Oklahoma Law Review

Volume 71 | Number 4

2019

The *Masterpiece Cakeshop* Decision and the Clash Between Nondiscrimination and Religious Freedom

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THE *MASTERPIECE CAKESHOP* DECISION AND THE CLASH BETWEEN NONDISCRIMINATION AND RELIGIOUS FREEDOM

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I. Introduction

During the past decade, individuals identifying as lesbian, gay, bisexual, or transgender (LGBT) have made significant progress in obtaining legal protections under federal and state law.[1] The Supreme Court's landmark decision in *Obergefell v. Hodges* to recognize same-sex marriage was a turning point and catalyst for extending civil rights protections to LGBT people.[2] Since *Obergefell*, the general prohibition against "sex" discrimination found in many federal and state statutes addressing employment, education, housing, and public accommodations has been interpreted rather liberally by some courts to include sexual orientation and gender identity, thus emboldening LGBT people to seek legal redress when they are fired, refused promotion, or denied goods and services in the marketplace. In response to this trend, lawmakers opposed to the expansion of LGBT rights have enacted religious exemption laws aimed at protecting individuals who claim that certain LGBT anti-discrimination laws violate their religious or moral beliefs. Today, two-fifths of all U.S. states have anti-discrimination laws that specifically protect LGBT people against both sexual orientation and gender identity discrimination, while several others have passed religious exemption laws protecting individuals, churches, non-profit organizations, and corporations from anti-discrimination laws that burden their religious beliefs.

Against this backdrop, U.S. courts have increasingly become the battleground for resolving disputes over discrimination against LGBT people in employment, education, housing, and public accommodations where the principles of religious liberty and nondiscrimination are in conflict. Both principles are important pillars of American democracy, and laws enacted by the government and interpreted by the courts should consistently affirm these basic rights. The key question for this Article, then, is which of these principles prevails over the other in the context of

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1. This article uses the acronym "LGBT" to describe the universe of individuals who identify as lesbian, gay, bisexual, transgender, intersex, and queer.

2. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

LGBT rights when there is a conflict between the two? The highly anticipated Supreme Court case of *Masterpiece Cakeshop vs. Colorado Civil Rights Commission*[3] was supposed to answer this question. The expectation among legal scholars was that this case would provide important guidance concerning the uneven recognition of LGBT rights under federal and state antidiscrimination laws and the role of religious liberty and free expression in this calculus.

The purpose of this Article is to analyze the legal implications of the recent *Masterpiece Cakeshop* decision for LGBT rights and future judicial decision-making surrounding the issue of whether the principles of religious freedom and nondiscrimination can co-exist in the post-*Obergefell* era. In particular, this Article will examine whether the *Masterpiece Cakeshop* decision supports or undercuts the recent trend by courts to expand LGBT rights to prohibit discrimination based on sexual orientation and gender identity in the face of religious exemption laws. Part I will discuss the history and meaning behind the First Amendment's "free exercise" of religion clause and the major laws prohibiting sex discrimination in employment, public accommodations, and education. This Part will also address some of the key federal and state cases where courts have interpreted anti-discrimination laws more broadly to include claims based on sexual orientation and gender identity, notwithstanding religious freedom justifications for discriminatory treatment. Part II will analyze the recent *Masterpiece Cakeshop* decision and its legal implications for LGBT rights and First Amendment jurisprudence. This Part will show that though the Supreme Court, in the end, failed to resolve the conflict between the principles of religious freedom and nondiscrimination in this particular case, it did provide useful guidance for courts to consider in cases involving the denial of goods and services to LGBT people in public accommodations. The Article will conclude by arguing that the Supreme Court may have temporarily dodged a bullet by punting on the question of where to draw the line in disputes involving LGBT discrimination and religious freedom claims when the two are in conflict. Nonetheless, the *Masterpiece Cakeshop* decision will be remembered as an important stepping stone in the struggle for LGBT rights and the effort to promote greater tolerance in society.

3. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

II. The Heart of the Debate: Freedom of Religion v. Freedom from Discrimination

A. The Meaning of "Free Exercise" of Religion

The First Amendment's religion clauses provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[4] The first clause, known as the Establishment Clause, was derived from the Enlightenment idea held by several of the Framers of the American republic that religious beliefs should not intertwine with affairs of the state. Thomas Jefferson declared in his famous speech before the Danbury Baptist Church that the Establishment Clause creates a "wall of separation between church and state."[5] Because some of the Framers viewed religion as a divisive force in the aftermath of the religious wars in Europe, they wrote the Establishment Clause with the intent to keep church and state completely separate.[6] In the words of Theodore I.T. Plucknett, "[a]though some things were Caesar's, others were God's, and from this fundamental conflict arose the problem of Church and State, which has lasted from Constantine's day to our own."[7]

The second clause is known as the Free Exercise Clause. It protects the right of American citizens to engage in religious expression and accept any religious belief. Courts have interpreted the Clause to mean that while the government can place no limits on one's religious beliefs, it can place some limits on the freedom to practice one's religion. In one of the most famous free exercise cases in American legal history, *Reynolds v. United States*, the U.S. Supreme Court held that the First Amendment does not protect the religious practice of polygamy.[8] The Court stated that while marriage is a

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4. U.S. CONST. amend. I.

5. Thomas Jefferson, Address Before a Committee of the Danbury Baptist Church Association (Jan. 1, 1802), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 307 (Adrienne Koch & William Peden eds., 1998).

6. KLINTON W. ALEXANDER & KERN ALEXANDER, HIGHER EDUCATION LAW: POLICY & PERSPECTIVES 58 (2d ed. 2017).

7. THEODORE FRANK THOMAS PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (1956).

8. In *Reynolds v. United States*, 98 U.S. 145 (1878), George Reynolds, a member of the Church of Jesus Christ of Latter-day Saints, was charged with bigamy under the federal Morrill Anti-Bigamy Act after marrying a woman while still married to his previous wife. *Id.* at 161. Reynolds argued that the law was unconstitutional because his religion required him to marry multiple women. *Id.* The law, in his view, violated his First Amendment right to free exercise of religion. *Id.* at 161-62. The Court upheld Reynolds's conviction and Congress's power to prohibit polygamy. *Id.* at 167, 169.

"sacred obligation," it is nevertheless "usually regulated by law" in "most civilized nations."[9] Additionally, the Court noted that people cannot avoid a law due to their religion.[10] The Court reasoned that the law permits limited restrictions on the freedom to exercise one's faith because religious freedom may affect others in society.

Since the *Reynolds* decision, courts have struggled to describe "the practice of religion." In *Sherbert v. Verner*, the Supreme Court established a four-part "compelling interest" test to determine the limits of the Free Exercise Clause.[11] According to the test, a court must first decide (a) whether an individual has a claim involving a sincere religious belief, and (b) whether the government action places a substantial burden on the person's ability to act on that belief.[12] If these two elements are established, then the government must show (c) that it is acting in furtherance of a "compelling state interest," and (d) that it has pursued that interest in the manner least restrictive, or least burdensome, to religion.[13] However, in 1990, the Supreme Court modified the *Sherbert* Test in *Employment Division, Department of Human Resources of Oregon v. Smith* when it held that the government no longer had to justify a burden on the free exercise of religion by a compelling state interest if that burden was an unintended result of laws that are generally applicable.[14] In other words, *Smith* narrowed the scope in which a free exercise claim can be asserted under the compelling interest test to those instances where either the government passed a law or took action that *intended* to prohibit the free exercise of

9. *Id.* at 165.

10. *Id.* at 166-67.

11. Sherbert v. Verner, 374 U.S. 398 (1963). In *Sherbert*, the Supreme Court held that the First Amendment's Free Exercise Clause required the government to demonstrate both a compelling interest and that the law in question was narrowly tailored before it denied unemployment compensation to someone who was fired because her job requirements substantially conflicted with her religion. *Id.* at 403. The case established the *Sherbert* Test, which sets forth the conditions for what is known as strict scrutiny.

12. *Id; see also* Scott Bomboy, *Arizona's Religious Freedom Debate and the Sherbert Test;* CONSTITUTION CENTER (Feb. 26, 2014), https://constitutioncenter.org/blog/arizonas-religious-freedom-or-discrimination-debate-defined/ (summarizing the *Sherbert* test as, "if a person claimed a sincere religious belief, and a government action placed a substantial burden on that belief, the government needed to prove a compelling state interest, and that it pursued that action in the least burdensome way").

13. *Id.*

14. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990). In *Smith*, the Court permitted the state of Oregon to deny unemployment benefits to Native American plaintiffs who were fired for ingesting peyote during a religious ceremony. *Id.* at 883, 890.

religion or violated other constitutional rights.[15] This modification of the test prompted national legislation to restore *Sherbert*'s broader free exercise exemption rule.

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA) to "ensure that interests in religious freedom are protected."[16] Under RFRA, Congress broadened the application of the *Sherbert* Test statutorily to all laws and regulations, both federal and state.[17] According to the law, "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest" and is the "least restrictive means of furthering that compelling governmental interest."[18] In practice, RFRA meant that a plaintiff could file a religious discrimination lawsuit to obtain relief from another federal or state law that might infringe upon one's religious views. For example, a business owner could challenge an insurance law requiring employers to provide abortion counseling as part of a company's health insurance package. Alternatively, certain defendants—such as religious charities—could invoke RFRA as a defense to a lawsuit for gender discrimination.

Four years after the enactment of RFRA, the Supreme Court held in *City of Boerne v. Flores* that RFRA was unconstitutional as applied to the states, reasoning that the law was not a proper exercise of Congress's enforcement power.[19] However, it is still applicable to the federal government. Since *Flores*, the Supreme Court has relied on the *Sherbert* Test to decide several prominent cases, including *Gonzales v. O Centro Espírita Beneficente União do Vegetal*[20] and *Burwell v. Hobby Lobby.*[21] More recently, though,

15. *Id.* at 882.

16. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014) (Kennedy, J., concurring) (citing Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb to bb-4 (2018))).

17. Religious Freedom Restoration Act of 1993, § 3(a)-(b), 107 Stat. at 1488-89.

18. *Id.* § 3(b), 107 Stat. at 1489.

19. 521 U.S. 507, 519-20 (1997).

20. 546 U.S. 418 (2006). In *Gonzales*, the Supreme Court held that the RFRA requires the government to permit the importation, distribution, possession and use of an otherwise illegal drug by a religious organization, even though Congress has found that the drug has a high potential for abuse, is unsafe for use even under medical supervision, and violates an international treaty when imported or distributed, because the government had failed to prove a compelling interest in regulating the organization's use of drugs for religious purposes. *Id.* at 428-29.

21. 573 U.S. 682 (2014). In the *Hobby Lobby* case, the Supreme Court held in a 5-4 decision that RFRA allows a for-profit company to deny its employees health care coverage for contraception to which the employees would otherwise be entitled based on the religious

the focus of religious liberty claims has shifted to LGBT rights in the wake of *Obergefell*, which legalized same-sex marriage.[22] Socially conservative lawmakers have worked to restore the original *Sherbert* Test through legislation at the state level,[23] arguing in favor of the right to fire, deny promotion, and refuse goods and services to LGBT people based upon religious justifications.

