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Unmarried and Unprotected: How Religious Liberty Bills Harm Pregnant People, Families, and Communities of Color

Public Rights/Private Conscience Project

UNMARRIED & UNPROTECTED:

How Religious Liberty Bills Harm Pregnant People, Families, and Communities of Color

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I. Introduction

Increasingly, the long-standing national commitment to equality is being undermined by competing claims to religious liberty. Advocates, politicians, and the media have all documented the "wave of religious-freedom bills" introduced in recent years, "almost all inspired by objections to homosexuality and same-sex marriage."[1] In the 2015-2016 legislative session, dozens of bills were introduced at the state and federal levels that would have created exemptions to otherwise generally applicable laws, including antidiscrimination protections, for persons whose sincerely held religious beliefs conflict with those laws.[2] The most extreme version of these bills would allow religious objectors to engage in a wide range of harmful behavior, including denial of employment, housing, public benefits, and access to social services, free from legal consequences.

Those who object to this wave of religious liberty bills have largely framed them as a threat to the rights of same-sex couples to marry and to LGBTQ rights more generally. Less appreciated is the fact that what started as a resistance to marriage equality has blossomed into something much broader: the use of religious liberty as part of a large scale attack on sexual liberty and equality rights. Many proposed bills, for example, confer special protection for the religiously-motivated belief that sexual relations should only take place between married heterosexual persons. Most notably, the First Amendment Defense Act (FADA), which President Donald Trump has promised to sign,[3] would prevent the federal government from taking any action to punish or withhold benefits from religious objectors who act on their belief 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."[4] FADA and similar bills could permit religious objectors to deny jobs, healthcare, and other benefits or services to those who have had sex outside marriage. With more and more people opting not to marry, and to have children or live with partners outside of

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[1] Emma Green, *When Doctors Refuse to Treat LGBT Patients,* THE ATLANTIC (April 19, 2016), http://www.theatlantic.com/health/archive/2016/04/medical-religious-exemptions-doctors-therapists-mississippi-tennessee/478797/.

[2] PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT, *State & Federal Religious Accommodation Bills: Overview of the 2015-2016 Legislative Session* (Sept. 20, 2016), http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_exemption_overview_-_9.20.16.pdf.

[3] CAMPAIGN WEBSITE OF DONALD J. TRUMP, *Issues of Importance to Catholics* (Sept. 22, 2016), https://www.donaldjtrump.com/press-releases/issues-of-importance-to-catholics ("If I am elected president and Congress passes the First Amendment Defense Act, I will sign it to protect the deeply held religious beliefs of Catholics and the beliefs of Americans of all faiths.").

[4] FADA, H.R. 2802, 114th Cong. (2015). There are currently at least three versions of FADA. In addition to the version that has been formally introduced, another draft of FADA is available on U.S. Senator Mike Lee's website. *See* MIKE LEE U.S. SENATOR FOR UTAH, *Lee, Labrador Introduce Bill Protecting Religious Liberty* (Jun 17, 2015) http://www.lee.senate.gov/public/index.cfm/press-releases?ID=e42a7e9d-294b-423e-ac90-208212c766d0 [hereinafter, "FADA II"]. A third version is available on the website of Representative Raúl Labrador. *See* Press Release, Congressman Raúl Labrador, Committee Considers Labrador Bill To Protect Religious Freedom (July 12, 2016) *available at* https://labrador.house.gov/press-releases/committee-considers-labrador-bill-to-protect-religious-freedom/ [hereinafter, "FADA III"]. The particular religious beliefs protected by the third version of FADA are worded differently than the first two versions; FADA III protects the belief that "extramarital relations are improper." FADA III. Unless otherwise noted, all references to FADA in this memo refer to the introduced FADA.

marriage,[5] these measures could have a dire impact on the lives of thousands of American citizens. While such measures could harm anyone who has had sex while unmarried, the effects will be felt acutely by unmarried pregnant and parenting individuals.

This report will focus on ways in which overly broad religious exemptions threaten to roll back longstanding rights that prohibit discrimination on the basis of sex, pregnancy, familial status, and marital status. It will discuss the new religious exemption measures that are currently before Congress and that have been introduced in a number of state legislatures, with particular attention to their focus on sexual activity by unmarried people. These measures stand to limit the reach of federal and state antidiscrimination laws, including the Pregnancy Discrimination Act (PDA), Fair Housing Act (FHA), and Equal Credit Opportunity Act (ECOA), and would permit (if not encourage) mistreatment of unmarried pregnant people and parents. All people who have had sex while unmarried stand to be harmed by these bills, however women of color would particularly suffer their effects. Women of color already face disproportionately high rates of pregnancy discrimination and are statistically more likely to become pregnant and raise families while unmarried.[6] In addition, because most women of color earn less than white women,[7] and are less likely to have financial cushions, such as savings or family members who can lend them substantial financial support, the financial hardship faced by women of color who lose a job or home is often greater than for white women. The compounding effects of sexism and racism render women of color particularly vulnerable to the effects of measures that build into law a preference for a partisan view of sexual morality.

Not only are overly broad religious exemptions deeply destructive to unmarried families, they are also likely unconstitutional. These bills risk running afoul of the Establishment Clause of the First Amendment insofar as they accommodate religious belief by shifting material harms onto other private citizens, and amount to the state's endorsement of a religious viewpoint toward sex and sexuality.

II. Existing Protections for Pregnant & Parenting People

Many federal, state, and local measures currently protect against discrimination on the basis of pregnancy, familial status, and marital status. Most notably, the Civil Rights Act of 1964 prohibits pregnancy discrimination, while the FHA forbids discrimination on the basis of familial status (including pregnancy). State laws ban employment, housing, and public accommodations discrimination on the basis of these protected classes. While some existing laws currently contain

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[5] Stephanie Hanes, *Singles Nation: Why So Many Americans Are Unmarried,* THE CHRISTIAN SCIENCE MONITOR (June 14, 2015), http://www.csmonitor.com/USA/Society/2015/0614/Singles-nation-Why-so-many-Americans-are-unmarried; Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RESEARCH CENTER (Sept. 24, 2014), http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/ ("Adults are marrying later in life, and the shares of adults cohabiting and raising children outside of marriage have increased significantly.").

[6] NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, *The Pregnancy Discrimination Act, Where We Stand 30 Years Later* 5 (2008), http://qualitycarenow.nationalpartnership.org/site/DocServer/ Pregnancy_Discrimination_Act_-_Where_We_Stand_30_Years_L.pdf?docID=4281.

[7] Lydia O'Connor, *The Wage Gap, Terrible for all Women Even Worse for Women of Color,* HUFFINGTON POST (April 12, 2016), http://www.huffingtonpost.com/entry/wage-gap-women-of-color_us_570beab6e4b0836057a1d98a.

religious exemptions, they are typically narrow in scope, unlike the broad and unyielding religious exemptions that are currently being considered by Congress and state legislatures.

a. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 prohibits employers with fifteen or more employees from discriminating against—including firing, refusing to hire, or failing to promote—any employee based on sex.[8] The Pregnancy Discrimination Act (PDA) of 1978 amended Title VII to clarify that the definition of "sex" should include discrimination on the basis of "pregnancy, childbirth, or related medical conditions,"[9] and that "women affected by pregnancy, childbirth, or related conditions shall be treated the same for all employment-related purposes… as other persons not so affected but similar in their ability or inability to work."[10] The protections of the PDA cover all pregnant employees, regardless of their marital status. In addition, asking female job applicants or employees about their marital status or whether they have children can constitute sex discrimination.[11] While religious organizations are covered by Title VII,[12] there are two narrow exemptions that allow certain religious employers to avoid the non-discrimination protections contained in the law for employees who become pregnant while unmarried.

The first is a provision of Title VII itself which exempts religious organizations "whose purpose and character are primarily religious,"[13] from the Act's prohibition against *religious* discrimination. This exemption states that Title VII "shall not apply to… a religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion."[14] It therefore gives religious organizations the right to employ only those who share their faith and beliefs. The Equal Employment Opportunity Commission (EEOC), the

[8] 42 U.S.C § 2000e-2(a)(1) (2012).
[9] 42 U.S.C § 2000e(k). The PDA was passed in response to the Supreme Court decision in General Electric Company v. Gilbert, which held that discrimination based on pregnancy did not necessarily constitute unlawful sex discrimination. 429 U.S. 125 (1976).
[10] *Id.*
[11] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Pre-Employment Inquiries and Marital Status or Number of Children* https://www.eeoc.gov/laws/practices/inquiries_marital_status.cfm (last visited May 17, 2016).
[12] *See* 42 U.S.C. § 2000 e (b) (There is a religious organization exception within Title VII that allows religious organizations to give preference to members of their own religion. In addition, there is a ministerial exemption where "ministers" generally cannot bring claims under the federal employment discrimination laws, including Title VII. The report will discuss both of these exemptions later.).
[13] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Questions and Answers: Religious Discrimination in the Workplace*, https://www.eeoc.gov/policy/docs/qanda_religion.html (last modified Jan. 31, 2011).
[14] 42 USC§ 2000e-1. The Title VII religious exemption survived an Establishment Clause challenge in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, a case involving an employee who was fired from employment with the Church of Latter Day Saints for failing to qualify for a certificate that he was a church member. 483 U.S. 327, 335 (1987). He, along with other similarly situated employees, brought a class action suit against the Church for violating Title VII's prohibition against religious discrimination. The Church claimed its actions fell beyond Title VII's reach, asserting a statutory exemption, and moved to dismiss. The plaintiffs argued unsuccessfully that the exemption violated the Establishment Clause. Notably, the original House version of the Civil Right Act would have exempted religious organizations from Title VII entirely. However, the language contained in the final bill was amended to limit the exemption to the context of co-religionist hiring. *See* Duane E. Okamoto, *Religious Discrimination and the Title VII Exemption for Religious Organizations: A Basic Values Analysis for the Proper Allocations of Conflicting Rights*, 60 S. CAL. L. REV. 1375, 1377 (1987).

federal agency charged with interpreting and enforcing Title VII, has clearly defined the limits of this statutory exemption for religious organizations; employers are only allowed to discriminate in favor of co-religionists on account of their shared religious belief—they may not use religion as an excuse to discriminate on the basis of sex, race or any other protected class covered by the Act.[15] Setting the boundaries between religious preferences in hiring and sex or pregnancy discrimination has been challenging in some cases. For instance, nonprofit religious organizations (predominantly schools) have successfully argued that firing unmarried pregnant women constitutes permissible discrimination based on religious belief—namely the belief that sex outside of marriage is sinful—rather than impermissible sex discrimination.

