

**THE UNFULFILLED PROMISE OF *OBERGEFELL* FOR CHILDREN
OF LGBTQ+ PARENTS:
ADVANCING NONDISCRIMINATION LAWS FOR FAMILIAL
ASSOCIATION**

*By Jeffrey A. Dodge**

Since the 2015 *Obergefell v. Hodges* decision, same-sex marriages have increased significantly in the United States. The American Community Survey data collected in 2022 shows that there are around 1.3 million same-sex couple households in the country, up from 565,000 in 2008. Just over half of these couples are legally married, up nearly 400% from prior to *Obergefell*. This data not only shows the significance of *Obergefell* for the LGBTQ+ community, but it also frames a generational shift in attitudes on marriage and family.

With the rise in same-sex couples accessing marriage has come greater visibility, representation, and acknowledgement. Couples are, in turn, empowered to create families that felt out of reach before *Obergefell*. In doing so, these LGBTQ+ couples expect the same cultural and legal dignity bestowed upon their marriages. The reality though is that the ten years since *Obergefell* have also involved increased anti-LGBTQ+ legislation. These hateful and harmful legislative attempts even led the Human Rights Campaign to declare a state of emergency for LGBTQ+ people in 2023.

During this period, children of LGBTQ+ parents also became targets for conservative political forces. Growing homophobic and transphobic rhetoric impacts the lived experiences of these children and fuels discriminatory conduct against them. In turn, *Obergefell*'s promise of dignity for children of LGBTQ+ parents remains unfulfilled and no federal, state, or local legal protections exist to meet these needs. In response, this Article calls for the establishment of familial association nondiscrimination protections through the amendment and adoption of the Equality Act. As the equal protection analysis shows, protecting children for their parents' conduct and identity is a well-established federal concern. Federal familial

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association protections for children LGBTQ+ parents would be a significant step in realizing the promise made in *Obergefell* and stoke broader thought about the bias family members of minoritized identities confront in this country.

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INTRODUCTION

Living in a post *Obergefell v. Hodges* (*Obergefell*) America for the last ten years, one could naively believe that marriage equality silenced the critics and provided the legal foundation to protect lesbian, gay, bisexual, transgender, and queer (LGBTQ+) headed households. The reality is that legalizing their right to marry is but one step in a long and complicated journey toward full equality. Further, the dignity *Obergefell* intended with marriage equality has yet to fully grace the LGBTQ+ community and

children in their families. Even in states and localities where sexual orientation and gender identity nondiscrimination laws exist, a legal blind spot for the growing number of children of LGBTQ+ parents holds *Obergefell*'s promise back from full realization.

It is estimated that of LGBTQ+ adults under the age of 50, 48% of women and 20% of men identifying individuals and couples are raising a child under the age of 18.¹ More than a third of them are racial or ethnic minorities and approximately 24% of children being raised by LGBTQ+ couples live in poverty, significantly more than the 14% of children being raised by opposite sex couples.² It is worth noting that this population is also growing in the United States and internationally.³ Inherent in the composition of these families is the understanding that while parents and legal guardians may themselves identify as LGBTQ+, that is not necessarily the same for their children. Meaning where legal protections exist, they do not by definition contemplate covering discrimination experienced by queer parents' children.

Comprehensive federal LGBTQ+ nondiscrimination laws do not exist, and less than half of the states currently extend protections in sectors like education, employment, housing, and more.⁴ While national, state, and local movements advocate for these protections, as written, they would only extend to self-identified members of the LGBTQ+ community themselves, not their children. It is these children, those who face a similar impact of homophobia and transphobia by association within the family, that inspire a call for additional legal protections. Establishing nondiscrimination laws that protect children, writ broadly, from discrimination based on their family members' associations and identities is critical to creating an inclusive America.

Part I of this Article outlines the promise in *Obergefell* that marriage equality would afford dignity to both same-sex couples and their children. The focus of this part is to understand the reasoning of the case as it relates to children of LGBTQ+ parents. Part II defines the need for more expansive protections that explicitly encompass the type of familial association bias carried by children of the LGBTQ+ community. This part shares reported circumstances where children of LGBTQ+ parents were treated differently by educational institutions, a medical provider, and a religious institution.

¹ GARY J. GATES, LGBT PARENTING IN THE UNITED STATES,1 (The Williams Inst., 2013).

² *Id.* at 5.

³ See Alex Fitzpatrick Kavya Beheraj, *The Rise of Same Sex Marriage, Charted*, AXIOS (Jun 20, 2024), <https://www.axios.com/2024/06/20/same-sex-marriage-us-sctus>.

⁴ *Nondiscrimination Laws, MOVEMENT ADVANCEMENT PROJECT*, https://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited July 13, 2024).

While these examples may have intersecting constitutional interests, they offer insight into the potential of society's misguided cruelty. This part will further explore the health harms experienced by children when they experience discrimination because of their identity or that of their parents. Part III describes the status of state and local nondiscrimination laws that address sexual orientation and gender identity. It also highlights a lack of protections at any level for children of LGBTQ+ parents. In Part IV, the Article will make the argument for a federal solution to addressing the need for these legal protections. First, this part will establish that the Supreme Court of the United States (Supreme Court) precedent exists to advance an equal protection claim through the federal courts. The cases cited show a clear interest by the Supreme Court over decades in children facing discrimination because of their parents' identities. This Part will outline how an impact-minded plaintiff could advance such an equal protection claim, as well as make the case for why a federal solution makes the most sense. With that in mind, this Article argues that the most immediate solution is to amend the Equality Act to include familial association. Such an amendment would both create the desired effect of protecting children of LGBTQ+ parents and have the valuable impact of introducing the concept of familial association nondiscrimination more broadly. The idea of familial association could inspire an expansion of protections for other affected communities, including family members of minoritized and marginalized communities. The conclusion acknowledges the possibility of state and local approaches to adding familial association to nondiscrimination protections but leaves the idea of a uniform statute to promote implementation to a future article.

I. THE PROMISE

In the *Obergefell* case, the primary issue was the constitutionality of state bans on LGBTQ+ marriages and whether states were required to recognize same-sex marriages validly formed in other states.⁵ The issue before the Supreme Court in *Obergefell* was whether the U.S. Constitution's guarantee of protection from state discrimination guarantees to same-sex adult couples the freedom to marry or have their out-of-state marriages recognized by home state authorities.⁶ This liberty interest affects a host of critical benefits and services, not the least important of which is securing stable connections between these legally bound couples and lesser-known individuals: their children.

Repeatedly validated in *Obergefell* is a long history of legal, social, religious, and political exclusion faced by LGBTQ+-headed families. This

⁵ See *Obergefell v. Hodges*, 576 U.S. 644, 653 (2015).

⁶ *Id.*

demeaning history in many ways traces the legal exclusions of the Jim Crow Era.⁷ On many levels, the very best the rule of law could offer until *Obergefell* was a “separate but equal” status, a problematic legal approach that is not equal to the actual recognition of same-sex relationships as marriage.⁸

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Constitutional interests in children that exist at status-based protection levels are parental autonomy and the protection of children.¹¹ Advocates for marriage equality advanced the view that stable families are frequently torn apart by the denial of these rights to marry.¹² Absent marriage, the children of LGBTQ+ couples are deprived of the financial and legal protections that marriage affords to children of opposite sex couples.¹³ The argument continues by asserting that marriage offers a normalizing impact in society that destigmatizes children of LGBTQ+ parents lived experiences. Drawing on the Court’s history of connecting procreation and parenthood to marriage, these arguments were recited in the opinion:

[M]any same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create

⁷ See Marie-Amelie George, *The LGBT Disconnect: Politics and Perils Of Legal Movement Formation*, 2018 WIS. L. REV. 503, 516 (2018) (stating the similarities in legal battles over public bathrooms).

⁸ See *Obergefell*, 576 U.S. at 657-59 (explaining the various mistreatment of LGBT relationships under the law).

⁹ *Obergefell*, 576 U.S. at 653.

¹⁰ *Id.*

¹¹ See Jessica Feinberg, *Parent Zero*, 55 U.C. DAVIS L. REV. 2271, 2271-72 (2002) (states the current state of constitutional protections of parents and children).

¹² Gary Gates, *Family formation and raising children among same-sex couples*. FF51.1 NAT’L COUNCIL OF FAM. RELS. F2, F2-F4 (2012).

¹³ See *id.*

loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.¹⁴

Since *Obergefell*, federal courts have interpreted this language in circumstances involving children of LGBTQ+ parents.¹⁵ Even with explicit language in the opinion contemplating the decision's impact on LGBTQ+ family formation, cases in Alabama, Arizona, Arkansas, Indiana, Iowa, and Utah required federal court intervention to reinforce the underlying principles of *Obergefell*.¹⁶ Most notably, *Pavan v. Smith* involved the Supreme Court citing *Obergefell* in a dispute over Arkansas law not allowing same-sex spouses to be listed on their children's birth certificates.¹⁷ The Court emphasized that same-sex couples must be afforded the same legal recognition as opposite-sex couples, including both being on their children's birth certificates.¹⁸ The same sentiment was reinforced by the Seventh Circuit Court of Appeals in the matter of *Henderson v. Box* three years later in 2020.¹⁹ Acknowledgement of a child's birth certificate is an excellent example of the actual harm faced by children of LGBTQ+ parents, even after *Obergefell*.²⁰ The initial resistance by these states represents the continued interest in depriving some children of access to accurate birth records maintained by their governments.²¹ Knowing that these matters were addressed as recently as five years ago indicates that

¹⁴ *Obergefell*, 576 U.S. at 688.

