A FUNDAMENTAL STANDOFF POST-*OBERGEFELL*: WHICH FUNDAMENTAL RIGHT SHOULD PREVAIL WHEN CLAIMS OF FREE EXERCISE CLASH WITH CLAIMS OF DISCRIMINATION IN THE PRIVATE MARKETPLACE?

INTRODUCTION

Imagine you work part-time in the family business—a floral shop. The business was founded by your grandmother. She has worked hard for as long as you can remember, and in fact, she still works in the store herself because she enjoys sharing her gifts with people. Your grandma is beloved by the community and has developed loyal customers. One such customer is a man whom your grandma has served for the past nine years. This man happens to be gay. While your grandma is deeply Christian, she does not mind that the man is gay; she enjoys his company and even considers him a friend. She has even designed numerous arrangements for him and his partner over the years, for such occasions as anniversaries and Valentine's Day.

One day, however, the man comes in with a different request. Newly engaged to his partner, he is very excited to start planning the wedding. Understandably, he comes to his favorite florist: your grandmother. The man is surprised when your grandma tells him she cannot create an arrangement for his wedding. She explains that same-sex marriage is against her faith, and that to use her talents to facilitate the act would be a sin on her part. The man, while saddened, indicates he understands. Your grandma provides him with various references to other shops and when he leaves, she is under the impression things are on good terms. Your grandma had no idea that by declining his request, she would risk losing everything she ever worked for. While the story sounds dramatic, that is exactly what happened to Barronelle Stutzman in February 2013.[1]

The Supreme Court's recent decision in *Obergefell v. Hodges*,[2] though intended to reconcile current law with the Constitution, brought two fundamental rights sharply into conflict: the right to free exercise of religion and the right to be free from discrimination. For the narrow subset of cases in which coexistence is infeasible, the decision now forces courts to answer the question, "Which is more important: Religious freedom or equal treatment for all?" Justice Kennedy believed the decision would have no bearing on those who disagreed with same-sex marriage; such persons would still be free to believe and teach as they pleased.[3] However, as discussed below and as pointed out by the dissent,[4] the First Amendment

1. State v. Arlene's Flowers, Inc., No. 13-2-00871-5, 2015 WL 720213, at *3–5 (Wash. Super. Ct. Feb. 18, 2015).

2. 135 S. Ct. 2584 (2015).

3. *Id.* at 2607 ("The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, ...").

4. *Id.* at 2625 (Roberts, C.J., dissenting) ("The First Amendment guarantees . . . the freedom to '*exercise*' religion. Ominously, that is not a word the majority uses.").

protects more than one's belief. The question today is: How far does the exercise of religion extend?

What happens when a private, small-business owner does not want to perform a specific service for a same-sex couple, and the affected couple sues said owner? There are two potential courses of action: a federal route under the Equal Protection Clause of the United States Constitution, or a potentially more accessible state route under a state's antidiscrimination provision. In a number of cases to hit the courts thus far,[5] the plaintiffs go the state route, alleging violation of their state's antidiscrimination provisions while the defendant business claims free exercise in defense. The typical result is that the business owner is penalized in some way and forced to comply with the state's understanding of the antidiscrimination laws—comply or forfeit the right to conduct business in the state. But constitutionally, is this what should happen? The Supreme Court has yet to hear a case on this issue, though that is likely to change in the near future.[6] The fact is that one fundamental right necessarily must displace the other. This Note tracks the two possible routes this issue could take and evaluates in each instance which right, according to the Constitution and current Supreme Court jurisprudence, should trump the other. I believe that, based on the Court's established law, equal protection principles in these cases will win over free exercise concerns, genuine and sympathetic as those concerns may be. This Note is concerned solely with the clash between free exercise and antidiscrimination in the *private* marketplace. I do not discuss or consider the implications in the public sphere, such as the "ministerial exception" or the Kim Davis scenario.[7]

This Note begins in Part I with a brief background of the antidiscrimination provision of the U.S. Constitution: the Fourteenth Amendment's Equal Protection Clause. Specifically, I focus on the clause's development as it pertains to sexual orientation as a classification. Part II gives a brief background on religious freedom in the United States under the First Amendment's Free Exercise Clause, focusing on major free exercise cases and the limits of the right. Part III explores the possibility of

5. Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, 370 P.3d 272; Hands on Originals, Inc., v. Lexington-Fayette Urban Cty. Human Rights Comm'n, No. 14-CI-04474 (Fayette Cir. Ct. Apr. 27, 2015), http://perma.cc/75FY-Z77D; Elane Photography, LLC v. Willock, 2013-NMSC-040, 309 P.3d 53; Gifford v. McCarthy, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016); *Arlene's Flowers, Inc.*, 2015 WL 720213.

6. The case of our grandmotherly florist is on track to reach the Supreme Court, according to ADF attorneys representing Ms. Stutzman. *See Govt Punishment of NM Photographer Stands, Compelled Speech Problem Unresolved . . . For Now*, ALLIANCE DEFENDING FREEDOM (Apr. 7, 2014), http://www.adfmedia.org/news/prdetail/5537. The Washington Supreme Court granted certiorari on March 2, 2016.

7. Miller v. Davis, 123 F. Supp. 3d 924 (E.D. Ky. 2015) (county clerk refused to issue a marriage and alleged that to force her to do so would violate her right to free exercise).

resolution of this issue under federal law, focusing on the necessity of state action. Part IV explores resolution of this issue under state law, surveying a handful of cases currently making their way through the state courts. Lastly, Part V predicts which fundamental right will prevail when the Supreme Court inevitably grants certiorari.