For example, in *Boyd v. Harding Academy of Memphis, Inc*.,[16] a Christian school defended against a pregnancy discrimination suit by demonstrating that it applied its code of conduct against premarital sex equally to both men and women.[17] A federal appeals court found that the school had applied its policy in a non-discriminatory manner and dismissed the claim as falling within Title VII's religious exemption.[18] Thus, in some cases, religious organizations may be allowed to discriminate based on an employee's sexual activities—but only if they are covered by the Title VII exemption and only if they can show proof that employees who have sex while unmarried are treated equally, regardless of gender or pregnancy.

The second exemption to Title VII is even narrower. Under the Free Exercise Clause of the First Amendment, as interpreted by the Supreme Court in 2012 in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, religious organizations are completely immunized from certain workplace discrimination claims brought by "ministerial" employees.[19] While *Hosanna-Tabor*

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[15] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Questions and Answers: Religious Discrimination in the Workplace*, *supra* note 13 ("The [Title VII religious] exception does not allow religious organizations otherwise to discriminate in employment on the basis of race, color, national origin, sex, age, or disability. Thus, a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races.").

[16] *See* Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996).

[17] *Id.* at 415.

[18] For other cases that distinguish between discrimination based on pregnancy and discrimination based on a neutrally-applied ban on extramarital sex, *see* Hamilton v. Southland Christian School, 680 F.3d 1316 (11th Cir. 2012) (reversing a trial court's grant of summary judgment to a religious school that fired a teacher who became pregnant while unmarried, and finding that "Title VII does not protect any right to engage in premarital sex, but as amended by the Pregnancy Discrimination Act of 1978, Title VII does protect the right to get pregnant."); Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 658 (6th Cir. 2001) ("[t]he central question in this case, therefore, is whether [a religious school's] nonrenewal of Cline's contract constituted discrimination based on her pregnancy as opposed to a gender-neutral enforcement of the school's premarital sex policy. While the former violates Title VII, the latter does not."); Ganzy v. Allen Christian School, 995 F.Supp. 340 (E.D.N.Y. 1998) (holding that the First Amendment does not exempt religious schools from compliance with the Pregnancy Discrimination Act, and therefore firing a pregnant teacher could violate the law unless the school demonstrated she was fired because of violation of a moral code applied equally to male and female employees); Vigars v. Valley Christian Ctr. of Dublin, Cal., 805 F. Supp. 802, 808 (N.D. Cal. 1992) ([t]he fact that defendants' dislike of pregnancy outside of marriage stems from a religious belief… does not automatically exempt the termination decision from Title VII scrutiny"); Dolter v. Wahlert High Sch., 483 F. Supp. 266 (N.D. Iowa 1980).

[19] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 708 (2012). (Lutheran school could successfully raise "ministerial exception" as defense to elementary school teacher's claim that she was discriminated against on the basis of a disability.) *See also* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1966 (2007).

involved a claim of disability discrimination, it is typically assumed that the ministerial exception also applies to other discrimination claims, including sex discrimination.[20] The Supreme Court gave minimal guidance on how broadly to define the term "minister," but relevant factors include an employee's job title, whether the employee holds herself out as a minister, and whether she performs important religious functions.[21]

b. The Fair Housing Act & The Equal Credit Opportunity Act

Title VIII of the Civil Rights Act, also known as the Fair Housing Act, prohibits discrimination in the sale, rental, or financing of housing based on "familial status."[22] This protection covers persons who are pregnant, parents, and some caretakers living with a child under eighteen, regardless of their marital status.[23] Similar to the Title VII exemption, the Fair Housing Act has a narrow exemption that allows religious organizations to restrict the lease or sale of housing to co-religionists at any dwelling that they own or operate "for other than a commercial purpose."[24] While this exemption has not been substantially litigated, it could potentially allow exempted religious organizations to refuse to sell or rent to unmarried pregnant and parenting tenants, so long as this rule is motivated by religious faith and is applied equally to men and women. Furthermore, this exemption could not apply to purely commercial real estate that is merely operated by a religious organization.

The Equal Credit Opportunity Act is unique among federal antidiscrimination laws for including marital status discrimination in its broad prohibitions against discrimination in lending, and applies regardless of pregnancy or familial status.[25] The ECOA does not contain a religious exemption.

c. State Protections

Many states have enacted laws prohibiting pregnancy and marital status discrimination that are much broader than those contained in federal law. These laws are important because they oftentimes reach actors that are not covered by federal law, such as small employers, and prohibit discrimination against groups that are not explicitly protected under federal law.

Nearly every state has protections against pregnancy discrimination in employment.[26] In addition, twenty states (plus D.C.) prohibit employment discrimination based on marital status and three (plus D.C.) prohibit employment discrimination based on familial status.[27]

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[20] *See, e.g.,* McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir.1972).
[21] *Hosanna-Tabor*, 132 S. Ct. 694 at 708.
[22] 42 U.S. Code § 3604a.
[23] 42 U.S. Code § 3602k-2.
[24] 42 U.S. Code § 3607(a) ("Nothing in this subchapter shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin…").
[25] 15 U.S.C. § 1691. Similar provisions are imposed on foreign banks and cooperative banks. *See* 12 U.S.C.A. § 3106a; 12 U.S.C. § 3015(a)(4).
[26] See Appendix, Table 1.

Of these states, many have religious exemptions to these laws.[28] Most of these exemptions, like the Title VII religious exemption, are narrow and only allow religious organizations or educational institutions to give employment preferences to co-religionists. However several states exclude religious non-profit organizations from the statutory definition of "employer," exempting them entirely from state antidiscrimination requirements. No state exempts secular, for-profit organizations run by a religious individual from antidiscrimination laws. While religious exemptions in state antidiscrimination laws are common, they are not invulnerable to legal challenges.[29]

In addition, most states forbid housing discrimination based on pregnancy or familial status (which nearly always includes pregnancy), and nearly half forbid such discrimination on the basis of marital status.[30] Religious exemptions from state housing antidiscrimination laws are fairly common, but are narrow in scope and typically only allow religious non-profits to preference co-religionists.[31] Finally a number of states ban discrimination in public accommodations on the basis of sex, pregnancy, familial status, and marital status.[32] Religious exemptions to these laws are rare, and tend to exempt houses of worship or religious nonprofits from the definition of public accommodation.[33]

While religious exemptions from federal and state antidiscrimination laws are widespread, existing accommodations are typically narrowly confined to ensure only that religious entities are able to preference co-religionists. In contrast, as will be discussed below, FADA and other newly-introduced exemptions apply much more broadly.

III. The Impact of Religious Liberty Laws on Unmarried Pregnant and Parenting Persons

While existing law permits religious entities to make hiring and other decisions based on a person's sexual activities in certain narrow circumstances, newly-proposed exemptions risk greatly expanding the power of religious entities to do so.[34] In the wake of *Obergefell v.*

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[27] *Id.*
[28] *Id.*
[29] For example, a challenge to Washington's religious exemption from its antidiscrimination law, brought under a provision of the state constitution, resulted in a confusing split opinion. *See* Ockletree v. Franciscan Health System, 179 Wash. 2d, 769 (Wash. 2014).
[30] See Appendix, Table 2.
[31] *Id.*
[32] See Appendix, Table 3.
[33] *Id.*
[34] In addition to newly proposed religious accommodations bills, the increasingly-broad application of existing religious exemption laws also threatens to weaken laws protecting pregnant and parenting individuals from discrimination. A federal court recently interpreted the Religious Freedom Restoration Act (RFRA), a broad federal religious accommodation law, to provide secular employers with an exemption from antidiscrimination law. *See* EEOC v. R.G. & G.R. Harris Funeral Homes No. 14-13710, slip op. (E.D. Mich. Sept. 25, 2014). In this case, the court held that RFRA prevented the EEOC from enforcing Title VII's prohibition on sex-stereotyping against an employer who believed he "would be violating God's commands" by allowing a transgender female employee to wear skirt suits at work. *Id.* at 30. Among other forms of discrimination, the court's analysis could allow employers,

Hodges,[35] the 2015 Supreme Court decision that recognized a constitutional right to marry for same-sex couples, opponents of marriage equality have increasingly turned their attention to the enactment of religious accommodations that would sanction the non-recognition of this right. These measures would exempt those who oppose marriage equality and LGBTQ rights from compliance with a wide range of laws, including antidiscrimination laws, that conflict with their religious beliefs. Many of the bills not only allow religious objectors to discriminate against LGBTQ individuals, they also provide them with a legal right to deny jobs, homes, and services to those who have had sex outside of marriage. At least thirty bills introduced in the past legislative session either explicitly protect religiously-motivated acts related to beliefs about extramarital sex, or could be interpreted to do so.[36]

It is, of course, difficult to identify persons who have had sex outside of marriage; however one way to do so is the presence of a pregnancy or child outside of marriage. (We acknowledge, of course, the existence of in-vitro fertilization and other assisted reproductive technologies that enable fertility outside the narrow context of married heterosexual intercourse.) Therefore, while these bills have the potential to affect nearly anyone, they would have an especially clear and pernicious impact on unmarried pregnant persons and parents.

a. Federal Legislation

Probably the most significant bill that would allow for discrimination against unmarried pregnant and parenting persons is the First Amendment Defense Act (FADA).[37] FADA was introduced into Congress in 2015 by Senator Mike Lee (R-UT) and Representative Raúl Labrador (R-ID). The bill would prevent the government from penalizing, fining, or denying tax subsidies, grants, or benefits to individuals or groups because they act in accordance with a religious belief or moral conviction that marriage "is or should be recognized as the union of one man and one woman" and that "sexual relations are reserved for such a marriage."[38] In other words, the Act gives religious objectors the ability to place their own views about sexual and reproductive

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including large, secular companies not covered by the Title VII exemption, to violate federal law by firing any employee who becomes pregnant while unmarried.

[35] 135 S. Ct. 2584 (2015).

[36] *See* FADA; H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016); H.B. 757, 2015-2016 Leg., (GA. 2015); H.B. 2532, 28th Leg., Reg. Sess. (HI. 2016); H.B. 2181, 28th Leg., Reg. Sess. (HI. 2016); S.B. 2164, 99th Gen. Assemb. Reg Sess. (Ill. 2016); HB 1107, 91st Leg., Reg. Sess. (SD. 2016); H.B. 2752, 2016 Leg., Reg. Sess. (Wash. 2016); S.B. 284, 2015-2016 Leg., Reg. Sess. (GA. 2016)**;** 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, 16th Leg., Reg. Sess. (Ky. 2016); 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, 16th Leg., Reg. Sess. (Ky. 2016); H.B. 28, 16th Leg., Reg. Sess. (Ky. 2016); 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. 40, 2016 Gen. Assemb., Reg. Sess. (Va. 2016); H.B. 158, 2016 Leg., Reg. Sess. (Ala. 2016); S.B. 204, 2016 Leg., Reg. Sess. (Ala. 2016); S.B. 2822, 2016 Leg., Res. Sess. (Miss. 2016); L.B. 975, 104th Leg., Reg. Sess. (Neb. 2016); H.B. 4309, 98th Leg., Reg. Sess. (Mich. 2015)**;** S.B. 292, 2016 Gen. Assemb., Reg. Sess. (Pa. 2015); S.B. 1556/ H.B. 1840, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016); H.B. 397, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015); HB 537 131st Gen. Assemb., Reg. Sess.; H.B. 43, 2016 Leg., Reg. Sess. (Fla. 2016); H.B. 2375, 109th Leg. Reg. Sess. (Tenn. 2015-2016).

