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RELIGIOUS EXEMPTIONS AND SAME- SEX MARRIAGE DISCRIMINATION POST TRUMP

by

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After the election of Donald Trump as United States President, many on the religious right believed they would get someone to address their concerns and restore religious liberty, which they perceive to be severely eroded. By the same token, many on the left feared the loss of basic hard won rights for minorities, women and lesbian, bisexual, gay and transgen-dered (LBGT) community members as a result of the election. When the President's Religious Freedom Executive Order¹ was issued on May 4, 2017, which coincided with the date for the National Day of Prayer, many on the left were relieved because it did not contain any of the controversial provisions that they feared it would. On the other hand, many on the religious right viewed the Executive Order as a disappointment because the text did not accomplish very much at all.²

This paper examines the expectations of where the Trump administration policies as well as overall religious conservative policy agendas will move the debate between same-sex marriage and religious freedom.

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THE BATTLE TO ERADICATE DISCRIMINATION VS. RELIGIOUS LIBERTY

On June 26, 2015, the U.S. Supreme Court issued its long-awaited decision in the *Obergefell v. Hodges* case.³ In this historic decision, the high court ruled that the constitution guarantees same-sex couples the same right to marry as heterosexual couples.⁴ The decision was a long-sought victory for the LGBT community and its supporters.⁵

Fighting for equal rights with regard to marriage was one of the important battles gay rights advocates wanted resolved. However, there are still other issues. LGBT rights advocates are still concerned about, and fighting to end, discrimination in employment and public accommodations.⁶ With some exception, sexual orientation is not a protected class at the federal level⁷ and is also not a protected class in many states.⁸ With recent announcements, including an executive order announcing that transgendered individuals will no longer be permitted in the military⁹ and the Attorney General's amicus brief which argues that Title VII of the 1964 Civil Rights Act does not recognize sexual orientation as a protected class, it is apparent that gay rights advocates will not find support under the Trump administration for eradicating the discrimination that the LGBT community faces.

On July 21, 2014, President Obama signed an executive order which prohibits all federal branches and federal contractors from discrimination based on sexual orientation and gender identity.¹⁰ While President Trump preserved this executive order, he eliminated the companion order that requires companies that contract with the federal government provide documentation of their compliance with various federal laws, including compliance with the executive order that prohibits discrimination on the basis of sexual orientation.¹¹ Although a federal court in Texas had enjoined the implementation of this executive order, the President's elimination of the order is seen as further proof of this administration's indifference towards the discrimination faced by the LGBT community.

HOBBY LOBBY AND ITS AFTERMATH

In *Burwell v Hobby Lobby*,¹² the U.S. Supreme Court determined that closely-held, for-profit corporations were considered “persons” for purposes of the Religious Freedom Restoration Act (RFRA). As such, they are entitled to exemption from federal laws that unduly burden their religious beliefs. In the aftermath of *Hobby Lobby*,¹³ there was speculation about whether granting freedom of religion status to for profit corporations would result in discrimination towards racial minorities, women and/or gays.¹⁴

Shortly after the decision, the first test came. The state of Indiana Governor Mike Pence, signed a Religious Freedom Restoration Act Law (state RFRA) that included a provision giving for profit corporations the right to refuse service to anyone if that service violates the company’s religious beliefs.¹⁵ Although no prior state RFRA legislation contained such a provision, the U.S. Supreme Court’s decision in *Hobby Lobby* declares that closely held corporations are “persons” within the meaning of RFRA and explicitly permits these for profit closely held corporations to assert claims of undue burden on religious freedom.¹⁶

By its language the Indiana law¹⁷ was not limited solely to closely-held corporations. Instead, it could have applied to any corporation no matter what size. Additionally, the Indiana law, unlike other state RFRA laws, did not require state action in order to bring a claim of substantial burden on religion.¹⁸

There is speculation that the language in the Indiana legislation was inserted as a response to New Mexico’s decision in the *Elane Photography v. Willock*¹⁹ case. Although the studio argued that New Mexico’s RFRA protected its actions of refusing to photograph a same-sex ceremony, the state Supreme Court held that RFRA did not apply “because the government was not a party.”²⁰

