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### State & Federal Religious Accommodation Bills: Overview of the 2015-2016 Legislative Session

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TO: Interested Parties  
FROM: Public Rights/Private Conscience Project  
RE: **State & Federal Religious Accommodation Bills:  
Overview of the 2015-2016 Legislative Session**  
DATE: September 20, 2016

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## I. Introduction

Since the Supreme Court's 2015 *Obergefell v. Hodges*<sup>1</sup> decision, which held that laws limiting marriage to opposite-sex couples were unconstitutional, opponents of marriage equality and LGBT rights have largely turned their attention to the enactment of religious exemption laws. These exemptions allow individuals and organizations to violate certain federal, state, and local laws and regulations that conflict with their religious faith. While some proposed bills are state-level variations<sup>2</sup> on the extremely broad and general federal Religious Freedom Restoration Act (RFRA),<sup>3</sup> passed in 1993, a new variety of legislation provides narrower accommodations specifically relating to religious views about sex, gender, and marriage. These bills, introduced at both the state and federal levels, would allow private and state actors to act in ways that would otherwise violate the law, so long as their actions are justified by a religious or moral belief about sex or marriage. The bills protect a huge range of behavior—from clergy members who refuse to officiate same-sex weddings<sup>4</sup> (something already protected by the First Amendment), to private businesses that deny essential services to anyone that does not meet a particular standard of sexual and reproductive morality. This memo provides an overview of the types of bills that were introduced over the past year.<sup>5</sup>

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<sup>1</sup> 135 S. Ct. 2584 (2015).

<sup>2</sup> H.B. 1180, 70th Gen. Assemb., Reg. Sess. (Colo. 2016); H.B. 401, 2016 Leg., Reg. Sess. (Fla. 2015); H.B. 29, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015); H.B. 218, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015); H.B. 129, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015); H.B. 837, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016); H.B. 1160, 28th Leg., Reg. Sess. (Haw. 2015); H.F. 2200, 86th Gen. Assemb., Reg. Sess. (Iowa 2016); H.F. 2032, 86th Gen. Assemb., Reg. Sess. (Iowa 2016); S.F. 2171, 86th Gen. Assemb., Reg. Sess. (Iowa 2016); S.B. 66, 119th Gen. Assemb., Reg. Sess. (Ind. 2016); H.B. 14, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 31, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 28, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 17, 2016 Leg., Reg. Sess. (Ky. 2016); S.B. 2822, 2016 Leg., Res. Sess. (Miss. 2016); S.B. 2093, 2016 Leg., Res. Sess. (Miss. 2016); S.B. 4, 98th Leg., Reg. Sess. (Mich. 2015); S.B.550/H.B. 348, 2016 Gen. Assemb., Reg. Sess. (N.C. 2015); H.B. 55, 52nd Leg., Reg. Sess. (N.M. 2016); S.B. 898, 55th Leg., Reg. Sess. (Okla. 2016); H.B. 1371, 55th Leg., Reg. Sess. (Okla. 2015); S.B. 440, 55th Leg., Reg. Sess. (Okla. 2015); S.B. 723, 55th Leg., Reg. Sess. (Okla. 2015); S.B. 2329/ H.B. 2375, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016); S.B. 11, 82nd Leg., Reg. Sess. (W. Va. 2016); H.B. 2508, 82nd Leg., Reg. Sess. (W. Va. 2016); H.B. 4012, 82nd Leg., Reg. Sess. (W. Va. 2016).

<sup>3</sup> 42 U.S.C. §§ 2000bb - 2000bb-4.

<sup>4</sup> These bills are often deemed “Pastor Protection Acts.” See, H.B. 16, 2016 Gen. Assemb., 436th Sess. (Md. 2016); H.B. 4858, 98th Leg., Reg. Sess. (Mich. 2015); S.B. 2093, 2016 Leg., Res. Sess. (Miss. 2016) (amending the state’s RFRA); H.B. 2000, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); H.B. 286, 131st Gen. Assemb., Reg. Sess. (Ohio 2015); H.B. 4446, 2016 Gen. Assemb., 121st Sess. (S.C. 2016); H.B. 4508, 2016 Gen. Assemb., 121st Sess. (S.C. 2016).

<sup>5</sup> Note that we have included many bills that have been pronounced “dead.” As legislators often introduce many versions of a similar bill, and since many bills pronounced dead in 2015 were re-introduced this year, we believe

## II. First Amendment Defense Acts

This past legislative session, Congress<sup>6</sup> and legislatures in eight states<sup>7</sup> introduced variations of the so-called First Amendment Defense Act, or FADA. These bills prohibit the government from taking so-called “discriminatory” action against any person or organization because of, for example, their “religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.”<sup>8</sup> Many state FADAs additionally protect the religious belief that “male and female refer to distinct and immutable biological sexes that are determinable by anatomy and genetics by the time of birth.”<sup>9</sup> Of course, *beliefs* are already protected from government discrimination under the First Amendment;<sup>10</sup> what’s more problematic is that the bills additionally protect *acts* motivated by such a belief, such as an individual’s or organization’s refusal to serve LGBT couples. It’s important to note that unlike many other exemption bills, FADAs do not merely shelter the denial of wedding-related services, such as cake and flowers, to same-sex couples. Rather, they typically give religious objectors free reign to withhold jobs, housing, services, or benefits to LGBT people or single parents in a wide range of settings. Below we discuss the forms of otherwise-illegal behavior that are protected by FADA, and which religious actors may seek protection under these laws.