[37] H.R. 2802, 114th Cong. (2015). *See also* FADA II; FADA III.

[38] FADA, Sec 3 (1).

morality above the liberty and equality rights of others. President Trump has promised to sign the bill if passed.

As mentioned previously, FADA does not apply only to religious organizations. The Act defines a "covered person" to include both individuals and corporations, including secular, for-profit companies, and grants special immunities to those whose views on sexuality are based either on "religious belief" or "moral conviction."[39] By preventing the federal government from penalizing or fining persons who act on their religious or moral beliefs regarding sex and marriage, FADA would give objectors the green light to bypass a wide range of laws that are publicly enforced through eligibility rules, fines, and enforcement actions by, among others, the Internal Revenue Service (IRS), the Equal Employment Opportunity Commission (EEOC), the Department of Housing and Urban Development (HUD), and the Department of Health and Human Services (HHS).[40] For example, under FADA:

- Employers could decide to provide health coverage,[41] or particular mandated health benefits,[42] only to the children of married employees, although doing so would otherwise violate the health care coverage requirements contained in the Affordable Care Act (ACA) and the Employee Retirement Income Security Act (ERISA).
- Health insurance plans could restrict benefits for hospital stays following childbirth for unmarried mothers,[43] or deny health insurance coverage entirely to unmarried persons who are pregnant when they sign up for coverage.[44]

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[39] The definition of "person" in the introduced FADA contains no exceptions and is extremely broad. *See* H.R. 2802, 114th Cong. (2015) ("The term 'person' means a person as defined in section 1 of title 1, United States Code, and includes any such person regardless of religious affiliation or lack thereof, and regardless of for-profit or nonprofit status."). The latest version of FADA, available on Representative Raúl Labrador's website, exempts only Federal employees, Federal for-profit contractors, or medical providers "with respect to visitation, recognition of a designated representative for health care decision-making, or refusal to provide medical treatment necessary to cure an illness or injury" from its definition of "person." *See* FADA III. Another version of FADA, published on Senator Mike Lee's website, additionally exempts "publicly traded for-profit entities." *See* FADA II.

[40] Id.; Hearing on H.R. 2802, the First Amendment Defense Act (FADA): House of Representatives Committee On Oversight And Government Reform, 114 Cong. 4 (2016) (statement of Professor Katherine Franke, Columbia Law School).

[41] This would violate a provision of the tax code, which imposes tax penalties on any employer that does not provide health coverage to the dependents of its employees. 26 U.S.C. § 4980H (imposing penalties for any applicable large employer that "fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan.").

[42] This could violate provisions of the Employee Retirement Income Security Act (ERISA), which broadly regulates health benefits for workers and their families. 29 U.S.C. §§1001 *et. seq*. ERISA also creates a private right of action, yet FADA threatens to jeopardize the private enforcement mechanisms whereby plan participants and beneficiaries are able to sue their employers or unions that sponsor those group health plans if they violate these protections. *See* 29 U.S.C § 1132. As will be discussed below, FADA may be used in some cases as a defense within a private suit. *See infra*, fn. 50-52 and accompanying text. Further, federal enforcement provides important additional protections against ERISA violations. Additionally, it's worth noting that church plans are not subject to ERISA, but only to IRS enforcement. Thus under FADA, they would have even greater leeway to discriminate without consequence.

[43] This would violate provisions of the Newborns' and Mothers' Health Protection Act. *See* 26 U.S.C. § 9811. Note that this provision only applies to plans that have elected to cover childbirth.

[44] This would violate provisions of the tax code that prohibit health plans from excluding coverage for pre-existing conditions. *See* 26 U.S.C. § 9815.1; 45 U.S.C. § 300gg-3. Note, however, that while covered plans could not impose pre-existing condition exclusions, they could decide not to provide coverage for a particular benefit for all enrollees, regardless of whether the condition is pre-existing.

- Employers could terminate an employee for becoming pregnant while unmarried without fear of the EEOC investigating, enforcing, or providing a "right to sue" letter.
- A landlord could advertise that it will not rent to unmarried parents without fear of the Secretary of Housing and Urban Development investigating or enforcing the Fair Housing Act.[45]
- Banks could deny loans to cohabitating unmarried people and unmarried parents without fear of federal enforcement under the Equal Credit Opportunity Act (ECOA).[46]
- An employer could deny maternity leave to unmarried mothers and/or medical leave to unmarried parents whose children have health needs in violation of the Family and Medical Leave Act (FMLA) without fear of enforcement actions by Department of Labor Wage and Hour Division.[47]

Even worse, FADA could be interpreted to prevent the judiciary from hearing discrimination and other claims brought by private parties.[48] While at first glance FADA appears only to apply to lawsuits against or initiated by the federal government, four circuit courts have held that the Religious Freedom Restoration Act (RFRA),[49] a federal law with very similar language to FADA, may be used as a claim or defense in suits between private parties.[50] If this were to occur,

[45] Unlike with employment discrimination covered by Title VII, persons who have been discriminated against in violation of the Fair Housing Act do not need to obtain a "right to sue" letter to bring a private lawsuit. However, as will be discussed further below, some court interpretations of legislation similar to FADA suggest that the FADA may restrict the ability of individuals to bring private discrimination suits against religious objectors. *See infra*, fn. 50-52 and accompanying text.

[46] 15 U.S.C. 1691 et seq. Various federal agencies, including HUD, have the ability to enforce the ECOA, and the Department of Justice may sue where there is a pattern or practice of discrimination. See U.S. Department of Justice, The Equal Credit Opportunity Act https://www.justice.gov/crt/equal-credit-opportunity-act-3 (last updated Aug. 16, 2016).

[47] 29 U.S.C. §§2601 *et seq*. An employee who is wrongfully denied leave could attempt to bring a civil suit to enforce FMLA rights. 29 U.S.C. § 2617. However as will be discussed below, FADA may in some cases be used as a defense within a private suit. *See infra*, fn. 50-52 and accompanying text. Further, federal enforcement is an important protection for employees who face other barriers to filing a private suit.

[48] *See* the First Amendment Defense Act (FADA): House of Representatives Committee On Oversight And Government Reform, 114 Cong. 4 (2016) (statement of Professor Katherine Franke, Columbia Law School p. 11-12).

[49] 42 U.S.C. § 2000bb–1. RFRA states that the "Government shall not substantially burden a person's exercise of religion." Like FADA, it therefore appears on its face to apply only against actions taken by the federal government rather than by private parties.

[50] *See* Sara Lunsford Kohen, *Religious Freedom in Private Lawsuits: Untangling When RFRA Applies to Suits Involving Only Private Parties*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 43 (2011); *Hankins v. Lyght*, 441 F.3d 96 (2nd Cir. 2006) (holding that, at a minimum, RFRA should apply in suits brought by private parties where a government agency also could have sued). The *Hankins* court found that "permitting the assertion of the RFRA as a defense only when relief is also sought against a governmental party [] involves a convoluted drawing of a hardly inevitable negative implication." *Hankins*, 441 F.3d at 103. *See also In re Young*, 141 F.3d 854 (8th Cir. 1998) (allowing RFRA to be used as a defense within a private suit involving bankruptcy law); *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996) (applying RFRA equally to Title VII claims brought by EEOC *and* by a private plaintiff). The Ninth Circuit has taken a middle-of-the-road approach, holding that RFRA applies to private parties acting "under color of law" as that term is defined in 42 U.S.C. § 1983. *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9th Cir. 1999). The Supreme Court has not ruled on this issue. *See McGill v. General Conference Corporation of Seventh-day Adventists*, 563 U.S. 936, (2011) (denying writ of certiorari to a 6th Circuit case that held RFRA could not be used as a defense between private parties); *Christians v. Crystal Evangelical Free Church*, 525 U.S. 811 (1998) (denying writ of certiorari to an 8th Circuit case that upheld the use of RFRA in a suit involving private parties).

not only would the government be unable to enforce antidiscrimination laws, but employers, landlords, and others could use their religious or moral beliefs about sexuality to shield themselves from discrimination lawsuits brought by private individuals.

Furthermore, by forbidding the government from denying grants to persons that act on their religious or moral beliefs about sex and marriage, FADA would make it impossible for federal agencies to require that taxpayer dollars be spent in a nondiscriminatory manner. For example, the recipient of a Title X grant, a program intended to fund the delivery of comprehensive family planning services, could permissibly deny such care to unmarried patients. A domestic violence shelter that receives federal funds could similarly refuse to house unmarried pregnant women and parents. Currently, numerous provisions of federal law and policy impose nondiscrimination requirements on recipients of federal grants and contracts, including social service providers, hospitals, and universities.[51] Many of these laws prohibit sex discrimination, and at least one law explicitly discourages marital status discrimination by grantees.[52] If passed, FADA would not only allow private organizations to discriminate—it would allow them to bake discrimination into the provision of crucial government-funded services.

b. State Legislation

In addition to the federal FADA, a number of state legislators have introduced bills that allow persons with religious or moral objections to sex outside marriage to violate laws, such as antidiscrimination laws, that conflict with these beliefs.[53] Most of these bills have not made it out of committee;[54] however, there is a good chance that similar measures will be re-introduced in the coming legislative cycle. The bills vary widely in their specific terms, yet they all risk undermining the rights and well-being of people who have sex outside of marriage, in the name of protecting religious liberty.

A number of state exemption bills contain language similar to that of FADA, exempting individuals and organizations from compliance with state and municipal laws that conflict with their views about sex and marriage. Illinois' S.B. 2164, for example, would have forbidden the state and its localities from taking any "discriminatory action"—defined extremely broadly—against any person or corporation because it "believes or acts in accordance with a religious

[51] *See, e.g.* 42 U.S.C. § 18116 ("[A]n individual shall not, on the ground prohibited under Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance…"); 20 U.S.C. § 1681 ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"); 42 U.S.C. § 5672 (applying antidiscrimination requirements to grants funded by the Office of Justice Programs).

[52] *See* 42 U.S.C, § 12639 (providing that programs that receive federal financial assistance under the National Service Trust Program are evaluated to determine their effectiveness in "recruiting and enrolling diverse participants in such programs… based on …marital status.").

[53] HB 2532 2016 Leg. Reg. Sess. (HI. 2016); HB 2181, 2016 Leg., Reg. Sess. (HI. 2016); SB 2164, 2016 Leg., Reg Sess. (Ill. 2016); HB 1107, 2016 Leg., Reg. Sess. (SD. 2016); HB 2752, 2016 Leg., Reg. Sess. (Wash. 2016).

