly, as exposure to bullying also has negative implications for the mental health of bystanders—meaning the presence of bullying can lead to a poor learning environment for the entire school community.<sup>17</sup>

In many cases, school personnel do not adequately respond to instances of bullying and harassment, deepening the harm to students. Approximately 57 percent of LGBT students avoid telling school employees about the harassment they experience, often because they expect staff will do nothing, are afraid of how staff will react, or worry about making the situation worse.<sup>18</sup> When students do report, these fears are often realized: 62 percent of LGBT students in the GLSEN survey indicated that staff took no action in response to reports of harassment and assault or told students to simply ignore it.<sup>19</sup> Indeed, educators sometimes initiate the harassment: 51 percent of LGBT students report hearing homophobic remarks from teachers or other staff, and 56 percent report hearing negative comments from school staff about a student’s gender expression.<sup>20</sup>

Even if school personnel do intervene, they may do so in a way that exacerbates the problem. LGBT students are more likely than straight students to be in a physical fight; data on transgender students are not available, but anecdotal evidence suggests they may experience similar trends.<sup>21</sup> Zero-tolerance policies and staff bias mean that all individuals involved in a school fight or other incidents of bullying or harassment frequently receive punishment. LGBT students are often penalized even if the LGBT participants were targeted as victims by other students, acted in self-defense, or were caught in an ongoing cycle of violence and victimization that the school allowed to go unaddressed. In some cases, LGBT students receive most or all of the blame for such incidents, and staff may discipline them instead of the perpetrator.<sup>22</sup> Staff may also address situations of violence by segregating the student rather than seeking to resolve the underlying problem. For example, in 2012, Gay and Lesbian Advocates and Defenders shared the story of a student who was punched at least weekly in the halls; the school’s only response was to have an adult accompany the youth between classes, further isolating him from his peers.<sup>23</sup>

## School policies and disciplinary practices

Explicit discrimination within school policies and selective enforcement of codes of conduct deny LGBT students the opportunity to be themselves at school and put them at risk of harsh punishments that interrupt learning time. Dress codes with gender-based requirements have a disproportionately negative impact on LGBT students, with 34 percent of respondents in the GLSEN survey reporting that their school prevented students from wearing clothing deemed inappropriate on the basis of gender.<sup>24</sup> Gender-nonconforming students of color are particularly at risk for disciplinary action based on their gender identity, expression, or presentation—such as one student who received a week-long suspension for wearing hair extensions, even though his female classmates were permitted to do so.<sup>25</sup>

Personal bias when enforcing other school policies also results in unjustified disciplinary actions against LGBT youth. Research indicates that LGBT students receive harsher punishments from school authorities than their peers for similar offenses.<sup>26</sup> For instance, LGBT students report that they are prevented from engaging in even minor displays of intimacy with same-sex partners, while non-LGBT students display affection often without consequence.<sup>27</sup> According to the GLSEN survey, 39 percent of students attended schools where LGBT students were sanctioned for similar displays of affection as their non-LGBT peers.<sup>28</sup>

These disparities are indicative of a clear tendency to discriminate against LGBT students as a result of their sexual orientation or gender identity. Indeed, a small but disturbing 9 percent of respondents to the GLSEN survey reported that simply being out as an LGBT person at school resulted in discipline.<sup>29</sup> Data suggesting that schools discourage students from advocating for or expressing interest in LGBT equality support this finding. For instance, although courts have repeatedly ruled that restricting a student's choice of clothing or political expression may constitute a violation of the First Amendment, school administrators continue to enforce unfair limits on LGBT students, with 24 percent of students reporting that their schools prevent them from wearing items supporting LGBT issues.<sup>30</sup>

Importantly, the disparate treatment of LGBT students also flows into school curricula, directly affecting academic content. Twenty-four percent of students in the GLSEN survey reported that their schools have prevented pupils from discussing or writing about LGBT topics during class assignments.<sup>31</sup> In some places, curricular discrimination extends beyond individual teacher preferences or school policies, representing a more systemic problem. Eight states currently have some version of a “no promo homo” law that prohibits educators from discussing LGBT issues or mandates that educators portray same-sex relationships negatively.<sup>32</sup>

## Unequal access to school clubs and activities

In addition to experiencing discrimination in the classroom, LGBT students are denied access to extracurricular activities that enrich learning, promote socialization, build resilience, develop leadership skills, and provide material for resumes and college applications.<sup>33</sup> Despite guidance from the U.S. Department of Education stating that public secondary schools permitting student clubs must also permit gay/straight alliances, or GSAs, under the Equal Access Act, school administrators continue to erect barriers against the formation of supportive student groups. Discouraging GSAs denies LGBT students access not only to the club itself but also to the wide range of benefits associated with having a GSA at school, including improvements in academic achievement and school climate and reductions in victimization, school drop-out rates, and suicidality.<sup>34</sup>

According to the GSLEN survey, nearly 20 percent of LGBT students said they have been hindered in forming or promoting a GSA or other school club that is supportive of LGBT issues.<sup>35</sup> School personnel sometimes attempt to ban the formation of GSAs altogether, even though courts have generally upheld students' right to create a GSA.<sup>36</sup> Administrators may also enact more subtle restrictions, such as informing students that they “can't tell anybody” about their involvement in a GSA<sup>37</sup> or pressuring teachers not to act as an advisor to a GSA—a particular concern in states where it is still legal to fire an employee on the basis of sexual orientation and gender identity. Students who do not attend public secondary schools face even more barriers: The Equal Access Act does not apply to private schools, and because the laws of individual states determine the definition of secondary schools, the rights of public middle school students to form a GSA in some jurisdictions are also limited or unclear.

LGBT students encounter similar discriminatory policies that limit their participation in other school activities that are core to the educational experience for many students. Approximately 28 percent of students reported attending schools that prevent students from going to school dances with another student of the same gender.<sup>38</sup> Participation in school sports teams can also be difficult, particularly for transgender students who are prohibited in many states from playing on teams that are consistent with their gender identities or who live in states that lack affirmative policies permitting them to play.<sup>39</sup> And even when LGBT students do participate in sports, many experience high rates of harassment or get labeled as disruptive—even though athletic involvement can promote better academic and mental health outcomes for LGBT students.<sup>40</sup>

## Failure to recognize gender identity

All students deserve to attend school and have their gender identity recognized and validated. However, few states have adopted policies to guarantee that transgender students receive the full benefits of an education. Moreover, the lack of specific federal guidance outlining the rights of transgender students permits school administrators, educators, and other school staff to interpret existing protections in a manner that enables persistent discrimination against transgender and gender-nonconforming students.

As a result, school is often a time of uncertainty for transgender young people and their families. Students who have made the decision to transition must become their own advocates with school personnel, most of whom lack any training on working with transgender students. Additionally, some school personnel allow personal beliefs to interfere with supporting transgender students or prioritize the unfounded concerns of other students and parents over the safety and well-being of transgender youth.<sup>41</sup>

The implications of refusing to recognize a student's gender identity ripple into nearly all aspects of the student's education. According to the most recent GLSEN survey, 42 percent of transgender students have been prevented from using their preferred name at school, and 59 percent have been required to use the bathroom or locker room of their sex assigned at birth.<sup>42</sup> Additional forms of discrimination include using incorrect gender markers on school records, inappropriately communicating confidential information about the student's sex assigned at birth or medical history without the permission of the student, and limiting the student's access to gender-segregated activities or spaces—all of which can create anxiety and interfere with learning.