Protest against Indiana’s law was swift and powerful.²¹ Many of the largest corporations, including state-domiciled corporations, denounced it as discriminatory.²² Governments such as the state of Connecticut and cities including San Francisco and Seattle also denounced the law and banned taxpayer monies from being used for

trips to Indiana.^{23,24} Under the weight of a firestorm of protest and pressure, Indiana's RFRA law was amended to remove the potentially discriminatory provisions.²⁵

On the heels of the events in Indiana, Arkansas faced a similar situation. It initially passed a law that expanded the definition of "person" to include a business.²⁶ Arkansas governor, Asa Hutchinson, initially said he would sign the bill, but later announced his intention to veto it.²⁷ Notably, Arkansas corporate giant Wal-Mart announced its opposition²⁸ and a revised law that removed the reference to for profit businesses was subsequently signed into law.²⁹

Several other states had religious freedom restoration acts pending, including North Carolina and Georgia, but the legislation was put on hold in light of the controversy in Indiana and Arkansas.³⁰

According to the National Conference of State Legislators, twenty one states have passed their own religious freedom restoration act statutes (State RFRA) the most recent being Arkansas and Indiana which eventually passed modified and less controversial bills during 2015.³¹

OBERGEFELL DECISION AND INCREASED STATE RFRA CHALLENGES

After the decision in *Obergefell*, many in the religious community, particularly the religious right, began to wonder what would happen to their rights. At the same time, many in the LGBT community wanted assurance that they would not continue to be subject to discrimination.

After *Obergefell* the number of state RFRA bills being introduced intensified. Several states including Georgia,³² North Carolina,³³ and Mississippi introduced bills.³⁴ The proposed language in the various bills protected the right to refuse to provide services that violate a person's religious beliefs. These services could conceivably include baking a cake for a same-sex marriage, performing in-vitro fertilization for a single woman, providing contraceptives to men or women, or holding a wedding rehearsal dinner for a same-sex couple. Kentucky, Georgia and North Carolina each faced heavy criticism and protest concerning their proposed bills³⁵ and in the end, the states passed less controversial state RFRA's.

On its face, some of the measures seemed innocent and appeared to contain standard language that a government shall not substantially burden a person's exercise of their religious belief unless there is a compelling government interest and the least restrictive means is used.³⁶ The difference between this legislation and similar legislation in prior years is the U.S. Supreme Court's decision in *Hobby Lobby* which stated that a "person" for purposes of the Federal RFRA includes a closely held corporation.

Mississippi's Religious Freedom Bill, H.B. 1523³⁷ was signed into law despite protests, including by the former First Lady Michelle Obama.³⁸ It is one of the broadest and includes a preamble ("Section 2") defining its purpose as protecting people with certain religious beliefs including those that believe marriage is between one man and one woman, that sexual relations are for marriage only, and that a person's sex is that which they were born with.³⁹

Under Mississippi's bill, those who refuse to provide counseling, surgery, psychological services and the like related to sex reassignment or gender identity transitioning are protected from government action.⁴⁰ Also included are provisions protecting persons who provide certain services including florists, bakers, and a host of other wedding service providers.⁴¹ Another broad provision addresses the controversial transgender bathroom issue.⁴² Although a federal court declared this Mississippi RFRA law unconstitutional in July 2016,⁴³ an appeals court later lifted the preliminary injunction placed on the law's implementation stating that the plaintiffs did not have standing to bring the case.⁴⁴ The U.S. Supreme Court declined to review the decision.⁴⁵

The cases that follow show the tension between the discrimination concerns of the LGBT community and the concerns of those who fear loss of religious freedom in their business or individual interactions when following their sincerely held religious beliefs.

SAME-SEX MARRIAGE DISCRIMINATION AND RELIGIOUS FREEDOM CASES

Elane Photography, LLC is a New Mexico corporation that specializes in photographing weddings. The couple that owns the company, the Huguenins, have a policy of not photographing events

that communicate messages contrary to the owners' religious beliefs. Elane Photography received a request from Vanessa Willock to have the studio photograph her commitment ceremony to her female partner. Because the studio owners believe that the bible teaches that marriage is between a man and a woman, the company stated that it would not photograph the same-sex commitment or wedding ceremony. Willock found another photographer, but in December 2006, she filed a claim with the New Mexico Human Rights Commission.⁴⁶

