

# The Intersection of Civil Rights, Religious Liberty, and Infectious Disease

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## I. INTRODUCTION

In June 1981, the CDC published the first two articles on a surge of rare illnesses amongst gay men, which would later be identified as opportunistic infections linked to the human immunodeficiency virus, acquired immunodeficiency syndrome (HIV/AIDS) virus.<sup>1</sup> Nearly forty years later, COVID-19 would surge across the globe, triggering a never before seen public health emergency – and an equally novel pushback to public health measures, often through litigation on religious freedom claims. In 2022, a third pandemic appeared: Monkeypox (MPX), diagnosed most often among men who have sex with men.

Comparing the government responses to HIV/AIDS, COVID-19, and MPX reveals the profound negative impact stigmatization has on public health outcomes for marginalized communities. This Note will show this by comparing the difference in the availability of government resources and level of public concern for the MPX and HIV/AIDS pandemics, two diseases associated with the LGBTQ community, than for COVID-19, which is not. Secondly, the surge in First Amendment Free Exercise Clause and Religious Freedom Restoration Act (RFRA) challenges to preventative public health measures brought on by COVID-19 will likely worsen this problem. This is due to the historical tension between sex- and gender-based civil rights claims and religious freedom litigation. Since the same lines of reasoning and Supreme Court doctrine that have historically been used to deny civil rights to LGBTQ individuals are now also being used to decrease the government's ability to prevent the spread of contagious disease, it is likely to have an especially stark negative impact on measures intended to protect the LGBTQ community during public health emergencies.

Current Supreme Court doctrine must be reframed to ensure that the United States can effectively respond to current and future public health emergencies that have profound effects on marginalized communities, while also protecting religious liberty interests. Litigation seeking to bar access to preventative health-care for LGBTQ people should also qualify as a violation of Model Rule 8.4 of

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1. *A Timeline of HIV and AIDS*, HIV.gov, <https://www.hiv.gov/hiv-basics/overview/history/hiv-and-aids-timeline> [https://perma.cc/YM3W-P643] (last visited Nov. 7, 2022).

Professional Conduct<sup>2</sup>: “It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . sexual orientation [and] gender identity . . . in conduct related to the practice of law.”

The legal profession is currently undergoing a crisis of integrity caused by a lack of public trust. The high level of national concern and interest in public health makes it especially important that lawyers demonstrate their ethical commitments in this area of the law, and amending the *Model Rules* would allow the profession as a whole to do so.

This Note will first address how stigmatization of the LGBTQ community negatively impacts health outcomes by delaying social and political reactions to public health emergencies through a discussion of the HIV/AIDS crisis. Then, it will address the increase of religious liberty litigation in opposition to public health measures designed to slow the spread of COVID-19. Next, it will address how anti-LGBTQ stigma is negatively impacting outcomes during the 2022 MPX outbreak and how additional public health dangers are created when both LGBTQ civil rights and public health measures are targeted by free exercise clause litigation. Finally, it will suggest possible legislative and judicial solutions that take into account both the health needs of the LGBTQ community and the genuinely held beliefs of religious communities. Since public health concerns impact every member of society, it is essential that the government act well in advance to ensure the best possible response.

## II. THE HIV/AIDS CRISIS AND ANTI-LGBTQ STIGMA

On June 5, 1981, the CDC published two articles about an inexplicable increase in diagnoses of Kaposi’s Sarcoma, a rare and aggressive cancer, and PCP, a rare type of pneumonia, amongst gay and bisexual men living in New York and Los Angeles.<sup>3</sup> The first article connecting these outbreaks with a sexually transmitted agent was not released until a year later, on June 18, 1982.<sup>4</sup> Congress would not approve funding for research into this deadly and mysterious disease until May of 1983, a full two years after the initial reports.<sup>5</sup> The virus itself, the human immunodeficiency virus (HIV), would not be identified until 1984.<sup>6</sup>

The reason for this slow crawl was easily identified: “The only confirmed straights struck down by AIDS are members of groups just as disenfranchised as gay men: intravenous drug users, Haitians, eleven hemophiliacs (up from eight),

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2. MODEL RULES OF PROF’L CONDUCT R. 8.4 (2009) [hereinafter MODEL RULES].

3. *A Timeline of HIV and AIDS*, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

black and Hispanic babies, and wives or partners of IV drug users and bisexual men.”<sup>7</sup>

President Reagan would not even say the word AIDS in public until September 17, 1985, four years after the CDC articles, after over 12,000 Americans had died of the disease.<sup>8</sup> This, in spite of the fact that Rock Hudson, a close family friend, had reached out to Nancy Reagan for help just five months earlier—and been refused.<sup>9</sup> Hudson, along with more than 25,000 others, would be dead before Reagan ever gave a public address about AIDS.<sup>10</sup>

Medical professionals refused to treat AIDS patients, terrified of catching the virus themselves.<sup>11</sup> People were reluctant to seek treatment, fearing the social repercussions of being diagnosed with “the gay plague,” a modern day scarlet letter.<sup>12</sup> So too were few people willing to disclose to their friends and relatives that they had the disease, making it less likely for anyone to know that their own community was suffering. Instead, it was a problem that belonged to Others.

This stigma against “gay cancer” also worsened the impact on people outside the LGBTQ community. Doctors, convinced that the disease only occurred in gay men were less likely to correctly identify the symptoms in women, leading to worse outcomes.<sup>13</sup> The fewer people who understood how to protect themselves (or even that they should protect themselves), and the more time the disease had to spread, the greater the impact was on the United States and the entire global community.<sup>14</sup>

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7. Larry Kramer, *I,112 and Counting*, N.Y.C. NATIVE (Mar. 27, 1983), <https://www.losangelesblade.com/2020/05/27/march-27-1983-1112-and-counting/> [<https://perma.cc/SW2A-KNRX>].

8. Tim Fitzsimons, *LGBTQ History Month: The early days of America's AIDS crisis*, NBC NEWS (Oct. 15, 2018), <https://www.nbcnews.com/feature/nbc-out/lgbtq-history-month-early-days-america-s-aids-crisis-n919701> [[perma.cc/J6CT-YUL8](https://perma.cc/J6CT-YUL8)]; Joseph Bennington-Castro, *How AIDS remained and Unspoken - but Deadly - Epidemic for Years*, HISTORY.COM (June 1, 2020), <https://www.history.com/news/aids-epidemic-ronald-reagan> [[perma.cc/CU7D-RYNC](https://perma.cc/CU7D-RYNC)].

