JAMA Health Forum™

Insights | Access to Care

Health Rights for LGBTQ+ Individuals in the US Under Fire

Nan D. Hunter, JD; William N. Eskridge Jr, JD; Lawrence O. Gostin, JD

Author affiliations and article information are listed at the end of this article.

The triumph of marriage equality for lesbian, gay, bisexual, transgender, and other sexual and gender minority (LGBTQ+) persons in *Obergefell v Hodges* (2015)[1] was a transformational civil rights victory, along with the US Supreme Court's subsequent ruling on employment discrimination in *Bostock v Clayton County* (2020).[2] The Supreme Court decisions portended great changes for more inclusive family law and affordable access to health care. The National Academy of Sciences concluded that discrimination can powerfully harm the health and well-being of sexual and gender minority members.[3] These harms are amplified by further marginalization by race/ethnicity, income insecurity, and atypical gender identity. Yet a new Supreme Court conservative majority may well claw back vital legal protections.

In the wake of *Obergefell*, more than half a million Americans have legally married persons of the same sex. Those marriages carry significant health benefits—not only a more secure social safety net, but also family health insurance as a job benefit, as well as rights to access spouses who are hospitalized and make medical decisions for spouses who become incompetent.

Despite its benefits, and with no evidence of negative effects on other families, *Obergefell* has come under fire, with some critics refusing to recognize same-sex marriages as equal to other marriages under law. Arkansas, for example, initially prohibited both spouses of the same sex from being recognized on their child's birth certificate; the restriction is denigrating to the family and could create problems for the child in accessing health care benefits because she or he is not formally listed on an official document. However, in *Pavan v Smith* (2017), the Supreme Court reversed the Arkansas policy in a 6-to-3 majority ruling. And in Houston, when the city began offering health benefits to municipal employees with domestic partners of the same sex, the local Republican Party sued to stop it. The Texas Supreme Court subsequently allowed the suit to proceed.[4]

Most Americans gain access to health insurance through the workplace (rather than health exchanges), making job discrimination a blow to both health and economic security. In June 2020, *Bostock* interpreted Title VII to bar job discrimination against employees because of their partner's sex or their gender presentation. Nonetheless, the primary dissenting opinion predicted that "healthcare benefits may emerge as an intense battleground." Transgender employees, for example, have brought suit under Title VII to challenge employer-provided health insurance plans that do not cover sex reassignment surgery. *Bostock* will likely apply to a range of health-associated laws that bar discrimination because of sex—including the Public Health Service Act (1944), Family and Medical Leave Act (1993), and access to health insurance via the Affordable Care Act (ACA) (2010). In addition, federal statutes conditioning health-associated block grants to nondiscrimination protections based on sex will now bar discrimination on the basis of the sex of one's partner or gender identity.

On the day after the 2020 election, the latest in a series of controversies that implicate nondiscriminatory access to health and social services reached the Supreme Court. In *Fulton v City of Philadelphia*, Catholic Social Services claimed a religious exemption from the requirement that city contracts for foster care be limited to organizations that do not discriminate on the grounds of sexual orientation. Justices Clarence Thomas and Samuel Alito have expressed strong misgivings about *Obergefell's* failure to afford robust protection of religious liberty. For example, at a Federalist Society meeting, Justice Alito condemned what he described as public censoriousness toward those who express the belief that marriage exists only between a man and a woman.

Open Access. This is an open access article distributed under the terms of the CC-BY License.

Downloaded From: https://jamanetwork.com/ by a Yale University User on 04/06/2022

In fact, the Supreme Court has taken pains not to trivialize religion. In *Obergefell*, the Court noted that the state could not penalize congregations for declining to perform same-sex marriage ceremonies or religious groups for advocating against marriage equality. In *Bostock*, it reiterated the importance of protecting the right of religious organizations to choose their own "ministers," and characterized the Religious Freedom Restoration Act of 1993 as a "super statute" that might, in future cases, protect religious employers against undue burdens on their faith missions.

This debate threatens the health care rights of sexual and gender minorities. The most direct example of the tension between religious liberty and access to health care has arisen under the ACA. Since its enactment 10 years ago, dozens of lawsuits have addressed the question of whether employers that sponsor group health insurance plans can decline to include coverage for contraceptive services. *In Burwell v Hobby Lobby Stores Inc* (2014), the Supreme Court held that the contraceptive mandate substantially burdened the free exercise rights of closely held corporations with religious objections. Charged by the Supreme Court with reformulating rules to address these cases, the Trump administration adopted regulations in 2017 that expanded the exemption for religious entities and added an exemption for conscience objections that applied to nonprofit organizations and businesses that are not publicly traded. In July 2020, the Supreme Court upheld the authority of federal agencies to issue the 2017 regulations.[5]

The ACA also includes a general antidiscrimination requirement that prohibits exclusion of patients from the direct provision of treatment or access to insurance coverage based on certain characteristics, including sex. The Obama administration interpreted this provision, Section 1557 of the Act, to cover sexual orientation and gender identity under the rubric of sex, consistent with its interpretation of the same term in Title VII. The Trump administration reversed this interpretation, even after the Supreme Court's decision in *Bostock*.[6] President-elect Joseph Biden will likely reinstate the Obama administration's interpretation.

Establishing that sexually diverse and gender-diverse populations will regain protection under the ACA will mark an important step forward. However, just as some employers asserted that they should be exempt from the contraceptive coverage mandate based on their religious beliefs, we can envision a similar argument that entities can claim a religious exemption from the obligation to include married couples of the same sex in family plans offered through the workplace or coverage of specific procedures, such as gender affirmation surgery.

People with LGBTQ+ identities have inherent rights to dignity, access to essential health services, and equal and fair treatment. Individuals or entities that hold genuine religious objections may express their views and practice their religion. But publicly funded contractors, as is the case in *Fulton*, should not be granted a legal right to discriminate against individuals who have the same needs and rights as anyone else in our society.

ARTICLE INFORMATION

Open Access: This is an open access article distributed under the terms of the CC-BY License. © 2021 Hunter ND et al. *JAMA Health Forum*.

Corresponding Author: Lawrence O. Gostin, JD, Georgetown University Law Center, 600 New Jersey Ave NW, Washington, DC 20001 (gostin@law.georgetown.edu).

Author Affiliations: Georgetown University Law Center, Washington, DC (Hunter, Gostin); Yale Law School, New Haven, Connecticut (Eskridge).

Conflict of Interest Disclosures: None reported.

REFERENCES

1. *Obergefell v Hodges*, 576 US 644 (2015).
2. *Bostock v Clayton County*, 140 SCt 1731 (2020).

Downloaded From: https://jamanetwork.com/ by a Yale University User on 04/06/2022

3. National Academies of Sciences, Engineering & Medicine. Understanding the well-being of LGBTQI+ populations. Published 2020. Accessed December 29, 2020. https://www.nap.edu/catalog/25877/understanding-the-well-being-of-lgbtqi-populations

4. *Pidgeon v Turner*, 538 SW3d 73, 87 (Texas June 2018), cert denied, 138 SCt 505 (December 2017).

5. *Little Sisters of the Poor Saints Peter and Paul Home v Pennsylvania*, 140 SCt 2367, 2020 WL 3808424 (July 8, 2020).

6. *Whitman-Walker Clinic Inc v US Department of Health and Human Services*, __F.Supp.3d __, 2020 WL 5232076 (DDC September 2, 2020).

Downloaded From: https://jamanetwork.com/ by a Yale University User on 04/06/2022