

# PATCHWORK PROTECTIONS IN KANSAS: THE RISE OF RELIGIOUS EXEMPTION LAWS DEMANDS STATE-LEVEL LGBTQ+ ANTIDISCRIMINATION PROTECTIONS

By: Delaney Hiegert\*

## I. INTRODUCTION

The evening of June 26, 2015, the White House was illuminated in rainbow colors.<sup>1</sup> A crowd gathered outside the lawn, looking at the lights and celebrating the historic *Obergefell v. Hodges* decision that came down earlier that day.<sup>2</sup> The Supreme Court's *Obergefell* decision confirmed that the fundamental right to marry applied to same-sex couples.<sup>3</sup> But it also fueled the flames of the anti-LGBTQ+ rights movement.<sup>5</sup>

This movement's most vocal supporters are the Religious Right, a conservative coalition of Protestants and Catholics.<sup>6</sup> The Religious Right's anti-LGBTQ+ rhetoric has existed in our country for decades.<sup>7</sup> However, their

---

\* J.D. Candidate 2021, University of Kansas School of Law; B.A. 2018, Newman University. Delaney wishes to thank Professor Kyle Velte for her invaluable guidance on this article. They are also grateful to the Board and staff members of the Journal for the time and effort that went into preparing this article for print.

<sup>1</sup> Allie Malloy & Karl de Vries, *White House Shines Rainbow Colors to Hail Same-Sex Marriage Ruling*, CNN POL. (June 30, 2015, 1:33 PM), <https://www.cnn.com/2015/06/26/politics/white-house-rainbow-marriage/index.html> [<https://perma.cc/PY6C-JWMC>].

<sup>2</sup> *Id.*

<sup>3</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015). In a historic 5-4 decision, the Supreme Court affirmed that the Constitution guarantees a right to same-sex marriage. *Id.* at 2629. The decision, penned by Justice Anthony Kennedy, ended a years-long legal battle over the right to marry. *Id.* at 2593.

<sup>4</sup> This article will use “LGBTQ+” as the acronym for lesbian, gay, bisexual, transgender, and queer. The term “queer” here is used “as a multifaceted term that may refer to an attraction toward people of many genders, a challenge to the status quo, and/or a claim to not conforming to cultural norms around sexual orientation.” Erin S. Lavender-Stott, Erika L. Graftsky, Hoa N. Nguyen, Emily Wacker & Sarah M. Steelman, *Challenges and Strategies of Sexual Minority Youth Research in Southwest Virginia*, 65 J. HOMOSEXUALITY 691, 693 (2018). The “+” is used to signal an inclusion of all other communities often left out of our initialisms, like two-spirit or asexual identities and intersex people.

<sup>5</sup> See Terri R. Day & Danielle Weatherby, *LGBT Rights and the Mini RFRA: A Return to Separate but Equal*, 65 DEPAUL L. REV. 907, 908 (2016).

<sup>6</sup> *Religious Right*, ASS'N OF RELIGIOUS DATA ARCHIVES, [http://www.thearda.com/timeline/movements/movement\\_17.asp](http://www.thearda.com/timeline/movements/movement_17.asp) [<https://perma.cc/QR5T-4C5E>].

<sup>7</sup> Kyle Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's*

strategy has shifted from attacking and shaming the LGBTQ+ community to framing themselves as victims who need religious exemptions from secular laws that they allege infringe on their religious liberties.<sup>8</sup> This argument is more effective in light of the societal shift in favor of LGBTQ+ rights and the increase of LGBTQ+ antidiscrimination laws and other legal protections.<sup>9</sup>

Notwithstanding significant progress in the LGBTQ+ movement—like the monumental Supreme Court decision *Bostock v. Clayton County*, holding that federal law protects against sexual orientation and gender identity discrimination in employment—there is still no explicit and concrete federal law that protects LGBTQ+ individuals from discrimination in all contexts.<sup>10</sup> While *Bostock* has the potential to broaden the protective scope of many other federal antidiscrimination laws—including Title IX, the Fair Housing Act, and the Affordable Care Act—these protections are theoretical for LGBTQ+ people until extended by a court.<sup>11</sup> In the interim, LGBTQ+ people lack explicit federal antidiscrimination protections in housing, public accommodations, education, healthcare and more. Additionally, twenty-nine states do not comprehensively include sexual orientation and gender identity as protected characteristics in their state antidiscrimination laws.<sup>12</sup> This lack of

---

*Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1, 5 (2016).

<sup>8</sup> *Id.*

<sup>9</sup> See ROBERT P. JONES, MAXINE NAJLE, OYINDAMOLA BOLA & DANIEL GREENBERG, PUB. RELIGION RSCH. INST., FIFTY YEARS AFTER STONEWALL: WIDESPREAD SUPPORT FOR LGBT ISSUES – FINDINGS FROM THE 2018 AMERICAN VALUES ATLAS 31, 32 (2018).

<sup>10</sup> *Bostock v. Clayton Cty.*, 140 S. Ct. 1739 (2020). This case was heard by the Supreme Court together with *Altitude Express Inc. v. Zarda*, 140 S. Ct. 1739 (2020) and *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 140 S. Ct. 1739 (2020). Both *Bostock* and *Zarda* involved a gay male employee who was fired because of his sexual orientation, *id.*; *Harris Funeral Homes* involved a transgender woman who was fired because of her gender identity. *Id.* at 1738. The Supreme Court consolidated these cases and issued one opinion, holding that Title VII prohibits employers from firing employees based on their sexual orientation or gender identity. *Id.* at 1737; see Katy Steinmetz, *Why Federal Laws Don't Explicitly Ban Discrimination Against LGBT Americans*, TIME (Mar. 21, 2019, 7:36 PM), <https://time.com/5554531/equality-act-lgbt-rights-trump/> [<https://perma.cc/7CXB-6U5P>] (describing the lack of federal-level protections, the history of the Equality Act, and the current attempt to pass the Act).

<sup>11</sup> Cory Collins, *A Landmark Supreme Court Case For LGBTQ Educators and Students*, TEACHING TOLERANCE (June 17, 2020), <https://www.tolerance.org/magazine/a-landmark-supreme-court-case-for-lgbtq-educators-and-students> [<https://perma.cc/8ND6-R9RL>]; *The Supreme Court's Ruling on Sexual Orientation and Gender Identity*, FAIR HOUS. INST. (June 23, 2020), <https://www.fairhousinginstitute.com/supreme-courts-ruling-sexual-orientation-and-gender-identity/> [<https://perma.cc/7XGM-73S9>].

<sup>12</sup> *Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws) [<https://perma.cc/9LKV-3ZBT>]. Comprehensive LGBTQ+ protection in a state antidiscrimination law here means sexual orientation and gender identity protections in housing, employment, and public accommodations. Twenty-seven states have no explicitly LGBTQ+-inclusive antidiscrimination laws. *Id.* Utah has a law that protects LGBTQ+ people in housing and employment, but not in access to public accommodations. *Id.* Wisconsin has a law that prohibits sexual orientation discrimination in housing, employment, and public accommodations, but that does not prohibit gender identity discrimination in any context. However, the recent *Bostock* decision has the potential to expand any of the aforementioned laws that include sex-based protections to encompass SOGI protections. This would require state courts or executive branch agencies to interpret the state's existing antidiscrimination law

protection means that in a majority of states, an LGBTQ+ person could get married on a Sunday and still lose their housing or be turned away from a business on Monday.<sup>13</sup> The absence of comprehensive LGBTQ+ protections underscores the threat of the Religious Right's new push for broad exemptions. This threat is especially present in states like Kansas, with broad religious exemption laws and an antidiscrimination law lacking explicit LGBTQ+ protections.<sup>14</sup>

The anti-LGBTQ+ movement's retooled attack on LGBTQ+ equality and civil rights began well before *Obergefell*, as the Religious Right mobilized to gain political support and limit the impact of a potential same-sex marriage decision.<sup>15</sup> A clear example of legislative action resulting from this anti-LGBTQ+ movement is the flurry of mini Religious Freedom Restoration Acts (RFRA) passed in states prior to *Obergefell*—including the Kansas Preservation of Religious Freedom Act (KPRFA) in 2013.<sup>16</sup> These laws carve out large exemptions from civil rights laws for religion and raise the level of scrutiny that applies to alleged violations of religious freedoms.<sup>17</sup>

Currently, twenty-one states have passed statutes or Constitutional amendments akin to mini-RFRAs.<sup>18</sup> These mini-RFRAs, framed by supporters as a means to “protect” religious individuals from having to serve LGBTQ+ communities,<sup>19</sup> have been considered a “license to discriminate” against

---

consistent with *Bostock*'s holding. For a more robust discussion on the potential impact of *Bostock* on state-level antidiscrimination laws, see CHRISTY MALLORY, LUIS A. VASQUEZ, & CELIA MEREDITH, WILLIAMS INSTITUTE, LEGAL PROTECTIONS FOR LGBT PEOPLE AFTER *BOSTOCK V. CLAYTON COUNTY* (Aug. 2020), <https://williamsinstitute.law.ucla.edu/publications/state-nd-laws-after-bostock/> [<https://perma.cc/58L7-NSVW>].

<sup>13</sup> *Id.*

<sup>14</sup> Kansas has one of the broadest state religious exemption laws in the country, casting a wide breadth of protection for religious claims in the state. The state's antidiscrimination law, the Kansas Act Against Discrimination (KAAD), does not explicitly include protections for sexual orientation or gender identity. See KAN. STAT. ANN. § 60-5303 (West, Westlaw through 2020 Reg. Sess.); KAN. STAT. ANN. § 44-1001 (West, Westlaw through 2020 Reg. Sess.). However, the Kansas Human Rights Commission announced it will apply *Bostock*'s holding to KAAD, allowing Kansans to file claims of sexual orientation or gender identity discrimination under KAAD's “sex discrimination” prohibition. See *Kansas Human Rights Commission Concurs with the U.S. Supreme Court's Bostock Decision*, KAN. HUM. RTS. COMM'N (Aug. 21, 2020), <http://www.khrc.net/pdf/Kansas%20Human%20Rights%20Commission%20Concurs%20with%20the%20US%20Supreme%20Court%20Decision%20in%20Bostock%20v%20Clayton%20County.pdf> [<https://perma.cc/N3EP-RMA3>]. For a more robust discussion on KHRC's decision, see discussion *infra* Section III.D.1.

<sup>15</sup> Day & Weatherby, *supra* note 5, at 910.

<sup>16</sup> Mini-RFRAs are the state-level versions of the federal Religious Freedom Restoration Act. *Religious Exemption Laws*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/religious\\_exemption\\_laws](http://www.lgbtmap.org/equality-maps/religious_exemption_laws) [<https://perma.cc/N4ER-SFFH>] (select the “Religious Exemptions” tab; then scroll down and select “Read the State-by-State Statutes” below the map to see when a state's mini-RFRA was enacted); KAN. STAT. ANN. § 60-5303 (West, Westlaw through 2020 Reg. Sess.).

<sup>17</sup> Day & Weatherby, *supra* note 5, at 909–10.

<sup>18</sup> *Religious Exemption Laws*, *supra* note 16.

<sup>19</sup> KIMBERLY A. JONES, SEYFERTH BLUMENTHAL & HARRIS, LLC, BEYOND OBERGEFELL: THE REMAINING LEGAL HURDLES FOR THE LGBTQ COMMUNITY 1, 7 (2016).

LGBTQ+ people.<sup>20</sup> This issue is exacerbated by the fact that multiple mini-RFRAs—including the KPRFA—use language intended to carve religious exemptions broader than those provided by the federal RFRA.<sup>21</sup>

Not only does Kansas have one of the most sweeping mini-RFRAs in the nation,<sup>22</sup> it also lacks a state-level antidiscrimination law that explicitly protects against sexual orientation and gender identity (SOGI) discrimination in housing, public accommodations, and employment.<sup>23</sup> In the absence of more comprehensive and concrete federal or state-level protections, one county and sixteen cities in Kansas have implemented local-level LGBTQ+ protections in the form of nondiscrimination ordinances (NDOs).<sup>24</sup> Each Kansas NDO provides sexual orientation and gender identity (SOGI) protections in housing, employment, and public accommodations.<sup>25</sup> However, these NDOs cover only thirty percent of the state's population.<sup>26</sup> While Kansas's local-level NDOs have not yet been challenged by a KPRFA claim, there is a chance that the NDOs would fail in court when pitted against the broad religious exemption law.<sup>27</sup>

To that end, it is necessary to analyze the most effective way to achieve comprehensive and secure LGBTQ+ protections in employment, housing, and public accommodations in Kansas despite the KPRFA and other religious exemption laws. This article proposes that local-level LGBTQ+ protections—while valuable in the short term—must be bolstered by state-level protections to truly shield LGBTQ+ Kansans from discrimination. These protections are necessary in light of the state's religious exemptions and the evolving and uncertain foundation of federal-level LGBTQ+ protections beyond Title VII

---

<sup>20</sup> See, e.g., “All We Want Is Equality”: Religious Exemptions and Discrimination Against LGBT People in the United States, HUM. RTS. WATCH (Feb. 19, 2018), <https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people> [<https://perma.cc/4FSV-2G7D>].

<sup>21</sup> Day & Weatherby, *supra* note 5, at 919 (citing to the KPRFA and other states RFRAs that have “key provisions that extend far beyond their federal parent”).

<sup>22</sup> *Id.* at 919–20 (citing the KPRFA as one of a handful of states with RFRA protections that “extend far beyond” the federal RFRA and implement “onerous” burden language).

<sup>23</sup> KAN. STAT. ANN. § 44-1001 (West, Westlaw through 2020 Reg. Sess.) (excluding specific protections for sexual orientation and gender identity).

<sup>24</sup> *Kansas' Equality Profile*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality\\_maps/profile\\_state/KS](http://www.lgbtmap.org/equality_maps/profile_state/KS) [<https://perma.cc/5VTL-VW7A>]. Kansas cities with LGBTQ+-inclusive NDOs: Fairway; Lawrence; Leawood; Lenexa; Manhattan; Merriam; Mission; Mission Hills; Mission Woods; Olathe; Overland Park; Prairie Village; Roeland Park; Shawnee; Westwood; Westwood Hills. Kansas counties with LGBTQ+-inclusive NDOs: Wyandotte. *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See *Brush & Nib Studio LC v. City of Phoenix*, 448 P.3d 890, 926 (Ariz. 2019) (holding that Phoenix's NDO substantially burdened a business-owner's free exercise of religion and unconstitutionally compelled speech). The court severed and struck the LGBTQ+ protection clause of the NDO, leaving the rest of the law intact. *Id.* This case is particularly worrisome considering Arizona's mini-RFRA is relatively constrained in power and reach compared to the language used in Kansas's mini-RFRA. *Cf.* ARIZ. REV. STAT. § 41-1493.01 (LexisNexis, Lexis Advance through the 2020 2d Reg. Sess.), with KAN. STAT. ANN. § 60-5303 (West, Westlaw through 2020 Reg. Sess.).

employment contexts. These local-level NDOs are beneficial to the extent they provide some LGBTQ+ Kansans protection from discrimination, operate as a statement about a city or county's values, and pressure state and federal legislators to act.<sup>28</sup> However, a policy analysis highlights the weaknesses of these NDOs. Local government action inherently creates a patchwork of coverage, leading to inconsistency and confusion.<sup>29</sup> Local-level NDOs are also more susceptible to repeal, have limited enforcement power, and often do not protect the LGBTQ+ populations most vulnerable to discrimination.<sup>30</sup> It is clear that although these local-level NDOs have value in the short term, they are not and cannot be sufficient to protect LGBTQ+ Kansans from discrimination.