### a. What Religiously-Motivated Acts are Protected

While most FADAs protect religious persons from government “discrimination,” how this is defined—and therefore to what extent religious objectors are protected—varies from bill to bill. While nearly every FADA sanctions anti-LGBT acts in the context of government-funded services, others protect nearly any otherwise-prohibited act by public or private actors that is motivated by a religious belief about sex or marriage.

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even those bills that will not be enacted this legislative session must be considered and analyzed. Additionally, since many bills fit more than one category, there is some overlap in the bills discussed within each section.

<sup>6</sup> H. R. 2802, 114th Cong (2016).

<sup>7</sup> H.B. 757, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016); H.B. 284, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016); H.B. 2181, 28th Leg., Reg. Sess. (Haw. 2016); H.B. 2532, 28th Leg., Reg. Sess. (Haw. 2016); S.B. 2164, 99th Gen. Assemb., Reg. Sess. (Ill. 2015); H.B. 2207, 86th Gen. Assemb., Reg. Sess. (Iowa 2016); H.B. 2211, 86th Gen. Assemb., Reg. Sess. (Iowa 2016); H.B. 1523, 2016 Leg., Res. Sess. (Miss. 2016); H.J.R. 96, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); H.J.R. 97, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); S.J.R. 39, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); H.B. 1107, 91st Gen. Assemb., Reg. Sess. (S.D. 2016); H.B. 773, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); S.B. 41, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); H.B. 2631, 64th Gen. Assemb., Reg. Sess. (Wash. 2016); H.B. 2752, 64th Gen. Assemb., Reg. Sess. (Wash. 2016).

<sup>8</sup> H. R. 2802, 114th Cong (2016).

<sup>9</sup> H.B. 2207, 86th Gen. Assemb., Reg. Sess. (Iowa 2016). *See also*, H.B. 2181, 28th Leg., Reg. Sess. (Haw. 2016); H.B. 1523, 2016 Leg., Res. Sess. (Miss. 2016); H.B. 1107, 91st Gen. Assemb., Reg. Sess. (S.D. 2016); H.B. 773, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); 2752, 64th Gen. Assemb., Reg. Sess. (Wash. 2016).

<sup>10</sup> *See, e.g.*, AID v. Alliance for Open Society International, 133 S.Ct. 2321 (2013) (holding that under the First Amendment, Congress could not require beneficiaries of a federal grant to sign a pledge explicitly opposing prostitution. Congress could, however, prohibit grantees from using government funds to promote the legalization of prostitution.).

### i. *Tax Exemptions & Government Grants*

In almost all cases, “discriminatory” government action against a religious objector is defined to include any State effort to change an entity’s tax status or withhold or deny a government grant, contract, or benefit.<sup>11</sup> This would essentially cut off the government’s ability to require that taxpayer funds are used to serve the public without regard to marital status or sexual orientation and gender identity. To give an example: under the federal FADA, if it were passed, the U.S. Department of Health and Human Services would be precluded from refusing to award Ryan White program funding, intended to provide legal and social services to people living with HIV/AIDS, to any organization that will not help LGBT or unmarried couples for religious reasons.<sup>12</sup> Allowing organizations that deny services to beneficiaries based on their sexual orientation, gender identity, or sexual practices to nevertheless receive government grants is problematic in any context; however this policy would be particularly harmful in small, rural, or highly religious communities with limited access to alternative services. It would also significantly impact the recipients of mandated services, like juvenile justice programs.<sup>13</sup> In communities where social services are limited, even a single faith-based organization’s decision not to assist LGBT individuals could essentially cut off access to benefits for that population. In such circumstances, the government would have no power under most FADAs to revoke a contract or grant with the provider. FADAs thus go much further than preventing “discrimination” against religious persons—they limit the government’s ability to adequately fund programs, encourage tolerance, and ensure that LGBT people have equal access to necessary services.

### ii. *Government Services*

Some FADAs additionally prevent the government from punishing government employees who speak about or act on their religious beliefs about sex and marriage. For example, Mississippi’s FADA-type law, H.B. 1523, forbids the state from taking any

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<sup>11</sup> H. R. 2802, 114th Cong (2016). *See also*, H.B. 284, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016); H.B. 2181, 28th Leg., Reg. Sess. (Haw. 2016); H.B. 2532, 28th Leg., Reg. Sess. (Haw. 2016); S.B. 2164, 99th Gen. Assemb., Reg. Sess. (Ill. 2015); H.B. 2207, 86th Gen. Assemb., Reg. Sess. (Iowa 2016); H.B. 1523, 2016 Leg., Res. Sess. (Miss. 2016); S.J.R. 39, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); H.B. 1107, 91st Gen. Assemb., Reg. Sess. (S.D. 2016); H.B. 773, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); H.B. 2631, 64th Gen. Assemb., Reg. Sess. (Wash. 2016); H.B., 2752, 64th Gen. Assemb., Reg. Sess. (Wash. 2016). Georgia’s H.B. 757, in contrast, provides that “government may enforce the terms of a grant, contract, or other agreement voluntarily entered into by [a] faith based organization.” H.B. 757, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016).

<sup>12</sup> At the very least, HHS would be required to *consider* such organizations on equal terms as organizations that provide services to LGBT and unmarried couples. Currently, grantees must comply with the U.S. Department of Health and Human Services Health Resources and Administration Application Guide, which states that in “any grant-related activity in which family, marital, or household considerations are, by statute or regulation, relevant for purposes of determining beneficiary eligibility or participation, grantees must treat same-sex spouses, marriages, and households on the same terms as opposite-sex spouses, marriages, and households, respectively.” *See* U.S. DEP’T OF HEALTH & HUMAN SERV. HEALTH RES. & SERV. ADMIN., SF-424 APPLICATION GUIDE 6 (Feb. 5, 2016) *available at* <http://www.hrsa.gov/grants/apply/applicationguide/sf424guide.pdf>.