9. Chris Greidner, *Nancy Reagan Turned Down Rock Hudson's Plea For Help Nine Weeks Before He Died*, BUZZFEED (Feb. 2, 2015), <https://www.buzzfeednews.com/article/chrisgreidner/nancy-reagan-turned-down-rock-hudsons-plea-for-help-seven-we> [[perma.cc/49HV-YH9N](https://perma.cc/49HV-YH9N)].

10. *Id.*

11. Josephine Gittler & Sharon Rennert, *HIV Infection Among Women and Children and Antidiscrimination Laws: An Overview*, 77 IOWA L. REV. 1313, 1371, 1373-1375, (May 1992).

12. Owen Jones, *We Can't Go Back to the deadly HIV stigma of the 1980s*, THE GUARDIAN (Nov 11 2015), <https://www.theguardian.com/commentisfree/2015/nov/11/hiv-stigma-1980s> [<https://perma.cc/XG3H-AZQS>].

13. Caitlin Yumori, Jason Zucker, Deborah Theodore, Michelle Chang, Caroline Carnevale, Jacek Slowikowski, Elijah LaSota, Susan Olender, Peter Gordon, Alwyn Cohall & Magdalena E. Sobieszczyk, *Women are less likely to be Tested for HIV or Offered PrEP at Time of STI Diagnosis*, J. OF THE AM. SEXUALLY TRANSMITTED DISEASES ASS'N (Jan. 2021), [https://journals.lww.com/stdjournal/Fulltext/2021/01000/Women\\_Are\\_Less\\_Likely\\_to\\_Be\\_Tested\\_for\\_HIV\\_or.6.aspx](https://journals.lww.com/stdjournal/Fulltext/2021/01000/Women_Are_Less_Likely_to_Be_Tested_for_HIV_or.6.aspx) [<https://perma.cc/CM5E-ZB7U>]; Nancy L. Sohler, Xuan Li, and Chinazo O. Cunningham, *Gender Disparities in HIV Health Care Utilization among the Severely Disadvantaged: Can We Determine the Reasons?*, AIDS PATIENT CARE AND STDs (Sept. 9, 2009), <https://www.liebertpub.com/doi/10.1089/apc.2009.0041> [<https://perma.cc/3GPP-AVEU>].

14. *See generally*, DAVID FRANCE, HOW TO SURVIVE A PLAGUE 1–43 (2016).

### III. COVID-19: A NEW ERA

In 2019, a cluster of patients suffering from a strange new respiratory illness was identified in Wuhan, China.<sup>15</sup> COVID-19 raced around the globe, overwhelming hospitals, closing all but essential services, and accidentally revolutionizing modern business methods along the way.<sup>16</sup>

COVID-19, a highly transmissible illness, had, and continues to have, a devastating health impact around the world. As of mid-March 2023, there have been over 6.8 million deaths around the world, over 1 million of which have been in the United States.<sup>17</sup> But at the same time, scientists around the world were able to do something incredible: develop multiple functioning vaccines in record time.<sup>18</sup> The United States granted emergency authorization to two vaccines only one year after the first COVID-19 cases were reported in Wuhan.<sup>19</sup>

Operation Warp Speed was incredibly successful at distributing the COVID-19 vaccine in record time.<sup>20</sup> However, not everyone was excited about the vaccine, or about other public health measures imposed by the government. Vaccine skepticism has increased throughout the United States, though the three available COVID-19 vaccinations are safe and effective.<sup>21</sup> While vaccine skepticism existed before COVID-19, those fears intensified during the pandemic and brought more people into the “anti-VAXX” movement, causing them to avoid vaccines for many different diseases.<sup>22</sup> Many Americans are highly skeptical of the government, with a Pew research poll finding that only 20% of people surveyed in the spring of 2022 saying they trust the federal government to do the right thing most or almost all of the time.<sup>23</sup>

The much quicker governmental response to COVID-19 than HIV/AIDS is partially attributable to the differences in the way each disease spreads. An aerosol-based contagion can move much more quickly across a wider area than one that spreads only through contact with bodily fluids. Similarly, differences in public awareness are partially attributable to the advent of social media.

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15. See LAWRENCE O. GOSTIN, *GLOBAL HEALTH SECURITY: A BLUEPRINT FOR THE FUTURE* 28 (2021).

16. *Id.* at 29.

17. WHO *Coronavirus Dashboard*, WORLD HEALTH ORG., <https://covid19.who.int/> [perma.cc/EXN5-MZHP] (last accessed Mar. 9, 2023).

18. Gostin, *supra* note 15 at 31.

19. *Id.*

20. *Id.* at 8.

21. *Safety of COVID-19 Vaccines*, CTR. FOR DISEASE CONTROL AND PROT. (Mar. 7, 2023), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html> [https://perma.cc/W8G9-9GSV].

22. Alan Greenblatt, *Vaccine Skepticism Spreads from COVID to Other Diseases* (Oct. 19, 2022), GOVERNING.COM, <https://www.governing.com/now/vaccine-skepticism-spreads-from-covid-to-other-diseases> [perma.cc/DN93-2HUY].

23. *Americans' Views of Government: Decades of Distrust, Enduring Support for Its Role*, PEW RSCH. CTR. (June 6, 2022), <https://www.pewresearch.org/politics/2022/06/06/americans-views-of-government-decades-of-distrust-enduring-support-for-its-role/> [https://perma.cc/3L99-QDS6].

However, the extreme differences between the responses to these illnesses cannot entirely be blamed on these distinctions. It took President Reagan six years to give his first press conference on the AIDS virus, but President Trump declared COVID-19 a National Health Emergency a mere three months after the first reports of the disease.<sup>24</sup> While there was certainly a difference in scale of spread, that cannot explain away the difference between six years and three months. And while HIV spread much more slowly, it was an effective death sentence for anyone who contracted the virus before the existence of anti-retroviral treatments. The world-wide mortality rate for COVID-19 topped out at 7.73% in April of 2020,<sup>25</sup> which, while horrifyingly large (particularly in the context of the quick spread) was not the same as certain death. The American government was less interested in helping people who were dying from HIV/AIDS than those who were dying from COVID-19. People protesting because of AIDS did so because they believed their government was not doing enough. People protesting because of COVID-19 did so because they believed their government was doing too much.