## Impact on students in K-12 education

Discrimination has a profound and disruptive impact on a student's education. Nearly one-third of LGBT students reported missing at least one entire day of school in the previous month due to feeling unsafe or uncomfortable. For similar reasons, some students also alter their activities during the course of the school day in ways that limit their opportunities for academic learning and physical and social development. For example, 32 percent of students report that they avoided physical education classes, 21 percent avoided school athletic fields and facilities,

and 20 percent avoided the school cafeteria.<sup>43</sup> In some cases, disruption to the student's education is so severe that families enroll the student in a different school—often by paying for private tuition or relocating to a new city or town with a better school climate, both of which can carry a significant financial cost and can be inaccessible for low-income families.<sup>44</sup> These disruptions can make it more difficult for a student to graduate or can negatively affect their academic aspirations.<sup>45</sup>

Disciplinary policies and practices that unfairly target LGBT youth for suspensions and expulsions also interrupt student learning time and increase the likelihood of involvement with the juvenile justice system, with a particularly heavy impact on students of color.<sup>46</sup> While data on graduation rates for LGBT students are limited, research does show that students who interact with the juvenile justice system are less likely to return to school or obtain their high school diplomas.<sup>47</sup> Disciplinary trouble at school can also exacerbate tension between students and their families—a particularly troubling phenomenon for LGBT students who are at risk of family rejection and homelessness.<sup>48</sup>

Research shows that LGBT young people have an increased likelihood of a variety of negative health outcomes and risk behaviors, including suicidal thoughts and other mental health issues, substance use, violence, high-risk sexual behaviors, and unhealthy weight management.<sup>49</sup> Health disparities among LGBT youth have a complex set of causes that extend beyond school environments; however, the education system can play a significant role in either exacerbating health risks or promoting resiliency. For instance, one study demonstrated that LGB students living in cities and states with positive school climates and protective factors—such as the presence of a GSA or the prohibition of harassment based on sexual orientation and gender identity—reported fewer suicidal thoughts.<sup>50</sup> Promoting positive physical and mental health through supportive policies is a key element of building student success.

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## Discrimination in higher education

In recent years, well-meaning advocates have advised LGBT youth to look forward to life after high school, telling them that when thinking about being a LGBT person, eventually, “It gets better.”<sup>51</sup> Higher education, according to this narrative, represents the road to a happy and prosperous future. Cultural scripts suggest that college provides a unique opportunity in a young person's life to break free of the constraints imposed by family or place of birth and start fresh. More practically, a degree from an institution of higher education is increasingly mandatory for ambitious young people seeking to prepare themselves for careers of their choice.



However, LGBT college students too often discover that life does not, in fact, get better once they are on college campuses. Persistent harassment, discriminatory policies, and uneven access to campus resources translate into subpar educational experiences for LGBT students. While media attention has largely focused on blatant displays of bias at religious institutions, LGBT students encounter challenges to their personal and academic progress at schools across America—regardless of whether they are attending a small private college or a large public university or whether they are pursuing an associate’s degree for the first time or returning to school to obtain a Ph.D. Many of the problems that LGBT college students face resemble those experienced by their younger counterparts in elementary and secondary schools, such as physical and verbal harassment and a refusal to recognize student gender identities; other issues are specific to college and university settings.

Of the more than 4,000 degree-granting colleges and universities in the country, approximately 80 percent lack basic nondiscrimination policies that are fully inclusive of both sexual orientation and gender identity and expression.<sup>52</sup> While the protections offered by Title IX’s prohibition on the basis of sex do apply to public schools, as well as most private colleges and universities that receive federal financial aid funding, the lack of clear nondiscrimination guidelines and overly restrictive policies mean that discrimination continues to occur. Where academic institutions overwhelmingly fail to provide equal opportunities to LGBT students, federal and state governments must step in to clarify existing protections and legislate new ones in order to remove unfair obstacles to academic achievement for LGBT individuals.

### Admissions and attendance

For aspiring LGBT college students, the application process is complicated by institutionalized bias. Because there are few guarantees of nondiscrimination on the basis of sexual orientation and gender identity, LGBT students may hesitate to come out in application materials, which limits their ability to discuss examples of personal leadership demonstrated by involvement in GSAs or LGBT advocacy efforts.<sup>53</sup> Recent examples indicate that such fears are not unfounded: A 20-year-old nursing student was denied readmission to a Baptist school in Missouri in 2014 after he came out as gay and university officials revoked an earlier letter of acceptance and invitation to apply to the school’s honors program, informing him that he was in violation of the school’s morality clause.<sup>54</sup> Similarly, already enrolled LGBT students may legally be expelled or forced to transfer as a result of codes of conduct that prohibit same-sex sexual or romantic behavior or that view LGBT identities as in conflict with school values.<sup>55</sup>



For transgender students, the decision about whether or not to disclose their identity is often rendered irrelevant by gender markers on application materials such as high school transcripts or government-issued documents. Many sex-segregated schools lack admissions policies on transgender students, while others attempt to confirm the student's gender identity through documentation that may not be obtainable, rather than accepting the student's self-identification. As a result, students can be denied admission to programs that are in fact consistent with their gender identities—such as when Smith College, a private women's school in Massachusetts, rejected the application of Calliope Wong, a high school senior and transgender woman.<sup>56</sup>

Even if accepted to an academic program, LGBT students may struggle to attend for financial reasons. At a time when tuition costs have skyrocketed, increasing more than 1,000 percent in the past three decades,<sup>57</sup> financial aid provides the only means for many students to attend. This assistance is particularly important for LGBT students who are homeless, are working low-wage jobs, or have been rejected by their families. Despite this, 11 percent of respondents to a national survey of transgender individuals reported they had lost or were denied financial aid or scholarships as a result of their gender identity or expression.<sup>58</sup> And while the Free Application for Federal Student Aid, or FAFSA, now makes it easier for same-sex couples or their children to accurately provide their family information, it continues to require that applicants use the name associated with their Social Security number. Additionally, it requires that applicants who were assigned male at birth have registered with the Selective Service, complicating the process for transgender students who may be unclear on the registration requirements and who do not receive the gender-specific prompts and information about the Selective Service that other applicants receive while completing the FAFSA online. Because of the specific requirements for providing information related to names and gender markers, the financial aid process can result in rejected application forms or delayed processing of applications for transgender students and can oust a transgender student to university administrators.<sup>59</sup>

## Housing and facilities

Once on campus, LGBT students face a host of additional challenges. Foremost among these for many students is securing safe, stable, and gender-appropriate housing and accessing other campus facilities. A combination of harassment from other students and inadequate or discriminatory policies limits access to on-campus dorm rooms, restrooms, and locker rooms, a clear indication to LGBT

students that they are not full members of the campus community. For instance, roommate conflicts over sexual orientation or gender identity may result in the temporary or permanent removal of the LGBT student from their own dorm, rather than the removal of the student filing the complaint.<sup>60</sup>

The gaps created by housing policies based on unfounded prejudices are particularly harmful for transgender students. Research indicates that one in five transgender individuals were not allowed to access gender-appropriate housing while in college.<sup>61</sup> Although best practices call for transgender students to be housed according to their gender identities, many schools instead place them in dorm rooms according to their sex assigned at birth, mandate that they live in single rooms only, or force them to find housing off campus.<sup>62</sup> While individual transgender students have different rooming preferences, blanket restrictions such as these ignore the identities of transgender students and deny them opportunities afforded to other students, such as developing interpersonal connections with roommates and living in a location convenient to academic buildings. These policies can result in financial penalties if the university does not offset costs for off-campus housing or single dormitory rooms, which are frequently more expensive.

Similarly, according to a survey of transgender adults, nearly one-quarter of respondents were denied access to the appropriate bathroom or other facilities during college; rates were higher for transgender respondents of color and transgender respondents with a disability.<sup>63</sup> Transgender women in particular have a higher risk of being denied gender-appropriate housing and access to campus facilities.<sup>64</sup> Failure to ensure consistent access to sex-segregated facilities on the basis of gender identity is detrimental to the physical health, safety, and emotional well-being of students and limits their participation in campus life.<sup>65</sup>

Notably, well-documented cases of these disparities in access to campus housing and facilities have occurred at a broad range of schools across the country, including private colleges, as well as public universities.<sup>66</sup> While some limited protections for transgender and gender-nonconforming students do exist under Title IX, no federal guidelines explain how colleges and universities should ensure nondiscrimination in campus housing, and no explicit protections exist for gender-conforming LGB students. Furthermore, the religious exemptions contained in Title IX allow discrimination to occur without consequence at some private institutions, even if they are recipients of federal funds through financial aid programs. For instance, the language contained in Title IX caused the U.S. Department of Education to grant an exemption for George Fox University—a Christian university in Oregon—in response to a complaint filed by a young transgender man whose request to live with other male students on campus was denied.<sup>67</sup>