<sup>13</sup> For example, FADAs could require that an organization that instructs incarcerated youth that LGBT relationships are immoral be considered eligible to receive government a contract for a juvenile justice program. Considering that LGBT minors are over-represented in the juvenile justice system, this would have a devastating impact. *See* James Swift, *LGBT Youth Over-Represented in Juvenile Justice System*, JUVENILE JUSTICE INFORMATION EXCHANGE (Jul. 17, 2012) *available at* <http://jjie.org/lgbt-youth-overrepresented-juvenile-justice-system/89743/>.

“discriminatory action against a state employee wholly or partially on the basis that such employee lawfully speaks or engages in expressive conduct based upon or in a manner consistent with a sincerely held religious belief or moral conviction.”<sup>14</sup> It also allows state employees who authorize or license marriages to “seek recusal from authorizing or licensing lawful marriages based upon... a sincerely held religious belief or moral conviction.”<sup>15</sup> H.B. 1523 was signed into law by Governor Phil Bryant, but has since been enjoined by a federal district court judge who found that the law likely violated the Equal Protection Clause and Establishment Clause of the U.S. Constitution.<sup>16</sup> While some legislatures have considered stand-alone bills that provide religious exemptions *only* to government workers, as will be discussed below, government employee exemptions are also incorporated into some state FADAs.

### iii. *Private Violations of Antidiscrimination and Other Laws*

Finally, some FADAs additionally define “discrimination” against religious objectors to include the administrative or judicial enforcement of private rights of action under applicable antidiscrimination or other laws. While there is currently no federal law that explicitly prohibits discrimination on the basis of sexual orientation or gender identity, some federal agencies and courts interpret existing sex discrimination laws to cover these categories.<sup>17</sup> Moreover nearly half the states and dozens of municipalities, including some where FADAs have been proposed, do have LGBT<sup>18</sup> or marital status<sup>19</sup> antidiscrimination laws. These laws are threatened by FADAs that adopt a broad view of government “discrimination.”

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<sup>14</sup> H.B. 1523, 2016 Leg., Res. Sess. (Miss. 2016).

<sup>15</sup> *Id.*

<sup>16</sup> *Barber v. Bryant*, No. 3:16-CV-417-CWR-LRA at 55 (S.D. Miss. Jun 30, 2016) (order granting preliminary injunction).

<sup>17</sup> Most of these cases apply in the employment context. *See, e.g.* *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012) (finding that Title VII of the Civil Rights Act prohibits discrimination based on gender identity); *David Baldwin v. Dep't of Transportation*, EEOC Appeal No. 120133080 (July 15, 2015) (finding that Title VII of the Civil Rights Act prohibits discrimination based on sexual orientation); U.S. EQUAL EMPL'T OPPORTUNITY COMM'N, Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII, [http://www.eeoc.gov/eeoc/newsroom/wysk/lgbt\\_examples\\_decisions.cfm](http://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm) (last visited Mar. 16, 2016). However LGBT persons may also have some protections under the Fair Housing Act. *See* HUD.GOV, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/LGBT\\_Housing\\_Discrimination](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination) (last visited Mar. 16, 2016) (“a lesbian, gay, bisexual, or transgender (LGBT) person's experience with sexual orientation or gender identity housing discrimination may still be covered by the Fair Housing Act”); *Thomas v. Osegueda et al.*, No. 2:2015cv00042 - Document 11 (N.D. Ala. 2015) *available at* <http://law.justia.com/cases/federal/district-courts/alabama/alndce/2:2015cv00042/154020/11/>. In addition, a lawsuit recently-filed by Lambda Legal has the potential to expand LGBT protections under the Fair Housing Act. *See* Chris Johnson, *New Lawsuit Asserts Anti-LGBT Bias Illegal in Housing*, WASHINGTON BLADE (Jan 16, 2016), <http://www.washingtonblade.com/2016/01/16/new-lawsuit-could-extend-lgbt-success-to-housing-discrimination/>. Note, however, that there are no protections against sex discrimination—and therefore against sexual orientation or gender identity discrimination—within federal public accommodations. *See* 42 U.S. Code § 2000a.

<sup>18</sup> *See* HAW. REV. STAT. §§ 378-2, § 489-3, § 515-3; WASH. REV. CODE. §§ 49.60.180, 49.60.215, 49.60.222; 775 ILL. COMP. STAT. 5/2-102, 5/3-102, 5/5-102; IOWA CODE §§ 216.6 - 216.8; City of Brookings, South Dakota Charter § 7.02(a)(1); City of Brookings, South Dakota Code of Ordinances § 2.63(k)(1); Sioux Falls, South Dakota Code of Ordinances § 39.042 (applies to government workers only); Arlington, Virginia County Code § 31-3; City Code of Alexandria, Virginia §§ 12-4-4, 12-4-5, 12-4-8; Atlanta, Georgia Code of Ordinances §§ 94-68, 94-97, 94-94; Savannah, Georgia Ordinance of 12-10-2015; ST. LOUIS, MISSOURI CITY ORDINANCE 67119; Kansas City, Missouri Code of Ordinances §§ 38-103, 38-105, 38-113.

