

**Report on the United States of America's Compliance with Its Human Rights Obligations in  
the Area of the Family Relationships of Lesbian, Gay, Bisexual, and Transgender People**

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Submitted By: National Center for Lesbian Rights (NCLR)

Contact Name: Catherine Sakimura

Contact Phone/Email: 1-415-392-6257 ext. 329 / [csakimura@nclrights.org](mailto:csakimura@nclrights.org)

Organization Website: [www.nclrights.org](http://www.nclrights.org)

The National Center for Lesbian Rights (NCLR) has been advancing the civil and human rights of lesbian, gay, bisexual, and transgender (LGBT) people and their families across the United States of America through litigation, legislation, policy, and public education since it was founded in 1977. NCLR is a non-profit, public interest law firm that litigates precedent-setting cases at the trial and appellate court levels, advocates for equitable public policies affecting the LGBT community, provides free legal assistance to LGBT people and their legal advocates, and conducts community education on LGBT issues. NCLR serves more than 5,000 LGBT people and their families throughout the United States each year, including LGBT parents, seniors, immigrants, athletes, and youth. NCLR's legal, policy, and legislative victories set important precedents that improve the lives of all LGBT people and their families across the country. We also seek to empower individuals and communities to assert their own legal rights and to increase public support for LGBT equality through community and public education.

Endorsing Organizations: Advocates for Youth, Campus Pride, Equality Federation, Family Equality Council, Human Rights Campaign, Lambda Legal, Marriage Equality USA, National Gay and Lesbian Task Force, National Latina Institute for Reproductive Health, The Trevor Project

## **I. SUMMARY**

1. “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>1</sup> “Men and women of full age . . . have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”<sup>2</sup> “Everyone has the right to the protection of the law against” “arbitrary interference with his privacy, family, [or] home,” yet, for lesbian, gay, bisexual, and transgender (LGBT) people in the United States of America, these fundamental human rights do not yet exist nationwide. In many states, LGBT people still do not have established rights to be legally recognized parents, to marry, or to access basic rights and benefits if they are unable to or chose not to marry. LGBT youth continue to be vulnerable to rejection by their families or removal from supportive parents by the courts. This report addresses the continuing insufficiencies of social and legal protections for LGBT families in the United States, in particular: (1) the denial of parental and custodial rights to LGBT parents, (2) the denial of marriage rights to same-sex couples, (3) discrimination against unmarried couples, and (4) family support of LGBT children. The National Center for Lesbian Rights (NCLR) has over three decades of expertise in the area of LGBT family law, as a non-profit, public interest law firm that litigates precedent-setting cases at the trial and appellate court levels, advocates for equitable public policies affecting the LGBT community, provides free legal assistance to LGBT people and their legal advocates, and conducts community education on LGBT issues. Based on our extensive experience working directly with and for LGBT families and their advocates, this report includes, at Section III, recommendations to for the United States of actions it should take to respect and protect all LGBT families.

## **II. LEGAL FRAMEWORK**

2. In the United States, regulation of family law is generally reserved for the individual states, subject to federal constitutional guarantees. While the federal Constitution protects the fundamental right to marry and to parent and requires equal protection of the laws, the United States Supreme Court has not yet held that states must respect those fundamental rights equally for LGBT persons. Accordingly, the rights of LGBT families are neither uniform nor guaranteed, and may change simply by crossing a state line or by passing from a state to a federal jurisdiction.
3. Many U.S. states still deny same-sex couples and transgender persons the right to marry and refuse to recognize valid marriages between same-sex spouses or marriages involving a transgender spouse that were entered into in other states and foreign countries.
4. The Federal government and state governments frequently determine eligibility for basic benefits and legal protections, such as access to health care and family leave, on the basis of marital status. Therefore, the denial of equal marriage rights to same-sex couples entails not just the denial of equal respect for their relationships, but also the denial of equal access to many critical rights and benefits that can be accessed only through marriage.

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<sup>1</sup> United Nations Declaration of Human Rights, art. 16(3).

<sup>2</sup> *Id.*, art. 16(1).