This article will demonstrate that the passage of inclusive state-level laws will solve the most pressing problems presented by local NDOs. Section II will provide background on both the LGBTQ+ and Religious Right movements. It will also discuss the rise of religious exemption laws—both in Kansas and nationally—as a response to growing LGBTQ+ support. Section III notes the existence of LGBTQ+ discrimination nationally and in Kansas while also describing the legal landscape of our national LGBTQ+ protections and the

---

<sup>28</sup> *ACLU Testimony - Prairie Village, KS Non-Discrimination Ordinance*, ACLU OF KAN., <https://www.aclukansas.org/en/legislation/aclu-testimony-prairie-village-ks-non-discrimination-ordinance> [https://perma.cc/A3Q3-SDX3]; LAURA E. DURSO, CAITLIN ROONEY, SHARITA GRUBERG, SEJAL SINGH, SHABAB AHMED MIRZA, FRANK J. BEWKES, AARON RIDINGS & DANIEL CLARK, CTR. FOR AM. PROGRESS, *ADVANCING LGBTQ EQUALITY THROUGH LOCAL EXECUTIVE ACTION 1–2* (2017), [https://cdn.americanprogress.org/content/uploads/2017/08/25065855/2LGBTExecAction-report.pdf?\\_ga=2.214632919.1389531545.1599080065-1048308799.1598653771](https://cdn.americanprogress.org/content/uploads/2017/08/25065855/2LGBTExecAction-report.pdf?_ga=2.214632919.1389531545.1599080065-1048308799.1598653771) [https://perma.cc/QJQ3-FR98].

<sup>29</sup> See, e.g., Ashley Wong, *A Patchwork of Anti-Discrimination Laws Don't Protect LGBTQ Workers*, CTR. FOR PUB. INTEGRITY (Aug. 25, 2019, 10:27 AM), <https://publicintegrity.org/business/workers-rights/workplace-inequities/injustice-at-work/a-patchwork-of-anti-discrimination-laws-dont-protect-lgbtq-workers/> [https://perma.cc/AZ2J-L2GN] (citing citizen frustration with the unpredictable layout of LGBTQ+ protections in Montana); Jennifer Huddleston, *The Problem of Patchwork Privacy*, GEO. MASON UNIV. MERCATUS CTR. (Aug. 23, 2018), <https://www.mercatus.org/bridge/commentary/problem-patchwork-privacy> [https://perma.cc/W6KM-C6C9] (highlighting the problem of inconsistency in local-level privacy regulation); Charity Allen, *State Road Rules: A Troubling Patchwork of Regulations*, AURORA (Aug. 28, 2019), <https://medium.com/aurora-blog/state-road-rules-a-troubling-patchwork-of-regulations-f2b77629d523> [https://perma.cc/UVB4-JAGR] (stating local-level road regulation created confusion and compliance challenges).

<sup>30</sup> Trudy Ring, *Voters in Two Kansas Cities Repeal Antidiscrimination Laws*, ADVOC. (Nov. 8, 2012, 7:13 PM), <https://www.advocate.com/politics/election/2012/11/08/voters-two-kansas-cities-repeal-antidiscrimination-laws> [https://perma.cc/FKT2-QS4F] (stating the measure was put to public vote after petitions from opponents arose); Robert Iafolla, *Stonewall at 50: Uprising Sparked Growth of LGBT Protections*, BLOOMBERG L. NEWS (June 28, 2019, 5:00 AM), [https://www.bloomberglaw.com/document/XA4KTV78000000?bna\\_news\\_filter=true&jcsearch=BNA%25200000016b9a4dd1f7a97bde6dcd8a0002#jcite](https://www.bloomberglaw.com/document/XA4KTV78000000?bna_news_filter=true&jcsearch=BNA%25200000016b9a4dd1f7a97bde6dcd8a0002#jcite) [https://perma.cc/2F26-GVKE] (explaining that existing NDOs do not provide a private right of action, meaning cities can enforce fines against employers but workers cannot receive backpay or other damages); MOVEMENT ADVANCEMENT PROJECT, *WHERE WE CALL HOME: LGBT PEOPLE IN RURAL AMERICA*, at iii (Apr. 2019), <http://lgbtmap.org/file/lgbt-rural-report.pdf> [https://perma.cc/2VLM-ZAPD] (stating majority-rural states are on average less likely to have LGBTQ+ protections and less likely to be LGBTQ+-friendly).

state of Kansas's LGBTQ+ protections specifically. Section IV analyzes the value of state-level over local-level LGBTQ+ protections. Finally, Section V discusses the likelihood of state or federal action in the LGBTQ+ antidiscrimination arena.

While there is a breadth of literature discussing the legal axis of the conflict between religious exemption laws and LGBTQ+ protections,<sup>31</sup> there is sparse policy-focused analysis. Moreover, there is an apparent lack of scholarly research focused on the interplay between local-level antidiscrimination laws and state-level religious exemption laws. There are articles addressing the need for federal rather than state LGBTQ+ antidiscrimination laws,<sup>32</sup> but few discussing the choice between state and local LGBTQ+ protections. Further, existing policy critiques of local-level antidiscrimination laws tend to focus on economic policy impacts or do not address emerging religious exemption issues.<sup>33</sup> This article will take the novel approach of applying a policy analysis to the choice between local- or state-level LGBTQ+ protections in a state with broad religious exemption laws.

Because none of Kansas's LGBTQ+-inclusive NDOs have been challenged at the appellate level, under the KPRFA or otherwise, discussing the legal axis of this conflict becomes more speculative. This further highlights the necessity for a policy analysis of the effectiveness of local- and state-level LGBTQ+ antidiscrimination protections in a state with broad religious exemption laws. This analysis relies heavily on the contributions of LGBTQ+

---

<sup>31</sup> See, e.g., Day & Weatherby, *supra* note 5 (focusing on the legal questions surrounding mini-RFRA, post-*Obergefell* LGBTQ rights, and creating a legal framework for the courts to analyze these conflicts); Velte, *supra* note 7 (discussing the legal impact of *Obergefell*, *Hobby Lobby*, and RFRA and articulating the legal arguments available to defeat the Religious Right's push for exemptions); Adam K. Hersh, *Daniel in the Lion's Den: A Structural Reconsideration of Religious Exemptions from Nondiscrimination Laws Since Obergefell*, 70 STAN. L. REV. 265 (2018) (proposing a new Constitutional framework to the analysis of potentially harmful religious exemption laws).

<sup>32</sup> See, e.g., Jeremy S. Barber, *Re-Orienting Sexual Harassment: Why Federal Legislation is Needed to Cure Same-Sex Sexual Harassment Law*, 52 AM. U. L. REV. 493, 497 (2002) (arguing the lack of uniformity, clarity, and consistency with state and Title VII protections requires federal legislation to cure the problem of same-sex sexual harassment); Shalyn L. Caulley, *The Next Frontier to LGBT Equality: Securing Workplace-Discrimination Protections*, 2017 U. ILL. L. REV. 909 (2017) (analyzing the value of the Equality Act over the Employment Non-Discrimination Act, while emphasizing the necessity of state-level protections for LGBTQ+ individuals in the interim).

<sup>33</sup> See Chad A. Readler, *Local Government Anti-Discrimination Laws: Do They Make a Difference?*, 31 U. MICH. J.L. REV. REFORM 777, 777-78 (1998) (arguing that the federal government should regulate private employment as local NDOs harm businesses and are ineffective. This article provides no analysis of religious laws in the antidiscrimination context); Pam Howland, *Idaho Employers Maneuver Through Inconsistent and Confusing Discrimination Laws While Awaiting Formal Human Rights Expansion*, 52 IDAHO L. REV. 913 (2016) (discussing the challenges of employer compliance with local-level discrimination laws with no analysis of religious exemption implications); Christy Mallory & Brad Sears, *An Evaluation of Local Laws Requiring Government Contractors to Adopt LGBT-Related Workplace Policies*, 5 ALB. GOV'T L. REV. 478 (2012) (analyzing the benefit of local-level LGBTQ+-related laws impacting government contractors over local-level LGBTQ+-related laws impacting the private sector).

and First Amendment legal scholars, including the work of Kyle Velte on the legal strength of antidiscrimination laws against religious freedom protections and the work of Terri R. Day and Danielle Weatherby on the tension between religious freedom and LGBTQ+ equal protection.<sup>34</sup> Their scholarship was critical both for creating a comprehensive background on these legal issues and for the formation of this paper's policy analysis.

## II. THE RISE OF RELIGIOUS EXEMPTION LAWS IN RESPONSE TO GROWING LGBTQ+ RIGHTS

To see the deep connection between religious exemption laws and LGBTQ+ rights, it is necessary to understand the general history of both the LGBTQ+ and Religious Right movements. Knowledge of these movements' histories makes it easier to understand what scholars call the "pendulum" on the civil rights continuum,<sup>35</sup> swinging between LGBTQ+ rights expansions and limitations. Further, it contextualizes the Religious Right's strategy shift and highlights underlying motivations of religious exemption laws.

### A. Historical Background

Organized LGBTQ+ social movements were born as a response to systemic persecution from church, state, and medical authorities.<sup>36</sup> Organizations like The Mattachine Society and Daughters of Bilitis began popping up in the early 1950s, working to provide information and outreach to the LGBTQ+ community in the face of a legal system often defining homosexuality as illegal or immoral.<sup>37</sup> Explosive events in the late 1960s—like the Compton Cafeteria and Stonewall Inn riots—marked a turning point in the LGBTQ+ civil rights movement and sparked an increase in LGBTQ+ liberation organizations in the 1970s.<sup>38</sup> This period also led to LGBTQ+ political and social victories, like the election of three LGBTQ+ people to

---

<sup>34</sup> Velte, *supra* note 7; Day & Weatherby, *supra* note 5.

<sup>35</sup> Day & Weatherby, *supra* note 5, at 913.

<sup>36</sup> Bonnie J. Morris, *History of Lesbian, Gay, Bisexual, and Transgender Social Movements*, AM. PSYCH. ASS'N (2009), <https://www.apa.org/pi/lgbt/resources/history> [<https://perma.cc/5Z75-CG9B>]; Nicole Pasulka, *Ladies in the Streets: Before Stonewall, Transgender Uprising Changed Lives*, NAT'L PUB. RADIO (May 5, 2015, 4:52 PM), <https://www.npr.org/sections/codeswitch/2015/05/05/404459634/ladies-in-the-streets-before-stonewall-transgender-uprising-changed-lives> [<https://perma.cc/XY99-G6JP>].

<sup>37</sup> Morris, *supra* note 36. The Mattachine Society, founded in 1950, was one of the first advocacy organizations for gay men. *Id.* Daughters of Bilitis, founded in 1955, was the first known lesbian advocacy organization. *Id.*

<sup>38</sup> Pasulka, *supra* note 36. The Compton Cafeteria riot, led by the transgender and queer community, was the "first known instance of collective militant queer resistance to police harassment in United States history." *Id.* The riot occurred in 1966 at Gene Compton's cafeteria in California's Tenderloin district. *Id.* Three years later at the Stonewall Inn riot in New York, the transgender and queer community fought back against ongoing police harassment and raids of the area's queer bars. *Id.* The Stonewall Inn riot is considered a "watershed moment" for the LGBTQ+ movement and is commemorated with marches during the pride month of June.

public office<sup>39</sup> and the American Psychiatric Association's removal of homosexuality from its official list of psychiatric disorders.<sup>40</sup> The 1980s encompassed the rise of the AIDS epidemic and the LGBTQ+ grassroots organizing that accompanied it—including activist groups like the AIDS Coalition to Unleash Power (ACT UP) and Queer Nation.<sup>41</sup> The 1990s signaled the beginning of a consistent rise in visibility and acceptance of the LGBTQ+ community, which has carried through to today.<sup>42</sup>

In contrast, the Religious Right has simultaneously worked to limit LGBTQ+ civil rights as LGBTQ+ social movements work to expand them.<sup>43</sup> The Religious Right's strategy from the 1950s through the AIDS epidemic was to pathologize homosexuality, fuel fears around AIDS diagnoses, and spread other misleading and harmful rhetoric.<sup>44</sup> This strategy made it easier to achieve the movement's goal: forestalling or repealing gay rights laws.<sup>45</sup> For example, Christian organizer Anita Bryant used this strategy in 1977 to effectively repeal a gay rights ordinance that had passed in Dade County, Florida.<sup>46</sup> Bryant's organization—Save Our Children, Inc.—campaigns on the platform that “homosexuals” were “after” America's children and needed to “recruit” them.<sup>47</sup> It is this approach that made anti-LGBTQ+ laws—like bans on LGBTQ+ public school teachers or same-sex marriage—much easier to enact.<sup>48</sup> In 1973, Maryland became the first state to enact a same-sex marriage ban.<sup>49</sup> By the late 1990s, thirty-eight states had implemented same-sex marriage bans<sup>50</sup> and the anti-LGBTQ+ Defense of Marriage Act (DOMA) was

---

<sup>39</sup> *LGBT Rights Milestones Fast Facts*, CNN (June 17, 2020, 10:06 AM), <https://www.cnn.com/2015/06/19/us/lgbt-rights-milestones-fast-facts/index.html> [<https://perma.cc/4XT2-Y8CU>].

<sup>40</sup> *LGBTQ History Timeline Reference*, GLSEN, <https://www.glsen.org/sites/default/files/LGBTQ-History-Timeline-References.pdf> [<https://perma.cc/BSS7-33WZ>].

<sup>41</sup> Morris, *supra* note 36. The ACT UP and Queer Nation movements were born out of necessity in the late 1980s and early 1990s as AIDS-related deaths were growing by the thousands. *Id.* These groups were known for their protests and displays of civil disobedience, becoming some of the most influential patient advocacy groups in history. They were most known for attention-getting tactics, like disrupting Sunday mass at St. Patrick's Cathedral in New York or swarming the streets in protest of anti-LGBTQ+ events. Scott Harris & Lynn Smith, *Gay Activists Disrupt Christian Service*, L.A. TIMES (Sept. 9, 1991, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1991-09-09-mn-1524-story.html> [<https://perma.cc/YMJ6-T82V>].

<sup>42</sup> Velte, *supra* note 7, at 9.

<sup>43</sup> *Id.* at 8–9.

