

# RELIGIOUS LIBERTY VS. DISCRIMINATION: STRIKING A BALANCE WHEN BUSINESS OWNERS REFUSE SERVICE TO SAME-SEX COUPLES DUE TO RELIGIOUS BELIEFS

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## I. INTRODUCTION

On an early spring day in 2015, a small family-owned restaurant opened its doors for business in the same manner that it did every day. Mrs. Jones worked to ensure everything in the dining room of the restaurant was in pristine condition while Mr. Jones worked in the kitchen preparing ingredients, rolling out dough, and preheating the pizza ovens for the day. However, this day would be different from other days at the restaurant. The Midwestern state in which the restaurant was located had recently enacted a highly controversial piece of “religious freedom” legislation and emotions in the state were highly charged. Many argued that the law allowed discrimination against those in the Lesbian, Gay, Bisexual, and Transgender (LGBT) community. Others argued the law was only in place to protect religious liberty.

In an attempt to discover what local business owners thought of this new law, a local television station sent a reporter down the street to speak with some local owners. One of the local businesses along the reporter’s route was a small family-owned pizza restaurant. The reporter entered the restaurant and asked to speak with the managers. Mr. and Mrs. Jones both stopped working, took a seat at one of the booths, and began to answer the reporter’s questions. The reporter asked whether they would discriminate against individuals based on sexual orientation and whether they believed the new law allowed for discrimination. They both explained that they were members of the Christian faith and that loving all people, regardless of their demographic classification, was a core tenant of their faith. They stated that they would never refuse to serve a patron just because that person was a member of the LGBT community and that discrimination was wrong and against every tenant of their faith.

The reporter then asked them, “what if an engaged same-sex couple asked for you to cater the meal at their wedding ceremony, would you do that?” Mr. and Mrs. Jones looked at one another with concerned looks on their faces; they knew the potential consequences of their answer. They had been watching the news about the reactions to the passing of the

“religious freedom” law. They knew about the boycotts, protests, and economic consequences that could befall them depending on their answer. After a brief pause, Mrs. Jones answered, “we would not be able to do that; our faith teaches us that marriage should only be between one man and one woman. While we would never refuse to serve an LGBT individual in our restaurant, we could not participate in a same-sex wedding ceremony or reception by catering a meal.” The reporter thanked them for their time and went back to the news station with his story.

The television news station began running the story focusing on the Jones’s statement that they would not be able to cater a same-sex wedding ceremony. The story was quickly picked up by the national media and heavily circulated by opponents of the Jones’s religious beliefs and consequent political views. Shortly thereafter, protestors arrived in front of the Jones’s small restaurant waving banners, carrying signs, and ensuring potential patrons could not enter the building. Protestors created a fake website for the restaurant containing graphic pornographic images, and the restaurant’s Facebook was flooded with sexually explicit messages attacking the Jones family. The family received numerous death threats and threats that their restaurant would be burned down. Before long, the Joneses were forced to close the restaurant because of economic losses and fear for their own safety.

While the Joneses are fictional, their story is based on the true experiences of a small family owned pizzeria in Walkerton, Indiana, following the state’s passing of the Indiana Religious Freedom Restoration Act.<sup>1</sup> Stories such as these highlight why very narrow protections should be carved out for business owners, like the Joneses, who do not believe in discrimination based on sexual orientation, but whose religious beliefs do not allow them to participate in same-sex marriage ceremonies and celebrations by providing goods and services for those ceremonies and celebrations.

Cases involving business owners like the Joneses are only now beginning to go through the court system. A very small number of socially liberal courts and administrative law judges have weighed in on the issue of whether business owners with religion-based objections to same-sex marriage must provide service to engaged same-sex couples, and have thus

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1. Justin Wm. Moyer, *Indiana Pizza Shop Won’t Cater Gay Wedding, Gets Over \$50K From Supporters*, WASH POST (Apr. 2, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/04/02/indianas-memories-pizza-wouldnt-cater-gay-wedding-gets-40k-in-crowdfunding/>.

far ruled against religious business owners.<sup>2</sup> However, this is too small a sample size to clearly determine how these cases will unfold in more moderate or conservative courts, and what the final resolution of this issue will be. Many states are now attempting to enact statutes which provide enhanced religious liberty protections and some states are attempting to enact laws which specifically protect business owners such as the Joneses.<sup>3</sup>

This comment argues that a statute which adequately protects business owners who have religion-based objections to same-sex marriage but does not provide for blanket discrimination against the LGBT community is feasible if it is narrowly tailored to encompass only businesses in the wedding industry engaged in wedding-related business transactions. In fact, the same statute can also ensure LGBT individuals are not discriminated against in conducting regular business activities. Thus, this comment proposes a sample statute successfully accomplishing the dual objectives of protecting religious liberty and banning discrimination based on sexual orientation.

Section II of this comment reviews court decisions addressing issues involving business owners refusing to serve same-sex couples for religious reasons. Section II will then review both proposed, and enacted statutes which provide enhanced religious liberty protections to individuals and businesses. Section III further analyzes these court decisions and enacted and proposed statutes. Additionally, Section III proposes a narrowly tailored model compromise statute which adequately protects business owners in the wedding industry with religion-based objections to same-sex marriage, but disallows businesses from discriminating against a potential customer only because the potential customer is a member of the LGBT community, and prohibits discrimination based upon sexual orientation alone.

## II. BACKGROUND

Because the First Amendment is the backbone of religious freedom in the United States, this section will first examine the U.S. Constitution's First Amendment. Secondly, this section will review the court decisions

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2. See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); *Sweetcakes by Melissa*, 44-14 & 45-14, 50-51 (Oregon Bureau of Labor and Industries) (Jan. 29 2015), [http://media.oregonlive.com/business\\_impact/other/BOLI-sweetcakes.pdf](http://media.oregonlive.com/business_impact/other/BOLI-sweetcakes.pdf); *Masterpiece Cakeshop, Inc.*, 2013-0008 (Colorado Civil Rights Commission) (Dec. 6 2013), [https://www.aclu.org/sites/default/files/assets/initial\\_decision\\_case\\_no.\\_cr\\_2013-0008.pdf](https://www.aclu.org/sites/default/files/assets/initial_decision_case_no._cr_2013-0008.pdf); *Washington v. Arlene's Flowers, Inc.*, No. 13-2-00871-5 (Wash. Superior Court, Benton Cnty., Feb. 18, 2015).
  3. See generally S.B. 1062, 51st Leg. 2d Reg. Sess. (Ariz. 2014); MISS. CODE ANN. § 11-61-1(5) (West 2014); S.B. 101, 119 Gen. Assemb. 1st Reg. Sess. (Ind. 2015); S.B. 296, 2015 Gen. Sess. (Utah 2015).

which have examined whether business owners who have religion-based objections to serving same-sex couples involved in a wedding-related matter must, nonetheless, be required to serve those individuals.<sup>4</sup> Finally, it examines proposed and enacted legislation with the stated purpose, or potential effect, of protecting business owners who have religion-based objections to same-sex marriage.