5. In 2013, the United States Supreme Court held that, if a same-sex couple is validly married by a state or another country, the federal government must recognize the couple as married for purposes of federal benefits and protections. Most federal agencies have extended benefits to legally married same-sex couples; however, some agencies recognize such marriages only if the same-sex couple lives in a state that recognizes their marriage, thus excluding these spouses from important government benefits.
6. During the last UPR in 2010, the United States accepted both recommendations relating the rights of LGBT Families: Recommendation 112, “Take measures to comprehensively address discrimination against individuals on the basis of their sexual orientation or gender identity”; and Recommendation 116, “Continue its intense efforts to undertake all necessary measures to ensure fair and equal treatment of all persons, without regard to sex, race, religion, colour, creed, sexual orientation, gender identity or disability, and encourage further steps in this regard.”

### **III. U.S. COMPLIANCE WITH ITS HUMAN RIGHTS OBLIGATIONS IN THE AREA OF THE FAMILY RELATIONSHIPS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE**

- A. Denial of Parental and Custodial Rights to LGBT Parents
7. A number of states provide no way for both parents in a same-sex parent family to establish a legally protected relationship with their children, either by adoption or by any other means. As a result, those children are denied government benefits and can be separated from one of their parents if their parents separate or the legally recognized parent dies. LGBT parents who are not legal parents may not be able to consent to medical care for the child or make educational decisions, and may have no ability to provide health insurance for the child as their dependent. In the absence of a will stating otherwise, a child generally has no right to inherit from a person who is not a legal parent or relative. The absence of legal recognition also stigmatizes these families, inviting private discrimination and making it more difficult for children being raised by LGBT parents to feel safe and included in their communities.
8. A number of states allow same-sex parents to protect their parental rights through adoption or another court process. However, a few states explicitly discriminate against same-sex parents by prohibiting adoptions by any adult who has an unmarried partner or preferring adoption by married, different-sex couples.
9. Even where parents have been able to protect their parental rights through an adoption or parentage judgment, parents still face challenges to the recognition of these judgments in other states. Under the Full Faith and Credit Clause of the U.S. Constitution, all states are required to recognize judgments from other states, but many states have not yet explicitly recognized these orders, and many parents are subject to expensive and time consuming challenges to their adoptions, often leading to separation from their children from a significant period of time.
10. In some states, LGBT parents are still denied custody of their children on the basis of the parent’s sexual orientation or gender identity. This issue is particularly widespread for transgender parents, who are at risk of losing custody or even having their parental rights

terminated in many states based solely on their gender identity. A number of states also allow courts to restrict the custody rights of LGBT parents by prohibiting them from living with a same-sex partner as a condition of retaining custody of their children.

11. *Recommendations:* All states should recognize both parents in LGBT parent families as legal parents and should recognize adoptions and parentage judgments issued by other states, without regard to a parent's sexual orientation, gender, gender identity, or marital status. The federal government should recognize non-biological parents for the purposes of government benefits provided to children. The federal government should also revise rules for children born abroad to same-sex parents to allow children conceived through assisted reproduction and born abroad to have U.S. citizenship through their non-biological parents.

#### B. Denial of Marriage Rights to Same-Sex Couples

12. As of September 2014, nineteen states and the District of Columbia permit same-sex couples to marry. Courts in an additional fourteen states have ruled that bans on marriages between same-sex couples violate, or are likely to violate, the federal Constitution; however, those rulings have been stayed pending appeal and have yet not gone into effect. Legal challenges are currently pending in every state that bars same-sex couples from marriage.
13. While a number of states permit same-sex couples to marry, 31 states refuse to recognize those marriages. As a result, legally married same-sex couples and their children may be stripped of legal protections simply by traveling or moving to certain states, resulting in serious disruption and harm. While couples can obtain some degree of protection through private agreements, such agreements cannot confer most of the rights and protections that are provided through marriage or other forms of official relationship recognition.
14. In 2013 the United States Supreme Court issued a decision striking down Section 2 of the Defense of Marriage Act, which had prohibited the federal government from recognizing marriages between same-sex couples.<sup>3</sup> Since that decision, most federal agencies have begun providing benefits to married same-sex couples equal to those that opposite-sex married couples receive. Notable exceptions are the Social Security Administration, the Department of Veterans Affairs, and the Railroad Retirement Board, which recognize marriages between same-sex couples only if their marriage is recognized by the couple's state of residence, regardless of its validity in the place it was celebrated. As a result, married same-sex couples continue to be denied important benefits by the federal government if they live in state that refuses to recognize their marriages.
15. *Recommendations:* All agencies of the federal government should adopt the place-of-celebration rule, recognizing all marriages that were valid where celebrated. The United States Supreme Court should hear one of the cases pending before it challenging the constitutionality of a state's ban on marriages between same-sex couples, and hold that the denial of equal marriage rights to same-sex couples violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the federal Constitution, thereby requiring every state to extend equal marriage rights to same-sex couples.