<sup>44</sup> *Id.* at 8; JOHN GALLAGHER & CHRIS BULL, *PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990S* 1, 25–26 (1996).

<sup>45</sup> Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 203 (1999).

<sup>46</sup> GALLAGHER & BULL, *supra* note 44, at 17.

<sup>47</sup> *Anti-Gay Organizing on the Right*, PBS, <https://www.pbs.org/outofthepast/past/p5/1977.html> [<https://perma.cc/WDS2-NF6F>]. The term “homosexual” is disfavored in the LGBTQ+ community because of the word's close association with pathology and stigma. Alexis L. Rossi & Eliot J. Lopez, *Contextualizing Competence: Language and LGBT-Based Competency in Health Care*, 64 J. HOMOSEXUALITY 1330, 1336 (2017). The term was used by the American Psychiatric Association as a pathological classification for decades until it was finally removed in 1987. *Id.*

<sup>48</sup> Velte, *supra* note 7, at 8.

<sup>49</sup> Day & Weatherby, *supra* note 5, at 913.

<sup>50</sup> *Id.*

federal law.<sup>51</sup>

As LGBTQ+ visibility rose, so did public acceptance of LGBTQ+ people.<sup>52</sup> Public acceptance of same-sex marriage in 1988 was eleven percent, compared to forty-six percent in 2010.<sup>53</sup> The first decade and a half of the 2000s saw a Supreme Court ban on anti-sodomy laws, the passage of fifteen state LGBTQ+ antidiscrimination laws, the repeal of Don't Ask Don't Tell, and *Obergefell*—the historic same-sex marriage ruling.<sup>54</sup> As the pendulum of civil rights swung in favor of the LGBTQ+ movement, it became necessary for the Religious Right to retool its strategy or risk losing all momentum.

### ***B. The New Religious Right Strategy***

The increased social acceptance of LGBTQ+ people has made the hurtful and denigrating tactics the Religious Right previously relied upon largely socially unacceptable.<sup>55</sup> In response, the Religious Right has tried to shed its role as an “attacker” of LGBTQ+ rights and instead frame itself as a “victim” of secularism and secularism’s embrace of LGBTQ+ rights.<sup>56</sup> This new strategy focuses on limiting the public sphere and spaces in which the government has the ability to protect LGBTQ+ rights.<sup>57</sup> This approach hinges on the Religious Right’s ability to redefine “religious freedom” into something that protects only those who believe as the Religious Right does and that is weakened by those who believe differently.<sup>58</sup>

The movement’s new religious freedom rhetoric makes an intentional shift away from religious pluralism and toward religious theocracy.<sup>59</sup> It also retools the status-conduct distinction argument to distance their movement

---

<sup>51</sup> CNN, *supra* note 39. Congress passed DOMA in 1996 in response to same-sex marriage litigation happening around the country with the intent to prevent states from having to recognize same-sex marriages from other states that may grant them. *Id.*

<sup>52</sup> See Velte, *supra* note 7, at 8.

<sup>53</sup> *Americans Move Dramatically Toward Acceptance of Homosexuality Finds GSS Report*, NORC AT THE UNIV. OF CHI., <https://www.norc.org/NewsEventsPublications/PressReleases/Pages/american-acceptance-of-homosexuality-gss-report.aspx> [https://perma.cc/WMG4-6XY5].

<sup>54</sup> CNN, *supra* note 39; *Nondiscrimination Laws*, *supra* note 12 (select the “Public Accommodations” tab; then scroll down and select “Read the State-by-State Statutes” to view the years state antidiscrimination laws were passed or amended). The Don't Ask Don't Tell legislation technically lifted a ban on gay members in the military that had been in place since World War II, but effectually maintained a statutory ban because it required gay members not disclose their sexual orientation. CNN, *supra* note 39.

<sup>55</sup> Velte, *supra* note 7, at 9.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 11.

<sup>59</sup> *Id.* Religious pluralism, also thought of as religious inclusivism, is a response to and acceptance of the diversity of religious beliefs and practices that exist in the world, both in society and government. In contrast, a religious theocracy recognizes one God or deity and elevates those religious laws above civil law. See Derek H. Davis, *Introduction: Religious Pluralism as the Essential Foundation of America's Quest for Unity and Order*, THE OXFORD HANDBOOK OF CHURCH AND STATE IN THE UNITED STATES (Jan. 2011), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780195326246.001.0001/oxfordhb-9780195326246-e-0> [https://perma.cc/Y5YN-FS3B].

from the label of “bigot.”<sup>60</sup> In denying service to LGBTQ+ people, the Religious Right claims it is not discriminating against LGBTQ+ people based on their *status* as LGBTQ+, but rather choosing not to approve of the LGBTQ+ person’s *conduct* for religious reasons.<sup>61</sup> This false distinction allows the Religious Right to separate its actions from the blatant attacks on LGBTQ+ people in the movement’s past.<sup>62</sup> For example, a bakery owner turning away a gay couple’s wedding cake request is not an attack on the couple’s LGBTQ+ identities—the Religious Right claims—but rather an exercise of the shop owner’s religious freedom to not participate in conduct (e.g., a same-sex wedding) that goes against the teachings of their religion. This approach directly benefits the Religious Right by: (1) offering religious protections as a shield to avoid LGBTQ+ civil rights, and; (2) reviving a false status-conduct distinction that legitimizes the movement in today’s more LGBTQ+-accepting society.<sup>63</sup>

### 1. Religious Freedom Restoration Acts

The Religious Right’s campaign has always focused on affecting legal change to solidify its beliefs,<sup>64</sup> and that focus remains with the movement’s new strategy. The Religious Right has deployed this strategy to encourage new legal religious protections or limits on LGBTQ+ legal rights. The epitome of this approach is captured in the proliferation and implementation of state-level RFRA laws.<sup>65</sup>

These state laws are descendants of the 1993 federal Religious Freedom Restoration Act, approved by the Clinton administration in response to the Supreme Court’s *Employment Division v. Smith* decision.<sup>66</sup> *Smith* held that neutral laws of general applicability do not unconstitutionally burden free exercise rights and are not subject to strict scrutiny, making it more challenging for religious exemption claims to win in court.<sup>67</sup> The federal RFRA was intended to reinstate the strict scrutiny standard the Court applied to questions of free exercise prior to *Smith*.<sup>68</sup>

However in 1997, the Supreme Court held that the federal RFRA did not

---

<sup>60</sup> Kyle Velte, *Why the Religious Right Can’t Have Its (Straight Wedding) Cake and Eat It Too: Breaking the Preservation-Through-Transformation Dynamic in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 36 LAW & INEQ. 67, 80 (2018).

<sup>61</sup> *Id.*

<sup>62</sup> *See id.*

<sup>63</sup> *See id.* at 81.

<sup>64</sup> *See generally id.* at 71–76 (noting the history of the Religious Right’s movement and its connection to legal change—from the 1950s “Lavender Scare” congressional report mirroring the movement’s homophobic rhetoric and resulting in thousands of LGBTQ+ government employees losing their jobs to campaigns in the 1970s and 1980s working to repeal LGBTQ+ antidiscrimination ordinances or pass sodomy laws).

<sup>65</sup> *See Religious Exemption Laws*, *supra* note 16.

<sup>66</sup> *See* Luke A. Gatta, *Conscience in the Public Square: The Pivoting Positions of the USCCB and ACLU Around the Religious Freedom Restoration Act*, 83 LINACRE Q. 445, 446, 453 (2016).

<sup>67</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 888 n.3 (1990).

<sup>68</sup> JONES, *supra* note 19, at 7.

apply to state and local governments in *City of Boerne v. Flores*.<sup>69</sup> This decision came at a time when the same-sex marriage debate was moving to the forefront of the political stage—Clinton signed DOMA in 1996 and states were introducing new legislation both protecting and limiting same-sex couples' rights.<sup>70</sup> The Religious Right capitalized on the fear and uncertainty these events created by advocating for states to enact their own RFRA.<sup>71</sup> Within three years of the *Boerne* ruling, nine states had passed mini-RFRAs that established broad religious exemptions.<sup>72</sup>

There are now twenty-one states with Constitutional amendments or statutes akin to mini-RFRAs.<sup>73</sup> Seven of these mini-RFRAs arose in the time between the 2008 California same-sex marriage ban and the 2015 *Obergefell* decision, including the KPRFA.<sup>74</sup> Additionally, three more states introduced mini-RFRA bills in their legislatures in 2020: Georgia, Iowa, and West Virginia.<sup>75</sup> All of these laws have the potential to exempt people from complying with antidiscrimination laws if they “burden” their exercise of religion—effectively granting legal rights for claimants to discriminate in the name of religion.<sup>76</sup> This threat is even greater when considering multiple mini-RFRAs use language intended to create broader religious exemptions than the federal RFRA provides.<sup>77</sup>

The federal RFRA states that the government “shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless it is furthering a compelling government interest and is the least restrictive means of doing so.<sup>78</sup> The Supreme Court decided in *Burwell v. Hobby Lobby* that a “person” under the federal RFRA includes

---

<sup>69</sup> *Id.*; *City of Boerne v. Flores*, 521 U.S. 507, 534–36 (1997).

<sup>70</sup> CNN, *supra* note 39 (highlighting specific events in LGBTQ+ history, including the passage of DOMA and other laws passed around that time).

<sup>71</sup> Adam Sonfeld, *Learning from Experience: Where Religious Liberty Meets Reproductive Rights*, 19 GUTTMACHER POL. REV. 1 (2016).

<sup>72</sup> See *Religious Exemption Laws*, *supra* note 16. These states were: Alabama, Arizona, Florida, Idaho, Illinois, New Mexico, Oklahoma, South Carolina, and Texas. See ALA. CONST. of 1901, art. I, § 3.01; ARIZ. REV. STAT. § 41-1493.01 (LexisNexis 1999); FLA. STAT. ANN. § 761.03 (LexisNexis 1998); IDAHO CODE § 73-402 (LexisNexis 2000); 775 ILL. COMP. STAT. § 35/15 (West, Westlaw through P.A. 101-651); N.M. STAT. ANN. § 28-22-3 (LexisNexis 2000); OKLA. STAT. tit. 51, § 253 (LexisNexis 2000); S.C. CODE ANN. § 1-32-40 (LexisNexis 1999); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (West 1999).

<sup>73</sup> See *Religious Exemption Laws*, *supra* note 16.

<sup>74</sup> *Id.* These states were: Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, and Tennessee. See ARK. CODE ANN. § 16-123-404 (LexisNexis 2015); IND. CODE ANN. § 34-13-9-8 (LexisNexis 2015); KAN. STAT. ANN. § 60-5303 (West, Westlaw through 2020 Sess.); KY. REV. STAT. ANN. § 446.350 (LexisNexis 2013); LA. STAT. ANN. § 13:5233 (2010); MISS. CODE ANN. § 11-61-1 (LexisNexis 2014); TENN. CODE ANN. § 4-1-407 (LexisNexis 2015).

<sup>75</sup> See S.B. 221, 155th Gen. Assemb., Reg. Sess. (Ga. 2019); S. File 508, 88th Gen. Assemb., Reg. Sess. (Iowa 2020); H.B. 2985, 84th Leg., Reg. Sess. (W. Va. 2020).

<sup>76</sup> See Hersh, *supra* note 31, at 293–94.

<sup>77</sup> Day & Weatherby, *supra* note 5, at 910.

<sup>78</sup> Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb-1(a)–(b) (West, Westlaw through Pub. L. No. 116-179).

closely held for-profit corporations.<sup>79</sup> This was the first time the Court held religious liberty exemptions—applied traditionally to non-profit religious organizations—also applied to for-profit businesses.<sup>80</sup>

While state courts are not bound by *Hobby Lobby* when interpreting state RFRA, states have tried to expand their mini-RFRA definition of “person” to encompass for-profit corporations as well.<sup>81</sup> Further, some mini-RFRA lower the religious burden requirement from “substantial burden” to a mere burden or restriction.<sup>82</sup> Others expand the bounds of “exercise of religion” or raise the evidence standard to satisfy the statute’s strict scrutiny test.<sup>83</sup> Taken as a whole, these laws disproportionately impact the already politically underrepresented LGBTQ+ community and threaten to create “a new wave of separate but equal.”<sup>84</sup>

## 2. Other Legal Measures Impacting Religion and LGBTQ+ Rights

While mini-RFRA highlight the Religious Right’s shift in strategy, they are not the only laws the movement is advocating for in the face of growing LGBTQ+ rights. Three states—Arkansas, Tennessee, and North Carolina—have passed laws specifically targeting local-level NDOs.<sup>85</sup> These laws ban local governments from passing antidiscrimination protections that are more expansive than what is provided at the state level.<sup>86</sup> In Arkansas, for example, a city could not implement an NDO with sexual orientation or gender identity protections because the state antidiscrimination law does not include those characteristics.<sup>87</sup> Florida and Wisconsin both attempted but failed to pass similar preemption legislation.<sup>88</sup>

In 2019, Texas passed S.B. 1987, a law that falls into the category of state-level “First Amendment Defense Acts” (FADAs).<sup>89</sup> FADAs effectively

<sup>79</sup> *Burwell v. Hobby Lobby*, 573 U.S. 682, 708–09 (2014); Velte, *supra* note 7, at 5.

<sup>80</sup> Velte, *supra* note 7, at 5.

<sup>81</sup> Jonathan Griffin, *Religious Freedom Restoration Acts*, 23 NAT’L CONF. STATE LEGISLATURES (May 2015), <https://www.ncsl.org/research/civil-and-criminal-justice/religious-freedom-restoration-acts-lb.aspx> [<https://perma.cc/BZU5-7ANU>].

<sup>82</sup> Day & Weatherby, *supra* note 5, at 919.

<sup>83</sup> *Id.* at 919–20.

<sup>84</sup> *Id.* at 921.

<sup>85</sup> *Local Nondiscrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_ordinances](http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances) [<https://perma.cc/KCJ4-P CCR>].

<sup>86</sup> *Id.* LGBTQ+ legal advocates in Arkansas, Tennessee, and North Carolina have discussed or are actively working toward repealing these state preemption laws. See Max Brantley, *Arkansas Supreme Court puts an end to Fayetteville non-discrimination ordinance. For now.*, ARK. TIMES (Jan. 31, 2019, 7:10 PM), <https://arktimes.com/arkansas-blog/2019/01/31/arkansas-supreme-court-puts-an-end-to-fayetteville-non-discrimination-ordinance-for-now> [<https://perma.cc/3U4K-LG LA>]; Nico Lang, *Nashville signs pro-LGBTQ order while Tennessee Republicans push license to discriminate*, LGBTQNATION (Feb. 12, 2019), <https://www.lgbtqnation.com/2019/02/nashville-signs-pro-lgbtq-order-tennessee-republicans-push-license-discriminate/> [<https://perma.cc/7GGA-MZ3U>]; Ely Portillo, *After HB2, NC leaders remain divided about LGBTQ Protections in the state*, CHARLOTTE OBSERVER (Oct. 29, 2018, 6:00 AM), <https://www.charlotteobserver.com/news/politics-government/influencers/article/220512460.html> [<https://perma.cc/7K8A-VCBP>].