#### IV. HEALTHCARE V. FREE EXERCISE

Litigation seeking to avoid COVID-19 vaccine mandates has surged over the past two years, as has litigation seeking to avoid other types of preventative public health measures. Many of these claims have been based on religious liberty arguments: the Supreme Court has twice provided injunctive relief to people seeking to attend religious gatherings over maximum occupancy limits,<sup>26</sup> and many more petitions for writs of certiorari have been filed by churches, religious schools, and other religious organizations seeking exemptions to COVID-19 preventative health measures such as mask mandates and vaccine requirements.<sup>27</sup>

The COVID-19 pandemic is far from the first time religious liberty has come into conflict with public health laws. In *Employment Division v. Smith*, the Supreme Court ruled that it was constitutionally permissible to ban all use of peyote, including religious usages.<sup>28</sup> Outraged, Congress quickly instituted the

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24. Donald J. Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, The White House (Mar. 13, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> [https://perma.cc/EU63-NX3V].

25. Edouard Mathieu Hannah Ritchie, Lucas Rodés-Guirao, Cameron Appel, Daniel Gavrilov, Charlie Giattino, Joe Hasell, Bobbie Macdonald, Saloni Dattani, Diana Beltekian, Esteban Ortiz-Ospina & Max Roser, *Mortality Risk of COVID-19*, OUR WORLD IN DATA, <https://ourworldindata.org/mortality-risk-covid> [https://perma.cc/Y4LB-MDXQ] (last visited Mar. 9, 2023).

26. *See* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (church services); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (home gatherings).

27. *See, e.g.*, Petition for a Writ of Certiorari, *Resurrection School v. Hertel*, WL 3757438 (2022) (free exercise challenge to masking by a Catholic school).

28. *See* *Emp't Div. v. Smith*, 110 S. Ct. 1595, 1606 (1990).

Religious Freedom Restoration Act (RFRA) to ensure that people would be able to freely practice their deeply held beliefs.<sup>29</sup>

*Burwell v. Hobby Lobby Stores, Inc.* explicitly extended RFRA to healthcare when the Court ruled that a company may use a religious exemption to exclude contraceptive coverage from health insurance plans.<sup>30</sup> Similarly, religious employers could also be exempted from the Affordable Care Act's contraceptive coverage mandate.<sup>31</sup> Organizations also need not file any specific form to declare themselves religious, but may simply notify the Secretary of Health and Human Services in writing.<sup>32</sup>

However, there were limits as to what the Supreme Court considered a permissible exemption. In *Stormans, Inc. v. Wiesman*, it refused to take up a case in which the 9th Circuit held it unlawful for a pharmacist to refuse to dispense medication due to a religious objection.<sup>33</sup> But as the composition of the court has greatly shifted since that 2016 ruling, it is possible, perhaps even likely, that the current Court would choose to grant such a petition for certiorari.<sup>34</sup>

## V. MPX: LESSONS UN-LEARNED

Monkeypox was endemic in Africa for several decades, but appeared for the first time in the United Kingdom, a non-endemic country, in May 2022.<sup>35</sup> It then spread to other European countries, as well as North and South America. Like HIV/AIDS, MPX is diagnosed most often in men who have sex with men, and is often transmitted through sexual contact.<sup>36</sup> Unlike HIV, MPX can also spread through other forms of close skin to skin contact, like kissing and rubbing against someone on a dance floor.<sup>37</sup>

Viewed without context, MPX should have been easy to contain, especially after the United States' all-too-recent experience with COVID-19. MPX spreads only through close physical contact, it has a long incubation period in which to intervene after a suspected exposure, and there have been no reports of asymptomatic cases.<sup>38</sup> While the symptoms of MPX may be extremely painful, no

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29. See Religious Freedom Restoration Act of 1993, U.S.C.S. 107 Stat. 1488.

30. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 692 (2014).

31. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2373 (2020).

32. *Wheaton College v. Burwell*, 573 U.S. 958, 958 (2014).

33. *Stormans, Inc. v. Wiesman*, 579 U.S. 942, 942-943 (2016).

34. See *id.* at 953 (Alito, J., dissenting from denial of certiorari).

35. *Monkeypox Timeline*, THINK GLOBAL HEALTH (Nov. 4, 2022), <https://www.thinkglobalhealth.org/article/monkeypox-timeline> [<https://perma.cc/6NH7-4FZ6>].

36. *Monkeypox outbreak 2022 – Global*, WORLD HEALTH ORG., <https://www.who.int/emergencies/situations/monkeypox-oubreak-2022> [<https://perma.cc/H24F-XQJM>] (last visited Nov. 7, 2022).

37. *Id.*

38. Jennifer B. Nuzzo, Luciana L. Borio, and Lawrence O. Gostin, "The WHO Declaration of Monkeypox as a Global Public Health Emergency," *JAMA* (July 27, 2022) <https://jamanetwork.com/journals/jama/fullarticle/2794922> [<https://perma.cc/5F9L-HEAH>].

deaths have been reported in the United States.<sup>39</sup> This country in particular had everything it needed to succeed in containing spread of the virus but has so far failed to do so.

Tests to diagnose MPX were available when the disease began to spread in the U.S., but despite the nation's recent experience with insufficient testing capabilities during the onset of the COVID-19 pandemic, the same problem occurred again.<sup>40</sup>

MPX already had both a usable vaccine and an effective antiviral treatment at the beginning of the outbreak, but the quantity of available doses was insufficient to meet demand.<sup>41</sup> The United States at one point had 20 million doses of an MPX vaccine, but most had expired by the time the disease appeared in the American populace. Those expired doses could have gone a long way to assist the African nations where the virus had been endemic for decades. Without the economic means to purchase the vaccines themselves, their people suffered, and the virus was able to further mutate and eventually make the leap to Europe.<sup>42</sup>

Even now, months into the western outbreak, the quantity of vaccine doses is still insufficient.<sup>43</sup> The United States had everything in place for a swift and effective response, not least of which was the government's very recent experience in executing Operation Warp Speed, a far more significant undertaking due to the greater prevalence of COVID-19, but the government still failed to respond in a timely manner.