The New Mexico Human Rights Act (NMHRA) states that it is an unlawful discriminatory practice for anyone to discriminate or refuse to offer its services to anyone on the basis of, *inter alia*, sexual orientation.⁴⁷ The arguments advanced by Elane Photography are similar to those that were later raised in a number of the cases that follow. First, the photography studio argued that it did not discriminate against Willock based on sexual orientation. The Company stated that it would happily photograph gay customers, but not in a context that endorses same-sex marriage. However, the court citing *Christian Legal Soc'y v. Martinez*,⁴⁸ stated it was a distinction without merit. Discrimination based on same-sex marriage is equivalent to discrimination based on sexual orientation.⁴⁹ As a commercial business that sold goods and services to the public at large, failure to photograph same-sex marriage ceremonies violated state public accommodation laws in the same way as if it had refused to photograph a wedding between people of different races.⁵⁰

Elane's argument that it would willingly offer some photography services, just not a wedding or commitment ceremony, was also rejected. The court analogized it to offering a full menu of goods or services to some and a limited menu of services (appetizers only) to others.⁵¹

Next, Elane argued that the NMHRA violates the owners First Amendment free speech rights by compelling her to speak by photographing a same-sex wedding with which she disagrees. Elane argued that photography entails expressive speech. However, the court noted that Elane was not required to publicly speak a specific government message. She did not have to display a specific message or even take photographs. Citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*,⁵² the court stated that if her business is open to the public she cannot discriminate against certain clients on the

basis of their sexual orientation; and this, the court noted, is different than compelled speech.

The photography studio, the court stated, is not being compelled to facilitate a message that same-sex marriage deserves celebration and approval. It would be different, noted the court, if the studio was required to include photographs of same-sex couples in its advertisements or to display them in its studio.⁵³

The court distinguished between a for profit business that is a public accommodation and privately organized parades or private membership organizations such as in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*⁵⁴ or *Boy Scouts of Am. v. Dale*,⁵⁵ respectively. In the case at hand, it would not be likely that observers would think that Elane Photography's pictures are an endorsement of same-sex marriage or that pictures of a same-sex wedding reflect the views of the studio or the owners. Whereas in the parade context such as *Hurley*, those watching might think this is the message of the parade organizers.

To Elane's argument that there should be an exemption from anti-discrimination laws for professions that involve creative or expressive conduct, the court gave the example of a Klan member who refuses to photograph an African-American customer's wedding, graduation, newborn child or any other event that would cast that family in a positive light or be interpreted as endorsing African-Americans. That studio would also be a commercial enterprise and a public accommodation prohibited from discriminating on the basis of race or other protected classifications. On the other hand, an African American could decline to photograph a Klan rally since political views and political group membership in organizations such as the Klan are not protected classes.⁵⁶

Finally, although New Mexico also has a RFRA statute (NMRFRA),⁵⁷ the court held that it was inapplicable to this case because it does not apply to a suit between private parties. Rather, it applies where the government is a party which was not the case here.⁵⁸

In a concurring opinion, Justice Richard Bosson wrote that the photographers are "compelled by law to compromise the very religious beliefs that inspire their lives. Though the rule of law requires it, the result is sobering..." He went on to say that:

The Huguenins [the owners] are free to think, to say, to believe, as they wish; they may pray to the God of their choice and follow those commandments in their personal lives wherever they lead...But there is a price, one that we all have to pay somewhere in our civic life.⁵⁹

In a similar case, *Craig v. Masterpiece Cake Shop*, a baker refused to bake a cake for a gay couple's wedding.⁶⁰ The baker believes that decorating cakes is a form of art, that he uses to honor God through his artistic talents, and that he would displease God by creating cakes for same-sex marriages."

The Colorado Civil Rights Commission ruled for the couple finding discrimination based on sexual orientation under the Colorado Anti-Discrimination Act. Phillips, the baker, appealed to the Colorado Court of Appeals. That court upheld the Commission's finding of sexual orientation discrimination by a place of public accommodation. In its ruling the court stated that "*Masterpiece* does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally.^{61,62}" The Colorado Supreme Court refused to hear the appeal.⁶³ However, the U.S. Supreme Court granted *certiorari*.⁶⁴ Oral arguments were heard on December 5, 2017 in addition to discussing on artistic expression⁶⁵ and compelled speech,⁶⁶ Justice Kennedy specifically raised the issue of tolerance and respect, including for religious beliefs.⁶⁷ The Department of Justice (DOJ) filed an amicus brief in which it stated that forcing Phillips to create expression for, and participate in, a ceremony that violates his sincerely held religious beliefs is an intrusion on his First Amendment rights and application of the public accommodations to Phillips is barred by the First Amendment.⁶⁸