## School records and gender markers

A further complication is that many universities create unnecessary barriers for transgender students seeking to change their names or gender markers on school records or prevent them from doing so altogether. LGBT student advocacy organization Campus Pride has identified only 114 schools that permit students to use their preferred rather than legal name on campus records and documents, and only 47 schools have policies allowing students to change the gender listed on campus records without evidence of medical intervention, which many students find costly or undesirable.<sup>68</sup> The refusal to recognize student names and gender identities is a particularly large barrier for low-income students, who may struggle to pay fees associated with legal name and gender changes and who are more likely to attend community colleges, where policies allowing preferred name and gender marker use are especially rare.<sup>69</sup> As a result, transgender graduates are vulnerable to additional discrimination and invasive questioning when applying for jobs, seeking entrance to graduate schools, or in other situations where college documents are required.<sup>70</sup>

## School health services

Colleges and universities frequently fail to provide LGBT students with adequate and equal health services. A study of campus counseling center websites found that only 30 percent stated that they offered individual counseling specifically for LGBT students and only 11 percent offered LGBT counseling groups.<sup>71</sup> Feedback from college students indicates that mental health counseling services often lack competency in providing adequate services to LGBT students, particularly transgender students. In one survey of 50 transgender college students, only three undergraduate respondents said their counselors had been “helpful, knowledgeable, and very supportive,” and similar trends were observed for transgender graduate students in the same study.<sup>72</sup> For instance, study participants reported being turned away from campus counseling centers, getting referred to un knowledgeable or unsupportive professionals, or not receiving adequate assistance.

Additionally, many campus health insurance plans exclude transition-related services, denying transgender students access to the medically necessary services that many need to be successful in higher education. According to Campus Pride, approximately 57 colleges and universities out of more than 4,000 degree-granting schools across the country cover hormones and gender confirmation surgeries for students, with an additional 20 schools covering hormones only.<sup>73</sup>

## Campus safety and climate

Discrimination by campus safety officers poses a significant threat to LGBT students. Statistics indicate that LGBT students are a vulnerable student population that requires the protection of campus security personnel, as well as prompt and sensitive responses to victimization. Approximately one-quarter of all on-campus hate crimes reported for 2013 under the Clery Act, which governs the disclosure of campus security and crime information, were categorized as based on bias due to sexual orientation.<sup>74</sup> Despite this, LGBT students frequently find themselves wrongfully targeted and discriminated against by campus safety officers. For instance, Andraya Williams, a transgender student at a North Carolina Community College, was interrogated by a campus security guard after using a women's restroom on campus, asked to "prove" her gender identity, and escorted off the campus and told she would be suspended.<sup>75</sup> Her story is not unique and points to an inability among campus security personnel to prevent or respond to violence against LGBT individuals.

In addition to reported hate crimes, LGBT college students experience significantly higher rates of harassment than their non-LGBT peers. Research indicates that 23 percent of LGB respondents in one survey reported experiencing harassment, compared with 12 percent of their straight peers. Rates are even higher for transgender individuals, according to one survey of LGBT college students, with 38 percent of feminine-presenting, 39 percent of masculine-presenting, and 31 percent of gender-nonconforming students reporting harassment, compared with 20 percent of non-transgender men and 19 percent of non-transgender women.<sup>76</sup> Additionally, data suggest that LGBT students are less likely than other students to feel comfortable in their classroom, department, and overall campus. This harassment is compounded for LGBT respondents of color, who are generally less likely to feel comfortable with the classroom climate than their white peers.<sup>77</sup>

LGBT students also suffer from high rates of sexual harassment and assault. In one study, 73 percent of LGBT students reported experiencing sexual harassment, compared with 61 percent of non-LGBT students. Additionally, 44 percent of LGBT students reported contact sexual harassment, such as being forced to engage in sexual acts, compared with 31 percent of non-LGBT students.<sup>78</sup> Despite this, school sexual assault policies may rely on narrow definitions of rape or other forms of sexual violence that limit the ability of LGBT survivors to seek redress.<sup>79</sup>

## Impact on students in higher education

The results of such discrimination and harassment can be severe. LGBT respondents are more likely than other students to avoid areas of campus associated with LGBT student life, fear for their physical safety due to sexual orientation or gender identity, and avoid disclosing their sexual orientation or gender identity.<sup>80</sup> Additionally, LGBT college students tend to experience worse mental health outcomes. Among LGB college students, rates of diagnoses for anxiety, depression, and panic attacks within the previous 12 months are higher than their straight counterparts, as were rates for having considered or attempted suicide within the same time span.<sup>81</sup> The impact of these mental health issues—along with other stressors such as physical or sexual assault, discrimination, and relationship or roommate difficulties—was larger for LGB respondents, who reported lower grades, more dropped courses, and greater disruption to theses, research, or practicums than straight respondents.<sup>82</sup> While research on outcomes for transgender students is scarce, it is likely that disparities for this population are also substantial.

More generally, negative campus climates can lead to substantial disruptions to the student's education. For instance, LGBT survivors of sexual harassment report greater difficulty in continuing their education compared to other survivors, with one-quarter finding it difficult to study or to pay attention in class and 14 percent skipping or dropping a course altogether. Similarly, a study of LGBT college students founds that 26 percent of respondents had contemplated leaving campus. Such consideration of leaving or transferring schools correlated with an inability to be open about sexual orientation or gender identity, unfair treatment by an instructor, and negative experiences with living situations and emotional support.<sup>83</sup>

The result is that LGBT students are denied a full education as a result of institutional bias, disparate enforcement of campus policies, and failure to address harassment that creates a hostile learning environment. Without clear federal and state protections for students in public and private colleges and universities—including religious institutions—the higher education system will continue to provide LGBT students with unequal educational opportunities.

Experiences of discrimination and harassment begin for some LGBT youth as early as preschool and frequently continue throughout primary and secondary school and into post-secondary programs. As a result, educational institutions routinely fail to provide LGBT young people, as well as older students returning to school, the same opportunities for growth and advancement as their peers and create negative environments for all members of the school community. In order to ensure that LGBT students have access to the foundational tools they need to succeed, policymakers must establish basic protections at all levels of education so that all students have the opportunity to achieve their aspirations.

# The history and efficacy of nondiscrimination protections

The alarming examples and the rates of discrimination that LGBT people face in the workplace, the public marketplace, housing, finances, and education demonstrate that LGBT individuals and their families need the same protections from discrimination as other Americans in order to fully participate in American society. State and federal protections against sexual-orientation and gender-identity discrimination would build on more than a century of precedent. The decades of enforcement of state and federal nondiscrimination laws, including race and sex protections, have demonstrated the potential benefits of such laws.

This chapter first covers the long precedent of nondiscrimination in American life and laws, beginning with an outline of federal and state nondiscrimination protections for categories such as race, sex, and disability. It then discusses the history and current status of the patchwork of federal and state LGBT-specific nondiscrimination protections. Finally, it explores the available data on the efficacy of nondiscrimination laws in combatting all forms of discrimination.

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## History of federal protections

### Civil War and reconstruction

The concept of nondiscrimination protections goes back centuries, predating the American Constitution.<sup>1</sup> Nondiscrimination law in the United States is rooted in English common law. Even before the modern civil rights movement, the United States inherited a common law tradition that prohibited public utilities with monopolies from discriminating on any unreasonable basis, whether race or some other reason. However, under this system, other businesses that were not monopolies were free to discriminate at will against patrons for any reason and all businesses were able to discriminate in employment.<sup>2</sup>

Before and following the Civil War, both the North and South were faced with widespread discrimination against African Americans. While the original sin of slavery ended with the Civil War and the adoption of the 13th Amendment, a system of Jim Crow laws, segregation, discrimination, violence, and economic hardship remained in its place.<sup>3</sup> Over the decade following the end of hostilities, Congress passed legislation designed to protect Americans' access to property and the ballot box, as well as proper treatment in the courtroom on the basis of race. Among the most sweeping pieces of legislation passed in the immediate aftermath of the war was the Civil Rights Act of 1866.