State legislatures have passed a number of "religious exemption" laws that undermine protections gained by LGBT people since *Obergefell*. Some of these laws permit business owners such as bakers, caterers, florists, and photographers to refuse goods and services to same-sex couples. For example, Mississippi's House Bill 1523 is the most comprehensive state law, explicitly permitting discriminatory conduct against LGBT persons in numerous areas, including the provision of wedding services.[24] Other laws permit health care providers and adoption agencies to refuse services to LGBT people.[25] In Tennessee, for example, a law was enacted recently to permit mental health counselors to turn away clients based on their religious beliefs.[26] In Michigan, too, adoption and foster care agencies are authorized to refuse to place children with LGBT parents based on religious objections.[27] A third type of law prevents the government from denying

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objections of the company's owners. *Id.* at 734-36. Known as the contraceptive mandate, the regulation required companies with fifty or more employees to provide insurance coverage of the twenty contraceptive methods then approved by the Food and Drug Administration. *Id.* at 693, 696.

22. Obergefell v. Hodges, 135 S. Ct. 2584 (2015). *Obergefell* was a landmark civil rights case in which the Supreme Court of the United States ruled that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 2604-05. The ruling meant that all fifty states must lawfully perform and recognize the marriages of same-sex couples on the same terms and conditions as the marriages of opposite-sex couples, with all the accompanying rights and responsibilities. *Id.* at 2607-08.

23. In some states, these efforts have been successful. However, in others, the courts have ruled that the compelling-interest test is applicable to religious claims by virtue of the state's own constitution. Still, in some states, the level of protection for free-exercise claims remains uncertain. See *supra* notes 24-29 and accompanying text.

24. H.B. 1523, § 2, 2016 Leg., Reg. Sess. (Miss. 2016).

25. *See, e.g.*, S.B. 1556, § 1(a), 2016 Leg., Reg. Sess. (Tenn. 2016).

26. *Id.*

27. H.B. 4188, § 2, 2015 Leg., Reg. Sess. (Mich. 2015). Alabama, North Dakota, South Dakota, Texas, and Virginia also have adoption and foster care exemptions in place. *See* S.B. 149, 2016 Leg., Reg. Sess. (S.D. 2016); H.B. 3859, 2017 Leg., Reg. Sess. (Tex. 2017); H.B. 189, 2012 Leg., Reg. Sess. (Va. 2012); Associated Press, *New Alabama Law Lets Adoption Groups Turn Away Same-Sex Couples*, NBC NEWS (May 4, 2017, 6:55 AM CDT),

licenses, funding, or contracts to service providers who discriminate based on religious beliefs. Michigan's House Bill 4188 and South Dakota's Senate Bill 149, for instance, prohibit the government from taking adverse action against a child placement agency because of its refusal to provide services based on religious beliefs.[28]

The challenge for lawmakers who support religious exemption laws is finding the right balance between the goals of protecting religious freedom and prohibiting discrimination. Some of these laws, like Mississippi's House Bill 1523, are simply licenses to discriminate and strongly favor those companies or individuals who do not wish to provide services to LGBT people.[29] Other laws are more narrowly defined to allow states the flexibility to enforce generally applicable laws of nondiscrimination when it has a compelling reason to do so. Regardless of form, the practical effect of such religious exemption laws is to encourage discriminatory practices against LGBT people in the marketplace, which in turn discourages LGBT people from seeking out goods and services in the first place. According to Human Rights Watch, "The recent drive for religious exemptions is not born of a neutral concern with religious liberty, but is largely the product of resistance to recent gains in LGBT equality across the United States."[30]

Thus, the key issue at the heart of the debate surrounding the Free Exercise Clause and LGBT rights is where to draw the line between the two ideas. Social conservatives argue that the line should be drawn in favor of religious freedom because free exercise of religion means the right to oppose same-sex marriage, same-sex parenting, or transgender identity in any form. Most religious exemption laws do not include language to protect LGBT people from discrimination because such protections are deemed to

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https://www.nbcnews.com/feature/nbc-out/new-alabama-law-lets-adoption-groups-turn-away-same-sex-n754691.

28. S.B. 149, § 2, 2017 Leg., Reg. Sess. (S.D. 2017); H.B. 4188, § 2, 2015 Leg., Reg. Sess. (Mich. 2015).

29. As of 2018, "License to Discriminate" laws have been enacted in eight states: Alabama, Michigan, Mississippi, North Dakota, South Dakota, Texas, Tennessee, and Virginia. Exemption bills have been filed in Florida, Georgia, Illinois, Oklahoma, and Washington. Nondiscrimination bills are pending in Alaska, Arizona, Florida, Idaho, Indiana, Kentucky, Missouri, Nebraska, New Hampshire, New York, Ohio, Pennsylvania, Utah, Virginia, and West Virginia. *See United States: State Laws Threaten LGBT Equality*, HUMAN RIGHTS WATCH (Feb. 2018, 12:01 AM EST), https://www.hrw.org/news/2018/02/19/united-states-state-laws-threaten-lgbt-equality.

30. HUMAN RIGHTS WATCH, "ALL WE WANT IS EQUALITY": RELIGIOUS EXEMPTIONS AND DISCRIMINATION AGAINST LGBT PEOPLE IN THE UNITED STATES 6 (2018), https://www.hrw.org/sites/default/files/report_pdf/lgbt0218_web_1.pdf.

be irreconcilable with these religious beliefs. For example, under Catholic doctrine, marriage is defined as the union of a man and a woman, and many Catholic charitable organizations have adhered to this rule in denying the adoption of children by same-sex couples.[31] Thus, as same-sex marriage has gained acceptance and legal approval over time, many Catholic agencies closed down their adoption and foster care services on the grounds that their freedom of religion had been violated.[32]

In the aftermath of *Obergefell*, much of the focus of religious freedom claims has shifted to the transgender community. At present, courts in California and Texas are addressing lawsuits over the refusal of hospitals to perform medical procedures on transgender individuals based upon religious beliefs.[33] According to a recent study performed by the Center for American Progress, thousands of transgender adults experience health care discrimination each year, and the majority of discrimination complaints filed by transgender people with the Department of Health and Human Services' Office of Civil Rights are related to medical care that has nothing

31. Claire Chretien, *Philadelphia Cuts Ties with Catholic Charities over Gay Foster Parenting Refusal*, LIFESITE NEWS (Mar. 28, 2018, 11:28 AM EST), https://www.lifesitenews.com/news/philadelphia-cuts-ties-with-catholic-charities-over-gay-foster-parenting-re ("'A man and a woman united in marriage, together with their children, form a family,' the Catechism of the Catholic Church teaches (CCC 2202). 'This institution is prior to any recognition by public authority, which has an obligation to recognize it. It should be considered the normal reference point by which the different forms of family relationship are to be evaluated.'").

32. Catholic Charities withdrew from adoption and foster care services in Massachusetts, Illinois, California, and Washington, D.C., rather than comply with nondiscrimination laws that protect same-sex couples. *See, e.g.*, Laurie Goodstein, *Bishops Say Rules on Gay Parents Limit Freedom of Religion*, N.Y. TIMES (Dec. 28, 2011), https://www.nytimes.com/2011/12/29/us/for-bishops-a-battle-over-whose-rights-prevail.html; Joseph LaPlant, *Tough Times for Catholic Adoption Agencies*, OUR SUNDAY VISITOR (May 7, 2014), https://www.osv.com/OSVNewsweekly/Article/TabId/535/ArtMID/13567/ArticleID/14666/Tough-times-for-Catholic-adoption-agencies.aspx; Amanda Paulson, *Several States Weigh Ban on Gay Adoptions*, CHRISTIAN SCI. MONITOR (Mar. 15, 2006), https://www.csmonitor.com/2006/0315/p02s02-ussc.html.

33. In *California v. Azar*, the Ninth Circuit affirmed a lower court ruling enjoining enforcement of Trump Administration's new rules that would allow employers and universities to use religion to deny their employees and students health insurance coverage for birth control. 911 F.3d 558, 581-82 (9th Cir. 2018). In Texas, a federal district judge temporarily stopped enforcement of the protections for transgender patients, saying that Congress had outlawed discrimination based on sex—"the biological differences between males and females"—but not transgender status. *See* Robert Pear, *Trump Plan Would Cut Back Health Care Protections for Transgender People*, N.Y. TIMES (Apr. 21, 2018), https://www.nytimes.com/2018/04/21/us/politics/trump-transgender-health-care.html.

to do with gender transition.[34] The Affordable Care Act (ACA) sought to address this issue by prohibiting health care providers and insurance companies from engaging in discrimination.[35] Under an Obama Administration rule, transgender people were explicitly protected against discrimination in health care on the basis of their gender identity and sex stereotypes. However, the Trump Administration has been working to make it easier for health care providers to discriminate against LGBT people on religious grounds. The new head of the Department of Health and Human Services' Office of Civil Rights, Roger Severino, recently stated that the federal government will be more open to listening to complaints of conscience.[36] He has created a special agency, the Division of Conscience and Religious Freedom, which aims to ensure that health care providers' religious liberties are not violated.[37] The creation of the new division is pursuant to an executive order signed by President Trump called "Promoting Free Speech and Religious Liberty."[38] The order has spawned new rules aimed at removing the legal mandate that health insurance provide contraception. To date, more conscience-based complaints have been filed with the Office of Civil Rights under President Trump than in all eight years of Obama's presidency.[39]

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34. *See* Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CTR. FOR AM. PROGRESS (Jan. 18, 2018, 9:00 AM), https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/.

35. *See* Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119, 260, sec. 1557(a) (2010) (codified at 42 U.S.C. S 18116 (2018)). The ACA prohibits discrimination based on race, color, national origin, sex, age, or disability in "any health program or activity" that receives federal financial assistance. *Id.*

36. Alison Kodjak, *Civil Rights Chief at HHS Defends the Right to Refuse Care on Religious Grounds*, NPR (Mar. 20, 2018, 3:38 PM ET), https://www.npr.org/sections/health-shots/2018/03/20/591833000/civil-rights-chief-at-hhs-defends-the-right-to-refuse-care-on-religious-grounds.

37. *See* Cynthia Romero, *Religious Freedom Is Not a License to Discriminate*, AM. CONST. SOC'Y (Apr. 20, 2018), https://www.acslaw.org/acsblog/religious-freedom-is-not-a-license-to-discriminate/; *see also* Kodjak, *supra* note 36. This agency will effectively give doctors, nurses, and other medical staff cover to discriminate against LGBT people, because providers will now get protection from the federal government if they cite religious or moral objections to refuse service to LGBT patients.

38. Toni Clarke, *U.S. Government to Shield Health Workers Under "Religious Freedom*," U.S. NEWS & WORLD REP. (Jan. 18, 2018, 10:47 AM), https://www.usnews.com/news/us/articles/2018-01-18/us-government-creates-health-division-for-religious-freedom.

39. *See supra* note 37 and accompanying sources.