#### A. The First Amendment of the United States Constitution<sup>5</sup>

The corner stone of religious liberty and free speech protection in the United States is the First Amendment of the United States Constitution. The First Amendment declares that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”<sup>6</sup> While the First Amendment originally only applied to prohibitions enacted by the federal government, in *Cantwell v. Connecticut*, the United States Supreme Court held state governments are likewise forbidden from making laws prohibiting the free exercise of religion.<sup>7</sup> Though the First Amendment appears clear on its face, courts interpreting it do not always agree, and occasionally find it inapplicable to particular situations.<sup>8</sup> To properly state a First Amendment Free Exercise Claim, courts have held that parties must show: (a) the law at issue is not a “neutral law of general applicability” or (b) the parties’ challenges implicate the Free Exercise Clause and another independent constitutional protection, or (c) the law functions “in a context that len[ds] itself to individualized government assessment of the reasons for the relevant conduct.”<sup>9</sup>

#### B. Court Decisions Holding Businesses in the Wedding Industry Cannot Refuse Service to Same-Sex Couples Involved in the Wedding Process

While the sample size is very small, and the decisions thus far come from socially liberal jurisdictions, courts unanimously agree businesses in

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4. See *Elane Photography*, 309 P.3d 53 (N.M. 2013); Sweetcakes by Melissa, 44-14 & 45-14, 50-51 (Oregon Bureau of Labor and Industries) (Jan. 29 2015), [http://media.oregonlive.com/business\\_impact/other/BOLI-sweetcakes.pdf](http://media.oregonlive.com/business_impact/other/BOLI-sweetcakes.pdf); Masterpiece Cakeshop, Inc., 2013-0008 (Colorado Civil Rights Commission) (Dec. 6 2013), available at [https://www.aclu.org/sites/default/files/assets/initial\\_decision\\_case\\_no\\_cr\\_2013-0008.pdf](https://www.aclu.org/sites/default/files/assets/initial_decision_case_no_cr_2013-0008.pdf); *Washington v. Arlene’s Flowers, Inc.*, No. 13-2-00871-5 (Wash. Super. Ct. Benton Cnty., Feb. 18, 2015).
  5. U.S. CONST. amend. I.
  6. *Id.*
  7. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).
  8. See, e.g., *Elane Photography*, 309 P.3d 53.
  9. See *Employment Div. Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 879–84 (1990).

the wedding industry cannot refuse service to same-sex couples involved in the wedding process under the First Amendment.<sup>10</sup> The cases involving these decisions are as follows.

*1. Sweetcakes by Melissa, 44-14 & 45-14 (Oregon Bureau of Labor and Industries) (Jan. 29 2015)*<sup>11</sup>

In this administrative decision, the Administrative Law Judge (ALJ) held that a Christian owned bakery, Sweetcakes by Melissa, was required by law to provide a wedding cake for a same-sex couple.<sup>12</sup> The bakery argued that its refusal to do so was protected by the First Amendment's freedom of religion and free speech provisions.<sup>13</sup> The Agency argued that the Christian bakers violated Oregon's public accommodation laws by refusing to provide the same-sex couple a wedding cake and by communicating their intent to discriminate based on sexual orientation.<sup>14</sup>

Under the state's public accommodation law, "all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age . . . ." <sup>15</sup> A place of public accommodation is defined as "(a) [a]ny place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise" and "(b) [a]ny place that is open to the public and owned or maintained by a public body, . . . regardless of whether the place is commercial in nature" and "(c) any service to the public that is provided by a public body, . . . regardless of whether the service is commercial in nature."<sup>16</sup>

The ALJ rejected the bakery's arguments and found no violation of the bakery's religious liberties or free speech.<sup>17</sup> The ALJ found that since

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10. See *Sweetcakes by Melissa, 44-14 & 45-14, 50-51* (Oregon Bureau of Labor and Industries) (Jan. 29 2015), available at [http://media.oregonlive.com/business\\_impact/other/BOLL-sweetcakes.pdf](http://media.oregonlive.com/business_impact/other/BOLL-sweetcakes.pdf); *Masterpiece Cakeshop, Inc. 2013-0008* (Colorado Civil Rights Commission) (Dec. 6 2013), available at [https://www.aclu.org/sites/default/files/assets/initial\\_decision\\_case\\_no\\_cr\\_2013-0008.pdf](https://www.aclu.org/sites/default/files/assets/initial_decision_case_no_cr_2013-0008.pdf); *Elane Photography*, 309 P.3d 53 (N.M. 2013); *Washington v. Arlene's Flowers, Inc.*, No. 13-2-00871-5 (Wash. Superior Court, Benton Cnty., Feb. 18, 2015), [https://www.aclu.org/sites/default/files/assets/2015-02-18--ord\\_denying\\_defs\\_msj\\_and\\_granting\\_pls\\_and\\_wa\\_states\\_msj.pdf](https://www.aclu.org/sites/default/files/assets/2015-02-18--ord_denying_defs_msj_and_granting_pls_and_wa_states_msj.pdf).

11. *Sweetcakes by Melissa, 44-14 & 45-14* at 50-51.

12. *Id.*

13. *Id.* at 25-26.

14. *Id.* at 8.

15. OR. REV. STAT. § 659A.403(1) (2013).

16. *Id.*

17. *Sweetcakes by Melissa, 44-14 & 45-14* at 50-51.

the bakery “was a place o[f] service offering goods and services—wedding cakes and the design of those cakes—to the public” it was a place of “public accommodation.”<sup>18</sup> He further found that because Oregon law prohibits discrimination based on sexual orientation, refusing to bake a cake for a same-sex wedding was synonymous with refusing to bake a cake because of sexual orientation.<sup>19</sup>

2. *Masterpiece Cakeshop, Inc., 2013-0008 (Colorado Civil Rights Commission) (Dec. 6 2013)*<sup>20</sup>

The facts of this administrative decision are essentially the same as *Sweetcakes by Melissa*, except this case took place in Colorado.<sup>21</sup> The bakers employed free speech and religious freedom arguments to defend their refusal to bake a wedding cake for a same-sex couple arguing that “compelling them to prepare a cake for a same-sex wedding is equivalent to forcing them to ‘speak’ in favor of same-sex weddings.”<sup>22</sup> The ALJ found this argument unpersuasive, stating “[t]here is no doubt that decorating a wedding cake involves considerable skill and artistry. . . [but the] product does not necessarily qualify as “speech,” as would saluting a flag, marching in a parade, or displaying a motto.”<sup>23</sup>

With regard to the bakers’ religious liberty claim, the ALJ found that “refusal to provide a cake for [a] same-sex wedding is distinctly the type of conduct that the Supreme Court has repeatedly found subject to legitimate regulation.”<sup>24</sup> Furthermore the ALJ found that, “[s]uch discrimination is against the law [and] adversely affects the right . . . to be free from discrimination in the marketplace.”<sup>25</sup>

3. *Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013)*<sup>26</sup>

In this case, a wedding photography business refused to photograph a same-sex “commitment ceremony.”<sup>27</sup> The business was sued under the

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18. *Id.* at 10.