Missouri’s S.J.R. 39, for example, which died in committee in April 2016, defines a forbidden government “penalty” to include any state or municipal action to “[r]ecognize or allow an administrative charge or civil claim against a religious organization or individual.”<sup>20</sup> The bill forbade the state from imposing any such penalty on a religious organization because it acted on its beliefs about sex and marriage. It would have thus precluded municipalities that had passed LGBT employment, housing, and public accommodations antidiscrimination ordinances from enforcing these ordinances against a religious organization. As will be noted below, religious organizations are defined broadly under the bill to include hospitals and other nonprofits.<sup>21</sup> S.J.R. 39 would also have barred antidiscrimination suits against individuals who refused to provide certain services for a wedding which they opposed.

Similarly, Georgia’s H.B. 757, which was vetoed by Governor Nathan Deal, stated that the “refusal by a faith based organization to hire or retain a person” for religious reasons “shall not give rise to a civil claim or cause of action against such faith based organization.”<sup>22</sup> This would have permitted religious organizations in Georgia to rigorously enforce a comprehensive behavioral code on everyone from an executive director to a janitor. Even if protected from discrimination under municipal law, Georgians would have had no recourse if they were fired due to their sexual orientation, gender identity, or status as an unmarried parent.

Other FADAs do not explicitly immunize religious persons from private civil discrimination claims, but nevertheless define government “discrimination” so vaguely that they could prevent the judiciary from enforcing such claims. The federal FADA, for example, contains a catch-all provision defining discriminatory action by the government as any action that would “otherwise discriminate against” a religious person or entity because of their beliefs about sex and marriage.<sup>23</sup> Several state FADAs define government “discrimination” to include any action to “[a]pply or cause to be applied, a fine, penalty, or payment assessed against” a religious objector.<sup>24</sup> Similarly, a FADA vetoed by Virginia Governor Terry McAuliffe would have prevented religious objectors from being subject to “any penalty, any civil liability, or any other action by the Commonwealth, or its political subdivisions or representatives or agents” on account of its religious beliefs.<sup>25</sup> A few FADAs define discrimination to include acts to “[i]nvestigate or initiate an investigation, claim, or administrative proceeding of” a religious

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<sup>19</sup> See HAW. REV. STAT. §§ 378-2, § 515-3; ILL. COMP. STAT. 5/2-102, 5/3-102, 5/5-102; WASH. REV. CODE. §§ 49.60.180, 49.60.222; VA. CODE ANN. §§ 2.2-3900, 2.2-3901.

<sup>20</sup> S.J.R. 39, 98th Gen. Assemb., Reg. Sess. (Mo. 2016).

<sup>21</sup> *Id.*

<sup>22</sup> H.B. 757, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016).

<sup>23</sup> H. R. 2802, 114th Cong (2016). See also, S.B. 2164, 99th Gen. Assemb., Reg. Sess. (Ill. 2015); H.B. 2631, 64th Gen. Assemb., Reg. Sess. (Wash. 2016). Later versions of the federal FADA do not contain this catch-all provision, but could nevertheless be interpreted broadly by courts to shelter religious organizations from private antidiscrimination lawsuits. See Testimony of Professor Katherine Franke before the House of Representatives Committee on Oversight and Government Reform Hearing on H.R. 2802 (July 12, 2016) *available at* [http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp\\_fada\\_testimony.pdf](http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_fada_testimony.pdf).

<sup>24</sup> See H.B. 2181, 28th Leg., Reg. Sess. (Haw. 2016). See also, H.B. 2207, 86th Gen. Assemb., Reg. Sess. (Iowa 2016); H.B. 1523, 2016 Leg., Res. Sess. (Miss. 2016) (“Impose, levy or assess a monetary fine, fee, penalty or injunction”); H.B. 1107, 91st Gen. Assemb., Reg. Sess. (S.D. 2016).

<sup>25</sup> S.B. 41, 2016 Gen. Assemb., Reg. Sess. (Va. 2016).

objector if they “would not otherwise be subject to such action.”<sup>26</sup> These definitions are so broadly worded that they may preclude any State efforts to hear or enforce a private lawsuit. For example, an employee seeking to sue her employer for sexual orientation discrimination could be prevented from doing so if a court finds that this would involve the government investigating, fining, or “otherwise discriminat[ing]” against the employer for his religious beliefs.

Antidiscrimination laws are not the only laws that could be affected these provisions. By preventing the government from punishing a person or organization that acts on its religious beliefs about sex and marriage, regardless of the consequence to others, FADAs could sanction a wide range of violations of contractual, civil, and even criminal law. For example, under the federal FADA, the government may be prevented from taking enforcement action against an employer that violates the law by refusing to provide health insurance coverage to the dependents of same-sex or unmarried parents, or against a retirement plan that refuses to provide required annuity benefits to same-sex spouses of plan beneficiaries.<sup>27</sup> Under Missouri’s S.J.R. 39, the ban on “recogniz[ing] or allow[ing] an administrative charge or civil claim” against religious objectors because of their beliefs could have prevented the state from enforcing private contracts. For example, the state could not recognize a civil claim against a religious employer for violating the “good cause” provision of a collective bargaining agreement if the employer fired a worker for marrying her same-sex partner. In fact, since the Missouri bill’s definition of a government penalty is non-exclusive, and since criminal prosecution by the state is clearly a type of government “penalty,” it’s arguable that the bill could have prevented the government from punishing religious objectors for violations of criminal laws—such as state or local criminal trespass, property damage, harassment, and assault laws—if motivated by religious opposition to marriage equality.