President Trump has taken steps to dismantle Obama-era protections for transgender persons in other areas as well, such as the military and employment. On March 23, 2018, the Trump Administration reissued its ban on transgender people in the military.[40] The Obama Administration fought for years to reverse "don't ask, don't tell"—which banned openly gay people from serving in the military—and was making progress on reversing a similar ban on open transgender service members. In addition, the Trump Administration reversed the Obama-era policy that used Title VII to protect transgender employees from discrimination.[41] President Trump issued "'religious liberty' guidance to federal agencies, essentially asking [federal employees] to respect religious-liberty protections' in all of the government's work."[42] It is still unclear what effect this guidance will have on LGBT protections, but LGBT organizations are concerned that it will be used to justify discrimination against LGBT employees working for the federal government.[43]

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40. The exceptions are persons who have been "stable for 36 consecutive months in their biological sex prior to accession [and] service members who do not require a change of gender." *Statement by Transgender Client of the Military Religious Freedom Foundation (MRFF) on the Reissued Ban on Transgender People in the Military*, MIL. RELIGIOUS FREEDOM FOUND. (Mar. 25, 2018), https://www.militaryreligiousfreedom.org/2018/03/statement-by-transgender-client-of-the-military-religious-freedom-foundation-mrff-on-the-reissued-ban-on-transgenders-in-the-military/; *see also* Amanda Kerri, *The Christian Takeover of the U.S. Military*, ADVOC., (Mar. 29, 2018, 12:54 PM EDT), https://www.advocate.com/commentary/2018/3/29/christian-takeover-us-military.

41. *Sessions' DOJ Reverses Transgender Workplace Protections*, CBS NEWS (Oct. 5, 2017, 12:35 PM), https://www.cbsnews.com/news/sessions-doj-reverses-obama-era-transgender-work-protections. Under Obama, the Department of Justice adopted the position that employment discrimination based on sexual orientation and gender identity was a violation of Title VII. *Id.*

42. German Lopez, *Trump Promised to Be LGBTQ-friendly. His First Year in Office Proved It Was a Giant Con.*, VOX, (Jan. 22, 2018, 8:00 AM EST) https://www.vox.com/identities/2018/1/22/16905658/trump-lgbtq-anniversary. In 2014, President Obama signed Executive Order 13672, adding "gender identity" to the categories protected against discrimination in hiring federal employees and both "sexual orientation" and "gender identity" to the categories protected against discrimination in hiring federal contractors. *Executive Order – Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity*, WHITE HOUSE (July 21, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employmen.

43. Trump has maintained existing executive orders that prohibit the federal government and federal contractors from discriminating against employees based on sexual orientation and gender identity. *See, e.g.*, Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (June

In response to the Trump Administration's support for "religious liberty" guidance, several Republican Senators on March 8, 2018, reintroduced the First Amendment Defense Act (FADA) "designed to prevent the federal government from discriminating against individuals or institutions based on their beliefs about marriage."[44] Specifically, the bill prohibits the federal government from taking action against an individual based on actions or beliefs in accordance with a "religious [] or moral conviction that [(1)] marriage is or should be recognized as the union of one man and one woman," or (2) sexual relations are properly reserved to such a marriage.[45] In contrast to previously proposed legislation, FADA frames the bill as responding to "conflicts between same-sex marriage and religious liberty" and protects those whose religious beliefs put them in opposition to same-sex marriage recognized under federal law.[46] In practical terms, FADA would permit individuals and businesses using public money from grants or contracts with the federal government to discriminate against same-sex couples in housing, employment, and education, as long as their actions are based on their belief about marriage. During a 2016 press conference, then-presidential nominee Donald Trump said, "If I am elected president and Congress passes the First Amendment Defense Act, I will sign it to protect the deeply held religious beliefs of Catholics and the beliefs of Americans of all faiths."[47]

The First Amendment's guarantee of freedom of religion is a fundamental human rights concern, and the government is obliged to refrain from imposing restrictions on this right. However, when religious freedom and conscience-based exemption laws clash with other laws, such as the prohibition against sex discrimination, courts are faced with the challenge of determining which of these laws prevails. The next section examines the significant federal and state anti-discrimination laws in place to protect

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2, 1998). *But see* Zack Ford, *Trump Revokes Executive Order, Weakens Protections for LGBT Workers*, THINKPROGRESS (Mar. 29, 2017, 12:53 PM), https://thinkprogress.org/trump-gutted-lgbt-executive-order-8dd0e3be69a/ (discussing Executive Order 13,672).

44. Julie Moreau, *GOP Reintroduces Bill Pitting 'Religious Freedom' Against Gay Marriage*, NBC NEWS (Mar. 12, 2018, 12:54 PM CDT), https://www.nbcnews.com/feature/nbc-out/gop-reintroduces-bill-pitting-religious-freedom-against-gay-marriage-n855836; *see also* First Amendment Defense Act, S.B. 2525, 115th Cong. (2018).

45. First Amendment Defense Act, S.B. 2525, § 3(a), 115th Cong. (2018).

46. *Id.* § 2(a).

47. Morgan Brinlee, *Donald Trump Just Quietly Admitted He's Going to Sign This Anti-LGBTQ Bill*, BUSTLE (Dec. 29, 2016), https://www.bustle.com/p/donald-trump-just-quietly-admitted-hes-going-to-sign-this-anti-lgbtq-bill-26960.

LGBT rights, and some of the key court cases interpreting these laws, which set the stage for the Supreme Court's *Masterpiece Cakeshop* decision.

B. Anti-Discrimination Laws and LGBT Rights

For decades, LGBT people have experienced discrimination in the United States without adequate legal protections in place. As a result of the 2015 U.S. Supreme Court decision in *Obergefell*, same-sex couples can marry nationwide and states must extend all the rights and benefits of marriage to same-sex couples. These rights and benefits include medical decision-making and joint adoption authority for married same-sex couples. However, the laws covering LGBT persons in other areas are still in a state of flux. This section examines the main federal and state laws established to prohibit discrimination in employment, education, and public accommodations contexts, and how courts are interpreting these laws with respect to LGBT rights.

1. Federal Law Protection of LGBT Rights

a) Title VII – Employment

Title VII of the 1964 Civil Rights Act prohibits employer discrimination on the basis of "race, color, national origin, *sex*, or religion."[48] Title VII applies to both public and private entities.[49] The power of Congress to regulate and prohibit discrimination by a state actor is justified under Section 5 of the Equal Protection Clause. That provision enforces constitutional prohibitions against discrimination for specified classifications of persons. Section 703(a) prohibits private discrimination and is justified under Article 1, Section 8 of the U.S. Constitution (Commerce Clause). According to Title VII, section 703(a)(1):

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[50]

48. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2018) (as amended by the Equal Employment Opportunity Act of 1972).

49. *Id.* § 2000e(b).

50. *Id.* § 2000e-2(a)(1).

Congress did not define the word "sex" in Title VII. Barbara Lindemann and David Kadue, citing to judicial definitions of "sex," explain that "it describes not only a basis protected by statute, but also an activity."[51] The word "gender", too, is defined as "the behavioral, cultural or psychological traits typically associated with one sex."[52] In 1976, Ruth Bader Ginsburg wrote that the term "sex," in referencing "sex discrimination," could be viewed as an invocation of sexuality, whereas the term "[g]ender, by contrast, has a neutral, clinical tone that may ward off distracting associations."[53] Ginsburg's influence precipitated a shift in the Supreme Court's use of the term "gender" in place of "sex" after 1976.

Title VII does not specifically mention sexual orientation or gender identity. Sexual orientation refers to an individual's sexual or emotional attraction to men, women, or members of both sexes, while gender identity refers to how a person self-identifies (male, female, or alternative gender) that may or may not conform to that person's primary or secondary sexual characteristics or assigned sex at birth.[54] In 2015, the Equal Employment Opportunity Commission (EEOC) ruled that Title VII should be interpreted to cover sexual orientation in *Baldwin v. Foxx*.[55] The Obama Administration, seeking to expand LGBT rights, included gender identity among the classes protected against discrimination under the authority of the EEOC.[56] However, the Department of Justice, under the Trump Administration, has taken the position that the law does not recognize gender identity or transgender status as a basis to protect LGBT rights.[57] The current split among federal agencies in interpreting the meaning of "sex discrimination" makes it difficult for courts to enforce Title VII.

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51. BARBARA LINDEMAN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 51 (1999).

52. *Id.*

53. Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1976).

54. *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions (last visited Mar. 18, 2019).

55. EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015).

56. Press Release, Dep't of Justice Office of Public Affairs, Attorney General Holder Directs Department to Include Gender Identity Under Sex Discrimination Employment Claims (Dec. 18, 2014), https://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination.

57. Memorandum from the Attorney General on Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Oct. 4, 2017), https://www.justice.gov/file/188671/download. Under President Obama, the Department of Justice adopted the position that employment discrimination based on sexual orientation and gender identity was a violation of Title VII. *Id.* at 2.

During the 1980s, the Supreme Court extended the scope of Title VII in *Price Waterhouse, Inc. v. Hopkins* to prohibit discrimination based on non-conformance with gender norms, stereotypes, and other sex-based considerations.[58] Nearly a decade later, the Court in *Oncale v. Sundowner Offshore Services, Inc.* held that Title VII reaches same-sex discrimination.[59] While Congress may not have had this in mind in 1964, on its face the words "discriminate because of sex" in the Act do not embrace only the opposite sex.[60] The precedents established in *Price Waterhouse* and *Oncale* provided LGBT people who were harassed at work with an opening to seek legal recourse under Title VII. Since the *Oncale* decision, courts have applied these precedents to expand protections to those who defy certain stereotypes or expectations as to how a person of a particular sex or gender should look or act.

Recently, several federal appellate courts have found that discrimination based on sexual orientation is cognizable under Title VII. In *Hively v. Ivy Tech Community of College of Indiana*, the Seventh Circuit stated that "[a]ny discomfort, disapproval or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner is a reaction purely and simply based on sex."[61] Thus, there is no distinction between a gender nonconformity claim

58. 490 U.S. 228 (1989). In this case, a female associate of an accounting firm sued her employer for sex discrimination after the firm denied her a promotion to partner. *Id.* at 231-32. A motivating factor in the employer's decision to deny her partnership was stereotyped thinking about her need for a "course at charm school," her "overcompensat[ion] for being a woman," and the importance that she "walk more femininely." Id. at 235. The Supreme Court held that discrimination based on non-conformance with gender norms, stereotypes, and other sex-based considerations was a violation of Title VII. *Id.* at 251; *see also* Mark C. Weber, *Beyond* Price Waterhouse v. Hopkins*: A New Approach to Mixed Motive Discrimination*, 68 N.C. L. REV. 495, 502 (1990).

59. 523 U.S. 75 (1998). In *Oncale*, a male employee brought a Title VII action against his former employer and against his male supervisors and co-workers, alleging sexual harassment. *Id.* at 77. The Supreme Court held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII. *Id.* at 82.

60. *Id.* at 79.