¹⁵ See *McLaughlin v. Jones*, 401 P.3d 492, 500-01 (Ariz. 2017).

¹⁶ See *Moore v. Ala. Jud. Inquiry Comm'n*, 234 So. 3d 458, 471-77 (Ala. 2017); *McLaughlin v. Jones*, 401 P.3d 492, 496-502 (Ariz. 2017); *Pavan v. Smith*, 582 U.S. 563, 564 (2017).

¹⁷ *Pavan v. Smith*, 582 U.S. 563, 564 (2017).

¹⁸ *Id.* at 567.

¹⁹ *Henderson v. Box*, 947 F.3d 482, 488 (7th Cir. 2020).

²⁰ CHRISTOPHER R. RIANO, WILLIAM N. ESKRIDGE, JR., THE UNFINISHED BUSINESS OF LGBTQ+ EQUALITY: FIVE YEARS AFTER OBERGEFELL V. HODGES, N.Y. STATE BAR ASS'N (June 3, 2020), <https://nysba.org/the-unfinished-business-of-lgbtq-equality-five-years-after-obergefell-v-hodges/>.

²¹ See *id.*

Obergefell's promise to children is as of yet unfulfilled in the United States.²²

Another example of the uniquely discriminatory harm inflicted by the law on children of LGBTQ+ parents is how courts address child custody and support matters even after *Obergefell*. LGBTQ+ couples experience the ordinary, expected challenges in divorce matters, but have another layer of complexity due to the varied avenues used in the family formation process.²³ Given the biological limitations, couples are required to explore private and foster care adoption, surrogacy, in vitro fertilization, sperm and egg donors, and more. It is also possible that there are children from prior relationships that invoke second and de facto parent adoption laws. These alternative avenues to family formation often create circumstances that don't correlate well with laws designed around the "old-fashioned way." Post-*Obergefell* family cases also challenged marital presumption laws that define parenthood. Across the country, including in more politically inclusive states like Pennsylvania, New York, and Vermont, lawsuits wrestled with fitting LGBTQ+ married parents into child custody and support laws designed for opposite sex married couples.²⁴ For children of LGBTQ+ parents, the analysis of these differences often continued the harm and stigmatization that plagued them before *Obergefell*. In some circumstances, these children were left with less financial and emotional support than similarly situated children of opposite-sex couples.

While the Supreme Court majority appears sincere in its concern for children of LGBTQ+ parents in *Obergefell*, it fails to reinforce the destigmatizing promises outlined in the decision with actual legal protections.²⁵ Marriage bans caused very real harm to children in affected families, including foreclosing a primary means to family formation and recognition, voiding existing legal parent-child relationships, denying economic benefits and rights to children, and inflicting stigma and psychological damage.²⁶ In the ten years since *Obergefell*, nothing significant has sought to meaningfully remedy that harm, advance legal protections, or even elevate their plight.

The impact of these bans still confronts children of LGBTQ+ parents as the homophobic and transphobic bias they made legally permissible

²² See *Obergefell v. Hodges*, 576 U.S. 644, 657-59 (2015).

²³ Press Release, Rachel Dowd, Same-sex parents are 7 times more likely to raise adopted and foster children (Oct. 27, 2020), <https://williamsinstitute.law.ucla.edu/press/lgbt-parenting-media-alert/>.

²⁴ See *Sinnott v. Peck*, 180 A.3d 560, 561 (Vt. 2017); *C.G. v. J. H.*, 193 A.3d 891, 892 (Pa. 2018); *Matter of David S. v. Samantha G.*, 74 N.Y.S.3d 730, 731 (N.Y. Fam. Ct. 2018).

²⁵ Catherine E. Smith, *Obergefell's Missed Opportunity*, 79 L. AND CONTEMPORARY PROBLEMS 223 (2016).

²⁶ *Id.* at 223-35.

continues to resonate with some people in the United States.²⁷ In fact, in the ten years since *Obergefell*, these views have grown louder and more influential in politically conservative circles. While the bipartisan Respect for Marriage Act offers statutory legal protections for marriage equality, recent calls in Project 2025 seek to install anti-LGBTQ+ policies, regulations, and laws.²⁸ These efforts, if successful, would remove the limited legal protections afforded to the LGBTQ+ community and further advance the cause for a white Christian nationalism culture in America that rewards homophobic and transphobic rhetoric.²⁹

While at its core *Obergefell* is about a fundamental right to marry, it is inherent in that right that LGBTQ+ parents desire the full social recognition and dignity afforded to opposite-sex-headed families.³⁰ Nondiscrimination legal protections for familial association will offer complementary legal protections to those already outlined in *Obergefell* and extend the spirit of the ruling to benefits currently unavailable to children of LGBTQ+ parents. In short, children of LGBTQ+ parents remain vulnerable and await the promised societal effects of marriage equality outlined in *Obergefell*.

II. THE DISCRIMINATION

It is well documented that identity-based bias harms members of the LGBTQ+ community in varied sectors of society, including housing, employment, education, public accommodation, and more. The reality is that forces in the United States have expanded these efforts over the last ten years and weaponized state laws to antagonize LGBTQ+ people. *Obergefell* makes clear that marriage carries the protections that strict scrutiny attaches to fundamental rights, but even that status felt vulnerable before the passage of the Respect of Marriage Act. Because no similar federal statute exists to protect everyone in the United States from discrimination based on sexual orientation and gender identity, the current legal paradigm relies primarily on state statutes. This section starts with outlining some of the publicly known acts of discrimination affecting children of LGBTQ+ parents. It then continues by showing the psychological harm of inconsistent legal recourse in the United States and the complete lack of nondiscrimination protections for impacted children.

²⁷ Geoff Bennett, Courtney Norris, Dorothy Hastings, *How the rise of anti-LGBTQ+ hate and violence is impacting the community*, PBS (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>.

²⁸ See Erin Reed, *Anti-Trans Policy Pushed by Project 2025 Passes Dem-Controlled Senate Committee*, TRUTHOUT (July 12, 2024), <https://truthout.org/articles/anti-trans-policy-pushed-by-project-2025-passes-dem-controlled-senate-committee/>.

²⁹ See *id.*

³⁰ See *Obergefell v. Hodges*, 576 U.S. 644, 653 (2015).

A. The Character of the Discrimination

Without legal protections for children of LGBTQ+ parents, it is hard to publicly know the depths of bias and discrimination they're experiencing. The following examples, though, provide a glimpse into the unmitigated hatred they may be experiencing. While many of these examples carry intersecting fundamental First Amendment rights that shelter the institutions from action, it is worth noting that there are people behind these decisions who carry the potential for bias into other parts of their lives. Similarly, there are people with the same belief systems who work in roles that require interacting with, supporting, and serving a diverse, ever-changing society. The resistance to acknowledging the needs of children of LGBTQ+ parents threaded into these examples is endemic to the bias that like-minded people will exhibit in their work.

In 2015, before *Obergefell*, Brian Copeland and Greg Bullard wanted their son to receive a Christian-based education and had set up a tour at Davidson Academy, an interdenominational Christian private school in Nashville.³¹ However, before the tour took place, they received a letter from the school cancelling the visit.³² The school cancelled this visit, effectively denying the child admission because his parents are gay.³³ The letter included in its reasons for cancellation a reference to its admission policy.³⁴ The school's policy reads in part "Davidson Academy has the right and responsibility to do everything possible to ensure that its expressed purposes, mission, and beliefs continue in their highest traditions and are not harmed, compromised, or hindered by unacceptable lifestyle conduct on the part of its students, parents or guardians."³⁵ The letter also says, "Just as you believe strongly in affirming all persons who worship at your church, we believe strongly in a strict interpretation of the Scriptures regarding the institution of marriage."³⁶ In this circumstance, it was clear that a child was denied an educational opportunity solely because of the identities of his parents.

³¹ Stevie St. John, *Nashville Christian School Rejects Two-Dad Family*, ADVOCATE (Jan. 23, 2015, 3:18 PM), <https://www.advocate.com/politics/religion/2015/01/23/nashville-christian-school-rejects-two-dad-family>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Joey Garrison, *Nashville School Rejects Kids Because Parents are Gay*, Detroit Free Press (Jan. 23, 2015, 10:57 AM), <https://www.firstcoastnews.com/article/news/private-school-rejects-children-because-parents-are-gay/77-123887763>.

³⁶ *Id.*

A month later, Dr. Vesna Roi refused to treat a baby with lesbian parents at a newborn checkup.³⁷ The pediatrician knew the parents were lesbians, but on the day of the check-up, she did not show up, saying that she had prayed on it and decided she would not be able to care for the baby.³⁸ In a letter sent a couple of months later, the pediatrician said, “After much prayer following your prenatal, I felt that I would not be able to develop the personal patient-doctor relationships that I normally do with my patients.”³⁹ In response, the parents pointed out that the baby did not yet have a known sexual orientation on which to deny services.⁴⁰ Here, it is clear that the doctor chose not to support a child’s health needs simply because her personal views conflict with the identities of the baby’s parents.⁴¹

The above examples are two of many before *Obergefell* that define a legal permissibility to discriminate against children of LGBTQ+ parents.⁴² Unfortunately, the examples continue even after marriage equality. In the private school sector, there’s a seemingly endless number of reported incidents in the media. In 2019, the Archdiocese of Kansas City denied admission to a kindergarten student with gay parents.⁴³ This caused division between the Catholic Church and the LGBTQ+ community.⁴⁴ The archdiocese’s policy bars all children of same-sex families from admission into any of the archdiocese’s Catholic schools.⁴⁵ Interestingly, these policy decisions are made by the archdiocese itself and only impact the schools under their jurisdiction.⁴⁶ Thus, Catholic school policies vary in the United States and create inconsistencies in where children of LGBTQ+ parents may access this type of education. The legal recognition of marriage afforded to LGBTQ+ couples did not remedy the social indignity their children continue to experience in this space.