In *Matter of Gifford v. McCarthy*,⁶⁹ the New York Supreme Court determined that the owners of a farm violated the state's Human Rights Law when they told Melissa and Jennifer McCarthy that, although the farm was available to the public as a wedding venue, the Giffords would "not hold same-sex weddings." The fines and restitution imposed on the Giffords, totaling \$13,000 were upheld and the Giffords were ordered to cease and desist from violating New York's nondiscrimination law. Allegedly, the Giffords stopped hosting

any weddings on the property, rather than provide same-sex weddings as well as heterosexual weddings.⁷⁰

In *State of Washington v. Arlene's Flowers*,⁷¹ Stutzman, a 70 year old florist in the state of Washington refused to provide flowers for a same-sex wedding. After passage of a same-sex marriage law in the state in 2012, a long-time friend and customer who had been in a committed same-sex relationship for eight years came to Stutzman's flower shop in 2013 and asked her to provide flowers for his upcoming same-sex wedding. Stutzman had known this man and had done business with him for about nine years. However, she told him she could not do the flowers for his wedding because of her religious beliefs.

Eventually, the Attorney General of Washington State as well as the two men sued Stutzman in her individual capacity as well as the corporation, Arlene's Flowers and Gifts for violating the state's anti-discrimination laws.⁷² As a result of these lawsuits, Stutzman stood to lose her business, her home, and her personal savings.

In February 2017, the Washington Supreme Court ruled that Stutzman discriminated on the basis of sexual orientation, that free speech rights were not violated because the sale of flowers is not expressive conduct and the law was a rational law of general applicability that had a rational basis and therefore had to be followed.⁷³ Stutzman argues that because she provides flowers no matter the person's sexual orientation, she cannot be liable for sexual orientation discrimination for failing to provide flowers for same-sex marriage ceremonies.⁷⁴ Similar to the ruling in *Elane Photography*, the court reiterated the principal that a tax on yarmulkes is a tax on Jews⁷⁵ when it stated that "there cannot be a distinction between status and conduct fundamentally linked to that conduct."⁷⁶

With regard to expressive conduct, Stutzman states that she would have been glad to provide the couple with bulk flowers, but arranging the flowers is using her artistic skills and the WLAD statute impermissibly compels her to speak in favor of same-sex marriage.⁷⁷

Two requirements are needed in order to protect conduct as speech. First, there must be an intent to convey a particular message and second, it's likely that people who viewed it would understand that message.⁷⁸ Here, an outside observer would not reasonably understand that providing flowers for a wedding expresses support for same-sex

weddings, just as providing flowers for a Muslim or Jewish wedding would not necessarily be an endorsement of Islam or Judaism.⁷⁹

Like *Elane Photography*, Stutzman also argued that there is no compelling government interest in applying the anti-discrimination statute (WLAD) to her since there are other florists that are willing to serve the same-sex couple. The court explains that “the issue is no more about access to flowers than civil rights cases in the 60’s were about sandwiches.”⁸⁰ Instead, public accommodation laws are not simply about access to services. Rather, they serve a bigger purpose which is eradicating barriers to equal treatment of all citizens in the marketplace.⁸¹

*Lexington Fayette Urban Cnty. Human Rights Comm’n v. Hands On Originals, Inc.*⁸² is a more recent example. Hands On Originals prints customized t-shirts and other items. The Gay and Lesbian Services Organization (GLSO) is a support network and advocacy group for gay, lesbian, bisexual or transgendered individuals. In 2012, GLSO, through its president, attempted to order t-shirts for an upcoming gay pride festival. One of the store owners stated that he could not promote that message which advocated “pride in being homosexual” because of his religious beliefs and therefore, would not design the t-shirts for the festival. The Human Rights Commission ruled that the action was discriminatory in violation of the state public accommodations law.⁸³ But, both the Kentucky Circuit Court and Appeals Court ruled that the ordinance was unconstitutional as applied to Hands On Originals. The Appeals Court explained that the company was not refusing to design the shirts because the person is of a specific orientation or gender identity. Here, the president who tried to place the order was not same-sex oriented, but heterosexual.⁸⁴ Instead, the majority states the t-shirts were an example of pure speech and not conduct closely associated exclusively or predominately with persons of a protected class.⁸⁵ The court determined that the company had the right not to promote this pure speech or message because the public accommodations statute does not prohibit the company from engaging in viewpoint censorship.