[54] HB 2532 2016 Leg. Reg. Sess. (HI. 2016); HB 2181, 2016 Leg., Reg. Sess. (HI. 2016); HB 1107, 2016 Leg., Reg. Sess. (SD. 2016).

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."[55] This could have prevented the state from enforcing a large number of laws intended to protect pregnant persons and parents. While antidiscrimination laws like the Illinois Human Rights Act would clearly be affected, if interpreted broadly it could also have prevented the State from enforcing basic health and other benefits, and even criminal laws, against those whose acts were motivated by a religious or moral opposition to non-marital sex.[56]

Other bills contain more narrow exemptions from antidiscrimination laws in particular contexts, such as in the provision of goods and services—particularly wedding-related services, adoption services, and counseling and health services.[57] These bills were likely written with the intent to sanction anti-LGBTQ discrimination, such as a wedding vendor, adoption agency, or marriage counselor that refuses to work with same-sex couples. Yet their broad language would have a much wider reach. Among other things, many of these bills, if enacted, would negatively impact unmarried pregnant persons and parents. For example:

- Florida's H.B. 401,[58] which provided a broad right to deny goods and services based on religious belief, would allow OB/GYNs to refuse to provide prenatal care to unmarried patents.[59]
- Oklahoma's S.B. 440 would (among other things) have allowed individuals and religious entities to refuse to "[p]rovide any services, accommodations, advantages, facilities, goods or privileges" if doing so would violate their religious beliefs "regarding sex, gender or sexual orientation."[60] This language could be read, for example, to allow a caterer to refuse to provide food for a baby shower for an unmarried woman.
- Mississippi's H.B. 1523 prohibited the government from taking "discriminatory action" against persons who decline to provide counseling or other medical services based on

[55] SB 2164 2015 Leg., Reg. Sess. (4a)(Il. 2015).

[56] For an explanation on how overly broad religious accommodation laws can sanction violations of criminal law, *see* PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT, *Missouri Constitutional Amendment SJR 39 Could Immunize Religiously-Motivated Crimes from Prosecution* (Apr. 18, 2016), http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/prpcp_sjr39_statement.pdf. In October 2016, an Indiana mother argued that under the state RFRA she should be exempted from prosecution for child abuse. The case was not ultimately litigated. *See* Kristine Guerra, *She Used Indiana's Religious Freedom Law As a Defense for Beating Her Son, Then Got Probation*, THE WASHINGTON POST (Oct. 30, 2016) https://www.washingtonpost.com/news/acts-of-faith/wp/2016/10/30/she-used-indianas-religious-freedom-law-as-a-defense-for-beating-her-son-then-got-probation/.

[57] H.B. 401, 2016 Leg., Res. Sess., (Fl. 2016) (adoption, healthcare); H.B. 2822, 2016 Leg., Res. Sess., (Miss. 2016) (adoption); H.B. 366, 2016 Leg., Res. Sess., (De. 2016) (healthcare); H.B. 1564, 2016 Leg., Res. Sess., (Il. 2016) (healthcare); S.B. 440, 2015 Leg., Res. Sess., (Ok. 2016) (healthcare); H.B. 4309, 2015 Leg., Res. Sess., (Mich. 2016) (healthcare); S.B. 292, 2015 Leg., Res. Sess., (Pa. 2015) (healthcare); H.B. 566, 2015 Leg., Res. Sess., (Tn. 2015) (counseling); H.B. 1840, 2016 Leg., Res. Sess., (Tn. 2016) (counseling); H.B. 2462, 2015-2016 Leg., Res. Sess., (MN. 2015-2016) (marriage); S.B. 478, 2015 Leg., Res. Sess., (Ok. 2015); S.B. 40, 2016 Leg., Res. Sess., (Va. 2016).

[58] H.B. 401, 2016 Leg. Reg. Sess. (FL. 2016).

[59] Id. at Section 2(2) "a health care provider, is not required to administer, recommend, or deliver a medical treatment or procedure that would be contrary to the religious or moral convictions or policies of the facility or health care provider. The facility or health care provider is not liable for such refusal, except when withholding the medical treatment or procedure places the patient in imminent danger of loss of life or serious bodily injury."

[60] S.B. 440, 2015 Leg., Reg. Sess. (OK. 2015).

their religious beliefs about sex.[61] Thus, for example, it would have allowed mental health care providers to refuse to counsel a family if the parents are not married. It also would have allowed government employees to refuse to provide marriage licenses or solemnize weddings if doing so would violate their religious convictions;[62] while clearly enacted as a response to marriage equality, this provision would have allowed state officials to refuse to marry a couple because they already had a child, a to-be spouse was pregnant, the couple shared the same residential address and thus had cohabitated prior to being married, or were an interracial or interfaith couple. This highly contested bill was signed into law by Governor Phil Bryant and subsequently enjoined by a federal court judge on the grounds that the law was likely to violate the Establishment Clause and Equal Protection Clause.[63]

- Nebraska's L.B. 975 focused exclusively on adoption services, and would have allowed organizations to refuse to place children with unmarried persons, regardless of their ability to care for a child.[64]

A final thing to emphasize about these bills is that many of them—in addition to limiting the scope and power of antidiscrimination laws—would have immunized certain private actors from liability in civil lawsuits. By affirmatively protecting the ability of employers, landlords, providers of public accommodation, and others to act in accordance with their views about sexual morality, these laws would have effectively stripped employees, renters, customers, and consumers of applicable contractually-created rights. For example, an employee could be fired from a religious hospital for having a child while unmarried despite the terms of a collective bargaining agreement that require "good cause" for a termination; a person whose family included a child that was born outside of a marriage would be vulnerable to eviction if their landlord objected to renting to "non-traditional families" for moral or religious reasons, even if their lease agreement and local landlord/tenant law prohibited eviction for reasons other than "just cause"; and a woman who hired a chain restaurant to cater her bridal shower would be unable to sue for breach of contract if the restaurant cancelled upon learning that she was pregnant.

On both the federal and state levels, there has been an increased effort to pass legislation that uses religious liberty rights to exempt private parties from a responsibility to comply with generally applicable laws. These bills would sacrifice antidiscrimination principles for the enforcement of sexual morality, and would cut off access to jobs, homes, services and benefits for unmarried families. While only a few of these bills have passed, their advocates remain undeterred and will continue to advance them on the state and local levels.

[61] Id at Section 3(4).
[62] H.B. 1523, 2016 Leg., Res. Sess., Section 3(8) (Miss. 2016).
[63] Barber v. Bryant, No. 3:16-CV-417-CWR-LRA at 55 (S.D. Miss. Jun 30, 2016) (order granting preliminary injunction); Madison Park, *Judge Blocks Controversial Mississippi Law,* CNN (July 1, 2016) http://www.cnn.com/2016/07/01/us/mississippi-religious-freedom-law-blocked/.
[64] L.B. 975, 2016 Leg. Reg. Sess. (NE. 2016).

IV. Impact of Newly Proposed Religious Liberty Laws on Women and Families of Color

FADA and similar laws will quite clearly harm the interests of the growing number of families that do not fit the "traditional" model of a married, different-sex couple.[65] Furthermore people of color, and especially African Americans, will be disproportionately harmed by such exemptions. African Americans have had a complicated and sometimes problematic relationship with the institution of marriage,[66] and among all large racial groups are least likely to be married[67] and have the highest rate of children born outside of marriage.[68] They therefore stand to be more negatively impacted than white people by laws allowing for discrimination based on sex outside marriage. In addition, women of color *already* face higher rates of pregnancy discrimination than white women,[69] and measures that weaken the scope and force of pregnancy antidiscrimination laws are likely to only exacerbate this disparity.

Over the past several decades there has been a shift in the public's attitude towards marriage that coincides with, and is perhaps driven by, a decline in religiosity.[70] Today, marriage is on the decline and a steadily increasing percentage of Americans are choosing not to marry, to marry later in life, or to live with a partner without marrying.[71] In 1960, about one-in-ten adults ages 25 and older had never been married; by 2012, that number had significantly increased to one-in-five adults (about 42 million people).[72] While the share of never-married adults has gone up for all large racial and ethnic groups in the U.S., the increase has been most evident among African Americans.[73] The share of African Americans ages 25 and older who have never been married

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[65] Hanes, *supra* note 5; Wang & Parker, *supra* note 5.

[66] For example, at the end of the Civil War, when formerly enslaved people gained the right to marry for the first time, freed Black people who entered into legal marriages were often harshly punished and disciplined when they followed pre-existing Black community norms for marriage, norms that were more flexible than were the marriage laws imposed on them by the larger society. KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY (2015).

[67] Wang & Parker, *supra* note 5.

[68] *See* U.S. DEP'T OF HEALTH & HUM. SERV'S, *National Vital Statistics Reports Births: Final Data for 2014* 41 (Dec. 23, 2015), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf. (in 2014 the percentage of births to unmarried women was as follows: 70.4 percent of births to African American women; 65.7 percent to Native American women; 52.9 percent to Hispanic women; 35.5 to White women and; 16.4 to Asian women). *See also* CHILD TRENDS DATABANK, *Births to Unmarried Women,* Appendix 1 (2015), http://www.childtrends.org/wp-content/uploads/2015/03/75_appendix1.pdf.

[69] NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, *By the Numbers: Women Continue to Face Pregnancy Discrimination in the Workplace* 3 (Oct. 2016), http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/by-the-numbers-women-continue-to-face-pregnancy-discrimination-in-the-workplace.pdf ("Nearly three in 10 charges of pregnancy discrimination (28.6 percent) were filed by black women, yet black women comprise only 14 percent of women in the workforce ages 16 to 54.").

[70] PEW RESEARCH CENTER, *U.S. Public Becoming Less Religious* (Nov. 3, 2015), http://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/.

[71] *See* Lydia Saad, *Fewer Young People Say I Do – to Any Relationship*, GALLUP (June 8, 2015), http://www.gallup.com/poll/183515/fewer-young-people-say-relationship.aspx (study shows that the percentage of young adults who report being single and not living with someone has risen dramatically in the past decade, from 52% in 2004 to 64% in 2014. The percentage of 30-somethings who are married has declined about 10 percentage points, the percentage living together has increased significantly -- nearly doubling from 7% to 13%).

[72] Wang & Parker, *supra* note 5.