#### b. What Religious Objectors Are Covered

In addition to variations in *what* religious acts are sanctioned, FADAs also vary in *who* they cover. The federal FADA prevents the government from discriminating against any “person” because of their religious beliefs. The term “person” is defined extremely broadly, by reference to Title 1, Section 1 of the U.S. Code, to include “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”<sup>28</sup> Other FADAs are slightly narrower. Missouri’s S.J.R. 39, for example, defines a protected religious organization as a house of worship, a religious “society, corporation, entity, partnership, order, preschool, school, institution of higher education, ministry, charity, social service provider, children's home, hospital or other health care facility, hospice, elder care facility, or crisis pregnancy center, whether or not connected to or affiliated with a” denomination, “where said organization holds itself out to the public in whole or in part as religious and its purposes and activities are in whole or in part religious.”<sup>29</sup> It also covers any “clergy, religious leader, minister, officer, manager, employee, member, or volunteer of any” religious organization. Georgia’s H.B. 757 defines a

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<sup>26</sup> See H.B. 2181, 28th Leg., Reg. Sess. (Haw. 2016). See also, H.B. 2207, 86th Gen. Assemb., Reg. Sess. (Iowa 2016); H.B. 2532, 28th Leg., Reg. Sess. (Haw. 2016); H.B. 1107, 91st Gen. Assemb., Reg. Sess. (S.D. 2016).

<sup>27</sup> See Testimony of Professor Katherine Franke before the House of Representatives Committee on Oversight and Government Reform Hearing on H.R. 2802 (July 12, 2016) available at [http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp\\_fada\\_testimony.pdf](http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_fada_testimony.pdf).

<sup>28</sup> 1 U.S.C. § 1.

<sup>29</sup> S.J.R. 39, 98th Gen. Assemb., Reg. Sess. (Mo. 2016).

covered faith based organizations to include any “church, a religious school, an association or convention of churches, a convention mission agency, or an integrated auxiliary of a church or convention or association of churches, when such entity is qualified as an exempt religious organization under Section 501(c)(3) of the Internal Revenue Code,” making it more limited in scope than S.J.R. 39.<sup>30</sup> Thus while federal and state FADAs allow religious entities to violate the law in accordance with their faith, who is covered by these protections varies considerably from houses of worship and their auxiliaries to secular, for-profit businesses.

### III. Wedding Services Bills

Wedding services bills provide more discrete religious accommodations than FADAs, and exempt individuals and organizations from providing event space or services for, or otherwise participating in, LGBT weddings.<sup>31</sup> A number of bills apply not just to weddings between same-sex partners, but to any wedding that would violate the objector’s religious beliefs, such as non-religious, interfaith, or interracial weddings.<sup>32</sup> These bills may apply more narrowly to religious clergy and institutions only (sometimes deemed “Pastor Protection Acts”),<sup>33</sup> such as a Catholic university that rents out event space. Or they may apply more broadly to exempt any private, secular business owned by a religious person or group of people. A few bills cover only a subset of private businesses: at least two, for example, cover private businesses only when the services they provide “reflect creative or artistic expression.”<sup>34</sup>

Not only do these bills cut off legal recourse for LGBT couples under state antidiscrimination law, some bills would also preempt any rights same-sex couples may have under municipal antidiscrimination provisions. For example, in Florida—where a relatively narrow wedding service bill was signed into law by the Governor on March 10<sup>th</sup>, 2016—a religious organization’s refusal to provide wedding-related services to LGBT couples may not serve as the basis for any

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<sup>30</sup> H.B. 757, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016).

<sup>31</sup> H.B. 236/S.B. 120, 29th Leg., Reg. Sess., (Alaska 2016); H.B. 1123, 70th Gen. Assemb., Reg. Sess. (Co. 2016); H.B. 43/S.B. 110, 2016 Leg., Reg. Sess. (Fla. 2016); H.B. 756, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016); H.B. 2764, 28th Leg., Reg. Sess. (Haw. 2016); S.B. 180, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 597, 2016 Leg., Reg. Sess. (La. 2016); H.B. 4855, 98th Leg., Reg. Sess. (Mich. 2015); S.F. 2158, 89th Leg., Reg. Sess. (Minn. 2015); H.F. 2462, 89th Leg., Reg. Sess. (Minn. 2016); S.B. 2822, 2016 Leg., Res. Sess. (Miss. 2016); H.B. 737, 2016 Leg., Res. Sess. (Miss. 2016); H.B. 587, 2016 Leg., Res. Sess. (Miss. 2016); H.J.R. 96, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); H.J.R. 97, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); S.J.R. 39, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); H.B. 2040, 98th Gen. Assemb., Reg. Sess. (Mo. 2016); H.B. 296, 131st Gen. Assemb., Reg. Sess. (Ohio 2015); S.B. 440, 55th Leg., Reg. Sess. (Okla. 2015); H.J.R. 1059, 55th Leg., Reg. Sess. (Okla. 2016); S.B. 1328, 55th Leg., Reg. Sess. (Okla. 2016); H.B. 3150, 2016 Gen. Assemb., 121st Sess. (S.C. 2015); H.B. 2375/ S.B.2329, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016); H.B. 2631, 64th Gen. Assemb., Reg. Sess. (Wash. 2016).

<sup>32</sup> See, e.g., H.B. 1123, 70th Gen. Assemb., Reg. Sess. (Co. 2016); H.B. 756, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016); H.B. 2764, 28th Leg., Reg. Sess. (Haw. 2016); S.B. 180, 2016 Leg., Reg. Sess. (Ky. 2016).

<sup>33</sup> In a different approach, one state introduced a bill that would remove religious organizations entirely from the statutory definition of a public accommodation, thus exempting them from all state antidiscrimination law regarding the provision of services. See, H.B. 1773, 28th Leg., Reg. Sess. (Haw. 2015). Another state introduced a bill to remove religious organizations from the definition of “employer,” similarly stripping employees of all state antidiscrimination protections. See, S.B. 916, 98th Gen. Assemb., Reg. Sess. (Mo. 2016).