19. *Id.* at 16.

20. *Masterpiece Cakeshop, Inc. 2013-0008 (Colorado Civil Rights Commission) (Dec. 6 2013)*, available at [https://www.aclu.org/sites/default/files/assets/initial\\_decision\\_case\\_no.\\_cr\\_2013-0008.pdf](https://www.aclu.org/sites/default/files/assets/initial_decision_case_no._cr_2013-0008.pdf).

21. *See id.* at 2–3.

22. *Id.* at 7.

23. *Id.*

24. *Id.*

25. *Id.* at 10.

26. *Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013)*.

27. *See Elane Photography, 309 P.3d at 59*. The term “commitment ceremony” may mean different things to different people. However, the term is frequently used to refer to a type of public ceremony, perhaps similar to a wedding ceremony, where a couple has some intimate exchange

New Mexico Human Rights Act (NMHRA).<sup>28</sup> NMHRA prohibits “any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap.”<sup>29</sup>

As in the above cases, the photography business defended its conduct with religious freedom and free speech arguments, while also defending its conduct under the state’s Religious Freedom Restoration Act (NMFRA).<sup>30</sup> The court found that the photography business was a place of public accommodation, and that there was no free speech violation because NMHRA does not force businesses to speak government-mandated messages or publish another’s speech.<sup>31</sup> The court found that the First Amendment’s freedom of religion provision does not allow an individual to escape an obligation to comply with valid and neutral laws of general applicability.<sup>32</sup> Finally, the court found that NMFRA was not applicable because NMFRA’s statutory language states it only applies when the government is a party and the government was not a party here.<sup>33</sup>

4. *Washington v. Arlene’s Flowers, Inc., No. 13-2-00871-5 (Wash. Superior Court, Benton Cnty., Feb. 18, 2015)*<sup>34</sup>

Defendant Barronelle Stutzman was the president of Arlene’s Flowers, a flower shop which sold flowers for events, including weddings.<sup>35</sup> Stutzman was a Christian, had religion-based opposition to same-sex marriage, and refused to provide flowers for same-sex weddings.<sup>36</sup> Plaintiff Robert Ingersoll was a gay man and frequent customer of Arlene’s Flowers who had spent over \$4,500 at Arlene’s Flowers over the years.<sup>37</sup> When the State of Washington legalized same-sex marriage, Ingersoll and his partner

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describing their love for one another but does not involve the law or government in any way (i.e., there is change in legal status among the parties involved and no government issues license or certificate). *Commitment Ceremonies*, UNMARRIED EQUALITY, <http://www.unmarried.org/commitment-ceremonies/> (last visited Mar. 28, 2015).

28. *Id.* at 58–59.

29. N.M. STAT. ANN. § 28-1-7 (2006).

30. *See Elane Photography*, 309 P.3d at 63.

31. *Id.* at 59.

32. *Id.* at 74–75.

33. *Id.* at 72–76.

34. *Washington v. Arlene’s Flowers, Inc., No. 13-2-00871-5 (Wash. Superior Court, Benton Cnty., Feb. 18, 2015)*.

35. *Id.* at 5.

36. *Id.* at 6.

37. *Id.*

decided to get married and attempted to purchase their wedding flowers from Arlene's Flowers.<sup>38</sup>

When Ingersoll came to Stutzman to inquire about flowers for his wedding, Stutzman informed Ingersoll that she could not provide the flowers for his wedding based on her religious belief that same-sex marriage was wrong.<sup>39</sup> The State of Washington, under its Attorney General, and Robert Ingersoll subsequently filed suit against Stutzman and Arlene's Flowers under the Washington Law Against Discrimination (WLAD).<sup>40</sup> Under WALD:

[t]he right to be free from discrimination because of . . . sexual orientation . . . is recognized as and declared to be a civil right. This right to be free from discrimination "shall include, but not be limited to: (b) [t]he right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement."<sup>41</sup>

Stutzman argued that she simply declined to participate in a same-sex wedding, and that compelling her to participate violated her First Amendment free speech and free exercise of religion rights.<sup>42</sup> The court was unpersuaded by Stutzman's arguments, and in applying the analysis from *Elane Photography* cited above, found that Stutzman discriminated against Ingersoll based on his sexual orientation and thus violated WLAD.<sup>43</sup> Because the State of Washington declared that same-sex marriage is a civil right accorded to gay and lesbian residents and has declared discrimination based on sexual orientation "a menace to 'the institutions and foundations of a free democratic state,'" the court found that "the conflict between Stutzman's religiously-motivated conduct in commerce and the law is insoluble."<sup>44</sup>

### C. Statutes Protecting Religious Liberties.

Many liberal, conservative, and moderate states have proposed or enacted laws providing specific religious liberty protections.<sup>45</sup> While many of these statutes were enacted long before the cases cited above, some of the more recent statutes have been proposed or enacted to prevent these

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38. *Id.* at 7.

39. *Id.*

40. *Id.* at 3–4.

41. WASH. REV. CODE. § 49.60.030(1)(b) (2009).

42. *Arlene's Flowers, Inc.*, No. 13-2-00871-5 at 4–5.

43. *Id.* at 29–30.

44. *Id.* at 38.

45. *See infra* notes 57, 58, and 59.

types of court holdings from occurring. Some of the recently enacted statutes have not been enacted for the specific purpose of protecting business owners in cases like the above, however, some individuals believe they could provide those types of protections. Others argue these statutes would allow individuals to blanketly discriminate against LGBT individuals under the guise of “religious liberty.” A number of these proposals and statutes are discussed below.