61. 853 F.3d 339, 347 (7th Cir. 2017). In *Hively,* the Seventh Circuit Court of Appeals held that Title VII's prohibition against discrimination on the basis of sex includes sexual orientation. *Id.* at 352. The en banc majority wrote, "[T]he common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade[s] us that the time has come to overrule our previous cases that have endeavored to find and observe that line." *Id.* at 351. Moreover, the court indicated that it would be open to including gender identity and transgender status under Title VII. *See id.* at 363-64. "Our panel," the court wrote, "described the line between a gender nonconformity

and a sexual orientation claim. The court also noted that bias based on sexual orientation constitutes associational discrimination because "[i]f we were to change the sex of one partner in a lesbian relationship, the outcome would be different."[62] The First Circuit, too, upheld a $700,000 jury award for a lesbian firefighter who experienced harassment from her co-workers at the Providence Fire Department, stating that there was more than enough evidence to support her "sex plus" discrimination claim under Title VII, where the "plus" in her case was her sexual orientation.[63] Furthermore, the Second Circuit in 2018 held that Title VII prohibited sexual orientation discrimination, but it did not go so far as to say that Title VII prohibited discrimination based on gender identity.[64]

These decisions are at odds with a 2017 Eleventh Circuit decision, *Evans v. Georgia Regional Hospital,* wherein the court concluded that it was bound by past precedent to hold that sexual orientation was not a protected characteristic under Title VII.[65] In this case, Jameka Evans claimed that she was subjected to discrimination and harassment based on sexual orientation while working at Georgia Regional Hospital.[66] The Eleventh Circuit ruled that the sexual orientation discrimination was not actionable, but the claim

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claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all." *Id.* at 346.

62. *Id.* at 349; *see also* Evan Gibbs & Rebecca Silk, *Second Circuit Says Sexual Orientation Is Protected Under Title VII*, ABOVE THE LAW (Feb. 27, 2018, 9:59 AM), https://abovethelaw.com/2018/02/second-circuit-says-sexual-orientation-is-protected-under-title-vii/?rf=1.

63. Franchina v. City of Providence, 881 F.3d 32, 52 (2018). A female firefighter presented evidence that she was repeatedly called "Frangina"; "that women were treated as less competent";" "that men treated women better when they were perceived as willing to have sex with them"; and that the firefighter "was subjected to humiliating sexual remarks and innuendos by [subordinates], including asking her if she wanted to have babies and if he could help her conceive." *Id.* at 40, 55.

64. Zarda v. Altitude Express Inc., 883 F.3d 100 (2nd Cir. 2018). The plaintiff in the case, a skydiver, claimed that his employer fired him because of his sexual orientation. *Id.* at 108-09. The plaintiff subsequently died in a base-jumping accident shortly after filing suit, but his estate took up the case and is continuing to prosecute it. *Id.* at 107 n.1. A three-judge panel of the Second Circuit initially held that the instructor had no claim under Title VII because sexual orientation was not a protected class. *Id.* at 110. The plaintiff, however, requested an *en banc* review and the Second Circuit sitting en banc reversed the panel's decision. *Id.* at 108.

65. 850 F.3d 1248, 1255 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017); *see also* Greg Stohr, *U.S. Supreme Court Turns Away Sexual-Orientation Bias Case*, BLOOMBERG: POLITICS (Dec. 11, 2017, 8:31 AM CST), https://www.bloomberg.com/news/articles/2017-12-11/sexual-orientation-bias-case-turned-away-by-u-s-supreme-court.

66. *Evans*, 850 F.3d at 1251.

could proceed because the facts supported a permissible Title VII claim of sex discrimination based on gender nonconformity. Given the split in the federal circuits on whether sexual orientation should be included under Title VII, it is likely that the Supreme Court will address this issue in the near future.

Some federal appellate courts have been in favor of extending civil rights protections for LGBT employees to include gender identity or transgender status.[67] In a landmark Title VII discrimination case that is expected to go to the Supreme Court, the Sixth Circuit recently ruled that the firing of a transgender employee by a Michigan funeral home for disclosing that she was transitioning from male to female constituted sex discrimination under Title VII.[68] The Court rejected the funeral home's argument that it was entitled to a religious exemption under RFRA and instead held that "[d]iscrimination on the basis of transgender and transitioning status" is, in fact, sex discrimination.[69] The court compared the situation to Title VII's prohibition on religious conversion discrimination, arguing that discrimination based on a "change in . . . sex" is prohibited.[70] The ruling affirms that transgender individuals are protected by federal sex

67. The federal appellate courts for the First, Sixth, Ninth, and Eleventh Circuits have found some protections in the 1964 Civil Rights Act for the category of gender identity. *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); Schwenck v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000); Rosa v. Parks W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000).

68. EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560, 567 (6th Cir. 2018). In this case, Aimee Stephens had worked for nearly six years as a funeral director at R.G. and G.R. Harris Funeral Homes when she informed the funeral home's owner that she was a transgender woman and planned to start dressing in appropriate business attire for a woman. *Id.* She asked for understanding and support. Instead, the owner fired her two weeks later, explaining that it would be unacceptable for her to present and dress as a woman. *Id.* at 568-69. The U.S. Court of Appeals for the Sixth Circuit ruled that R.G. & G.R. Harris Funeral Homes unlawfully discriminated against Aimee Stephens when it fired her after she told her employer that she would begin presenting as a woman because she was transgender. *Id.* at 600. The decision reverses the lower court's decision, which held that religious belief was sufficient to exempt the employer from anti-discrimination laws. *Id.* at 567.

69. *Id.* at 574-75. Judge Karen Moore, who wrote the Sixth Circuit opinion, held that Title VII outlaws anti-trans employment discrimination for two reasons: (1) Title VII bars sex stereotyping punishing an employee for her failure to conform to gender norms; and (2) anti-trans discrimination is inherently sex-based. *Id.* at 572, 575; *see also* Mark Joseph Stern, *Businesses Can't Fire Trans Employees for Religious Reasons, Federal Appeals Court Rules in Landmark Decision*, SLATE (Mar. 7, 2018, 2:30 PM), https://slate.com/news-and-politics/2018/03/sixth-circuit-rules-businesses-cant-fire-transgender-employees-for-religious-reasons.html.

70. *Harris Funeral Homes*, 884 F.3d at 575.

discrimination laws, and that religious beliefs do not give employers the right to discriminate against them. Moreover, the case is significant because it addressed the conflict between religious freedom under RFRA and the principle of nondiscrimination, concluding that the compelling government interest in eradicating employment discrimination against transgender people trumps business owners' religious liberty claims.

b) Title IX – Education

In 1972, Congress and the Nixon Administration enacted a number of amendments to the Higher Education Act of 1965.[71] Title IX, the most well-known of these amendments, protects people from discrimination based on sex in federally funded educational programs and activities.[72] Title IX states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .[73]

Unlike Title VII, Title IX is primarily a regulatory statute designed to ensure that institutions receiving federal funds are "compliant" with Congress's prohibition on sex discrimination. Title IX applies only to institutions that receive federal financial assistance, including public and private colleges and universities, local school districts administering primary and secondary schools, as well as charter schools, for-profit schools, libraries, and museums.[74] The U.S. Department of Education's Office for Civil Rights (OCR) enforces Title IX.

In 2016, the Obama Administration interpreted Title IX to prohibit discrimination on the basis of sexual orientation, gender identity, and transgender status. OCR specifically issued guidance explaining that transgender students are protected from sex discrimination under Title IX and should be allowed to use bathrooms, locker rooms, and other sex-

71. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified as amended at 20 U.S.C. §§ 1681–1688 (2018)). The Higher Education Act of 1965 provides federal funding to colleges and universities and financial assistance to students.

72. *Id.* § 901(a), 86 Stat. at 373.

73. *Id.*

74. *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last modified Sept. 25, 2018). Some key issue areas in which recipients have Title IX obligations are: recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment; treatment of pregnant and parenting students; discipline; single-sex education; and employment.

segregated spaces that correspond with their gender identity in public schools, colleges, and universities. However, the Trump Administration recently rescinded this guidance, stating in a "Dear Colleague" letter that the guidance did not undergo a formal public review before it was released and "that there must be 'due regard for the primary role of [s]tates and local school districts in establishing educational policy.'"[75] According to Secretary of Education Betsy Devos, "[s]chools, communities, and families can find—and in many cases have found—solutions that protect all students."[76] The Trump Administration's withdrawal of Obama-era guidance has created confusion about the enforcement of LGBT rights in the educational arena, which in turn is having an impact on pending lawsuits in a number of states.

The Fourth Circuit was the first federal appellate court to address the scope of Title IX as applied to transgender students in the case of *G.G. ex. rel. Grimm v. Gloucester County School Board*.[77] Gavin Grimm, a Virginia transgender high school student, filed this lawsuit, alleging discrimination under Title IX after the Gloucester County School Board passed a resolution requiring that access to changing rooms and bathrooms be "limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility."[78] The Fourth Circuit held that the resolution seeking to regulate

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75. Sandhya Somashekhar, Emma Brown & Moriah Balingit, *Trump Administration Rolls Back Protections for Transgender Students*, WASH. POST (Feb. 22, 2017), https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html?noredirect=on&utm_term=.c9da1344635f.

76. *Id.*

77. 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017). Later that same year, the U.S. Court of Appeals for the Sixth Circuit also found in favor of a transgender student in a similar case stating that if the plaintiff were to be restricted from using the restroom in line with her gender identity, she would face "irreparable harm." Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 221-22 (6th Cir. 2016).

78. G.G. *ex rel.* Grimm, 822 F.3d at 719, 723. As part of Gavin's medical treatment for severe gender dysphoria, Gavin and his mother notified administrators of his male gender identity at the beginning of his sophomore year so that he could socially transition in all aspects of his life. *Id.* at 715. With permission from school administrators, Gavin used the boys' restroom for almost two months without any incident. *Id.* at 715-16. But after receiving complaints from some parents and residents of Gloucester County, the school board adopted the new policy on December 9, 2014, by a vote of 6-1. *Id.* at 716. Grimm refused to use the girls' bathroom and was offered the use of some broom closets that had been retrofitted into unisex bathrooms. Verna L. Williams, *Bathrooms, Not Broom Closets: Title IX, Gavin Grimm, and Trans Students' Rights*, UC SOC. JUST., (Oct. 31, 2016),

sex-segregated facilities was ambiguous, and that OCR's interpretation of this regulation pursuant to Obama-era guidance was "entitled to deference . . . and is to be accorded controlling weight."[79] A year later, the Supreme Court reversed the Fourth Circuit's decision and vacated the judgment, citing the Trump Administration's withdrawal of Obama-era guidance and its interpretation of Title IX to which the Fourth Circuit had granted deference.[80] The Supreme Court requested the federal district court to revisit the case and rule on the underlying statutory question regarding the scope of Title IX. In May 2018, the district court "sided with Grimm and denied the [school] board's request to dismiss the case."[81] The case is now on appeal again to the Fourth Circuit to resolve whether the school board resolution is discriminatory under Title IX.

The Gavin Grimm case is expected to have a significant impact on other pending transgender discrimination cases around the nation. In North Carolina, for example, a high-profile lawsuit challenging the state's anti-LGBT law, House Bill 142, is still pending.[82] House Bill 142 recently

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https://ucsocialjustice.com/2016/10/31/bathrooms-not-broom-closets-title-ix-gavin-grimm-and-trans-students-rights/. He refused to use those as well, opting to use a bathroom in the school nurse's office. *Grimm*, 822 F.3d at 728.

79. *Id.* at 723. The ruling in favor of Grimm did not grant him the right to use the boys' restrooms; rather, it directed a lower court that had ruled against him to re-evaluate his request for injunctive relief to be able to use those restrooms. The Fourth Circuit cited an Education Department letter that said "a school generally must treat transgender students consistent with their gender identity." *Id.* at 717; *see* also Richard Fausset, *Appeals Court Favors Transgender Student in Virginia Restroom Case*, N.Y. TIMES (Apr. 19, 2016), https://www.nytimes.com/2016/04/20/us/appeals-court-favors-transgender-student-in-virginia-restroom-case.html.

80. Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017); *see also* Pete Williams, *Supreme Court Rejects Gavin Grimm's Transgender Bathroom Rights Case*, NBC NEWS (Mar. 6, 2017, 5:11 PM CST), https://www.nbcnews.com/news/us-news/u-s-supreme-court-rejects-transgender-rights-case-n729556.

81. *Judge: School Board Can Try to Appeal Gavin Grimm Lawsuit*, AP NEWS (June 6, 2018), https://apnews.com/184dce420a574be6b60ea8297bb67a3d.

82. Carcano v. Cooper, No. 1:16-cv-236, 2018 BL 357474, at *3-4 (M.D.N.C. Sept. 30, 2018). The case, *Carcano v. Cooper* (formerly *Carcano v. McCrory*), was filed in the U.S. District Court for the Middle District of North Carolina against North Carolina Governor Pat McCrory, Attorney General Roy Cooper, and the University of North Carolina, on behalf of two transgender North Carolinians (Joaquín Carcaño, a UNC-Chapel Hill employee, and Payton McGarry, a UNC-Greensboro student), Angela Gilmore (a lesbian and North Carolina Central University law professor), and the ACLU of North Carolina and Equality North Carolina. According to the plaintiffs, it is still ambiguous whether House Bill 142 discriminates against transgender people's access to public restrooms. *Id.* at *6.

replaced a more sweeping law, House Bill 2[83] (known as the "bathroom bill"), which barred transgender people from using the restrooms and other single-sex facilities matching their gender identity in government buildings.[84] The American Civil Liberties Union (ACLU) has sued the state on behalf of Joaquin Carcaño, a twenty-seven-year-old transgender man who works at the University of North Carolina at Chapel Hill and is banned from using public men's restrooms under the law. The complaint in *Carcano v. Cooper* alleged that House Bill 142 discriminates against students and school employees on the basis of sex and is an invasion of privacy for transgender people pursuant to Title IX and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[85]

Federal courts have extended the same reasoning from Title VII cases to include sexual orientation and gender identity claims in Title IX cases. Following the *Hively* case, the Seventh Circuit ruled in *Whitaker ex rel. Whitaker v. Unified School District No. 1* that discrimination against transgender students violates Title IX.[86] The federal appellate court concluded that the school district must allow Ashton Whitaker, a transgender boy in Wisconsin, to use the boys' restroom. "By definition," the court wrote that

> a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth. . . . A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.[87]

More recently, the Third Circuit in *Doe ex rel. Doe v. Boyertown Area School District*, a case referred to as the inverse of the Gavin Grimm lawsuit,[88] ruled against a school's policy to prohibit transgender students from using the proper bathroom at school, concluding that Title IX

83. *See* Public Facilities Privacy and Security Act, H.B. DRH40005-TC-1B, 2016 Gen. Assemb., 2d. Special Sess. (N.C. 2016), https://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v0.pdf.

84. *Id.* § 1.3. It also prevented cities and counties from enacting or enforcing LGBT-inclusive antidiscrimination ordinances. *Id.* § 3.3.

85. *Carcano*, 2018 BL 357474, at *11, *15.

86. 858 F.3d 1034, 1049-50 (7th Cir. 2017).

87. *Id.* at 1048, 1049.

88. Mark Joseph Stern, *Federal Court Emphatically Shoots Down Anti-Trans Lawsuit in Rare Ruling from the Bench*, SLATE (May 24, 2018, 4:13 PM), https://slate.com/news-and-politics/2018/05/third-circuit-shoots-down-adfs-anti-transgender-lawsuit.html.

prohibits discrimination based on transgender status, including denial of equal access to restrooms.[89] This decision is groundbreaking, not only because it recognizes gender identity under Title IX, but also because the court rejected the argument that trans-inclusive policies infringe upon anti-trans students' right to "privacy."[90]

Religious educational institutions are exempt from Title IX requirements to protect First Amendment rights. Title IX states that an educational institution is exempt when 1) it is "controlled by a religious organization,"[91] and 2) prohibiting sex discrimination "would not be consistent with the religious tenets of such [controlling] organization."[92] To date, no educational institution has ever been denied a Title IX waiver to avoid punishment for not providing certain accommodations (such as gender-

89. 897 F.3d 518, 521, 533 (3d Cir. 2018). In this case, Cisgender high school students brought an action against the school district superintendent and school principal, alleging that the school district's practice of allowing transgender students to access bathrooms and locker rooms consistent with their gender identity violated their right to privacy under Fourteenth Amendment, their right of access to educational opportunities to programs, benefits, and activities under Title IX, and their Pennsylvania common law right of privacy preventing intrusion upon their seclusion while using bathrooms and locker rooms, and sought preliminary injunction requiring school district to return to prior practice of requiring all students to only use the privacy facilities corresponding to their biological sex. *Id.* at 521, 525; *see also* Stern, *supra* note 89.

90. The Alliance Defending Freedom, "a conservative law firm that seeks to legalize anti-LGBT discrimination through the courts," filed suit on behalf of "several [high school] students who said they felt uncomfortable sharing facilities with a transgender classmate." Stern, *supra* note 89.

91. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 34 C.F.R. § 106.12 (2018). To satisfy the OCR test determining whether an educational institution is controlled by a religious organization, a religious educational institution need meet only one of the following requirements: 1) "It is a school or department of divinity," 2) "It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the [controlling] organization," or 3) "Its charter . . . contains explicit statements that it is controlled by a religious organization or [it] is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization . . . , and it receives a significant amount of financial support from the controlling religious organization . . . ." *Exemptions from Title IX*, U.S. DEP'T OF EDUC.: OFFICE FOR CIVIL RIGHTS, https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html (last visited Feb. 27, 2019); *see also* Memorandum from Harry M. Singleton, Assistant Sec'y for Civil Rights, Dep't of Educ., on Policy Guidance for Resolving Religious Exemption Requests (Feb. 19, 1985).

92. 20 U.S.C. § 1681(a)(3) (2018). Title IX "does not apply to an educational institution that is controlled by a religious organization to the extent [that] application of [Title IX] would not be consistent with the religious tenets of the organization." 34 C.F.R. § 106.12.

inclusive housing or restrooms) to the LGBT community.[93] Moreover, "very few students or employees have challenged an educational institution's eligibility for a Title IX exemption."[94] This situation raises the question of whether the current system for religious exemptions from Title IX is working effectively to protect LGBT rights.

In a recent landmark California decision, a same-sex couple on the Pepperdine University women's basketball team sued the university for sex discrimination under Title IX.[95] The university ultimately prevailed before a jury because it was exempt from the law on religious grounds at the time the case was filed; however, the federal judge, in denying the university's motion to dismiss found that "sexual orientation discrimination is not a category distinct from sex or gender discrimination. . . . Simply put, the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct."[96] While the case was still pending, "Pepperdine University's president submitted a letter to the [Department of Education's] Office of Civil Rights requesting a withdrawal of its original Title IX exemption," thus relinquishing its power to discriminate against LGBT students based on religious grounds.[97]

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93. SARAH WARBELOW & REMINGTON GREGG, HUM. RTS. CAMPAIGN, HIDDEN DISCRIMINATION: TITLE IX RELIGIOUS EXEMPTIONS PUTTING LGBT STUDENTS AT RISK 10 (2015), http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/Title_IX_Exemptions_Report.pdf. The Department of Education is creating a "searchable database that reveals the names of colleges and universities who have been granted religious exemptions from federal civil rights protections." Katie Barnes, *How Title IX Expanded to Protect LGBT Students*, ABC NEWS (Jan. 17, 2017, 1:21 PM ET), https://abcnews.go.com/Sports/title-ix-expanded-protect-lgbt-students/story?id=44832919.

94. Cara Duchen, *Rethinking Religious Exemptions from Title IX After* Obergefell, 2017 BYU ED. & L.J. 249, 253.

95. Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1154-57 (C.D. Cal. 2015). The plaintiffs asserted several allegations against the university, including: violation of their right to privacy; violation of a California education code that prohibited discrimination at a state-funded postsecondary institution (similar to Title IX); deliberate indifference to harassment, systemic intentional discrimination and retaliation for complaints about discrimination under Title IX; violation of the Unruh Civil Rights Act, which prevents business entities (in this case, Pepperdine University) from discriminating against those in California's jurisdiction; and an intentional infliction of emotional distress. *Id.* at 1157.

96. *Id.* at 1159; *see also* Shivani Patel, *Jury Rules Against Former Pepperdine Basketball Players in Landmark Civil Rights Case*, MALIBU TIMES (Aug. 17, 2017), http://www.malibutimes.com/news/article_f150171e-837b-11e7-b274-73e5c72eef79.html.

97. Patel, *supra* note 97.

In sum, most educational institutions are subject to both Title VII and Title IX, including any potential expansion of those statutes to incorporate protections for sexual orientation and transgender status. While federal agencies charged with implementing these laws are sending mixed signals as to how to interpret the prohibition against sex discrimination, courts are relying more on judicial precedent to expand the scope of this prohibition to include LGBT interests. Given this trend, employers, in general, should expect more anti-discrimination lawsuits pursuant to Title VII and Title IX in the future. At the same time, LGBT advocates are preparing for future legislation to expand the meaning of religious freedom to allow anti-LGBT advocates to engage in discriminatory conduct in the workplace and educational arena. The tension between these issues is destined for the Supreme Court, which may or may not provide more clarity.

2. State and Local Laws Protecting LGBT Rights

Regardless of whether the federal government and courts take an expansive view of Title VII and Title IX, employers and schools are still prohibited from discriminating against LGBT persons on the basis of sexual orientation and gender identity under a number of state laws. These states have enacted comprehensive laws prohibiting discrimination based on sexual orientation and gender identity in employment, education, housing, healthcare, adoption and foster care, and public accommodations.[98] In Colorado, for example, there are laws that authorize marriage licenses to same-sex couples, ban insurance exclusions for transgender healthcare, facilitate gender marker change on driver's licenses, and address harassment and bullying of students or hate crimes based on sexual orientation and gender identity.[99] Wisconsin bans discrimination based on sexual orientation alone.[100]

In regard to public accommodations, twenty states and the District of Columbia ban discrimination based on sexual orientation and gender

98. HUMAN RIGHTS WATCH, *supra* note 30, at 1-4. These states include California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, New Hampshire, Rhode Island, Utah, Vermont, and Washington. Human Rights Watch, *Human Rights Campaign State Law Map* (June 11, 2018), https://www.hrc.org/state-maps/pdf-all [hereinafter State Law Map]. One state, Wisconsin, bans discrimination based on sexual orientation alone. *Id.*

99. State Law Map, *supra* note 99. Colorado has no restrictions on "conversion therapy."

100. *Id.*

identity.[101] "Public accommodations refers to both governmental entities and private businesses that provide services to the general public such as restaurants, . . . shops,"[102] banks, movie theaters, hotels, libraries, and doctors' offices. Public accommodation non-discrimination laws protect LGBT people from being unfairly refused service or entry to, or from facing discrimination in, places accessible to the public on the basis of sexual orientation or gender identity. Forty-eight percent of the LGBT population live in states prohibiting discrimination based on sexual orientation and gender identity in public accommodations.[103] The remaining fifty-two percent of the LGBT population do not have state protection for sexual orientation and gender identity in their nondiscrimination laws.