<sup>34</sup> H.J.R. 96, 98th Gen. Assemb., Reg. Sess. (Mo. 2016). See also, S.B. 180, 2016 Leg., Reg. Sess. (Ky. 2016) (“‘Protected activities’ means actions by people commissioned, employed, hired, retained, or otherwise used by the public or the government to provide customized, artistic, expressive, creative, ministerial, or spiritual goods or services...”).



civil or criminal cause of action, whether brought by an individual, a municipality, or the state.<sup>35</sup> Like FADAs, wedding services bills could additionally limit the enforcement of contractual law: for example, if a musician broke a contract to play at a wedding upon learning that the couple is of the same sex.

It's worth noting that in states where no state or local antidiscrimination laws have been passed, LGBT-specific wedding service exemptions purport to solve a problem that does not actually exist, since religious (and secular) individuals and institutions are already free to discriminate against LGBT couples. The bills therefore serve only to reinforce social stigma against LGBT persons under color of law. However by actively sanctioning anti-LGBT discrimination, such bills might actually encourage bias against same-sex couples. As a practical matter, wedding service exemptions may serve to cut off entirely LGBT couples' access to wedding-related services, especially in rural or religiously conservative areas.

#### IV. Government Worker Exemption Bills

This category of state bill is responsive to last summer's uproar over Kentucky County Clerk Kim Davis. After refusing to issue marriage licenses to same-sex couples at her county office following the Court's decision in *Obergefell*, Kim Davis was held in contempt of the law and briefly jailed, earning her national attention and praise from opponents of marriage equality.<sup>36</sup> This past legislative session, many states put forward bills that would have allowed government employees and officials—who represent the State and have sworn to uphold the law—to refuse to provide marriage licenses or solemnize weddings if doing so would violate their religious convictions.<sup>37</sup> Other bills would have changed or reduced the role of the state entirely in regulating marriage;<sup>38</sup> at least two of them sought to amend state law to allow *only* religious leaders, and not judges or government workers, to solemnize marriage.<sup>39</sup> Two states went so far as to introduce bills that would have punished government workers who followed the Constitution and recognized marriage equality, banned the use of funds to enforce court orders

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<sup>35</sup> H.B. 43/S.B. 110, 2016 Leg., Reg. Sess. (Fla. 2016) *codified as* Fla. Stat. Ann. § 761.061 (West 2016).

<sup>36</sup> See Jim Yardley & Laurie Goodstein, *Pope Francis Met With Kim Davis, Kentucky County Clerk*, in *Washington*, N. Y. TIMES, Sept. 30, 2015, [http://www.nytimes.com/2015/09/30/us/county-clerk-kim-davis-who-denied-gay-couples-visited-pope.html?\\_r=0](http://www.nytimes.com/2015/09/30/us/county-clerk-kim-davis-who-denied-gay-couples-visited-pope.html?_r=0); Dawn Ennis, *Kim Davis is Back in Court, Defiant as Ever*, ADVOCATE, Jan. 20, 2016, <http://www.advocate.com/marriage-equality/2016/1/20/kim-davis-back-court-defiant-ever>.

<sup>37</sup> H.B. 130, 2016 Leg., Reg. Sess. (Ala. 2016); H.B. 236/ S.B. 120, 29th Leg., Reg. Sess., (Alaska 2016); H.B. 401, 2016 Leg., Reg. Sess. (Fla. 2015); H.B. 14, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 17, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 31, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 28, 2016 Leg., Reg. Sess. (Ky. 2016); S.F. 2158, 89th Leg., Reg. Sess. (Minn. 2015); H.F. 2462, 89th Leg., Reg. Sess. (Minn. 2016); S.B. 440, 55th Leg., Reg. Sess. (Okla. 2015); S.B. 478, 55th Leg., Reg. Sess. (Okla. 2015); S.B. 1328, 55th Leg., Reg. Sess. (Okla. 2016); S.B. 116, 2016 Gen. Assemb., 121st Sess. (S.C. 2015); H.B. 3150, 2016 Gen. Assemb., 121st Sess. (S.C. 2015); S.B. 40, 2016 Gen. Assemb., Reg. Sess. (Va. 2016).

<sup>38</sup> S.B. 143, 2016 Leg., Reg. Sess. (Ala. 2016); H.B. 1041, 119th Gen. Assemb., Reg. Sess. (Ind. 2016); S.B. 5, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 572, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 4732, 98th Leg., Reg. Sess. (Mich. 2015); H.B. 4733, 98th Leg., Reg. Sess. (Mich. 2015); H.B. 1125, 55th Leg., Reg. Sess. (Okla. 2015); H.B. 2379/S.B. 2462, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016).