Trinity Schools, Inc. is affiliated with People of Praise, an insular Christian community with its own interpretation of the Bible.⁴⁷ Trinity

³⁷ Abby Phillip, *Pediatrician Refuses to Treat Baby with Lesbian Parents and There’s Nothing Illegal About It*, WASHINGTON POST (Feb. 19, 2015, 4:36 PM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it/>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See id.*

⁴² *See Obergefell v. Hodges*, 576 U.S. 644, 653-55 (2015).

⁴³ Christine Hauser, *Catholic School in Kansas Faces a Revolt for Rejecting a Same-Sex Couple’s Child*, NY TIMES (Mar. 8, 2019), <https://www.nytimes.com/2019/03/08/us/kansas-catholic-school-same-sex-parents.html>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ John Riley, *Amy Coney Barrett Served as Trustee for Three Private Schools With LGBTQ-Hostile Policies*, METROWEEKLY (Oct. 21, 2020),

Schools, Inc. maintains policies barring LGBTQ+ students and children of LGBTQ+ parents from enrolling in its schools.⁴⁸ In early 2017, a lesbian parent who toured the school and was worried about how her child would be treated asked about their enrollment policies.⁴⁹ The tour guide went to the school's headmaster to clarify how he should have answered the woman's question.⁵⁰ The headmaster directed him toward a soon-to-be-added policy in the handbook condemning gay marriage.⁵¹ The headmaster then reportedly told the student tour guide that "trans families, gay families, gay students, trans students would not feel welcome at Trinity Schools."⁵² The soon-to-be-adopted policy was developed in response to *Obergefell* and the headmaster was eventually promoted to serve as president of Trinity Schools, Inc.⁵³ It is worth noting that Supreme Court Justice Amy Coney Barrett is a longtime member of People of Praise and served as a Trustee on the Trinity Schools, Inc. Board for just over two years starting in 2015.⁵⁴ Such a high-profile, public official with these beliefs creates a prime example of the bias that can seep into spaces unprotected from discrimination, like judicial decision-making.

Finally, in November 2015, five months after *Obergefell*, the Church of Latter-Day Saints announced new policies in the General Handbook, the primary guide for local leaders around the world.⁵⁵ The policies classified Church members in same-sex marriages as apostates.⁵⁶ Apostates are generally individuals who oppose the Church or may live in conflict with it.⁵⁷ The result of that policy was that children of LGBTQ+ parents were not permitted to be blessed or baptized in the Church until they were 18 years old, and they received explicit permission from local leaders.⁵⁸ The policy was seen by many as an extension of the Church's support for Proposition

<https://www.metroweekly.com/2020/10/amy-coney-barrett-served-as-trustee-for-three-private-schools-with-lgbtq-hostile-policies/>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Riley, *supra* note 46.

⁵⁴ *Id.*

⁵⁵ Jana Riess, *The Mormon Fallout of Legalized Same-Sex Marriage*, RELIGION NEWS SERV. (July 1, 2016), <https://religionnews.com/2016/07/01/the-mormon-fallout-of-legalized-same-sex-marriage/>; *see also* General Handbook: Serving in The Church of Jesus Christ of Latter-day Saints, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.churchofjesuschrist.org/study/manual/general-handbook?lang=eng> (last visiting April 28, 2025).

⁵⁶ *Id.*

⁵⁷ Riess, *supra* note 54; *see also* *Apostasy*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.churchofjesuschrist.org/study/manual/gospel-topics/apostasy?lang=eng> (last visited Mar. 8, 2025).

⁵⁸ Riess, *supra* note 54.

8, a California ballot initiative that banned same-sex marriage.⁵⁹ Four years later, in April 2019, the Church reversed the policy.⁶⁰ The reasoning provided by Church President Dallin Oaks was to “help affected families” and “to reduce the hate and contention so common today.”⁶¹ Many in and out of the Church who argued in opposition to the policy claimed it needlessly punished children because of their parents’ LGBTQ+ identity.⁶² While thousands resigned from the Church over the policy, pressuring leaders to reconsider, the reversal represents at a minimum a religious acknowledgement that children of LGBTQ+ parents are worthy of nondiscrimination protections, even when a religious institution’s actions are protected by the First Amendment.⁶³

Even ten years after *Obergefell*, children of LGBTQ+ parents continue to face discrimination throughout society. Marriage equality has done nothing to give them meaningful protections, and societal views on the LGBTQ+ community have arguably regressed. As evidence, as of June 28, 2024, the ACLU is tracking 533 anti-LGBTQ+ bills in the United States, a reversal in trends leading up to *Obergefell* and a difficult reality for this community’s children to inherit.⁶⁴ These emboldened attacks on LGBTQ+ rights would permit landlords to deny leases, banks to reject mortgage applications, supervisors to mistreat employees, and more. The harms of these discriminatory decisions are felt both by the LGBTQ+ parents and their children. If the growth in anti-LGBTQ+ bills is any indication, it is inevitable that these forms of discrimination are both happening and may eventually receive sanctioned protections in the name of states’ rights and free expression of religion.

B. The Harm of the Discrimination

Although there isn’t complete agreement on exactly how discrimination is defined, whether it works through prejudice or differential treatment, interdisciplinary scholars have documented that it has very real, detrimental effects on children. Vicarious discrimination, which is discrimination experienced typically by families watching other members go through traumatic prejudice, has profound consequences if it continues to go

⁵⁹ *Id.* (stating the reasons for the new change as the many purposed laws in various states at the time).

⁶⁰ Laurel Wamsley, *In Major Shift, LDS Church Rolls Back Controversial Policies Toward LGBT Members*, NAT. PUB. RADIO (Apr. 4, 2019, 5:42 PM), <https://www.npr.org/2019/04/04/709988377/in-major-shift-mormon-church-rolls-back-controversial-policies-toward-lgbt-membe>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See id.*

⁶⁴ *See Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, ACLU, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024> (last updated Dec. 4, 2024).

unaddressed in our communities.⁶⁵ There should be more research done to fill the gaps between vicarious discrimination's detrimental effects on the LGBTQ+ household from the perspective of both children and parents. But judging by the research available from minority households, its effects are severe.⁶⁶ This discrimination is affecting families more the longer it is allowed to continue.

The bulk of the research investigating the effects of discriminatory experiences among children has focused on African American and Hispanic youth, the largest racial minority groups in the United States.⁶⁷ Rates of racial victimization are highest for these youth, being subjected to race-based discrimination more frequently than other groups. Further, these rates frequently exceed levels experienced by their comparable adult counterparts.⁶⁸ A variety of studies comparing children display additional mental health concerns among these minority adolescents when experiencing race-based discrimination. A similar impact is being reported in LGBTQ+ youth as well.⁶⁹

Children who experience discrimination deal with not only material disadvantages but also various psychological reactions to their discriminatory experiences.⁷⁰ The research shows a wide range of psychological issues tied to mental health.⁷¹ The research on these effects links children who face discrimination with low self-esteem, symptoms of psychiatric disorder, a sense of demoralization, negative feelings regarding self-appearance and academic performance, as well as post-traumatic stress reactions that are maintained over time.⁷² The long-term result is that these

⁶⁵See Patricia Louie & Laura Upenieks, *Vicarious Discrimination, Psychosocial Resources, and Mental Health Among Black Americans*, 85 SOC. PSYCH. Q. 187, 187-209 (2022).

⁶⁶See *id.*

⁶⁷Elanor K. Seaton et al., *Perceived Discrimination and Peer Victimization Among African American and Latino Youth*, 42 J. YOUTH ADOLESCENCE 342, 342-50 (2013); Lee M. Pachter et al., *Discrimination and Mental Health in a Representative Sample of African-American and Afro-Caribbean Youth*, 5 J. RACIAL AND ETHNIC HEALTH DISPARITIES 831, 831-37 (2018); Giovanni Burgos & Fernando Rivera, *The (In)Significance of Race and Discrimination Among Latino Youth: The Case of Depressive Symptoms*, 42 SOCIO. FOCUS 152, 152-71 (2009).

⁶⁸Seaton et al., *supra* note 66, at 342-50.

⁶⁹See Joanna Almeida et al., *Emotional Distress Among LGBT Youth: The Influence of Perceived Discrimination Based on Sexual Orientation*, 38 J. YOUTH ADOLESCENCE 1001, 1001-14 (2009).

⁷⁰See *id.*

⁷¹*Id.* at 1008-10.

⁷²See Stephanie Brooks Holliday et al., *The Association Between Discrimination and PTSD in African Americans: Exploring the Role of Gender*, 25 ETHNICITY & HEALTH 717, 717-31 (2020); See Maykel Verkuyten, *Perceived Discrimination and Self-Esteem Among Ethnic Minority Adolescents*, 138 J. SOC. PSYCH. 479, 479-93 (1998); See Courtney Stevens, Cindy H. Liu, & Justin A. Chen, *Racial/Ethnic Disparities in US College Students' Experience: Discrimination as an Impediment to Academic Performance*, 66 J. AM. COLL. HEALTH 665, 665-73 (2018).

children grow up uncertain about themselves, challenged by the society they're navigating, and suspicious about the rule of law that was supposed to protect them.