[73] *Id.*

has quadrupled over the past half century, increasing from 9% in 1960 to 36% in 2012, while the percentage has doubled for whites, moving from 8% to 16%.[74] This discrepancy is partially explained by the fact that African Americans tend to marry later in life.[75] In addition, African American women are the least likely group of their racial counterparts to stay married.[76]

Wealth also plays an important factor in marriage rates. According to a recent study, wealth and asset ownership help to explain the race gap in first marriages, as individuals are more likely to marry someone on whom they can financially depend.[77] Because there are entrenched racial inequalities in wealth in the U.S., these findings offer another explanation for why African Americans and Latinos, who earn less than their white counterparts,[78] have lower marriage rates. The racial and socio-economic groups that are least likely to marry, or to marry early in life, are most likely to be harmed by broad religious accommodations that permit employment, housing, and benefits discrimination against unmarried partners and families. Also troubling is the fact that many of these bills have been introduced in southern states, where the concentration of African Americans is highest in the nation,[79] and the poverty rate among African Americans is deepening.[80] In other words, a large and growing number of African Americans will be subject to disproportionate harm under many of the recently proposed religious accommodation bills.

While all unmarried individuals may be affected by these new laws, unmarried individuals who are pregnant or have children are the most obvious and likely targets. This once again places women of color of reproductive age at disproportionate risk, since a higher number of women of color become pregnant while unmarried than white women.[81] The percentage of births to women who are not married is just over 70% for African American women, followed by 67% for Native American women and 53% percent for Hispanic women.[82] Again, poverty plays a significant

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[74] *Id.*

[75] Stephanie Hallett, *Marriage Rates Declining For Blacks, Less Educated: Study* THE HUFFINGTON POST (Dec. 20, 2011) http://www.huffingtonpost.com/2011/10/20/marriage-rates-declining-_n_1011035.html; Daniel Schneider, *Wealth and Marital Divide*, American Journal of Sociology, Vol. 117, No. 2, 627, 631 (Sept. 2011) http://users.cla.umn.edu/~uggen/schneider_ajs_11.pdf.

[76] *See* PEW RESEARCH CENTER, *Pew Research Center, On Views of Race and Inequality, Blacks and Whites Are Worlds Apart* 29 (June 27, 2016), http://www.pewsocialtrends.org/files/2016/06/ST_2016.06.27_Race-Inequality-Final.pdf. In addition to economic disparities, discussed below, another reason for this disparity is the mass incarceration of men of color. *See* Franke, *supra* note 66 at 87 ("In thirty-two states more than one in ten young black men are in prison, and in ten states one in six young black men is behind bars. With so few marriageable African American men, African American women are making other choices about love and family.").

[77] *See* Schneider, *supra* note 75 at 628.

[78] *See* Eileen Patten, *Racial, gender wage gaps persist in U.S. despite some progress*, Pew Research Center (July 1, 2016) http://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress.

[79] *See* U.S. CENSUS BUREAU*, 2010 Census Shows Black Population has Highest Concentration in the South* (Sept. 2011), https://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn185.html.

[80] Sue Sturgis, *Latest Census Numbers Show Deepening Southern Poverty* (Sept. 16 2011), https://www.facingsouth.org/2011/09/latest-census-numbers-show-deepening-southern-poverty.html.

[81] *See National Vital Statistics Reports Births: Final Data for 2014 , supra* note 68 at 41 (finding that the 2014 birth rate per 1,000 unmarried women was as follows: 61.5 for African American women, 68.5 for Hispanic women, 40.6 for white women, and 21.7 for Asian women).

[82] *Id. See also* Child Trends Databank, *supra* note 68, at Appendix 1.

correlating factor in these disparities.[83] Poverty also plays a factor in the ability to afford effective contraception.[84]

It's also important to note that women of color *already* face disproportionate rates of pregnancy discrimination in the workplace. A study by the National Partnership for Women & Families showed that from 1996 to 2005 the number of pregnancy discrimination complaints increased at a faster rate than the influx of women into the workplace.[85] Moreover, the study showed that this sharp increase was largely caused by pregnancy discrimination cases filed by workers of color. During this time, the number of pregnancy discrimination claims filed by workers of color increased by 76%, while pregnancy claims overall increased only 25%.[86] Rates of pregnancy discrimination remain high, and African American women continue to be disproportionately affected.[87] This discrepancy could be attributed to the fact that many pregnant people of color work in low-wage jobs, where discrimination is typically more overt.[88] Pregnant workers in low wage jobs have reported being fired on the spot and banned from certain positions.[89] However even amongst low-wage workers, women of color often face increased discrimination. One article examining discrimination claims brought by low-wage workers found that pregnant workers of color reported being denied access to accommodations—like temporary transfer to a less physically demanding position—that were routinely granted to their pregnant white coworkers.[90]

The higher rates of discrimination faced by pregnant women of color may be attributed to pervasive stereotypes about people of color generally, as well as gender role ideologies that are often racialized in pernicious ways. Workers of color, unmarried workers, and economically vulnerable workers are more likely to be viewed as irresponsible, which makes them more

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[83] See Rachel M. Shattuck and Rose M. Kreider, *Social and Economic Characteristics of Currently Unmarried Women With a Recent Birth: 2011* 1 U.S. CENSUS BUREAU (May 2013) https://www.census.gov/prod/2013pubs/acs-21.pdf ("Women and men who have children outside of marriage…have lower income than married parents").

[84] For example, because of their high cost, only 6% of Black women have used IUDs—the most effective form of contraception— compared with 78% who have used birth control pills. *See* Renee Bracey Sherman, *A Right to Contraception Without Access Is a Disaster for the Black Community,* RH REALITY CHECK (July 1, 2014), http://rhrealitycheck.org/article/2014/07/01/right-contraception-without-access-disaster-Black-community. The Affordable Care Act addressed this problem by mandating coverage for all forms of contraception without a copay. However the contraceptive mandate has been repeatedly challenged by individuals and corporations seeking a religious accommodation from the requirement, *See* Burwell v. Hobby Lobby Stores, Inc. 134 S.Ct. 2751 (2014); Zubik v. Burwell, 136 S.Ct. 1557 (2016); Wieland v. U.S. Dep't of Health & Human Services, 2016 WL 3924118 (E.D. Mo. 2016).

[85] *See* Nat'l Partnership for Women & Families, *The Pregnancy Discrimination Act, Where We Stand 30 Years Later*, *supra* note 6 at 3.

[86] *Id.* at 5. The report found that charges filed by Black women increased 45%, charges filed by Hispanic women increased 135%, charges filed by Asian/Pacific Islander women increased 90%, and charges filed by American Indian/Alaska Native women increased 109% while charges filed by White women declined by almost 16%.

[87] Nat'l Partnership for Women & Families, *By the Numbers: Women Continue to Face Pregnancy Discrimination in the Workplace, supra* note 69.

[88] Stephanie Bornstein, *Work, Family and Discrimination at the Bottom of the Ladder*, US LAW SCHOLARSHIP REPOSITORY, 16 (Winter 2012) http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1516&context=facultypub.

[89] Id at 16-22.

[90] Id. at 5.

disposable in the minds of their employers and therefore easy to fire or demote.[91] Women of color are caught in an impossible double-bind; they are more likely to be viewed as "irresponsible reproducers" and "while African American mothers are viewed more positively if they work. At the same time…[they] are more likely to be stereotyped as unreliable workers after becoming mothers."[92] Adding religious accommodations that allow employers and others to make judgments based on a person's sexual history on top of these existing class- and race-based inequalities will only exacerbate the discrimination that women of color face when they have and raise children when unmarried.

The share of American adults who have never been married is at an all-time high,[93] and an increasing number of adults do not wish to marry in the future. Overly broad religious accommodation laws that would allow religious objectors to discriminate against unmarried pregnant and parenting individuals in the workplace and in the provision of housing, benefits, and services would therefore harm a large and growing percentage of American families. This harm would be particularly great in communities of color, and most harmful to economically disadvantaged African Americans living in the South.

V. Overly Broad Religious Exemptions Violate the Establishment Clause

Efforts to place religious preferences above antidiscrimination norms run contrary to judicial precedent. The Supreme Court has held that the religion clauses of the First Amendment, which state "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,"[94] do not provide an absolute right to act in accordance with one's beliefs, religious, moral, or otherwise; rather, free exercise rights must be balanced against other fundamental rights. This is especially true when religious acts harm the rights of third parties.[95] For example, in *Newman v. Piggie Park*, a restaurant argued that enforcement of the 1964 Civil Rights Act constituted an "interference with the 'free exercise of the Defendant's religion,'" a claim the Supreme Court deemed "patently frivolous."[96] In *Bob Jones University v. U.S.*, the Court upheld the denial of tax benefits to a religious university that banned interracial dating. While the university argued that this policy was religiously motivated, and therefore protected by the First Amendment, the Court found that the government had a "fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[97]

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[91] *See* Deborah L. Blake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35,* Scholarly Commons at Hofstra Law, 106 (2013) http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1798&context=faculty_scholarship.
[92] Id.
[93] Wang & Parker *supra* note 5.
[94] U.S. CONST. amend. I.
[95] *See, e.g.,* U.S. v. Lee, 455 U.S. 252, 261 (1982) (denying a religious accommodation that would "operate[] to impose the employer's religious faith on the employees.").
[96] Newman v. Piggie Park, 390 U.S. 400, 402 fn 5 (1968).
[97] Bob Jones University *v.* U.S., 461 U.S. 574, 604 (1983).

Not only are discriminatory exemptions not required by First Amendment's Free Exercise Clause, they may in fact be unconstitutional as violations of the First Amendment's Establishment Clause. The Supreme Court has consistently held that religious accommodations that cause a meaningful harm to other private citizens violate the Establishment Clause.[98] Citing this precedent, a federal court recently found that Mississippi's H.B. 1523, a religious accommodation that contains language almost identical to the federal FADA, improperly harms others in violation of the Establishment Clause. In a decision ordering that a state law be preliminarily enjoined, the Southern District of Mississippi found that the law "violates the First Amendment because its broad religious exemption comes at the expense of other citizens."[99] Accommodations that permit religious objectors to deny jobs, homes, services and benefits to unmarried persons in violation of state and federal law clearly benefit religion at the expense of others' right to equality and liberty, and therefore violate the Establishment Clause.[100]

In addition, government actions may violate the Establishment Clause if they tend to express support for a particular religious faith or belief.[101] The applicable test in these cases is whether,

[98] *See* Estate of Thornton v. Caldor, 472 U.S. 703, 709 (1985) (holding a Connecticut statute giving workers the right to a Sabbath day of rest impermissibly advanced religion by "impos[ing] on employers and employees an absolute duty to conform their business practices to the particular religious practices of the [observing] employee"); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989) (internal quotations omitted) (holding that a state tax exemption for religious periodicals violated the Establishment Clause by forcing non-religious publications to "become indirect and vicarious donors" to religious entities); Cutter v. Wilkinson, 544 U.S. 709, 726 (2005) (upholding a religious exemption law while noting that accommodations need not be granted where they "impose unjustified burdens" on third parties or the State); Burwell v. Hobby Lobby Stores, Inc. 134 S.Ct. 2751, 2759 (2014) (upholding a religious accommodation under the Religious Freedom Restoration Act in while repeatedly emphasizing the fact that others' rights and interests would not be harmed). *See also* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion,* 49 HARV. C.R.-C.L. L. REV. 343, 357 (2014); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014); Board of Education of Kiryas Joel Village School District, 512 U.S. at 725 ("There is a point, to be sure, at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment.") (Kennedy, J., concurring).