<sup>39</sup> H.B. 4732, 98th Leg., Reg. Sess. (Mich. 2015); H.B. 2379/S.B. 2462, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016).

requiring recognition of same-sex marriage, and, most incredibly, would have instructed state courts to dismiss any legal challenges to the clearly unconstitutional bills.<sup>40</sup>

These bills threaten to impose on LGBT couples seeking to wed both administrative barriers and pejorative treatment in state courthouses and other institutions of government. In some cases, the proposed exemptions would make same-sex and other couples' constitutional right to marry contingent upon their ability to find a public official who has no objection to their having such a right.<sup>41</sup> The proposed exemptions are all the more troubling considering that public employees and officials have a duty to impartially perform their duties and serve the public under state judicial codes of conduct,<sup>42</sup> oaths of office,<sup>43</sup> state constitutions,<sup>44</sup> and the federal constitution.<sup>45</sup>

## V. Context-Specific Exemption Bills

A final category of bills introduced this past year would have created a religious right to deny services to LGBT people in specific contexts. Some, for example, allowed foster care or adoption agencies to deny services to potential clients where providing these services would violate their sincerely-held beliefs.<sup>46</sup> In a few cases, agencies that choose to deny such services could nevertheless continue to receive government grants or contracts.<sup>47</sup> Two New Jersey bills would have required adoption agencies and the government, "to the maximum extent practicable," to place a child in an adoptive or foster home of the same religious faith as the

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<sup>40</sup> H.B. 1599, 55th Leg., Reg. Sess. (Okla. 2015); S.B. 805, 55th Leg., Reg. Sess. (Okla. 2015); S.B. 973, 55th Leg., Reg. Sess. (Okla. 2016); H.B. 3022, 2016 Gen. Assemb., 121st Sess. (S.C. 2016).

<sup>41</sup> Some bills contain a caveat that government employees need not solemnize a marriage "unless another employee or official is not promptly available and willing to provide the requested governmental service without inconvenience or delay." S.F. 2158, 89th Leg., Reg. Sess. (Minn. 2015). However not all bills contain any such limitation. *See, e.g.*, H.B. 14, 2016 Leg., Reg. Sess. (Ky. 2016) ("Solemnizing a marriage to which a person holds a sincere religious objection or which is contrary to that person's faith tradition due to the marriage being between persons of the same sex as biologically identified and recorded at birth shall be considered a substantial burden for which there is no compelling government interest and that person shall additionally be immune from any civil or criminal liability for declining to solemnize such a marriage."); S.B. 116, 2016 Gen. Assemb., 121st Sess. (S.C. 2015).

<sup>42</sup> *See, e.g.*, Canons of Judicial Conduct for the State of Virginia, Canon 2 ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"); Florida Code of Judicial Conduct, Canon 2; Minnesota Code of Judicial Conduct, Canon 2, Rule 2.2.

<sup>43</sup> *See, e.g.*, OKLA. CONST., Art. XV ("I, \_\_\_, do solemnly swear (or affirm) that I will support, obey, and defend the Constitution of the United States, and the Constitution of the State of Oklahoma, and that I will not, knowingly, receive, directly or indirectly, any money or other valuable thing, for the performance or nonperformance of any act or duty pertaining to my office, other than the compensation allowed by law; I further swear (or affirm) that I will faithfully discharge my duties as \_\_\_ to the best of my ability."); KY. CONST., § 228; ALA. CODE § 36-4-1.

<sup>44</sup> *See, e.g.*, Alaska Const. art. 1, § 1.1 ("all persons are equal and entitled to equal rights, opportunities, and protection under the law"); S. C. Const., art I. § 3 ("...nor shall any person be denied the equal protection of the laws.").

<sup>45</sup> NYC Transit Authority v. Beazer, 440 U.S. 568, 587 (1979) ("The Equal Protection Clause of the Fourteenth Amendment provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' The Clause announces a fundamental principle: the State must govern impartially.").

<sup>46</sup> H.B. 158, 2016 Leg., Reg. Sess. (Ala. 2016); S.B. 204, 2016 Leg., Reg. Sess. (Ala. 2016); H.B. 401, 2016 Leg., Reg. Sess. (Fla. 2015); S.B. 2822, 2016 Leg., Res. Sess. (Miss. 2016); L.B. 975, 104th Leg., Reg. Sess. (Neb. 2016); A. 2969/S. 72, 217th Leg., Reg. Sess. (N.J. 2016); A. 2974, 217th Leg., Reg. Sess. (N.J. 2016); S.B. 440, 55th Leg., Reg. Sess. (Okla. 2015).

<sup>47</sup> *See, e.g.*, H.B. 158, 2016 Leg., Reg. Sess. (Ala. 2016); L.B. 975, 104th Leg., Reg. Sess. (Neb. 2016); S.B. 440, 55th Leg., Reg. Sess. (Okla. 2015).

child, except at the written request of the child's birth parent or legal guardian.<sup>48</sup> In contrast, a Mississippi bill *forbade* the state from discriminating against foster or adoptive parents based on "the parents' instruction or raising of a child... in a manner consistent with [their] sincerely held religious belief."<sup>49</sup> This language, while not passed as a stand-alone bill, was also included in the larger Mississippi FADA that was signed into law and subsequently struck down.<sup>50</sup> It bars the state from considering parents' religious beliefs and practices at all, and could therefore prevent a child welfare agency from refusing to place LGBT foster children with anti-gay parents.

Other bills did or would have permitted religiously-motivated denial of health care or mental health counseling.<sup>51</sup> For example, Florida's H.B. 401 would have permitted health care providers and some health care institutions to refuse to "administer, recommend, or deliver a medical treatment or procedure that would be contrary to [their] religious or moral convictions," unless the patient is in "imminent danger of loss of life or serious bodily injury."<sup>52</sup> While this bill may have been intended to sanction the denial of contraceptive or abortion-related care, it could clearly be used to deny medical services to LGBT patients. These bills are particularly disturbing, as they allow medical professionals to refuse to provide necessary care to patients based on the patients' sexual orientation or gender identity. Since LGBT people and particularly LGBT youth experience a higher risk of bullying, harassment, and violence, it's vital that they have access to medical and mental health services.<sup>53</sup> Health care and counseling exemption bills prioritize the religious beliefs of trained professionals over the health and safety of potentially vulnerable clients, and many professional organizations, including the American Counseling Association, have spoken out against such "accommodations."<sup>54</sup> Nevertheless, Tennessee Governor Bill Haslam signed into law S.B. 1556, a counseling exemption bill, in April 2016.<sup>55</sup>

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<sup>48</sup> See A. 2926, 217th Leg., Reg. Sess. (N. J. 2016); A. 2974, 217th Leg., Reg. Sess. (N. J. 2016).