While children of LGBTQ+ parents are not new in society, their growth and visibility as a population are relatively recent. As the fight for marriage equality entered mainstream society's awareness, the change provided a valuable opportunity for interdisciplinary research on the lives of children raised by LGBTQ+ parents.⁷³ Research has investigated these children's well-being and adjustment relative to their peers living in more traditional structures, like heterosexual married-parent and single-parent families.⁷⁴ Generally speaking, the findings indicate that children of LGBTQ+ parents receive comparable levels of care, love, and support to their counterparts being raised by opposite sex couples. More recently, as acceptance of LGBTQ+ families has risen, deeper questions are being explored about these children's lived experiences with discrimination, correlations with their parents' identities, and the general impact of both on their lives.⁷⁵

The limited but growing findings on the children of LGBTQ+ parents suggest that experiences of discrimination (e.g., explicit acts of bias, both verbal and physical) and stigma (e.g., societal disapproval of family structure) cause similar harm to those from African American and Hispanic backgrounds.⁷⁶ Experiences of discrimination that are personally directed at these children are associated with a variety of negative consequences, including psychological maladjustment and physical health problems.⁷⁷ Further, the impact influences interactions with family members, peers, teachers, government officials, church leaders, employers, and others they engage with in their daily lives.⁷⁸

Parents face many challenges in raising their children, regardless of their sexual orientation or gender identity. However, some of the challenges that LGBTQ+ parents encounter, mainly in the form of social exclusion and

⁷³ E.g. Ana Čović, *Experience of LGBT Parents and Their Children: The Results of Longitudinal Studies*, 49 SOCIOLOŠKI PREGLED 399, 399-418 (2015) (explaining the state of research on children of LGBT children pre-*Obergefell*); E.g. Kyle A. Simon & Rachel H. Farr, *Identity-Based Socialization and Adopted Children's Outcomes in Lesbian, Gay, and Heterosexual Parent Families*, 26 APPLIED DEVELOPMENTAL SCI. 155, 155-75 (2020).

⁷⁴ See Abbie E. Goldberg & Randi Garcia, *Community Characteristics, Victimization, and Psychological Adjustment Among School-Aged Adopted Children With Lesbian, Gay, and Heterosexual Parents*, FRONTIERS PSYCH., March 2020, at 1, 1-16 (2020).

⁷⁵ See, e.g., *id.*

⁷⁶ Rachel H. Farr et al., *Microaggression and Discrimination Experiences Among Diverse Youth with LGBTQ+ Parents in the United States*, 34 J. RSCH. ON ADOLESCENCE 551, 560 (2024).

⁷⁷ See *id.*

⁷⁸ *Id.* at 558.

discrimination, have direct negative effects on their children.⁷⁹ Negative public attitudes influence not only the parenting experience, but also potential legal outcomes and overall concerns about public perception. Witnessing someone else discriminate against their parent (defined as “vicarious experiences of discrimination”) is also associated with risks to their children’s psychological well-being.⁸⁰ This is especially challenging when the discrimination is felt by parents and more complicated when the basis for it is not one the children share with the parent.⁸¹ Different than children who share identity traits with their parents, like race, ethnicity, or ancestry, these children may not themselves identify as members of the LGBTQ+ community. Thus, witnessing their parents’ discrimination for sexual orientation or gender identity feels both deeply personal as a member of their family, but also distant as it may not feel like an attack on who they are, too.

Part of what makes the discrimination against children of LGBTQ+ parents so unique and significant is that children are often treated as if they possess fewer rights.⁸² In fact, children do have certain negative rights to freedom from harm, which implies that these rights should be respected nationwide.⁸³ The recent erosion of children in general—being off limits for political and legal attacks—creates a new framework for the future.⁸⁴ LGBTQ+ children specifically have faced a rash of attacks in states across the country and are legally helpless to the vile treatment of adult politicians.⁸⁵ Book bans, prohibitions on transgender student participation in athletics, “Don’t Say Gay” laws, and more, are telling both members of the LGBTQ+ community and their children that they are fair game in today’s culture wars.⁸⁶

⁷⁹ CYNTHIA J. TELINGATOR, ET AL., *Clinical Work with Children and Adolescents Growing Up with LGBTQ Parents*, in LGBTQ-PARENT FAMILIES 409-10 (Abbie E. Goldberg & Karen R. Allen eds., 2d ed., 2020).

⁸⁰ See Patricia Louie & Laura Upenieks, *Vicarious discrimination, psychosocial resources, and mental health among Black Americans*, 85 SOC. PSYCH. Q. 187, 200 (2022).

⁸¹ See *id.*

⁸² Catherine E. Smith, *State Action That Penalizes Children as Evidence of a Desire to Harm Politically Unpopular Parents*, 51 SUFFOLK U.L. REV. 439, 440 (2018).

⁸³ See *Garcia v. Clark Cnty.*, No. 2:07-CV-01507-RCJ-PAL, 2009 U.S. Dist. LEXIS 104940, at *19-*20 (D. Nev. Nov. 10, 2009) (explaining that children in state custody should be free from harm).

⁸⁴ Renato da Silva Pereira, “Protect the Children, Save the Family” – ‘Gender Ideology’ in the Classroom: A Case Study of Moral Panic in Brazil,” 5-9 (April, 2023) (M.S. thesis, University of British Columbia) (on file with the University of British Columbia library) (explaining the political use of children as moral vehicles to maintain homophobia).

⁸⁵ See Joanna Almeida et al., *Emotional Distress Among LGBT Youth: The Influence of Perceived Discrimination Based on Sexual Orientation*, 38 J. YOUTH ADOLESCENCE 1001, 1010 (2009) (determining that LGBT youth are more likely to experience discrimination).

⁸⁶ Abbie E. Goldberg & Roberto Abreu, *LGBTQ Parent Concerns and Parent-child Communication about the Parental Rights in Education Bill (“Don’t Say Gay”) in Florida*,

What is clear is that *Obergefell*, while significant in expanding the fundamental right to marry, has not yet changed the hearts and minds of society. Arguably, the progress is a threat to those who value the privilege the status quo provided them. Familial association protections in nondiscrimination laws thus feel like a necessity toward both realizing the dignity referenced in *Obergefell* and supporting children surviving an increasingly hostile and polarizing political environment.

III. THE LACK OF PROTECTIONS

LGBTQ+ nondiscrimination laws in the United States vary significantly by state. These laws aim to protect individuals from discrimination based on their sexual orientation and gender identity. As of now, 24 states and Washington, D.C., have comprehensive laws that prohibit discrimination based on sexual orientation and gender identity in employment, housing, and public accommodations.⁸⁷ An additional two states have anti-discrimination laws based solely on sexual orientation.⁸⁸

States seen as having some of the strongest, most innovative protections include California, Maine, New York, and Washington, D.C. While California adopted statewide protections for the LGBTQ+ community in 2003, the work to realize equality began decades before. In *Gay Law Students Assn. v. Pacific Tel., & Tel.*, the California Supreme Court found that public institutions violate the California Constitution when they discriminate arbitrarily in employment.⁸⁹ Amendments in 2000 to the California Fair Employment and Housing Act of 1959 furthered this decision to include employment, housing, and credit protections for gay

73 FAM. RELS. 318, 327-30 (2024) (explaining parents' fears over the safety of their LGBTQ children under the Florida Parental Rights in Education Bill.)

⁸⁷ These states include California (CAL. GOV'T CODE § 12955 (2024)), Colorado (COLO. REV. STAT. § 24-34-502 (2024)), Connecticut (CONN. GEN. STAT. § 46a-60 (2024)), Delaware (DEL. CODE ANN. tit. 19, § 711 (2024)), Hawaii (HAW. REV. STAT. ANN. § 378-2 (2024)), Illinois (775 ILL. COMP. STAT. ANN. 5/1-102 (2024)), Iowa (IOWA CODE § 216.6 (2024)), Maine (ME. REV. STAT. tit. 5, § 4572 (2024)), Maryland (MD. CODE ANN., STATE GOV'T § 20-606 (2024)), Massachusetts (MASS. ANN. LAWS ch. 151B, § 4 (2024)), Minnesota (MINN. STAT. ANN. § 363A.08 (2024)), Nevada (NEV. REV. STAT. ANN. § 613.330 (2024)), New Hampshire (N.H. REV. STAT. ANN. § 354-A:7 (2024)), New Jersey (N.J. STAT. § 10:5-12 (2024)), New Mexico (N.M. STAT. ANN. § 28-1-7 (2024)), New York (N.Y. EXEC. LAW § 296 (2025)), Oregon (OR. REV. STAT. ANN. § 659A.030 (2024)), Pennsylvania (16 PA. CODE § 41.206 (2024)), Rhode Island (R.I. GEN. LAWS SECTION 28-5-7 (2024)), Utah (UTAH CODE ANN. § 34A-5-106 (2025)), Vermont (VT. STAT. ANN. tit. 21, § 495 (2025)), Virginia (VA. CODE ANN. § 2.2-3905 (2024)), Washington (WASH. REV. CODE ANN. § 49.60.030 (2024)), Wisconsin (WIS. STAT. ANN. § 111.36 (2024)), and Washington D.C. (D.C. CODE § 2-1402.11 (2025)).