In the employment context, twenty-one states, the District of Columbia, and at least 255 cities and counties have enacted bans on employment discrimination based on sexual orientation and gender identity. Employment non-discrimination laws protect LGBT people from being unfairly terminated, denied promotion, or discriminated against in the workplace by private employers. Minnesota became the first state to ban employment discrimination based on both sexual orientation and gender identity when it passed the Human Rights Act in 1993.[104] Nine states have an executive order, administrative order, or personnel regulation prohibiting discrimination in public employment based on sexual orientation and gender identity.[105] An additional four states have executive orders

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101. *Id.* These states include California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, New Hampshire, Rhode Island, and Washington. In Wisconsin, public accommodations non-discrimination law covers only sexual orientation. *Id.* Utah prohibits discrimination on the basis of sexual orientation and gender identity in employment and housing, but not public accommodations. *Id.*

102. *Id.*

103. Two percent of the LGBT population lives in states prohibiting public accommodations discrimination based on sexual orientation only.

104. MINN. STAT. § 363A.01 (2018). In 1993, the Minnesota Legislature amended the Minnesota Human Rights Act (MHRA) to prohibit many forms of discrimination on the basis of "sexual orientation" in the areas of employment, housing, public accommodations, public service, educational institutions, credit, and business discrimination. *Id.* § 363A.02. "The broad definition of 'sexual orientation' in MHRA made it the nation's first state civil rights law to protect transgender individuals from discrimination." *Human Rights Protections in Minnesota*, OUTFRONT MINN., http://outfront.hutman.net/library/humanrights (last visited Feb. 27, 2019).

105. These states include Indiana, Wisconsin, Ohio, Kentucky, Michigan, Montana, Pennsylvania, and Virginia. *See State Maps of Laws & Policies: Employment*, HUM. RTS. CAMPAIGN, https://www.hrc.org/state-maps/employment (last visited Mar. 21, 2019).

prohibiting discrimination in public employment based on *sexual orientation* only.[106]

In addition to state laws, numerous local ordinances prohibit discrimination based on sexual orientation and gender identity in employment and public accommodations. Today, more than four hundred cities and counties have laws in place protecting LGBT persons from sex discrimination in the workplace and the marketplace.[107] Most of these cities and counties are located within states that have similar statewide nondiscrimination laws.[108] While the vast majority of local ordinances include employment, housing, and public accommodations, some ordinances are not as comprehensive. The level of enforcement of these ordinances varies depending on the jurisdiction.

Some states have enacted blocking statutes, preventing passage or enforcement of state or local nondiscrimination laws. In North Carolina, for instance, House Bill 142 restricts cities and counties from protecting against discrimination in places of public accommodation on the basis of sexual orientation and gender identity.[109] The effect has been a decline in business for the state, including the cancellation of NCAA tournaments that were scheduled to be held in Charlotte.[110] The Arkansas Supreme Court recently "struck down a local law that protected [LGBT persons] in the city of Fayetteville from discrimination."[111] The court wrote:

> In essence, [the city ordinance] is a municipal decision to expand the provisions of the Arkansas Civil Rights Act to include persons of a particular sexual orientation and gender identity. This violates the plain wording of [the state law] by extending

106. Alaska, Arizona, Missouri, and Ohio.

107. *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender (last updated Jan. 28, 2018).

108. See *supra* notes 99-107 and accompanying text.

109. Public Facilities Privacy and Security Act, H.B. DRH40005-TC-1B, 2016 Gen. Assemb., 2d. Special Sess. (N.C. 2016), https://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v0.pdf.

110. Andrew Carter, *NCAA Polls Championship Events from North Carolina over HB2*, CHARLOTTE OBSERVER (Sept. 13, 2016, 12:39 PM), https://www.charlotteobserver.com/sports/article101464492.html.

111. Rebecca Hersher, *Arkansas Supreme Court Strikes Down Local Anti-Discrimination Law*, NPR (Feb. 23, 2017, 3:11 PM ET), https://www.npr.org/sections/thetwo-way/2017/02/23/516702975/arkansas-supreme-court-strikes-down-local-anti-discrimination-law. The Arkansas legislature passed a state law "barring cities from passing broad anti-discrimination statutes." *Id.*

> discrimination laws in the City of Fayetteville to include two classifications not previously included under state law.[112]

The City of Fayetteville's attorney argued that the local law was legal because a state anti-bullying statute covered discrimination on the basis of gender identity and sexual orientation, but this argument failed.[113]

To limit the expansion of LGBT rights at the local level, several state legislatures have enacted religious exemption laws. More than twenty states have passed state religious exemption laws allowing people to refuse services to LGBT people based on religious or moral opposition to same-sex marriage, extramarital sex, or transgender identity.[114] In Tennessee, the state legislature recently enacted a "religious freedom" measure (Senate Bill 1556) allowing counselors and therapists to deny service to a patient if doing so would conflict with the counselor's "sincerely held principles."[115] Mississippi also passed a religious freedom bill (House Bill 1523), according to Governor Phil Bryant, "to protect sincerely held religious beliefs and moral convictions of individuals, organizations and private associations from discriminatory action by state government."[116] In 2015,

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112. Protect Fayetteville v. City of Fayetteville, 510 S.W.3d 258, 263 (Ark. 2017). In this case, Protect Fayetteville filed suit challenging a city ordinance that provides for the right "to be free from discrimination because of sexual orientation and gender identity." *Id.* at 260. The Arkansas Supreme Court held that the Fayetteville ordinance violated a state statute precluding municipalities from adopting or enforcing an ordinance that creates a protected classification or prohibits discrimination on a basis not contained in state law. *Id.* at 263.

113. *Id.*

114. HUMAN RIGHTS WATCH, *supra* note 30, at 13-19.

115. TENN. CODE ANN. § 63-22-302 (West 2016). The anti-LGBT law allows licensed counselors in private practice to use their own religious beliefs as an excuse for terminating care or referring away clients because of moral objections to how the client identifies. *See also* Emma Margolin, *Tennessee Enacts 'Religious Freedom' Measure*, MSNBC (Apr. 28, 2018, 5:13 PM), http://www.msnbc.com/msnbc/tennessee-enacts-religious-freedom-measure.

116. CNN Wire, *Mississippi Passes Religious Freedom Bill That LGBT Groups Call Discriminatory*, CBS NEWS (Apr. 5, 2016, 9:04 PM), https://wtvr.com/2016/04/05/mississippi-passes-religious-freedom-bill-that-lgbt-groups-call-discriminatory/. "The so-called Religious Liberty Accommodations Act is meant to protect people, businesses, and organizations with 'sincerely held' religious beliefs about the sanctity of traditional marriage. The bill also says gender is determined by 'an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.'" Becca Andrews, *A Federal Judge Just Blocked One of the Nation's Most Sweeping Anti-LGBT Laws*, MOTHER JONES (Apr. 1, 2016, 9:11 PM), https://www.motherjones.com/politics/2016/04/mississippi-passes-new-anti-lgbt-law-masked-religious-liberty; *see also* Ashley Fantz, *North Carolina, Mississippi Measures Have Companions Elsewhere in U.S.*, CNN (Apr. 7, 2016, 12:47 AM

former Indiana Governor Mike Pence signed a similar religious exemption law, but a boycott imposed by businesses across the state forced lawmakers to amend it before it took effect.[117] Approximately 200 bills have been proposed in state legislatures around the country that could lead to discrimination against LGBT people, and nearly half of these bills invoke religion or the right to free expression of religion to justify refusing goods and services to LGBT people.

Lawmakers opposed to expanding LGBT protections argue that the right to religious freedom should trump the principle of nondiscrimination when it comes to LGBT rights. LGBT advocates, on the other hand, contend that invoking religious liberty is nothing more than a pretext to justify continued sex discrimination against LGBT people in employment, housing, education, public accommodations, and other areas. This conflict of American values was elevated to the U.S. Supreme Court this past term by a Colorado baker and a same-sex couple in a dispute over a wedding cake near Denver. The next section examines whether the Supreme Court, in one of the most anticipated rulings of the 2017-2018 term, resolved this conflict in favor of religious liberty or LGBT rights.

III. Masterpiece Cakeshop*: Striking the Balance Between Religious Freedom and Nondiscrimination, or Not*

A. The Masterpiece Cakeshop *Decision and Its Legal Implications*

The *Masterpiece Cakeshop* case arose from a brief encounter in 2012 between a gay couple, David Mullins and Charlie Craig, and a bakery owner, Jack Phillips, when the couple visited Phillips' bakery, Masterpiece Cakeshop, in Lakewood, Colorado.[118] The cakeshop offered a variety of baked goods, including cookies, brownies, and custom-designed cakes for special events, such as weddings and birthday parties.[119] The couple was planning to marry in Massachusetts and was looking for a wedding cake for a local reception to celebrate the upcoming same-sex marriage. Phillips, a

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ET), https://www.cnn.com/2016/04/06/us/nationwide-bill-religious-freedom-sexual-orientation/index.html.

117. Tony Cook, Tom LoBianco & Doug Stanglin, *Indiana Governor Signs Amended "Religious Freedom" Law*, USA TODAY (Apr. 2, 2015, 6:50 PM ET), https://www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination/70819106/.

118. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).

119. *Id.* at 1724.

devout Christian, turned down the couple's request for a wedding cake, saying that he would not use his talents to convey a message of support for same-sex marriage at odds with his religious faith.[120] Phillips informed the couple that he would make them "birthday cakes, shower cakes, [or would] sell [them] cookies or brownies," but that he would "not 'create' wedding cakes for same-sex weddings."[121] Humiliated by Phillips's refusal to serve them, the couple filed a complaint with the Colorado Civil Rights Commission, alleging that Phillips had violated the Colorado Anti-Discrimination Act (CADA), which prohibits discrimination based on sexual orientation.[122]

During its investigation, the Commission learned that Phillips had declined to sell custom wedding cakes to same-sex couples on multiple occasions, claiming religious freedom. On one occasion, "Phillips' shop had refused to sell cupcakes to a [same-sex] couple for their 'commitment celebration.'"[123] Thus, Phillips's actions appeared to be motivated by more than just religious opposition to same-sex marriage. The state Administrative Law Judge (ALJ) who adjudicated the dispute found that Phillips's actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage.[124]

"The Commission ordered Phillips to 'cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [he] would sell to heterosexual couples.'" He was instructed to rewrite his company policies and to pay for and conduct "comprehensive staff training," so that no similar request is refused in the

120. *Id.* "To Phillips," according to the Court, "creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs." *Id.* "One of Phillips' religious beliefs is that 'God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman.'" *Id.*

121. *Id.*

122. *Id.* at 1725. The Colorado Anti-Discrimination Act (CADA) prohibits discrimination based on sexual orientation in a "place of business engaged in any sales to the public and any place offering services . . . to the public." COLO. REV. STAT. ANN. § 24-34-601(1) (West 2014). CADA establishes steps for the administrative review of discrimination claims which include (1) an investigation of a complaint by the Colorado Civil Rights Division; (2) referral of the matter to the Colorado Civil Rights Commission if probable cause is found to exist; by the division, (3) initiation of a formal hearing before a state Administrative Law Judge (ALJ) who will hear evidence and argument and issue a written decision; and (4) referral back to the Commission for a public hearing and deliberative session before voting on the case. *Id.* §§ 24-34-306, 24-4-105(14).