[99] Barber v. Bryant, No. 3:16-CV-417-CWR-LRA at 55 (S.D. Miss. Jun 30, 2016) (order granting preliminary injunction). This case additionally found that the Mississippi FADA bill violated the Establishment Clause by improperly creating "an official preference for certain religious beliefs over others." *Id.* at 47. On its face, the opinion notes, the bill provides "special privileges to citizens who hold" particular religious beliefs about sex and marriage. *Id.* at 49. The same could be said of many religious exemptions that provide specific accommodations for the religious belief that sex should only occur in the context of an opposite-sex marriage.

[100] The Supreme Court has upheld one religious accommodation that clearly imposes harms on third parties, in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). This case held that the religious exemption of Title VII, which permitted co-religionist hiring, did not violate the Establishment Clause. However *Amos* is properly understood as protecting the "Church's ability to propagate its religious doctrine." *Id.* at 337. In contrast, broad FADA-like laws would exempt even large, secular companies from a range of antidiscrimination, health, and benefit laws.

[101] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 687 (1984) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community") (O'Connor, J., concurring); Santa Fe Independent School District v. Doe, 530 U.S. 290, 305 (2000) ("Contrary to the District's repeated assertions that it has adopted a 'hands-off' approach …the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion."); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 8 (1989) ("the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion

in light of the context and history of the relevant law or action, a reasonable observer would perceive a state endorsement of religion.[102] While this test is more typically used for expressive government actions (such as a religious display on government property), it has been invoked in religious accommodation cases where the state goes too far in accommodating the interests of religion.[103] In the Mississippi opinion mentioned above, the court found that H.B. 1523 violated this non-endorsement principle since "the State has put its thumb on the scale to favor some religious beliefs over others."[104] The risk of seeming to endorse a religious belief is even greater where accommodations are provided within government-funded and sponsored programs. Providing public funds to an organization that places religious restrictions on the use of those funds creates the perception that the government has endorsed the organization's religious beliefs.[105] For example, awarding a grant to an organization that, for religious reasons, explicitly refuses to provide services to unmarried parents could cause a reasonable observer to believe that the government supports the religious judgment that this population is sinful or unworthy of assistance. This violates the Establishment Clause, which forbids the government from supporting organizations that "impose religiously based restrictions on the expenditure of taxpayer funds, and thereby impliedly endors[ing] the religious beliefs of" those organizations.[106] The same problem arises with regard to religious exemptions advanced in the new wave of bills

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generally"); U.S. v. Lee, 455 U.S. 252, 263 fn. 2 (1982) (Stevens, J., concurring) ("The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.").

[102] *See* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) ("To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute."); Santa Fe Independent School Dist. v. Doe, 30 U.S. 290, 308 (2005) ("In cases involving state participation in a religious activity, one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools") (internal citations omitted).

[103] Caldor, 472 U.S. 703, 210 (1985) ("the Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of the Sabbath observance. All employees, regardless of their religious orientation, would value the benefit which the statute bestows on Sabbath observers… Yet Connecticut requires private employers to confer this valued and desirable benefit only on those employees who adhere to a particular religious belief…The message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it."); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 at 15 ("when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion" it "cannot but 'conve[y] a message of endorsement' to slighted members of the community.").

[104] Barber v. Bryant, No. 3:16-CV-417-CWR-LRA at 2 (S.D. Miss. Jun 30, 2016) (order granting preliminary injunction).

[105] Of course, the Supreme Court has held that not every grant given to a religious organization or group violates the Establishment Clause. The Court has typically upheld grants where secular services are provided to religious and secular institutions on a neutral basis. *See*, *e.g.*, *Mitchell v. Helms*, 530 U.S. 793 (2000). Permitting religious grant recipients to discriminate, however, is *not* a matter of merely providing funds for the same services in a neutral way. Rather, by permitting grant recipients to refuse to provide funded services to certain populations based on a religious belief, the government allows the grant recipients to redefine state programs in religious terms, to the benefit of religion, and to the detriment of non-adherents and program recipients.

[106] Am. Civil Liberties Union of Mass. v. Sebelius, 821 F. Supp. 2d 474, 488 (2012) (finding that it violated the Establishment Clause for a nonprofit to place religious conditions on the use of federal funds). *See also*
Dodge v. Salvation Army, 1989 WL 53857 (S.D. Miss. 1989) ("The [government] grants constituted direct financial support in the form of a substantial subsidy, and therefore to allow the Salvation Army to discriminate on the basis of religion…would violate the Establishment Clause of the First Amendment in that it has a primary effect of advancing religion and creating excessive government entanglement.").

that permit discrimination by government workers. To the extent that religious accommodations endorse religious beliefs about sexual morality or permit religious restrictions on the use of government funds, these bills violate the Establishment Clause. "At some point, accommodation may devolve into 'an unlawful fostering of religion.'"[107] Where the state embraces a particular religious approach to sexuality, as is the case in some of the religious liberty bills discussed in this report, it has gone too far: fostering, endorsing, and thereby promoting, a religious approach to sexuality that runs afoul of the Establishment Clause of the First Amendment.

VI. Conclusion

The expansion of existing religious exemptions and introduction of newly proposed religious accommodation laws pose serious threats to the rights of unmarried pregnant and parenting individuals and people who have had sex outside of marriage. Since the number of Americans who are unmarried and/or living with a partner is rapidly increasing,[108] these laws allow religious and moral objectors—including for-profit companies, government grantees, and government employees—to discriminate against a growing number of individuals in a wide range of contexts. If newly proposed religious accommodations prevail in state legislatures across the country and in Congress, religious objectors would be excused from compliance with a number of laws created to protect pregnant women, persons, and families, regardless of their marital status. Such legislation would negatively impact all women of reproductive age, however the heaviest burden would fall on women and families of color.

[107] Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334–335, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (quoting Hobbie, 480 U.S., at 145, 107 S.Ct. 1046).
[108] Hanes, *supra* note 5.

APPENDIX

TABLE 1. State Employment Antidiscrimination Laws

State	Pregnancy	Marital or Familial Status	Religious Exemptions
Alabama	X	X	N/A
Alaska	ALASKA STAT. § 18.80.220	ALASKA STAT. § 18.80.220 (covers marital status, changes in marital status, and parenthood)	ALASKA STAT. § 18.80.300 (excludes religious organizations from definition of employer)
Arizona	ARIZ. REV. STAT. § 41-1463(B) (covers sex, which has been interpreted to cover pregnancy)	X	ARIZ. REV. § STAT. 41-1462 (co-religionist hiring exemption for religious organizations)
Arkansas	ARK. CODE ANN. § 16-123-107 (covers gender, which is defined to include pregnancy, childbirth, or related medical conditions)	X	X
California	CAL. GOV. CODE § 12940 (covers sex and gender, which is defined to include pregnancy, childbirth, breastfeeding, and related medical conditions)	CAL. GOV. CODE § 12940 (covers marital status)	CAL. GOV. CODE § 12926(d) (excludes religious organizations from definition of employer)
Colorado	COLO. REV. STAT. § 24-34-402 (covers sex, which the Colorado Supreme Court has interpreted to include discrimination based on pregnancy)	X	COLO. REV. STAT. § 24-34-401(3) (excludes religious organizations from definition of employer, unless publicly funded)
Connecticut	CONN. GEN. STAT. § 46a-60	CONN. GEN. STAT. § 46a-60 (covers marital status)	X
Delaware	DEL. CODE. ANN. tit. 19 § 711	DEL. CODE. ANN. tit. 19 § 711 (covers marital status)	DEL. CODE. ANN. tit 19 § 710 (7) (co-religionist hiring exemption for religiously-affiliated educational institutions)
D.C.	D.C. CODE § 2-1402.11 (covers sex, which is defined to include pregnancy, childbirth, and related medical conditions, breastfeeding, or reproductive decisions)	D.C. CODE § 2-1402.11 (covers marital status and family responsibilities)	D.C. CODE § 2-1401.03 (b) (co-religionist hiring exemption for religious organizations)
Florida	FLA. STAT. § 760.10	FLA. STAT. § 760.10 (covers marital status)	FLA. STAT. § 760.10 (9) (co-religionist hiring exemption for religious organizations)
Georgia	GA. COMP. R. & REGS. 478-1-.03 (covers state employees only)	X	X
Hawaii	HAW. REV. STAT. § 378-2 (covers sex, which is defined to include pregnancy, childbirth, and related medical condition)	HAW. REV. STAT. § 378-2 (covers marital status)	HAW. REV. STAT. § 378-3 (5) (co-religionist hiring exemption for religious organizations)
Idaho	IDAHO CODE ANN. § 67-5909(1) (covers sex, which has been construed by the Idaho Supreme Court to cover pregnancy)	X	IDAHO CODE ANN. § 67-5910 (co-religionist hiring exemption for religious organizations)
Illinois	775 ILL. COMP. STAT. 5/2-102	775 ILL. COMP. STAT. 5/2-102 (covers marital status)	775 ILL. COMP. STAT. 5/2-101(B)(2) (co-religionist hiring exemption for religious organizations)
Indiana	IND. CODE § 22-9-1-2 (covers sex)	X	IND. CODE § 22-9-1-3(h) (excludes religious organizations and educational institutions from definition of employer)
Iowa	IOWA CODE § 216.6	X	IOWA CODE § 216.6(6.) (co-religionist hiring exemption for religious organizations)