⁸⁸ These states include Iowa, Iowa Code Chapter 216 (July 1, 2025), and various in Wisconsin. See *Civil Rights Statutes and Codes*, Dept. of Workforce Dev., <https://dwd.wisconsin.gov/er/civilrights/statutes.htm> (last visited Apr. 28, 2025).

⁸⁹ *Gay L. Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 613 (Cal. 1979).

men, lesbians, and bisexuals.⁹⁰ Transgender people were afforded the same rights in an amendment in 2003 with public accommodations added in 2005.⁹¹ While marital status nondiscrimination protections are often laced into the same statutes, the California Code of Regulations defines that as “an individual’s state of marriage, non-marriage, divorce or dissolution, separation, widowhood, annulment, or other marital state.”⁹² Different than addressing the needs of children in a family because of identity-based bias against their parents or another family member, these laws are solely focused on an adult’s individual status.

Similar to California, Maine is regarded as one of the top states for LGBTQ+ nondiscrimination laws.⁹³ In 2005, the Maine Human Rights Act expanded to include “actual or perceived . . . sexual orientation or gender identity.”⁹⁴ The protections against discrimination include employment, housing, credit, public accommodations, and education.⁹⁵ After successfully passing the Maine House and Senate, the Act was challenged and defeated in a veto referendum.⁹⁶ In 2021, the Maine Legislature and Governor went further by explicitly adding “gender identity” and “familial status” to all relevant Maine statutes.⁹⁷ Familial status is defined in the law as:

One or more individuals who have not attained 18 years of age and are living with a parent or another person having legal custody of the individual[,] or . . . [o]ne or more individuals 18 years of age or older who lack the ability to meet essential requirements for physical health, safety or self-care because the individual or individuals are unable to receive and evaluate information or make or communicate decisions.⁹⁸

While closer to addressing the needs of children facing discrimination because of their parents’ LGBTQ+ identity, this status is about protecting adults with caregiving responsibilities. In fact, none of the states regarded as innovative in realizing equality based on sexual orientation and general

⁹⁰ Assembly Bill No. 1001, (Cal. Legis. 1999).

⁹¹ Assembly Bill No. 196, (Cal. Legis. 2003); Assembly Bill No. 1400, (Cal. Legis. 2005).

⁹² CAL. CODE REGS. tit. 2, § 11053 (2025)

⁹³ Noreen Verini et al., *Challenges Facing LGBTQ Youth*, 23 GEO. J. GENDER & L. 179, 194-95 (2022).

⁹⁴ ME. REV. STAT. tit. 5, § 4553 (2024).

⁹⁵ *Id.*

⁹⁶ H.R. Roll Call Vote on *An Act to Extend Civil Rights Protections to All People Regardless of Sexual Orientation*, L.D. 1196, 122nd Leg., 1st Reg. Sess. (Me., Mar. 29, 2005), <https://www.maine.gov/legis/lawlib/ldl/sexualorientation/rc122-ld-1196.pdf>.

⁹⁷ An Act to Improve Consistency in Terminology and within the Maine Human Rights Act (S.P. 544 - L.D. 1688), ch. 366, 2019 Me. Laws 1019 (codified as amended in scattered sections of ME. REV. STAT. ANN. tit. 5, §§ 4551-4634).

⁹⁸ ME. REV. STAT. tit. 5, §4553 (2024).

identity explicitly extend nondiscrimination protections to the entire family unit.

Some states have laws that provide partial protections.⁹⁹ These might cover only certain areas (e.g., employment, but not housing) or only offer protections for sexual orientation, but not gender identity.¹⁰⁰ Examples include Utah, which only protects against employment and housing discrimination based on sexual orientation and gender identity, and Wisconsin, which protects against discrimination based on sexual orientation only.¹⁰¹ It is also worth noting that some states with nondiscrimination protections also include exemptions for religious organizations or individuals who act based on their religious beliefs.¹⁰² The scope and impact of these exemptions can vary significantly, affecting the extent of protections in practice.

In states lacking comprehensive statewide protections, various cities and counties have enacted their own nondiscrimination ordinances to protect LGBTQ+ individuals. These local laws can vary widely in their scope and enforcement mechanisms.¹⁰³ For example, Idaho does not have statewide nondiscrimination laws, but roughly 35% of the population is protected through county and city laws.¹⁰⁴ Ada County is the only of forty-four in the state to offer private employment, housing, and public accommodation non-discrimination protections based on sexual orientation and gender identity.¹⁰⁵ Thirteen cities have similar ordinances, including Bellevue, Boise, Coeur d'Alene, Driggs, Hailey, Idaho Falls, Ketchum, Lewiston, Meridian, Moscow, Pocatello, Sandpoint, and Victor.¹⁰⁶ Idaho's legal landscape represents the difficulty of leaving these protections to the states. In such a vast state, someone shouldn't fear facing discrimination based on where they live, work, or visit.

Washington, D.C., offers the closest protections to familial association in the United States.¹⁰⁷ Within the D.C. Human Rights Act, there are two notable protected classes: a person with "familial responsibility" and "an employee who is a victim or a family member of a victim of domestic

⁹⁹ *State Scorecards: Kentucky*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/state-scorecards/kentucky> (last visited-Mar. 10, 2025).

¹⁰⁰ *Id.*

¹⁰¹ UTAH CODE ANN. § 34A-5-106 (2024). WIS. STAT. ANN. § 111.36 (2024).

¹⁰² Utah Code Ann. § 34A-5-106 (2024).

¹⁰³ *Cities and Counties with Non-discrimination Ordinances that include Gender Identify*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> (last visited Mar. 10, 2025).

¹⁰⁴ *Idaho's Equality Profile*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/profile_state/ID (last visited July 14, 2024).

¹⁰⁵ *LGBTQIA+ Rights*, ACLU IDAHO, <https://www.acluidaho.org/en/know-your-rights/lgbtqia-rights> (last visited July 14, 2024).

¹⁰⁶ *Idaho's Equality Profile*, *supra* note 104.

¹⁰⁷ See D.C. CODE § 2-1402.11 (2025).

violence, a sexual offense, or stalking.”¹⁰⁸ “Family responsibilities” refers to “the state of being, or the potential to become a contributor to the support of a person or persons in a dependent relationship, irrespective of their number, including the state of being the subject of an order of withholding or similar proceedings to pay child support or a debt related to child support.”¹⁰⁹ The statute protects employees who need to help other family members “when an accommodation is necessary to ensure the person’s security and safety,” and in the event of “meetings with an attorney or law enforcement officials,” from “employer intervention or interference.”¹¹⁰ The statute also outlines the most progressive form of this kind of anti-discrimination law with the inclusion of both sexual orientation and gender identity.¹¹¹ The D.C. Human Rights Act shows that there are jurisdictions that are aware of the need for additional protection for family units that have members who belong to protected classes. This statute also shows that there is an avenue for these protections to exist, at a minimum, on the state and local levels.

On a federal level, the U.S. Supreme Court’s decision in *Bostock v. Clayton County* (2020) ruled that Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on sex, includes discrimination based on sexual orientation and gender identity.¹¹² This provides nationwide employment protection in the private sector, but it does not explicitly extend to housing or public accommodations.¹¹³ A common misconception is that *Bostock* addressed the entirety of the federal nondiscrimination legal need through an expanded definition of sex under Title VII, as well as all laws related to discrimination.¹¹⁴ The reality, though, is far more nuanced. *Bostock* was essentially disregarded by the Trump Administration and only broadly applied under an executive order issued by the Biden Administration.¹¹⁵ That order required federal agencies to apply the *Bostock* analysis to all federal bans on sex discrimination, and to, in turn, recognize the protections as including the LGBTQ+ community.¹¹⁶ The current position leaves federal protections for the LGBTQ+ community to the whim of each presidential administration.¹¹⁷ To further complicate the

¹⁰⁸ *Id.*

¹⁰⁹ D.C. CODE § 2-1401.02 (2025).

¹¹⁰ D.C. CODE § 2-1402.11 (2025).

¹¹¹ *Id.*

¹¹² Marc Spindelman, *Bostock’s Paradox: Textualism, Legal Justice, and the Constitution*, 69 Buff. L. Rev. 553 (2021); see also *Bostock v. Clayton Cty.*, 590 U.S. 644, 650-52 (2020).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 438 (2024) (Gorsuch, J., concurring) (describing how different laws’ enforcement changes from administration to

uncertainty, the recent overruling of the deference given to administrative agencies in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.* leaves such decisions open to legal attack.¹¹⁸

Overall, while there has been some progress in advancing LGBTQ+ nondiscrimination protections in the U.S., the patchwork nature of these laws means that protections can vary greatly depending on the state and locality. Living in a country that allegedly values a fundamental right to travel, the LGBTQ+ community and their families should not have to balance exploring personal, professional, and economic opportunities with a fear of discrimination without legal recourse. The current state and local approaches are admirable, but only federal solutions make sense moving forward.

IV. THE FEDERAL SOLUTIONS

In considering the lack of current protections for children of LGBTQ+ parents, the most ideal solutions exist at the federal level. The first could be a plaintiff-driven equal protection argument that makes its way to the Supreme Court of the United States. Such a case could argue that precedent exists to support familial association as a protected class under the Constitution. The second option is a legislative approach to granting legal protections through amending the Equality Act to include familial association. The grounds for each approach are outlined below. The second option is more favorable due to the current political climate shown through the Supreme Court.