I. EQUAL PROTECTION—AMERICA'S ANTIDISCRIMINATION PROVISION

The Equal Protection Clause states: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."[8]

The Clause was traditionally understood as the vehicle through which courts would provide for equal protection of the laws already in place, not prevent the making of discriminatory laws.[9] The latter function was traditionally the purpose of the Privileges or Immunities Clause.[10] As the Court noted early in its jurisprudence, "[t]he [Fourteenth] [A]mendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty *for the protection of such as he already had*."[11] The Supreme Court, however, expanded the scope of the Clause in *The Slaughterhouse Cases*,[12] where "the Court, somewhat ironically, butchered the language of the Fourteenth Amendment."[13] The issue before the Court was squarely a privileges or immunities issue, but the Court refused to recognize it as such, finding that the Clause protected only the privileges or immunities of national citizenship, not state citizenship.[14] The Court instead chose to focus on equal protection,[15] and ended up holding that the applicability of the Equal Protection Clause referred solely to "the freedom of the slave race,"[16] and thus did not apply to protect the butchers in their claim for protection under the current law.[17] After the confusion of

8. U.S. CONST. amend. XIV, § 1, cl. 3.

9. Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 921–23 (2013) (relying on the literal text of the Equal Protection Clause in conjunction with the existing function of the Privileges or Immunities Clause in preventing the making or enforcement of discriminatory laws). Calabresi references the work of Professor Currie in advancing this theory. *See* DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 342–51 (1985).

10. Calabresi & Salander, *supra* note 9, at 921–23.

11. Minor v. Happersett, 88 U.S. 162, 171 (1874) (emphasis added).

12. 83 U.S. 36 (1872) (butchers brought suit against the city of New Orleans alleging a city ordinance violated their constitutional rights by effectively creating a monopoly of the butchering industry).

13. Calabresi & Salander, *supra* note 9, at 920.

14. *Id.* at 922–23.

15. *See The Slaughterhouse Cases*, 83 U.S. at 74–75, 78–79; Calabresi & Salander, *supra* note 9.

16. *The Slaughterhouse Cases*, 83 U.S. at 71 (the purpose of the Clause was to forbid slavery and like discriminatory laws on the basis of race, but nothing more).

17. *Id.* at 81 ("It is so clearly a provision for that [negro] race and that emergency, that a strong case would be necessary for its application to any other.").

The Slaughterhouse Cases, where the Court essentially nullified the Privileges or Immunities Clause, "the Supreme Court had to read back into the Equal Protection . . . Clause[] all the content that it had wrongly drained from the Privileges or Immunities Clause."[18] Thus, the Equal Protection Clause became the primary vehicle through which the Court analyzed the rights originally left to the province of the Privileges or Immunities Clause: positive rights, paving the way for equal protection as we know it today.

Fast-forward almost 100 years and the Court provides an illustrative example of the new equal protection framework. In *Loving v. Virginia*, the Court used the Equal Protection Clause to strike down Virginia's antimiscegenation statute.[19] The Court held that the "mere 'equal application' of a statute containing racial classifications" is not enough to comport with the Fourteenth Amendment.[20] "Over the years, th[e] Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'"[21] The Court essentially stated that any distinction drawn according to race presumptively violates the Fourteenth Amendment and refused to entertain the State's argument of what the drafters originally intended.[22]

In the period after *Loving*, the accepted rule was that certain classifications based on race, national origin, and ethnicity (i.e., suspect classes) incur strict scrutiny and that laws based on such statuses are presumptively unconstitutional.[23] Eleven years later, the Court expanded the protections once again in *Zablocki v. Redhail*.[24] The Court in *Zablocki* created a special subset of equal protection doctrine: where a classification burdens a fundamental right—suspect or not—courts may inquire into the legislative classification to determine if it passes muster under the Equal Protection Clause.[25] Thus, it is not only when a forbidden classification—i.e., race—is invoked that strict scrutiny applies, but also any time "a statutory classification significantly interferes with the exercise of a fundamental right" in general.[26]

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18. Calabresi & Salander, *supra* note 9, at 923.

19. 388 U.S. 1 (1967).

20. *Id.* at 8.

21. *Id.* at 11 (alteration in original) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

22. *Id.* at 9–11.

23. Adarand Constructors v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

24. 434 U.S. 374 (1978) (Wisconsin statute provided that residents under child support obligations could not marry without the permission of a court). The Court relied exclusively on *Loving*'s holding that marriage is a fundamental privacy right and thus, *any* infringement affecting only one group of people is automatically subject to strict scrutiny under the 14th Amendment. *Id.*

25. *Id.* at 388.

26. *Id.*

In a paradigmatic sequence of cases building off of *Loving* and *Zablocki*, the Court laid the equal protection foundation that would eventually lead to the decision in *Obergefell*. In *Romer v. Evans*,[27] the Court struck down a state amendment that forbade the enactment of any law designed to protect homosexuals from discrimination in various activities and public accommodations.[28] The principal basis for the Court's ruling was that the statute was not related to any legitimate state interest—not even rationally—and thus its only conceivable purpose was a "classification of persons . . . for its own sake."[29] Such a classification could only mean "a bare . . . desire to harm a politically unpopular group [which] cannot constitute a *legitimate* governmental interest."[30] Thus, as it pertains to homosexuals, *Romer* essentially began the "end of all morals legislation" that Justice Scalia later decried.[31] In other words, the Court made it harder for states to justify classification based on sexual orientation.