1. *Arizona Senate Bill 1062*<sup>46</sup>

According to some, in an attempt to protect businesses whose owners have religious objections to same-sex marriages, the Arizona legislature passed SB 1062.<sup>47</sup> The bill expanded on Arizona’s prior Religious Freedom Restoration Act in numerous ways.<sup>48</sup> One of these ways was by expanding the definition of “person” to include not only “a religious assembly or institution” as the previous law defined, but also, “any individual, association, partnership, corporation, church, religious assembly or institution, estate, trust, foundation or other legal entity.”<sup>49</sup>

The major provision of the bill provided that “[s]tate action shall not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability.”<sup>50</sup> The state could only burden a person’s exercise of religion if the burden was “in furtherance of a compelling governmental interest” and was “[t]he least restrictive means of furthering that compelling governmental interest.”<sup>51</sup>

However, the bill was widely attacked as an overly broad method to legally discriminate against the LGBT community.<sup>52</sup> Following the backlash, Governor Brewer vetoed it after pressure from the business community, and fellow Republicans encouraged her to do so.<sup>53</sup> She stated that it did “not address specific or pressing concerns related to religious liberty in Arizona” and was “poorly worded and could result in unintended and negative consequences.”<sup>54</sup>

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46. S.B. 1062, 51st Leg. 2d Reg. Sess. (Ariz. 2014).

47. Ray Sanchez & Miguel Marquez, *Arizona Lawmakers Pass Controversial Anti-gay Bill*, CNN (Feb. 21, 2014), <http://www.cnn.com/2014/02/21/us/arizona-anti-gay-bill/>.

48. See S.B. 1062, 51st Leg. 2d Reg. Sess. (Ariz. 2014).

49. *Id.*

50. *Id.*

51. *Id.*

52. Ben Jacobs, *Jan Brewer Keeps Arizona in the 21st Century*, DAILY BEAST (Feb. 26, 2014), <http://www.thedailybeast.com/articles/2014/02/26/jan-brewer-vetoes-anti-gay-bill.html>.

53. Alia Beard Rau, Yvonne Wingett Sanchez & Mary Jo Pitzl, *Arizona Gov. Jan Brewer Vetoes Senate Bill 1062*, THE ARIZ. REPUBLIC (Feb. 26, 2014), <http://www.azcentral.com/news/politics/articles/20140226arizona-jan-brewer-1062-statement.html>.

54. Jacobs, *supra* note 52.

2. *Mississippi Religious Freedom Restoration Act § 11-61-1 (2014)*<sup>55</sup>

While Arizona was unsuccessful in its attempt to pass enhanced religious liberty protections, Mississippi did successfully enact into law a “Religious Freedom Restoration Act” (RFRA) on April 3, 2014.<sup>56</sup> This Act is based on, and very similar to, the Federal RFRA.<sup>57</sup> Mississippi is one of at least twenty-one states that have adopted RFRA, based on the Federal RFRA.<sup>58</sup> Specifically, the critical language of this statute states that:

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability . . . [unless] it demonstrates that application of the burden to the person: (i) Is in furtherance of a compelling governmental interest; and (ii) Is the least restrictive means of furthering that compelling governmental interest.<sup>59</sup>

While this statute does not have language specifically stating businesses could use religion as a defense, many proponents of the law stated that it effectively protects businesses from judicial decisions like

55. MISS. CODE ANN. § 11-61-1 (West 2014).

56. See Paresh Dave, *Miss. Governor Signs Religious Freedom Bill; Civil Rights Groups Dismayed*, L.A. TIMES (Apr. 4, 2014), <http://articles.latimes.com/2014/apr/04/nation/la-na-nn-mississippi-governor-signs-religious-freedom-bill-20140404>.

57. See *The Religious Freedom Restoration Act*, 42 U.S.C § 2000bb (2014); Adam Serwer, *Anti-gay Activists Celebrate Mississippi ‘Religious Freedom’ Law*, MSNBC (Apr. 2 2014), <http://www.msnbc.com/msnbc/mississippi-religious-freedom-law>.

58. As of April 19, 2015, these twenty-one states include: Alabama, ALA. CONST. amend. 62; Arkansas, 2015 SB 975 (as enacted Apr. 2, 2015); Arizona, ARIZ. REV. STAT. § 41-1493 (2015); Connecticut, CONN. GEN. STAT. ANN. § 52-571b (West 2015); Florida, FLA. STAT. ANN. §§ 761.01-761.05 (2014); Idaho, IDAHO CODE ANN. §§ 73-401 to 73-404 (West 2014); Illinois, 775 ILL. COMP. STAT. ANN. 35 (West 2014); Indiana, 2015 SB 101 (as enacted Mar. 26, 2015); Kansas, KAN. STAT. ANN. §§ 60-5301 to 60-5305 (West 2014); Kentucky, KY. REV. STAT. ANN. § 446.350 (West 2014); Louisiana, LA. REV. STAT. ANN. §§ 5231-5242 (2014); Mississippi, MISS. CODE ANN. § 1-3-39 (West 2014); Missouri, MO. REV. STAT. § 1.302 (2014); New Mexico, N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (2014); Oklahoma, OKLA. STAT. tit. 51, §§ 251-258 (2014); Pennsylvania, 71 PA. STAT. § 2403 (2014); Rhode Island, R.I. GEN. LAWS ANN. §§ 42-80.1-1 to 42-80.1-4 (2014); South Carolina, S.C. CODE ANN. §§ 1-32-10 to 1-32-60 (2014); Tennessee, Tenn. Code Ann. § 4-1-407 (2014); Texas, TEX. CIV. PRAC. & REMEDIES CODE §§ 110.001-110.012 (2014); and Virginia, VA. CODE ANN. §§ 57-1 to 57-2.1 (2014). At least twelve other states have adopted protections such as those in the federal Religious Freedom Restoration Act through court order, including: Alaska, Hawaii, Indiana, Maine, Massachusetts, Michigan, Minnesota, Montana, North Carolina, Ohio, Washington, and Wisconsin. Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, WASH. POST (Mar. 1, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/>. As of April 19, 2015, at least twelve additional states have considered the enactment of state Religious Freedom Restoration Acts during the current legislative term, including: Colorado, Georgia, Hawaii, Maine, Michigan, Montana, Nevada, North Carolina, South Dakota, Utah, West Virginia and Wyoming. *2015 State Religious Freedom Restoration Legislation*, NAT’L CONFERENCE OF STATE LEGISLATURES (Apr. 16, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx>.

