

303 Creative: The Public Perils of Ignoring Public Health Harms in LGBTQ Rights Cases

Heather Walter-McCabe

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/jhclp>

Recommended Citation

Heather Walter-McCabe, *303 Creative: The Public Perils of Ignoring Public Health Harms in LGBTQ Rights Cases*, 27 J. Health Care L. & Pol'y (2024).

Available at: <https://digitalcommons.law.umaryland.edu/jhclp/vol27/iss2/2>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Health Care Law and Policy by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

303 CREATIVE: THE PUBLIC PERILS OF IGNORING PUBLIC HEALTH HARMS IN LGBTQ RIGHTS CASES

HEATHER WALTER-MCCABE*

Abstract

LGBTQ communities, particularly transgender and nonbinary communities, are experiencing the threat of unprecedented numbers of anti LGBTQ legislation introduced at the state level. Research shows, through a growing body of evidence that stigma and discrimination exacerbated by these laws are creating a situation in which LGBTQ communities—already at disparate risk for mental health issues, risk of violent injury or death, and risk of death by suicide—are at an increased risk for public health harms. This Article will examine the Court’s analyses in cases where religious rights and LGBTQ rights are at odds, using 303 Creative, the latest free speech challenge to LGBTQ public accommodations, as a case study. It posits that the Court misguidedly declines to consider the public health harms to those who would be impacted by an exemption—something the Court made clear fell beyond the scope of consideration in Hobby Lobby, to the detriment of LGBTQ communities.

* Heather Walter-McCabe, JD, MSW, is an Associate Professor with a joint appointment at Wayne State University School of Social Work and Law School.

INTRODUCTION

This Article is written in a moment of chaos for LGBTQ¹ health equity and human rights. Despite recent advances in state legislatures and at the Supreme Court for LGBTQ interests,² a backlash to these advances emerged in the last several years.³ Beginning in 2016 with HB 2,⁴ a North Carolina bill that aimed to restrict bathroom use to the bathroom corresponding with a person's assigned sex at birth, states started creating laws targeting LGBTQ communities at a record breaking pace.⁵ While some states passed significant legislation protecting LGBTQ rights,⁶ other states are churning out anti LGBTQ laws impacting education, public accommodations, health care access, and more.⁷ These laws are part of a larger culture war,⁸ one which finds some litigants fighting for LGBTQ rights and other litigants seeking religious exemptions to the implementation of LGBTQ rights.⁹

While the words unprecedented and exponentially are sometimes used inappropriately, it is not hyperbole to say that LGBTQ communities—particularly trans, nonbinary, and other gender-diverse communities—are experiencing unprecedented legislative attacks in the states, increasing exponentially in number.¹⁰ Advocacy groups raised concerns in 2021–2022 as

1. In this Article, “LGBTQ” is intended to include a variety of non-heterosexual, sexual orientations—inclusive of, but not limited to, lesbian, gay, and bisexual. The term also includes transgender communities, broadly defined, to include transgender, nonbinary, genderfluid, and genderqueer people or any person whose gender identity does not match their sex assigned at birth.

2. See *Obergefell v. Hodges*, 576 U.S. 644 (2015) (recognizing marriage equality); *Bostock v. Clayton County*, 590 U.S. 644 (2020) (ruling Title VII employment protections “because of sex” include sexual orientation and gender identity).

3. Geoff Bennett et al., *How the Rise of Anti-LGBTQ+ Hate and Violence Is Impacting the Community*, PBS NEWSHOUR (Aug. 31, 2023, 6:35 PM), <https://www.pbs.org/newshour/show/how-the-rise-of-anti-lgbtq-hate-and-violence-is-impacting-the-community>; Nolan S. Kline et al., *Responding to “Don’t Say Gay” Laws in the US: Research Priorities and Considerations for Health Equity*, 19 SEXUALITY RSCH. & SOC. POL’Y 1397, 1397 (2022); Kirsten A. Gonzalez et al., *“In the Voices of People Like Me”: LGBTQ Coping During Trump’s Administration*, 50 COUNSELING PSYCH. 212, 213 (2022).

4. H.B. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016).

5. *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights> (last updated Mar. 15, 2024); Annette Choi, *Record Number of Anti-LGBTQ Bills Were Introduced in 2023*, CNN: CNN POLITICS (Jan. 22, 2024, 5:04 PM), <https://www.cnn.com/2023/04/06/politics/anti-lgbtq-plus-state-bill-rights-dg/index.html>.

6. *Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last updated Mar. 30, 2024); see also, e.g., S.B. 119, 2024 Leg., 446th Sess. (Md. 2024) (altering state definition of “legally protected health care” to include gender-affirming treatment).

7. *Mapping Attacks on LGBTQ Rights*, supra note 5.

8. Adam Gabbatt, *Well-Funded Christian Group Behind US Effort to Roll Back LGBTQ+ Rights*, GUARDIAN (June 19, 2023, 6:00 AM), <https://www.theguardian.com/world/2023/jun/19/alliance-defending-freedom-lgbtq-rights-america>.

9. See *infra* Part III; Part IV.

10. *Our Fight for LGBTQ+ Rights in the States*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/campaigns/the-state-legislative-attack-on-lgbtq-people> (last updated May 5, 2023).

the number of anti LGBTQ bills reached nearly 200; this trend continues, as in the 2022–2023 legislative session alone, state legislators introduced 510 bills attacking LGBTQ communities.¹¹

The introduction of these laws harms LGBTQ communities. Researchers are generating an evidence base to show how the stigma and discrimination¹² exacerbated by these laws are creating an environment in which LGBTQ communities—already at disparate risk for mental health issues, risk of violent injury or death, and risk of death by suicide—are at an increased risk.¹³ It is in this environment that *303 Creative v. Elenis*,¹⁴ a free speech challenge to the Colorado Antidiscrimination Act, reached the Supreme Court. To be sure, this is not the first case asking the Court to examine the balance between the rights of individuals opposing LGBTQ rights, generally individuals with a religious-based opposition to the law,¹⁵ and the rights of LGBTQ individuals. However, it is notable that here, the Court doubled down on its approach to broaden the path for religious exemptions and narrow a state’s ability to withstand such a challenge. This Article will seek to examine the Court’s analyses in these cases, using *303 Creative* as a case study,¹⁶ and posits that the Court misguidedly declined to consider the public health harms to those who would be impacted by an exemption¹⁷—something the Court made clear fell beyond the scope of consideration in *Hobby Lobby*.¹⁸

The Article will begin in Part I by providing additional context regarding the current environment for LGBTQ communities within which these cases are

11. *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2023*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2023> (last updated December 31, 2023).

12. See generally Valarie K. Blake, *Remedying Stigma-Driven Health Disparities in Sexual Minorities*, 17 HOUS. J. HEALTH L. & POL’Y 183 (2017); Valarie K. Blake & Mark L. Hatzenbuehler, *Legal Remedies to Address Stigma-Based Health Inequalities in the United States: Challenges and Opportunities*, 97 MILBANK Q. 480 (2019).

13. Julia Raifman et al., *Difference-in-Differences Analysis of the Association Between State Same-Sex Marriage Policies and Adolescent Suicide Attempts*, 171 JAMA PEDIATRICS 350, 350 (2017); Blake & Hatzenbuehler, *supra* note 12, at 2275; Kiara Alfonseca, *Rise in Anti-LGBTQ Hate and Extremism Captured in New Reports*, ABC News (Jun. 22, 2023, 2:35 PM), <https://abcnews.go.com/US/rise-anti-lgbtq-hate-extremism-captured-new-reports/story?id=100304706>; *National Survey on LGBTQ Youth Mental Health 2021*, TREVOR PROJECT, <https://www.TheTrevorProject.org/survey-2021/> (last visited Mar. 31, 2024). See generally Mark L. Hatzenbuehler et al., *State-Level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations*, 99 AM. J. PUB. HEALTH 2275 (2009).

14. 600 U.S. 570 (2023).

15. Plaintiffs brought these cases on different grounds, generally relying on free exercise, free association, or, as with *303 Creative*, free speech as the basis for action. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (free speech); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (free association); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617 (2018) (free speech and free exercise).

16. See *infra* Part IV.

17. See *infra* Part V.

18. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014).

decided.¹⁹ Part II will provide a brief overview of the types of laws enacted and the legal frameworks used to challenge them.²⁰ From there, Part III will analyze the *303 Creative* case, situating it within the larger framework of cases recently considered by the Court in this area, including potential impacts to related religious rights jurisprudence.²¹ Part IV will examine different legal theories for approaching the concept of harm.²² Lastly, the Article will examine the public perils of the Court’s decision not to include public health harms in their analysis, making the decision one that not only will impact communities experiencing dignitary harms, but also one of an evidence-based potential for real health related injury and death.²³

I. EVOLUTION OF COURT INTERPRETATIONS OF HARM

Many LGBTQ related cases arise from religious objections to a state or federal law. These cases are often brought as constitutional challenges under the First Amendment’s Free Exercise, Free Association, or Free Speech Clauses, sometimes a combination thereof.²⁴ Additionally, the Religious Freedom Restoration Act²⁵ (“RFRA”) can serve as the basis for challenges either under the federal act or similar state level acts, requiring strict scrutiny—a compelling state interest, narrowly tailored—in order to burden a party’s religious interests. Cases analyzed under any of these theories require courts to carefully consider the competing interests of the parties. The Roberts Court recently showed a shift in the method of interpreting these interests.²⁶ This Part provides a brief overview of the history and recent shift in this line of reasoning with a focus on how the Court considers third-party harm, particularly public health harm, in its analysis.

19. See *infra* Part I.

20. See *infra* Part II.

21. See *infra* Part III.

22. See *infra* Part IV.

23. See *infra* Part V.

24. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 640 (2000); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617, 617 (2018); *Fulton v. Philadelphia*, 141 S. Ct. 1868, 1876 (2021).

25. Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C §§ 2000bb–2000bb-4). Congress passed RFRA in response to *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990). The Act requires courts to apply strict scrutiny to any infringement of religious liberties. Though limited to federal law through *City of Boerne v. Flores*, 521 U.S. 507 (1997), many states subsequently passed “mini RFRA” applying similar strict scrutiny analysis to state laws. Terri R. Day & Danielle Weatherby, *LGBT Rights and the Mini-RFRA: A Return to Separate but Equal*, 65 DEPAUL L. REV. 907, 919 (2016).