The Court referenced its decision in *Romer* when it decided *Lawrence v. Texas*.[32] This case concerned the criminalization of certain sexual acts occurring between persons of the same sex.[33] The Court noted that in *Romer*, it used equal protection to strike down legislation directed at homosexuals,[34] but it declined the invitation to do the same in *Lawrence*.[35] The Court feared that doing so might lead some to "question whether a prohibition would be valid if drawn differently."[36] The Court did not ignore equal protection entirely, though. Rather, it noted that a decision on due process grounds would advance equal protection interests given that the two are importantly linked, implicitly referring back to *Zablocki*.[37] Perhaps most significantly, however, *Lawrence* showed the Court's disfavor for a distinction based on conduct when that conduct is inextricably linked to one's identity. The Court characterized the issue in *Lawrence* broadly as "whether the majority may use the power of the State to enforce [traditional] views [condemning homosexual conduct] on the whole society through operation of the criminal law."[38] The Court was clear that its job

27. 517 U.S. 620 (1996).
28. *Id.* at 623, 635.
29. *Id.* at 635.
30. *Id.* at 634 (first alteration in original) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
31. Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).
32. *Id.* at 574 (majority opinion).
33. *Id.* at 562.
34. *Id.* at 574.
35. *Id.* at 575.
36. *Id.*
37. *Id.*
38. *Id.* at 571.

was "not to mandate our own moral code."[39] The problem, according to the Court, of regulating homosexual conduct is that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."[40] The Court's refusal to embrace this conduct–status distinction even before same-sex marriage was seriously in dispute creates today an uphill battle for free exercise advocates arguing for an exemption to providing services for same-sex weddings—perhaps an obstacle the Court did not anticipate.

Lawrence led directly to what Justice Scalia foreshadowed: a decision striking down state bans against same-sex marriage as unconstitutional.[41] *Lawrence* led directly to *Obergefell v. Hodges*.[42] In this monumental case, the Court continued the blend of equal protection and due process principles, confirming "this relation between liberty and equality."[43] The Court explained that "[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."[44] Because, then, marriage is a fundamental right, and because homosexual couples were being treated differently from similarly situated heterosexual couples, state laws prohibiting same-sex marriage are unconstitutional under the Equal Protection Clause.[45] In relying on cases like *M.L.B. v. S.L.J.*[46] and *Skinner v. Oklahoma*,[47] as well as the cases discussed above, the Court relied on "*principles* of . . . equality," not the Equal Protection Clause itself, in determining that the Equal Protection Clause was violated, completing the shift in equal protection jurisprudence from pure equal protection of existing laws to a shield against the making and enforcement of any discriminatory law.[48]

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39. *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)).

40. *Id.* at 575.

41. *Id.* at 590 (Scalia, J., dissenting) ("State laws against . . . same-sex marriage . . . [are] called into question by today's decision . . . .").

42. 135 S. Ct. 2584 (2015).

43. *Id.* at 2604.

44. *Id.* at 2602.

45. *Id.* at 2604–05 (recall Zablocki v. Redhail, 434 U.S. 374 (1978) and the creation of a special subset of equal protection that combined with due process).

46. 519 U.S. 102 (1996) (reversing court's dismissal of indigent mother's appeal where mother could not pay for record preparation required by state statute as a predicate to appeal). The Court held that because a sufficiently strong interest was at stake (termination of parental rights) and because the statute discriminated based on wealth, the statute violated the Equal Protection Clause. *Id.*

47. 316 U.S. 535 (1942) (reversing a judgment affirming the order for sterilization for a man convicted twice of larceny). Punishment for larceny was sterilization while punishment for the same quality of offense—embezzlement—did not bring such a penalty. *Id.* The sentencing structure disparately impacted one group but not another similarly situated, and therefore violated the Equal Protection Clause. *Id.*

48. *Obergefell*, 135 S. Ct. at 2604 (emphasis added).

II. RELIGIOUS FREEDOM—THE LIMITS OF FREE EXERCISE IN AMERICA

The First Amendment states, in relevant part, "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*."[49] The amendment accomplishes dual purposes, both prohibiting the Government from mandating a religion and allowing citizens to freely exercise their religion.[50] "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act."[51] While the first concept is absolute, the second by nature cannot be.[52] "Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection."[53] It is this aspect of conduct that has been the subject of constant litigation—when, where, and how the exercise of religion in a public forum or accommodation is appropriate.

The Court laid the foundation for free exercise jurisprudence in *Reynolds v. United States*.[54] A Mormon man was convicted of bigamy and challenged his conviction on grounds of free exercise.[55] The Court declined to find that those whose faith requires the practice of polygamy are exempted from the criminal statute.[56] "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[57] The Court largely relied on the fact that Reynolds engaged in a *positive* act he knew to be illegal, and then sought to justify it based on his belief that the law never should have been enacted.[58] According to the Court, this is sharply distinguishable from the situation where an actor *abstains* from engaging in a certain act on the basis of religious belief.[59] This distinction appears to foreshadow the framework the Court operates under in later cases. When taking an affirmative step that knowingly violates established law, one cannot rest on religious belief.[60] Conversely, when abstaining from certain

49. U.S. CONST. amend. I, cl. 1 (emphasis added).

50. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

51. *Id.* at 303.

52. *Id.* at 303–04.

53. *Id.* at 304 (footnote omitted).

54. 98 U.S. 145 (1878).

55. *Id.* at 162. As part of his faith, he believed it was his duty to practice polygamy or else face eternal damnation. *Id.*

56. *Id.* at 167.

57. *Id.*

58. *See id.*

59. *Id.* (referencing Regina v. Wagstaff (10 Cox Crim. Cases, 531), where parents of sick child refuse to get medicine for the child on grounds of religion, and they were found not guilty of manslaughter).

60. *See* Emp't Div. v. Smith, 494 U.S. 872, 878–79 (1990), *superseded by statute*, 42 U.S.C. § 2000bb (2012).

conduct or practices on the basis of religious belief, there may be more room for exception.[61]

The Court considered such an abstention in *Wisconsin v. Yoder*.[62] Wisconsin had a compulsory school-attendance law requiring children to attend public or private school until age sixteen.[63] Respondents, members of the Amish faith, believed that the teachings corresponding to higher levels of education clashed with their religious beliefs.[64] Having recognized the legitimacy of the belief, the issue for the Court was whether the State could show an "interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[65] According to the Court, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[66]