123. *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

124. *Id.*

future.[125] The Commission further ordered him to make quarterly compliance reports for two years about his remedial and retraining measures, and to log the number of customer celebrations he declines and the reason why.[126] The Colorado Court of Appeals affirmed the Commission's decision *de novo*, and the Colorado Supreme Court declined to take the case up on appeal.[127]

In June 2018, the U.S. Supreme Court, in a 7-2 ruling, reversed the Colorado court's decision and ruled in favor of the baker, arguing that members of the Commission showed hostility toward the baker based on his religious beliefs.[128] Justice Anthony Kennedy, who wrote the majority opinion, concluded that the Commission, based on comments made by individual commissioners in the hearings, had failed to give "neutral and respectful consideration" to Phillips's claim that his right to free exercise of religion entitled him to disregard the state's anti-discrimination law.[129] The Court did not determine whether the baker's religious freedom claim prevailed over the couple's antidiscrimination claim in denying the couple's request to purchase a wedding cake, just that the baker was denied a fair opportunity to present his claim based on the Commission's conduct during the proceedings. "The Commission's hostility," Justice Kennedy wrote, "was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."[130]

The Supreme Court focused on several aspects of the case which, in its view, overshadowed the key question of how to resolve the conflict between religious freedom and nondiscrimination in a public accommodation setting where discrimination based on sexual orientation is at issue. First, the Court noted that Phillips's actions leading to the refusal of service all occurred in 2012, prior to *Obergefell* and Colorado's recognition of the validity of same-sex marriage. According to the Court,

> the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of

125. *Id.*
126. *Id.*
127. Craig v. Masterpiece Cakeshop, Ltd., 370 P.3d 272, 276 (Colo. App. 2015).
128. *Masterpiece Cakeshop*, 138 S. Ct. at 1732.
129. *Id.* at 1729.
130. *Id.* at 1732.

> gay marriage, even one planned to take place in another State.[131]

Thus, the timing of this dispute was not optimal because it preceded *Obergefell* and the expansion of LGBT rights that occurred after this landmark decision.

Second, the Court concluded that the Commission was inconsistent in its treatment of Phillips as compared to similarly situated Colorado bakers in the so-called "William Jack cases" filed with the Commission.[132] In these cases, the Court noted the Commission's finding that "a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages."[133] However, the Commission found Phillips to be in violation of Colorado's anti-discrimination law for declining to create a wedding cake for his customers. Moreover, the Court highlighted the inconsistency in the Commission's treatment of the bakers in the William Jack cases and Phillips, all of whom offered other products in the shop to their customers.[134] The Court's view of the Commission's "disparate consideration" of the various Colorado bakers was that the Commission was hostile towards Phillips to ignore his First Amendment claim, but not the claims of the other bakers.[135] The Court concluded that the "attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs."[136]

The Court's assumption that the bakers in the William Jack cases were similarly situated to Phillips's case was a key factor in its finding of disparate treatment by the Commission. But Phillips's refusal to produce

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131. *Id.* at 1728. To Phillips, using his artistic skills to make an expressive statement on a wedding cake is a free speech right that he—the baker—enjoys because it implicates his sincere religious beliefs. *Id.* at 1726.

132. *Id.* at 1732.

133. *Id.* at 1728 (citing Jack v. Gateaux, Ltd., Charge No. P20140071X (Mar. 24, 2015); Jack v. Le Bakery Sensual, Inc., Charge No. P20140070X (Mar. 24, 2015); Jack v. Azucar Bakery, Charge No. P20140069X (Mar. 24, 2015)).

134. *Id.* at 1730.

135. *Id.* at 1732.

136. *Id.* "William Jack visited three Colorado bakeries [where] [h]e requested two cakes 'made to resemble an open Bible'" and "decorated with Biblical verses." *Id.* at 1749 (Ginsburg, J., dissenting). "[He] requested that one of the cakes include an image of two groomsmen holding hands with a red 'X' over the image. On one cake, he asked the baker to inscribe the phrase 'God hates sin.' Psalm 45:7 and the opposite side of the cake Homosexuality is a detestable sin. Leviticus 18:2.' On the second cake," he requested the words, "'God loves sinners' and on the other side 'While we were yet sinners Christ died for us. Roman 5:8.'" *Id.*

for a same-sex couple a wedding cake that he regularly sold to other customers was distinct from the other bakers' refusal to make Jack cakes of a kind they would not make for anyone else. Jack requested that Biblical versus or phrases condemning homosexuality be inscribed on his cake. There was no message or anything else distinguishing the cake that the same-sex couple wanted to buy from any other wedding cake Phillips would have sold. The bakers in the Jack cases would have refused to make a cake with Jack's requested message "for any customer, regardless of [] sexual orientation," whereas Phillips's refusal to serve a same-sex couple was for "no reason other than their sexual orientation."[137] Thus, the three bakers treated Jack as they would have treated any other customer, whereas Phillips treated the customers differently from other heterosexual customers and in a way that the Colorado anti-discrimination law prohibits.

Third, the Court placed substantial emphasis on the Commission's treatment of Phillips during the case, arguing that the Commission "violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."[138] In particular, the Court was troubled with disparaging remarks made by some of the commissioners during the Commission's public hearings. The Court saw the Colorado Commission as endorsing the idea that "religious beliefs cannot legitimately be carried into the public sphere or commercial domain."[139] One commissioner suggested that Phillips cannot act on his religious beliefs "if he decides to do business in the state."[140] At a subsequent hearing, a commissioner stated:

> Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust . . . . [I]t is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[141]

These comments, in the Court's perspective, "cast doubt on the fairness and impartiality of the Commission's adjudication of [the] case."[142] The Commission, according to the Court, "gave 'every appearance' of adjudicating Phillips' religious objection based on a negative normative

137. *Id.* at 1735 (Gorsuch, J., concurring); *id.* at 1750 (Ginsburg, J., dissenting).
138. *See id.* at 1721.
139. *Id.*
140. *Id.* at 1729.
141. *Id.*
142. *Id.* at 1730.

'evaluation of the particular justification' for his objection and the religious grounds for it."[143]

It is questionable whether the Court should have given such weight to the statements of a few commissioners in determining whether Phillips's refusal to sell a wedding cake to a same-sex couple violated CADA. Procedurally, the proceedings involved several levels of independent review and decision-making, of which the Commission was but one. The Division, the Administrative Law Judge, and the Colorado Court of Appeals in a *de novo* review each produced its own findings consistent with the Commission's conclusions. As the dissenting opinion points out, the majority opinion does not describe the prejudice affecting the determinations of the adjudicators before or after the Commission in any way.[144] Instead, the Court relies heavily on its decision in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, "where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council."[145]

Finally, the Court reiterated the importance of the principle of neutrality when the Free Exercise Clause is invoked. Citing *Hialeah*, the Court wrote that "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion."[146] In the majority's view, the Commission's hostility toward Phillips was inconsistent not only with its treatment of other bakers, but with the First Amendment's guarantee of neutral treatment toward religion. "Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented," the Court concluded.[147]

Because the Court determined that Phillips did not receive the benefit of a fair and impartial adjudicatory process, it did not address the larger question of whether the right to religious liberty must yield to an otherwise valid exercise of state power to ban discrimination in public accommodations based on sexual orientation. However, the Supreme Court did state in dicta "a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services

143. *Id.* at 1731.

144. *Id.* at 1749-50 (Ginsburg, J., dissenting).

145. *Id.* at 1751-52 (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 534 (1993).

146. *Id.* at 1731 (quoting Church of Lukumi, 508 U.S. at 534).

147. *Id.* at 1732.

under a neutral and generally applicable public accommodations law."[148] "Gay persons may be spared from 'indignities when they seek goods and services in an open market,'" according to the Court.[149] This recognition of the role of state anti-discrimination laws in protecting same-sex couples suggests that business owners may not simply put up signs denying goods and services used for gay marriages. There must be a valid First Amendment defense to justify such action, and even then, it is unclear how this conflict of principles will be resolved.

B. The Aftermath of Masterpiece Cakeshop *and Its Legal Effect*

Although the Supreme Court ruled in favor of Phillips in *Masterpiece Cakeshop*, its reasoning was narrow in scope and did not diminish LGBT rights as originally feared. The Court's opinion was focused more on the Commission's hostile attitude towards Phillips's religiosity than his discriminatory conduct or the substance of his religious liberty defense. In fact, the Court—in dicta—signaled to future courts its support for a more inclusive approach toward LGBT people in public accommodations. Justice Kennedy wrote:

> Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts.[150]

Moreover, the Court noted that the lower federal courts still have work to do in bringing the appropriate case to the Supreme Court that will resolve the conflict between religious freedom and nondiscrimination claims in public accommodations. According to Justice Kennedy:

> The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.[151]

148. *Id.* at 1732 (Kagan, J., concurring).
149. *Id.* at 1748 (Ginsburg, J., dissenting).
150. *Id.* at 1727.
151. *Id.* at 1732.

Opponents of LGBT rights, however, see the *Masterpiece Cakeshop* decision in starkly different terms. Some view it as a call to arms to turn LGBT people away in public accommodations, while others interpret it more cautiously as a small step in support of religious freedom. In Tennessee, for example, a local hardware owner celebrated the Supreme Court's decision "by placing a 'No Gays Allowed' sign in front of his store." The store owner declared "the decision a victory for Christianity."[152] The Court in its opinion emphasized that religious and philosophical objections to gay marriage are protected views and in certain instances are protected forms of expression. Citing *Obergefell*, the Court observed that "[t]he 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."[153] The *Wall Street Journal*, however, criticized the Court's nod to religious freedom as a "muddle provid[ing] only gossamer protection."[154]

The first test case to assess the impact of *Masterpiece Cakeshop* was decided in Arizona a few days after the Court announced its holding. An Arizona Court of Appeals in *Brush & Nib Studio v. Phoenix* considered a challenge to a local nondiscrimination ordinance that makes it illegal for businesses to refuse service to anyone based on sexual orientation and gender identity.[155] The studio is in the business of selling cards and

152. Justin Wise, *Tennessee Store Puts 'No Gays Allowed' Sign Back Up After Supreme Court Cake Ruling*, HILL (June 7, 2018, 4:51 PM EDT), https://thehill.com/homenews/state-watch/391249-tennessee-store-puts-no-gays-allowed-sign-back-up-after-supreme-court-cake-ruling. The store owner initially posted the sign in 2015 in response to the *Obergefell* decision. *See* id.

153. *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015)).

154. Sohrab Ahmari, *Social Conservatism After Masterpiece Cakeshop*, COMMENT. MAG. (June 6, 2018), https://www.commentarymagazine.com/politics-ideas/social-conservatism-after-masterpiece-cakeshop.