The legislation, which became law despite President Andrew Johnson's veto, declared that all citizens have an equal right to inherit, purchase, lease, sell, or hold property and deserve equal protection of U.S. laws on the basis of race.<sup>4</sup> Much of the language used in the Civil Rights Act of 1866 surrounding equal protection became enshrined into the U.S. Constitution with the adoption of the 14th Amendment in 1868.<sup>5</sup> But the 14th Amendment, the Civil Rights Act of 1866, and all of the pieces of legislation passed in the succeeding years unfortunately lacked effective enforcement mechanisms to combat discrimination.<sup>6</sup>

The discrimination that African Americans faced permeated life and was not limited to owning property, the electoral process, or the judicial system. In response to widespread discrimination against African Americans in the public square, radical Republican Sen. Charles Sumner (MA) and Rep. John Mercer Langston (R-VA)—the first African American to represent Virginia in the U.S. House of Representatives—drafted legislation banning discrimination based on race in schools, public transportation, and public accommodations, among other areas. Passed five years after its introduction, the Civil Rights Act of 1875 stated that every U.S. citizen was entitled to “the full and equal enjoyment” of covered public places.<sup>7</sup>

The Supreme Court, however, ruled the law unconstitutional in 1883. The Court held that the 13th Amendment and the 14th Amendment's Equal Protection Clause were not meant to prohibit racial discrimination in general life but merely to eliminate slavery and discrimination by the government.<sup>8</sup> In the following decades, however, constitutional jurisprudence began to change, and the Court's understanding of the power of the federal government to regulate commerce expanded.<sup>9</sup>



## The civil rights era

Nearly three quarters of a century passed before Congress ventured to pass updated civil rights protections. In 1957 and 1960, Congress passed legislation expanding protections for voting on the basis of race.<sup>10</sup> The compromise bills, shepherded through Congress by then-Senate Majority Leader Lyndon Johnson (D-TX), did not include the areas most desired by many liberals, including protections in employment or public accommodations. These two compromise bills were a result of a fragile coalition built by Sen. Johnson that had to include southern Democrats, who maintained control of the U.S. Senate at the time.<sup>11</sup>

Faced with growing peaceful protests in opposition to racial discrimination, President John F. Kennedy eventually called on Congress to pass a comprehensive civil rights act. Addressing the country from the Oval Office in June 1963, President Kennedy endorsed “legislation giving all Americans the right to be served in facilities which are open to the public—hotels, restaurants, theaters, retail stores, and similar establishments.” He went on to state, “This seems to me to be an elementary right. Its denial is an arbitrary indignity that no American ... should have to endure, but many do.”<sup>12</sup>

A little more than one year later, Congress passed the Civil Rights Act in 1964.<sup>13</sup> Throughout the preceding decade, Americans watched as Rosa Parks<sup>14</sup> defied racial segregation in public transportation and young civil rights leaders endured taunting and violence for daring to sit at local “whites-only” lunch counters.<sup>15</sup> The growing awareness and brutality of this discrimination led in part to Title II of the Civil Rights Act, which prohibits discrimination in public accommodations on the basis of race, color, religion, or national origin.<sup>16</sup> Meanwhile, Title VII banned discrimination in private employment for the first time in federal law, and Title VI forbade discrimination on the basis of race, color, or national origin in federal spending. While sex was included in Title VII’s employment protections, the category was left out of the public accommodations and federal funding sections, and this category of discrimination remains largely unprotected in federal law to this day.<sup>17</sup>

The Civil Rights Act of 1964 served as a tipping point in federal nondiscrimination laws, and Congress passed a number of laws expanding on its goal in the following years. In 1965, Congress strengthened voting protections with the Voting Rights Act. The Age Discrimination in Employment Act of 1967 barred workplace discrimination against individuals older than 40 years of age.<sup>18</sup> Following the assassination of Martin Luther King Jr., Congress passed and President Lyndon Johnson signed the Civil Rights Act of 1968, commonly referred to as the Fair Housing Act.

The act prohibited discrimination on the basis of race, religion, and national origin in the sale, rental, or financing of housing and enhanced the enforcement mechanisms to combat such discrimination. Sex was later added to the Fair Housing Act in the 1970s, and disability status was incorporated in 1988.<sup>19</sup>

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## Contemporary civil rights progress

In the 1970s, the Democratic Congress joined with the Republican Nixon administration to further expand federal nondiscrimination protections. Congress passed the Education Amendments of 1972, which included a prohibition on sex discrimination in federally funded education programs. The nondiscrimination provision, which is commonly referred to as Title IX, exempted college admissions from the protections, allowing for the perpetuation of gender segregated schools. Title IX also included a uniquely broad religious exemption that “exempts from coverage any education operation of an entity that is controlled by a religious organization ... to the extent Title IX would be inconsistent with the religious tenets of the organization.”<sup>20</sup> Just two years later, President Richard Nixon signed the Equal Credit Opportunity Act, or ECOA. The ECOA forbids discrimination in any credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, or public assistance status.<sup>21</sup>

The Americans with Disabilities Act, or ADA, which Congress passed and President George H.W. Bush signed into law in 1990, ensured protections from discrimination based on disability in employment, public entities, telecommunications, and places of public accommodation. Over the previous several decades, federal jurisprudence enhanced the ability of the federal government to prohibit discrimination in places of public accommodation.<sup>22</sup> This growing power provided the framework for the federal government to create the more expansive definition of public accommodations found in the ADA.<sup>23</sup> Similar to what the Civil Rights Act of 1964 accomplished for people of color and religious minorities, the ADA dramatically improved access to jobs and facilities and protections for people with disabilities. While more work remains, the ADA has opened up America’s economy to the more than 50 million individuals living with a disability to a degree never seen before.<sup>24</sup>

In what became known as the “first major new civil rights bill of the new century,”<sup>25</sup> Congress passed and President George W. Bush signed into law the Genetic Information Nondiscrimination Act. The legislation banned discrimination in health insurance and employment on the basis of genetic information—or

the use of and results from genetic tests or the medical history of a person or their family—and it passed unanimously in the Senate and by a vote of 414-1 in the House of Representatives.<sup>26</sup> The overwhelming support for the bill and the lack of controversy surrounding it showed the bipartisan consensus that the federal government has the power to prohibit discrimination in areas of public life.

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## History of state protections

Many state-level prohibitions on race discrimination predate the federal Civil Rights Act of 1964. Eighteen states responded to the U.S. Supreme Court’s 1883 ruling that the Civil Rights Act of 1875 was unconstitutional<sup>27</sup> by enacting state-level duplicates of the previous federal law.<sup>28</sup> Some of the resulting state statutes were even broader than the 1875 federal version. Colorado, for example, initially included a broad definition of public accommodations that included churches.<sup>29</sup>

Massachusetts was among the first states to prohibit unreasonable discrimination by licensed facilities on the basis of race in places such as inns, “places of amusement,” or “public meetings.”<sup>30</sup> Some states, such as Mississippi, Louisiana, and New York,<sup>31</sup> passed laws that were mainly reaffirmations of what the states perceived the common law to be at the time, rather than new protections.<sup>32</sup> Following passage of the Civil Rights Act of 1964, many states followed suite by passing their own comprehensive nondiscrimination laws on the basis of race, sex, religion, and national origin, including employment and public accommodations protections.<sup>33</sup>

Today, 48 states and the District of Columbia ban discrimination in private employment based on race, the most common protected category. Georgia only bans discrimination based on race in government employment, while Alabama has no explicit protections.<sup>34</sup> Forty-five states and the District of Columbia ban discrimination based on race in public accommodations. Alabama, Georgia, Mississippi, North Carolina, and Texas are the five states without explicit public accommodations race protections.<sup>35</sup> Every state has passed its own version of the Fair Housing Act with the exception of Wyoming.<sup>36</sup> Current state laws often protect a wider range of spaces and categories of people than federal law.<sup>37</sup>

Despite varying definitions, state governments mostly provide explicit and fairly uniform protections from discrimination in employment, housing, public accommodations, and other areas of public life on the basis of race, religion, sex, national origin, disability, and often marital status and genetic information.

However, explicit protections from discrimination on the basis of sexual orientation and gender identity are left out of both the federal statutory protections and the state protections in roughly 30 states.

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## The history of LGBT nondiscrimination protections

Over the past 40 years, several unsuccessful attempts have been made to add LGBT people to federal protections, while 18 states have successfully passed LGBT-inclusive protections. This section explores how members of Congress, states, and federal agencies have attempted to update nondiscrimination laws to include LGBT Americans.