The Court noted that our society considers the right to free exercise so fundamental that "[t]he values underlying [the Free Exercise Clause] have been zealously protected, *sometimes even at the expense of other interests of admittedly high social importance*."[67] The Court also noted the effect of the law was such that the Amish would either have to "perform acts undeniably at odds with fundamental tenets of their religious beliefs" or face criminal punishment.[68] Thus the impact of the law was severe.[69] The Court then specified the standard of review, explaining that even a neutral regulation on its face can still violate the Free Exercise Clause if it unduly burdens such free exercise.[70] Here, given the pervasiveness and centrality of the Amish religion to that community, and given the severity of the impact of the statute, the Court decided that the Wisconsin law "carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent."[71] Under *Yoder*, absent a compelling government interest—not merely a rational basis—a law interfering with the fundamental right to free exercise cannot stand.[72]

The concept of a "compelling government interest" was eventually codified into federal law, but not until after the Supreme Court decided

61. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).
62. *See id.*
63. *Id.* at 207.
64. *Id.* at 207, 217.
65. *Id.* at 214.
66. *Id.* at 215.
67. *Id.* at 214 (emphasis added).
68. *Id.* at 218.
69. *See id.*
70. *Id.* at 220.
71. *Id.* at 218.
72. *See also* Sherbert v. Verner, 374 U.S. 398, 406–07 (1963) (holding that "no showing merely of a rational relationship to some colorable state interest would suffice," and that instead a compelling state interest is required).

Employment Division v. Smith.[73] There, the Court ruled that where inhibiting the exercise of religion is not the purpose of a law "but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[74] The Court insisted that a strict "compelling government interest" standard would produce "a private right to ignore generally applicable laws,"[75] and that it had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[76] In support of its contention, the Court noted

> [t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . ."[77]

Specifically, the Court referenced its decisions in *Cantwell v. Connecticut*[78] (free exercise and free speech), *Follett v. Town of McCormick*[79] (free exercise and freedom of press), and *Yoder*[80] (free exercise and rights of parents), all cases involving "a hybrid situation"—i.e., some other constitutional right in addition to free exercise. Further, *Smith* involved an affirmative step taken by the defendant to positively engage in activity he knew violated the law.[81] From the time of *Reynolds*, the Court has been wary of religious justifications of such conduct.

Three years later, Congress enacted the Religious Freedom Restoration Act (RFRA),[82] a direct reaction to the dramatic restriction on religious freedom the Supreme Court in *Smith* imposed.[83] RFRA was intended "to provide very broad protection for religious liberty."[84] The essence of RFRA

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73. *See* 494 U.S. 872 (1990), *superseded by statute*, 42 U.S.C. § 2000bb (2012).

74. *Id.* at 878.

75. *Id.* at 886.

76. *Id.* at 878–79.

77. *Id.* at 881.

78. 310 U.S. 296 (1940) (statute prohibiting solicitation for religious causes held unconstitutional).

79. 321 U.S. 573 (1944) (license tax requirement for book agents selling books inapplicable to Jehovah's Witnesses selling religious books in accordance with ministry).

80. Wisconsin v. Yoder, 406 U.S. 205 (1972).

81. Emp't Div. v. Smith, 494 U.S. 972 (1990), *superseded by statute*, 42 U.S.C. § 2000bb (2012). Defendant engaged in peyote use, a Schedule I drug in Oregon.

82. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2012).

83. *Id.* § 2000bb(b)(1) (stating the purpose of RFRA: "[T]o restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened").

84. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2755 (2014).

was to combat the notion in *Smith* that neutral, generally applicable laws cannot violate the First Amendment.[85] Thus, RFRA returned free exercise to its former fundamental glory—at least as it pertains to federal law[86] — requiring strict scrutiny even for neutral laws of general applicability. Under RFRA, the only time government may substantially burden an individual's free exercise of religion is when it shows that "application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[87] Two decades later, the Supreme Court followed suit and, applying RFRA in an unprecedented manner, protected the free exercise rights of a corporation against a government regulation.

In *Burwell v. Hobby Lobby*, the issue was whether RFRA prohibited the U.S. government from requiring corporations to provide health insurance coverage for contraception methods that violated the sincerely held religious beliefs of the companies' owners.[88] The Court held that the regulation mandating employer coverage of contraceptives substantially burdened the owners' exercise of religion, given that noncompliance carried a heavy fine, and that any compelling government interest was not served in the least restrictive means.[89] The Court declared that owners of companies do not forfeit their RFRA protections simply by organizing as a corporation.[90] While *Hobby Lobby* is a narrow case, it is important for our purposes in at least one respect: it demonstrates the Court's willingness to recognize the sincerely held religious beliefs of a national corporation. One might wonder, then, how much more the Court may be willing to protect the religious beliefs of traditional "mom and pop" business owners.

III. OPPORTUNITY FOR A FEDERAL EQUAL PROTECTION CLAIM

The current fight for religious exemptions to state antidiscrimination laws brings with it the possibility for a federal equal protection claim in addition to state law complaints. The one obstacle to invoking such a claim will be whether the affected homosexual couple can show that a religious statutory exemption constitutes sufficient state action.

85. 42 U.S.C. § 2000bb(a)(2) ("[L]aws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.").

86. State free exercise claims are still governed by *Smith*. *See* City of Boerne v. Flores, 521 U.S. 507, 534–36 (1997).

87. 42 U.S.C. § 2000bb-1(b)(1)(2).

88. 134 S. Ct. at 2759.

89. *Id.* at 2779, 2782.

90. *Id.* at 2759.

A. The State Action Requirement

The Fourteenth Amendment binds only state actors.[91] Thus, for the Equal Protection Clause to apply, there has to be state action.[92] State action typically includes action by state legislatures, courts, administrative agencies, municipal governments, judges, etc.[93] However, "[s]tate participation in private activities may in some circumstances subject such activities to the restrictions of the Fourteenth Amendment."[94] For a private actor's conduct to be subject to the Equal Protection Clause, its conduct must be "fairly attributable to the State."[95] For example, the Court found state action where a restaurant refused to serve a man on account of his race, reasoning that the restaurant leased its space from the city parking authority, which generated income for the city; public funds paid for maintenance of the leased space; and the restaurant itself benefitted from the parking authority's tax-exempt status.[96] Conversely, the Court declined to find state action per se where the private actor (in this case, a private club) received its license to sell liquor from a state liquor control board.[97] The Court held that the simple act of providing a license, without more, is not enough to involve the state significantly in any invidious discrimination by the private actor.[98]

While it is generally understood that state *inaction* does not create state action,[99] such as a state's failure to prevent private discrimination, what of the gray area in between? The Court has suggested that state action can be found even where the state does no more than *encourage* discrimination.[100]

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91. *See, e.g.*, Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009); Shelley v. Kraemer, 334 U.S. 1 (1948).