A. *The Case for Equal Protection Analysis*

The *Obergefell* case was a landmark decision that legalized same-sex marriage nationwide.¹¹⁹ As established, the case references children in several contexts, emphasizing the impact of the ruling on families and the well-being of children raised by same-sex couples.¹²⁰ While the core of the case affirmed that “[n]o union is more profound than marriage,” the grounds for the decision drew heavily on the presence of children within these previously unrecognized families.¹²¹

Notably, this is not the first time that the Supreme Court has addressed discrimination faced by children because of their parents’ identities. Past expansions of protected class statuses have extended to other circumstances

administration); *see generally* *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984) *overruled by* *Loper Bright Enterprises v. Raimondo* 603 U.S. 369.

¹¹⁸ *See generally, id.*

¹¹⁹ *Obergefell v. Hodges*, 576 U.S. 644, 680 (2015).

¹²⁰ *See id.* at 646.

¹²¹ *See id.* at 646, 681.

of similar forms of discrimination. Under the Fourteenth Amendment Equal Protection Clause, Section 1983 claims have already provided some classifications of children with an intermediate scrutiny level of protection from government discrimination.¹²² Other family associations remain relatively unaddressed.

i. The Precedent on Undocumented Children

Plyler v. Doe is a landmark case that was heard and decided by the Supreme Court in 1982.¹²³ This seminal case involved the right to education for undocumented immigrant children. It arose from a 1975 Texas legislative statute that required school districts in the state of Texas to deny enrollment to children who were not legally present in the United States.¹²⁴ Certain school districts in Texas complied and dismissed students of Hispanic—mainly Mexican—descent.¹²⁵ The reason was that when these children's legal status was challenged, they were allegedly found to be undocumented residents. A group of these students then challenged the Texas law as violating their Equal Protection guarantees under the Fourteenth Amendment.¹²⁶

Plyler was the first case to consider the benefits that a state provides to aliens and, more specifically, the children of undocumented parents residing in the United States.¹²⁷ The decision is significant for several reasons. First, the majority applied the intermediate level of scrutiny that had previously been utilized in cases involving gender. The benefits that were at issue are significant; education is vitally important to a person's ability to function well in society.¹²⁸ Because of the effect of education, the majority's decision to apply the intermediate level of scrutiny meant that state and local governments that try to erect barriers between aliens and education could have a difficult time defending their actions.

The majority asserted that “the illegal alien status of the children is irrelevant to any legitimate state objective.”¹²⁹ Thus, “it is unlikely that those who chose to cross an international border without legal authorization . . . did so with the expectation of frustrating a state educational system with a direct interest in their performance.”¹³⁰ The Court's opinion goes on to say

¹²² 42 U.S.C. § 1983.

¹²³ *Plyler v. Doe*, 457 U.S. 202, 206 (1982).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ *See id.*

¹²⁹ *Plyler*, 457 U.S. at 224–25.

¹³⁰ *Id.*

holding children responsible for their parents' decisions "does not comport with fundamental conceptions of justice."¹³¹

As a result of this case, children of undocumented aliens hold a quasi-suspect classification concerning K-12 public education.¹³² Much like children of LGBTQ+ parents, this particular population faces layered and sometimes legally complex discrimination. These difficulties can affect their education, health, emotional well-being, and overall opportunities in life.¹³³ While now legally entitled to enter public education in the United States, children of immigrants and their families lack knowledge of their rights, fear deportation, and sometimes face language barriers that infringe on full, equitable access.¹³⁴ These experiences make them vulnerable to mistreatment by public education officials who are fueled by identity-based bias.¹³⁵

Further, these children may become victims of unaddressed bullying and discrimination by other students. Studies have shown that discriminatory educational circumstances lead to increased absenteeism, lower academic performance, and even higher dropout rates.¹³⁶ Beyond the education sector, children of undocumented parents may fear the unknown repercussions of accessing healthcare, live in a constant state of fear, and not access public assistance programs, all out of fear of deportation and/or family separation.

ii. The Precedent on Children of Unmarried Parents

Over many years, the Supreme Court has also wrestled with how to address government restrictions and classifications against persons born out of wedlock. Initial views on the matter were met with inconsistency. For example, *Levy v. Louisiana* and *Glon v. American Guar. & Liab. Ins. Co.* applied strict scrutiny to wrongful death actions involving children born out

¹³¹ *Id.* at 220.

¹³² *Id.*

¹³³ See Patricia A. Cavazos-Rehg et al., *Legal Status, Emotional Well-Being and Subjective Health Status of Latino Immigrants*, 99 J. NAT'L MED. ASS'N 1126, 1126–31 (2007) (explaining the detriments faced by immigrants both legally and medically).

¹³⁴ See Yael Meir et al., *Children of Illegal Migrant Workers: Life Circumstances and Mental Health*, 34 CHILD. & YOUTH SERV. R. 1546, 1546–52 (2012) (explaining the link between worse mental health outcomes and immigration status).

¹³⁵ See Joaquin S. Aganza et al., *Breaking the Silence: A Framework for School Psychologists Working With Students of Undocumented Immigrant Families*, 23 CONTEMP. SCH. PSYCH. 10, 10–19 (2019) (explaining the mental health results of migrant children in the school system from the perspective of school officials).

¹³⁶ See Seok Jeng Jane Lim & James L. Hoot, *Bullying in an Increasingly Diverse School Population: A Socio-Ecological Model Analysis*, 36 SCH. PSYCH. INT'L. 268, 268–82 (2015) (stating the prevalence of bullying among migrant children).

of wedlock.¹³⁷ These 1968 cases were quickly followed up in 1971 with *Labine v. Vincent* and in 1972 with *Weber v. Aetna Casualty & Surety Co.* *Labine*, which applied rational basis review to an intestate succession issue, and *Weber* used intermediate scrutiny in a workers' compensation matter.¹³⁸ Regardless of the varied legal scrutiny used, the Court seemed steadfast in its belief that children of unmarried parents are a protected class, stating it "is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations."¹³⁹

Subsequent decisions on these issues tend to fortify around intermediate scrutiny, arguing that such judicial scrutiny is "not toothless" in that it falls between the protections given to race and economic classifications.¹⁴⁰ The matters do get more complicated, though, as the Court analyzes the intersecting factors of marital presumptions and a lack of paternity establishment. In the case of *Lalli v. Lalli*, for example, the child's parents were never married, and a paternity determination was not sought while the father was alive.¹⁴¹ This case involved issues of inheritance rights for illegitimate children under New York law.¹⁴² Without the court order of filiation declaring paternity during the father's life, the state would not let the child inherit.¹⁴³

The Supreme Court was asked if this additional requirement for children of unwed parents violated the Equal Protection Clause of the Fourteenth Amendment.¹⁴⁴ In *Lalli*, the Court applied a standard akin to intermediate scrutiny by looking at the state interests and legitimacy of the requirements.¹⁴⁵ While the majority ultimately held the New York law constitutional, the opinion is significant in providing clarity through consistency about the protected class status of children from unmarried parents.¹⁴⁶ It also reaffirms the Court's continued belief that the law should protect children born out of wedlock from discrimination for the conduct of their parents.¹⁴⁷ As the Court notes, New York's law sought "to alleviate the plight of the illegitimate child," moving away from prior law that permitted

¹³⁷ *Levy v. Louisiana*, 391 U.S. 68, 69-72 (1968); *Glonn v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968).

¹³⁸ *Labine v. Vincent*, 401 U.S. 533 (1971), *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 165 (1972).

¹³⁹ *Trimble v. Gordon*, 430 U.S. 762, 764-66 (1977).

¹⁴⁰ *Id.* at 767.

¹⁴¹ *Lalli v. Lalli*, 439 U.S. 259 (1978).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 273.

¹⁴⁷ *Angelini v. OMD Corp.*, 575 N.E.2d 41, 46 (1991). *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

these children to inherit only from their mothers.¹⁴⁸ The establishment of a paternity requirement while the father is alive thus bore a substantial relationship to the intended government purposes.¹⁴⁹

The conclusion is that the legal standard of review places the burden on the government to show that its law affecting a quasi-suspect classification is substantially related to an important governmental interest.¹⁵⁰ If there's no substantial relationship between the law in question and the government's alleged objectives, then that typically shows the government's justifications are pretextual. The objectives must be genuine, factual, and closely aligned with the law.¹⁵¹ In the instance of children from LGBTQ+ parents, it is rarely related to one's ability to perform or contribute to society; rather, they are based on stereotypical notions of one's role as it relates to decisions by their parents.¹⁵² A similar argument is present for children of LGBTQ+ parents.

iii. The Court's Further Insights

National discussions about the impact of parents' decisions on children have also occurred in more directly in family law matters. *Palmore v. Sidoti* was decided by the Supreme Court in 1984.¹⁵³ The case centered on issues of racial discrimination in the context of child custody determinations.¹⁵⁴ Linda Sidoti Palmore, a white woman, and Anthony Sidoti, a white man, divorced, and Linda was awarded custody of their daughter, Melanie. Linda later remarried a Black man and, in response, Anthony sought to have sole custody of their daughter transferred to him.¹⁵⁵ He argued that the child would face social stigmatization and harm because of the interracial household the child would be raised in.¹⁵⁶

The Florida trial court agreed with Anthony and transferred custody to him.¹⁵⁷ The court's decision was based on the belief that the child would suffer from societal prejudices due to being raised in an interracial household. According to the Court, that discrimination would, in turn, negatively impact her well-being.¹⁵⁸ The decision concluded that "there is no issue as to either party's devotion to the child, adequacy of housing

¹⁴⁸ *Lalli*, 439 U.S. at 269.