<sup>87</sup> Day & Weatherby, *supra* note 5, at 920.

<sup>88</sup> See H.B. 871, 2018 Leg., Reg. Sess. (Fla. 2018); S.B. 634, 2017 Leg., Reg. Sess. (Wis. 2017).

<sup>89</sup> See 2019 Tex. Sess. Law Serv. Ch. 666 (S.B. 1978) (West) (codified at Tex. Gov. Code Ann. §

allow anyone—including government employees, contractors, and for-profit business—to use their religious beliefs regarding transgender people, same-sex marriage, and sexual activity outside of heterosexual marriage to discriminate against those classes of people.<sup>90</sup> Oklahoma and Massachusetts both have FADAs pending in their legislatures, as well.<sup>91</sup> Other states have passed or are attempting to pass further religious exemption laws or amendments that would provide carve-outs for adoption, foster care, marriage, and more.<sup>92</sup> In 2020 alone, there have been twenty-one bills introduced across the country that would harm LGBTQ+ rights by expanding religious exemptions in areas like healthcare, education, adoption, and beyond.<sup>93</sup>

### 3. The Kansas Preservation of Religious Freedom Act

Kansas's RFRA—the KPRFA—is one of the mini-RFRAs with language considerably more expansive than the federal statute.<sup>94</sup> For example, the federal RFRA limits claims under the act to burdens that have actually occurred.<sup>95</sup> The KPRFA, however, allows a person to bring a claim if their religion has been burdened *or* if it is “substantially likely to be burdened.”<sup>96</sup> The KPRFA also institutes a higher evidence standard than the federal RFRA. The federal statute only requires the government “demonstrate” a compelling

---

2400.001 *et seq.* (West 2019)); *First Amendment Defense Acts*, Protect Thy Neighbor, <http://www.protectthyneighbor.org/first-amendment-defense-acts#StateFADA> (last visited Oct. 17, 2020) (highlighting that there has been FADA legislation in the States in response to the failure of the federal FADA to pass).

<sup>90</sup> See, e.g., 2019 Tex. Sess. Law Serv. Ch. 666 (S.B. 1978) (codified at Tex. Gov. Code Ann. § 2400.001 *et seq.* (West 2019)).

<sup>91</sup> See S. 1250, 56th Leg., 2d Sess. (Okla. 2018) (referred to S. Comm. on the Judiciary, Feb. 6, 2018); H.R. 1392, 191st Gen. Ct., 2019–2020 Sess. (Mass. 2019) (referred to H. Comm. on the Judiciary, Jan. 22, 2019). Oklahoma's S. 1250 was referred to the Committee on the Judiciary on Feb. 6, 2018. Bill Information for SB 1250, Okla. State Leg. (Feb. 6, 2018), <http://www.oklegislature.gov/BillInfo.aspx?Bill=SB1250&Session=1800> [<https://perma.cc/DP7G-N6LD>]. Massachusetts's H.R. 1392 was referred to the Committee on the Judiciary on Jan. 22, 2019. H.B. 1392, Gen. Ct. of the Commw. of Mass. (June 7, 2019). <https://malegislature.gov/Bills/191/H1392/BillHistory> [<https://perma.cc/WC3Q-M4NK>].

<sup>92</sup> See, e.g., 2016 Miss. Laws Ch. 334 (H.B. 1523) (codified at MISS. CODE ANN. § 11-62-1 *et seq.* (West 2020) (Mississippi passed this bill in 2015 following the *Obergefell* decision, allowing those in the state to discriminate against LGBTQ+ individuals in areas spanning from public accommodations to adoption in the name of religious beliefs); Marriage Amendment Reaffirmation Act, H.R. 65, 2019–2020 Gen. Assemb., Reg. Sess. (N.C. 2019) (North Carolina's H.R. 65, referred to the House Committee on Rules, would amend the North Carolina state constitution to deem invalid “[m]arriages between persons of the same gender”); 2020 Tenn. Pub. Acts Ch. 514 (H.B. 836) (codified at TENN. CODE ANN. § 36-1-147 (West 2020) (Tennessee's statute went into effect on Jan. 24, 2020, allowing adoption agencies in the state to refuse to provide any services that would conflict with the religious beliefs of the agency).

<sup>93</sup> See *Legislation Affecting LGBT Rights Across the Country*, ACLU, <https://www.aclu.org/legislation-affecting-lgbt-rights-across-country> [<https://perma.cc/3LKC-L4G6>].

<sup>94</sup> Cf. Kan. Preservation of Religious Freedom Act, KAN. STAT. ANN. § 60-5301 *et seq.* (West, Westlaw through 2020 Reg. Sess.), with Religious Freedom and Restoration Act, 42 U.S.C.A. § 2000bb (West, Westlaw through Pub. L. No. 116-158).

<sup>95</sup> Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb-1(c) (West, Westlaw through Pub. L. No. 116-179).

<sup>96</sup> KAN. STAT. ANN. § 60-5303(b) (West, Westlaw through 2020 Reg. Sess.).

interest that is narrowly tailored in order to legally burden a person's exercise of religion.<sup>97</sup> The KPRFA requires the government demonstrate "by clear and convincing evidence" its compelling interest that is narrowly tailored,<sup>98</sup> which is a significantly more burdensome legal standard.<sup>99</sup> This higher standard makes it easier for religious claimants to win in court or to use the KPRFA as a shield from local-level LGBTQ+-inclusive NDOs.

#### 4. Other Kansas Measures Impacting Religion and LGBTQ+ Rights

Kansas has also passed and continues attempts to pass additional laws benefiting the Religious Right and harming LGBTQ+ people.<sup>100</sup> In 2018, then-Governor Jeff Colyer signed into law the Kansas Adoption Protection Act—which a former Republican Kansas senator called "sign[ing] discrimination into Kansas law."<sup>101</sup> The Act allows child placement agencies to refuse placement of children for foster care or adoption "when the proposed placement of such child would violate such agency's sincerely held religious beliefs."<sup>102</sup> This Act, claiming to protect religious beliefs, could discourage LGBTQ+ parents from adopting or acting as foster parents and could lead to LGBTQ+ children being placed in non-affirming homes—all in the name of religious exemptions.<sup>103</sup>

The Marriage and Constitution Restoration Act (H.B. 2320) was introduced to the Kansas House of Representatives in 2019.<sup>104</sup> The bill would have prohibited the state from enforcing or endorsing a myriad of LGBTQ+-specific rights—including same-sex marriage, LGBTQ+ anti-discrimination laws at any level, conversion therapy bans, policies allowing gender marker changes on a birth certificate, and more.<sup>105</sup> The bill argued that LGBTQ+ identities are not immutable but faith-based, and that any law favoring these "religious" identities over other religions is in violation of Constitutional religious freedom protections.<sup>106</sup> However, the bill died in committee on May 21, 2020.<sup>107</sup>

---

<sup>97</sup> 42 U.S.C.A. § 2000bb-1(a)–(b) (West, Westlaw through Pub. L. No. 116-179).

<sup>98</sup> KAN. STAT. ANN. § 60-5303(a) (West, Westlaw through 2020 Reg. Sess.).

<sup>99</sup> Day & Weatherby, *supra* note 5, at 919–20, 920 n.87 (citing KAN. STAT. ANN. § 60-5303 as an example of a statute that raises the evidentiary standard for a state government attempting to justify a challenged law).

<sup>100</sup> See Katherine Burgess, *Colyer Signs Bill Allowing Faith-Based Adoption Groups to Refuse LGBTQ Couples*, WICHITA EAGLE (May 19, 2018, 4:40 PM), <https://www.kansas.com/news/politics-government/article211454394.html> [<https://perma.cc/6MN4-G9G3>]; 2018 Kan. Sess. Laws Ch. 118 (S.B. 284) (to be codified at KAN. STAT. ANN. § 59-2112 *et seq.*).

<sup>101</sup> Burgess, *supra* note 98.

<sup>102</sup> 2018 Kan. Sess. Laws Ch. 118 (S.B. 284), § 1(b) (to be codified at KAN. STAT. ANN. § 59-2112, *et seq.*).

<sup>103</sup> Burgess, *supra* note 100.

<sup>104</sup> H.R. 2320, 88th Leg., 2019 Reg. Sess. (Kan. 2019).

<sup>105</sup> *Legislative Tracker: Kansas 'Marriage and Constitution Restoration Act' (HB 2320)*, REWIRE NEWS (Feb. 14, 2019), <https://rewire.news/legislative-tracker/law/kansas-marriage-and-constitution-restoration-act-hb-2320/> [<https://perma.cc/C47J-AAN6>].

<sup>106</sup> See generally H.R. 2320, 88th Leg., 2019 Reg. Sess. (Kan. 2019).

<sup>107</sup> *Id.*

### III. THE NEED FOR LGBTQ+ ANTIDISCRIMINATION PROTECTIONS

#### A. *The Existence and Impact of LGBTQ+ Discrimination Nationally*

Research over the past quarter-century shows LGBTQ+ people have consistently faced higher levels of discrimination than heterosexual cisgender people,<sup>108</sup> and this trend did not stop after the 2015 *Obergefell* decision. As recently as 2018, a Gallup report found cisgender LGB people twenty percent more likely than cisgender heterosexuals to have been fired or denied a job for discriminatory reasons.<sup>109</sup> Cisgender LGB people were also more than two times as likely to have been discriminatorily prevented from renting or buying a house or apartment than cisgender heterosexuals.<sup>110</sup>

The National Center for Transgender Equality's (NCTE) 2015 U.S. Transgender Survey also found that thirty percent of respondents had been fired, denied a promotion, or experienced some other form of mistreatment at work because of their gender identity or gender expression.<sup>111</sup> Nearly a quarter of respondents had experienced some form of housing discrimination in the past year, with nearly one-third having experienced homelessness at some point in their lives.<sup>112</sup> Thirty-one percent of respondents also reported experiencing some form of mistreatment while attempting to access a public accommodation—including physical attacks, verbal harassment, and denial of equal services.<sup>113</sup>

This increased exposure to instances of discrimination has long-lasting harmful impacts on the LGBTQ+ community.<sup>114</sup> The experience of discrimination in areas like employment, education, housing, and public accommodations is linked to negative physical and mental health outcomes in LGBTQ+ populations, as well as health disparities between LGBTQ+ people and heterosexual cisgender people.<sup>115</sup> NCTE's U.S. Transgender Survey echoed these findings; reporting thirty-nine percent of respondents had experienced "serious psychological distress" in the month prior to completing the survey, compared to five percent of the general United States population.<sup>116</sup> Additionally, forty percent of respondents had attempted suicide in their

---

<sup>108</sup> ILHAN H. MEYER, WILLIAMS INST., EXPERIENCES OF DISCRIMINATION AMONG LESBIAN, GAY AND BISEXUAL PEOPLE IN THE U.S. 1 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Discrimination-Work.pdf> [<https://perma.cc/5PV3-4M6X>].

<sup>109</sup> *Id.*

<sup>110</sup> *See id.*

<sup>111</sup> S.E. JAMES, J.L. HERMAN, S. RANKIN, M. KEISLING, L. MOTTET & M. ANAFI., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 148 (2015), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/JU6F-CG8W>]. This was the second ever comprehensive survey examining the lives and experiences of transgender and gender non-conforming people in the United States since the National Transgender Discrimination Survey conducted in 2008–09.

<sup>112</sup> *Id.* at 176.

<sup>113</sup> *Id.* at 213.

<sup>114</sup> *Id.* at 197; MEYER, *supra* note 108.

<sup>115</sup> MEYER, *supra* note 109.

<sup>116</sup> JAMES ET AL., *supra* note 111, at 5.

lifetimes.<sup>117</sup> This is nearly nine times the attempted suicide rate for the general United States population.<sup>118</sup> Research shows that LGBTQ+ discrimination also has harmful impacts on LGBTQ+ people's socioeconomic status.<sup>119</sup> For example, transgender individuals are three times more likely to be unemployed and nearly fifty percent less likely to own a home than the general population.<sup>120</sup>

### ***B. The Existence and Impact of LGBTQ+ Discrimination in Kansas***

Three years ago, an LGBTQ+ drama and art teacher from Seneca, Kansas had photographs circulate online that depicted him with a male friend.<sup>121</sup> The teacher then started to receive anonymous threats, including statements like “queers will burn and so will you.”<sup>122</sup> His car tire was punctured and the car itself was vandalized with the word “faggot.”<sup>123</sup> These incidents were reported to the police, who “made no finding.”<sup>124</sup> The school requested the teacher take leave for his safety.<sup>125</sup> After seven weeks of unpaid leave, the school—which took no protective or corrective action—told the teacher he could return or resign.<sup>126</sup> State antidiscrimination laws offered the teacher no remedy and Seneca did not have a city or county LGBTQ+-inclusive NDO.<sup>127</sup> Therefore, the teacher—still fearing for his safety—opted to resign and move to California.<sup>128</sup>

This incident, while heartbreaking, is only one of the many instances of LGBTQ+ discrimination still occurring in Kansas post-*Obergefell*.<sup>129</sup> The Williams Institute's 2019 report on discrimination against LGBTQ+ people in Kansas estimated 72,600 LGBTQ+ adults live in Kansas.<sup>130</sup> The report found LGBTQ+ Kansans experience discrimination at rates consistent with national statistics—twenty-one percent of LGBTQ+ respondents had been treated unfairly by an employer and twenty-three percent had received poor service while accessing a public accommodation because of their sexual orientation or

---

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> See *id.*; SARAH MCBRIDE, LAURA E. DURSO, HANNAH HUSSEY, SHARITA GRUBERG & BISHOP GENE ROBINSON, CTR. FOR AM. PROGRESS, WE THE PEOPLE: WHY CONGRESS AND U.S. STATES MUST PASS COMPREHENSIVE LGBT NONDISCRIMINATION PROTECTIONS 34 (2014), <https://cdn.americanprogress.org/content/uploads/2014/12/24121649/LGBT-WeThePeople-report-1.pdf> [<https://perma.cc/UK5T-AS6D>].

<sup>120</sup> JAMES ET AL., *supra* note 111, at 5.

<sup>121</sup> CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., DISCRIMINATION AGAINST LGBT PEOPLE IN KANSAS 5 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-KS-Jan-2019.pdf> [<https://perma.cc/L6W6-4CRY>].

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Kansas' Equality Profile*, *supra* note 24.

<sup>128</sup> MALLORY & SEARS, *supra* note 121, at 5.