59. MISS. CODE ANN. § 11-61-1(5) (West 2014).

those discussed in the Washington, Oregon, Colorado, and New Mexico cases above.<sup>60</sup> One of the reasons proponents of the law believe this is because the word “person” as used in this Mississippi religious liberty law, is defined by another Mississippi statute to include public and private corporations; thus, this RFRA also protects businesses.<sup>61</sup>

### 3. *Indiana Religious Freedom Restoration Act S.B. 101*<sup>62</sup>

On March 26, 2015, Indiana enacted its own RFRA based on the Federal RFRA and very similar to the Mississippi statute cited above.<sup>63</sup> Like other RFRAs, it provides that the government cannot substantially burden one’s exercise of religion unless the government demonstrates the burden furthers a compelling government interest in the least restrictive means possible.<sup>64</sup> However, one of the major differences with this statute compared to other RFRAs is that it specifically defines the word “person” to mean:

(1) An individual. (2) An organization, a religious society, a church, a body of communicants, or a group organized and operated primarily for religious purposes. (3) A partnership, a limited liability company, a corporation, a company, a firm, a society, a joint-stock company, an unincorporated association, or another entity that: (A) may sue and be sued; and

(B) exercises practices that are compelled or limited by a system of religious belief held by: (i) an individual; or (ii) the individuals; who have control and substantial ownership of the entity, regardless of whether the entity is organized and operated for profit or nonprofit purposes.<sup>65</sup>

Additionally, while the Federal RFRA and other state RFRAs provide that the law may only be asserted in a judicial proceeding against the government,<sup>66</sup> S.B. 101 applies “regardless of whether the state or any other governmental entity is a party to the proceeding.”<sup>67</sup>

The backlash over this law’s enactment was intense as celebrities, professional football players, organizations, and businesses voiced

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60. Serwer, *supra* note 57.

61. See MISS. CODE ANN. § 1-3-39 (West 2014).

62. S.B. 101, 119 Gen. Assembly 1st Reg. Sess. (Ind. 2015).

63. See Tony Cook, *Gov. Mike Pence Signs ‘Religious Freedom’ Bill in Private*, INDIANAPOLIS STAR (Mar. 27, 2015), <http://www.indystar.com/story/news/politics/2015/03/25/gov-mike-pence-sign-religious-freedom-bill-thursday/70448858/>.

64. S.B. 101, 119 Gen. Assembly 1st Reg. Sess. (Ind. 2015).

65. *Id.*

66. See Religious Freedom Restoration Act, 42 U.S.C. § 2000bb.

67. S.B. 101, 119 Gen. Assembly 1st Reg. Sess. (Ind. 2015).

opposition to the law, claiming it would promote discrimination, so they threatened to boycott the state.<sup>68</sup> However, Governor Pence argued the law's purpose was not about discrimination.<sup>69</sup> He also was clear that this particular law would not allow businesses to refuse to serve same-sex couples and later signed a S.B. 50 clarifying that the state's RFRA would not allow blanket discrimination.<sup>70</sup>

In Governor Pence's defense of the law, he pointed to the fact that the federal government, along with at least nineteen other states, had adopted similar laws at the time Indiana's RFRA was enacted.<sup>71</sup> The Federal RFRA was passed unanimously, 435-0 in the House of Representatives, 97-3 in the Senate, and signed into law by President Bill Clinton.<sup>72</sup> Governor Pence further noted that President Barack Obama, when he was an Illinois state senator, voted in favor of Illinois' RFRA.<sup>73</sup> Thus, over the years, the enactment of RFRAs has frequently been a bipartisan act and uncontroversial procedure.

#### 4. Oregon Protect Religious Freedom Initiative (2014)<sup>74</sup>

In Oregon, the "Friends of Religious Freedom" attempted to have an initiative placed on the Oregon ballot which would have allowed businesses to refuse to sell wedding-related goods and services for same-sex marriages.<sup>75</sup> Specifically, the proposed legislation would protect "persons," including nonprofits, corporations, associations, and partnerships from being penalized by the government or subject to civil actions for "declining to solemnize, celebrate, participate in, facilitate, or support any same-sex marriage ceremony or its arrangements, same-sex civil union ceremony or

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68. Cook, *supra* note 63.

69. Tim Swarens, *Swarens: Gov. Mike Pence to Push for Clarification of 'Religious Freedom Law*, INDIANAPOLIS STAR (Mar. 28, 2015), <http://www.indystar.com/story/opinion/columnists/tim-swarens/2015/03/28/swarens-gov-mike-pence-push-clarification-religious-freedom-law/70611906/>.

70. Kevin Robillard, *Pence: Coverage of Religious Freedom Law 'Shameless,'* POLITICO (Mar. 29, 2015), [http://www.politico.com/story/2015/03/mike-pence-indiana-religious-freedom-law-abc-this-week-george-stephanopoulos-116488.html?hp=c3\\_3](http://www.politico.com/story/2015/03/mike-pence-indiana-religious-freedom-law-abc-this-week-george-stephanopoulos-116488.html?hp=c3_3); Tony Cook, Tom LoBianco & Brian Eason, *Gov. Mike Pence Signs RFRA Fix*, INDIANAPOLIS STAR (Apr. 2, 2015), <http://www.indystar.com/story/news/politics/2015/04/01/indiana-rfra-deal-sets-limited-protections-for-lgbt/70766920/>; S.B. 50, 119 Gen. Assembly 1st Reg. Sess. (Ind. 2015).

71. Swarens, *supra* note 69.

72. Ryan T. Anderson, *Indiana Protects Religious Liberty. Why That's Good Policy*, DAILY SIGNAL (Mar. 26, 2015), <http://dailysignal.com/2015/03/26/indiana-protects-religious-liberty-why-thats-good-policy/>.

73. Swarens, *supra* note 69.

74. OREGON SECRETARY OF STATE, <http://oregonvotes.org/irr/2014/052text.pdf> (last visited Feb. 28, 2015).

75. Edith Honan, *Gay-Marriage Debate Takes New Twist in Oregon: Religious Exemption*, REUTERS (Feb. 2, 2014), <http://www.reuters.com/article/2014/02/02/us-usa-gaymarriage-oregon-idUSBREA1106Z20140202>.

its arrangements, or same-sex domestic partnership ceremony or its arrangements.”<sup>76</sup>

While this initiative would have been voted on prior to the Oregon *Sweetcakes by Melissa* decision cited above, the rationale for this initiative was based on similar situations where religious individuals who owned businesses refused to provide services for same-sex weddings.<sup>77</sup> However, Friends of Religious Freedom dropped this initiative after losing a court battle over the name of the initiative and the proposal was never voted on.<sup>78</sup> Even though this proposal did not become law, the language of the statute is very helpful for purposes of this comment because the language was specifically limited to provide protections for business owners who have religion-based objections to same-sex marriage.