The case is also noteworthy for its concurring opinion, where a court for the first time noted that *Hobby Lobby* as well as the Kentucky RFRA statute provides protection against laws such as the accommodations statute that substantially burden the free exercise of religion.⁸⁶ The concurring opinion stated that the company did not

refuse to print the shirts because people were members of protected classes, but because printing the t-shirts would violate the owners sincerely held religious convictions.⁸⁷ It remains to be seen whether other courts will follow similar reasoning and whether a court will rule that religious liberties under *Hobby Lobby* outweigh discrimination statutes.

CONCLUSION

The decision in *Obergefell* did not eradicate the discrimination the LGBT community faces. Similarly, state RFRA laws and the *Hobby Lobby* decision did not eliminate the issues faced by business owners with sincerely held religious beliefs. In the *Hobby Lobby* decision, the majority stated that its decision to grant freedom of religion status to for profit corporations would not provide a shield to corporations to discriminate under the guise of religious freedom. The majority noted that “government has a compelling interest in providing equal opportunity to participate in the workplace without regard to race.” But this did not provide reassurance to those concerned about discrimination based on sex or based on sexual orientation and gender identity.

Most courts have held that the businesses involved in these challenges are unlawfully discriminating in places of accommodation. But not all courts have reached that decision. The business owners have argued that to require them to provide services for same-sex marriages is compelled speech and a violation of the First Amendment. They have also argued that being against same-sex marriage is not equivalent to discrimination on the basis of sexual orientation. But the majority of courts have held that the business owners are not engaged in speech, but rather conduct and that conduct must comply with anti-discrimination statutes that require that all customers be treated equally. Also, sexual orientation is violated when same-sex marriage services are denied.

The battle lines have been drawn and the U.S. Supreme Court will likely provide when it decides the *Masterpiece* case.⁸⁸

¹ Promoting Free Speech and Religious Liberty, Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017), *available at*: <https://www.whitehouse.gov/the-press-office/2017/05/04/presidential-executive-order-promoting-free-speech-and-religious-liberty>.

² Sarah Pulliam Bailey, *Many Religious Freedom Advocates are Actually Disappointed with Trump's Executive Order*, THE WASHINGTON POST (May 5, 2017), *available at*: https://www.washingtonpost.com/news/acts-of-faith/wp/2017/05/05/many-religious-freedom-advocates-are-disappointed-with-trumps-executive-order/?utm_term=.8341fe460b2c.

³ *Obergefell*, 135 S. Ct. 2584 (2015).

⁴ *Id.*

⁵ Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage A Right Nationwide*, NY TIMES (June 26, 2015), *available at*: http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html?_r=0.

⁶ Erik Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, THE N.Y. TIMES (June 27, 2015).

⁷ On April 4, 2017 the 7th Circuit issued a historic ruling that discrimination based on sexual orientation was protected by Title VII in *Hively v. Ivy Tech Community College of Indiana*, 853 F. 3d 339. (7th Cir 2017). *But see, Evans v. GA Regional Hospital*, 850 F. 3d. 1248 (11th Cir 2017) ruling that sexual orientation is not a protected class in a decision issued March 10, 2017 one month before *Hively*. *Christiansen v. Omnicom Group, Inc.*, 852 F. 3d 195 (2nd Cir 2017) decided March 27, 2017, could proceed based on failure to conform to gender stereotypes but discrimination based on sexual orientation not covered by Title VII.

⁸ Jennifer Callas, *Employment Discrimination: The Next Frontier for LGBT Community*, USA TODAY (August 1, 2015). In 28 states it is legal to fire someone based solely on their sexual orientation or gender identity, but 22 states have laws protecting workers from being fired based solely on sexual orientation or gender identity, *available at*:

<https://www.usatoday.com/story/news/nation/2015/07/31/employment-discrimination-lgbt-community-next-frontier/29635379/>.

⁹ Julie Hirschfield Davis and Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, THE N.Y. TIMES (July 26, 2017), *available at*: <https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html>.