Kansas	KAN. STAT. ANN. § 44-1009 (covers sex, which the Kansas Human Rights Commission has interpreted to prohibit pregnancy discrimination)	X	X
Kentucky	KY. REV. STAT. ANN. § 344.040 (covers sex, which is defined to include pregnancy, childbirth, or related medical conditions)	X	KY. REV. STAT. ANN. § 344.090 (co-religionist hiring exemption for religious organizations and educational institutions)
Louisiana	LA. REV. STAT. ANN. § 23:332 (covers sex); LA. REV. STAT. ANN. § 23:342	X	LA. REV. STAT. ANN. § 23:332 (co-religionist hiring exemption for religious educational institutions); LA. REV. STAT. ANN. § 23:302(2) (co-religionist hiring exemption for religious organizations)
Maine	ME. REV. STAT. tit. 5, § 4572 (covers sex, which is defined to include pregnancy and medical conditions which result from pregnancy)	X	ME. REV. STAT. tit. 5, § 4553 (co-religionist hiring exemption for religious organizations. This exemption does not apply to disability discrimination.)
Maryland	MD. CODE ANN., STATE GOV'T § 20-606 (covers sex)	MD. CODE ANN., STATE GOV'T § 20-606 (covers marital status)	MD. CODE ANN., STATE GOV'T § 20-605 (co-religionist hiring exemption for religious educational institutions); MD. CODE ANN., STATE GOV'T § 20-604 (co-religionist hiring exemption for religious organizations)
Massachusetts	MASS. GEN. LAWS ANN. ch. 151B, § 4 (covers sex, which has been interpreted by the Massachusetts Supreme Judicial Court to bar discrimination on the basis of pregnancy)	X	MASS. GEN. LAWS ANN. ch. 151B, § 1 5 (co-religionist hiring exemption for certain religious educational institutions and charities)
Michigan	MICH. COMP. LAWS ANN. § 37.2202	MICH. COMP. LAWS ANN. § 37.2202 (covers marital status)	X
Minnesota	MINN. STAT. § 363A.08 (covers sex)	MINN. STAT. § 363A.08 (covers marital status and familial status)	MINN. STAT. § 363A.20 (co-religionist hiring exemption for religious organizations)
Mississippi	MISS. CODE ANN. § 25-9-149 (covers sex, which is defined to include pregnancy, for state employees only)	X	X
Missouri	MO. ANN. STAT. § 213.055 (covers sex, which the Missouri Commission on Human Rights and some courts have interpreted to include pregnancy)	X	MO. ANN. STAT. § 213.010 (7) (excludes religious organizations from definition of employer)
Montana	MONT. CODE. ANN. § 49-2-310; MONT. CODE. ANN. § 49-2-303 (covers sex)	MONT. CODE. ANN. § 49-2-303 (covers marital status)	MONT. CODE. ANN. § 49-2-101(11) (excludes religious organizations from definition of employer, unless they provide a public accommodation)
Nebraska	NEB. REV. STAT. § 48-1104 (covers sex, which is defined to include pregnancy, childbirth, ad related medical conditions, and marital status)	NEB. REV. STAT. § 48-1104 (covers marital status)	NEB. REV. STAT. § 48-1103 (co-religionist hiring exemption for religious organizations); NEB. REV. STAT. § 48-1108(2) (co-religionist hiring exemption for religious educational institutions)
Nevada	NEV. REV. STAT. § 613.330 (covers sex)	X	NEV. REV. STAT. § 613.320 (co-religionist hiring exemption for religious organizations and educational institutions)
New Hampshire	N.H. REV. STAT. ANN. § 354-A:7	N.H. REV. STAT. ANN. § 354-A:7 (covers marital status)	N.H. REV. STAT. ANN. § 354-A:18 (co-religionist hiring exemption for religious charities and educational institutions)

New Jersey	N.J. STAT. ANN. § 10:5-12	N.J. STAT. ANN. § 10:5-12 (covers marital status civil union status, and domestic partnership status)	N.J. STAT. ANN. § 10:5-12 (co-religionist hiring exemption for religious organizations)
New Mexico	N.M. STAT. ANN. § 28-1-7 (covers sex, which the New Mexico Human Rights Commission has defined to include pregnancy, childbirth, or related medical conditions)	N.M. STAT. ANN. § 28-1-7 (covers "spousal affiliation")	X
New York	N.Y. EXEC. LAW § 296	N.Y. EXEC. LAW § 296 (covers marital status and familial status)	N.Y. EXEC. LAW § 296 (11) (co-religionist hiring exemption for religious charities and educational institutions)
North Carolina	N.C. GEN. STAT. ANN. § 143-422.2 (covers sex and provides no specific remedy)	X	X
North Dakota	N.D. CENT. CODE § 14-02.4-03 (covers sex, which is defined to include pregnancy, childbirth, and disabilities related to pregnancy or childbirth)	N.D. CENT. CODE § 14-02.4-03 (covers "status with respect to marriage")	X
Ohio	OHIO REV. CODE ANN. § 4112.02 (covers sex, which is defined to include pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions)	X	OHIO REV. CODE ANN. § 4112.02 (R) (co-religionist hiring exemption for religious organizations and educational institutions)
Oklahoma	OKLA. STAT. ANN. tit. 25, § 1302 (covers sex, which is defined to include pregnancy, childbirth or related medical conditions)	X	OKLA. STAT. ANN. tit. 25 § 1307 (co-religionist hiring exemption for religious organizations); OKLA. STAT. ANN. tit. 25 § 1308 (co-religionist hiring exemption for religious educational institutions)
Oregon	OR. REV. STAT. § 659A.030 (covers sex, which is defined to include pregnancy, childbirth and related medical conditions or occurrences)	OR. REV. STAT. § 659A.030 (covers marital status)	OR. REV. STAT § 659A.006(4) (narrow co-religionist hiring exemption for religious organizations)
Pennsylvania	43 PA. STAT. ANN. § 955 (covers sex, which the Pennsylvania Human Rights Commission has interpreted to cover pregnancy)	X	43 PA. STAT. ANN. § 955 ("it shall not be an unlawful employment practice for a religious corporation or association to…employ on the basis of sex in those certain instances where sex is a bona fide occupational qualification because of the religious beliefs, practices, or observances of the corporation…"); 43 PA. STAT. ANN. § 954(b) (excludes religious organizations from definition of employer, with many exceptions)
Rhode Island	R.I. GEN. LAWS ANN. § 28-5-7 (covers sex, which is defined to include pregnancy, childbirth, or related medical conditions)	X	R.I. GEN. LAWS ANN. § 28-5-6 (8)(ii) (co-religionist hiring exemption for religious organizations and educational institutions)
South Carolina	S.C. CODE ANN. § 1-13-80 (covers sex, which is defined to include pregnancy, childbirth, or related medical conditions)	X	S.C. CODE ANN. § 1-13-80(I)(5) (co-religionist hiring exemption for religious organizations and educational institutions)
South Dakota	S.D. CODIFIED LAWS § 20-13-10 (covers sex)	X	S.D. CODIFIED LAWS § 20-13-18 (co-religionist hiring exemption for religious organizations)
Tennessee	TENN. CODE ANN. § 4-21-401 (covers sex, which has been interpreted by the	X	TENN. CODE ANN. § 4-21-405 (co-religionist hiring exemption for

	Tennessee Court of Appeals to include pregnancy)		religious organizations and educational institutions)
Texas	TEX. LAB. CODE ANN. § 21.051 (covers sex, which is defined to include pregnancy, childbirth, or a related medical condition)	X	TEX. LAB. CODE ANN. § 21.109 (co-religionist hiring exemption for religious organizations and educational institutions)
Utah	UTAH CODE ANN. § 34A-5-106	X	UTAH CODE ANN. § 34A-5-102(1)(i)(ii) (excludes religious organizations from definition of employer); UTAH CODE ANN. § 34A-5-106 (3)(a) (co-religionist hiring exemption for religious educational institutions)
Vermont	VT. STAT. ANN. tit. 21 § 495 (covers sex, which the Supreme Court of Vermont has interpreted to include pregnancy)	X	X
Virginia	VA. CODE ANN. § 2.2-3903	X	X
Washington	WASH. REV. CODE § 49.60.180 (covers sex, which the Supreme Court of Washington and the Washington Human Rights Commission have interpreted to include pregnancy or childbirth, and marital status)	WASH. REV. CODE § 49.60.180 (covers marital status)	WASH. REV. CODE § 49.60.040 (11) (excludes religious organizations from definition of employer)
West Virginia	W. VA. CODE, § 5-11-9 (covers sex, which the Supreme Court of Appeals of West Virginia has interpreted to include pregnancy)	X	X
Wisconsin	WIS. STAT. ANN. §§ 111.321, 111.322, 111.325 (covers sex, which is defined to cover pregnancy, childbirth, maternity leave or related medical conditions)	WIS. STAT. ANN. §§ 111.321, 111.322, 111.325 (covers marital status)	WIS. STAT. ANN. § 111.337(2) (co-religionist hiring exemption for religious organizations)
Wyoming	WYO. STAT. ANN. § 27-9-105	X	WYO. STAT. ANN. § 27-9-102(b) (excludes religious organizations from definition of employer)

TABLE 2. State Housing Antidiscrimination Laws

State	Pregnancy or Familial Status	Marital Status	Religious Exemptions
Alabama	X	X	N/A
Alaska	ALASKA STAT. § 18.80.240	ALASKA STAT. § 18.80.240	X
Arizona	ARIZ. REV. STAT. § 41-1491.14	X	Ariz. Rev. Stat. 41-1491.03
Arkansas	ARK. CODE ANN. § 16-123-107 (covers gender, which is defined to include pregnancy, childbirth, or related medical conditions); ARK. CODE ANN § 16-123-204	X	X
California	CAL. GOV. CODE § 12955	CAL. GOV. CODE § 12955	Cal. Gov. Code § 12955.4
Colorado	COLO. REV. STAT. § 24-34-502	COLO. REV. STAT. § 24-34-502	Colo. Rev. Stat. § 24-34-502
Connecticut	CONN. GEN. STAT. § § 46a-64c	CONN. GEN. STAT. § § 46a-64c	X
Delaware	DEL. CODE. ANN. tit 5 § 4603	DEL. CODE. ANN. tit 5 § 4603	Del. Code. Ann. tit 5 § 4607
D.C.	D.C. CODE § 2-1402.21 (covers familial status and family responsibilities)	D.C. CODE § 2-1402.21	D.C. Code § 2-1401.03