26. See, e.g., *Fulton*, 141 S. Ct. at 1882 (allowing religious exemption when secular exemptions removed city’s antidiscrimination law from neutral and general applicability); *Masterpiece Cakeshop*, 584 U.S. at 617 (failing to address ongoing relevance of *Smith* on procedural grounds); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 512–18 (2022) (holding that disciplining a public school football coach for prayer after football games violated First Amendment); *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 682 (2014) (extending RFRA protections to closely held for profit businesses).

Legal scholars have posed the question of what counts as harm, with some finding that no harm occurs to third parties as a result of exempting religious objectors from the application of LGBTQ antidiscrimination laws.²⁷ Other scholars posit that religious exemptions based on the concept of complicity with the sin of a third party are unique in their ability to “amplify the material and dignitary harms that accommodation of the claims can inflict on other citizens.”²⁸ These differing concepts of harm are illustrated by the variety of approaches taken by courts as they weigh harms, varying based on the type of case, the cause of action, and the judges on the bench at the time of the case. As this Article examines the concept of harm in LGBTQ related cases, the following list of terms and their definitions is a helpful guide to the discussion:

- *Dignitary harm* implicates harms that create humiliation, stigma, or moral harm.²⁹ Though courts use this concept in religious rights cases, not all courts place the same emphasis on these harms, which may vary based on the group at whom the indignity is targeted.³⁰
- *Material harm* is harm that causes economic or other tangible harms.³¹
- *Third-party harm* is harm caused to others by the granting of religious exemption to the parties in the case.³²
- *Complicity-based conscience claims* are defined as religious objections to being made complicit in the assertedly sinful conduct of others.³³ Some courts sometimes consider the dignitary harms which may be inherent in granting an exemption under these types of claims.³⁴

27. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1469 (1999); Elizabeth Sepper, *Religious Exemptions, Harm to Others, and the Indeterminacy of a Common Law Baseline*, 106 KY. L.J. 661, 662 (2018) [hereinafter *Religious Exemptions*]; *Developments in the Law—Reframing the Harm: Religious Exemptions and Third-Party Harm After Little Sisters*, 134 HARV. L. REV. 2186, 2196 (2021) [hereinafter *Reframing the Harm*].

28. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2522 (2015).

29. Eric Merriam, *Obergefell and the Dignitary Harm of Identity-Based Military Service Exclusion*, 27 UCLA WOMEN'S L.J. 41, 71–72 (2020).

30. *Reframing the Harm*, *supra* note 27, at 2192 n.46; Sepper, *supra* note 27, at 670; Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1491 (2015) [hereinafter *Free Exercise*]; NeJaime & Siegel, *supra* note 28, at 2522.

31. See generally NeJaime & Siegel, *supra* note 28, at 2522; Thomas C. Berg, *Religious Exemptions and Third-Party Harms*, 17 FEDERALIST SOC'Y REV. 50, 54 (2016); *Free Exercise*, *supra* note 30, at 1492–93.

32. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (Ginsburg, J., dissenting) for a discussion of the Court's past consideration of third-party harms. In *Burwell*, Justice Ginsberg asserts that the *Hobby Lobby* majority departs from the Court's traditional position that “[a]ccommodations to religious beliefs or observances . . . must not significantly impinge on the interests of third parties.” *Id.* at 745.

33. NeJaime & Siegel, *supra* note 28, at 2518.

34. *Id.*

- *Public health harm* contemplates the harm to the health of the public at large, rather than harm to a particular individual or party.³⁵

In examining pre-RFRA cases, a Harvard Law Review Board analysis found that “[c]oncern for third-party harm underlay[s] the Court’s treatment of religious exemptions across a diverse spectrum of cases for many years.”³⁶ They discovered that even when the Court held in favor of an exemption, the Court’s reasoning included an examination of how the exemption would impact those beyond the person seeking the exemption.³⁷ The Board also described civil rights era cases in which businesses sought religious exemptions to public accommodation laws and the Court explicitly found that a balancing of the interests justified some burden on religious beliefs.³⁸

In 1990, the Court heard a seminal case: *Employment Division v. Smith*.³⁹ Smith, a private drug rehabilitation center employee, was denied state unemployment benefits after using peyote for a religious ceremony.⁴⁰ His case reached the Supreme Court after the state court denied Smith relief.⁴¹ The Supreme Court held that because the law was a general law of neutral applicability and was not designed with religious animus, there should be no religious exemption.⁴² The Court reasoned that

35. See, e.g., Michael R. Ulrich, *Public Carry Versus Public Health—The Harms to Come from the Supreme Court’s Decision in Bruen*, 387 NEW ENG. J. MED. 1245, 1246–47 (2022) (characterizing gun violence and “continued deterioration of mental health” as public health harms).

36. *Reframing the Harm*, *supra* note 27, at 2188.

37. *Id.* at 2192; see also, e.g., *Sherbert v. Verner*, 374 U.S. 398, 410 (1963) (granting exemption to Seventh Day Adventist seeking exemption from work on sabbath where court specifically mentioned that exemption would not harm others’ religious liberties); *Wisconsin v. Yoder*, 406 U.S. 205, 229 (1972) (finding that granting exemption to compulsory school requirement would not harm any other children).

38. *Yoder*, 406 U.S. at 233–34; see also *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941 (D.S.C. 1966) (challenging Civil Rights Act of 1964 for violating defendant’s First Amendment rights of free exercise “since his religious beliefs compel him to oppose any integration of the races whatever;” Court found that “[u]ndoubtedly defendant . . . has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve [African Americans] in his business establishments upon the ground that to do so would violate his sacred religious beliefs.”), *rev’d on other grounds*, 377 F.2d 433 (4th Cir. 1967); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (fighting IRS decision to remove 501(c)(3) status for university on basis of racial discrimination; Court held “the Government has a fundamental, overriding interest in eradicating racial discrimination in education That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.”) Though the reasoning of the Court in these cases is important to the issue at hand, it is important to note that issues of race have a specific history in the United States.

39. 494 U.S. 872 (1990).

40. *Id.* at 874.

41. *Id.* at 874–76.

42. *Id.* at 889–92.

[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.⁴³

Smith overruled years of precedent in the analysis of religious jurisprudence. In response, Congress passed the RFRA, as described above.⁴⁴

Since *Smith* and the enactment of the RFRA, the number of religious exemption cases regarding LGBTQ antidiscrimination increased.⁴⁵ The Court's analysis of *Smith* also changed throughout this time period, with Justices Thomas, Alito, and Gorsuch all suggesting that the *Smith* analysis should give way to strict scrutiny and Justices Coney Barrett and Kavanaugh also expressing concern.⁴⁶ The ultimate fate of *Smith*, in the face of this conservative Court, remains to be seen.

In one religious exemption case regarding LGBTQ laws, *Hurley v. Irish American Gay Lesbian & Bisexual Group*, the Court reasoned that the government "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."⁴⁷ However, this reasoning begs the question of whether compelled speech which is shown to cause public health harms is merely "disfavored." Free speech is not absolute.⁴⁸ At what point is the public health harm of free speech exceptions to antidiscrimination laws so great that it reaches the threshold to qualify as an unconstitutional exception? The same question can apply to free exercise and free association claims seeking exceptions to antidiscrimination laws. Part II provides an overview of the evidence of public health harms experienced by

43. *Id.* at 879 (quoting *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594–95 (1940)).

44. See *supra* note 25 and accompanying text.

45. For examples, see *infra* Part III.

46. See *Fulton v. City of Philadelphia*, 593 U.S. 522, 555–56 (Alito, J., concurring) (noting that before *Smith* test, "a law that impose[d] a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest," better aligning with "the understanding of the scope of the free-exercise right at the time of the First Amendment's adoption"); *id.* at 543 (Barrett, J., concurring) ("[T]he textual and structural arguments against *Smith* are . . . compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination.").

47. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995) (allowing private citizens organizing a parade to exclude marchers who wanted to participate in parade to express pride as LGBTQ individuals, on Free Speech basis and in opposition to state law that prohibited discrimination in places of public accommodation, on basis of sexual orientation).

48. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

LGBTQ communities, particularly harms that are exacerbated by anti LGBTQ policy.⁴⁹

II. CURRENT ENVIRONMENT FOR LGBTQ COMMUNITIES

From experiences with the HIV/AIDS epidemic⁵⁰ to the criminalization of homosexuality through sodomy laws until 2003,⁵¹ sexual minorities, past and present, experience interpersonal and structural discrimination. Though gender-diverse communities always existed in society, studies that examine and acknowledge the impact of stigma and discrimination on these communities took longer to reach fruition.⁵² For people with intersectional identities, their experiences with discrimination and its health effects are amplified.⁵³ The stigma and discrimination that LGBTQ communities experience directly impact health.⁵⁴ A growing body of research explores the impact of policy on stigma and discrimination with troubling results, as illustrated below.⁵⁵

A. Health Disparities in LGBTQ Communities

LGBTQ communities comprise a diverse collection of sexual orientations and gender identities.⁵⁶ Each of the individuals in these communities also bring their own unique backgrounds and intersectional identities.⁵⁷ While the information in this Section focuses on some of the health disparities in these

49. See *infra* Part II.

50. George Ayala & Andrew Spieldenner, *HIV Is a Story First Written on the Bodies of Gay and Bisexual Men*, 111 AM. J. PUB. HEALTH 1240, 1241 (2021); Breana Bietsch, *Second Time Overlooked in Crisis: Examining How HIV/AIDS Health Policies in the USA Connect with Policy Implications Today for Aging LGBTQ Adults During the COVID-19 Pandemic*, 7 J. HUM. RTS. & SOC. WORK 246, 246–47 (2022).

51. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding anti sodomy law), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

52. Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCH. BULL. 674, 674 (2003); Bietsch, *supra* note 50, at 247; NAT'L ACADS. OF SCIS., ENG'G, & MED., UNDERSTANDING THE WELL-BEING OF LGBTQI+ POPULATIONS 122 (2020).