¹⁴⁹ *Id.* at 269-70.

¹⁵⁰ *Id.* at 273.

¹⁵¹ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

¹⁵² *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165-66 (1972).

¹⁵³ *Palmore v. Sidoti*, 466 U.S. 429, 430 (1984).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 431.

¹⁵⁸ *Id.*

facilities, or respectability of the new spouse of either parent.”¹⁵⁹ The court cited a counselor’s recommendation for the change in custody, saying “[t]he life [petitioner] has chosen for herself, and for her child, [was] a lifestyle unacceptable to the father and to society. . . . The child . . . is, or at school age will be, subject to environmental pressures not of choice.”¹⁶⁰ The decision goes on to assert:

This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age, and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.¹⁶¹

The case was appealed, and the decision was affirmed by the Florida Second District Court of Appeal.¹⁶²

The case was then successfully appealed to the Supreme Court.¹⁶³ The Court unanimously reversed the lower Florida court’s ruling.¹⁶⁴ The Court held that private biases and the potential negative reactions of others could not justify a racial classification removing a child from the custody of her mother.¹⁶⁵ The decision emphasized that the best interests of the child should not be subordinated to societal prejudices.¹⁶⁶ In writing for the Court, Chief Justice Warren E. Burger says, “The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”¹⁶⁷ It goes on to state that “[t]he effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.”¹⁶⁸ The Court’s opinion makes clear that societal prejudices should not be given legal effect in custody decisions, upholding the principle of equal protection under the law.¹⁶⁹

Similar arguments can be made for children of LGBTQ+ parents, thus advancing the potential for an Equal Protection argument under the Fourteenth Amendment. Similarly, familial association nondiscrimination

¹⁵⁹ *Palmore*, 466 U.S. at 430.

¹⁶⁰ *Id.* at 431.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Palmore*, 466 U.S. at 433.

¹⁶⁶ *Id.* at 433.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 434.

¹⁶⁹ *See id.*

protections might give these families legal assurances that while their parents' legal status in the United States might be in question, their presence in society is not permission for mistreatment.

B. The Equality Act

Advancing an equal protection argument will require an impact-minded plaintiff willing to take an experience of discrimination by the government and catapult it to the Supreme Court. As outlined, past jurisprudence has addressed several similar circumstances that the Court can draw on to acknowledge a suspect classification for children of LGBTQ+ parents.¹⁷⁰ That said, the current composition of justices and recent rulings in the equal protection space make success questionable. The precedent by the Court exists, though, and is, at a minimum, persuasive for a federal solution.

What seems more likely to find success is the establishment of federal statutory protections against familial association discrimination. While the Equality Act has not yet found the moment to pass both houses of Congress and land on a receptive President's desk for signing, its repeated introduction with broad Democratic support offers some hope. Additionally, the nonpartisan Public Religion Research Institute has found that public support nationally for the Equality Act has topped 70% in recent years, including majorities of Democratic, Republican, and Independent respondents.¹⁷¹ It is also possible that the Equality Act is just one culture-defining event or election away from gaining enough Republican votes to pass.¹⁷² In fact, focused amendments to include familial association in the expanded definition of sex discrimination, alongside sexual orientation and gender identity, might be a tipping point for family values-focused Republicans to vote in favor of the bill.

i. The History

In a first attempt to resolve the lack of national legal protections for the LGBTQ+ community, the first iteration of the Equality Act was proposed by New York Congresswoman Bella Abzug in 1974.¹⁷³ Abzug had promised to introduce LGBT discrimination laws and move the discussion around LGBT protections from state and local levels, where protections had

¹⁷⁰ *Id.* at 432-33.

¹⁷¹ *Americans' Support for Key LGBTQ Rights Continues to Tick Upward*, PUB. RELIGION RSCH. INST. (Mar. 17, 2022), <https://www.prri.org/research/americans-support-for-key-lgbtq-rights-continues-to-tick-upward/>.

¹⁷² *See id.*

¹⁷³ Jeremy W. Brinster, Note, *Taking Congruence and Proportionality Seriously*, 95 N.Y.U. L. REV. 580, 595 (2020).

largely been blocked by conservative politicians.¹⁷⁴ Her proposed Equality Act was the first legislative effort to secure LGB employment protections, and it also added sex, sexual orientation, and marital status to the list of protected classes in civil rights statutes dealing with public accommodations, federally funded programs, and housing.¹⁷⁵ The bill failed to gain traction, largely due to the failure to mobilize a sizable constituency behind it.¹⁷⁶ In 1993, a coalition of gay rights organizations made the difficult choice to abandon the push for a comprehensive statute such as the Equality Act and instead pursued an act that would prohibit sexual orientation discrimination in the employment context alone, the Employment Non-Discrimination Act.¹⁷⁷ Since the Democrats lost their majority in Congress, they hoped that more streamlined bills targeting sectors such as employment, public accommodations, credit, and housing would be easier to push through Congress, but these attempts have largely failed to be enacted.¹⁷⁸

The Equality Act proposal was reborn in 2015 when Representative David Cicilline pledged a renewed commitment to enacting the type of sweeping civil rights bill that Abzug had first proposed in 1974.¹⁷⁹ Cicilline's modern Equality Act outlined expansive protections for LGBT people in employment, public accommodations, credit lending, and jury service.¹⁸⁰ Hoping to avoid what opponents would claim to be conferred special rights upon LGBT people, the bill merely adds LGBT to the protected classes of the Civil Rights Act.¹⁸¹ Since Cicilline's initial introduction of the bill in 2015, it has been proposed in the House in 2017, 2019, and 2021.¹⁸² In the 115th Congress, the bill was referred to the Committees on the Judiciary, Education, Labor, Oversight and Reform, and House Administration, but it was never put to a vote.¹⁸³

The 2019 bill largely struggled due to a Republican Senate that opposed the bill, resulting in House Democrats taking their time with the amendment and voting process, and referring the bill to various House Committees for

¹⁷⁴ Ty Gamble-Eddington, *The Equality Act: How We Got Here and How to Get It Passed*, GLAAD (Sept. 30, 2020), <https://www.glaad.org/amp/equality-act-how-we-got-here-and-how-we-move-forward>.

¹⁷⁵ Brinster, *supra* note 170, at 595.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 596.

¹⁷⁸ *Id.* at 596-97; Adam P. Romero, Article, *Does the Equal Pay Act Prohibit Discrimination on the Basis of Sexual Orientation or Gender Identity?*, 10 ALA. C.R. & C.L. L. REV. 35, 67 (2019).

¹⁷⁹ Brinster, *supra* note 170, at 598.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Equality Act, H.R. 2282, 115th Cong. (2017); Equality Act, H.R. 5, 116th Cong. (2019); Equality Act, H.R. 5, 117th Cong. (2021).

¹⁸³ H.R. 2282, 115th Cong., *supra* note 179.

Amendment.¹⁸⁴ During these committee deliberations, Republican members of the judiciary committee attempted to dilute the bill with amendments, so the act was brought back to the floor, and debate was limited and timed with a Closed Rule to avoid further amendments.¹⁸⁵ The House then passed the bill on May 17, 2019, in a bipartisan 236-173 vote, but the Senate did not act on the bill after receiving it because Mitch McConnell refused to hold a vote on the bill.¹⁸⁶ Regardless of the Senate's decision on the bill, it was futile due to President Trump's opposition to its passage, claiming that the bill was filled with poison pills that threatened to undermine parental and conscience rights.¹⁸⁷ This opposition had gone against his previous statements, indicating that amending the Civil Rights Act to include a ban on discrimination based on sexual orientation would be fair, simple, and straightforward.¹⁸⁸ Nonetheless, Trump indicated that he would veto the bill if it reached his desk.¹⁸⁹

The most recent iteration of the Equality Act, introduced in the 117th Congress on February 18, 2021, passed the House shortly after on February 25, 2021, but never received a full vote in the Senate.¹⁹⁰ Hearings were held in the Senate Committee on the Judiciary on March 17, 2021, but no action was taken.¹⁹¹

ii. The Current Status

The Equality Act was again introduced in the 118th Congress on June 21, 2023.¹⁹² The bill was referred to committees in the House and Senate with no further action undertaken. If the bill were to pass under the current administration, President Biden has indicated that the Act is one of his top legislative priorities, and he would sign it into law.¹⁹³

The current version of the Equality Act, if passed, would prohibit discrimination on the basis of sex, including the expanded definition of sexual orientation and gender identity, in areas including public accommodations and facilities, education, federal funding, employment, housing, credit, and the jury system. The scope of what is considered a public accommodation under the Civil Rights Act of 1964 would be

¹⁸⁴ Gamble-Eddington, *supra* note 171.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Tim Fitzsimons, *Trump Opposes Federal LGBTQ Nondiscrimination Bill, Citing 'Poison Pills'*, NBC NEWS (May 14, 2019), <https://www.nbcnews.com/feature/nbc-out/trump-opposes-federal-lgbtq-nondiscrimination-bill-citing-poison-pills-n1005551>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Equality Act, H.R. 5, 117th Cong. (2021).