¹⁰ Exec. Order No. 13,672, 3 C.F.R. 282 (2014).

¹¹ Revocation of Federal Contracting Executive Orders, Exec. Order No. 13,782, 82 Fed. Reg. 15,607 (March 27, 2017).

¹² 134 S. Ct. 2751, 189 L.Ed.2d 675 (2014).

¹³ *Id.*

¹⁴ Adam Liptak, *Ruling Could Have Reach Beyond Issue of Contraception*, NY TIMES (March 27, 2014).

¹⁵ S.B. 101, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015) (revised after passage).

¹⁶ The law did not specifically address whether closely-held corporations were protected under the First Amendment's free exercise clause. The decision was limited to whether the corporations were considered persons entitled to exercise a religious belief.

¹⁷ Garrett Epps, *What Makes Indiana's Religious Freedom Law Different?* THE ATLANTIC (March 30, 2015), available at: <http://www.theatlantic.com/politics/archive/2015/03/what-makes-indianas-religious-freedom-law-different/388997/>.

¹⁸ S.B. 101, Specifically, the Indiana law provided: "A person whose exercise of religion has been substantially burdened, or is likely to be substantially burdened, by a violation of this chapter may assert the violation or impending violation as a claim or defense in a judicial or administrative proceeding, *regardless of whether the state or any other governmental entity is a party to the proceeding.*" (emphasis supplied).

¹⁹ 309 P. 3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787, 188 L. Ed. 2^d. 757 (2014).

²⁰ *Id.* at 77.

²¹ Cara Anthony, *Thousands in Indy Protest Religious Freedom Law*, INDIANAPOLIS STAR (March 28, 2015), available at: <http://www.indystar.com/story/news/2015/03/28/hundreds-in-indy-protest-rfra-law/70594058/>.

²² Thompson Wall, *Businesses Take a Stand Against Indiana's Religious Freedom Restoration Law*, INC. (March 30, 2015), available at: <http://www.inc.com/thompson-wall/indianas-new-religious-freedom-act-deterring-big-business.html>.

²³ Kristin Toussaint, *Connecticut is First State to Take Stand Against Indiana's Religious Freedom Law*, THE BOSTON GLOBE (March 30, 2015) available at: <http://www.boston.com/news/nation/2015/03/30/connecticut-first-state-take-stand-against-indiana-religious-freedom-law/bT5FS9bPb5fwOhEspMVFDI/story.html>.

²⁴ *Id.*

²⁵ IND. CODE §34-13-9-0.7 (2015). The revised language states that no "provider...may deny service to anyone on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity or United States military service. *See also*, Wesley Lowery, *Governor Pence Signs Revised Indiana Religious Freedom Bill Into Law*, THE WASHINGTON POST (April 2, 2015), available at: <http://www.washingtonpost.com/news/post-nation/wp/2015/04/02/gov-pence-signs-revised-indiana-religious-freedom-bill-into-law/>.

²⁶ The Religious Freedom Restoration Act, H.R. 1228, 90th Gen. Assemb., Reg. Sess. (Ark. 2015).

²⁷ Mark Berman, *Arkansas Lawmakers Approve Religious Liberty Bill Despite Firestorm Over Indiana Law*, THE WASHINGTON POST (March 31, 2015), available at: <http://www.washingtonpost.com/news/post-nation/wp/2015/03/31/after-a-firestorm-over-indianas-religious-law-is-arkansas-next/>.

²⁸ *Id.*

²⁹ S. 975, 90th Gen. Assemb., Reg. Sess. (Ark. 2015).

³⁰ Sandhya Somashekhara and Mark Berman, *Indy. To 'Clarify' New Law Decried As Anti-Gay*, THE WASHINGTON POST (March 30, 2015), available at: https://www.washingtonpost.com/politics/indiana-to-clarify-religious-liberties-law-decried-as-anti-gay/2015/03/30/1d918698-d6fc-11e4-b3f2-607bd612aeac_story.html?utm_term=.dd6a624d3a48.