##### 5. *Utah Antidiscrimination and Religious Freedom S.B. 296*<sup>79</sup>

In Utah, a historic bill was enacted into law on March 12, 2015, after same-sex rights advocates and the Mormon Church joined forces to support a bill which provided anti-discrimination protections to LGBT individuals, while also providing religious freedom protections.<sup>80</sup> In regard to same-sex rights protections, the law provides that one cannot discriminate against another in regard to housing and employment on the basis of sexual orientation.<sup>81</sup> It provides additional religion-based protections by stating that anti-discrimination protections “may not be interpreted to infringe upon the freedom of expressive association or the free exercise of religion,” that “an employee may express the employee's religious or moral beliefs . . . in [the] workplace in a reasonable, non-disruptive, and non-harassing way.”<sup>82</sup> Furthermore, “an employer could not fire workers for expressing beliefs on marriage, family or sexuality unless those beliefs created a conflict with the employer’s business interests.”<sup>83</sup> While this law does not provide specific protections for business owners who believe they cannot provide goods or

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76. OREGON SECRETARY OF STATE, <http://oregonvotes.org/irr/2014/052text.pdf> (last visited Feb. 28 2015).

77. Jeff Mapes, *Gay Marriage: Backers of Exemption to Serving Gay Weddings Drop their Initiative*, THE OREGONIAN (May 9, 2014), [http://www.oregonlive.com/mapes/index.ssf/2014/05/gay\\_marriage\\_backers\\_of\\_exempt.html](http://www.oregonlive.com/mapes/index.ssf/2014/05/gay_marriage_backers_of_exempt.html).

78. *Id.*

79. S.B. 296, 2015 Gen. Sess. (Utah. 2015).

80. Jennifer Dobner, *'Milestone': Herbert Signs LGBT Nondiscrimination, Religious Freedom Protections Bill*, THE SALT LAKE TRIBUNE (Mar. 12, 2015), <http://www.sltrib.com/home/2283645-155/milestone-herbert-poised-to-sign-lgbt>.

81. S.B. 296, 2015 Gen. Sess. (Utah. 2015).

82. *Id.*

83. *Id.*; Robert Gehrke & Jennifer Dobner, *Mormon Leaders, LGBT Groups Trumpet New Anti-bias Bill as a 'Model'*, THE SALT LAKE TRIBUNE (Mar. 7, 2015), <http://www.sltrib.com/home/2249270-155/mormon-leaders-lgbt-groups-rally-behind?fullpage=1>.

services for same-sex weddings due to religious beliefs,<sup>84</sup> it does show that religious liberty advocates and LGBT rights advocates can work together to support a law which protects the interests and liberties of both groups.

### III. ANALYSIS

This section will first discuss why there is a need for state statutes protecting business owners with religion-based objections to same-sex marriage. Secondly, this section will review the above-cited proposed and adopted state statutes which provide enhanced religious liberty protections and will discuss why some of them are overbroad and should be clearer when the intent is to protect the business owners at issue in this comment. Finally, this section will propose a model law which specifically protects persons in the wedding industry engaged in wedding-related transactions with religion-based objections to same-sex marriage, while also ensuring that businesses cannot discriminate against LGBT individuals based on their sexual orientation alone in regular business transactions.

#### A. The Need for a Statute Protecting Business Owners with Religion-Based Objections to Same-Sex Marriage

Many of the world's leading religions' sacred writings contain statements indicating the belief that homosexual conduct is a "sin."<sup>85</sup> While in the United States, this belief is most frequently attributed to "Evangelical Christians" and other conservative Christian denominations, other religious groups within Islam, Buddhism, Hinduism, and Judaism also share this belief.<sup>86</sup> The Muslim Qur'an, Jewish Torah, and Christian Bible, among other sacred writings, all have passages describing opposition to same-sex sexual conduct.<sup>87</sup>

The Muslim Qur'an describes its view on same-sex sexual conduct: "Of all the creatures in the world, will ye approach males, . . . [a]nd leave those whom Allah has created for you to be your mates? Nay, ye are a people transgressing."<sup>88</sup> The Jewish Torah asserts that "[i]f a man lies with a man as one lies with a woman, both of them have committed an abomination."<sup>89</sup> One of the many verses prohibiting same-sex sexual conduct in the Christian Bible states: "do you not know that wrongdoers

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84. See generally S.B. 296, 2015 Gen. Sess. (Utah. 2015).

85. See generally Qur'an 26:165–166; Leviticus 20:13; and I Corinthians 6:9–11.

86. *Religious Groups' Official Positions on Same-Sex Marriage*, PEW RESEARCH CENTER (Dec. 7, 2012), <http://www.pewforum.org/2012/12/07/religious-groups-official-positions-on-same-sex-marriage/>.

87. See Qur'an 26:165–166; Leviticus 20:13; and I Corinthians 6:9–11.

88. Qur'an 26:165–166.

89. Leviticus 20:13.

will not inherit the kingdom of God? Do not be deceived: Neither the sexually immoral, nor idolaters, nor adulterers, nor men who have sex with men, nor thieves, nor the greedy, nor drunkards, nor slanderers, nor swindlers, will inherit the kingdom of God.”<sup>90</sup>

For individuals who interpret their religion’s sacred texts literally, as opposed to those who believe they should be interpreted figuratively or as general guidelines, these sacred writings’ statements are very serious and these individuals believe the statements must be complied with.<sup>91</sup> Based on writings such as these, many individuals have religion-based beliefs that same-sex sexual conduct and same-sex marriage is “sinful.” While others may understandably question these beliefs, those who devoutly adhere to the tenants of their faith hold to these beliefs passionately.

Because the First Amendment explicitly protects an individual’s right to freely exercise his or her religion, a state which desires to protect its citizens’ religious liberties should ensure that an individual who has a religion-based objection to same-sex marriage is not compelled or mandated to participate in a same-sex wedding ceremony or celebration in any way.<sup>92</sup> This includes providing goods and services in connection with the ceremony. The majority of the American public agrees, with 57% believing that “wedding-related businesses with religious objections should be allowed to refuse service to same-sex couples.”<sup>93</sup>

The First Amendment is clear that the government may not place prohibitions on the free exercise of religion and may not abridge the right to free speech.<sup>94</sup> However, courts have held that the First Amendment’s right of the free exercise of religion does not relieve individuals of the obligation to comply with laws of general applicability, such as the state anti-discrimination statutes discussed in the cases above.<sup>95</sup> Indeed, to properly state a First Amendment Free Exercise Claim, courts have held that parties must show that (a) the law at issue is not a “neutral law of general applicability,” or (b) that the party’s challenge implicates the Free Exercise Clause and another independent constitutional protection, or (c) that the law

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90. *I Corinthians* 6:9–11.

91. There is wide disagreement amongst religious theologians on which passages of the religions’ holy writings should be interpreted literally and which passages were in place for a specific time in history but are no longer relevant today. This is a theological debate, which is beyond the scope of this comment. The relevant aspect for purposes of this comment is the wide-spread belief among many religions that homosexual conduct is wrongful.