### Federal LGBT protections

Forty years ago, Reps. Bella Abzug (D-NY) and Ed Koch (D-NY) introduced the Equality Act of 1974 in an attempt to remedy the lack of protections for gay, lesbian, and bisexual Americans.<sup>38</sup> The first-of-its-kind law was referred to committee in the House of Representatives, where no action occurred.<sup>39</sup> The act would have expanded employment, housing, and public accommodations protections to include marital status and sexual orientation. It also would have expanded public accommodations protections to include sex.<sup>40</sup>

Little movement occurred on the issue until Rep. Gerry Studds (D-MA) introduced legislation in 1994 banning discrimination on the basis of sexual orientation in employment alone, leaving out public accommodations and housing in an effort to draft a bill with a greater chance of passage.<sup>41</sup> Since Rep. Studds' legislation, known as the Employment Non-Discrimination Act, or ENDA, was first introduced, the bill has been expanded to include protections on the basis of gender identity.

More recently, a variety of bills banning discrimination based on sexual orientation and gender identity in other specific areas have been introduced. The introductions of these bills marked a move to an incremental or piecemeal approach to federal LGBT nondiscrimination protections in attempt to secure partial protections at the very least. The Student Non-Discrimination Act, or SNDA, which was first introduced in 2011, applies to students in public schools and is even narrower than Title IX's sex protections since it would not apply to post-secondary education institutions.<sup>42</sup> The Housing Opportunities Made Equal Act, or HOME Act,

was introduced in 2013 and would bar discrimination in housing based on sexual orientation, gender identity, source of income, and marital status.<sup>43</sup> Additionally, the Freedom from Discrimination in Credit Act; Juror Non-Discrimination Act, or Jury ACCESS Act; and the Every Child Deserves a Family Act would provide protections from sexual-orientation and gender-identity discrimination in credit services, jury selection, and federally financed child welfare services, respectively.<sup>44</sup> None of these pieces of legislation have passed, and currently, no legislation is pending that would ban discrimination against LGBT Americans in public accommodations or all federal funding.

Despite these proposed bills not becoming law during the past two decades, administrative attempts to interpret existing protections on the basis of sex to include sexual orientation and gender identity have been somewhat successful. Recently, the Equal Employment Opportunity Commission, or EEOC, found that sex discrimination in employment included discrimination on the basis of gender identity in its landmark decision *Macy v. Holder*.<sup>45</sup> Additionally, U.S. District Court judge recently denied a motion to dismiss a former Library of Congress employee's claim that he experienced sex discrimination based on his sexual orientation, allowing the claim to proceed.<sup>46</sup> In both instances, the interpretation of sex discrimination to include sexual orientation and gender identity rested on the long-standing judicial precedent that sex discrimination includes discrimination based on "gender stereotypes."<sup>47</sup> Similar protections have been secured through administrative interpretations of sex discrimination in federally funded or administered health care programs or activities, housing, and education programs.<sup>48</sup>

For instance, the U.S. Department of Housing and Urban Development, or HUD, extended protections to these groups through the Fair Housing disability and sex-discrimination protections. Discrimination against people living with HIV/AIDS is covered under the Fair Housing Act's disability protections,<sup>49</sup> and HUD began interpreting discrimination against LGBT people and families as sex discrimination covered by the Fair Housing Act in 2010.<sup>50</sup> In the case of *HUD v. George Toone and In Toone Services LLC*, the HUD Secretary Shaun Donovan filed a suit with the HUD Office of Hearings and Appeals on behalf of a transgender woman against a Texas trailer park's management company for not permitting her to wear women's clothing in common areas because it was "not the type of atmosphere we want to promote on private property."<sup>51</sup> The manager then placed a notice on her door stating that her RV site service agreement would not be renewed and that her five remaining days of paid stay would be refunded if she immediately vacated. HUD found that the management company discriminated against the woman based on sex in violation of the Fair Housing Act, assessed a civil penalty of \$16,000 against the management company, and awarded the woman monetary damages.<sup>52</sup>

Additionally, HUD published its final rule about this interpretation, titled “Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity,” on February 3, 2012. This rule makes it illegal to discriminate against LGBT individuals and families in any housing funded by HUD or insured by the Federal Housing Administration, or FHA, regardless of local laws.<sup>53</sup> Public housing, HUD-assisted or HUD-financed housing, and FHA-insured mortgage financing are all covered by this rule. HUD’s first enforcement action against a lender under this rule occurred in January 2013 when it settled a claim against Bank of America for denying a FHA-insured mortgage to a lesbian couple in Florida because of their sexual orientation and status as unmarried.<sup>54</sup> As part of the settlement, Bank of America was required to pay \$7,500; remind employees that they are prohibited from discriminating against FHA-loan applicants on the basis of sexual orientation, gender identity or marital status; and revise its fair lending training program to include compliance information with HUD’s Equal Access Rule.

Since sex discrimination is excluded from federal public accommodations protections and federal funding nondiscrimination laws—with the exception of education, federally funded housing, and health care—there is no opportunity for similar judicial or administrative action to expand federal protections to LGBT Americans in these spheres. In the areas of public accommodations where LGBT people have some degree of legal protection because of the inclusion of sex protections—such as in hospitals or doctors’ offices that receive federal funding—victims of discrimination have limited avenues for redress, both in terms of legal remedies available and because of financial and other barriers to filing a legal action or administrative complaint. Additionally, protections from judicial or administrative decisions interpreting sex-discrimination protections to include sexual orientation or gender identity are not universally binding on all courts.<sup>55</sup>

### State and local LGBT protections

LGBT nondiscrimination protections have developed over the previous decades in several states. In 1981, Wisconsin was the first state to prohibit discrimination in employment, housing, and public accommodations on the basis of sexual orientation.<sup>56</sup> Passed seven years after the introduction of the Equality Act of 1974, Wisconsin’s protections mirrored the federal bill in the areas of protection that it provided.<sup>57</sup>

After Wisconsin's law was passed, it took more than a decade for another state to pass protections on the basis of gender identity: Minnesota became the first state to pass nondiscrimination protections for transgender individuals in 1993.<sup>58</sup> Instead of an explicit gender-identity category inserted into the nondiscrimination statute, the Minnesota legislature defined sexual orientation as:

*Having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness.*<sup>59</sup>

Since the passage of nondiscrimination protections in Wisconsin, 20 additional states plus the District of Columbia have acted to protect gay, lesbian, and bisexual people, and 18 of those states plus the District protect transgender people as well.<sup>60</sup> Currently, three states with sexual-orientation protections—New York, New Hampshire, and Wisconsin—lack both explicit employment and public accommodations protections for transgender individuals. One more state, Massachusetts, currently has protections based on sexual orientation and gender identity in employment and housing, but Massachusetts only has protections based on sexual orientation in public accommodations.<sup>61</sup> In most instances, state legislatures have passed their protections in a single, comprehensive nondiscrimination bill that at least includes employment, housing, and public accommodations protections.<sup>62</sup>

Most recently, the Maryland House of Delegates passed the Fairness for All Marylanders, prohibiting discrimination based on gender identity, in March 2014.<sup>63</sup> Maryland became the 18th state, in addition to the District of Columbia, with employment and housing nondiscrimination laws that include gender identity, and the 17th state, plus the District, with public accommodations nondiscrimination laws that are gender-identity inclusive.<sup>64</sup>

As of August, more than 190 cities and counties have passed nondiscrimination ordinances to protect their LGBT residents in public and private employment.<sup>65</sup> Most of those ordinances include protections against discrimination in housing and public accommodations.<sup>66</sup> These ordinances often provide protections to LGBT residents in states without similar statewide nondiscrimination laws. The ordinances have been passed in both large and small localities, ranging from large cities such as Phoenix, Atlanta, New Orleans, Houston, Dallas, and New York City to smaller towns such as Ketchum, Idaho; Vicco, Kentucky; and Olivette, Missouri.<sup>67</sup>



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## The efficacy of nondiscrimination protections

In the decades since passage of the Civil Rights Act and subsequent nondiscrimination bills, these laws have not only offered many Americans much-needed remedies to discrimination, but they have also resulted in general gain to the broader economy. For instance, while significant barriers still exist for African Americans in the United States, areas of the country once known for discrimination have seen both an increase in median income and employment opportunities for African Americans since the passage of the Civil Rights Act, as well as broader economic benefits for the entire region.<sup>68</sup> Similarly, while a predictable spike in complaints against discrimination in public accommodations occurred in the immediate aftermath of the law's passage, complaints dropped dramatically within a year and almost entirely after five years. This drop off, coupled with the aggressive enforcement by the U.S. Department of Justice, demonstrates the undeniable success of federal nondiscrimination law in reducing explicit racial discrimination in many aspects of public life, although significant work still remains to combat these forms of discrimination.<sup>69</sup>