53. Sara Brightman et al., *Anti-Transgender Ideology, Laws, and Homicide: An Analysis of the Trifecta of Violence*, HOMICIDE STUD., Sept. 26, 2023, at 1, 9, 13; Elle Lett et al., *Intersectionality and Health Inequities for Gender Minority Blacks in the U.S.*, 59 AM. J. PREVENTIVE MED. 639, 640 (2020); Heather A. McCabe & M. Killian Kinney, *LGBTQ+ Individuals, Health Inequities, and Policy Implications*, 52 CREIGHTON L. REV. 427, 430–31 (2019).

54. Meyer, *supra* note 52, at 675–76; S. Bryn Austin et al., *Stigma and Health-Related Quality of Life in Sexual Minorities*, 53 AM. J. PREVENTIVE MED. 559, 559–60 (2017); Mark L. Hatzenbuehler, *Social Factors as Determinants of Mental Health Disparities in LGB Populations: Implications for Public Policy*, 4 J. SOC. ISSUES 31, 35–36 (2017).

55. Hatzenbuehler et al., *supra* note 13, at 2275; Mark L. Hatzenbuehler & Katherine M. Keyes, *Inclusive Anti-Bullying Policies and Reduced Risk of Suicide Attempts in Lesbian and Gay Youth*, 53 J. ADOLESCENT HEALTH S21, S21, S24 (2013); Raifman et al., *supra* note 13, at 350, 351.

56. McCabe & Kinney, *supra* note 53, at 427.

57. *Id.* at 430.

communities, it is important to note that the communities also have a history of resilience and positive attributes,⁵⁸ which should not be forgotten in this discussion of the negative impact on these communities from stigma and discrimination.

1. Behavioral Health and Suicide Risk

One of the primary health consequences of prevalent discrimination and stigma presents in the vastly disparate rates of behavioral health issues in LGBTQ communities.⁵⁹ Depression, anxiety, and substance use disorders are all seen at higher rates for LGBTQ individuals than for cisgender heterosexual peers.⁶⁰ Of particular concern are rates of suicide and suicidal ideation.⁶¹ LGB individuals are two to three times as likely to attempt suicide as their cisgender and heterosexual peers.⁶² For transgender communities, the lifetime suicide rate is a sobering nine times the rate of the general population.⁶³ For LGBTQ youth, suicide rates are four times that of their peers.⁶⁴ But, these rates are not inherent or immutable. Studies show that when an LGBTQ person is in a supportive environment that recognizes and affirms who they are, their suicide rates are closer to those of their cisgender and heterosexual peers.⁶⁵ In fact, LGBTQ youth who report at least one supportive person in their life are 40% less likely than

58. Anže Jurček et al., *Defining and Researching the Concept of Resilience in LGBT+ Later Life: Findings from a Mixed Study Systematic Review*, 17 PLOS ONE 1, 17, 26 (2022); Dawn M. Szymanski & Kirsten A. Gonzalez, *The Role of Resilience in Sexual and Gender Minority Mental Health*, in THE OXFORD HANDBOOK OF SEXUAL AND GENDER MINORITY MENTAL HEALTH 429 (Esther D. Rothblum ed., 2020).

59. NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 52, at 5; INST. OF MED., THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING 170 (2011); *Research Brief: Data on Transgender Youth*, TREVOR PROJECT (Feb. 22, 2019), <https://www.thetrevorproject.org/research-briefs/data-on-transgender-youth/>; RON STALL ET AL., LGBTQ HEALTH RESEARCH: THEORY, METHODS, PRACTICE 7–11, 38–39 (2020); David M. Frost & Ilan H. Meyer, *Minority Stress Theory: Application, Critique, and Continued Relevance*, 51 CURRENT OP. PSYCH. 1, 2 (2023).

60. NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 52, at 45, 309.

61. *Id.* at 29, 154; Andrea Kaniuka et al., *Stigma and Suicide Risk Among the LGBTQ Population: Are Anxiety and Depression to Blame and Can Connectedness to the LGBTQ Community Help?*, 23 J. GAY & LESBIAN MENTAL HEALTH 205, 205 (2019).

62. Jennifer L. Hughes et al., *Suicide in Young People: Screening, Risk Assessment, and Intervention*, 381 BMJ 1, 3 (2023).

63. SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 5 (2016).

64. *LGBTQ+ Youth Suicide Statistics & Attempt Rates in the U.S.*, TREVOR PROJECT (2021), <https://www.thetrevorproject.org/research-briefs/estimate-of-how-often-lgbtq-youth-attempt-suicide-in-the-u-s/> (last visited Apr 15, 2024) [hereinafter *LGBTQ+ Youth Suicide Statistics*].

65. *Accepting Adults Reduce Suicide Attempts Among LGBTQ Youth*, TREVOR PROJECT (June 27, 2019), https://www.thetrevorproject.org/wp-content/uploads/2019/06/Trevor-Project-Accepting-Adult-Research-Brief_June-2019.pdf [hereinafter *Accepting Adults*].

those without a supportive person to report a suicide attempt in the previous year.⁶⁶

2. *Violent Injury*

LGBTQ people are victims of violence, including rape, sexual assault, robbery, and aggravated assault, at four times the rate of their non-LGBTQ peers.⁶⁷ Even among victims of hate crimes, when LGBTQ and non-LGBTQ victims are compared, LGBTQ people experience eight times as many hate crimes.⁶⁸ Recent crime data indicate that incidents of anti LGBTQ hate crimes are increasing.⁶⁹ The rates of violence vary by sexuality and gender identity. While all LGB people experience an increase in violent victimization, bisexual individuals have the highest rate among sexual minorities.⁷⁰ Transgender communities experience violent victimization at a higher rate than sexual minorities.⁷¹ One particular area of concern is the homicide rate of Black transgender women.⁷² The year 2020 saw the most homicides of transgender women since surveillance started in 2013.⁷³

3. *Disease Disparities*

In addition to disparities in behavioral health and violent injury, LGBTQ communities experience disparities in overall health and wellness. These disparities are in broad areas, for example: females who are lesbian or bisexual

66. *Id.*

67. Andrew R. Flores et al., *Victimization Rates and Traits of Sexual and Gender Minorities in the United States: Results from the National Crime Victimization Survey, 2017*, 6 *SCI. ADVANCES* 1, 3 (2020).

68. Andrew R. Flores et al., *Hate Crimes against LGBT People: National Crime Victimization Survey, 2017-2019*, 17 *PLOS ONE* 1, 6–7 (2022).

69. JL Heinze, *Fact Sheet on Injustice in the LGBTQ Community* (June 24, 2021), <https://www.nsvrc.org/blogs/fact-sheet-injustice-lgbtq-community>.

70. Judy Porter & LaVerne McQuiller Williams, *Intimate Violence Among Underrepresented Groups on a College Campus*, 26 *J. INTERPERSONAL VIOLENCE* 3210, 3217–18 (2011); MIKEL L. WALTERS ET AL., NAT'L CTR. FOR INJ. PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER & SEXUAL VIOLENCE SURVEY (NISVS): 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION 1–2, 18–27 (2013); ADAM M. MESSINGER, *LGBTQ INTIMATE PARTNER VIOLENCE: LESSONS FOR POLICY, PRACTICE, AND RESEARCH* 6 (1st ed. 2017).

71. NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 52, at 116, 202; Flores et al., *supra* note 67, at 3, 4.

72. Nicole Moeder, *Number of Trans Homicides Doubled over 4 Years, with Gun Killings Fueling Increase: Advocates*, ABC NEWS (Oct. 12, 2022, 10:37 AM), <https://abcnews.go.com/US/homicide-rate-trans-people-doubled-gun-killings-fueling/story?id=91348274>; *see also* Gina Martinez & Tara Law, *Two Recent Murders of Black Trans Women in Texas Reveal a Nationwide Crisis, Advocates Say*, TIME (June 12, 2019, 2:36 PM), <https://time.com/5601227/two-black-trans-women-murders-in-dallas-anti-trans-violence/> (showing that although Black transgender women make up only 13% of transgender population, they represent 73% of transgender homicide victims; in 2018 as of June, they made up 100% of transgender homicide victims).

73. Brightman et al., *supra* note 53, at 11.

have higher rates of obesity,⁷⁴ gay men are at increased risk for sexually transmitted diseases,⁷⁵ and LGBTQ communities are more likely to experience substance use issues.⁷⁶ In a report titled *Understanding the Wellbeing of LGBTQI+ Populations*, the National Academies of Health Sciences, Engineering, and Medicine reported that LGBTQ communities record lower health and well-being than their non-LGBTQ peers.⁷⁷ Bisexual and transgender communities, particularly nonbinary communities, appear to experience these disparities at an even higher rate.⁷⁸ The report also found that those with intersectional identities are particularly impacted by health disparities.⁷⁹ In examining the causes of disparities for LGBTQ communities, the report discussed the impact of minority stress on communities, particularly the physiological impact of exposure to stigma and discrimination.⁸⁰ These mechanisms also contribute to the differences for people with intersectional identities and those who experience multiple forms of stigmatization.⁸¹

4. Other Types of Disparities

While this Article focuses specifically on health disparities for the purposes of the analysis of the Court's reasoning below,⁸² it is worth noting that there are other ways that LGBTQ communities are impacted by systemic discrimination and stigma. The rates of homelessness in LGBTQ communities are far above that of non-LGBTQ communities.⁸³ Of note, LGBTQ youth are extremely overrepresented in unhoused populations, particularly those who are transgender or with intersectional identities.⁸⁴ The leading reason LGBTQ youth are unhoused is that they are kicked out of their homes due to their LGBTQ status.⁸⁵

74. Corrie Barnett Struble et al., *Overweight and Obesity in Lesbian and Bisexual College Women*, 59 J. AM. COLL. HEALTH 51, 52–53 (2010).

75. *Syphilis & MSM*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/std/syphilis/stdfact-msm-syphilis.htm> (last updated Jan. 30, 2024).

76. INST. OF MED., *supra* note 59, at 214–19.

77. NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 52, at 289.

78. *Id.* at 354–55.

79. *Id.* at 41–42.

80. *See generally id.*

81. *Id.* at 319.

82. *See infra* Sections IV.B, IV.C.