155. Brush & Nib Studio, LC, v. Phoenix, No. 1 CA-CV 16-0602, at 6-7 (Ariz. Ct. App. June 7, 2018), http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2018/1%20CA-CV%2016-0602.pdf. "Brush & Nib is a calligraphy shop represented by Alliance Defending Freedom (ADF), the Religious Right legal group that represents Masterpiece and several other businesses in related cases." Liz Hayes, *The Ripple Effect of the Supreme Court's Masterpiece Cakeshop Decision*, AM. UNITED FOR SEPARATION OF CHURCH & ST., (June 8, 2018), https://www.au.org/blogs/wall-of-separation/the-ripple-effect-of-the-supreme-courts-masterpiece-cakeshop-decision; *see also* Terry Tancy, *Court Upholds Phoenix Law over Same-Sex Wedding Invitations*, ASSOCIATED PRESS (June 7, 2018), https://www.apnews.com/1fdbeaf17dab4c55891da91e5d414b62/Arizona-court-rules-for-city-on-same-sex-wedding-invitations [hereinafter Phoenix Ordinance Article].

decorations for weddings and special events.[156] The studio's evangelical owners argued that the ordinance violated their First Amendment right to free expression of religion by prohibiting the company from denying service to same-sex couples who wish to celebrate their weddings.[157] The Arizona court upheld the LGBT nondiscrimination law and concluded that Christian owners of a studio open to the general public must not "discriminate against potential patrons based on sexual orientation."[158] Judge Lawrence Winthrop, writing for a unanimous three-judge panel, explained that "the primary purpose of [the business] was not to convey a particular message but rather to engage in commercial sales activity."[159] Citing *Masterpiece Cakeshop* and a number of state law cases rejecting similar claims brought by bakers, florists, photographers, and venue rental owners, Judge Winthrop concluded that "[t]he case before us is one of a blanket refusal of service to the LGBTQ community."[160] Importantly, the Arizona court's decision in *Brush & Nib Studios* suggests that state courts will apply *Masterpiece Cakeshop* broadly to protect LGBT rights in the marketplace, at least where local law prohibits discrimination based on sexual orientation and gender identity.

However, the Supreme Court again signaled its unwillingness to resolve the tension between religious freedom and LGBT equality when, in late June 2018, it ordered the Washington Supreme Court to revisit its decision to fine a Christian florist for violating a state law prohibiting discrimination against same-sex couples.[161] In *State v. Arlene's Flowers*, the Benton

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156. *See* Carol Kuruvilla, *Wedding Invitation Business Can't Shun Same-Sex Couples, Arizona Court Rules*, HUFFINGTON POST (June 8, 2018), https://www.huffingtonpost.com/entry/wedding-invitation-business-same-sex-couples-arizona-court_us_5b19a797e4b09d7a3d707a37.

157. The studio was run by Christian owners, Joanna Duka and Breanna Koski,

> who argue[d] that they cannot separate their religious beliefs from their work. They want[ed] to post a public statement to notify potential customers that their studio won't create artwork that "demeans others, endorses racism, incites violence, contradicts [their] Christian faith, or promotes any marriage except marriage between one man and one woman."

Id. The company produced "custom-designed wedding invitations, among other products." *Id.*

158. *Brush & Nib Studio*, No. 1 CA-CV 16-0602, at 15.

159. *Id.* at 19.

160. *Id.* at 15.

161. State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017), *vacated and remanded sub nom.*, Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018) (mem.). Stutzman had previously sold the couple flowers and knew they were gay; however, on the day of the

County Superior Court fined Barronelle Stutzman, a local florist, $1000 for denying wedding-related services to a same-sex couple, Robert Ingersoll and Curt Freed, in violation of the Washington Law Against Discrimination (WLAD) and the Consumer Protection Act (CPA).[162] On appeal, the Washington Supreme Court upheld the lower court's decision, stating that "[Stutzman's] floral arrangements do not constitute protected free speech, and that providing flowers to a same-sex wedding would not serve as an endorsement of same-sex marriage."[163] Unlike the *Masterpiece Cakeshop* decision, there was no finding of religious hostility towards Stutzman in the court proceedings leading up to the state court's decision.[164] The Washington Supreme Court wrote:

> As every other court to address the question has concluded, public accommodations laws do not simply guarantee access to goods or services. Instead, they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace. . . . Were we to carve out a patchwork of exceptions for ostensibly justified discrimination, that purpose would be fatally undermined.[165]

The court further concluded that "this case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches."[166] The U.S. Supreme Court, in granting Stutzman's petition for certiorari, stated in a single sentence that the case should be remanded to the lower court "for further consideration in light" of the *Masterpiece Cakeshop* decision.[167] According to Professor Steve Vladeck at the University of Texas Law School, "[I]t's quite possible that this one-sentence order will open the door to serious disagreements among the lower

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attempted purchase, she told them that she could not provide flowers for their wedding because same-sex marriage was incompatible with her Christian beliefs. *Id.* at 549.

162. *Id.* at 550; Rachel La Corte, *Washington Court Rules Against Florist in Gay Wedding Case*, DETROIT NEWS (Feb. 17, 2017, 12:41 PM ET), https://www.detroitnews.com/story/news/nation/2017/02/16/gay-wedding-florist/97997040/2017.

163. La Corte, *supra* note 164; *see also id.* at 557.

164. Robert Barnes, *Justices Decline to Rule on Florist Who Refused Wedding Services to Same-Sex Couple*, WASH. POST (June 25, 2018), https://www.washingtonpost.com/politics/courts_law/justices-decline-to-rule-on-florist-who-refused-to-serve-same-sex-couple/2018/06/25/c7bb1916-787c-11e8-93cc-6d3beccdd7a3_story.html (via subscription).

165. *Arlene's Flowers*, 389 P.3d at 851-52.

166. *Id.* at 851.

167. Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671, 2671 (2018).

courts over when and under what circumstances business owners can refuse to serve same-sex couples . . . ."[168]

It is too early to determine whether the U.S. Supreme Court's decision to remand the *Arlene Flower's* case is a positive or negative development for LGBT rights. Had the Court denied the florist's petition for certiorari, it would have sent a positive signal to the LGBT community that the Washington Supreme Court was correct in its decision to rule in favor of the same-sex couple. On the other hand, had the Court taken the case up on appeal for the 2018-2019 term, this would have been more problematic for the couple and LGBT rights in general. Instead, the Court chose for the second time this term not to show its hand and to leave it up to the lower courts to sort out whether a business owner's religious beliefs can justify the denial of wedding services to a same-sex couple in public accommodations.

Similar cases involving the clash between religious freedom and nondiscrimination are pending in other states as well. In Minnesota, a federal district court judge dismissed a suit challenging a state law for the right to refuse to shoot wedding videos for same-sex couples.[169] In his ruling, U.S. District Court Judge Tunheim described the business owner's actions as "conduct akin to a 'White Applicants Only' sign" that may be outlawed without infringing on First Amendment rights.[170] The videography company, Telescope Media, filed an appeal with the Eighth Circuit in October 2017, and a decision is expected this coming term.[171] In Kentucky, too, the state Supreme Court is examining whether a local sexual orientation and gender identity nondiscrimination provision can compel a Lexington printer to provide T-shirts with messages that violate his religious beliefs. The Lexington Human Rights Commission, in 2012, determined that a T-shirt order for organizers of a Lexington gay pride festival should have been filled by the printer despite his religious freedom

168. Ariane de Vogue & Eli Watkins, *Supreme Court Won't Take Up Case of Florist Who Refused Service for Same-Sex Couple*, CNN (June 25, 2018, 10:53 AM ET), https://www.cnn.com/2018/06/25/politics/supreme-court-flowers/index.html.

169. Telescope Media Grp. v. Lindsey, 271 F. Supp. 3d 1090 (D. Minn. 2017).

170. *Id.* at 1112.

171. Christine Hauser, *Minnesota Videographers Said They Don't Have to Film Gay Weddings. A Judge Disagreed*, N.Y. TIMES (Sept. 22, 2017), https://www.nytimes.com/2017/09/22/us/minnesota-gay-marriage-video.html; *Telescope Media Group v. Lindsey*, FREEDOM FOR ALL AM., *https://www.freedomforallamericans.org/telescope-media-group-v-lindsey/* (last visited Feb. 27, 2019); Emily Zantow, *Videographers Argue for Right to Refuse Gay Couples*, COURTHOUSE NEWS SERV. (Oct. 17, 2018), https://www.courthousenews.com/videographers-argue-for-right-to-refuse-gay-couples.

claim.[172] These and other cases will likely result in a divergence of opinions among courts attempting to answer the question of whether religious freedom trumps nondiscrimination in the marketplace, at least until the current U.S. Supreme Court, which now includes a new conservative Justice, takes another look at the issue.

IV. Conclusion

Since the 2015 *Obergefell* decision, U.S. courts have been working to strike the right balance between the promotion of LGBT equality and the protection of religious liberty in cases involving sex discrimination based on sexual orientation and gender identity in employment, education, public accommodations, and other areas. To date, courts have interpreted the prohibition against "sex" discrimination in Title VII, Title IX, and numerous state statutes to allow LGBT people to seek recourse and redress when they are fired, refused promotion, or denied goods and services based on sexual orientation or gender identity. At the same time, lawmakers who oppose same-sex marriage and transgender equality have enacted religious exemption laws in some states to protect employers and business owners who claim that compliance with certain nondiscrimination laws violates their religious or moral beliefs. These religious exemption laws have opened the door for individuals to assert religious or moral objections to justify discriminatory actions taken against LGBT people.

Freedom of religion and freedom from discrimination are core principles under U.S. law, and neither lawmakers nor judges can trample upon these basic freedoms. The tension between these freedoms, however, lies at the crux of the political and cultural divide in the United States over LGBT rights, and the courts are now being asked to decide which of these basic freedoms should prevail when the two are in conflict. Currently, lawsuits are pending in several states involving the denial of services to LGBT people by hospitals, banks, funeral homes, child placement agencies, educational institutions, and small businesses who oppose same-sex marriage or transgender equality on religious or moral grounds. Some of these lawsuits involve more comprehensive nondiscrimination statutes or ordinances that bar discrimination based on sexual orientation and gender identity, while other cases hinge on laws more limited in scope.

172. Richard Nelson, *Supreme Court Ruling May Impact KY. Religious-Liberty Case*, LEXINGTON HERALD-LEADER (June 7, 2018, 5:18 PM), http://www.kentucky.com/opinion/op-ed/article212767209.html.

The highly anticipated *Masterpiece Cakeshop* decision was expected to resolve the question of whether a business owner's religious beliefs can justify the denial of products and services to LGBT customers in the area of public accommodations. But the Supreme Court ultimately dodged the question, instead focusing on procedural irregularities with the case and the Colorado Commission's dismissive attitude towards a cakeshop owner's claim of religious freedom under the First Amendment. In the end, the *Masterpiece Cakeshop* decision will have less of an impact on LGBT rights and religious freedom advocacy than originally predicted. However, some of the dicta in Justice Kennedy's opinion will likely be used by both sides in future disputes involving discrimination against LGBT people in the workplace and the marketplace. For the time being, the law as it applies to LGBT people in the United States will remain a patchwork quilt of federal, state, and local protections prohibiting discrimination in various areas of economic and social life.