<sup>129</sup> See generally *id.*

<sup>130</sup> *Id.* at 2.

gender identity.<sup>131</sup> These numbers are even higher for transgender Kansans, with twenty-nine percent reporting discrimination or harassment while accessing public accommodations in Kansas within the last year.<sup>132</sup>

The report's research also linked the lack of LGBTQ+ antidiscrimination protections to poorer socioeconomic outcomes for LGBTQ+ Kansans.<sup>133</sup> For example, thirty-three percent of LGBTQ+ adult respondents in Kansas said they did not have enough money for food, while only twelve percent of non-LGBTQ+ adults in Kansas reported experiencing this issue.<sup>134</sup> The unemployment rate reported by LGBTQ+ Kansans was two times that of non-LGBTQ+ Kansans.<sup>135</sup> Further, thirty-six percent of transgender Kansans were living in poverty,<sup>136</sup> while the state average was only thirteen percent.<sup>137</sup>

Kansas is also a majority-rural state.<sup>138</sup> LGBTQ+ populations in rural states often face unique issues of resentment and aversion from those in their communities.<sup>139</sup> Legal scholar Luke Boso theorizes these feelings stem from both widely shared and incorrect beliefs about LGBTQ+ identities being a mainly urban phenomenon and the ways in which LGBTQ+ identities challenge core tenants of rural community identity—like religiously-informed gender and sexual normativity.<sup>140</sup> The statistics in Kansas seem to reflect this rural resentment: LGBTQ+ Kansans that live in rural counties are less likely to have LGBTQ+-friendly community climates and are more likely to experience discrimination.<sup>141</sup> They also have less available alternatives to housing, employment, and public accommodations when discriminated against, causing the harmful impacts of SOGI discrimination to land on rural LGBTQ+ populations the hardest.<sup>142</sup>

### C. Federal LGBTQ+ Protections

The Court's decision in *Bostock*—holding that Title VII prohibits discrimination against employees because of their sexual orientation or gender identity<sup>143</sup>—significantly impacted the state of federal LGBTQ+ antidiscrimination protections. Prior to *Bostock*, a patchwork of SOGI protections existed, leaving LGBTQ+ employees at the mercy of geography: federal circuit courts and district courts had varying interpretations of Title

---

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> MALLORY & SEARS, *supra* note 121, at 2.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 3.

<sup>137</sup> Erin Duffin, *Kansas – Poverty Rate 2000-2008*, STATISTA (Sept. 27, 2019), <https://www.statista.com/statistics/205466/poverty-rate-in-kansas/> [<https://perma.cc/P34L-9RJ9>].

<sup>138</sup> MOVEMENT ADVANCEMENT PROJECT, *supra* note 30, at 4.

<sup>139</sup> See generally Luke A. Boso, *Rural Resentment and LGBTQ Equality*, 71 FLA. L. REV. 919 (2019).

<sup>140</sup> See *id.* at 931–54.

<sup>141</sup> MOVEMENT ADVANCEMENT PROJECT, *supra* note 30, at 52–57.

<sup>142</sup> *Id.* at 54.

<sup>143</sup> *Bostock v. Clayton Cty.*, 140 S. Ct. 1739, 1737 (2020).

VII's coverage—the Second and Seventh Circuit held Title VII prohibited sexual orientation discrimination, while the Tenth Circuit held Title VII explicitly did not protect against sexual orientation discrimination.<sup>144</sup> This fractured coverage prior to *Bostock* left LGBTQ+ people in the majority of states with no federal protections from discrimination under Title VII, and uncertain coverage under other federal statutes prohibiting discrimination “because of . . . sex.”<sup>145</sup>

Now, every LGBTQ+ employee that falls under Title VII coverage is protected from SOGI discrimination, regardless of where they live.<sup>146</sup> Further, *Bostock* suggests that any federal statute prohibiting discrimination “because of” sex or “on the basis of” sex in fact prohibits SOGI discrimination.<sup>147</sup> As Justice Alito wrote in his *Bostock* dissent, “[w]hat the Court has done today—interpreting discrimination because of “sex” to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences” for the hundreds of federal statutes that prohibit discrimination because of sex.<sup>148</sup> For example, *Bostock*'s reasoning will likely lead to courts interpreting Title IX, the Fair Housing Act, and the Affordable Care Act as prohibiting SOGI discrimination under their sex discrimination provisions.<sup>149</sup> *Bostock* provides a legal basis for courts to expand federal LGBTQ+ antidiscrimination protections outside of the employment context—including in housing, healthcare, education, and more.

However, while *Bostock* marks a monumental win for the LGBTQ+ rights movement, it is not a fix-all for the multitude of discrimination issues faced by LGBTQ+ people. Even within the realm of employment discrimination, *Bostock* lacks the ability to protect *all* LGBTQ+ employees from discrimination.<sup>150</sup> Further, *Bostock* could be overturned by congressional amendment to Title VII or limited by potential religious exemption challenges.

While *Bostock* opened the door for an expansive interpretation of a numerous antidiscrimination statutes, this expansion is neither guaranteed nor immediate. Moreover, just because *Bostock* provides persuasive reasoning and

---

<sup>144</sup> See *Federal Court Decisions*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/federal\\_court\\_decisions](https://www.lgbtmap.org/equality-maps/federal_court_decisions) [<https://perma.cc/3F6X-524U>] (noting the various circuit court decisions defining federal protections prior to *Bostock* and flagging how circuits have interpreted federal protections outside of Title VII contexts); *Medina v. Income Support Div.*, 413 F.3d 1131 (10th Cir. 2005). The Second Circuit encompasses Connecticut, New York, and Vermont. The Seventh Circuit encompasses Illinois, Indiana, and Wisconsin. The Tenth Circuit encompasses Oklahoma, New Mexico, Kansas, Colorado, Wyoming, and Utah.

<sup>145</sup> *Id.*; 42 U.S.C.S. § 2000e-2(a) (LexisNexis, Lexis Advance through P.L. 116-193, approved 10/30/2020).

<sup>146</sup> See *Bostock*, 140 S. Ct. at 1754.

<sup>147</sup> See *id.* at 1778–83 (Alito, J., dissenting).

<sup>148</sup> *Id.* at 1778.

<sup>149</sup> *Id.* at 1778–81, 1791–96 (providing a full list of the statutes Justice Alito flagged as likely to be impacted by the *Bostock* holding).

<sup>150</sup> See 42 U.S.C.S. § 2000e(b) (LexisNexis, Lexis Advance through P.L. 116-158, approved 8/14/2020) (defining “employer” under Title VII of the Civil Rights Act of 1964 as someone with fifteen or more employees, excluding those with less employees from having to meet Title VII antidiscrimination standards).

authority to argue for the expansion of all federal antidiscrimination laws with sex-based protections, it would be shortsighted for LGBTQ+ advocates to rely solely on *Bostock* and to stop advocating for LGBTQ+-inclusive state antidiscrimination laws. This is necessary because the path to extending *Bostock*'s holding to other federal antidiscrimination statutes will take time—requiring plaintiff searches, lengthy litigation and appeals, and willing courts. Though *Bostock* has placed the LGBTQ+ rights movement in a better position than ever before to litigate SOGI protections in other contexts (e.g., education, healthcare, housing), this expansion will depend on a myriad of variables and certainly will not be immediate. Moreover, the federal public accommodations statute—Title II of the Civil Rights Act of 1964—does not prohibit sex discrimination in public accommodations;<sup>151</sup> as a result, *Bostock* holds no promise of extending such protections. Instead, consumers facing sex-based discrimination in the marketplace must rely on those state public accommodations laws that prohibit such discrimination. *Bostock* is not controlling authority for state courts interpreting state laws. As a result, protections for LGBTQ+ people in places of public accommodation—a category almost universally covered by state antidiscrimination laws—are not controlled by *Bostock*'s holding.<sup>152</sup>

In the interim, there are still hundreds of thousands of LGBTQ+ people living in states without LGBTQ+-inclusive antidiscrimination laws who are vulnerable to SOGI discrimination while accessing housing, healthcare, public accommodations, and more.<sup>153</sup> Actively pursuing expansion of state antidiscrimination laws will help to protect these LGBTQ+ people while litigation works its way through the federal courts, interpreting *Bostock*'s impact on laws like Title IX and the Affordable Care Act.

Additionally, *Bostock* only protects those LGBTQ+ people whose employers fall under the scope of Title VII, which most notably excludes employers with less than fifteen employees.<sup>154</sup> The most recent published census data on United States businesses found 20.4 million people were employed by “very small enterprises” with nineteen or fewer employees<sup>155</sup>—inevitably, some portion of these millions of employees are still vulnerable to SOGI employment discrimination post-*Bostock*. However, most state

---

<sup>151</sup> See 42 U.S.C.A. § 2000a(a) (West, Westlaw through Pub. L. No. 116-179). Providing that “[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, and accommodations of any public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin.” *Id.* (emphasis added). Notably absent from the statutes protected categories is sex.

<sup>152</sup> Cathryn Oakley, *What the Supreme Court Ruling in Bostock Means for State Legislative Efforts*, HUM. RTS. CAMPAIGN (July 15, 2020), <https://www.hrc.org/news/what-the-supreme-court-ruling-in-bostock-means-for-state-legislative-effort> [<https://perma.cc/BHC8-VV6Z>].

<sup>153</sup> See *Nondiscrimination Laws*, *supra* note 12.

<sup>154</sup> See 42 U.S.C.S. § 2000e(b) (LexisNexis 1991).

<sup>155</sup> ANTHONY CARUSO, U.S. CENSUS BUREAU STATISTICS OF U.S. BUSINESSES EMPLOYMENT AND PAYROLL SUMMARY: 2012 (2015), <https://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-susb.pdf> [<https://perma.cc/LY2G-WWRK>].

antidiscrimination laws cover far smaller employers than Title VII.<sup>156</sup> Kansas's antidiscrimination law, for example, "applies to any person in [Kansas] employing *four or more* persons."<sup>157</sup> This highlights the value of continuing to pursue SOGI amendments to state antidiscrimination laws, even in the employment context, after *Bostock*.

It is also worth noting that *Bostock* is vulnerable to a congressional amendment of Title VII and to future RFRA claims. Justice Gorsuch, writing for the majority in *Bostock*, left open the potential for the federal RFRA to defeat Title VII SOGI protections: "[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases."<sup>158</sup> So while *Bostock* marked a historic step forward in the LGBTQ+ rights battle, the current state of federal LGBTQ+ protections is still underinclusive and potentially unreliable. This lack of comprehensive and concrete coverage at the federal level leaves LGBTQ+ people searching for more expansive and localized protections. Thus, advocates should follow a "both/and" approach—pursuing *both* the adoption of explicit SOGI protections in state law *and* the extension of *Bostock*'s reasoning to the myriad of federal and state laws that include sex-based antidiscrimination protections.

#### D. Kansas LGBTQ+ Protections

LGBTQ+ Kansans who face discrimination outside of the employment context (or have an employer who does not fall under Title VII's scope) are forced to rely on protections provided by the state. This could be protections provided state-wide, or protections provided city- or county-wide. Kansas offers protections at both the state and local level, but these protections share the same issues as the federal protections of unreliability and under-inclusivity.

##### 1. State-Level Protections

Kansas passed its state antidiscrimination law in 1953—the Kansas Act Against Discrimination (KAAD).<sup>159</sup> The purpose of the act is to "eliminate and prevent segregation and discrimination, or separation" in employment, housing, and public accommodations.<sup>160</sup> While KAAD has been updated over the years to include more protected classes and cover a broader range of public accommodations,<sup>161</sup> the law still does not include SOGI protections.<sup>162</sup>

While KAAD has yet to be amended to explicitly include these protections, the Kansas Human Rights Commission—the executive agency

---

<sup>156</sup> Oakley, *supra* note 152.

<sup>157</sup> KAN. STAT. ANN. § 44-1002(b) (West, Westlaw, through 2020 Reg. Sess.) (emphasis added).

<sup>158</sup> *Bostock v. Clayton Cty.*, 140 S. Ct. 1739, 1754 (2020).

<sup>159</sup> *Records of the Kansas Commission on Civil Rights*, KAN. HISTORICAL SOC'Y, <https://www.kshs.org/dart/units/view/215783> [<https://perma.cc/QBE7-HKKY>].

<sup>160</sup> KAN. STAT. ANN. § 44-1001 (West, Westlaw through 2020 Reg. Sess.).

<sup>161</sup> KAN. HISTORICAL SOC'Y, *supra* note 159.

<sup>162</sup> KAN. STAT. ANN. § 44-1001 (West, Westlaw through 2020 Sess.). This Act does ban discrimination on the basis of "race, religion, color, sex, disability, national original or ancestry . . . [or] familial status." *Id.*

tasked with investigating complaints of discrimination in the state—recently announced it will interpret *Bostock* to apply to KAAD.<sup>163</sup> The KHRC now “accept[s] complaints of ‘sex’ discrimination in employment, housing, and public accommodations wherein allegations include discrimination based on LGBTQ and all derivatives of ‘sex.’”<sup>164</sup> Under KHRC’s new policy, KAAD protects Kansans from SOGI discrimination in employment, housing, and public accommodations.<sup>165</sup> This decision came at the end of August 2020; the KHRC has not had time to publish and seek Board approval of a guidance document instructing how to institute this policy change.<sup>166</sup> As such, it is too soon to tell how this decision will impact the existence of LGBTQ+ discrimination in the state and the number of SOGI claims filed with the KHRC. However, KHRC’s interpretive expansion of KAAD certainly has the potential to achieve outcomes similar to those we would see from amending KAAD to explicitly include SOGI protections.

While this policy change is a necessary and positive step for LGBTQ+ rights in Kansas, it is not as effective and reliable as amending KAAD to explicitly include SOGI as protected categories. Without the words “sexual orientation” and “gender identity” actually listed in KAAD, the LGBTQ+ discrimination protections extended by the KHRC’s policy decision are only as reliable as the changing will of a Governor-appointed seven-member board.<sup>167</sup> There are safeguards built into the KHRC appointments—they must be congressionally approved, no more than four members can be from the same political party, and each member’s term is capped at four years.<sup>168</sup> However, that is little comfort when all it takes is four votes to overturn Kansans’ new access to LGBTQ+ discrimination protections.<sup>169</sup> Kansans deserve stability, continuity, and cohesion in Kansas antidiscrimination law. They reasonably seek to rely on stable rule of law rather than be at the mercy of shifting political winds in the Governor’s office.

Moreover, while the KHRC’s decision extends SOGI protections across Kansas, it does not guarantee LGBTQ+ Kansans will win in court. Those charged with SOGI discrimination may be able to pose a federalism argument—since KAAD is a state law, only the *legislature* can determine what it means and they should not be bound by the agency’s interpretation of *Bostock*.<sup>170</sup> Further, because these protections stem from an agency policy

---

<sup>163</sup> *Kansas Human Rights Commission Concurs with the U.S. Supreme Court’s Bostock Decision*, KAN. HUM. RTS. COMM’N (Aug. 21, 2020), <http://www.khrc.net/pdf/Kansas%20Human%20Rights%20Commission%20Concurs%20with%20the%20US%20Supreme%20Court%20Decision%20in%20Bostock%20v%20Clayton%20County.pdf> [https://perma.cc/P4YY-A6LW].