92. See U.S. CONST. amend. I.

93. Emily Swanson & Brady McCombs, *AP-GfK Poll: Support of Gay Marriage Comes with Caveats*, ASSOC. PRESS (Feb. 5, 2015), <http://ap-gfcpoll.com/featured/findings-from-our-latest-poll-13>; *Associated Press & GfK Public Affairs and Corporate Communications*, [http://ap-gfcpoll.com/main/wp-content/uploads/2015/02/AP-GfK\\_Poll\\_January\\_2015\\_Topline\\_politics.pdf](http://ap-gfcpoll.com/main/wp-content/uploads/2015/02/AP-GfK_Poll_January_2015_Topline_politics.pdf) (last visited Mar. 29, 2015).

94. U.S. CONST. amend I.

95. See *Elane Photography, LLC v. Willock*, 309 P.3d 53, 60 (N.M. 2013).

functions “in a context that len[ds] itself to individualized government assessment of the reasons for the relevant conduct.”<sup>96</sup>

Thus far, the courts have not been receptive to religious business owners’ First Amendment claims and have not found the above showings to have been met.<sup>97</sup> Because courts have, thus far, been unwilling to accept these First Amendment arguments, states concerned with protecting business owners’ religion-based objections to same-sex marriage should enact specific statutory protections to ensure these owners’ religious freedoms are respected and not infringed upon.

### B. Analysis of the Proposed and Adopted Statutes

Twenty-one states, and the federal government, have adopted RFRAs, with the purpose of protecting Americans’ religious liberties.<sup>98</sup> The key provision of these laws typically state that: “[g]overnment shall not substantially burden a person’s exercise of religion . . . [unless it] (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest.”<sup>99</sup> The laws then typically provide for judicial relief by stating that “[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”<sup>100</sup> The Mississippi and Indiana statutes, as well as the proposed Arizona statute modifications discussed above, are examples of state RFRAs based on the Federal Act. However, states with recently enacted statutes are coming under attack by many individuals who do not understand the contents and purpose of the law.<sup>101</sup>

However, among many, the belief persists that LGBT discrimination is the purpose, or at least the effect, of state RFRA laws.<sup>102</sup> In one frequently cited and egregious anecdote, an Indiana restaurant owner

96. See *Employment Div. Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 879–84 (1990).

97. See *Elane Photography*, 309 P.3d at 68.

98. See Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, WASH. POST (Mar. 1, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/>; *supra* note 58.

99. See Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2014).

100. See *id.* § 2000bb-1(c).

101. Indiana University Maurer School of Law Professor Daniel O. Conckle, a gay rights supporter, and supporter of the Indiana RFRA, explained the reactions to a RFRA. Indiana’s RFRA is “basically . . . an overreaction, and that’s putting it mildly.” Mark Peters & Jack Nicas, *Indiana Religious Freedom Law Sparks Fury*, WALL ST. J. (Mar. 27, 2015), <http://www.wsj.com/articles/indiana-religious-freedom-law-sparks-fury-1427491304>. He went on to say that “[t]he reaction to this is startling in terms of its breadth—and to my mind—the extent to which the reaction is uninformed by the actual content of the law.” *Id.*

102. See generally *Indiana Business Owner Claims He Will Now Openly Discriminate Against Gays and Lesbians*, DAILY KOS (Mar. 29, 2015), <http://www.dailykos.com/story/2015/03/29/1374128/-Indiana-Business-Owner-Claims-He-Will-Now-Openly-Discriminate>.

claimed that under the new Indiana RFRA he now had the right to blanketly discriminate against any gay or lesbian individual who attempted to patronize his restaurant, based only on the fact that the person was gay or lesbian.<sup>103</sup>

This belief does not seem to be grounded in the language of the law itself, as there is no reference to refusing service to LGBT individuals. Instead, the belief appears to be grounded in the fact that the RFRA's statutory language does not also provide LGBT protections prohibiting discrimination, or because of the fact that the state, which has enacted the RFRA, does not also have separate protections prohibiting LGBT discrimination.<sup>104</sup> Even though those who drafted state RFRA's and those who understand the laws best say they do not allow for blanket discrimination against LGBT individuals, and, in Indiana's case, a recently enacted clarification states blanket discrimination is not permitted, there is still an unfortunate perception that RFRA's are in existence for discriminatory purposes.<sup>105</sup>

The fact that RFRA's are perceived to allow for blanket discrimination against members of the LGBT community is extremely problematic for the integrity and public support of the laws themselves. If a state is truly trying to protect business owners such as the Joneses, discussed in the introduction, and those in the above-cited cases, the state should utilize more precise language than the language contained in RFRA's to ensure the public, as well as the courts, do not interpret the statute as allowing blanket discrimination against LGBT individuals under the guise of "religious freedom."

The failed Oregon ballot initiative, while in no way perfect, was more effective in utilizing specific language to clarify its intent to protect only individuals and businesses that may be involved in the wedding industry from being compelled to participate in same-sex wedding ceremonies.<sup>106</sup> However, even though that initiative set forth a valuable overall framework, the language could be even more precise to ensure that the statute is not overbroad.

The Utah Antidiscrimination and Religious Freedom law shows it is possible for both sides of this highly charged emotional issue, religious liberty advocates and LGBT rights advocates, to come together to enact a law that is acceptable to all parties when the statute provides protections for

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103. *Id.*

104. See generally Mathew Searcy, *Controversial Indiana Law Isn't Same as Illinois Legislation*, WSIL (Mar. 31, 2015), <http://www.wsilv.com/home/top-story/Controversial-Indiana-Law-Draws-Comparisons-to--298218451.html>.

105. See generally SWARENS, *supra* note 69.

106. See OREGON SECRETARY OF STATE, <http://oregonvotes.org/irr/2014/052text.pdf> (last visited Feb. 28 2015).

both sides and is not overbroad.<sup>107</sup> For an acceptable compromise to occur, language must be inserted into the statute that provides adequate protections for both sides. Thus, as the enactment of the Utah law indicates, a statute can more fully protect LGBT individuals from discrimination while also protecting those who are concerned that their religious liberties are being infringed upon.<sup>108</sup> This comment's proposed statute accomplishes both of those objectives.

### C. Proposed Model Law Which Strikes the Right Balance

To ensure the religious liberties of those who have religion-based objections to same-sex marriage are protected, while also ensuring that LGBT individuals are not blanketly discriminated against in the manner discussed in the anecdote above, a very precise and narrowly tailored statute is necessary. Many of the above-cited laws contain language which will be useful in constructing a model statute. However, none of those statutes, by themselves, contain the necessary language to do an adequate job protecting both religious liberties and LGBT individuals. Because of this, a statute that borrows language from numerous state and federal statutes and proposals but also contains new language is necessary to protect the rights of LGBT individuals to be free from discrimination, while also protecting the religious rights of certain individuals. The model statute below provides for broad prohibitions against discrimination based on sexual orientation in regular business transactions while providing narrow religious liberty protections for those in the wedding industry engaged in wedding-related transactions. The complete text of this model statute is as follows:

#### THE RELIGIOUS FREEDOM AND ANTIDISCRIMINATION ACT

SECTION 1: This Act shall be known as the Religious Freedom and Antidiscrimination Act and is intended: (1) to exempt persons involved in the wedding industry and engaged in wedding-related transactions from participating in same-sex ceremonies in violation of their religious beliefs; (2) to ensure court decisions punishing said persons do not occur in this State; and (3) to protect individuals from blanket discrimination based upon sexual orientation in regular business transactions.