83. SOON KYU CHOI ET AL., *SERVING OUR YOUTH 2015: THE NEEDS AND EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH EXPERIENCING HOMELESSNESS* 9–10 (2015); NICHOLAS RAY, *NAT'L GAY & LESBIAN TASK FORCE POL'Y INST. & NAT'L COAL. FOR THE HOMELESS, LESBIAN, GAY, BISEXUAL & TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS* 153 (2006).

84. *See* RAY, *supra* note 83, at 13 (describing how “the proportion of LGBT youth in the overall homeless youth population is significantly higher than their proportion in the U.S. population as a whole”).

85. *Homelessness and Housing Instability Among LGBTQ Youth*, TREVOR PROJECT (Feb. 3, 2022), <https://www.thetrevorproject.org/research-briefs/homelessness-and-housing-instability-among-lgbtq->

Socioeconomic disparities also exist, often explained by continuing discrimination in work environments.⁸⁶ Differences in morbidity in some diseases, particularly cancer, correlate with a lack of affirming health care environments.⁸⁷ The variety of disparities reflects the ongoing social and structural discrimination impacting the overall health and well-being of LGBTQ communities.

B. *Minority Stress Theory*

In 2003, Ilan Meyer published a seminal study of the health impacts of LGBTQ stigma.⁸⁸ His work examined what he coined as “minority stress theory,” in which he described the way that stigma and discrimination directly impact the mental and physical health of sexual minority individuals.⁸⁹ Though first described as related to sexual minorities, the concept of minority stress has been applied more widely over the years to those who are sexual and gender minorities.⁹⁰ In 2023, twenty years after Meyer’s original study, Frost and Meyer documented and analyzed the continued relevance of minority stress theory and its impact on LGBTQ populations.⁹¹ They described its continued applicability, underscored by an ever growing collection of studies that highlight its relevance.⁹² Minority stress theory posits that health disparities experienced by sexual and gender minorities are “produced by excess exposure to social stress” faced by these groups “due to their stigmatized social status.”⁹³ The types of stressors that are experienced include not only chronic stressors, like living in poverty and unfair treatment due to minority status, but also discriminatory laws and policies.⁹⁴ Additionally, people may experience socialization which creates internalized stigma, expectations of rejection, and identity concealment, all of

youth-feb-2022/; see also Bianca D.M. Wilson et al., *Homelessness Among LGBT Adults in the US*, WILLIAMS INST. (May 2020), <https://williamsinstitute.law.ucla.edu/publications/lgbt-homelessness-us/>.

86. Mitchell R. Lunn et al., *Sociodemographic Characteristics and Health Outcomes Among Lesbian, Gay, and Bisexual U.S. Adults Using Healthy People 2020 Leading Health Indicators*, 4 *LGBT HEALTH* 283, 286 (2017).

87. Thomas Buchmueller & Christopher S. Carpenter, *Disparities in Health Insurance Coverage, Access, and Outcomes for Individuals in Same-Sex Versus Different-Sex Relationships, 2000–2007*, 100 *AM. J. PUB. HEALTH* 489, 493–94 (2010); Julia A. Dilley et al., *Demonstrating the Importance and Feasibility of Including Sexual Orientation in Public Health Surveys: Health Disparities in the Pacific Northwest*, 100 *AM. J. PUB. HEALTH* 460, 460, 463–65 (2010); *Cancer Facts for Lesbian and Bisexual Women*, AM. CANCER SOC’Y, <https://www.cancer.org/cancer/risk-prevention/understanding-cancer-risk/cancer-facts/cancer-facts-for-lesbian-and-bisexual-women.html> (last updated Feb. 1, 2024).

88. Frost & Meyer, *supra* note 59, at 1–2.

89. *Id.*

90. *Id.* at 2–3.

91. *Id.* at 5–6.

92. *Id.* at 1.

93. *Id.* at 1–2.

94. Blake, *supra* note 12, at 182–83; Blake & Hatzenbuehler, *supra* note 12, at 484–86.

which contribute to the stress caused by discrimination based on status.⁹⁵ The impact of the combination of minority stressors is that sexual and gender minorities experience health inequities where they are at higher risk from negative health outcomes, as detailed above, than those who are cisgender and heterosexual.

C. Policy Related Stigma and LGBTQ Health Inequities

While Meyer originally looked at the impact of stigma and discrimination on LGBTQ individuals, over time, other researchers turned to examining the structures of stigma themselves. Of particular interest to these scholars are the ways that policies impact the health of LGBTQ communities. Early research by Hatzenbuehler studied how state level policies impact the behavioral health of LGB populations.⁹⁶ Later work examined the impact of bullying laws on youth.⁹⁷ Other studies since continued to examine laws as one of the drivers, or mediators, of stigma in LGBTQ populations.⁹⁸ For example, a 2017 study found that prior to *Obergefell*⁹⁹ and national marriage equality, in states that permitted same-sex marriage there was a 7% reduction in high school students who reported suicide attempts.¹⁰⁰ Also, a recent 2023 report examined the impact of Florida's "Don't Say Gay" bill on LGBTQ communities.¹⁰¹ The report found that some families were considering leaving the state.¹⁰² Others described "fear, anger, and disbelief" and an increase in bullying behaviors at schools.¹⁰³ Another researcher specifically called for public health researchers to increase their study of the public health impacts of "Don't Say Gay" type laws after twelve additional states followed Florida's lead, introducing similar bills in their states.¹⁰⁴ In encouraging further research, the authors offer "research priorities using theoretical and

95. See Frost & Meyer, *supra* note 59, at 2–3 for additional information. Meyer defines "internalized stigma" as the process by which the person rejects their LGBTQ identity, "expectations of rejection" as the process of expecting discrimination due to awareness of societal stigma and "identity concealment" as the process of hiding one's LGBTQ identity to protect themselves from minority stressors. *Id.* at 2.

96. Hatzenbuehler et al., *supra* note 13, at 276; Hatzenbuehler & Keyes, *supra* note 55, at S22–S26; Blake & Hatzenbuehler, *supra* note 12, at 485–86, 488.

97. See generally Hatzenbuehler & Keyes, *supra* note 55 (evaluating impact of "anti-bullying policies that are inclusive of sexual orientation").

98. Blake, *supra* note 12, at 187–200; Arthur C. Evans, Jr., *Protecting the LGBT Community Is Good Health Policy*, AM. PSYCH. ASS'N (May 22, 2018), <https://www.apa.org/news/press/op-eds/lgbt-health-policy>; McCabe & Kinney, *supra* note 53, at 441–44.

99. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

100. Raifman et al., *supra* note 13, at 355. See generally Mark L. Hatzenbuehler et al., *Social Attitudes Regarding Same-Sex Marriage and LGBT Health Disparities: Results from a National Probability Sample*, 73 J. SOC. ISSUES 508 (2017).

101. ABBIE E. GOLDBERG, THE WILLIAMS INST., IMPACT OF HB 1557 (FLORIDA'S DON'T SAY GAY BILL) ON LGBTQ+ PARENTS IN FLORIDA (2023).

102. *Id.* at 19.

103. *Id.*

104. Kline et al., *supra* note 3, at 1398.

methodological approaches that highlight the complexity of these issues, prioritize community input, and work to reverse harmful policy adoption.”¹⁰⁵ Other studies seek to examine the health harms perpetrated generally by the spate of anti LGBTQ bills.¹⁰⁶ Some of the research specifically examines the increase in violence in this climate.¹⁰⁷ For instance, anti LGBTQ incidents reportedly increased by 300% during Pride month in 2023.¹⁰⁸ Anti LGBTQ hate crimes jumped up 19% from 2021 to 2022 according to the FBI annual crime report, with crimes specific to gender identity rising 35% in that time period.¹⁰⁹ Recent reports discuss the correlation of these crimes with anti LGBTQ extremism.¹¹⁰ The evidence is mounting, though it appears this evidence is not used by the Court in its decisions regarding competing rights in this area.¹¹¹ As some scholars observed, “[t]here are risks to ignoring the results of experiments, just as there are dangers to casting aside scientific understanding. The Supreme Court’s new direction poses a profound threat to the public’s health.”¹¹²

III. OVERVIEW OF STATE LAWS AND RELATED LEGAL CHALLENGES

The data establishes that laws adversely impacting LGBTQ communities are on the rise. Some laws are protective, as evidenced by twenty-seven states and the District of Columbia either adding sexual orientation and/or gender identity to their existing antidiscrimination laws or interpreting existing laws denoting “because of sex” to include sexual orientation and gender identity.¹¹³ But, the vast majority of these laws seek to create new barriers. Since 2020, these

105. *Id.*

106. TIMOTHY WANG ET AL., THE FENWAY INST., THE CURRENT WAVE OF ANTI-LGBT LEGISLATION 3–9 (2016). See generally Brightman et al., *supra* note 53; Gonzalez et al., *supra* note 3; Laura E. Kuper et al., *Supporting and Advocating for Transgender and Gender Diverse Youth and Their Families Within the Sociopolitical Context of Widespread Discriminatory Legislation and Policies*, 10 CLINICAL PRAC. PEDIATRIC PSYCH. 336 (2022).

107. Bennett et al., *supra* note 3.

108. *Id.* at 1.

109. Brooke Migdon, *FBI Crime Statistics Show Anti-LGBTQ Hate Crimes on the Rise*, HILL (Oct. 16, 2023, 6:22 PM), <https://thehill.com/homenews/lgbtq/4259292-fbi-crime-statistics-show-anti-lgbtq-hate-crimes-on-the-rise/>.