<sup>164</sup> *Id.*

<sup>165</sup> *See id.*

<sup>166</sup> *Id.*

<sup>167</sup> *See* KAN. STAT. ANN. § 44-1003(a) (West, Westlaw through 2020 Reg. Sess.); KAN. STAT. ANN. § 44-1004(3) (West, Westlaw through 2020 Reg. Sess.).

<sup>168</sup> KAN. STAT. ANN. § 44-1003(a) (West, Westlaw through 2020 Reg. Sess.).

<sup>169</sup> *See* KAN. STAT. ANN. § 44-1003(e) (West, Westlaw through 2020 Reg. Sess.).

<sup>170</sup> *See Separation of Powers—An Overview*, NAT’L CONF. STATE LEGISLATURES (May 1, 2019), <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx>

decision rather than state legislative amendment to KAAD, they do not hold the same power against mini-RFRAs in court that is outlined in the “State-Level Benefits” section below.<sup>171</sup>

## 2. Local-Level Protections

As stated previously, Kansas has sixteen LGBTQ+-inclusive city NDOs and one LGBTQ+-inclusive county NDO.<sup>172</sup> Combined, these NDOs protect thirty percent of the state’s population from SOGI discrimination in employment, housing, and public accommodations.<sup>173</sup> These protections are concentrated near the Kansas City metropolitan and surrounding areas.<sup>174</sup> The only NDOs outside of these areas are ordinances in Lawrence and Manhattan<sup>175</sup>—the two cities that house the state’s largest universities.<sup>176</sup> While each NDO protects against LGBTQ+ discrimination in these localities, the methods of enforcement and remedies vary.

Each NDO lays out a process for an aggrieved individual to make a formal administrative complaint, which is investigated by an appointed investigator, the locality’s Human Rights Commission, or the local department equivalent.<sup>177</sup> In a majority of the NDOs, if the investigation finds probable cause that an unlawful discriminatory practice occurred, the parties to the complaint will be subject to a hearing before the locality’s appointed hearing officer or Commission.<sup>178</sup> However, each NDO requires some attempt at conciliation and settlement between the parties prior to the hearing.<sup>179</sup> If settlement fails and the hearing officer or Commission finds that an unlawful discriminatory practice did occur, the complainant may be entitled to some sort of remedy.<sup>180</sup>

---

[<https://perma.cc/F9S6-RH4F>]. This argument would be rooted in the core concepts of federalism and separation of powers as discussed in this article.

<sup>171</sup> See *infra* Section IV.B.1, for a more robust discussion the strength of state antidiscrimination laws when up against state RFRAs. This discussion does not apply to the KHRC decision because it hinges on a battle of two state laws, not one state law and one agency policy interpreting a state law.

<sup>172</sup> *Kansas’ Equality Profile*, *supra* note 24.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* Ten of the fourteen NDOs are located within Johnson County. Two additional NDOs protect areas immediately surrounding the Kansas City metropolitan.

<sup>175</sup> See *id.*

<sup>176</sup> *Kansas’ Largest Colleges and Universities*, WICHITA BUS. J. (Nov. 10, 2017, 5:00 AM), <https://www.bizjournals.com/wichita/subscriber-only/2017/11/10/kansas-largest-colleges-and.html> [<https://perma.cc/CPE5-SEHS>].

<sup>177</sup> See, e.g., MISSION, KAN., CODE §§ 615.040(B), 615.010 (2000) (stating that a complaint filed under the Mission NDO will be submitted to an investigator, who is appointed by the Mayor and approved by City Council).

<sup>178</sup> See, e.g., MANHATTAN, KAN., CODE §§ 10-2, 10-22 (2016) (stating that upon finding probable cause and failing to settle the complaint, it will be set for a hearing in front of a hearing officer). The hearing officer under Manhattan’s NDO is a municipal judge. *Id.*

<sup>179</sup> See, e.g., LEAWOOD, KAN., CODE XI § 11-1104(h) (2019) (requiring the city investigator to notify the parties of a request for conciliation and settlement before referring the complaint to the city attorney for filing of ordinance violations in municipal court).

<sup>180</sup> See, e.g., MERRIAM, KAN., CODE § 35-53(j) (2019) (stating that if the hearing officer determines a violation occurred, the hearing officer *may* award the claimant actual damages or a

Due to preemption issues between federal law, state law, and local government ordinances, NDOs are left with limited enforcement powers and few remedial options.<sup>181</sup> Most NDOs cannot create a private right of action, meaning aggrieved parties cannot directly sue for backpay, damages, or other remedies.<sup>182</sup> Rather, they must rely on the appropriate local authorities to issue fines or alternative remedies under the localities' NDO.<sup>183</sup> Most of the state's local-level NDO remedies are limited to a capped civil fine and vary greatly by city and county. However, some NDOs offer actual damages if the hearing determines that discrimination did occur.<sup>184</sup> Some NDOs cap civil damages at \$500 and others extend civil damages as high as \$50,000 for repeat offenders.<sup>185</sup>

#### IV. HOW SHOULD WE SECURE STATE LGBTQ+ ANTIDISCRIMINATION PROTECTIONS?

It is clear from the continued existence of LGBTQ+ discrimination and under-inclusive federal LGBTQ+ protections that states must act to protect their LGBTQ+ populations in the interim. As more and more states pass broad religious exemption laws or consider other damaging religious protection legislation, state LGBTQ+ protection becomes even more important. The question, then, is how should states go about providing antidiscrimination protections? There are two main approaches states can take: (1) passing local-level NDOs across the state to create a patchwork of LGBTQ+ protections, or (2) passing a state-level LGBTQ+ antidiscrimination law. I argue that the latter approach is necessary to provide truly comprehensive LGBTQ+ protections in Kansas or any state with sweeping religious exemption laws.

##### A. *The Local-Level Approach*

Seventeen Kansas localities have already adopted this approach by expanding their existing NDOs to include SOGI protections.<sup>186</sup> While these are beneficial in the short term, local-level NDOs have numerous weaknesses that result in insufficient and ineffective protections for LGBTQ+ Kansans.

---

civil penalty of \$1,000, whichever is greater).

<sup>181</sup> See *Developments in the Law: Sexual Orientation and the Law. Pt. 2 of 2*, 102 HARV. L. REV. 1584, 1668 (1989); Iafolla, *supra* note 30.

<sup>182</sup> Iafolla, *supra* note 30.

<sup>183</sup> *Id.*

<sup>184</sup> See, e.g., ROELAND PARK, KAN., CODE § 5-1204(k) (2019) (allowing for remedies of actual damages or a civil penalty of \$500, whichever is greater); LAWRENCE, KAN., CODE § 10-108.15(B) (2019) (allowing for remedies of actual damages, "including damages caused by pain, suffering, and humiliation" in addition to a civil penalty).

<sup>185</sup> MANHATTAN, KAN., CODE § 10-23 (2016) (allowing the hearing officer to impose a civil penalty of no more than \$500); LAWRENCE, KAN., CODE § 10-108.15(B) (2019) (allowing the hearing officer to impose actual damages and a civil penalty of no more than \$10,000, if it is the respondent's first violation). The hearing officer can impose a penalty of up to \$25,000 if it is the respondent's second violation within five years. They can impose a penalty of up to \$50,000 if it is the respondent's third violation within seven years.

<sup>186</sup> *Kansas' Equality Profile*, *supra* note 24.

### 1. Local-Level Benefits

The most obvious benefit of local-level NDOs is that they better ensure equal protection for LGBTQ+ individuals in states lacking statewide protections.<sup>187</sup> Kansas localities' current NDOs provide LGBTQ+ antidiscrimination protections to more than 873,000 Kansans.<sup>188</sup> While underinclusive of the entire state population, these NDOs still create valuable safeguards for some LGBTQ+ Kansans and help combat disproportionately high rates of LGBTQ+ unemployment and homelessness within the state.<sup>189</sup>

Local government action, like LGBTQ+-inclusive NDOs, has proven impacts on state and federal legislation.<sup>190</sup> A study on the diffusion of policy ideas found that local-level action has the potential to influence peer jurisdictions and change state and federal legislation through what is called the “snowball effect.”<sup>191</sup> However, local-level action is only likely to “snowball” into a state law if there are motivated legislators and interest groups supporting the policy movement.<sup>192</sup> Otherwise, local-level action can have the opposite effect on the policy movement, acting as a “pressure valve” that halts the need for state-level action.<sup>193</sup> Kansas's local-level NDOs, therefore, can act as a statement of public support and have the potential to pressure the state legislature to pass LGBTQ+ antidiscrimination laws.

### 2. Local-Level Detriments

Local-level NDOs provide crucial protections to LGBTQ+ populations, but local government—regardless of its focus—necessarily creates a patchwork of laws that are inherently inconsistent and unreliable.<sup>194</sup> The existence of SOGI protections in some areas of a state but not others creates confusion in citizens and employers alike.<sup>195</sup> An employer or business owner in a state with patchwork protections will likely find it challenging to monitor and conform to the various federal, state, and local antidiscrimination laws.<sup>196</sup> LGBTQ+ antidiscrimination policies have proven benefits to employers:

---

<sup>187</sup> See ACLU OF KAN., *supra* note 28.

<sup>188</sup> *Kansas' Equality Profile*, *supra* note 24; *QuickFacts Kansas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/KS> [<https://perma.cc/2V9N-F4E4>]. The total population of Kansas is 2,913,314. *Id.* Only thirty percent of the state lives in areas with LGBTQ+-inclusive NDOs. *Kansas' Equality Profile*, *supra* note 24.

<sup>189</sup> See LGBT POLICY SPOTLIGHT: LOCAL EMPLOYMENT NONDISCRIMINATION ORDINANCES, MOVEMENT ADVANCEMENT PROJECT 1 (2015), <https://lgbtmap.org/file/policy-spotlight-local-NDOs.pdf> [<https://perma.cc/KTG9-H7ZK>]; MALLORY & SEARS, *supra* note 120, at 2–3.

<sup>190</sup> See DURSO ET AL., *supra* note 28, at 1–2.

<sup>191</sup> *Id.*

<sup>192</sup> Charles R. Shipan & Craig Volden, *Bottom-Up Federalism: The Diffusion of Antismoking Policies from U.S. Cities to States*, 50 AM. J. POL. SCI. 825, 826 (2006).

<sup>193</sup> *Id.* at 827.

<sup>194</sup> See e.g., Wong, *supra* note 29 (citing citizen frustration with the unpredictable layout of LGBTQ+ protections in Montana); Huddleston, *supra* note 29 (highlighting the problem of inconsistency in local-level privacy regulation); Allen, *supra* note 29 (stating local-level road regulation created confusion and compliance challenges).

<sup>195</sup> See Howland, *supra* note 33, at 932–33; Wong, *supra* note 29.

<sup>196</sup> Howland, *supra* note 33, at 932–33.

creating a more motivated and committed workforce,<sup>197</sup> improving employee health,<sup>198</sup> and lowering employer's legal expenses.<sup>199</sup> Therefore, most businesses are in support of LGBTQ+ antidiscrimination laws,<sup>200</sup> but require uniformity of antidiscrimination laws to more effectively apply them and reap the benefits.

Further, local-level NDOs can only protect those that live in specific localities. In Kansas, this encompasses individuals that live in Lawrence, Manhattan, or Kansas City and its surrounding areas.<sup>201</sup> However, as noted, Kansas is a majority-rural state with large amounts of the population living in majority-rural counties.<sup>202</sup> On average, majority-rural states are significantly less likely to be LGBTQ+-friendly or to have LGBTQ+ protections.<sup>203</sup> Further, these states are "significantly more likely to have harmful, LGBTQ-exclusive laws."<sup>204</sup> There are also fewer alternatives for employment, housing, and public services in rural areas, which means a lack of LGBTQ+ antidiscrimination laws disproportionately impacts rural LGBTQ+ people.<sup>205</sup>

The existing NDOs in Kansas leave seventy percent of the state's population without local LGBTQ+ antidiscrimination protections.<sup>206</sup> Many of these individuals are living in majority-rural counties with statistically poor LGBTQ+ climates, a higher likelihood of LGBTQ+ discrimination, and unreliable state SOGI discrimination protections.<sup>207</sup> Therefore, the people most susceptible to LGBTQ+ discrimination in Kansas and across the country are likely not covered under the local-level approach.

NDOs are also inherently weaker than state protections—for example, local government action is limited in its scope and enforcement power, leaving LGBTQ+-inclusive NDOs with limited remedial options.<sup>208</sup> Historical

<sup>197</sup> M.V. LEE BADGETT, LAURA E. DURSO, ANGELIKI KASTANIS & CHRISTY MALLORY, WILLIAMS INST., *THE BUSINESS IMPACT OF LGBT-SUPPORTIVE WORKPLACE POLICIES 15* (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-LGBT-Policies-Full-Report-May-2013.pdf> [<https://perma.cc/CW5N-VJFQ>].

<sup>198</sup> *Id.* at 9–11.

<sup>199</sup> Michaela Krejcova, *The Value of LGBT Equality in the Workplace*, GLAAD (Feb. 26, 2015), <https://www.glaad.org/blog/value-lgbt-equality-workplace> [<https://perma.cc/5CGS-WTR3>].

<sup>200</sup> *See id.*

<sup>201</sup> *Kansas' Equality Profile*, *supra* note 24. Besides the Lawrence and Manhattan NDOs, all of the Kansas NDOs are located in or around the Kansas City metropolitan area.

<sup>202</sup> MOVEMENT ADVANCEMENT PROJECT, *supra* note 30, at 4 (defining majority-rural states as states where, in a majority of the state's counties, a majority of people live in rural areas); U.S. CENSUS BUREAU, *KANSAS: 2010, POPULATION AND HOUSING UNIT COUNTS 1* (2012), <https://www.census.gov/prod/cen2010/cph-2-18.pdf> [<https://perma.cc/C7NE-ADPC>] (referencing Table 1 population statistics). The most recent census data available reports that 736,157 Kansans live in rural areas.

<sup>203</sup> MOVEMENT ADVANCEMENT PROJECT, *supra* note 30, at 55.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 54.

<sup>206</sup> *Kansas' Equality Profile*, *supra* note 24 (stating that only thirty percent of Kansas's population is fully protected from sexual orientation or gender identity discrimination by local ordinance).

<sup>207</sup> *See* MOVEMENT ADVANCEMENT PROJECT, *supra* note 30, at 54.