¹⁹¹ *Id.*

¹⁹² Equality Act, H.R. 15, 118th Cong. (2023).

¹⁹³ *See id.*

expanded to include places or establishments that provide (1) exhibitions, recreation, exercise, amusement, gatherings, or displays; (2) goods, services, or programs; and (3) transportation services.¹⁹⁴ The bill also prohibits an individual from being denied access to a shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual's gender identity.¹⁹⁵ Amendments to the Fair Housing Act, Equal Credit Opportunity Act, and Title 28 of the United States Code would further strengthen nondiscrimination protections to include and define sexual orientation and gender identity.

In the Act's history, Congress has had issues with crossing party lines in order to pass it, and with the current filibuster rule, 60 votes are required for the bill's passage in Senate, meaning that ten Republicans must vote in favor of the bill.¹⁹⁶ Gaining Republican support here is difficult, as many of them believe that the *Bostock* decision expanded the Civil Rights Act of 1964 protections in employment to LGBTQ+ Americans was sufficient, and they also fear that the Act would infringe upon religious objections.¹⁹⁷ Even so, a federal statute would both codify and protect the rights afforded to LGBTQ+ Americans from differing presidential administration interpretations and elevate the *Bostock* ruling into statutory law.¹⁹⁸ A similar bipartisan effort was successful with the Respect for Marriage Act, a direct political response to concerns about the future of interracial and same-sex marriage rulings of the Court.

iii. The Needed Amendments

The four-pronged reasoning in *Obergefell* points to marriage as a way to legally and culturally acknowledge LGBTQ+ families.¹⁹⁹ Such recognition should allow for the "permanency and stability important to children's best interests."²⁰⁰ The holding goes on to recognize that children of LGBTQ+ parents "suffer the stigma of knowing their families are somehow lesser," causing both harm and humiliation.²⁰¹ In rightly identifying this issue, the Court leaves open the legal work needed to define this bias and protect against it. The Equality Act, with amendments, is ripe to fill that void. The following amendments to the 2023 version would address *Obergefell*'s unfulfilled promises to children of LGBTQ+ parents:

¹⁹⁴ *Id.* at 14.

¹⁹⁵ *Id.* at 23.

¹⁹⁶ Danielle Kurtzleben, *House Passes Equality Act: Here's What It Would Do*, NPR (Feb. 25, 2021), <https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do>.

¹⁹⁷ *See Bostock v. Clayton Cty.*, 590 U.S. 644, 681 (2020).

¹⁹⁸ *Id.*

¹⁹⁹ *See Obergefell v. Hodges*, 576 U.S. 644, 646 (2015).

²⁰⁰ *Id.* at 668.

²⁰¹ *See id.* at 668.

- Adding familial association alongside sexual orientation and gender identity in all referenced expansions of “sex” in the Act is foundational to achieving the legal protections sought for children of LGBTQ+ parents. The first example is found in Section 2(a)(1). Familial association should be added between gender identity and pregnancy. All references to “sex (including sexual orientation and gender identity)” should be amended to state “sex (including sexual orientation, gender identity, and familial association).”²⁰²
- Finding 2 specifically addresses instances of discrimination against married same-sex couples. An addition could include: “Finally, familial association discrimination could be actually and vicariously experienced by children for the intersecting characteristics carried by their lesbian, gay, bisexual, transgender, and queer parents.”²⁰³
- Finding 3’s last sentence should be amended to read “This discrimination prevents full participation of LGBTQ people and their families in society and disrupts the free flow of commerce.” The recognition of the discriminatory harm to their family members simply by association is important. The similar addition of “and their families” after LGBTQ people to finding 6 expands the acknowledgement of harm.²⁰⁴
- Amending finding 11 to read: “Individuals who are LGBTQ, or are perceived to be LGBTQ, and their children have been subjected to a history and pattern of persistent, widespread, and pervasive discrimination” broadens the Equality Act’s intention to cover familial association. A similar addition of “and their children” should be added to finding 19.²⁰⁵
- Rewording the final sentence of finding 12 to: “Even if these perceptions are incorrect or misapplied to children of LGBTQ parents, the identity imputed by others forms the basis of discrimination.”²⁰⁶
- Finding 15 would benefit from the addition this new final sentence: “Similarly, children of LGBTQ parents experience the same discriminatory response when asked to list parents to secure housing, even into adulthood.”²⁰⁷

As written, the Equality Act makes no mention at all the children being parented by LGBTQ+ people nor does it discuss the discrimination

²⁰² Equality Act, H.R. 15, 118th Cong. (2023).

²⁰³ *See id.* at 3.

²⁰⁴ *Id.* at 3-5.

²⁰⁵ *Id.* at 6-7.

²⁰⁶ *Id.* at 7.

²⁰⁷ *Id.* at 8.

experienced by these families. The proposed amendments could have the powerful impact of recognizing the discrimination experienced by children of LGBTQ+ parents and bring to the forefront a responsive legal solution to *Obergefell*.

iv. The Alternative

As has often been pursued in the place of federal protections, an alternative could be the development of state and local nondiscrimination statutes to include children of LGBTQ+ parents. Given the current political and legal climate at the federal level, this option might provide more immediate legal protections and closer-to-home redress. The reality is that the current national climate for any matter perceived to advance support for diverse communities is seen as a direct attack on the rights of others. Leaning into the dangerously illogical idea of reverse discrimination, current federal lawmakers are unlikely to take up the Equality Act soon and would not do so with the empathy required to understand the needs of Americans outside their own lived experiences. Preserving the Equality Act and the proposed amendments for a political environment to support success may make good sense, despite the moral imperative to address these needs now. What seems most urgent is an acknowledgment of the potential and actual harm felt by these children as a counter to the hateful rhetoric. The possibilities to do so through an expansion of protections are vast.

State and local legislators could model amendments to their statutes after those proposed to the Equality Act. Such an effort provides an opportunity for legislative bodies to think broadly about the impact of national efforts to erode LGBTQ+ rights and recommit to equality. The amendment exercise could also politically and morally empower the electorate with similar values around actions within their control, countering the despair currently felt by many. Similarly, the effort will test the commitment of elected officials seeking diverse coalitions of electoral support.

Another option is to create a model statute for state and local governments to use in broadening familial association protections. Such a model gives legislators a template to implement in their jurisdictions that can be supported by national forces for equality. Organizations like the Human Rights Campaign, Lambda Legal, and the National Center for Human Rights can engage in cross-interest partnership with Family Equality and Marriage Equality USA to draft a model statute that creates meaningful protections for children of LGBTQ+ parents. Efforts along this line could even have an upward, grassroots impact from local communities through to, ideally, an amended Equality Act. This particular alternative

also allows legislatures to consider the broader impact of establishing familial association nondiscrimination protections.

v. The Broader Impact

Including familial association nondiscrimination protections in either the Equality Act or state and local statutes is broader in its impact than for the exclusive purpose of addressing the needs of children of LGBTQ+ parents. Familial association bias exists in many contexts and harms children, parents, and other family members of people who carry minoritized identities. Additional examples include the discrimination faced by children of people with certain disabilities, criminal records, professions, religions, and lifestyles. The potential for broadening the definition of familial association beyond children to other types of family relationships also expands the possibilities of preventing others from discrimination. Such laws also comport with and strengthen the fundamental right to parent as they see fit under the Due Process Clauses of the Fifth and Fourteenth Amendments.²⁰⁸ When discriminatory behavior interferes with the right to parent or harms children or family members for conduct and identities that are not their own, the law should respond. A broader discussion and interpretation of familial association nondiscrimination laws at the federal, state, and local level would be responsive to those needs, should a movement to address this legal need outside LGBTQ+-headed households serve an intersectional coalition's goals.

V. CONCLUSION

Ten years on from *Obergefell*, much has changed legally and culturally in the United States. For many, the fight for marriage equality and the culminating experience of *Obergefell*'s landmark decision was a once-in-a-lifetime moment of inspiration. Since that time, though, the fight for the LGBTQ+ community to realize full legal equality and cultural acceptance has been challenged and perhaps even regressed. At the core of this movement is a lack of empathy for people who have different identities, beliefs, and families than their own. This lack of empathy will undoubtedly devolve into increased instances of the children of LGBTQ+ individuals experiencing discrimination. Furthermore, the law will increasingly be asked to address harm caused to children of varied types of parents with minoritized identities.

The reality is that children are no longer off limits when advancing the goals of white Christian nationalist views. In many ways, borrowing from the playbook of *Brown v. Board of Education*, children are now being used by far-right political forces to expand religious and parental rights. While

²⁰⁸ See *Santosky v. Kramer*, 455 U.S. 745, 747 (1982).

Brown successfully expanded rights for all by installing a right to educational equity, this new strategy seeks to restrict the impact of diversity in our society, devalue inclusion, and limit freedom of thought. Instances of said discrimination are already well documented under the guise of religious liberties.

Even with the current legal and political backdrop, it remains more critical than ever to hold the United States accountable to *Obergefell's* as-of-yet unfulfilled promise to children of LGBTQ+ parents. Amending and passing the Equality Act creates the possibility of another once-in-a-generation impact on the lives of millions of adults and children. This Article calls for the modification and ratification of the Equality Act to include, under the definition of "sex," protections against discrimination based on familial association. If adopted, the law would acknowledge and protect against the discrimination of children based on bias and perception of the sex, sexual orientation, and gender identity of family members. This truly seems like the only way to realize *Obergefell's* promise to the next generation.