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<sup>3</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

### C. Discrimination Against Unmarried Couples

16. Several states expressly exclude unmarried couples from enforcing property rights that are generally available to other individuals. Although these laws affect all unmarried partners, they disproportionately disadvantage same-sex couples, who are less likely to be married than their opposite-sex counterparts, due in significant part to their historic and continuing exclusion from marriage. In particular, Illinois, Georgia, and Louisiana prohibit unmarried couples from enforcing any contract or property claims against each other, even though such claims are generally available to all other persons.
17. In addition, the federal government, along with most states, excludes unmarried couples from the full array of public benefits and the security of the public safety net by allowing only married spouses to access benefits such as health care (including family insurance through the Affordable Care Act); retirement, survivor, and disability benefits; and the right to take unpaid leave from ones' job in order to care for an ailing loved one. Distributing benefits through marriage disproportionately harms same-sex couples. It also harms LGBT people who have experienced family rejection and are more likely to be cared for by networks of friends rather than biological relations.
18. *Recommendations:* Eligibility for basic public benefits should be separated from marital status. Those benefits that are intrinsically tied to social relationships (such as survivorship benefits, disability benefits for dependents, and employment leave for caretaking) should be made available based on the actual interdependence and need of the relevant individuals.

### D. Family Support for LGBT Children

19. Family acceptance and support are critical to both the long-term and short-term health and well-being of LGBT children. However, rather than seeking to strengthen family bonds between LGBT children and their families, the laws in many states do the opposite. For example, when an LGBT child's parents or legal guardians do not accept the child's identity, most states permit families to engage professionals to attempt to change the child's sexual orientation or gender identity. In addition to being ineffective, such practices can cause depression, substance abuse, self-harm, and suicide in LGBT children. Since the last UPR in 2010, California and New Jersey have become the first states to prohibit state-licensed professionals, such as therapists, from engaging in this dangerous and discredited practice.
20. In many states, parents who are supportive of their LGBT child's sexual orientation or gender identity are at risk of losing custody of their child as a result of their support. This most frequently occurs when a custody dispute arises between the parents and one parent disagrees with the other's support for the LGBT child's identity.
21. When parents abuse or reject their LGBT children and the children are removed from the home by state child welfare agencies, state agencies rarely attempt either to reunify the family or to place the LGBT child in an alternative family setting. Instead, LGBT children who are abused or rejected overwhelmingly either end up homeless, without access to any governmental resources or support, or are placed in group homes or other institutional settings where the

child's identify is not supported. As a result, LGBT children who are placed into state care frequently experience continued physical and mental abuse because of their sexual orientation and gender identity.

22. *Recommendations:* Every state should prohibit state-licensed professionals from attempting to change a minor's sexual orientation or gender identity. State courts making custody decisions should recognize that an LGBT child's best interest is served by acceptance and support of the child's identity. The state and federal governments should fund and implement programs aimed at increasing acceptance of LGBT children in order to prevent abuse and rejection of LGBT children by their parents. Child welfare agencies should seek to reunify LGBT children with their families in appropriate cases, recruit providers of alternative placements for abused children who are LGBT-friendly, train all providers in best practices for housing LGBT children, and provide supportive housing options for LGBT children in state care.

#### **IV. CONCLUSION**

23. Although some progress has been made since the last UPR in 2010, LGBT people in the United States are still denied “protections by society and the state” for their families that are a fundamental human right.<sup>4</sup> These include the denial of parental and custodial rights to LGBT parents, the denial of marriage rights to same-sex couples, discrimination against unmarried couples, and a lack of legal protections for LGBT youth and their families.

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<sup>4</sup> United Nations Declaration of Human Rights, art. 16(3).