Florida	FLA. STAT. § 760.23	X	FLA. STAT § 760.29
Georgia	GA. CODE ANN. § 8-3-202	X	GA. CODE ANN. § 8-3-205
Hawaii	HAW. REV. STAT. § 515-3	HAW. REV. STAT. § 515-3	HAW. REV. STAT. § 515-4
Idaho	X	X	IDAHO CODE ANN. § 67-5910(8)
Illinois	775 ILL. COMP. STAT. 5/2-102	775 ILL. COMP. STAT. 5/2-102	775 ILL. COMP. STAT. 5/3-106(E)
Indiana	IND. CODE § 22-9.5-5-1	X	IND. CODE 22-9.5-3-2 Sec. 2
Iowa	IOWA CODE §§ 216.8, 216.8A	X	IOWA CODE § 216.12
Kansas	KAN. STAT. ANN. § 44-1016	X	KAN. STAT. ANN. § 44-1018(a)
Kentucky	KY. REV. STAT. ANN. § 344.360 *but see* KY. REV. STAT. ANN. § 344.362 ("KRS 344.360 shall [not] apply to: (2) A landlord who refused to rent to an unmarried couple of opposite sex")	X	KY. REV. STAT. ANN § 344.365(1)
Louisiana	LA. REV. STAT. ANN. § 51:2606	X	LA. REV. STAT. ANN. § 51:2605(A)
Maine	ME. REV. STAT. tit. 5, § 4581-A	X	ME. REV. STAT. tit. 5, § 4581(4)
Maryland	MD. CODE ANN., STATE GOV'T § 20-705	MD. CODE ANN., STATE GOV'T § 20-705	MD. CODE ANN., STATE GOV'T § 20-703
Massachusetts	MASS. GEN. LAWS ANN. ch. 151B, § 4 (6) (sex)	MASS. GEN. LAWS ANN. ch. 151B, § 4 (6)	MASS. GEN. LAWS ANN. ch. 151B, § 4(18)
Michigan	MICH. COMP. LAWS ANN. § 37.2502	MICH. COMP. LAWS ANN. § 37.2502	MICH. COMP. LAWS ANN. § 37.2505
Minnesota	MINN. STAT. § 363A.09	MINN. STAT. § 363A.09	MINN. STAT. § 363A.26
Mississippi	X	X	N/A
Missouri	MO. ANN. STAT. § 213.040	X	MO. ANN. STAT. § 213.040(12)
Montana	MONT. CODE. ANN. § 49-2-305	MONT. CODE. ANN. § 49-2-305	
Nebraska	NEB. REV. STAT. §§ 20-318, 20-320	X	NEB. REV. STAT. § 20-322(1)
Nevada	NEV. REV. STAT. § 118.100	X	X
New Hampshire	N.H. REV. STAT. ANN. § 354-A:10	N.H. REV. STAT. ANN. § 354-A:10	N.H. REV. STAT. ANN. § 354-A:13 II
New Jersey	N.J. STAT. ANN. § 10:5-12	N.J. STAT. ANN. § 10:5-12 (marital status, civil union status, domestic partnership status)	N.J. STAT. ANN. § 10:5-5(n)
New Mexico	N.M. STAT. ANN. § 28-1-7 (covers sex)	N.M. STAT. ANN. § 28-1-7 (spousal affiliation)	N.M. STAT. ANN. § 28-1-9
New York	N.Y. EXEC. LAW § 296	N.Y. EXEC. LAW § 296	N.Y. EXEC. LAW § 296 11
North Carolina	N.C. GEN. STAT. ANN. § 41A-4	X	N.C. GEN. STAT. ANN. § 41A-6(3)
North Dakota	N.D. CENT. CODE § 14-02.5-02	N.D. CENT. CODE § 14-02.5-02	N.D. CENT. CODE § 14-02.5-10(1)
Ohio	OHIO REV. CODE ANN. § 4112.02	X	OHIO REV. CODE ANN. § 4112.02 (K)(1)
Oklahoma	OKLA. STAT. ANN. tit. 25, § 1452	X	OKLA. STAT. ANN. tit. 25. § 1453(A)
Oregon	OR. REV. STAT. § 659A.421	OR. REV. STAT. § 659A.421	OR. REV. STAT. § 659A.006(3)
Pennsylvania	43 PA. STAT. ANN. § 955	X	43 PA. STAT. ANN. § 955(10)
Rhode Island	R.I. GEN. LAWS ANN. § 34-37-4	R.I. GEN. LAWS ANN. § 34-37-4	R.I. GEN. LAWS ANN. § 34-37-4.2 (a)
South Carolina	S.C. CODE ANN. § 31-21-40	X	S.C. CODE ANN. § 31-21-70(D)
South Dakota	S.D. CODIFIED LAWS § 20-13-20	X	X
Tennessee	TENN. CODE ANN. § 4-21-601	X	TENN. CODE ANN. § 4-21-602 (a)
Texas	TEX. PROP. CODE ANN. § 301.021	X	TEX. PROP. CODE ANN. § 301.042(a)
Utah	UTAH CODE ANN. § 57-21-5	X	UTAH CODE ANN. § 57-21-3 (2)
Vermont	VT. STAT. ANN. tit. 9 § 4503	VT. STAT. ANN. tit. 9 § 4503	VT. STAT. ANN. tit. 9 § 4504
Virginia	VA. CODE ANN. § 36-96.3	X	VA. CODE ANN. § 36-96.2(C)
Washington	WASH. REV. CODE § 49.60.222	WASH. REV. CODE § 49.60.222	X
West Virginia	W. VA. CODE § 5-11A-5	X	W. VA. CODE § 5-11A-8(a)
Wisconsin	WIS. STAT. ANN. § 106.50	WIS. STAT. ANN. § 106.50	X
Wyoming	WYO. STAT. ANN. § 40-26-103	X	WYO. STAT. ANN. §§ 40-26-111(a)

TABLE 3. State Public Accommodations Antidiscrimination Laws

State	Pregnancy	Marital or Familial Status	Religious Exemptions
Alabama	X	X	N/A
Alaska	ALASKA STAT. § 18.80.230	ALASKA STAT. § 18.80.230 (covers, marital status, changes in marital status, and parenthood)	X
Arizona	ARIZ. REV. STAT. § 41-1463(B) (covers sex)	X	X
Arkansas	ARK. CODE ANN. § § 16-123-107 (covers gender, which is defined to include pregnancy, childbirth, or related medical conditions)	X	X
California	CAL. CIV. CODE § 51 (covers sex)	CAL. CIV. CODE § 51 (covers marital status)	X
Colorado	COLO. REV. STAT. § 24-34-601 (covers sex)	COLO. REV. STAT. § 24-34-601 (covers marital status)	COLO. REV. STAT. § 24-34-601
Connecticut	CONN. GEN. STAT. § 46a-64 (covers sex)	CONN. GEN. STAT. § 46a-64 (covers marital status)	CONN. GEN. STAT. § 46a-64(b)(4) (exemption for religious nursing homes)
Delaware	DEL. CODE. ANN. tit 6 **§** 4504 (covers sex)	DEL. CODE. ANN. tit 6 **§** 4504 (covers marital status)	X
D.C.	D.C. CODE § § 2-1402.31 (covers sex)	D.C. CODE § § 2-1402.31 (covers marital status, familial status, family responsibilities)	X
Florida	FLA. STAT. § 760.08	FLA. STAT. § 760.08 (covers familial status)	X
Georgia	X	X	N/A
Hawaii	HAW. REV. STAT. § 489-3 (covers sex)	X	X
Idaho	IDAHO CODE ANN. § 67-5909(5)-(6) (covers sex)	X	X
Illinois	775 ILL. COMP. STAT. 5/2-102	775 ILL. COMP. STAT. 5/2-102 (covers marital status)	X
Indiana	IND. CODE § 22-9-1-2 (covers sex)	X	X
Iowa	IOWA CODE § 216.7 (covers sex)	X	IOWA CODE § § 216.7 (2)
Kansas	KAN. STAT. ANN. § 44-1009(c) (covers sex)	X	KAN. STAT. ANN. § 44-1002
Kentucky	KY. REV. STAT. ANN. § 344.145 (covers sex)	X	KY. REV. STAT. ANN. § 344.130 (3)
Louisiana	LA. REV. STAT. ANN. § 51:2247 (covers sex)	X	X
Maine	ME. REV. STAT. tit. 5, §§ 4591-92 (covers sex)	X	X
Maryland	MD. CODE ANN., STATE GOV'T § 20-304 (covers sex)	MD. CODE ANN., STATE GOV'T § 20-304 (covers marital status)	X
Massachusetts	MASS. GEN. LAWS ANN. ch. 272 § 98 (covers sex)	X	X
Michigan	MICH. COMP. LAWS ANN. § 37.2302 (covers sex)	MICH. COMP. LAWS ANN. § 37.2302 (covers marital status)	MICH. COMP. LAWS ANN. § 37.2301
Minnesota	MINN. STAT. § 363A.11 (covers sex)	MINN. STAT. § 363A.11 (covers marital status)	MINN. STAT. § 363A.26
Mississippi	X	X	N/A
Missouri	MO. ANN. STAT. § 213.065 (covers sex)	X	MO. ANN. STAT. §213.065(3)
Montana	MONT. CODE. ANN. § 49-2-304 (covers sex)	MONT. CODE. ANN. § 49-2-304 (covers marital status)	X
Nebraska	NEB. REV. STAT. § 20-132 (covers sex)	X	NEB. REV. STAT. § 20-137
Nevada	NEV. REV. STAT. § 651.070 (covers sex)	X	X
New	N.H. REV. STAT. ANN. § 354-A:17	N.H. REV. STAT. ANN. § 354-A:17	N.H. REV. STAT. ANN. § 354-A:18

Hampshire	(covers sex)	(covers marital status)	
New Jersey	N.J. STAT. ANN. § 10:1-3 (covers sex)	N.J. STAT. ANN. § 10:1-3 (covers marital status)	N.J. STAT. ANN. § 10:5-5 *l*
New Mexico	N.M. STAT. ANN. § 28-1-7 (covers sex)	N.M. STAT. ANN. § 28-1-7 (covers spousal affiliation)	X
New York	N.Y. EXEC. LAW § 296(2)(a) (covers sex)	N.Y. EXEC. LAW § 296(2)(a) (covers marital status)	N.Y. EXEC. LAW § 292(9)
North Carolina	X	X	N/A
North Dakota	N.D. CENT. CODE § 14-02.4-14 (covers sex)	N.D. CENT. CODE § 14-02.4-14 (covers status with respect to marriage)	X
Ohio	OHIO REV. CODE ANN. § 4112.02(G) (covers sex)	X	X
Oklahoma	OKLA. STAT. ANN. tit. 25, § 1402 (covers sex)	X	X
Oregon	OR. REV. STAT. § 659A.403 (covers sex)	OR. REV. STAT. § 659A.403 (covers marital status)	X
Pennsylvania	43 PA. STAT. ANN. § 953 (covers sex)	X	X
Rhode Island	R.I. GEN. LAWS ANN. § 11-24-2 (covers sex)	X	X
South Carolina	X	X	N/A
South Dakota	S.D. CODIFIED LAWS § 20-13-23 (covers sex)	X	X
Tennessee	TENN. CODE ANN. § 4-21-501 (covers sex)	X	X
Texas	X	X	N/A
Utah	UTAH CODE ANN. § 13-7-3 (covers sex)	X	UTAH CODE ANN. § 13-7-3
Vermont	VT. STAT. ANN. tit. 9 § 4502 (covers sex)	VT. STAT. ANN. tit. 9 § 4502 (covers marital status)	VT. STAT. ANN. tit. 9(l)
Virginia	VA. CODE ANN. § 2.2-3900	VA. CODE ANN. § 2.2-3900 (covers marital status)	X
Washington	WASH. REV. CODE § 49.60.215 (covers sex)	WASH. REV. CODE § 49.60.215 (covers status as a mother breastfeeding her child)	WASH. REV. CODE 49.60.040 (2)
West Virginia	W. VA. CODE § 5-11-2 (covers sex)	X	X
Wisconsin	WIS. STAT. ANN. § 106.52 (covers sex)	X	X
Wyoming	WYO. STAT. ANN. § 6-9-101 (covers sex)	X	X