<sup>49</sup> S.B. 2822, 2016 Leg., Res. Sess. (Miss. 2016).

<sup>50</sup> H.B. 1523, 2016 Leg., Res. Sess. (Miss. 2016).

<sup>51</sup> H.B. 401, 2016 Leg., Reg. Sess. (Fla. 2015); H.B. 4309, 98th Leg., Reg. Sess. (Mich. 2015); S.B. 440, 55th Leg., Reg. Sess. (Okla. 2015); S.B. 292, 2016 Gen. Assemb., Reg. Sess. (Pa. 2015) (providing a religious exemption only with regards to the provision of certain sexual and reproductive health care that violates a provider's religious beliefs. While this may not appear to implicate LGBT rights, it would nevertheless provide medical providers with legal cover were they to deny, for example, a hysterectomy to a trans man, or in-vitro fertilization to a same-sex couple, because of the provider's religious beliefs about sexual orientation and gender identity.). See also S.B. 1556/H.B. 1840, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016); H.B. 556/ S.B. 397, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015).

<sup>52</sup> H.B. 401, 2016 Leg., Reg. Sess. (Fla. 2015).

<sup>53</sup> See CENTERS FOR DISEASE CONTROL AND PREVENTION, *Lesbian, Gay, Bisexual, and Transgender Health* (last updated Nov. 12, 2014), <http://www.cdc.gov/lgbthealth/youth.htm>.

<sup>54</sup> See AMERICAN COUNSELING ASSOCIATION, *ACA Takes Firm Stance Against Tenn. Bill That Would Allow Discrimination Within Counseling Profession* (Feb. 9, 2016), <https://www.counseling.org/news/updates/2016/02/09/aca-takes-firm-stance-against-tenn.-bill-that-would-allow-discrimination-within-counseling-profession>; TENNESSEE COUNSELING ASSOCIATION, *TCA Opposes House Bill 1840* (Mar. 3, 2016), <http://www.tncounselors.org/blog/2016/03/03/tca-opposes-house-bill-1840/>; Ryan Wilson, Tennessee Committee Hears Testimony on Counseling Discrimination Bill, HUMAN RIGHT CAMPAIGN (Feb. 25, 2016), <http://www.hrc.org/blog/tennessee-committee-hears-testimony-on-counseling-discrimination-bill>.

<sup>55</sup> S.B. 1556/H.B. 1840, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016); Steve Almasy, *Tennessee Governor Signs 'Therapist Bill' Into Law*, CNN.COM (Apr. 27, 2016), <http://www.cnn.com/2016/04/27/politics/tennessee-therapist-bill/>.

Finally, a handful of bills either prohibited state colleges and universities from “discriminating” against student groups that impose religious conditions on their members, or require that they do not so discriminate as a condition of receiving state funds.<sup>56</sup> One of these bills was signed into law in Kansas, and could require taxpayer funds to go to student groups that discriminate based on sexual orientation, gender identity, religion, or other traits.<sup>57</sup>

## VI. Conclusion

Only thirty-three years ago, Bob Jones University argued that it had the right to adopt a theologically-based policy that refused admittance to anyone in an interracial marriage, forbade students from membership in any organization that “advocate[d] interracial marriage,” and banned interracial dating on campus.<sup>58</sup> The University did not lift this policy until 2000 and did not formally apologize until 2008.<sup>59</sup> Now, individuals, non-profits, for-profits, and even government actors are again demanding the right not just to believe or express their opposition to marriage equality, but to discriminate without consequence against disfavored minority groups. The need for laws that purport to end “discrimination” against persons who themselves seek to discriminate is disingenuous at best. The bills are typically superfluous, misleadingly broad, and raise serious legal and constitutional problems. While the move away from state RFRA to seemingly-narrower accommodation bills may seem encouraging, many of these bills reach far beyond access to wedding cake, and could lead to widespread, religiously-motivated discrimination at work, home, school, and even the courthouse door.

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<sup>56</sup> A.B. 1212, 2016 Leg., Reg. Sess. (Cal. 2016); S.B. 175, 86th Leg., Reg. Sess. (Kan. 2015); S.B. 210, 2016 Gen. Assemb., 121st Sess. (S.C. 2015).

<sup>57</sup> See John Hanna, *New Law Signed by Gov. Sam Brownback Is Expected to Receive a Legal Challenge from Those Who Argue it Allows for Discrimination*, U.S. NEWS & WORLD REPORT, Mar. 22, 2016, <http://www.usnews.com/news/us/articles/2016-03-22/new-kansas-law-lets-campus-religious-groups-restrict-members>.

<sup>58</sup> See *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 580-81 (1983).

<sup>59</sup> See ASSOC. PRESS, *Bob Jones Univ. Apologizes for Racist Policies*, NBCNEWS.COM (Nov. 21, 2008), [http://www.nbcnews.com/id/27845030/ns/us\\_news-life/t/bob-jones-univ-apologizes-racist-policies/#.V9CN\\_PkrLcs](http://www.nbcnews.com/id/27845030/ns/us_news-life/t/bob-jones-univ-apologizes-racist-policies/#.V9CN_PkrLcs).