92. The Civil Rights Cases, 109 U.S. 3, 25–26 (1883) (holding that the Fourteenth Amendment did not grant authority for the enactment of two sections of the Civil Rights Act that would proscribe individual discriminatory conduct, because the Amendment was directed at state legislatures); *see also* 16B AM. JUR. 2D *Constitutional Law* § 844 (2016).

93. 15 AM. JUR. 2D *Civil Rights* § 10 (2016).

94. *Id.* (referencing Gilmore v. City of Montgomery, 417 U.S. 556 (1974)).

95. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

96. Burton v. Wilmington Parking Auth., 365 U.S. 715, 716 (1961).

97. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). The plaintiff, an African-American, was denied service in a private club, though he was the guest of a club member. *Id.* at 164–65. He brought a § 1983 civil rights action. *Id.*

98. *Id.* at 173.

99. *See Civil Rights*, *supra* note 93.

100. Robinson v. Florida, 378 U.S. 153, 155–56 (1964) (holding that a state's criminal code that punishes for violation of a state law compelling racial discrimination in effect enforces the discrimination mandated by that law); Anderson v. Martin, 375 U.S. 399 (1964) (state statute requiring the designation of race of all candidates on the ballot ruled unconstitutional on grounds that it encouraged racial discrimination in elections); Barrows v. Jackson, 346 U.S. 249, 254 (1953) (holding that for a state to punish a person for her refusal to comply with a racially discriminatory restrictive covenant would be for the state to encourage the use of such covenants, and therefore would be unconstitutional); *see also* Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor*

For example, one state statute that precluded the state from curtailing the right of landowners to sell, lease, or rent at their sole discretion was held invalid under the Fourteenth Amendment, on the grounds that it effectively codified and encouraged the right to discriminate.[101] Would a statutory religious exemption—for private business owners—to a state antidiscrimination law likewise be sufficient to constitute state action under an encouragement theory? Given the handful of states currently, and very controversially, trying to pass such exemptions, we may get the chance to find out.

Mississippi, North Carolina, Kansas, Georgia, Missouri, and Tennessee. These are just a few of the states making headlines for their passage or attempted passage of religious freedom bills.[102] In the wake of *Obergefell*, states have taken it upon themselves to address the question the Court left open. Among other issues not relevant to the present discussion, each of these bills has as its purpose to protect the sincerely held religious beliefs of business owners—in the case of Mississippi, exclusively those business owners in the wedding-vendor industry[103]—by allowing them to refuse services to people based on their sexual orientation or gender identity.[104] Some states were successful. Legislation in Mississippi, North Carolina, Kansas and Tennessee is now signed into law.[105] In Georgia, however, (along with South Dakota) the governor vetoed the bill, due largely to big business opposition and economic pressure.[106] And in Missouri, the bill was defeated in a House committee vote.[107]

B. Likelihood of Proving State Action: The Link to Race

After *Obergefell*, it should be challenging for a state to argue in defense of any statutory religious exemptions to the antidiscrimination laws. This is because after *Obergefell*, it is much more difficult—legally—

of Constitutional Meta-Analysis in State Action Determinations, 94 MICH. L. REV. 302, 320 (1995) (discussing the "nexus test" for state action: "that a private party is a state actor if the private party's actions are encouraged or substantially facilitated by the government").

101. *See* Reitman v. Mulkey, 387 U.S. 369 (1967).

102. Mark Berman, *Mississippi Governor Signs Law Allowing Businesses to Refuse Service to Gay People*, WASH. POST (Apr. 5, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/04/05/mississippi-governor-signs-law-allowing-business-to-refuse-service-to-gay-people/.

103. H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016).

104. Berman, *supra* note 102.

105. *Id.*; Steve Almasy, *Tennessee Governor Signs 'Therapist Bill" Into Law*, CNN (Apr. 27, 2016), http://www.cnn.com/2016/04/27/politics/tennessee-therapist-bill/.

106. Berman, *supra* note 102.

107. Sarah Fenske, *Religious Freedom Bill, SJR 39, Fails in Committee*, RIVERFRONT TIMES (Apr. 27, 2016), http://www.riverfronttimes.com/newsblog/2016/04/27/religious-freedom-bill-sjr-39-fails-in-committee.

to differentiate discrimination on the basis of sexual orientation from race-based discrimination. "We live, after all, in an age when discriminatory treatment is illegal in most of the country . . . ."[108] Virtually every state bans marketplace discrimination on the basis of race, religion, national origin, and sex, and subjects such discrimination to heightened scrutiny.[109] While the Court has not officially declared sexual orientation to be on the same basis as race, the reasons why the Court applies strict scrutiny to race also apply to sexual orientation.[110] "In *Obergefell*, the Court found that sexual orientation is (1) 'immutable,' (2) irrelevant to the ability to participate meaningfully in civil marriage, and (3) a trait that, when manifested in relationships between gay and lesbian people, has been subject to 'a long history of disapproval.'"[111] Thus, when states "fail to protect against sexual-orientation discrimination *while protecting against similar invidious discrimination on the basis of race*," they presumably "unconstitutionally deny equal protection of the law through inaction."[112]

James Oleske argues there is a "textual disparity" within the Fourteenth Amendment that creates a significant distinction between a negative action and a positive action.[113] He argues that the most natural reading of the Equal Protection Clause is that it grants "a positive right to protection in the face of selective . . . *inaction*."[114] And according to Charles Black, "[i]naction, rather obviously, is the classic and often the most efficient way of 'denying protection,'"[115] which the Equal Protection Clause prohibits.[116] This can be contrasted with the language in the Due Process Clause of the same amendment, which Oleske believes is "reasonably . . . read as safeguarding only negative rights against adverse state *action*."[117] In the

108. Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 938 (2015).