110. Alfonseca, *supra* note 13.

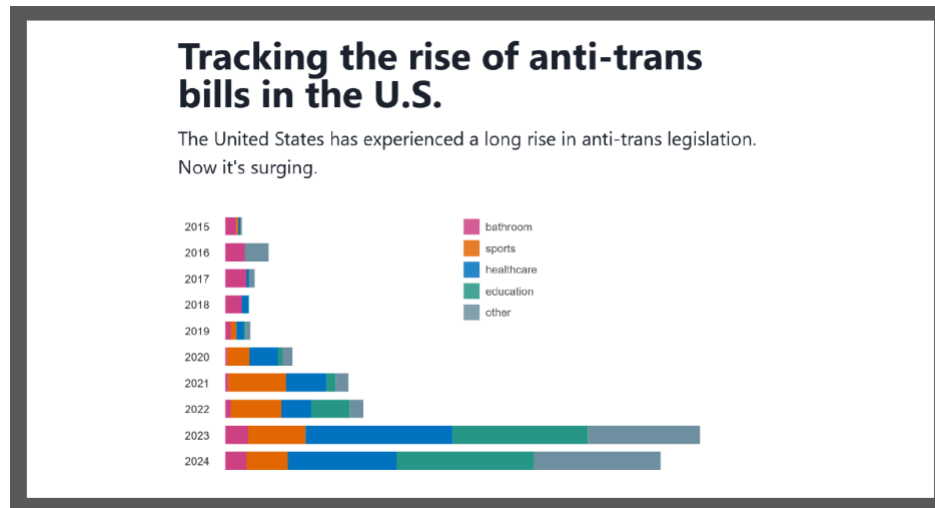
111. Joshua N. Auerbach & Joshua M. Sharfstein, *The Supreme Court’s New Direction and the Public’s Health*, 3 JAMA HEALTH F. 1, 1 (2022).

112. *Id.* at 2.

113. *Equality Maps: Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Dec. 27, 2023) (reporting that as of December 2023, 23 states and the District of Columbia have state laws which explicitly prohibit discrimination of both sexual orientation and gender identity, 7 states prohibit discrimination based on sexual orientation and gender identity through interpretation of existing antidiscrimination laws on basis of sex, 1 state prohibits discrimination on basis of sexual orientation only, and 19 states have no antidiscrimination provisions for sexual orientation or gender identity). For information on select local laws, see *id.*

restrictive laws have risen dramatically, with over 500 anti LGBTQ bills introduced throughout the United States in 2023 (see Figure 1).¹¹⁴

Figure 1¹¹⁵



A. Anti LGBTQ State Laws

Anti LGBTQ laws take multiple forms.¹¹⁶ Seven states passed laws censoring discussion of LGBTQ people or issues in schools, with an additional five states requiring parental notification of any LGBTQ content, with the option to opt out of inclusion for their child.¹¹⁷ Five states passed laws forcing schools to out transgender youth with another six states promoting the practice of outing transgender students without requiring schools to do so.¹¹⁸ Nine states

114. Susan Miller, 'War' on LGBTQ Existence: 8 Ways the Record Onslaught of 650 Bills Targets the Community, USA TODAY (Apr. 5, 2023, 1:45 PM), <https://www.usatoday.com/story/news/nation/2023/03/31/650-anti-lgbtq-bills-introduced-us/11552357002/>; Choi, *supra* note 5; AM. C.L. UNION, *supra* note 5.

115. For Figure 1 (and more information regarding these legislative trends), see *Tracking the Rise of Anti-Trans Bills in the U.S.*, TRANS LEGIS. TRACKER, <https://translegislation.com/learn> (last visited April 23, 2024). Permission to use the Figure in this Article was provided to the author by Andrew Bales, Founder of the Trans Legislation Tracker.

116. See generally *Equality Maps: LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/curricular_laws (last updated Feb. 22, 2024) (explaining that anti LGBTQ state laws include subject censorship laws, parental notification laws, and discussion censorship laws).

117. *Id.*

118. *Equality Maps: Forced Outing of Transgender Youth in Schools*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/youth/forced_outing (last updated Feb. 22, 2024).

implemented laws impacting transgender individuals' ability to use bathrooms congruent with their gender identity in schools, with two states expanding the ban to colleges or government buildings.¹¹⁹ Florida makes using a bathroom inconsistent with assigned sex at birth a criminal offense.¹²⁰ Twenty-four states ban transgender students from sports participation consistent with their gender identity.¹²¹

Of particular concern is the increase in states which are banning transgender youth from receiving gender-affirming care in accordance with medical best practices.¹²² Twenty-two states enacted bans on gender-affirming health care.¹²³ Five states make providing gender-affirming care in accordance with medical best practices a felony.¹²⁴ Many of these bans are currently challenged in the courts and some are under partial or full temporary injunction.¹²⁵ Only one of these laws has been permanently blocked and this decision is on appeal.¹²⁶ Texas Governor Greg Abbott has even made parents seeking gender-affirming care for their children in Texas subject to removal by child protective services.¹²⁷ Though this order is challenged in court, some families remain eligible for investigation by child protective services while the case continues.¹²⁸

Importantly, all of the anti LGBTQ bills impact the community by increasing minority stress as described above and bring with them a concern for

119. *Equality Maps: Bans on Transgender People's Use of Bathrooms & Facilities According to Their Gender Identity*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/youth/school_bathroom_bans (last updated Feb. 22, 2024).

120. *Id.*

121. *Equality Maps: Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans (last updated Feb. 22, 2024).

122. *See Equality Maps: Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare/youth_medical_care_bans (last updated Feb. 22, 2024) ("Bans on best-practice medical care represent one of the most extreme and coordinated political attacks on transgender people in recent years.").

123. *Id.*

124. *Id.*

125. As of the date of this Article, two states had a partial or full temporary injunction; one state enacted a permanent injunction (which was appealed). *See id.* (providing regularly updated listing of court case statuses).

126. *Id.*; *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 894 (E.D. Ark. 2021).

127. *See* Letter from Ken Paxton, Texas Att'y Gen., Op. No. KP-0401, to Matt Krause, Chair, Texas House Comm. on Gen. Investigating 5 (Feb. 18, 2022), <https://texasattorneygeneral.gov/sites/default/files/global/KP-0401.pdf>; Letter from Greg Abbott, Texas Governor to Jaime Masters, Comm'r, Texas Dep't of Fam. & Protective Servs. 1 (Feb. 22, 2022), <https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf> ("Texas law also imposes a duty on [the Department of Family Protective Services] to investigate the parents of a child who is subjected to . . . gender-transitioning procedures.").

128. *See* Letter from Ken Paxton, *supra* note 127; *see also* *Abbott v. Doe*, No. 03-22-00107-CV, 2022 Tex. App. LEXIS 1607 (Tex. App. Mar. 9, 2022); *Abbott v. PFLAG, Inc.*, No. 03-22-00420-CV, 2022 Tex. App. LEXIS 5115 (Tex. App. July 20, 2022).

the associated public health harms.¹²⁹ Research suggests that this is not a theoretical concern but one that is very real and an anticipated consequence, through decades of research.¹³⁰

B. Legal Challenges

Not all laws and cases highlight discriminatory policies and practices. For example, *Obergefell*, making marriage equality the law of the land¹³¹ and *Bostock*,¹³² interpreting “because of sex” in Title VII to include sexual orientation and gender identity, created obligations to protect the rights of LGBTQ people even in the absence of federal legislation specifically including sexual orientation and gender identity as protected classes.¹³³ While these are positive steps, a steady stream of cases are asking courts to consider the religious rights of those who oppose these protections on the basis of their religion. This Section briefly provides an overview of some cases specifically related to LGBTQ communities. The following Section introduces the issue of varying interpretations of harm in religious exemption cases.¹³⁴

The Supreme Court held in the 1995 case *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*¹³⁵ that although a Massachusetts public accommodation law was not on its face unconstitutional, the application of the law—requiring parade organizers to allow an LGBTQ group to participate in the parade—violated the Free Speech Clause of the First Amendment.¹³⁶ Though the state court found the parade not expressive in nature, the Supreme Court disagreed.¹³⁷ The analysis contained no mention of any potential harm to the denied group or to LGBTQ communities as part of the majority opinion.¹³⁸

The *Boy Scouts of America v. Dale* case followed in 2000.¹³⁹ Dale was a longtime Boy Scout member and leader.¹⁴⁰ He was released from his leadership position following the organization’s discovery that he was a gay man.¹⁴¹ The Court held that application of the state antidiscrimination law was an

129. See *supra* Section II.B.

130. See *supra* Section II.B.

131. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

132. *Bostock v. Clayton County*, 590 U.S. 644 (2020).

133. *Id.* at 658, 683; *Obergefell*, 576 U.S. at 681.

134. See *infra* Section III.C.

135. 515 U.S. 557 (1995).

136. *Id.* at 573.

137. *Id.* at 564, 568. See generally *Irish-Am. Gay, Lesbian, & Bisexual Grp. Of Bos., Inc. v. City of Boston*, 636 N.E.2d 1293 (Mass. 1994), *rev’d*, *Hurley*, 515 U.S.

138. See generally *Hurley*, 515 U.S. at 557.

139. 530 U.S. 640 (2000).

140. *Id.* at 643.

141. *Id.* at 645.

unconstitutional violation of the Boy Scouts of America’s free association.¹⁴² Though the Court found the state public accommodations law constitutional, they ultimately determined that the state’s interests “do not justify such a severe intrusion on the freedom of expressive association.”¹⁴³ The majority’s analysis of harm largely focused on harm to the organization, rather than the harm to Dale.¹⁴⁴ Justice Stevens, in his dissent, unlike the majority, analyzed the dignitary harm:

The only apparent explanation for the majority’s holding, then, is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual’s—should be singled out for special First Amendment treatment. Under the majority’s reasoning, an openly gay male is irreversibly affixed with the label “homosexual.” That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority.¹⁴⁵

In addition to these two important cases, a group of cases followed examining the ability of wedding providers to decline to provide services to same-sex weddings: *Elane Photography*,¹⁴⁶ and *Masterpiece Cakeshop*,¹⁴⁷ in which a wedding photographer and a baker, respectively, sought religious exemptions to their state’s public accommodation laws. Both cases requested that the Court consider the definition of expressive conduct, with the potential to affect the efficacy of public accommodation laws impacting LGBTQ communities more broadly.¹⁴⁸ The New Mexico Supreme Court found *Elane Photography*, the earliest of these cases, in violation of the state public accommodation law.¹⁴⁹ The Supreme Court denied *certiorari* in the case.¹⁵⁰ *Masterpiece Cakeshop*, however, made its way to the Supreme Court following a state decision finding the baker in violation of the state public accommodations law.¹⁵¹ The case offered the Court an opportunity to make clear that religious exemptions to public accommodations laws are not permitted.¹⁵² But, the Court declined to rule on the question itself, instead finding that the state’s public

142. *Id.* at 656.