Notably, many of the early problems faced by doctors and patients were more similar to those experienced during the AIDS crisis than COVID-19: in a decision reminiscent of President Reagan's refusal to acknowledge the AIDS crisis, the World Health Organization (WHO) delayed declaring MPX a Public Health Emergency of International Concern (PHEIC).<sup>44</sup> When it did eventually make the declaration, it did so in spite of its own Emergency Committee's failure to recommend it.<sup>45</sup> This month-long delay frustrated and confused both gay rights activists and public health experts.<sup>46</sup> One of the cited reasons for not recommending the PHEIC was that the disease was not spreading among the general population

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39. Lawrence O. Gostin and James G. Hodge Jr., *Monkeypox: National Emergency Declaration & Powers*, O'NEILL INST. (Aug. 7, 2022), <https://oneill.law.georgetown.edu/monkeypox-national-emergency-declaration-powers/> [https://perma.cc/JM3K-CAST].

40. Jefferey Kluger, *Why It's Way Harder to Get Tested for Monkeypox Than It Should Be*, TIME (July 22, 2022), <https://time.com/6198670/monkeypox-testing-difficult-slow/> [https://perma.cc/4LDL-YTZS].

41. Jeffrey S. Crowley, Gregorio A. Millett & Lawrence O. Gostin, *What Can We Learn from the First 100 Days of the Monkeypox Outbreak?*, BMJ (Aug. 5, 2022), 1966. <https://doi.org/10.1136/bmj.o1966>.

42. *Id.*

43. Gostin and Hodge, *supra* note 39.

44. Kai Kupferschmidt, *WHO Chief Declares Monkeypox an International Emergency after Expert Panel Fails to Reach Consensus*, SCIENCE (July 23, 2022), <https://www.science.org/content/article/declaring-monkeypox-an-international-emergency-who-chief-rejects-expert-panels-advice> [https://perma.cc/BC62-LX2N].

45. *Id.*

46. *Id.*

(98% of which were in cases were diagnosed in men who identify as gay or bisexual).<sup>47</sup> This transforms “general populace” into a loaded term, deliberately Othering LGBTQ men.

For both HIV and MPX, doctors were required to fill out applications before patients could receive necessary medications or even be tested for the illness, applications so long that it was impossible to find the time to fill them out for everyone who needed treatment.<sup>48</sup> Obtaining a vaccine appointment for an MPX shot felt like winning the lottery.<sup>49</sup> By contrast, people were easily able to request and be prescribed Ivermectin, a medicine used to treat stomach parasites, to treat COVID-19, despite the lack of any scientific evidence supporting its use for a respiratory illness.<sup>50</sup>

Furthermore, the allocation of vaccine doses revealed a fundamental lack of understanding and communication with the LGBTQ community. In Washington, D.C., the U.S. city with the highest incidence of MPX per capita, the vaccine roll-out initially limited doses to cis men and trans women who have sex with men, while excluding trans men who have sex with men.<sup>51</sup> It calls to mind Lou Sullivan’s famous quote when he was diagnosed with HIV after years of being denied gender affirming care due to his sexuality: “I took a certain pleasure in informing the gender clinic that even though their program told me I could not live as a Gay man, it looks like I’m going to die like one.”<sup>52</sup>

Like the COVID-19 shot, the MPX vaccine also inspired hesitancy. However, it was for an entirely different reason: the intradermal MPX injection causes a distinct red discoloration on the arm.<sup>53</sup> People are unwilling and embarrassed to get

47. *Id.*; Rachel Treisman, *As monkeypox spreads, know the difference between warning and stigmatizing people*, NPR (July 26, 2022), <https://www.npr.org/2022/07/26/1113713684/monkeypox-stigma-gay-community> [<https://perma.cc/N8TX-A2RA>].

48. Leon Neyfakh, Andrew Parsons, Sam Graham-Felsen, Madeline Kaplan & Ula Kulpa, *Fiasco: The AIDS Crisis*, Audible Originals (Mar. 24, 2022), <https://www.audible.com/pd/Fiasco-The-AIDS-Crisis-Podcast/B09SVPH27K#:~:text=From%20the%20co%2Dcreators%20of,America's%20most%20pivotal%20historical%20events> [<https://perma.cc/W5KD-9MHD>]; Pien Huang, *There has been a shortage of testing and vaccines for Monkeypox*, NPR (July 9, 2022), <https://www.npr.org/2022/07/09/1110667122/there-has-been-a-shortage-of-testing-and-vaccines-for-monkeypox/> [<https://perma.cc/FWX2-2DSE>].

49. Huang, *supra* note 48.

50. Gisele Galoustian, *Prescribe Ivermectin for Covid-19 Only in Large Randomized Trials*, FLA ATL. U. NEWS DESK (Feb. 16 2022), <https://www.fau.edu/newsdesk/articles/ivermectin-prescriptions-covid.php> [<https://perma.cc/5RXB-2UJC>].

51. Huang, *supra* note 48; *Mayor Bowser and DC Health Announce that Limited Monkeypox Vaccination Appointments Will Become Available to Eligible Residents Today at 1 PM*, GOV'T OF THE DIST. OF COLUMBIA (June 27, 2022), <https://mayor.dc.gov/release/mayor-bowser-and-dc-health-announce-limited-monkeypox-vaccination-appointments-will-become> [<https://perma.cc/KW78-9N6H>] (original guidance excluding trans men); *Mpox*, DCHEALTH.GOV, <https://dchealth.dc.gov/page/mpox#criteria> [<https://perma.cc/DZT5-63WK>] (last accessed Mar. 10, 2023) (current guidance, inclusive of trans men).

52. Dean Strauss, *Lou Sullivan*, MAKING QUEER HISTORY (May 21 2018), <https://www.makingqueerhistory.com/articles/2018/5/21/lou-sullivan> [<https://perma.cc/S28R-VFUZ>].