Likewise, in post-secondary education, the benefits of the ban on sex discrimination in Title IX of the Education Amendments of 1972 are widespread. Since passage of the law, the share of women students has jumped from about 40 percent of all students to nearly 60 percent. In 1970, only about 15 percent of doctoral degrees were awarded to women, compared with nearly half today. In other areas, women have seen a 40-fold increase in dental degrees, 500 percent increase in medical doctorates, and a 700 percent increase in law degrees since the passage of Title IX.<sup>70</sup>

Unfortunately, discrimination appears to be intractable at the intersection of race and housing. Fifty years after the passage of the Fair Housing Act, black and Hispanic Americans have seen little progress when it comes to housing discrimination.<sup>71</sup> While the dynamics of discrimination based on race and discrimination based on sexual orientation or gender identity in housing differ in fundamental ways, LGBT people of color will find their housing options unfairly and discriminatorily limited even with passage of LGBT-inclusive housing nondiscrimination laws.<sup>72</sup> While all areas of life require a redoubling of efforts to combat race- and gender-based discrimination, among others, addressing LGBT housing discrimination must be met with an expanded and enhanced effort surrounding race discrimination.

Nevertheless, a study in Michigan found that local ordinances banning housing discrimination against individuals based on their sexual orientation did result in lower rates of discrimination when compared with parts of the state without local ordinances. Similarly, areas with anti-discrimination ordinances related to housing



showed discrimination in only 22 percent of test cases, compared with 30 percent of tests in areas without protections, as described in the “LGBT Americans and Housing” chapter of this report.<sup>73</sup> When comparing states with nondiscrimination protections to states without protections, a HUD study found comparable rates of discrimination in states with and without protections. HUD’s report, however, points to a variety of factors that could account for this, such as low levels of enforcement, lack of familiarity with the law, or that protections exist in states with high incidence of discrimination.<sup>74</sup>

Despite the mixed progress in housing, nondiscrimination laws have successfully curbed blatant discrimination against the protected classes on the whole. There is no evidence to suggest that LGBT nondiscrimination laws are or would be less effective than sex- or race-based nondiscrimination protections are at decreasing discrimination. Meanwhile, these protections would increase the economic contributions of LGBT Americans.<sup>75</sup> Recently, businesses have frequently pointed to the economic benefits of having LGBT-inclusive nondiscrimination policies. These benefits are a core reason why 91 percent of Fortune 500 companies have sexual-orientation nondiscrimination policies and 61 percent have gender-identity nondiscrimination policies.<sup>76</sup>

In the states that have passed LGBT-inclusive nondiscrimination laws, the overall rate of complaints related to sexual-orientation discrimination is comparable to that of sex-discrimination complaints. These complaint rates—coupled with the previously discussed experiences of discrimination in employment, housing, public accommodations, education, and credit—make clear that discrimination against LGBT people exists and that nondiscrimination laws provide a necessary and fair remedy.<sup>77</sup>

# Religious exemptions and LGBT nondiscrimination

As LGBT nondiscrimination laws have slowly spread from state to state, some conservative religious organizations have opposed these protections. These opponents have requested special exemption from the protections already passed, arguing that their personal religious beliefs should allow for a license to discriminate against LGBT Americans in the workplace or over the counter.<sup>1</sup> Opponents have requested that broad exemptions be inserted into new LGBT nondiscrimination legislation,<sup>2</sup> and some opponents have attempted to utilize the federal Religious Freedom Restoration Act, or RFRA—which limits “burdens on religious exercise”—and similar state laws to circumvent these nondiscrimination protections.<sup>3</sup>

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## Religious exemptions in public accommodations

In many instances, those opposed to equal protections for LGBT people claim that businesses providing services related to weddings should not be required to do business with same-sex couples if it violates the business owner’s religious beliefs, maintaining that they are permitted to engage in such discrimination under RFRA.<sup>4</sup>

However, nondiscrimination laws, whether providing wedding services or otherwise, do not violate religious liberty. The New Mexico Supreme Court found that the New Mexico Human Rights Act—which banned discrimination in employment, housing, and places of public accommodation—was a “neutral law of general applicability,” one that prohibits discrimination from both secular and religious business owners alike.<sup>5</sup> Furthermore, the state Supreme Court found that nondiscrimination laws do not regulate belief or even religious expression within individuals’ personal lives, but rather actions in the public sphere. As the New Mexico Supreme Court ruled in the previously mentioned 2013 case involving a New Mexico photography company:

*The Huguenins [owners] are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead.<sup>6</sup> Indeed, they may indicate their opposition to marriage equality by marching in a public protest, putting up a sign in their business's window supporting a "no" vote in a marriage equality referendum, or so express themselves in social media. All of these are protected as free speech. What they cannot do is deny their public services to someone who asks for them and who is in a protected category of people.*

New Mexico Supreme Court Justice Richard Bosson's concurring opinion went on to draw a distinction between personal lives and the public sphere, as well as between beliefs and conduct:

*In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the Huguenins have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. The sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world.<sup>7</sup>*

Earlier this year, the U.S. Supreme Court declined to hear the appeal of the New Mexico Court's decision, thus leaving it in place.<sup>8</sup>

The U.S. Supreme Court grappled with similar issues in 1990 with its decision in *Employment Division v. Smith*.<sup>9</sup> While the question in *Smith* did not directly include nondiscrimination laws, the Court heard arguments over whether an Oregon state law banning the use of peyote violated the free exercise clause of the First Amendment. The individuals involved with this case had been fired from their jobs and then denied unemployment compensation from the state after they had used peyote for religious purposes.

The majority opinion upheld the state law banning the drug. The Court found that the law did not specifically target the religious use of peyote but rather all use of it and thus did not violate the free exercise clause of the First Amendment. In finding that the law was a "neutral [one] of general applicability," the Court determined that the religious practice was not singled out. Writing for the majority, Justice Antonin Scalia stated, "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."<sup>10</sup> Almost anticipating the issues surrounding nondiscrimination laws, Justice Scalia went on to write:

*The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind – ranging from compulsory military service to the payment of taxes to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.<sup>11</sup>*

Despite efforts to the contrary, American courts have routinely held that religious liberty does not afford people of particular faiths a license to discriminate. As the New Mexico Supreme Court articulated, requiring equal service to all patrons is “part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people.”

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## Religious exemptions in employment

Another equally questionable attack on nondiscrimination legislation that uses appeals to an individual's religious belief and RFRA comes in the area of employment. Some conservative Christians are using a religious liberty argument in an attempt to limit nondiscrimination legislation by exempting secular businesses that are owned by religious entities.<sup>12</sup> An important distinction in these cases is the difference between the hiring practices of secular organizations run by religious individuals and those operated by religious bodies such as churches, synagogues, and mosques.

Following the passage of Title VII of the Civil Rights Act of 1964, the Supreme Court has held that a “ministerial exception” exists that allows discrimination to continue in positions associated with ministries that directly seek to spread the message of a given faith.<sup>13</sup> While this exception was initially limited to clergy, it has since been expanded by the Supreme Court to include positions—such as music directors or any faculty at a religiously affiliated school—whose responsibilities include religious activities or studies.<sup>14</sup> Fortunately, legal precedent provides guidance on determining whether a position is exempt, namely by establishing if the position's duties include religious activities.<sup>15</sup> A similar distinction can also be found in the tax code: Nonprofit religious institutions that earn revenue by engaging in activities that are not part of their charitable purpose—a church, for instance, that rents its parking lot spaces out during the work week—are required to pay taxes on this nonreligious, noncharitable revenue.<sup>16</sup> This balance preserves both the autonomy of places of worship and religious ministry, while ensuring that a custodian or a teacher cannot be discriminated against.