143. *Id.* at 658–59.

144. *Id.* at 653, 659.

145. *Id.* at 696 (Stevens, J., dissenting).

146. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 572 U.S. 1046 (2014).

147. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617 (2018).

148. *Id.* at 640; *Elane Photography*, 309 P.3d at 77.

149. *Elane Photography*, 309 P.3d at 77.

150. *Id.*

151. *Masterpiece*, 584 U.S. at 630–31.

152. *Id.* at 623–24.

accommodations law, though constitutional, applied in that case in a way showing religious animus.¹⁵³ The Court again left the determination of religious exemptions to LGBTQ public accommodations laws for another day.¹⁵⁴

C. Health Care Related Legal Challenges

In addition to the cases regarding religious exemptions to antidiscrimination laws, LGBTQ communities are experiencing the impact of ongoing and pervasive litigation regarding LGBTQ rights. The Obama administration interpreted the Antidiscrimination in Health Care provision of Section 1557 of the Patient Protection and Affordable Care Act (“ACA”)¹⁵⁵ as inclusive of sexual orientation and gender identity in 2016; since then, this interpretation has been challenged through litigation.¹⁵⁶ In *Franciscan Alliance v. Burwell*,¹⁵⁷ the United States District Court, Northern District of Texas evaluated a challenge to the administrative rule interpreting Section 1557 and issued a nationwide injunction against enforcement of nondiscrimination provisions related to sexual orientation and gender identity.¹⁵⁸ In 2017, the court stayed the case to allow the Department of Health and Human Services to revise its rule to bring it in compliance with the court’s ruling.¹⁵⁹ The Trump administration then promulgated the 2020 rule revising the interpretation of “on the basis of sex” to only include “biological sex,” effectively ending the antidiscrimination protections for sexual orientation and gender identity, as well

153. *Id.* at 639–40.

154. *Id.* at 640.

155. 42 U.S.C. § 18116.

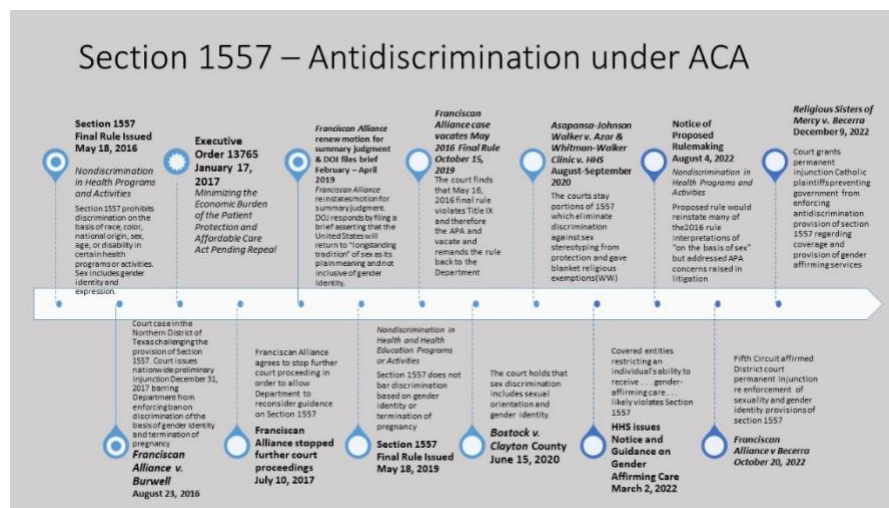
156. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31376, 31384, 31390 (May 18, 2016) (interpreting 42 U.S.C. § 18116 during Obama administration).

157. 227 F. Supp. 3d 660 (N.D. Tex. 2016).

158. *Id.* at 696. It is worth noting that the Northern District of Texas historically only seats one judge, making the forum ripe for forum shopping by conservative groups who want a favorable judge to first hear controversial cases. *See, e.g., All. For Hippocratic Med. v. FDA*, 688 F. Supp. 3d 507 (N.D. Tex. 2023) (bringing suit against FDA, on behalf of physicians and associations, arguing that FDA exceeded its authority through 2000 approval of mifepristone, “abortion pill”), *aff’d in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023), *cert. granted*, *Danco Lab’s, LLC v. All. for Hippocratic Med.*, 144 S. Ct. 527 (2023); Lindsay Whitehurst & Alanna Durkin Richer, *Abortion Pill Order Latest Contentious Ruling by Texas Judge*, AP NEWS (Apr. 8, 2023, 10:07 AM), <https://apnews.com/article/texas-judge-matthew-kacsmark-abortion-pill-fda-75964b777ef09593a1ad948c6cfc0237> (explaining that only civil judge for Northern District of Texas, Judge Matthew Kacsmark, has history of opposing LGBTQ rights and commonly adjudicates lawsuits for conservative plaintiffs who know he is sympathetic to their cause); Jacqueline Thomsen, *US Judge Shopping Curb Thwarted as Texas Court Resists*, BL (Apr. 1, 2024, 4:56 PM), <https://news.bloomberglaw.com/us-law-week/texas-court-eyed-for-judge-shopping-wont-alter-case-assignments> (describing how federal Judicial Conference “adopted a policy urging courts to change their case assignment procedures to avoid litigants filing in courts where they think they’re more likely to have a favorable outcome,” in response to “judge shopping”).

159. *Franciscan All., Inc. v. Burwell*, No. 7:16-CV-00108-O, 2017 WL 2964088, at *1 (N.D. Tex. Jan. 24, 2017).

as adding a blanket religious exemption provision.¹⁶⁰ When the Supreme Court ruled in *Bostock v. Clayton County*¹⁶¹ that “on the basis of sex” under Title VII includes sexual orientation and gender identity, multiple court cases were filed seeking to bar enforcement of the provisions of the 2020 rule removing antidiscrimination provisions for sexual orientation and gender identity.¹⁶² Some also challenged the blanket religious exemption.¹⁶³ The 2020 rule’s interpretation is enjoined, though some Catholic providers received an exemption.¹⁶⁴ The pervasive nature of the fight for equity in health care settings, spanning 2016 to the time of this writing in 2023, is illustrated in Figure 2 below.

Figure 2¹⁶⁵

Section 1557 is only one of many cases currently litigated related to religious objections to antidiscrimination provisions for LGBTQ communities.¹⁶⁶ Employment discrimination cases continued following *Bostock*.

160. *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928, 947 (N.D. Tex. 2019); 85 Fed. Reg. 37160, 37162, 37167 (June 19, 2020) (to be codified at 42 C.F.R. pts. 438, 440, 460, 45 C.F.R. pts. 86, 92, 147, 155, 156).

161. 590 U.S. 644 (2020).

162. *Id.* at 683; *see, e.g.*, *Walker v. Azar*, 480 F. Supp. 3d 417 (E.D.N.Y. 2020); *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020); *Bos. All. Of Gay, Lesbian, Bisexual, & Transgender Youth v. U. S. Dep’t of Health & Hum. Servs.*, 557 F. Supp. 3d 224 (D. Mass. 2021).

163. *See, e.g.*, *Whitman-Walker Clinic*, 485 F. Supp. 3d at 43.

164. *See id.* at 65 (enjoining 2020 rule); *Walker*, 480 F. Supp. 3d at 430 (same); *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1154 (D.N.D. 2021) (granting exemption to Catholic plaintiffs).

165. The author created this Figure.

166. *See, e.g.*, *Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm’n*, 70 F.4th 914, 937–38 (5th Cir. 2023).

While the Court ruling made it clear that sexual orientation and gender identity were included in “because of sex,”¹⁶⁷ they left for future cases questions of company rules (e.g., single gender bathrooms, rules regarding morals provisions) and discussions of religious exemptions.¹⁶⁸ A recent court ruling in Texas, currently under appeal, held that businesses with a secular opposition to different sexual orientations and gender identities could implement gender neutral provisions such as dress codes and requiring bathroom use in accordance with sex assigned at birth.¹⁶⁹ Court cases are likely to continue to examine the extent to which non-ministerial for profit religious businesses can receive religious exemption to the provisions.

Other cases examine the extent to which health care services are excluded from antidiscrimination provisions. For example, in *Braidwood Management v. Becerra*,¹⁷⁰ the Fifth Circuit ruled that the provision of the ACA requiring coverage of preventive services violated the RFRA by requiring coverage of PrEP, a drug prescribed for prevention of transmission of HIV.¹⁷¹ After twenty states passed bans on gender-affirming care for youth, nearly half of these laws are challenged in court on equal protection and due process grounds.¹⁷² As of the time of this writing, most courts adjudicating these laws issued injunctions on the bans, at least preliminarily.¹⁷³ The Sixth Circuit, however, declined an injunction, expressing an unwillingness to interfere with state legislatures.¹⁷⁴ It appears likely that these cases may find their way to the Supreme Court.

D. Other Cases Impacted by Public Health Harms

Concerns regarding the Court’s failure to consider public health harms are not exclusive to LGBTQ cases. In *Hobby Lobby*, the Court heard arguments regarding the public health harms of creating exemptions to providing

167. *Bostock*, 590 U.S. at 655–56.

168. *Id.* at 658, 662.

169. *Braidwood Mgmt.*, F. Supp. 3d at 613 (reasoning that Title VII is not generally applicable as it creates exceptions for businesses with under fifteen employees, for firing members of Communist Party, and for hiring of Indigenous Americans on basis of race or national origin).

170. *Braidwood Mgmt., Inc. v. Becerra*, No. 420-cv-00283-O, 2023 U.S. Dist. LEXIS 54769 (N.D. Tex. Mar. 30, 2023).

171. *Id.* at *4.

172. See, e.g., Amended Complaint, *Voe v. Mansfield*, No. 1:23-CV-00864 (M.D.N.C. Oct 11, 2023), ECF No. 71; *L.W. by & through Williams v. Skrmetti*, 83 F.4th 460, 467 (6th Cir. 2023), *cert. dismissed in part sub nom. Doe v. Kentucky*, 144 S. Ct. 389 (2023); *K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, No. 23-2366, 2024 WL 811523 (7th Cir. Feb. 27, 2024), *reconsideration denied*, No. 23-2366, 2024 WL 1212700 (7th Cir. Mar. 21, 2024).