³¹ National Conference of State Legislators, *Existing Religious Freedom Restoration Acts (as of 2015)*, <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx#>. See also, Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. Davis L. Rev. 605 (1999)

noting the following states as having State RFRA statutes See, Alabama Religious Freedom Amendment, S. 604, 1998 Reg. Sess. (Ala. 1998); New Jersey Religious Freedom Act, A. 903, 208th Leg., 1998 Sess. (N.J. 1998); New Jersey Religious Freedom Restoration Act, S. 321, 208th Leg., 1998 Sess. (N.J. 1998); Virginia Religious Freedom Protection Act, H.R. 668, 1998 Sess. (Va. 1998); Religious Freedom Protection Act, A. 1617, 1997-98 Reg. Sess. (Cal. 1997) (vetoed following enactment); Religious Freedom Restoration Act of 1998, H.R. 3201, 1998 Reg. Sess. (Fla. 1997); Religious Freedom Restoration Act, H.R. 2370, 90th Leg., 1997-98 Reg. Sess. (Ill. 1997); Religious Freedom Restoration Act, S. 1591, 90th Leg., 1997-98 Reg. Sess. (Ill. 1997); Michigan Religious Freedom Restoration Act, H.R. 4376, 89th Leg., 1997 Reg. Sess. (Mich. 1997); Religious Freedom, H.R. 1470, 155th Leg., 2d Sess. (N.H. 1997); Religious Freedom Restoration, S. 5673, 220th Leg., 1997-98 Reg. Sess. (N.Y. 1997); Religious Freedom Restoration Act, R.I. Gen. Laws § 42-80.1-3 (R.I. 1997); South Carolina Religious Freedom Restoration Act, H.R. 5045, 112th Leg., 1997 Reg. Sess. (S.C. 1997).

³² Ga. Religious Freedom Restoration Act, S. 129 Gen. Assemb., Reg. Sess. (Ga. 2015).

³³ N.C. Religious Freedom Restoration Act, H.R. 348, Gen. Assemb., Reg. Sess. (N.C. 2015), available at:

<http://www.ncleg.net/Sessions/2015/Bills/House/PDF/H348v0.pdf>.

³⁴ Miss. Protecting Freedom of Conscience From Government Discrimination Act, H.R. 1523, Gen. Assemb., Reg. Sess. (Miss. 2016), available at:

<http://billstatus.ls.state.ms.us/documents/2016/html/HB/1500-1599/HB1523PS.htm>.

³⁵ For example, ***many large corporations including*** Microsoft, Google, Coca-Cola, Home Depot and the Atlanta Falcons opposed the Georgia bill. Also, the NFL warned that passage of the bill could impact Atlanta's bid to host the Superbowl the following year. See, AP, *NFL Warns State of Georgia Over Religious Freedom Bill*, CBS NEWS (March 20, 2016), available at <http://www.cbsnews.com/news/nfl-warns-state-of-georgia-over-religious-freedom-bill/>.

³⁶ See, e.g., Georgia Religious Freedom Restoration Act.

³⁷ Miss. Protecting Freedom of Conscience From Government Discrimination Act.

³⁸ Carly Hoilman, *Michelle Obama Criticizes Mississippi 'Religious Freedom Bill' In Commencement Speech*, THE BLAZE/AP (April 24, 2016), available at:

<http://www.theblaze.com/stories/2016/04/24/michelle-obama-criticizes-mississippi-religious-freedom-bill-in-commencement-speech/>.

³⁹ Miss. Protecting Freedom of Conscience From Government Discrimination Act.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* The law includes language that protects procedures concerning access to restrooms, spas, baths, showers, dressing rooms, locker rooms, or other intimate facilities or settings, based upon or in a manner consistent with a sincerely held religious belief.

⁴³ *Barber v. Bryant*, 193 F. Supp. 3d 677 (S.D. Miss, N.D. June 30, 2016).

⁴⁴ *Barber v. Bryant*, 860 F. 3d. 345 (5th Cir. 2017), *cert. denied*, 583 U.S. ____ (2018).

⁴⁵ *Id.*

⁴⁶ *Elane Photography*, 309 P.3d at 59–60.

⁴⁷ Unlawful Discriminatory Practice, N.M. STAT. ANN. § 28-1-7 (1978). Specifically, the statute makes it unlawful for any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of race, religion, color, national origin, ancestry, sex, sexual orientation [or] gender identity.

⁴⁸ 561 U.S. 661, 689 (2010).

⁴⁹ *Elane Photography*, 309 P.3d at 62.

⁵⁰ *Id.* at 58.

⁵¹ *Id.* at 62.