53. Bryan Pietsch, *Monkeypox cases are down, but concern over intradermal vaccine lingers*, WASH. POST (Oct. 6 2022), <https://www.washingtonpost.com/health/2022/10/06/monkeypox-outbreak-scars-vaccine-side-effects/> [<https://perma.cc/KZ39-3DXV>].

the MPX vaccine when vaccination status is easily visible and publicly limited to men who have sex with men, transgender women who have sex with men, and sex workers. Though gay rights have come an astonishingly long way since the 1980s, this is eerily similar to the people of that decade's reluctance to seek treatment for HIV/AIDS, or to publicly admit to having the disease. Studies show that an intramuscular injection, which does not leave a red mark, would also be effective, and yet it has not been approved by the government.<sup>54</sup>

Fears of stigmatization leading people to avoid seeking medical attention when they notice symptoms of MPX are also widespread.<sup>55</sup> As with HIV/AIDS, the less people are willing to talk about having MPX, the fewer will be able to recognize the symptoms.<sup>56</sup> People who do not know what to look for will not know to avoid close contact with someone showing symptoms, to report symptoms, or to seek treatment, even if they might otherwise have been willing to face the associated stigma.<sup>57</sup> Those people go on to spread the illness throughout their communities, furthering the cycle.<sup>58</sup> And if doctors perceive MPX as an illness belonging only to gay men, they will be less likely to recognize the symptoms in a woman or a child.<sup>59</sup> There are already fears that the true incidence of MPX is being under-reported because of lack of reporting and testing capabilities.<sup>60</sup>

This difference in pandemic responsiveness is clearly tied to the stigmatization of the LGBTQ community. The community is becoming steadily more angry and distrustful of the federal government, reminded of the bad old days of the AIDS crisis.<sup>61</sup>

## VI. TRUST IN GOVERNMENT AND HEALTHCARE ESTABLISHMENTS

The LGBTQ community had little faith in government at the beginning of the HIV/AIDS epidemic. Many people lived in states where physical intimacy was still officially criminalized, if irregularly enforced (*Lawrence v. Texas* would not reach the Supreme Court until 2003).<sup>62</sup> The lack of response crushed what little trust many people had left in both the national government and the medical establishment.

Trust in government is a major determining factor for success in pandemic response measures. During the COVID-19 pandemic, higher levels of trust in government were highly correlated with adoption of positive health behaviors,

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54. *Id.*

55. Treisman, *supra* note 47.

56. *Id.*

57. *Id.*

58. *Id.*

59. Yumori, *supra* note 13 (women are less likely to be tested for HIV).

60. Gostin & Hodge, *supra* note 39.

61. Huang, *supra* note 48

62. *Lawrence v. Texas*, Brief of Petitioners, No. 02-102, 6-7, 25; *see generally* *Lawrence v. Texas*, 539 U.S. 558 (2003).

such as handwashing and self-quarantine.<sup>63</sup> Higher trust was also significantly associated with less decline in health behaviors over time.<sup>64</sup> This phenomenon was not limited to COVID-19, either: higher trust in government also correlates to getting a yearly flu shot, preventing the swine flu, and being vaccinated for Ebola.<sup>65</sup> The more willing a community is to follow health recommendations, the easier it is to slow the spread of disease.

Worse, this effect is exacerbated by stigma and in minority populations. Research has shown that 29% of black men who have sex with men have experienced race and sexual orientation stigma from health providers, and 48% report distrust for medical establishments.<sup>66</sup> These same men, if diagnosed with HIV, report longer gaps in time between HIV care appointments due to the stigma they experience from providers.<sup>67</sup> The resultant lack of trust has also been linked to decreased adherence to antiretroviral regimens and mental health outcomes.<sup>68</sup>

People who test positive for HIV and report higher levels of trust are more likely to take antiretroviral medications than those who do not.<sup>69</sup> Trust in government is also associated with fewer emergency room visits and improved mental and physical health amongst HIV+ populations.<sup>70</sup>

Unfortunately, Americans have an unusually low level of trust in government.<sup>71</sup> Trust in government is more than just culture, which means that it is, at least theoretically, possible to build—and to damage. Governments perceived as being “well-organized in response to the pandemic,” fair, and having “clear messages . . . on coping with COVID-19” have higher levels of public trust.<sup>72</sup>

Conflict between the different branches of government’s attempts to address public health needs is especially dangerous when trying to build trust. If the President says one thing on TV, Congress passes a different law, and then the

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63. Qing Han, Bang Zheng, Mioara Cristea, Maximilian Agostini, Jocelyn J. Bélanger, Ben Gützkow, Jannis Kreienkamp & N. Pontus Leander, *Trust in government regarding COVID-19 and its associations with preventive health behaviour and prosocial behaviour during the pandemic: a cross-sectional and longitudinal study*, NAT’L LIBR. OF MED., <https://doi.org/10.1017/S0033291721001306> [<https://perma.cc/55ED-W4BN>].

64. *Id.*

65. *Id.*

66. Lisa Eaton, Daniel D. Driffin, Christopher Kegler, Harlan Smith, Christopher Conway-Washington, Denise White & Chauncey Cherry, *Acknowledging the role of stigma and medical mistrust in engagement in routine health care among Black men who have sex with men*, NAT’L LIBR. OF MED. (Jan. 1, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/mid/NIHMS658693/> [<https://perma.cc/6XSK-3VMR>].

67. *Id.*

68. *Id.*

69. Kathryn Whetten, Jane Leserman, Rachel Whetten, Jan Ostermann, Nathan Thielman, Marvin Swartz & Dalene Stangl, *Exploring Lack of Trust in Care Providers and the Government as a Barrier to Health Service Use*, NAT’L LIBR. OF MED. (Apr. 2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1470533/> [[perma.cc/MMP5-9RXQ](https://perma.cc/MMP5-9RXQ)].

70. *Id.*

71. Frank Newport, *COVID and Americans’ Trust in Government*, GALLUP (Feb. 11, 2022), <https://news.gallup.com/opinion/polling-matters/389723/covid-americans-trust-government.aspx> [<https://perma.cc/VU7C-838G>].

72. Han et al., *supra* note 63 at 154.

Supreme Court overrules it, there's little hope of convincing the nation the government is well organized or has clearly defined goals. Marginalized communities are also less likely to perceive society as being 'fair' due to their experience of being part of a stigmatized group.

In order to increase trust in government, the United States should take targeted action to prove to its citizens that it is well organized, fair, and can convey a clear message, all areas in which it fell short during the early days of COVID-19.

LGBTQ people tend to have low trust in medical professionals, and are less likely to seek treatment than straight people, an effect particularly pronounced in the trans community.<sup>73</sup> Two in three trans adults worry their health evaluations are affected by their gender or sexual orientation, and nearly half have had a negative or discriminatory experience with a health care provider.<sup>74</sup> People report intentional misgendering, rough physical treatment, harsh or abusive language, and being asked unnecessary and invasive questions about their bodies.<sup>75</sup> Forty-seven percent of all trans people have experienced some type of discrimination or mistreatment from a healthcare provider, a number that increases to sixty-eight percent for trans people of color.<sup>76</sup> It is no wonder so many trans people prefer to avoid the doctor all together. This stigmatization can have serious effects on health outcomes, and on the spread of disease amongst the trans community as well as the general population.