173. See *Doe v. Ladapo*, No. 4:23cv114-RH-MAF, 2023 U.S. Dist. LEXIS 99603, at *47 (N.D. Fla. June 6, 2023); *Van Garderen v. State*, No. DV-23-541 (Mont. Jud. Dist. Ct. Sept. 27, 2023) (granting preliminary injunction); *K.C. v. Individual Members of the Med. Licensing Bd. of Ind.*, No. 1:23-cv-00595-JPH-KMB, 2023 U.S. Dist. LEXIS 104870, at *39–*40 (S.D. Ind. June 16, 2023). *But see* *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1231 (11th Cir. 2023).

174. *L.W. v. Skrmetti*, 73 F.4th 408, 413, 416 (6th Cir. 2023).

contraception under the ACA.¹⁷⁵ The Court did not find these harms sufficiently convincing.¹⁷⁶ State courts are considering religious exemptions to Section 1557 under the ACA and granting exemptions to provision of reproductive and gender-affirming care, finding arguments regarding public health harms unpersuasive.¹⁷⁷ Even the area of Second Amendment jurisprudence presented significant evidence of potential public health harms, which the Supreme Court declined to consider.¹⁷⁸ In *Bruen*, the Court struck down the law at issue and

paid no attention to escalating gun homicides—which have reached rates this country has not seen in decades—or to the fact that the law was New York’s attempt to balance protection of Second Amendment rights with public safety. Although the Court could have ruled that the law was being enforced too strictly, it instead invalidated the law entirely, on the basis of its radically expanded interpretation of the Second Amendment, while giving no weight to the state’s interest in reducing the number of firearms in the public sphere.¹⁷⁹

In *Vlaming v. West Point School Board et al.*,¹⁸⁰ a recent Virginia Supreme Court free speech and free exercise case brought by a teacher seeking to decline to use a transgender student’s preferred pronouns, the dissent critiqued the majority for declining to consider the impact of the claim on the transgender youth.¹⁸¹ The dissent provided data regarding the impact of discrimination on LGBTQ youth and proposed that the majority’s analysis should have centered on balancing the rights of the parties.¹⁸² This case is notable because of the dissent’s clear articulation of the public health harms of discrimination on the impacted party.¹⁸³ Moving forward, it is unclear if other courts, including the

175. *Hobby Lobby*, 573 U.S. at 726–27.

176. *Id.* at 686, 719.

177. *See, e.g., Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1148 (D.N.D. 2021); *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 694 (N.D. Tex. 2016).

178. *See generally* Ulrich, *supra* note 35, for a discussion on the public health implications of firearm violence in relation to the decision in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022).

179. *Id.* at 1245.

180. 895 S.E.2d 705 (2023).

181. Justice Mann’s concurrence in part and dissent in part concurs with the ultimate disposition to return the case to the lower court. His opinion takes issue with the majority’s interpretation of the compelling state interest to include only regulation of peace and good order. He proposes an interpretation that includes public safety as a compelling interest and writes that the majority uses a “super scrutiny standard,” elevating Free Exercise above other rights in a way that may never be overcome by compelling state interest. Justice Mann suggests the court must consider not only the petitioners’ religious rights, but the rights of the school board to create an environment free from discrimination for transgender students in order to provide a high-quality education and the rights of the impacted student including their individual liberty and self-determination. His dissent also includes information on the impact of discrimination and harassment on transgender students, inclusive of mental health harms. *Id.* at 748–83 (Mann, J., concurring in part and dissenting in part).

182. *Id.*

183. *Id.*

Supreme Court, will follow this line of analysis (though the current Supreme Court does not appear ready to embrace this line of reasoning at this time).¹⁸⁴

IV. 303 CREATIVE V. ELENIS ANALYSIS

The *303 Creative v. Elenis* case, decided in July 2023, is the most recent Supreme Court case impacting LGBTQ communities.¹⁸⁵ This case provides a clear illustration of how the Court views, or declines to view, public health harms to LGBTQ communities in its analysis of religious rights. In *303 Creative*, Lorie Smith, a Colorado website designer, wanted to post a statement on her website explaining how she would only promote messages consistent with her faith and beliefs, which would preclude her from designing websites for any same-sex weddings.¹⁸⁶ She asserted that her work as a website designer qualifies as the creative expression of an artist, the content of which is not subject to state regulation.¹⁸⁷ She emphasized, and the State acknowledged, that she would provide other services to LGBTQ customers, but not wedding sites, which she asserts would force her to convey a message that is against her faith and restricts her from explaining her faith.¹⁸⁸ Colorado argued that the Colorado Anti-Discrimination Act (“CADA”) requires her to provide these website services in a nondiscriminatory way.¹⁸⁹ They asserted that once one offers goods or services to the public, they must do so in a nondiscriminatory manner, regardless of the content involved.¹⁹⁰

Smith argued that CADA is an impermissible infringement on both her free exercise and free speech rights.¹⁹¹ The district court and the Tenth Circuit found for Colorado using a strict scrutiny analysis.¹⁹² The Court granted *certiorari* only regarding the free speech claims, specifically to address whether applying a

184. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014) (looking only at economic impact and finding that granting exemption would have “precisely zero” effect on those impacted by exemption); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 219 (2022) (declining to endorse a weighing of “the relative weights of the respective interests involved” deeming that a legislative function); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 511 (2022) (involving a free speech and free exercise case regarding a public school employee’s prayer on a school football field where Court used a strict scrutiny analysis requiring interpretation with “reference to historical practices and understandings,” with dissent expressing concern that majority did not give enough weight to endorsement and coercion issues).

185. 600 U.S. 570 (2023).

186. *Id.* at 580.

187. *Id.* at 579–84.

188. *Id.* at 579–80.

189. *Id.* at 581–82.

190. *Id.* at 590–91, 594–95.

191. *Id.* at 579–84.

192. *303 Creative v. Elenis*, 405 F. Supp. 3d 907, 912 (Colo. 2019); *303 Creative v. Elenis*, 6 F.4th 1160, 1168 (10th Cir. 2021).

public accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.¹⁹³

The Supreme Court's analysis of the free speech claim led to a different outcome than in the lower court. The majority started its discussion of the case by reaffirming the importance of public accommodation laws to ensure the civil rights of all Americans.¹⁹⁴ The opinion then immediately pivoted to the concern that an antidiscrimination law could compel speech.¹⁹⁵

The majority in this case based its analysis strictly on whether CADA compelled speech.¹⁹⁶ The Court viewed Ms. Smith's activity as pure speech and analyzed the interests involved through that framework.¹⁹⁷ The Court did not analyze harm or any balancing of the state interest of antidiscrimination and Ms. Smith's free speech rights.¹⁹⁸ In fact, the only mention of harm by the majority was in reference to the dissent and their "reimagining" of the case.¹⁹⁹ The Court relied on *West Virginia Bd. of Ed. v. Barnette*,²⁰⁰ *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,²⁰¹ and *Boy Scouts of America v. Dale*²⁰² to illustrate the proposition that even if speech is unpopular, "the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided,' ... and likely to cause 'anguish' or 'incalculable grief.'"²⁰³ The majority highlighted that Ms. Smith is not refusing to serve LGBTQ customers, rather only refusing to create websites for same-sex marriage.²⁰⁴ The majority opinion ended by noting "tolerance, not coercion, is our Nation's answer. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands. Because Colorado seeks to deny that promise, the judgment is reversed."²⁰⁵

193. *303 Creative*, 600 U.S. at 577–79. Though much has been made of a potential standing issue in this case, as Ms. Smith brought the action before she took any action and without any party alleging harm from her implementation of the website statement, the Court decided the standing issue in the affirmative and this Article leaves that issue for another day.

194. *Id.* at 590–92.

195. *Id.* at 591–92.

196. *Id.* at 588–89.

197. *Id.* at 587–93.

198. *See id.*

199. *Id.* at 597.

200. 319 U.S. 624 (1943).

201. 515 U.S. 557 (1995).

202. 530 U.S. 640 (2000).

203. *303 Creative*, 600 U.S. at 586 (quoting *Hurley*, 515 U.S. at 574; *Snyder v. Phelps*, 563 U.S. 442, 456 (2011)).

204. *Id.* at 594–95.

205. *Id.* at 603.

The dissent, on the other hand, spends a great deal of time discussing the potential harms and constitutional concerns caused by granting Ms. Smith leave to place her message regarding same-sex marriage on her website.²⁰⁶ Justice Sotomayor wrote, “[t]oday, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class.”²⁰⁷ Though this assertion is specifically refuted in the majority opinion, Justice Sotomayor spent pages of the dissent defining the harms perpetuated by granting Ms. Smith’s petition.²⁰⁸ Unlike the majority, the dissent viewed CADA as regulating Ms. Smith’s conduct rather than her speech.²⁰⁹ The dissent explicitly discussed the backlash experienced by LGBTQ communities as a result of gaining previously denied rights.²¹⁰ They liken the phenomenon to a familiar pattern seen during both the civil rights and women’s rights movements, where people cited their sincerely held religious beliefs as a reason for refusing access to public establishments based on race or gender.²¹¹

The dissent focused not only on the purpose of public accommodation laws to provide equal access, but also on the purpose of ensuring “equal dignity.”²¹² As mentioned by the majority, the dissent started their analysis with an overview of the history of public accommodation laws, asserting that from common law to statutory law, when a person avails themselves of the public for commercial gain, they must be available to all.²¹³ The dissent also addressed the dignitary harms encountered when groups are unable to enjoy full access to public accommodations.²¹⁴ “[T]he decision [in *303 Creative*] itself inflicts a kind of stigmatic harm, on top of any harm caused by denials of service.”²¹⁵ While the dissent goes to great lengths to discuss the harm that ruling with Ms. Smith will cause, it fails to discuss any of the health related harms that research suggests will accompany any stigma or discrimination associated with such a decision.

Scholar Kenji Yoshino provides a concise and compelling analysis of the dissent’s concerns:

The majority observed: “Much of [the dissent] focuses on the evolution of public accommodations laws, and the strides gay Americans have made towards securing equal justice under law. And, no doubt, there is much to applaud here. . . . But none of this answers the question we face today: Can a State force someone who provides

206. *Id.* at 603–41 (Sotomayor, J., dissenting).