Title VII does, however, allow religiously affiliated institutions to make employment decisions on the basis of the applicant's religion, regardless of whether the position is secular or religious in nature, meaning that a Catholic nonprofit can prioritize the hiring of Catholics.<sup>17</sup> But this provision does not allow for the use of a religion's tenets in employment decisions—meaning that an entity owned by a religious institution that opposes the hiring of women on religious grounds cannot deny a job to an applicant simply because of her gender.<sup>18</sup> Title VII's allowance for religiously affiliated entities to use an applicant's religion in its hiring practices does not exempt them from treating employees of other protected classes fairly. The Americans with Disabilities Act of 1990, in contrast, allows for religious institutions to factor in their religion's tenets when it comes to the hiring of people with disabilities.<sup>19</sup>

The version of the Employment Non-Discrimination Act, or ENDA, that the U.S. Senate passed in November of 2013 included a religious exclusion that mirrored Title VII's exception.<sup>20</sup> If enacted, this statute would have provided, for instance, religiously affiliated hospitals the ability to hire or fire employees because of their sexual orientation or gender identity.<sup>21</sup>

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## Religious exemptions in education

A notably broad religious exemption exists within Title IX's bar on sex discrimination in education.<sup>22</sup> This exemption provides special permission for certain institutions to avoid compliance with Title IX. Divinity schools, institutions that require students and faculty to be members of or espouse a specific religion, and institutions that are explicitly controlled by, governed by, or receive significant funding from a religious organization may seek exceptions to any section of Title IX that the institution regards as inconsistent with its religious tenets.<sup>23</sup>

Existing use of religious exemptions under Title IX suggest that these exemptions enable targeted discrimination against transgender students. According to the U.S. Department of Education, a majority of religious exemptions granted under Title IX have involved colleges or universities seeking permission to refuse to fully acknowledge the gender identity of transgender students. The U.S. Department of Education granted exemptions as outlined under Title IX to three Christian universities in 2014—George Fox University, Simpson University, and Spring Arbor University—permitting them to deny transgender students equal opportunities on campus, including access to housing, campus facilities, and athletic programs.<sup>24</sup> The exemption granted to Spring Arbor University also included permission to make decisions in admissions and enrollment regarding unmarried students who are pregnant, pointing to troubling broader implications.<sup>25</sup>

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## The threat of substandard protections

Treating LGBT Americans differently than the predominant standard for other protected classes creates inferior protections that fail to address many of the most notable instances of discrimination.

At the end of its 2014 session, the Supreme Court's *Burwell v. Hobby Lobby* decision expanded religious personhood to include closely held for-profit organizations, or organizations owned by—at most—a small group of people. The Court's decision appeared to only extend to questions of insurance mandates for contraception and specifically excluded application to nondiscrimination laws.<sup>26</sup> However, a recent Center for American Progress report lays out the potential long-term impact of the *Hobby Lobby* decision, including in areas of health care and LGBT equality. The decision would potentially allow the corporate leadership of many for-profit entities to invade workers' health care decisions beyond contraception or evade protections for people of color, working mothers, and seniors.<sup>27</sup> These tools could enable business owners to circumvent nondiscrimination laws, stripping protections from millions of LGBT Americans in the 18 states that have already passed comprehensive laws, including employment, housing, and public accommodations protections.<sup>28</sup>

While the Supreme Court made clear in its *Hobby Lobby* decision that nondiscrimination protections are sacrosanct, the court utilized race as their example.<sup>29</sup> The inclusion of a broad religious exemption in LGBT nondiscrimination legislation, similar to the one found in the 2013 version of ENDA, would differentiate sexual-orientation and gender-identity protections from prevailing race, sex, and national-origin protections. This statutory difference could provide the Supreme Court with a rationale to differentiate between LGBT nondiscrimination laws and protections based on race, sex, and national origin when interpreting RFRA, thus allowing the former to be gutted while the latter remain untouchable.

Allowing individuals to circumvent nondiscrimination laws purely out of religious conviction effectively nullifies these laws. These arguments are consistent with the past use of religion as a justification for other forms of discrimination, such as racial segregation, throughout the country's history.<sup>30</sup> As with those instances, religious liberty is not threatened by generally applicable nondiscrimination laws. To prevent this harmful interpretation of the law, Congress should clarify the original intent of the law by amending RFRA to ensure that all nondiscrimination laws, including possible future LGBT protections, cannot be undermined.<sup>31</sup>

# Policy recommendations

The majority of LGBT Americans live in jurisdictions without explicit protections from discrimination on the basis of sexual orientation or gender identity in employment, housing, education, credit, and public accommodations. In 29 states, same-sex couples can be denied a job because of whom they love. In 33 states, transgender children and their families can be thrown out of a restaurant simply because of who they are.<sup>1</sup> In the states with protections, the patchwork of LGBT-inclusive nondiscrimination laws is often both inconsistent and incomplete, and changes need to be made to address these gaps.

The following recommendations reflect a local, state, and federal approach to ensuring basic fairness and protections for all Americans. While LGBT protections may not end all discrimination against people based on their sexual orientation or gender identity, these laws ensure that LGBT Americans have the same recourse as other Americans in the event of discrimination. Additionally, as with protections for other identities, passage of these laws sends a clear message that LGBT Americans are to be treated with dignity and fairness and that protecting people from all kinds of discrimination is both in the interest and purview of the government. In keeping with the intent of existing nondiscrimination laws, these recommendations seek to prevent discrimination from happening in the first place, while also creating opportunities for LGBT people and their families across the country.

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## Congress should pass a comprehensive LGBT nondiscrimination act

The only way to achieve uniform and consistent protections for LGBT Americans nationwide is for Congress to pass protections on the basis of sexual orientation and gender identity in all vital areas of life, including employment, housing, public accommodations, credit, and federal funding. Federal funding would include many educational institutions, including all public schools, health care services that receive government funding, and public assistance programs. Without a comprehensive approach that provides protections in all vital aspects of life, many

LGBT Americans will continue to be denied the basic tools necessary to achieve the American Dream. A comprehensive nondiscrimination act would build on more than a century of precedent to provide much-needed protections from discrimination to millions of American workers, customers, and families.

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### State and local governments should pass comprehensive nondiscrimination laws

While 17 states, the District of Columbia, and dozens of cities and counties have passed measures including employment, housing, and public accommodations protections for the entire LGBT community, the remaining jurisdictions should pass similar protections against discrimination on the basis sexual orientation and gender identity in all aspects of life. The four states that currently protect lesbian, gay, and bisexual individuals but lack any or all of the areas of protections for transgender people—Wisconsin, Massachusetts, New York, and New Hampshire—should promptly pass protections that are inclusive of gender identity. States should also establish nondiscrimination protections and policies on bullying and harassment on the basis of sexual orientation and gender identity that are inclusive of private educational institutions, where consistent with existing state nondiscrimination statutes and definitions of educational institutions.

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### Congress and state legislatures should appropriate necessary funds for full enforcement of nondiscrimination protections

Congress and state legislatures should ensure that the offices, agencies, and departments tasked with enforcing nondiscrimination protections receive the necessary appropriation for timely, fair, and complete reviews of complaints. Once passed, these nondiscrimination protections are only as strong as the enforcement mechanism, which includes fully financed and resourced equal opportunity and civil rights offices.



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## Executive departments, agencies, and enforcement offices should issue inclusive and comprehensive regulations

Relevant offices in federal, state, and local governments should issue regulations, bulletins, and guidelines based on existing sex and/or sexual-orientation and gender-identity protections to remove barriers and exclusions that LGBT Americans face in all aspects of life, including the removal of exclusions for transition-related health care for transgender Americans.

Similarly, offices should issue strong and clear regulations and guidance that allow individuals to utilize facilities and services in accordance with their gender identity, addressing individuals' right to:

- Determine their own gender identity
- Be called by the appropriate name and pronouns, verbally, as well as in records wherever possible
- Have access to gender-segregated activities, programs, and spaces—including restrooms—in a manner consistent with their gender identity and equal to their peers
- Keep information relating to their legal name, gender assigned at birth, and transgender status confidential

Regulations should also require all single-occupancy restroom facilities to use gender-neutral signage to increase the number of safe, gender-inclusive facilities for all people.