Many doctors may not even know how to treat transgender patients.<sup>77</sup> Transfeminine people, which includes both trans women and nonbinary people assigned male at birth who take feminizing hormones, have historically been combined with cisgender men for HIV research.<sup>78</sup> However, differing hormone profiles create different health risks. For example, transfeminine people have a higher incidence of breast cancer than cis men.<sup>79</sup> Transmasculine people (trans men and nonbinary people assigned female at birth who take masculinizing

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73. Shahab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People From Accessing Health Care*, CTR. FOR AM. PROGRESS (Jan. 18, 2018), <https://www.americanprogress.org/article/discrimination-prevents-lgbtq-people-accessing-health-care/> [<https://perma.cc/9ZHV-VDDX>].

74. *Protecting and Advancing Health Care for Transgender Adult Communities*, CTR. FOR AM. PROGRESS at 16-17 (Aug. 18, 2021), <https://www.americanprogress.org/article/protecting-advancing-health-care-transgender-adult-communities/> [<https://perma.cc/SPH4-6CX7>].

75. *Id.*

76. *Id.* at 17.

77. *Protecting and Advancing Health Care for Transgender Adult Communities*, *supra* note 74 (“One in 3 transgender people reported having to teach their doctor about transgender people in order to receive appropriate care . . .”).

78. Emily Land, *Does PrEP work for trans people taking gender-affirming hormones? Yes, says new research*, S.F. AIDS FOUND. (Sept. 4, 2020), <https://www.sfaf.org/collections/beta/does-prep-work-for-trans-people-taking-gender-affirming-hormones-yes-says-new-research/> [<https://perma.cc/S37N-2XPP>].

79. Christel J. M. de Blok, Chantal M. Wiepjes, Nienke M. Nota, Klaartje van Engelen, Muriel A. Adank, Koen M. A. Dreijerink, Ellis Barbé, Inge R. H. M. Konings & Martin den Heijer, *Breast cancer risk in transgender people receiving hormone treatment: nationwide cohort study in the Netherlands*, *BMJ* (May 14, 2019), <https://www.bmj.com/content/365/bmj.11652> [<https://perma.cc/54PK-JVN5>].

hormones) have historically been entirely excluded from HIV research.<sup>80</sup> Both “lumping in” and exclusion create a serious problem when doctors need to choose which medicine to prescribe a trans patient, or whether to prescribe medications like PrEP (a drug that prevents HIV) to trans people at all.<sup>81</sup> Research on whether PrEP was even effective for trans people was not published until 2020, eight years after it was first approved by the FDA.<sup>82</sup> Lack of understanding and stigmatization makes trans patients less likely to trust their health care providers.<sup>83</sup> After all, if your provider doesn’t understand the basics of how your body works, and you think there is a serious possibility they will dislike you because of who you are, why even go to the doctor in the first place?

To increase trust among the trans population, the government could require that medical schools make training in how to treat trans and nonbinary patients a mandatory part of the curriculum, so that obtaining medical care is less likely to be an adversarial interaction. It could also publish recommendations or tips for well-meaning doctors who may simply lack the knowledge on how to interact with trans patients, and do so publicly, so that the trans community is aware that health officials are aware of their problems and care about improving the situation. Stigma arises from fear and a lack of understanding, so the more comfortable providers feel interacting with the trans community, the less likely they are to stigmatize its members. And as fewer trans people are afraid of experiencing stigma and discrimination at the doctor’s office, more will begin to seek preventative care and treatments, decreasing the spread of disease.

Lack of trust in government resulting from health-related stigma is also a major issue amongst the population of men who have sex with men. The Food and Drug Administration still maintains a blanket ban on all blood donations from men who have had sex with another man within the past three months before donation.<sup>84</sup> This is in spite of the fact that the FDA tests all donated blood for HIV, irrespective of whether the individual has engaged in “risky behavior” within the relevant time period.<sup>85</sup> This means that a gay man in a committed, monogamous relationship would be forbidden from donating, while a heterosexual woman who has had multiple recent sex partners would not. What was once a reasonable precaution when HIV was difficult to test for is no longer medically justifiable. The

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80. Land, *supra* note 78.

81. *Id.*

82. *Id.*; FDA approves first drug for reducing the risk of sexually acquired HIV infection, HIV.GOV (July 16, 2012), <https://www.hiv.gov/blog/fda-approves-first-drug-for-reducing-the-risk-of-sexually-acquired-hiv-infection> [<https://perma.cc/YC5C-CEKT>].

83. *Protecting and Advancing Health Care for Transgender Adult Communities*, *supra* note 74 at 17.

84. Gerald E. Harmon, *The FDA must lift its discriminatory blood-donor policy*, AM. MED. ASS’N (Jan. 26, 2022), <https://www.ama-assn.org/about/leadership/fda-must-lift-its-discriminatory-blood-donor-policy> [<https://perma.cc/GH89-NTWW>].

85. *Id.*

blood ban continues to drive anger and frustration within the gay community.<sup>86</sup> To many people, it is a constant reminder of the medical prejudice they face, and of a generation of gay men who died because the government did not care enough to help them.

In order to improve trust amongst gay and bisexual men, the FDA should remove identity based restrictions on who may donate blood, and switch to action-based restrictions. For example, they could turn down donations from people who have had multiple sex partners within a certain length of time, rather than a blanket ban on all men who recently had sex with another man.

## VII. THE CONFLICT BETWEEN PUBLIC HEALTH, SECULAR CIVIL RIGHTS, AND RELIGIOUS LIBERTY

As discussed in the section on COVID-19, a significant portion of the litigation challenging public health measures has been based on religious freedom arguments.

Free exercise claims are commonly in conflict with LGBTQ civil rights claims. For example, *Fulton v. City of Philadelphia*,<sup>87</sup> held that it is unlawful for a city to refuse to contract with a religious foster care agency because it would not place children with same-sex couples. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* held that the Colorado Civil Rights Commission's conduct in evaluating a cake shop owner's refusal to make a wedding cake for a gay couple was a violation of the Free Exercise Clause.<sup>88</sup> While it did not actually rule on whether prohibiting service providers with religious beliefs from discriminating against gay people was a violation or not, that question will likely be answered in the upcoming case *303 Creative v. Elenis*, involving a wedding website designer.<sup>89</sup> Based on the composition of the Court, it seems likely that it will rule in favor of the website designer.<sup>90</sup>

This tendency to place the free exercise of religion above the civil rights of LGBTQ people has concerning implications for diseases that have been stigmatized due to their connection with that population. In autumn 2022, one especially concerning case appeared in a Texas district court: *Braidwood Mgmt. v. Beccerra*.<sup>91</sup> In that case, it was held that the federal government may not mandate health insurance coverage for PrEP in policies provided by religious employers,

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86. Craig LeMoult, *Doctors say it's time to end ban on blood donations from gay and bisexual men*, GBH NEWS (Mar. 24, 2022), <https://www.wgbh.org/news/local-news/2022/03/24/doctors-say-its-time-to-end-ban-on-blood-donations-from-gay-and-bisexual-men> [<https://perma.cc/KCC2-4J6N>].

87. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).

88. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1732 (2018).

89. *303 Creative v. Elenis*, Petition for a Writ of Certiorari, 2021 WL 4459045 (Sep. 24, 2021).

90. Amy Howe, *Conservative justices seem poised to side with web designer who opposes same-sex marriage*, SCOTUSBLOG (Dec. 5, 2022), <https://www.scotusblog.com/2022/12/conservative-justices-seem-poised-to-side-with-web-designer-who-opposes-same-sex-marriage/> [<https://perma.cc/86DL-CKMY>].

91. *Braidwood Mgmt. v. Beccerra*, 2022 U.S. Dist. LEXIS 161052, (N.D. Tex. Sep. 7, 2022).

because there was no “compelling government interest” that could supersede the plaintiff’s religious objection to “encouraging homosexual behavior,” though there was no research or evidence offered by Braidwood Management to demonstrate that PrEP actually encouraged such behavior.<sup>92</sup>

People take PrEP for many reasons, only one of which is being a man who has sex with men. Racial and ethnic minorities, IV drug users, sex workers of all genders, and people who need frequent blood transfusions are all at higher risk of HIV<sup>93</sup>, and may decide that PrEP is the right choice for them. In this court case, the anti-gay stigma associated with HIV/AIDS combined with now frequent religious liberty challenges to healthcare regulations to target the LGBTQ community. However, it is not only the LGBTQ community that is harmed but everyone living in the Northern District of Texas. The conception of HIV being a “gay disease” continues to make it especially difficult for heterosexual women to be correctly diagnosed, treated, and to gain access to necessary resources, when the vast majority of advice and non-profits are targeted at gay men. Similarly, straight men may not take precautions because they falsely believe that HIV is not an issue they need to worry about. When PrEP is made unavailable, the entire community is at greater risk.

The United States government should make it clear that it has a compelling state interest in preventing the spread of disease through official health policy. This could be through a statute, perhaps commemorating the victims of COVID-19, or through executive action. While it is important to protect people’s ability to practice their genuinely held religious beliefs, the practice of religion should not burden an entire class of people’s ability to maintain basic physical health. When medical evidence supports the usage of prophylactic medicine to prevent the spread of disease, it should be presumed that the government has a compelling state interest in ensuring access to that medicine.

### VIII. SOLUTIONS AND RECOMMENDATIONS

The most important stage of pandemic response is at the beginning, when there is the greatest ability to stop or slow the spread of disease.<sup>94</sup> Establishing a plan of action on how to combat LGBTQ health stigma before the emergency occurs means no wasted time during that essential early stage of the response. It would also reduce confusion and backtracking,<sup>95</sup> because any litigation challenging policy decisions could happen well in advance of the emergency.

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92. *Id.*

93. Kramer, *supra* note 7.

94. See Gostin, *supra* note 15 at 17.

95. Dylan Scott, *The most consistently botched part of the US pandemic response*, Vox (Jan. 14, 2022), <https://www.vox.com/coronavirus-covid19/22870268/cdc-covid-19-guidelines-isolation-boosters-masks> [https://perma.cc/X76L-DAYS].

One thing that conservative religious groups and LGBTQ people share is low trust in government.<sup>96</sup> Publicly announcing a decision making process and asking for input and participation from relevant religious and LGBTQ interest groups would both increase understanding in why certain preventative measures were being recommended, and help strengthen trust in the final policy outcome. Rather than asking people to put their faith in the government, something they may be reluctant to do, they could instead be asked to put their faith in community members they are already comfortable with. It's likely that the more people trust and understand the final policy decision, the more likely they are to adhere to its recommendations.<sup>97</sup>

Participating in attempts to bar access to preventative care based on an illness's association with a marginalized group, such as in *Braidwood Management*, should also be considered an ethics violation under Model Rule 8.4.<sup>98</sup> Model Rule 8.4 forbids discrimination on the basis of religion as well as sexual orientation and gender,<sup>99</sup> so it should be made clear that requiring adequate health care for all people is not a form of religious discrimination. To use a phrase often requested, one person's right to swing their fists ends where another's nose begins.<sup>100</sup> People should be able to decide with their doctors what sort of health-care is necessary for them, rather than being forced to abide by someone else's religious principles.

This should be supported by legislation creating evidentiary requirements for healthcare litigation. That is, scientific support must be required for proposed treatment methods and denials of treatment. It should also explicitly forbid the exclusion of treatment and preventative care for diseases because they are stigmatized or occur more often in stigmatized populations.

It could also be beneficial to add a rule to the *Model Rules* that emphasizes public welfare and service to a community (whether that be a city, a particular marginalized community, or the country as a whole). This could be considered part of a lawyer's already-existing "professional responsibility" to do pro bono work under Model Rule 6.1, or as a new section under Rule 8, which addresses the integrity of the profession.<sup>101</sup> The current duty to perform pro bono focuses on individual

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96. Greenblatt, *supra* note 22; *Protecting and Advancing Health Care for Transgender Adult Communities*, *supra* note 74.

97. Han et al., *supra* note 63.

98. See generally *Braidwood Mgmt. v. Becerra*, 2022 U.S. Dist. LEXIS 161052 (N.D. Tex. Sep. 7, 2022); MODEL RULES R. 8.4.

99. MODEL RULES R. 8.4.

100. Variations of this phrase are attributed to Oliver Wendel Holmes, Abraham Lincoln, and Richard Posner, amongst many others. But the earliest record of a similar saying is from a pro-prohibition speech given by John B. Finch in 1882. *Your Liberty To Swing Your Fist Ends Just Where My Nose Begins*, QUOTE INVESTIGATOR, <https://quoteinvestigator.com/2011/10/15/liberty-fist-nose/> [<https://perma.cc/3SMJ-9FJG>] (last accessed Mar. 3, 2022).

