

Legal analysis finds Arkansas law that bars protection of LGBTQ people unconstitutional

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An original legal analysis by NYU College of Global Public Health finds an Arkansas law that prohibits local governments from enacting civil rights protections for lesbian, gay, bisexual, transgender, or queer (LGBTQ) individuals to be unconstitutional.

The article, published in the December issue of the *American Journal of Public Health*, provides information in support of evidence-based policymaking in order to prevent the passage of similar laws in other [states](#).

LGBTQ individuals have historically been discriminated against in a variety of ways; this puts them at an increased risk for disparate health outcomes when they reside in states that fail to extend equal protections to them or that actively deprive equal rights to them.

"In the wake of the Supreme Court's 2015 case holding that the Constitution protects the right of same-sex couples to marry, Congress and state legislatures have proposed and enacted laws to protect [people](#) who disagree with this ruling. These laws take several forms, but they all foster inequities that are concerning for [public health](#)," said Jennifer L. Pomeranz, assistant professor of public health policy and management at NYU College of Global Public Health and the article's author.

One such law, Arkansas' Intrastate Commerce Improvement Act of 2015, or Act 137, prohibits [local governments](#) from enacting civil rights protections for LGBTQ individuals that are also lacking at the state

level.

Act 137 declares that its purpose is to improve intrastate commerce by requiring state uniformity for civil rights laws. However, it withdraws the authority of local governments to provide increased protections to groups of people not mentioned in the state's civil rights act, which in Arkansas includes race, religion, national origin, gender, and disability - but not sexual orientation or gender identity. Moreover, it is not an evidence-based method to improve commerce.

"It appears that the purpose of Act 137 is to ensure that local governments cannot enact civil rights protections for LGBTQ people in Arkansas. Such state laws undermine local control, damage the economy, and create injustices that harm LGBTQ people," said Pomeranz.

In an original legal analysis, Pomeranz examined the legislative history and context for Act 137. She found that the law was proposed and enacted in response to Fayetteville, Arkansas attempting to pass local civil rights protections for LGBTQ individuals and the Supreme Court's decisions related to same-sex marriage.

Pomeranz presents two constitutional arguments to challenge Arkansas' law based on its violation of the Establishment and Equal Protection clauses.

The Establishment Clause prohibits the government from enacting laws respecting an establishment of religion. While Arkansas could argue that Act 137 was enacted for the secular purpose of creating uniformity in the law applicable to businesses throughout the state, this purpose is not reflected in the legislative history. Moreover, even if Arkansas was simply seeking to accommodate religion, Act 137 burdens LGBTQ people and their families to advance the religious beliefs of those accommodated.

"Through Act 137, the state is giving the force of law to religious business owners who wish to discriminate against same-sex couples. Thus, the statute goes further than constitutionally appropriate to accommodate religious beliefs," Pomeranz said.

Pomeranz's second argument focuses on the Equal Protection Clause, which says that no state shall deny any person the equal protection of the law. Equal protection challenges usually involve a law that classifies people in a discriminatory manner.

Pomeranz found several factors suggesting that Act 137 is in fact discriminating against LGBTQ people. For example, one of the sponsors of Act 137 stated that the law was shaped by an earlier Colorado law - overturned by the Supreme Court in *Romer v. Evans* in 1996 - that prohibited government [protection](#) of people based on sexual orientation. The Arkansas law does not specify that its target is LGBTQ individuals, perhaps in an effort to bypass the Equal Protection Clause and learning from the outcome of *Romer v. Evans*.

While challenging Arkansas' Act 137 may prove difficult, given that courts are reluctant to attribute unconstitutional motives to states when they are not explicit, Pomeranz's arguments and evidence provided could arm advocates to help them prevent the passage of similar laws in other states.

"Even without a legal challenge to the law, which requires resources and a plaintiff with standing, these findings can be used to convince legislators in other states not to enact such a law in the first place. State legislators understand that they have a 'fiduciary obligation to be good stewards of state resources,' which should translate into avoiding putting the state in a position to defend its laws in court," Pomeranz said.

Provided by New York University

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