109. James M. Oleske, Jr., *"State Inaction," Equal Protection, and Religious Resistance to LGBT Rights*, 87 U. COLO. L. REV. 1, 8 n.22 (2016) (forty-five states engage in such protection); *id.* at 36–37, 37 n.128.

110. *Id.* at 36.

111. *Id.* (footnotes omitted) (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2596, 2605 (2015)).

112. *Id.* at 8 (emphasis added).

113. *Id.* at 6.

114. *Id.* (citing David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 887 (1986) ("Equal protection by its terms imposes . . . the conditional duty to help one person to the extent the government helps another who is similarly situated.")).

115. Charles L. Black, Jr., *The Supreme Court, 1966 Term–Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 73 (1967) (arguing that traditional state action doctrine is largely responsible for upholding racial injustice by barring state-originated discrimination claims from the federal courts).

116. U.S. CONST. amend. XIV, § 1, cl. 3 ("[N]or *deny* to any person . . . the equal protection of the laws." (emphasis added)).

117. Oleske, *supra* note 109, at 6 (citing Currie, *supra* note 114, at 865 ("[T]he due process clause is phrased as a prohibition, not an affirmative command . . . . [W]hat the states are forbidden to do is to 'deprive' people of certain things, and depriving suggests aggressive state activity, not mere failure to help.")).

due process context then, it makes sense that state *in*action does not rise to the level of state action. In the equal protection context, however, if we are dealing with the obligation to provide a positive right, then state "inaction" *will* at times rise to the level of state action.[118] The Mississippi law, for example, is likely one of those times. It is more of an "encouragement" of discrimination than what the Court has previously held as such. In *Reitman v. Mulkey*,[119] a state statute *forbade* limitation on a landowner's discretionary selling rights—and that was held to be encouragement.[120] The Mississippi law takes an affirmative step to positively *grant* businesses the right to refuse services on the basis of sexual orientation or gender identity.[121] Such a step surely implicates the state in discriminatory action.

In the height of the civil rights era, Black stated, "[t]he amenability of racial injustice to national legal correction is inversely proportional to the durability and scope of the state action 'doctrine,' and of the ways of thinking to which it is linked."[122] The same holds true for injustices based on sexual orientation. No court today would uphold a religious exemption such as Mississippi's if it allowed business owners, because of their religion, to refuse service to persons of color.[123] In the same vein, those who wish to challenge religious exemptions such as Mississippi's that permit discrimination based on sexual orientation theoretically have a clear pathway to the Supreme Court under the federal Equal Protection Clause. To be clear, I do not contend race and sexual orientation are analogous. Much has been written on that subject with very valid arguments on both sides.[124] I do not attempt to engage in that debate in this short space. Nor do

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118. Oleske, *supra* note 109, at 7.

119. 387 U.S. 369 (1967).

120. *Id.*

121. *Id.*

122. Black, *supra* note 115, at 70.

123. This idea is not as far-fetched as it may seem. Some religions believed people of African ancestry were cursed by God. *See* Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303, 342 n.208 (2001) (referencing 1958 Mormon doctrine that the dark skin of the "negro race" is the mark of Cain, their ancestor who was cursed by God); *see also* Bob Jones Univ. v. United States, 461 U.S. 574 (1983). In *Bob Jones*, the question was whether a private university could keep its religiously based tax-exempt status though it prescribed and enforced racially discriminatory admissions criteria on grounds of its religious doctrine. *Id.* at 577. Two schools, dedicated to teaching fundamental Christian beliefs, forbade interracial dating and marriage. *Id.* at 580. Students caught engaging in this conduct would be disciplined. *Id.* at 580–81. The schools argued that revocation of their status violated the Free Exercise Clause. The Court held that "an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy." *Id.* at 586. Given the fundamental policy against racial discrimination in education following *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court declined to find that revocation violated the schools' right to free exercise. *Id.* at 612.

124. *See* Adele M. Morrison, *It's [Not] a Black Thing: The Black/Gay Split Over Same-Sex Marriage – A Critical [Race] Perspective*, 22 TUL. J.L. & SEXUALITY 1, 21 (2013) ("Arguing that sexual orientation is the same as, or just like, race is an argument that may prove successful in a court of law, but may fail in a court of public opinion." (citing Catherine Smith, *Queer as Black Folk?*,

I believe it is necessary to. I simply contend that given the Court's treatment of the characteristic of sexual orientation in *Obergefell*, there is very little legal basis left for distinguishing race discrimination in public accommodations from discrimination on the basis of sexual orientation.

IV. THE CURRENT STATE OF AFFAIRS—PRESENT CLAIMS UNDER STATE LAW

Though the Supreme Court has not yet heard a case pertaining to claims of religious freedom against claims of same-sex discrimination, several states have faced the issue, and recent cases suggest free exercise does not extend very far. In 2013, the Supreme Court of New Mexico found that a wedding photography business violated state antidiscrimination law.[125] The owner of Elane Photography declined to photograph a commitment ceremony for a same-sex couple.[126] New Mexico law makes it unlawful for "any person in any public accommodation to make a distinction . . . in offering or refusing to offer its services . . . to any person because of race, religion, color, national origin, ancestry, sex, [or] *sexual orientation*."[127] Elane Photography argued that the New Mexico statute violated its right to free exercise under the First Amendment.[128] The court rejected this argument, relying largely on the Supreme Court's holding in *Employment Division v. Smith*.[129] The court held that the New Mexico law was neutral and of general applicability and that, under *Smith*, it did not violate the Free Exercise Clause.[130]