⁵² 547 U.S. 47 (2006).

⁵³ *Elane Photography* at 68-69.

⁵⁴ 515 U.S. 557 (1995).

⁵⁵ 530 U.S. 640 (2000).

⁵⁶ *Id.* at 72.

⁵⁷ N.M. STAT. ANN. §§28-22-1to -5 (2000).

⁵⁸ *Id.* at 76 (the statute provides that “A government agency shall not restrict a person’s free exercise of religion unless...” (emphasis supplied).

⁵⁹ *Id.* at 79 (Bosson, R., concurring).

⁶⁰ 370 P. 3d 272 (Colo. App. 2015), *cert denied sub nom. Masterpiece Cake Shop v. Colorado Civil Rights Comm.*, No. 2015SC738, 2016 LEXIS 429 (Apr. 25, 2016), *cert granted*, 137 S. Ct. 2290, 198 L. Ed. 2d 723 (June 2017).

⁶¹ *Id.* at 287.

⁶² *Id.* at 282. The court distinguished *Masterpiece* from the bakeries involved in *Azucar Bakery*, *Le Bakery Sensual*, and *Gateaux, Ltd.*, (internal citations omitted) noting that they did not discriminate against a Christian patron by refusing his requests to create bible-shaped cakes inscribed with messages, including “Homosexuality is a detestable sin. Leviticus 18:2.” The bakeries refused the requests because the message was offensive.

⁶³ See *Masterpiece Cake Shop*, No. 2015SC738 (April 25, 2016).

⁶⁴ *Masterpiece*, 137 S. Ct. 2290.

⁶⁵ Oral Argument at 7:49, *Masterpiece*, 137 S. Ct. 2290(2017) (No. 16-111), available at https://www.supremecourt.gov/oral_arguments/audio/2017/16-111.

⁶⁶ *Id.* at 1:40.

⁶⁷ *Id.* at 50:33.

⁶⁸ Brief for the United States as Amici Curiae Supporting Petitioner at 7, *Masterpiece*, 137 S. Ct. 2290(2017) (No. 16-111), available at <https://www.documentcloud.org/documents/3988504-SGbriefmasterpiece.html>.

⁶⁹ 137 A.D. 3d. 30, 23 N.Y.S. 3d. 422 (N.Y. App. 2016).

⁷⁰ Sunnivia Brydum, *N.Y. Supreme Court: Upstate Farm Can’t Refuse Same-Sex Weddings*, ADVOCATE (Jan. 14, 2016) available at: <http://www.advocate.com/marriage-equality/2016/1/14/ny-supreme-court-upstate-farm-cant-refuse-same-sex-weddings>.

⁷¹ 389 P. 3d. 543 (Wash. 2017).

⁷² The suit alleged violation of Washington Law Against Discrimination (RCW ch. 49.60.215) as well as violation of The Consumer Protection Act (RCW ch. 19.86).

⁷³ *Arlene's Flowers*, 389 P 3d. at 557.

⁷⁴ *Id.* at 552.

⁷⁵ *Id.* at 553 (citing, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993)).

⁷⁶ *Id.*

⁷⁷ *Id.* at 550, 556.

⁷⁸ *Id.* at 557 (citing *Spence v. Washington*, 418 U.S. 405,410-11 (1974) (per curiam)).

⁷⁹ *Id.*

⁸⁰ *Id.* at 566.

⁸¹ *Id.*

⁸² No. 2015-CA-000745-MR, 2017 Ky. App. LEXIS 371 (Ky. Ct. App. May 12, 2017).

⁸³ *Id.* at *2 (discussing Local Ordinance No. 201-99 §2-33 ("Fairness Ordinance")).

⁸⁴ *Id.* at *6-7.

⁸⁵ *Id.*

⁸⁶ *Id.* at *8.

⁸⁷ *Id.*

⁸⁸ Only one gay rights case has been decided by the U.S. Supreme Court post-*Obergefell* and the decision may give us a glimpse at how the court might rule in *Masterpiece*. In *Pavan v. Smith*, the court ruled that states are required to list the same-sex couple on the birth certificate and that the constitution protects the rights of same-sex couples related to marriage. *Pavan v. Smith*, 137 S. Ct. 2075, 198 L. Ed. 2d. 636 (2017), (6-3 decision) (per curiam).