101. MODEL RULES R. 6.1 ("Voluntary Pro Bono Publico Service"); MODEL RULES R. 8 ("Maintaining the Integrity of the Profession").

client services. By adding a community focused rule, lawyers would be encouraged to consider the big picture – civil rights and broader community welfare – as part of their ongoing public service commitments. Rather than viewing a lawsuit merely in the context of the disagreement between the two parties, it would emphasize the precedential effects of the ruling. It could also encourage lawyers to focus their pro bono efforts on a specific community. Building a community’s trust in one particular lawyer would encourage trust in general. If the first thing people think of when they hear “lawyer” is someone they know and trust, someone who has helped their friends and family, it would build trust in the legal profession as a whole.

First Amendment doctrine is currently in a state of flux, for both the Free Speech and Free Exercise Clauses. For many years *Lemon v. Kurtzman* provided the standard test.<sup>102</sup> However, while the *Lemon* test was never officially renounced, it is no longer used<sup>103</sup>—but the factors it laid out are still often referenced: a government action must have a secular purpose, the principal effect may neither advance nor inhibit religion, and it may not foster excessive “entanglement” of government and religion.<sup>104</sup> In *Employment Division, Dept. of Human Resources v. Smith*, the court held that a government action could be upheld if it was neutral to religion, with only an “incidental effect” burdening it.<sup>105</sup> However, in *Tandon v. Newsom*, government action forbidding all home gatherings of greater than three households was held to violate the Establishment Clause, even though it applied to all types of activity equally and did not single out religion.<sup>106</sup> The court applied strict scrutiny, which it failed for having a poor fit between the government action and the intended result, as the statute did not ban people from gathering in groups of larger than three households at places such as hair salons and retail stores resulting in a greater burden on at-home religious practices than non-religious activities.<sup>107</sup>

Considering these precedents, future doctrine should use a two-prong test when considering a free exercise challenge to a health care law. This test is based on the Supreme Court’s choice to apply to heightened scrutiny to laws effecting LGBTQ civil rights cases, since that standard is lower than the strict scrutiny used for free exercise and establishment clause cases. While this test would be used to evaluate the effect of a free exercise clause action on civil rights rather than a government action’s effect on religion or civil rights separately, it would be consistent to use the same type of measurements when comparing the two interests against each other, as when they are compared separately against the government’s interests.

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102. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

103. See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983) (no reference to *Lemon* test).

104. *Lemon*, *supra* note 102 at 612-613.

105. *Emp’t Div. v. Smith*, *supra* note 28 at 1600.

106. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-1297 (2021).

107. *Id.* at 1296-1298.

First, the requested religious exemption must be closely fit to the conflict between the health policy and the genuinely held religious belief. That is, it must not be so over- or under-inclusive that it does not actually accomplish what was intended. To apply that prong to *Braidwood Management v. Beccerra*, exempting the insurance company from covering PrEP is both under- and over-inclusive of the company's interest in not "facilitating homosexual behavior."<sup>108</sup> It is underinclusive because denying coverage for HIV prophylactics does not prevent men from having sex with other men, but forces them to take unnecessary risks when they do have sex. It is also overinclusive, because people may take PrEP for many reasons, only one of which is being a man who wants to have safer sex with other men.<sup>109</sup> Under this denial of coverage, someone who needed frequent blood transfers and wanted to take PrEP for an additional layer of safety would also be denied coverage. This also distinguishes *Braidwood Management* from *Burwell v. Hobby Lobby*<sup>110</sup> and *Little Sisters of the Poor v. Pennsylvania*,<sup>111</sup> the two Supreme Court cases that held it was lawful to exempt religious employers from providing birth control coverage in their health insurance plans. Barring intentional medical interventions such as IVF, pregnancy cannot be 'spread' by anything other than sexual intercourse, whereas HIV can. Exempting birth control is not as underinclusive of the employers interests.

Second, the religious exemption must be weighed against the government's legitimate interests in preventing the spread of disease. If the burden on religion is large, and the risk to public health small, then the party seeking an exception should be granted one, and vice versa if the burden was small and the risks large.

An example of a large burden on religion would be requiring someone to undergo a medical procedure contradicted by their sincerely held beliefs, such as forcing a Jehovah's Witness to undergo a blood transfusion. In the infectious disease context, the government should continue offering religious exemptions for vaccination requirements (noting that this is limited to *religious*, not political beliefs).<sup>112</sup> A small burden would be a company providing insurance policy options that allow people to determine for themselves which type of medical care is appropriate for them.

## IX. CONCLUSION

Examining the relative lack of government response to the HIV/AIDS and MPX pandemics with its reaction to COVID-19 and the resultant worsening of health outcomes during the LGBTQ-associated pandemics shows the negative

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108. *Braidwood Mgmt. v. Beccerra*, 2022 U.S. Dist. LEXIS 161052 at 7 (N.D. Tex. Sep. 7, 2022).

109. Kramer, *supra* note 7.

110. *Burwell v. Hobby Lobby*, 573 U.S. 682, 688 (2014).

111. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2373 (2020).

112. See, e.g., *Request for a Religious Exception to the COVID-19 Vaccination Requirement*, UNITED STATES DEP'T OF COM., [https://www.commerce.gov/sites/default/files/2021-10/DOC\\_Religious\\_Exception\\_Request\\_Form\\_Fillable-100621.pdf](https://www.commerce.gov/sites/default/files/2021-10/DOC_Religious_Exception_Request_Form_Fillable-100621.pdf) [<https://perma.cc/VF7S-BD9T>] (last accessed Mar. 3, 2023).

impact stigmatization has on public health outcomes, due in part to a resultant decrease in trust in government and health care providers. The increase in Free Exercise Clause challenges to preventative public health measures that arrived alongside COVID-19 create additional dangers for the LGBTQ community's health, since religious freedom is often placed above civil rights in Supreme Court doctrine. This dangerous combination is exemplified by the recent Texas District Court case *Braidwood Management v. Beccerra*.<sup>113</sup> By adjusting Supreme Court doctrine to take into consideration the likely public health results of religious exemptions to public health measures and the civil rights of marginalized groups as well as the genuinely held religious beliefs that inspired the challenge, the United States will better position itself to weather the next public health emergency.

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113. *Braidwood Mgmt. v. Beccerra*, *supra* note 91.