A similar situation occurred in Washington two years later. In *State v. Arlene's Flowers, Inc.*, our grandmotherly florist, Mrs. Stutzman, was sued for refusing to do flower arrangements for a gay couple's wedding, in violation of the Washington Law Against Discrimination.[131] Again, the state court cited *Smith* and held that "[f]ree exercise does not relieve an individual from the obligation to comply with a valid and neutral law of

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2007 WIS. L. REV. 379, 380 (2007))); Oleske, *supra* note 109; Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1070 (2014) (arguing that an analogy to race is not even necessary for same-sex arguments to prevail; that after *Windsor*, "Justice Kennedy is more generous toward sexual orientation claims than he is toward race . . . claims"); Lynn D. Wardle and Lincoln C. Oliphant, *In Praise of* Loving*: Reflections on the "*Loving *Analogy" for Same-Sex Marriage*, 51 HOW. L.J. 117 (2007) (arguing race is not the same as sexual orientation).

125. Elane Photography, LLC v. Willock, 2013-NMSC-040, 309 P.3d 53.

126. *Id.* ¶ 7.

127. N.M. STAT. ANN. § 28-1-7(F) (2012) (emphasis added).

128. *Elane Photography*, 309 P.3d at 63.

129. 494 U.S. 872, 879 (1990).

130. *Elane Photography*, 309 P.3d at 75.

131. State v. Arlene's Flowers, Inc., No. 13-2-00871-5, 2015 WL 720213, at *3–5 (Wash. Super. Ct. Feb. 18, 2015).

general applicability that forbids conduct that a religion requires."[132] The court further rejected any argument that the defendant did not discriminate based on identity, but simply chose not to participate in certain conduct, stating that the Supreme Court has routinely struck down such arguments as a loophole, given that conduct in the same-sex marriage realm is closely related to identity.[133]

The conduct-versus-status distinction was also rejected in *Gifford v. McCarthy*.[134] There, petitioners owned and operated a farm they also rented out as a wedding venue.[135] Petitioners offered their farm for both religious and secular weddings, but when a same-sex couple called inquiring about rental, petitioners promptly refused, stating that they did not hold same-sex marriages.[136] The appellate division of the trial court upheld an administrative finding that the petitioners illegally discriminated against the respondents.[137] The court rejected petitioners' free exercise claim, citing *Smith* and holding that the Human Rights Law at issue was a generally applicable law forbidding all forms of discrimination against a protected class in places of public accommodation.[138] As such, it does not violate the First Amendment.[139] It is the same trend each time: where an antidiscrimination law is neutral and of general applicability, claims of free exercise by private business owners cannot justify an exception to the antidiscrimination law.

"What is novel today is the argument that . . . business owners should be granted religious exemptions to continue engaging in discrimination that is otherwise being prohibited in the marketplace."[140] Until *Hobby Lobby*, the consensus was that business owners were free to practice their faith on their own time, but as soon as they entered the commercial context, "faith had to bow to secular law."[141] This was the so-called theory of "separation of church and commerce."[142] As discussed in Part II, *supra*, *Hobby Lobby* held that, in certain circumstances, corporations have constitutionally protected religious beliefs. The foreseeable argument, then, is that if a

132. *Id.* at *7.

133. *Id.* at *15; *see also* Lawrence v. Texas, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination . . . .").

134. Gifford v. McCarthy, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016).

135. *Id.* at 426.

136. *Id.*

137. *Id.* at 433.

138. *Id.* at 429–30.

139. *Id.*

140. James M. Oleske, Jr., *Doric Columns Are Not Falling: Wedding Cakes, the Ministerial Exception, and the Public-Private Distinction*, 75 MD. L. REV. 142, 157 (2015) (emphasis added).

141. Loren F. Selznick, *Running Mom and Pop Businesses by the Good Book: The Scope of Religious Rights of Business Owners*, 78 ALB. L. REV. 1353, 1353 (2014–2015).

142. *Id*.

national, closed corporation has protectable religious beliefs because it is "closely held,"[143] so should the traditional "mom and pop" business—arguably the most closely held business there is. But the business owners in *Hobby Lobby* won under RFRA, not the Constitution. Thus, predictably, the perception of a need for state RFRAs became even stronger[144] since business owners in states without a RFRA face an uphill battle: the free exercise clause, as interpreted in *Smith*, will apply to defenses of free exercise.[145]

Even where state RFRAs do exist, however, they still may not offer much protection to private business owners.[146] *Obergefell* provides strong support for the validity of state laws prohibiting private sector discrimination, regardless of any RFRA in effect.[147] The Court in *Obergefell* blended principles of equal protection and due process, following decisions like *Zablocki* and *Lawrence*, such that same-sex couples are implicitly treated as a suspect class for purposes related to marriage, invoking the highest level of scrutiny.[148] The implication is this: it is far from clear that a state RFRA will trump an antidiscrimination statute. Given the heightened status the Court implicitly bestowed upon sexual orientation, *Obergefell* may be more potent in this area than previously thought.

V. WHAT DOES ALL THIS MEAN?

Looking to how the Court has developed each right separately, we see that the Court holds principles of equal protection very dear while it is more willing to relax the protections surrounding free exercise. The Court over the years has fashioned the Equal Protection Clause into a tool it can use to positively protect the rights of people—a function that was not the

143. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014).

144. *See* Steve Sanders, *RFRAs and Reasonableness*, 91 IND. L.J. 243, 252 (2016) (advocating the reasonable use of state RFRAs, not as a weapon but to be used sparingly and only in cases where a sincere religious belief is at stake—not just a distaste for homosexuals). Sanders also proposes that courts measure the level of complicity when deciding whether a state RFRA can be invoked, looking at the facts of each case. *Id.; see also* Kent Greenawalt, *Granting Exemptions from Legal Duties: When Are They Warranted and What is the Place of Religion?*, 93 U. DETROIT MERCY L. REV. 89, 109 (2016) (proposing that exemptions be limited to those matters involving "direct participation" in the marriage).