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## Both government and private institutions should collect more data to fully document and understand the discrimination that LGBT Americans face

The data available on the discrimination that LGBT Americans face vary dramatically depending on the area of study and populations of interest. For example, research on transgender people's experiences in housing is in short supply, and more research is particularly necessary regarding discrimination faced by non-transgender gay, lesbian, and bisexual Americans in public accommodations. Data related to discrimination in credit is all but nonexistent. In general, more data are sorely needed to investigate the discrimination that transgender individuals and LGBT people of color face and to explore the incidence and impact of these experiences across an individual's lifespan.

To address these gaps in knowledge, both federal and state governments should prioritize the collection of sexual orientation and gender identity data on population-based surveys. Years of scientific research have identified the most appropriate question formats and methodologies for asking these questions, and inclusion of these questions on major surveys will allow for further refinement of best practices and improve knowledge of smaller subpopulations, such as LGBT people of color and transgender youth.<sup>2</sup>

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### Private businesses and government entities should establish or expand trainings for employees

LGBT experiences of discrimination vary from outright refusal of services as a customer to unfair treatment as an employee. Private businesses and government entities should establish or expand workplace diversity and competency trainings to ensure that LGBT workers are treated fairly and respectfully and LGBT patrons receive the services or care they deserve and need. These trainings should include clear instructions on proper access to facilities in accordance with one's gender identity and appropriate instruction on employee documentation and confidentiality. Trainings are particularly important for businesses, entities, or employees who provide life-saving protections, including those working in health care or law enforcement.

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### Congress should amend the Religious Freedom Restoration Act to ensure it cannot grant a license to discriminate

Recent Supreme Court decisions that expand corporate personhood and the impact of the Religious Freedom Restoration Act, or RFRA, pose a very real possibility of nullifying protections and laws when they seemingly conflict with business owners' personal religious beliefs. Despite the fact that the U.S. Supreme Court clearly excluded nondiscrimination laws from its *Hobby Lobby* decision, Congress should clarify RFRA by amending the law to state that it cannot be utilized to allow discrimination, impose costs, or cause any other harm to individuals.<sup>3</sup>

# Conclusion

The American Dream—indeed, the ability of all individuals to work hard and reach their dreams—rests on the promise of a level playing field: a society where all people have equal access to the central pillars of opportunity, including a job, a home, an education, and basic necessities such as food. It was the notion of a fair shot for all that led to workplace safety protections during the Progressive Era, a “New Deal for the American people” in the 1930s,<sup>1</sup> and federal civil rights protections in the 1960s to secure the Great Society.

All Americans, regardless of who they are or whom they love, deserve the ability to participate in society and the economy. A free market ensures the rights of all people to access the spaces, facilities, and programs they all rely on to live and to pursue happiness. Those rights form the foundation of American society.

As the United States approaches the “moment in history when We the People becomes more inclusive,”<sup>2</sup> significant progress is still needed before LGBT Americans are treated equally and fairly under the law. Enacting these proposals will allow the United States to live up to the traditions of its past and its future potential by widening the circle of opportunity and inclusion now and for generations to come.

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## About the authors

**Sarah McBride** is the Special Assistant for LGBT Progress at the Center for American Progress where her work includes employment and public accommodations protections. McBride joined CAP after completing her undergraduate degree at American University, where she served as student body president.

A native of Wilmington, Delaware, McBride currently serves on the Board of Directors of Equality Delaware, the state's primary LGBT-advocacy and -educational organization. In that capacity, McBride helped lead and served as the primary spokesperson for the successful effort to add gender identity and expression to her state's nondiscrimination and hate-crimes laws during the 2013 legislative session. She served as a field organizer for Gov. Jack Markell's (D-DE) campaign in 2008 and as field director for Delaware Attorney General Beau Biden's re-election effort in 2010.

**Laura E. Durso** is Director of the LGBT Research and Communications Project at the Center for American Progress. Using public health and intersectional frameworks, she focuses on the health and well-being of LGBT communities, data collection on sexual orientation and gender identity, and improving the social and economic status of LGBT people through public policy.

Prior to joining CAP, Durso was a public policy fellow at the Williams Institute at UCLA School of Law, where she conducted research on the LGBT community, including LGBT homeless and at-risk youth, poor and low-income LGBT people, and the business impact of LGBT-supportive policies. Earlier in her career, Durso conducted research on the health impact of weight-based discrimination. Her research has been published in high-impact, peer-reviewed journals, including *Sexuality Research and Social Policy*, *Obesity*, and the *International Journal of Eating Disorders*, and she has presented her work at both national and international conferences.

She holds a bachelor's degree in psychology from Harvard University and master's and doctoral degrees in clinical psychology from the University of Hawai'i at Mānoa.

**Hannah Hussey** is a Research Associate for LGBT Progress at the Center for American Progress. Prior to joining CAP, Hannah served as coordinator for the Massachusetts Commission on Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning Youth, an independent state agency dedicated to recommending policies, programs, and resources for LGBT youth to thrive. In that role, Hussey helped write and implement policy recommendations to 15 state agencies on topics including education, health, foster care, juvenile justice, housing, immigration, transportation, and workforce development. She also led an initiative to create a comprehensive map and database of culturally competent services available to LGBT youth throughout the state to improve accessibility and identify resource gaps.

Previously, Hussey held internships with MassEquality and the Boston Consortium on Gender, Security and Human Rights. She has also worked for a consulting agency specializing in social enterprise and spent several years as a freelance reporter. Originally from Maine, Hussey received her B.A. in sociology and women's, gender, and sexuality studies from Tufts University, where she completed a capstone project examining the contributions of feminist and queer theory to asexuality studies.

**Sharita Gruberg** is a Policy Analyst for the LGBT Immigration Project at the Center for American Progress. She came to CAP with extensive experience working in immigration advocacy, law, and policy, as well as experience providing direct service to immigration detainees, refugees, and asylum seekers.

Prior to joining CAP, Gruberg worked as a program specialist for the Women's Refugee Commission. In that capacity she lobbied Congress and administrative agencies for increased protections for migrant populations, particularly women, families, and unaccompanied children. She has also worked as a law clerk for the American Bar Association Commission on Immigration, where she provided support to immigration detainees in removal proceedings, including LGBT asylum seekers, and filed complaints on detention conditions with the Department of Homeland Security. Most recently, she completed a fellowship with the U.N. High Commissioner for Refugees, where she wrote and submitted refugee resettlement requests to safe third countries and liaised with congressional offices on refugee resettlement cases.

Gruberg earned her J.D. from the Georgetown University Law Center, where she was a public interest law scholar and the writing program director for the *Georgetown Journal on Poverty Law and Policy*, and she also received the Refugees and Humanitarian Emergencies Certificate from the Institute for the Study of International Migration. She holds a B.A. in political science and women's studies from the University of North Carolina at Chapel Hill.

**Bishop Gene Robinson** is a Senior Fellow at the Center for American Progress. He was elected bishop of the Episcopal Diocese of New Hampshire on June 7, 2003, having served as Canon to the Ordinary (assistant to the bishop) for nearly 18 years. He was consecrated a bishop on All Saints Sunday, November 2, 2003, and was invested as the Ninth Bishop of New Hampshire on March 7, 2004.

He is the co-author of three AIDS education curricula for youth and adults and has done AIDS work in the United States and in Africa—in Uganda and South Africa. He has also been an advocate for antiracism training in the diocese and wider church. Robinson helped build the Diocese of New Hampshire’s close working partnership with the New Hampshire Community Loan Fund, advocated for debt relief for the world’s most impoverished nations, and lobbied for socially responsible investment within and beyond the church.

Bishop Robinson has been particularly active in the area of full civil rights for gay, lesbian, bisexual, and transgender people. Working at the state, national, and international levels, he has spoken and lobbied for equal protection under the law and full civil marriage rights. He has been honored by many LGBT organizations for this work, including the Human Rights Campaign, Lambda Legal, the National Gay and Lesbian Task Force, GLAAD, and the Equality Forum.

Bishop Robinson was invited by President Barack Obama to give the invocation at the opening inaugural ceremonies at the Lincoln Memorial on January 18, 2009. In 2012, he authored *God Believes in Love: Straight Talk About Gay Marriage* and a feature-length documentary on Bishop Robinson’s ministry, “Love Free or Die,” premiered at the Sundance Film Festival that same year.

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## The history and efficacy of nondiscrimination protections

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## Policy recommendations

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