207. *Id.* at 603.

208. *Id.* at 603–23.

209. *Id.* at 627–31.

210. *Id.* at 604.

211. *Id.*

212. *Id.* at 606 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984)).

213. *Id.* at 604–09.

214. *Id.* at 609–19.

215. *Id.* at 637.

her own expressive services to abandon her conscience and speak *its* preferred message instead?” Yet the dissent’s history of public accommodations laws and its discussion of gay rights did in fact constitute a good faith answer to this question. . . . The dissent’s history of public accommodations law described the compelling nature of the interest and showed why no more narrowly tailored option existed. And its history of gay rights brought vividly home both parts of that means/ends inquiry even though the peculiarities of this case rendered gay individuals and their interests largely invisible.²¹⁶

In addition to failing to consider the interests of gay individuals, *303 Creative* continues *Hobby Lobby*’s expansion of plaintiffs who may qualify for religious exemptions, here applied in the context of LGBTQ public accommodations laws. While *Hobby Lobby* expanded Free Exercise exemptions to for profit businesses determined to have a religious interest, *303 Creative* allowed such an exemption to apply to for profit businesses under a Free Speech analysis, leading some scholars to raise alarms about both the lack of limiting principles on the concept of “expressive conduct” and the breadth of litigants who might qualify to bring such cases under Free Speech complaints.²¹⁷ The majority’s unwillingness to consider the dignitary and public health harms to LGBTQ communities in the face of a growing evidence base of serious health consequences, partnered with the potential expansions in the availability of religious exemptions, is a troubling sign of how the Court may move forward in the area of LGBTQ rights.

V. PUBLIC PERIL IN DECLINING TO CONSIDER PUBLIC HEALTH IMPACT AS HARM AND MOVING FORWARD IN THIS MOMENT

As we look to the future of LGBTQ rights, without a shift, hard won advances will be replaced with a system of semi protections, giving those with religious beliefs exemptions from antidiscrimination laws. While actions at the federal level may be in question due to the current composition of the Court, it is important to note that many lower courts are ruling in the area of LGBTQ rights. There is still an opportunity to provide compelling arguments for a balancing of interests, including recognition of public health harms, in lower court cases.

While no one action may change the current direction of religious challenges of LGBTQ rights, there are numerous potential actions for consideration. An underlying and important consideration in all areas is to ensure

216. Kenji Yoshino, *Rights of First Refusal*, 137 HARV. L. REV. 244, 280 (2023) (quoting *303 Creative*, 600 U.S. at 597 (majority opinion)).

217. See *id.*; Elizabeth W. Sepper et al., *The Supreme Court’s 303 Creative Decision and the Threat to LGBTQ+ Health Care*, 330 J. AM. MED. ASS’N 1951,1952 (2023).

that those who are impacted by laws and policies are integral to any decision making or policymaking processes.

A. Encourage Legislators to Explicitly Include Reducing Public Health Harms in the Text of the Law As One of Their Underlying Interests in Passing the Law

When courts engage in an analysis of religious exemption under the First Amendment, compelling state interests, at least in theory, are intended to be a part of the analysis.²¹⁸ The Court's history in this regard is not straightforward, but explicitly listing reducing public health harms as part of the rationale for an antidiscrimination law can provide a roadmap to any court engaged in this analysis.²¹⁹

B. LGBTQ Advocates, Legal and Otherwise, Should Intentionally Engage Public Health Experts and Stakeholders Even When the Targeted Policy Is Not Per Se Health Focused

Gender-affirming care policies and related legislative and litigation strategies provide a positive example of how interdisciplinary approaches to advocacy for LGBTQ rights are impactful. Inclusion of medical and public health organizations in legislative public testimony and through *amicus briefs* to courts can serve to frame LGBTQ rights cases as not only civil rights cases, but public health concerns.²²⁰ This interdisciplinary approach does not need to be limited to those policies which are explicitly health related in nature. LGBTQ policies generally show an impact on LGBTQ health and arguably can be treated as such.²²¹

C. Legislators Must Work To Support and Increase Research Regarding the Link Between Policy Based Stigma, Discrimination, and Public Health Harms

A strong evidence base is needed to highlight the public health impacts of LGBTQ policies.²²² Advocates of all types can act to support research in the area

218. See *supra* Part III.

219. See generally Heather Walter-McCabe & M. Killian Kinney, *An Argument for Explicit Public Health Rationale in LGBTQ Antidiscrimination Law as a Tool for Stigma Reduction*, 13 ST. LOUIS UNIV. J. HEALTH L. & POL'Y 147 (2020).

220. See generally *Function and Role of Amicus Briefs in Public Health Litigation*, PUB. HEALTH L. CTR., <https://publichealthlawcenter.org/sites/default/files/resources/phlc-fs-amicus.pdf> (last visited Apr. 24, 2024). See, e.g., Brief for Am. Med. Ass'n et al. as Amici Curiae Supporting Respondents, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) (No. 20-843).

221. See generally Hatzenbuehler & Keyes, *supra* note 55; Kline et al., *supra* note 3; Brightman et al., *supra* note 53.

222. See *supra* Part II.

of policy and the impact on public health, harming stigma and discrimination. The Movement Advancement Project (“MAP”)²²³ is an important resource for such work. A policy surveillance database using legal epidemiology methods is underway, which will build on the work of the MAP and allow more detail regarding which aspects of policies are most critical to improve outcomes for LGBTQ health.²²⁴ More research, however, is needed to ensure that advocacy efforts are targeted at those areas with the promise of the most positive impact, especially in a time when there are so many areas needing advocacy in the community.

D. Partner with Those Working in Other Areas Impacted by Public Health to Normalize Court Consideration of Public Health Impacts in the Analysis

The increase in challenges to LGBTQ rights is not occurring in isolation. In the recent past, state legislation and Supreme Court decisions created an environment negatively impacting public health in reproductive rights,²²⁵ firearm violence,²²⁶ and environmental health.²²⁷ Each of these areas is supported by a strong evidence base showing public health harms impacted by policy.²²⁸ The Court’s willingness to balance these interests with the interests of those bringing cases will be important to ensuring that harm is diminished. By working across the topical silos, innovative thinking and strategies are enhanced.

This work must expand beyond a Court that is reticent to center the interests of those who stand to experience public health harms as a result of the Court’s decisions. This work should also include education on these harms more broadly, including for state legislators and the public. The current Court routinely makes it clear that the interests, including public health harm, considered when deciding questions of LGBTQ rights are narrow.²²⁹ The scientific evidence is clear that

223. MAP is an independent, nonprofit thinktank. It provides significant publicly available research on laws and policies impacting the LGBTQ community in the United States for use by researchers, policymakers, and others. *OUR WORK & MISSION*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/home> (last visited Apr. 24, 2024).

224. *Id.*

225. *See, e.g.*, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022); *Cox v. State*, No. D-1-GN-23-008611, 2023 WL 8628762 (Dist. Ct. Tex. Travis Cnty. Dec. 7, 2023).

226. *See, e.g.*, *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022).

227. *See, e.g.*, *West Virginia v. EPA*, 597 U.S. 697, 706 (2022); *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. 109, 113 (2022); *see also* Auerbach & Sharfstein, *supra* note 111, at 1.

228. *See generally* S. Marie Harvey et al., *The Dobbs Decision — Exacerbating U.S. Health Inequity*, 388 N. ENGL. J. MED. 1444 (2023); Maya Manian, *The Impact of Dobbs on Health Care Beyond Wanted Abortion Care*, 51 J. LAW. MED. ETHICS 592 (2023); Ulrich, *supra* note 35; Auerbach & Sharfstein, *supra* note 111.

229. *See, e.g.*, *Irish-Am. Gay, Lesbian, & Bisexual Grp. Of Bos., Inc., v. City of Boston*, 638 N.E.2d 1293 (Mass. 1994); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *303 Creative v. Elenis*, 600 U.S. 570 (2023).

stigma, exacerbated by anti LGBTQ laws and policies, is causing public health harms in addition to any material or dignitary harm.²³⁰ Study after study shows the impact of discriminatory laws on mental health and physical health, including an increase in risk of death by suicide.²³¹ Importantly, research also shows that these harms can be mediated by an environment that is accepting with lowered stigma.²³² The Court will stay responsible for determining when such risks of harm are enough to demand their attention.

CONCLUSION

The Court's recent decisions illustrate a pattern where the Court holds that dignitary harms and associated public health harms do not rise to the level of harm occurring when a person is required to provide public accommodations (too often framed as expressive speech) to LGBTQ individuals.²³³ Further, the Court often fails to even mention the harms to LGBTQ communities except when referring to arguments put forth in the dissent.²³⁴ Even without mentioning the harms, the Court sends a clear message to LGBTQ communities—your harm is not a necessary consideration for analysis in the Court's rulings. Those seeking to exclude LGBTQ communities from their spaces based on sincerely held religious beliefs also hear a message—they can continue to exclude LGBTQ communities from their spaces. History has not been kind to Courts that fail to protect against discrimination.²³⁵ Only time will tell if the Roberts Court will continue to expand exemptions from antidiscrimination laws or will fully recognize the rights of LGBTQ communities.

230. See generally Blake, *supra* note 12; Meyer, *supra* note 52; Blake & Hatzenbuehler, *supra* note 12.

231. See generally *LGBTQ+ Youth Suicide Statistics*, *supra* note 64; Hatzenbuehler & Keyes, *supra* note 55; Raifman et al., *supra* note 13.

232. *Accepting Adults*, *supra* note 65.

233. See *supra* Part III.

234. See *supra* Part IV.

235. See, e.g., *Plessy v. Ferguson*, 163 U.S. 527 (1896) (holding that discrimination on basis of race is constitutional as long as “separate but equal”), *overruled by* *Brown v. Board of Ed.*, 347 U.S. 483 (1954); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding forcing Japanese Americans into internment camps during World War II as hardship justified by wartime); *Buck v. Bell*, 274 U.S. 200 (1927) (finding that state law authorizing involuntary sterilization of inmates with certain conditions constitutional, deeming eugenics legitimate state interest).