

# LEADING FIRST AMENDMENT SCHOLARS SUPPORT FAIRNESS FOR ALL STRATEGY

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We are constitutional law scholars who have studied, taught, and written about the law of religious liberty for decades. All of us have persistently argued for religious liberty in legislatures and in the courts. Most of us have also argued for LGBTQ rights in legislatures, the courts, or both.

We have long been concerned about legal clashes between those who cherish the fundamental right to religious liberty and those who advocate new legal protections for the civil rights of LGBTQ people. These conflicts have led to increasingly polarized positions in which progress is blocked for both sides. Many Americans think that traditional believers seek a general “license to discriminate” and that hostility to the LGBTQ community is the public face of Christianity. Many traditional believers think that the LGBTQ community and its supporters are determined to destroy their institutions, deprive them of their rights, and confine them to hidden and wholly private corners of the society.

Neither side’s perception of the other is accurate, but the perceptions are real, and they have done much damage to traditional believers, to the LGBTQ community, and to the larger society. Same-sex marriage is protected from interference by government, but in about half the states, same-sex couples can still get married on Saturday and discover that one or both of them has been fired on Monday. Believers with conscientious objections to assisting with same-sex weddings still fear being forced to surrender their consciences or close their businesses in the other half of the states, and churches and other religious organizations fear intrusive regulation or loss of tax exemptions everywhere, whether from blue states or federal agencies.

There is a better way. The proposed Fairness for All Act is balanced civil rights legislation that equitably protects the rights of both communities. It broadly protects LGBTQ persons in employment, housing, credit, public accommodations, federally assisted programs, public facilities, jury service, refugee resettlement, and marriage recognition, and it offers protection against bullying and retaliation. It broadly protects religious institutions and individual believers in practice, doctrine, conscience, and institutional integrity. It protects tax exemptions; it protects small businesses and medical professionals; it greatly strengthens accommodations for religious employees. It protects free speech in the workplace for both supporters and opponents of same-sex marriage.

Both traditional believers and the LGBTQ population would have far more protection under this bill than they have under existing law, and far more protection than they have any reasonable prospect of enacting without this bill or some similar negotiated solution. The experience in Indiana with attempts to enact a state Religious Freedom Restoration Act, and less publicized failures in Georgia, Michigan, Ohio, and West Virginia, show that except possibly in the reddest states, the religious community cannot pass additional religious liberty legislation without making adequate provision for LGBTQ rights. It is equally clear that LGBTQ advocates cannot pass gay-rights legislation in Congress or in red states without making adequate provision for religious liberty. No state has

enacted a new statewide law against sexual-orientation discrimination since Colorado in 2007—with one telling exception. The deep red state of Utah was able to enact statewide protections for sexual orientation and gender identity in housing and employment, but only because it protected religious liberty in those domains in the same bill.

LGBTQ people still face discrimination and need protection now, not after some imagined political realignment far in the future. Many of these cases arise in secular and nonsexual contexts where there is no plausible claim that religious faith is the reason for discriminating. Few Americans, if any, sincerely believe that God wants LGBTQ persons to be unemployed, homeless, or without access to basic goods and services. But all kinds of discrimination against LGBTQ people are entirely legal under federal law and in about half the states.

More than half of Americans live in jurisdictions where state or local laws already protect LGBTQ people from discrimination. But these laws do not strike an adequate balance with religious liberty. Most state-law protections were enacted before the Supreme Court's marriage decisions and therefore do not address the most religiously sensitive conflicts. This bill addresses some of those conflicts; it leaves others to state law.

Some traditional religious believers would rely on protections in regulations recently issued by the Trump Administration. But these regulations offer no protection for LGBTQ rights, some of them are subject to challenge as lacking statutory authority, and all of them will likely be withdrawn by the next Democratic President as quickly and easily as they were issued. Legislation can also be amended, but doing so is far more difficult, requires a far more elaborate process, and usually requires at least some votes from both political parties. Reliance on the courts is deeply uncertain for everyone involved, but for the foreseeable future the courts are especially unpromising for advocates of LGBTQ rights.

The Fairness for All Act has been carefully negotiated by representatives of the traditional religious community and of the LGBTQ community. It comprehensively addresses the issues, and it addresses them in the context of current law. No negotiated solution is perfect from the perspective of either side. But the negotiated solutions in this bill are well thought out and carefully drafted, and as we said, they would make both the LGBTQ community and traditional faith communities far better off than they are today. In putting together complex legislation, there will always be provisions we might do a little differently, but the interested groups should not let the perfect be the enemy of the good.

The nation's deep division on these issues is aggravating polarization and contributing to gridlock more generally, and it is making lasting progress impossible for either side. We urge Americans of good will and of all views on

these issues to support a negotiated solution. It would be a huge advance for both sides.

Of course we write in our individual capacities as scholars; none of our institutions takes any position on the bill or the issues discussed in this letter.

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### THOMAS C. BERG

**Professor Thomas Berg** currently teaches law and public policy at the University of St. Thomas, where he directs the religious liberty appellate clinic. He has written over 50 book chapters and journal articles and dozens of op-eds on religious liberty, and is a co-author of a leading religious liberty casebook. Professor Berg has also drafted nearly 40 briefs on issues of religious liberty and free speech for the Supreme Court and lower courts, including an amicus brief with Professor Douglas Laycock in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Professor Berg has received a Religious Liberty Defender of the Year Award from the Christian Legal Society.



### CARL H. ESBECK

**Professor Carl Esbeck** is a professor at the University of Missouri School of Law. He has published widely in the area of religious liberty and church-state relations, and has taken the lead in recognizing that the modern Supreme Court has applied the establishment clause not as a right, but as a structural limit on the government's authority in specifically religious matters. Professor Esbeck was the architect of the Charitable Choice provisions in the federal Welfare Reform Act of 1996 and was a key part of the congressional advocacy behind the Religious Land Use and Institutionalized Persons Act of 2000.



### DOUGLAS LAYCOCK

**Professor Douglas Laycock** has written and taught religious liberty law for over four decades at University of Chicago, the University of Michigan, the University of Virginia, and now the University of Texas. Professor Laycock has testified frequently before Congress and has served as lead counsel in six cases before the U.S. Supreme Court. His many writings on religious liberty have been reprinted in a five-volume collection. Professor Laycock is co-author of *Same Sex Marriage and Religious Freedom: Emerging Conflicts*, was a key architect of the Religious Freedom Restoration Act of 1993, and successfully advocated for numerous state religious freedom protections.



### ROBIN FRETWELL WILSON

**Professor Robin Fretwell Wilson** is a professor of law at the University of Illinois. Her work has been featured in national publications such as the New York Times, the Wall Street Journal, and the Atlantic Monthly. Professor Wilson directs the Fairness for All Initiative, which builds on her work protecting religious freedom and LGBT rights in landmark legislation in Utah in 2015. She has successfully advocated for numerous other state religious freedom protections. She is the co-author of *Same Sex Marriage and Religious Freedom: Emerging Conflicts and Religious Freedom, LGBT Rights, and the Prospects for Common Ground*.