<sup>208</sup> *See* Mary Tuma, *Without Teeth, Are Nondiscrimination Laws Effective?: City Ordinance Aims to Protect LGBTQ Austinites, but the Punishment for Violators is Mild*, AUSTIN CHRON. (May 27,

concepts of preemption leave most local NDOs without the ability to grant claimants a private right of action, leaving claimants fate in the hands of local enforcement agencies who typically only have the ability to issue civil fines.<sup>209</sup> These federalism principles also raise concerns about NDOs strength when up against mini-RFRAs, as any contradictions between the two would be decided in favor of the state law. Without language like that in Indiana's RFRA—stating the law does not contradict existing LGBTQ+-protective regulations and barring individuals and businesses from using the mini-RFRA to discriminate in housing, employment, and public accommodations—local NDOs are vulnerable to mini-RFRA claims.<sup>210</sup> Further, NDOs are more susceptible to repeal than state laws.<sup>211</sup> In fact, two Kansas cities—Salina and Hutchinson—repealed their LGBTQ+-inclusive NDOs in 2012.<sup>212</sup>

Moreover, NDOs are vulnerable to state preemption laws that can gut local-level LGBTQ+ antidiscrimination laws completely.<sup>213</sup> State preemption laws ban local governments from passing more expansive antidiscrimination protections than what exists at the state level.<sup>214</sup> These laws, like the one in Arkansas referenced in Section II, allow anti-LGBTQ+ individuals to bypass local NDOs altogether.<sup>215</sup> Arkansas used its preemption law in 2017 to strike down a city ordinance that would have added SOGI protections to the city's NDO.<sup>216</sup> Preemption laws of this nature destroy the power of local governments to protect their LGBTQ+ citizens and have the potential to stop a local-level approach in any state without existing statewide SOGI protections.

### ***B. The State-Level Approach***

Currently, twenty-one states have laws explicitly prohibiting SOGI

---

2016), <https://www.austinchronicle.com/news/2016-05-27/without-teeth-are-nondiscrimination-laws-effective/> [<https://perma.cc/77NJ-V9PZ>]; Iafolla, *supra* note 30.

<sup>209</sup> Iafolla, *supra* note 30.

<sup>210</sup> See German Lopez, *How Indiana's Religious Freedom Law Sparked a Battle over LGBT Rights*, VOX (Apr. 2, 2015, 6:35 PM), <https://www.vox.com/2015/3/31/8319493/indiana-rfra-lgbt> [<https://perma.cc/4TK8-3TF9?type=imagehttps>]. However, Indiana's legislature introduced H.B. 1416 in January 2020, which would repeal the limiting language currently included in the state's mini-RFRA. H.B. 1416, 121st Gen. Assemb., 2d Reg. Sess. (Ind. 2020).

<sup>211</sup> See KAN. STAT. ANN. § 12-3013 (West, Westlaw through 2020 Reg. Sess.) (stating that a local ordinance can be repealed by a vote of the electors *or* the governing body itself); KAN. CONST. B. of Rts. § 2 (stating that a state law can only be repealed by the state legislature).

<sup>212</sup> Ring, *supra* note 30. Salina and Hutchinson both repealed the LGBTQ+-inclusive protections of their NDOs. Salina's ordinance had covered sexual orientation and gender identity; Hutchinson's ordinance had covered only sexual orientation.

<sup>213</sup> MOVEMENT ADVANCEMENT PROJECT, THE POWER OF STATE PREEMPTION: PREVENTING PROGRESS AND THREATENING EQUALITY 2 (May 2018), <http://www.lgbtmap.org/file/Preemption-Report-FINAL.pdf> [<https://perma.cc/6RKK-MMRF>].

<sup>214</sup> See, e.g., Day & Weatherby, *supra* note 5, at 921.

<sup>215</sup> *Id.*

<sup>216</sup> Kat Sieniuc, *Arkansas Supreme Court Strikes City's LGBT Protections*, LAW360 (Feb. 23, 2017), <https://www.law360.com/articles/895097/arkansas-supreme-court-strikes-city-s-lgbt-protections> [<https://perma.cc/6LSU-25RU>].

discrimination in employment, housing, and public accommodations.<sup>217</sup> These laws are mainly concentrated in coastal states, with all of the South and majority of the Midwest lacking state LGBTQ+ antidiscrimination laws.<sup>218</sup> State-level LGBTQ+ antidiscrimination laws, while an imperfect solution compared to comprehensive federal action, are still stronger, more reliable, and more effective than local-level NDOs.

### 1. State-Level Benefits

State LGBTQ+ antidiscrimination laws avoid the issues that arise from the patchwork nature of local NDOs. Though state LGBTQ+ protections cannot address the national “patchwork” of antidiscrimination laws, they can solve coverage and reliability problems within a state. If Kansas were to amend KAAD to include SOGI protections, every LGBTQ+ Kansan—including the most vulnerable rural populations—would be secure in their knowledge that they are protected from discrimination. Further, state uniformity of antidiscrimination standards would benefit businesses that operate in multiple cities or counties within the state.<sup>219</sup> Businesses would only have to look to the state requirements for discrimination protections, rather than comply with varying city and county NDOs. *Every* business—not just those operating in NDO-protected areas—could reap the benefits of a healthier and more motivated workforce<sup>220</sup> without having to invest time in monitoring and complying with the variety of LGBTQ+ antidiscrimination standards across the state.

Moreover, LGBTQ+ antidiscrimination protections from the state are significantly more reliable than local protections. There is a higher bar to repeal state laws than local government action, which makes state laws less vulnerable to an attack from the Religious Right. State laws are also not threatened by the state preemption laws cropping up across the country and destroying the possibility of local-level NDO protections.<sup>221</sup>

Another crucial benefit of the state-level approach is that state antidiscrimination laws have a significantly stronger chance of standing up to mini-RFRAs and other religious freedom attacks in court.<sup>222</sup> Kyle Velte’s *All Fall Down: A Comprehensive Approach to Defeating the Religious Right’s Challenges to Antidiscrimination Statutes* provides a complete background to this legal argument.<sup>223</sup> Unlike Kansas’s local-level NDOs, a state

---

<sup>217</sup> *Non-Discrimination Laws*, *supra* note 12. The 21 states are: Washington, Oregon, California, Hawaii, Nevada, Colorado, New Mexico, Minnesota, Iowa, Illinois, New York, Vermont, New Hampshire, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, and Virginia. Utah offers SOGI protections in housing and employment, but not public accommodations. *Id.*

<sup>218</sup> *See id.*

<sup>219</sup> *See* Howland, *supra* note 33, at 915 (explaining how employers operating businesses in multiple cities within a state face challenges complying with varying antidiscrimination standards that arise from the patchwork of local ordinances in a state).

<sup>220</sup> BADGETT ET AL., *supra* note 197, at 1.

<sup>221</sup> *See* MOVEMENT ADVANCEMENT PROJECT, *supra* note 213, at 2.

<sup>222</sup> *See generally* Velte, *supra* note 7.

<sup>223</sup> *Id.*

antidiscrimination law would not have to clear any preemption hurdles when up against the KPRFA. The legal challenge would instead focus on whether the state antidiscrimination law substantially burdens the religious beliefs of a business owner, landlord, or potentially a for-profit corporation.<sup>224</sup> The Supreme Court's RFRA analysis in *Hobby Lobby* focused on the concept of coercion—if compliance with the government action would “create or result in [a] ‘sin’” or valid religious objection, then the government action violated RFRA.<sup>225</sup> Essentially, the Court required a causal link between compliance with the government action and the “sin” alleged.<sup>226</sup>

Common religious objections against the LGBTQ+ community are that homosexuality and same-sex marriage are against God's will, and therefore “sins.”<sup>227</sup> However, compliance with state LGBTQ+ antidiscrimination laws that require businesses to employ, house, or serve an LGBTQ+ person in no way creates a causal link to the “sin” of homosexuality or same-sex marriage.<sup>228</sup> Imagine a lesbian couple orders wedding bouquets from a local flower shop whose owners' religious beliefs deem homosexuality and same-sex marriage as “sins.” The couple entered the store as lesbians who had the intent to marry. Whether or not they leave the store with a receipt for wedding bouquets, those facts do not change. Therefore, there is no way the store's acts could be interpreted as *creating* or *resulting* in the “sins” the owners allege burden their religious beliefs.<sup>229</sup> Regardless of whether the shop provides the couple with flowers, the couple will still be lesbians and still get married. There is no causal link between the owners' compliance and the “sins” they object to.<sup>230</sup>

Under this logic from *Hobby Lobby*, required compliance with a state LGBTQ+ antidiscrimination law arguably cannot be interpreted to violate a mini-RFRA and should defeat mini-RFRA claims or defenses in court.<sup>231</sup> This is an especially important benefit of state-level protections when considering twenty-one states already have mini-RFRAs and three more have proposed them.<sup>232</sup> Seventeen of those twenty-one states only offer local-level LGBTQ+ antidiscrimination protections, which are significantly less likely to survive a

---

<sup>224</sup> *Id.* at 25.

<sup>225</sup> *Id.* at 26.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> Velte, *supra* note 7, at 26–27.

<sup>229</sup> *See id.* at 26.

<sup>230</sup> *See id.*

<sup>231</sup> *See id.* at 26–27.

<sup>232</sup> *Religious Exemption Laws*, *supra* note 16. These 21 states are: Idaho, Arizona, New Mexico, Kansas, Oklahoma, Texas, Missouri, Arkansas, Louisiana, Illinois, Indiana, Kentucky, Tennessee, Mississippi, Alabama (by Constitutional amendment), Florida, South Carolina, Virginia, Pennsylvania, Connecticut, and Rhode Island. *Id.* The three states that have recently proposed mini-RFRAs are Georgia, Iowa, and West Virginia. *See* S.B. 221, 155th Gen. Assemb., Reg. Sess. (Ga. 2019); S. File 508, 88th Gen. Assemb., Reg. Sess. (Iowa 2020); H.B. 2985, 84th Leg., Reg. Sess. (W. Va. 2020).

RFRA claim or defense than state-level protections.<sup>233</sup>

Lastly, implementing state-level protections is unlikely to increase costs for a state.<sup>234</sup> A William's Institute report estimated that if Kansas added SOGI protections to KAAD, it would only create an additional thirty-one complaints each year.<sup>235</sup> This variation could easily be absorbed without a financial impact, as the average variance of complaints filed each year is fifty-four.<sup>236</sup> This small increase of complaints would neither be costly nor burdensome for the state to handle, with minimal impacts on state staff and resources.<sup>237</sup> Once the KHRC implements its recent policy decision regarding *Bostock*, we will be able to see if this financial impact analysis rings true. Additionally, the natural result of less discrimination in employment, housing, and healthcare is lower numbers of unemployment and homelessness, therefore creating less demand on the state's social safety nets of welfare, housing assistance, and healthcare programs.

## 2. State-Level Detriments

While state action is universally stronger than local action, there are still critiques of the state-level approach. Supporters of localism—a theory that proposes local governments should retain power over critical political and social issues within the locality—argue against state-level antidiscrimination laws.<sup>238</sup> Localism suggests municipal regulations, like local-level NDOs, promote democracy and “self-determination by territorial communities.”<sup>239</sup> Further, it would find local government better positioned to make policy decisions about social issues because the local government is able to understand and address the social climate within the community<sup>240</sup> and has more trust from the community.<sup>241</sup>

There is widespread support for LGBTQ+ antidiscrimination laws in the United States.<sup>242</sup> Since 2015, the support of such laws has hovered around

---

<sup>233</sup> *Religious Exemption Laws*, *supra* note 16; *Nondiscrimination Laws*, *supra* note 12 (select the “Public Accommodations” tab; then scroll down and select “Read the State-by-State Statutes” below the map to see each state’s respective antidiscrimination law). These 17 states are: Idaho, Arizona, Kansas, Oklahoma, Texas, Missouri, Arkansas, Louisiana, Indiana, Kentucky, Tennessee, Mississippi, Alabama, Florida, South Carolina, Virginia, and Pennsylvania. *Id.*

<sup>234</sup> *See, e.g.*, MALLORY & SEARS, *supra* note 121, at 9–10.

<sup>235</sup> *Id.* at 1.

<sup>236</sup> *Id.* at 10.

<sup>237</sup> *Id.* at 9–10.

<sup>238</sup> *See* Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 15–17 (2000) (discussing the increased efficiency, democracy, and community that arises from local rather than state action); Michael Hendrix, *The Case for Local Government*, REAL CLEAR POL'Y (Mar. 4, 2019), [https://www.realclearpolicy.com/articles/2019/03/04/the\\_case\\_for\\_local\\_government\\_111089.html](https://www.realclearpolicy.com/articles/2019/03/04/the_case_for_local_government_111089.html) [<https://perma.cc/ZU23-48Y2>] (arguing that local governments are “well-positioned” to protect constitutional and individual liberties).

<sup>239</sup> Briffault, *supra* note 238, at 15.

<sup>240</sup> *Id.* at 17; Hendrix, *supra* note 238.

<sup>241</sup> Hendrix, *supra* note 238.

<sup>242</sup> Molly Igoe, *Americans Show Widespread Support for LGBT Nondiscrimination Protections and Transgender Rights*, PUB. RELIGION RSCH. INST. (Oct. 1, 2019), <https://www.prii.org/spotlight/americans-show-widespread-support-for-lgbt-nondiscrimination-protections-and->

seventy percent nationally.<sup>243</sup> However, support also exists for religious exemption laws that would allow businesses to refuse LGBTQ+ people services based on a religious objection. Roughly one-third of Americans support these exemption laws.<sup>244</sup> In the context of wedding-based businesses, forty-one percent of Americans support such laws.<sup>245</sup> A localism approach to antidiscrimination protections would allow local governments to determine the scope of their protections based on the social climate and desires of the body politic within the locality. This ability to have hyper-localized input on policy decisions would be lost with the state-level approach.

An additional concern with the state-level approach is the challenge of passing a state LGBTQ+ antidiscrimination law. In Kansas, LGBTQ+ antidiscrimination bills have previously been introduced but never passed.<sup>246</sup> Many of the other twenty-nine states without state-level protections have attempted but failed to pass LGBTQ+-inclusive amendments to their state antidiscrimination laws.<sup>247</sup> However, a recent report shows high numbers of support for LGBTQ+ antidiscrimination laws in states without protections.<sup>248</sup> In Kansas, seventy percent of the population is in support of statewide LGBTQ+ antidiscrimination protections.<sup>249</sup>

## V. THE FUTURE OF LGBTQ+ ANTIDISCRIMINATION PROTECTIONS

### A. *Potential Federal Protections*

There have been attempts for decades to pass federal legislation that would expand and solidify LGBTQ+ antidiscrimination protections.<sup>250</sup> For example, the Equality Act was first introduced in 1974.<sup>251</sup> The original act, which only provided federal public accommodation and education protections

---

transgender-rights/ [https://perma.cc/CVH9-PPDU].

<sup>243</sup> *Id.*

<sup>244</sup> *Americans Overwhelmingly Oppose Allowing Business Owners to Refuse Service to Gay and Lesbian People for Religious Reasons*, PUB. RELIGION RSCH. INST. (June 4, 2018), <https://www.prii.org/spotlight/most-americans-oppose-religious-service-refusals-to-gay-and-lesbian-people/> [https://perma.cc/4EB9-97BS].

<sup>245</sup> *Id.*

<sup>246</sup> Jonathan Shorman, *Dozens of Kansas Lawmakers Seek to Ban Discrimination Against LGBT Individuals*, WICHITA EAGLE (Feb. 4, 2019, 11:04 AM), <https://www.kansas.com/news/politics-government/article225495620.html> (last visited Sept. 30, 2020).