145. *See supra* note 86; Oleske, *supra* note 140, at 158.

146. *See* Selznick, *supra* note 141, at 1391–92 (noting that "[r]elief . . . is unpredictable" given that the implication of state RFRAs is left entirely up to individual judges). Because courts can be reluctant to implement such exemptions, "the separation of church and commerce doctrine could continue to gain momentum in the states." *Id.*

147. Vincent J. Samar, *Toward a New Separation of Church and State: Implications for Analogies to the Supreme Court Decision in* Hobby Lobby *by the Decision in* Obergefell v. Hodges, 36 B.C. J.L. & SOC. JUST. 1 (2016), (looking at religious protections and exemptions that might be extended, by analogy to *Hobby Lobby*, under state RFRAs).

148. *Id.* at 29.

clause's original purpose. From *Loving* and *Zablocki* to *Romer* and *Lawrence*, the Court has slowly unveiled an equal protection philosophy that does not tolerate discrimination of any kind, for any reason, when it comes to the exercise of a fundamental right. Simply put, the Court does not like discrimination and has shown its willingness to interpret the laws as guarding against such discrimination (i.e., *Obergefell*).

Meanwhile, the Court in *Smith* showed its willingness to subvert the protections of the Free Exercise Clause when there is a greater good at stake. The Court distinguished its decisions in *Yoder* and previous cases, where it subjected laws infringing on free exercise to strict scrutiny, by noting that each of those cases did not involve free exercise alone, but some other fundamental right as well. And while the Court's dicta in *Reynolds* regarding positive versus negative actions on the basis of belief[149] may at first blush seem to support the case of the private business owner, it is not all-encompassing. The Court there simply stated that when dealing with an abstention from some activity as opposed to the positive engagement in an illegal activity, there is more room for consideration of an exception. But the Court in *Reynolds* did not contemplate what would happen if the result of such an abstention were discrimination against an entire class of persons. One thing we know for sure is that the Court is not inclined to give credence to the "status-versus-conduct" distinction—the biggest argument for private business owners. The Supreme Court addressed this argument well before *Obergefell* changed the landscape of the question. In *Lawrence*, the Court held that to allow distinctions based on conduct in the realm of homosexuality is essentially to invite discrimination based on the person himself[150]—an unacceptable outcome to the Court.

While *Hobby Lobby* may seem to have opened the door to the protection of business owners' free exercise rights under RFRA, it is important to note that there was no discrimination involved in that case. In *Hobby Lobby*, the owners refused to provide contraception to *any* employee, not just to a certain class.[151] Should one of the present-day same-sex discrimination cases make it to the Supreme Court, it would most likely turn out in a manner similar to the *McClure* case decided by the Minnesota Supreme Court.[152] There, the owners expressly refused to hire homosexuals

149. *See supra* Part II.

150. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

151. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014).

152. State *ex rel.* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985) (holding that the discriminatory hiring practices of a sports club, including not hiring and affirmatively firing people whose lifestyles were against the owners' religious beliefs, were not entitled to protection under free exercise given the overriding compelling interest in prohibiting discrimination in employment and public accommodations).

as antagonistic to their faith.[153] Both *McClure* and *Hobby Lobby* involved closely held businesses operated in a manner consistent with the owners' religious beliefs. In *Hobby Lobby*, the law compelling the owners to provide contraception in contravention of their beliefs was held unconstitutional.[154] In *McClure*, however, the antidiscrimination law compelling the owners to cease their discriminatory practices was held not to violate their right to free exercise.[155] Only one relevant factor distinguishes the two cases: an element of discrimination. But for the fact an entire group of people was discriminated against, *McClure* could have come out the same way *Hobby Lobby* did thirty years later. Like the antidiscrimination interest in the education context relied on in *Bob Jones*,[156] the Supreme Court gave voice to a policy of antidiscrimination in the realm of marriage in *Obergefell*. Given the fundamental interest in marriage equality after *Obergefell*, the Court does not seem especially poised to find a compelling governmental interest that would justify a religious exemption for discrimination. This goes for defenses under both federal RFRA and state RFRAs. And speaking of the states, the current trend among the states is clear: equal protection trumps free exercise. Notably, this trend is in line with the jurisprudence when free exercise has clashed in the past with other allegations of discrimination.[157]

CONCLUSION

Either way you slice it—a federal claim based on a discriminatory statutory exemption, or a state-law claim based on a violation of antidiscrimination laws—our florist grandmother is unlikely to put forth a successful defense. The Court has created and fostered a jurisprudence hostile to acts of discrimination against a person for who he is and how he lives. In the recent push for gay rights, that commitment to non-discrimination and progressivism has only become stronger. In all likelihood, the Supreme Court will soon have to decide which fundamental freedom prevails when private business owners invoke free exercise

153. *Id*. at 846–47.

154. *See Hobby Lobby*, 134 S. Ct. at 2755.

155. *See McClure*, 370 N.W.2d at 854.

156. Bob Jones Univ. v. United States, 461 U.S. 574 (1983); *see supra* note 123.

157. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661 (2010) (holding that university's antidiscrimination policy requiring all groups to admit and make eligible for leadership positions persons of all status or belief did not violate CLS's free exercise rights); Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909 (Cal. 1996) (finding that landlord's right to free exercise was not violated under *Smith* where state statute required her to rent to unmarried couples as well as married couples); Pines v. Tomson, 206 Cal. Rptr. 866 (Cal. Ct. App. 1984) (holding that a Christian-owned telephone directory company illegally discriminated against non-Christians by requiring any person who advertised in the directory to declare in writing that they are Christians); *McClure*, 370 N.W.2d 844.

protection against discrimination allegations from same-sex couples. And in all likelihood, the Court will side with the same-sex couples. The Court should grant certiorari sooner rather than later, and answer once and for all the divisive question it left open when it decided *Obergefell*.

Briana Knox[*]

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