SECTION 2: Religious freedom is the first freedom guaranteed by the United States Constitution's Bill of Rights. It is a fundamental human

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107. See S.B. 296, 2015 Gen. Sess. (Utah, 2015).

108. See generally *id.*

right and is the right to express, think, and act upon what a person believes. Religious freedom upholds stability in a diverse society and protects the rights of all individuals and groups, whether actively involved in religious activity or not. Religion, for many, is more than just private worship. It involves critical public expression on moral and social issues. As such, religious freedom needs protection.

SECTION 3: While religious freedom is the first freedom guaranteed by the United States Constitution's Bill of Rights, other rights not cited in the Bill of Rights are also important. Among these rights is the right to be free from discrimination based on a person's sexual orientation. Thus, this Act shall never be construed to allow for the blanket discrimination against individuals based on their sexual orientation alone by places of public accommodation. The religion-based protections afforded in this Act shall be construed narrowly, and shall only apply to those persons involved in the wedding industry during a wedding-related transaction. Other persons shall not be permitted to discriminate against individuals based on their sexual orientation in the person's regular business transactions with those individuals.

SECTION 4: (a) As used in this Act:

(1) The word "Person" or "Persons" include: (A) an individual; (B) an organization, a religious society, a church, a body of communicants, or a group organized and operated primarily for religious purposes; and (C) a partnership, a limited liability company, a corporation, a company, a firm, a society, a joint-stock company, an unincorporated association, or another entity that: (i) may sue and be sued; and (ii) exercises practices that are compelled or limited by a system of religious belief held by: (1) an individual; or (2) the individuals; who have control and substantial ownership of the entity, or are employees of the entity, regardless of whether the entity is organized and operated for profit or nonprofit purposes.

(2) The term "wedding industry" includes, but is not limited to: (A) any type of bakery, cake shop, confectionary, pastry shop, or other type of business which sells desserts which could be used in a wedding ceremony or celebration; (B) any type of restaurant, cafeteria, diner, bar, caterer, or other eating or drinking establishment whose services and goods could be used in a wedding ceremony or celebration; (C) any type of florist whose services and goods could be used in a wedding ceremony or celebration; (D) any type of photographer or videographer whose services and goods could be used in a wedding ceremony or celebration; (E) any wedding venue whose space could be used in a wedding ceremony or celebration; (F) any event planner whose services could be used in a wedding ceremony or celebration; and (G) any other person who engages in wedding-related business transactions.

SECTION 5: (a) Notwithstanding any other provision of law, if doing so would violate a person's deeply held religious beliefs, a person involved in the wedding industry engaged in a wedding-related transaction, acting in a nongovernmental capacity may not be:

(1) Penalized by the state or a political subdivision of this state for declining to provide goods or services for, solemnize, celebrate, participate in, facilitate, or support any same-sex marriage ceremony or its arrangements, same-sex civil union ceremony or its arrangements, same-sex domestic partnership ceremony or its arrangements, or any other form of same-sex commitment ceremony or its arrangements; or

(2) Subject to a civil action for declining to provide goods or services for, solemnize, celebrate, participate in, facilitate, or support any same-sex marriage ceremony or its arrangements, same-sex civil union ceremony or its arrangements, same-sex domestic partnership ceremony or its arrangements, or any other form of same-sex commitment ceremony or its arrangements.

(b) No person engaged in any non-wedding regular business transaction, shall be permitted to refuse service to or discriminate against an individual based on sexual orientation alone.

SECTION 6: A person involved in the wedding industry whose religious liberties have been harmed by a violation of this Act may assert the violation or impending violation as a claim or defense in a judicial or administrative proceeding, regardless of whether the state or any other governmental entity is a party to the proceeding. If the relevant governmental entity is not a party to the proceeding, the governmental entity has the right to intervene in the proceeding in order to respond to the person's invocation of this chapter.

SECTION 7: Relief against the governmental entity or discriminating person may include any of the following:

(a) Declaratory relief or an injunction or mandate that prevents, restrains, corrects, or abates the violation of this chapter.

(b) Compensatory damages.

(1) In the appropriate case, the court or other tribunal also may award all or part of the costs of litigation, including reasonable attorney's fees, to a person that prevails against the governmental entity or discriminating person under this chapter.

SECTION 8: This Act must be construed in favor of the protection of religious exercise to the maximum extent permitted by the State Constitution and the United States Constitution, while also taking into account a person's right to be free from discrimination based on their sexual orientation.

#### D. Why This Act Strikes the Right Balance

While there is language in this proposed Act that will concern, upset, or anger some individuals, it is an Act which takes into account the concerns of both LGBT advocates and religious freedom advocates. It provides narrow, specific protections for individuals in the wedding industry engaged in wedding-related transactions who have religion-based objections to same-sex marriage, while also forbidding discrimination based on an individual's sexual orientation in regular business transactions by any person. The verbiage of the proposed Act primarily focuses on the religious protection aspect, because it is necessary to discuss that aspect in more detail to ensure it is clear that the religion-based exemption is narrow and only applies in a few, probably rare, circumstances. Thus, in the spirit of the Utah compromise, the law provides valuable protections for all parties, and is a law both religious liberty advocates and LGBT rights groups could potentially accept as a workable compromise solution.

#### IV. CONCLUSION

To properly protect the religious liberties of business owners with religion-based objections to same sex marriage, but also to ensure blanket discrimination based on sexual orientation is prohibited, a state should adopt a statute similar to the one proposed by this comment. This proposed statute provides narrow protections for business owners in the wedding industry who have religion-based objections to same-sex marriage, but does not allow for blanket discrimination against LGBT individuals as many other religious freedom laws are alleged to allow. In fact, this statute provides explicit protections for LGBT individuals by prohibiting discrimination based on sexual-orientation in all regular business transactions. However, this provision does not extend to businesses in the wedding industry engaged in a wedding-related transaction which can refuse service to LGBT individuals based on religious objections to same-sex marriage. Thus, this proposed act is truly a balanced approach to resolving a highly polarizing issue and provides both religious liberty protections and protections for LGBT individuals to be free from discrimination.