<sup>247</sup> *See, e.g., Ariel Salk, Arizona Bills to Expand Non-Discrimination Protections to LGBTQ Have Bipartisan Support*, CRONKITE NEWS (Jan. 30, 2019), <https://cronkitenews.azpbs.org/2019/01/30/anti-discrimination-law/> [https://perma.cc/MJB6-N8VV]; Kyle Munzenrieder, *Florida LGBT Rights Bill Dead; Still Legal to Fire Someone for Being Gay*, MIAMI NEW TIMES (Feb. 10, 2016, 12:53 PM), <https://www.miaminewtimes.com/news/florida-lgbt-rights-bill-dead-still-legal-to-fire-someone-for-being-gay-8241066> [https://perma.cc/RFH9-A56S].

<sup>248</sup> GREENBERG ET AL., *supra* note 9, at 7.

<sup>249</sup> *Id.* at 16 fig.5.

<sup>250</sup> *See Steinmetz, supra* note 10 (describing the history of the Equality Act and the current attempt to pass the Act).

<sup>251</sup> *Id.*

for sexual orientation, took six years to receive a hearing and never passed.<sup>252</sup> Numerous versions of the Equality Act have been introduced since 1974, with various levels of LGBTQ+ antidiscrimination protections.<sup>253</sup> However, each version was either voted down or died before being brought to a vote.<sup>254</sup>

The current Equality Act—which provides explicit SOGI protections in housing, employment, education, public accommodations, jury service, federal programs, and credit—was passed by the House and received by the Senate on May 20, 2019.<sup>255</sup> It was then referred to the Committee on the Judiciary and has since received no action.<sup>256</sup> The current Equality Act was introduced with 287 original co-sponsors—more than any other piece of pro-LGBTQ+ legislation has received to date.<sup>257</sup> The bill has garnered high levels of public support, with reports finding roughly seventy percent of the country supports the Equality Act.<sup>258</sup> However, critics are still skeptical of the act's likelihood of success.<sup>259</sup> This is because Republican Senate Majority Leader Mitch McConnell controls whether the bill will be brought to a vote; if it is, it must collect a majority of the Republican-controlled Senate's votes.<sup>260</sup> LGBTQ+ advocates predict the Equality Act's road to passage is an uphill battle, facing significant push-back from Religious Right advocates and conservative legislators.<sup>261</sup>

Despite the *Bostock* ruling, LGBTQ+ advocates still back the Equality Act as necessary to solidify comprehensive antidiscrimination protections at the federal level.<sup>262</sup> The act would expand SOGI protections to areas like public accommodations, which is not explicitly covered by Title VII, as well as make clear the status of RFRA and other religious exemptions in antidiscrimination contexts.<sup>263</sup> Further, robust federal legislation like the Equality Act would be harder to overturn or weaken than the *Bostock* ruling.

Additional bills have been introduced in Congress that would provide piecemeal LGBTQ+ antidiscrimination protections.<sup>264</sup> The Customer Non-

---

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *The Equality Act*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/the-equality-act> [<https://perma.cc/H3XX-FL7J>]; *H.R. 5 – Equality Act*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/5/all-actions?overview=closed#tabs> [<https://perma.cc/D4KZ-7NLV>]. The House passed the Act by a vote of 236-173. *Id.*

<sup>256</sup> CONGRESS.GOV, *supra* note 255.

<sup>257</sup> HUM. RTS. CAMPAIGN, *supra* note 255.

<sup>258</sup> *Id.*

<sup>259</sup> *See, e.g.*, Steinmetz, *supra* note 10.

<sup>260</sup> *Id.*

<sup>261</sup> *See id.*

<sup>262</sup> Julie Moreau, *Supreme Court's LGBTQ Ruling Could Have 'Broad Implications,' Legal Experts Say*, NBC NEWS (June 23, 2020, 3:40 AM), <https://www.nbcnews.com/feature/nbc-out/supreme-court-s-lgbtq-ruling-could-have-broad-implications-legal-n1231779> [<https://perma.cc/M6P6-3MU9>].

<sup>263</sup> *Id.*

<sup>264</sup> *See Federal Legislation*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/federal-legislation> [<https://perma.cc/8GQ5-NGUH>].

Discrimination Act (CNDA) would amend the Civil Rights Act of 1964 to prohibit LGBTQ+ discrimination in public accommodations.<sup>265</sup> The CNDA was introduced to the House in May 2019, referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties in June 2019, and has since received no action.<sup>266</sup> The Fair and Equal Housing Act (FEHA), introduced in the House in April 2019,<sup>267</sup> would prohibit LGBTQ+ discrimination in housing.<sup>268</sup> FEHA was also referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties in May 2019 and has since received no action.<sup>269</sup>

### B. Potential State Protections

H.B. 2130—a bill amending KAAD to provide statewide SOGI protections—was introduced to the Kansas legislature in February 2019.<sup>270</sup> It was introduced with fifty-five sponsors—thirty-eight on the House bill and seventeen on the companion Senate bill.<sup>271</sup> Roughly seventy percent of the Kansas population supports amending KAAD to include LGBTQ+ protections,<sup>272</sup> suggesting the bill had a good chance of passing. However, H.B. 2130 died in committee in May 2020.<sup>273</sup> The bill faced opposition from the Religious Right almost immediately; advocates attacked the bill with their new “victim” rhetoric—framing themselves as victims who need religious exemptions from antidiscrimination laws to stop their religious liberties from being “infringed.”<sup>274</sup> Brittany Jones, Advocacy Director for the Family Policy Alliance of Kansas, said an LGBTQ+ antidiscrimination law would “target people of faith” and be “used as a sword” against people who want to live out their faith.<sup>275</sup>

Although this was not the state’s first failed attempt at amending KAAD to include SOGI protections, H.B. 2130’s failure does not signal an impossible path to amending KAAD. Previous bills of its kind in the state have been

---

<sup>265</sup> Customer Non-Discrimination Act, H.R. 2687, 116th Cong. (2019).

<sup>266</sup> *Id.*

<sup>267</sup> Fair and Equal Housing Act of 2019, H.R. 2402, 116th Cong. (2019).

<sup>268</sup> *Fair and Equal Housing Act*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/fair-and-equal-housing-act> [<https://perma.cc/Y7TL-5V9L>].

<sup>269</sup> Fair and Equal Housing Act of 2019, *supra* note 267.

<sup>270</sup> H.B. 2130, 2019 Leg., Reg. Sess. (Kan. 2019); Sherman Smith, *55 Kansas Lawmakers Sponsor Bills to Ban LGBT Discrimination*, TOPEKA CAP.-J. (Feb. 4, 2019, 1:58 PM), <https://www.cjonline.com/news/20190204/55-kansas-lawmakers-sponsor-bill-to-ban-lgbt-discrimination> [<https://perma.cc/TFE3-X3F6>].

<sup>271</sup> Jay Senter, *Shawnee Mission Area Lawmakers Lead Effort on Statewide LGBTQ Protections*, SHAWNEE MISSION POST (Feb. 5, 2019, 7:26 AM), <https://shawneemissionpost.com/2019/02/05/shawnee-mission-area-lawmakers-lead-effort-on-statewide-lgbtq-protection-bill-76827> [<https://perma.cc/XS7B-NHTY>]; *2019-2020 Legislative Sessions*, KAN. LEGISLATURE, [http://www.kslegislature.org/li/b2019\\_20/measures/hb2130/](http://www.kslegislature.org/li/b2019_20/measures/hb2130/) [<https://perma.cc/B2KX-YK6W>].

<sup>272</sup> GREENBERG ET AL., *supra* note 9, at 38 fig.11.

<sup>273</sup> KAN. LEGISLATURE, *supra* note 271 (noting H.B. 2130 died in committee on May 21, 2020).

<sup>274</sup> Shorman, *supra* note 246.

<sup>275</sup> *Id.*

defeated before passage as recently as 2017.<sup>276</sup> However, I argue the LGBTQ+ climate in Kansas and multiple other factors position the state to continue pursuing a SOGI-inclusive KAAD amendment and even find success.

First, Kansas currently has a democratic and LGBTQ+-friendly governor.<sup>277</sup> Additionally, the state recently elected its first openly LGBTQ+ representatives—Kansas House Representatives Brandon Woodard (D) and Susan Ruiz (D), as well as U.S. Congressional Representative Sharice Davids (D).<sup>278</sup> There still remains a staunch conservative stronghold in the Kansas legislature, but there are rumbles of a weakening core. For example, Kansas Senator Barbara Bollier—a former moderate Republican—switched to the Democratic party in December 2018, citing anti-LGBTQ+ sentiment from her former party as the “last straw.”<sup>279</sup>

As discussed in Section IV, local-level LGBTQ+ protections can “snowball” into state law *if* there are motivated legislators and interest groups supporting the policy movement. Reps. Woodard and Ruiz were the original sponsors of H.B. 2130, meaning for the first time in Kansas’s legislative history the amendment had openly-LGBTQ+ sponsors advocating for it. Additionally, grassroots LGBTQ+ advocacy group Equality Kansas was actively advocating for H.B. 2130’s passage through events like “Equality Day” at the state capitol.<sup>280</sup> While these facts clearly did not guarantee the bill’s passage, they do highlight the necessity for Kansas to capitalize on its most LGBTQ+-friendly political climate in history and zealously pursue a state-level LGBTQ+ antidiscrimination law that will more comprehensively protect LGBTQ+ Kansans. If anything, activists and legislators in the state can use H.B. 2130’s failure to provide insight into how to better weaponize local NDO advances and the KHRC policy change, the presence of LGBTQ+ legislators and activists in Kansas, and the growing support of LGBTQ+ people across the state and country.

Seven states have bills similar to Kansas’s H.B. 2130 pending in their legislatures that would expand the state’s LGBTQ+ antidiscrimination protections in employment, housing, and public accommodations.<sup>281</sup> Ten other

---

<sup>276</sup> KAN. LEGISLATURE, *supra* note 271 (noting H.B. 2130 was introduced in 2017 to amend KAAD to include SOGI protections, but died in committee).

<sup>277</sup> See Kathleen Sebelius, *Gov. Kelly’s Support of LGBT Rights is a Positive Step Forward for All Kansans*, WICHITA EAGLE (Jan. 17, 2019, 5:00 AM), <https://www.kansas.com/opinion/opn-columns-blogs/article224625325.html> (last visited Sept. 30, 2020).

<sup>278</sup> Annie Gowen, *In Conservative Kansas, Newly Elected Gay Legislatures Try to Make History*, WASH. POST (Dec. 29, 2018, 6:34 PM), [https://www.washingtonpost.com/national/in-conservative-kansas-newly-elected-gay-legislators-try-to-make-history/2018/12/29/de046259-9ea8-4e07-b80b-f5d5ceec5dbb\\_story.html](https://www.washingtonpost.com/national/in-conservative-kansas-newly-elected-gay-legislators-try-to-make-history/2018/12/29/de046259-9ea8-4e07-b80b-f5d5ceec5dbb_story.html) [<https://perma.cc/SJ22-H33X>].

<sup>279</sup> *Id.*

<sup>280</sup> *Equality Kansas: End Discrimination Based on Sexual Orientation and Gender Identity*, EQUAL. KAN. (Jan. 28, 2019), <https://eqks.org/2019/01/28/equality-day-2019/> [<https://perma.cc/T2XA-LGRV>].

<sup>281</sup> *Legislative Tracker: Pro-LGBTQ Nondiscrimination Legislation*, FREEDOM FOR ALL AMERICANS, <https://www.freedomforallamericans.org/2020-legislative-tracker/2020-nondiscrimination-bills/> [<https://perma.cc/7CVR-8M2T>] (select the “Pro-LGBTQ+ Nondiscrimination Bills” tab underneath the “Navigate Legislative Tracker” section; scroll through the listed legislation to

states attempted to pass similar bills in 2019 and 2020, but all died in committee or were voted down.<sup>282</sup>

## VI. CONCLUSION

It is easy to believe that attacks on LGBTQ+ rights have dissipated. In fact, clear majorities of Americans believe it is illegal nationwide to discriminate against LGBTQ+ individuals in housing, employment, and health care.<sup>283</sup> After all, *Obergefell* solidified the right to same-sex marriage; the Religious Right abandoned its hateful and misleading rhetoric tactics;<sup>284</sup> and LGBTQ+ people are gaining more and more visibility.<sup>285</sup>

However, it is clear that this is not the case. The Religious Right simply created a more palatable narrative of “religious freedom” that is being used to attack LGBTQ+ rights in a myriad of ways.<sup>286</sup> Moreover, LGBTQ+ discrimination is widespread and pervasive—in Kansas and nationally.<sup>287</sup> This is not the time to be cavalier about LGBTQ+ protections in the United States. It is the time to seriously address the issue of LGBTQ+ discrimination, especially in the face of broad religious exemption laws.

To do this, it is necessary to analyze the effectiveness of existing protections. It is clear that, while local-level LGBTQ+ protections are valuable and necessary in the short term, they cannot be used to provide comprehensive and reliable antidiscrimination protections. This is especially true in states with broad religious exemption laws like Kansas, as they have the potential to invalidate local NDOs. If Kansas—or any state—wants to truly protect its LGBTQ+ citizens from discrimination, it must actively pursue and advocate for state-level LGBTQ+ antidiscrimination protections.

---

identify state antidiscrimination bill SOGI amendments). States with legislation pending currently: Arizona, Nebraska, Michigan, Ohio, Pennsylvania, North Carolina, and Georgia. *Id.*

<sup>282</sup> *Id.* (select the “Pro-LGBTQ+ Nondiscrimination Bills” tab underneath the “Navigate Legislative Tracker” section; scroll through the listed legislation to identify state antidiscrimination bill SOGI amendments). These states were: Alaska, Florida, Idaho, Indiana, Kentucky, Missouri, Mississippi, South Carolina, West Virginia, and Wisconsin. *Id.*

<sup>283</sup> Igoe, *supra* note 242. Sixty-seven percent of Americans believe it is illegal at the federal level for a business to fire or deny someone a job because they are LGBTQ+. *Id.* Sixty percent believe it is illegal at the federal level for a property owner to refuse to rent a property to someone because they are LGBTQ+. *Id.* Seventy-nine percent believe it is illegal at the federal level for a doctor or health care professional to refuse treatment for someone because they are LGBTQ+. *Id.*

<sup>284</sup> Velte, *supra* note 7, at 9.

<sup>285</sup> Gary J. Gates, *LGBT Data Collection Amid Social and Demographic Shifts of the U.S. LGBT Community*, 107 AM. J. PUB. HEALTH 1221 (2017) (noting the percentage of adults who openly identify as LGB doubled from 2008 to 2016).

<sup>286</sup> Velte, *supra* note 7, at 8–13.

<sup>287</sup> See MALLORY & SEARS, *supra* note 121, at 4; MEYER, *supra* note 108; JAMES ET AL., *supra* note 111, at 4–5.