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All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes

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The fulcrum of the modern-day fight over LGBT civil rights is at the intersection of religious liberty as asserted by for-profit corporations and state antidiscrimination laws asserted by LGBT people who are refused goods, services, and other public accommodations by these for-profit corporations.

Notwithstanding the significant victories of the LGBT civil rights movement over the past 20 years, anti-LGBT sentiment continues to run deep. The leading voice against LGBT civil rights is the Religious Right. While the Religious Right has vocally opposed LGBT equality and civil rights for decades, its narrative has drastically changed. What was a narrative that attacked and pathologized LGBT people, today is a narrative that frames the Religious Right as victims of secularism—embodied in law—that infringes on their religious liberty.

What is religious liberty? What roles do Obergefell, Hobby Lobby, Religious Freedom Restoration Acts, and the First Amendment play in the Religious Right's campaign for religiously-based exemptions from state antidiscrimination laws for for-profit corporations? What are the legal arguments that can be made to defeat this campaign?

Neither Obergefell nor Hobby Lobby answered these questions. This Article does. It addresses and dismantles the legal claims asserted by the Religious Right to secure exemptions from state antidiscrimination laws for for-profit corporations. It concludes that state antidiscrimination laws may—consistent with Religious Freedom Restoration Acts and the First Amendment—be applied to for-profit corporations, regardless of the purported religious beliefs of those corporations. Moreover, they should be so applied to protect both the rule of law and genuine religious freedom, which can only truly exist in the context of religious pluralism.

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INTRODUCTION

“When you’re accustomed to privilege, equality feels like oppression.”¹

“[R]eligious freedom is only possible in the context of religious pluralism.”²

The marriage equality battle is over. The United States Supreme Court has spoken, and marriage equality is the law of the land.³ Despite this significant victory, the war for LGBT civil rights is not over. In many states, a person may marry his or her same-sex partner under *Obergefell v. Hodges* on Sunday but return to work on Monday only to be fired based on his or her sexual orientation. Members of the LGBT community—whether married or not—may be denied housing, goods, services, and other public accommodations because of their sexual orientation or gender identity. There is no federal law explicitly prohibiting sexual orientation or gender

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¹ Unknown. See Neil Carter, *My Dear Evangelicals: Realities and Myths After Marriage Ruling*, GOOD MEN PROJECT (July 1, 2015), <http://goodmenproject.com/ethics-values/my-dear-friends-realities-and-myths-after-scotus-ruling-jrmk/> [<https://perma.cc/R4BH-3P7E>] (explaining to the religious right, which was “worked up into a lather over the 5-4 victory for supporters of marriage equality,” that while some things would change as a result of the Supreme Court’s marriage equality ruling, most of its fears were “imaginary” and would not come to pass).

² FREDERICK CLARKSON, WHEN EXEMPTION IS THE RULE: THE RELIGIOUS FREEDOM STRATEGY OF THE CHRISTIAN RIGHT 26 (2016) [hereinafter WHEN EXEMPTION IS THE RULE].

³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

identity discrimination in employment, housing, or public accommodations.⁴ As a result, LGBT persons have explicit protection from discrimination only in those states or municipalities that have passed antidiscrimination statutes or ordinances that include sexual orientation and/or gender identity as protected characteristics.⁵

Notwithstanding the significant victories of the LGBT civil rights movement over the past twenty years—in courthouses and legislatures alike⁶—and culminating in *Obergefell*, anti-LGBT sentiment continues to run deep and strong in the United States. The leading voice of the anti-LGBT rights movement is the Religious Right, an alliance of evangelical Protestant

⁴ See Sarah M. Stephens, *What Happens Next? Will Protection Against Gender Identity and Sexual Orientation Workplace Discrimination Expand During President Obama's Second Term?*, 19 WASH. & LEE J. CIV. RTS. & SOC. JUST. 365, 382–83 (2013) (stating that while the Employment Non-Discrimination Act (ENDA) was first introduced in 1994 and has not yet passed, various versions of legislation seeking to protect against sexual orientation discrimination in employment have been introduced in Congress since the 1970s). *Obergefell* has increased momentum to get such a federal statute passed. Soon after *Obergefell* was handed down, the Equality Act was introduced; that act would amend the Civil Rights Act of 1964 to include sex, sexual orientation, and gender identity among the prohibited categories of discrimination or segregation in places of public accommodation. Equality Act, H.R. 3185, 114th Cong. (2015).

⁵ In the absence of a federal statute prohibiting discrimination based on sexual orientation and gender identity, the EEOC, along with a growing number of courts and executive agencies, has taken the position that sexual orientation discrimination is a form of sex discrimination prohibited by Title VII, the federal civil rights law that prohibits discrimination against employees on the basis of sex, race, color, national origin, and religion. See *Facts About Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, and Gender Identity*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/federal/otherprotections.cfm> [<https://perma.cc/BG5V-FXUQ>] (last visited Oct. 4, 2016). So while LGBT people and our allies continue to push for clear, consistent, and explicit protections at the state, local, and federal levels, there has been significant progress—progress that has resulted in legal recourse for LGBT people who have been fired in states without an antidiscrimination statute that includes sexual orientation and gender identity. The Title VII argument is that discrimination based on sexual orientation or gender identity “run[s] afoul of Title VII’s historic prohibition against discrimination ‘because of sex.’” Brief of American Civil Liberties Union et al. as Amici Curiae Supporting Appellant at 1, *Zarda v. Altitude Express, Inc.*, No. 15-3775-cv (2d Cir. Mar. 18, 2016).

⁶ The legislative victories began when states began to amend their antidiscrimination statutes to include sexual orientation (and in some instances, gender identity) as a protected characteristic. For example, in 1982, Wisconsin became the first state to ban both public- and private-sector employment discrimination based on sexual orientation. See 1981 Wis. Sess. Laws 901, 901–08; see also William B. Turner, *The Gay Rights State: Wisconsin’s Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS. WOMEN’S L.J. 91, 99 (2007) (discussing how Wisconsin prohibited employment discrimination by including sexual orientation as a protected category). The judicial victories began in 1996, when the Supreme Court decided *Romer v. Evans*, 517 U.S. 620 (1996), in which it struck down an amendment to the Colorado Constitution that prohibited the passage of any statutes or ordinances that included sexual orientation or gender identity as a protected characteristic. *Id.* at 635–36. In 2003, the Supreme Court struck down Texas’s sodomy law as unconstitutional in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Further in 2014, in *United States v. Windsor*, the Court struck down the provision in the Defense of Marriage Act that prohibited the federal government from recognizing same-sex marriages from states that had legalized such marriages. 133 S. Ct. 2675, 2695–96 (2014). Most recently, in 2015, the Court held that the fundamental right to marry includes same-sex couples in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

Christians and American Roman Catholics, whose goal is to stop and reverse these civil rights victories.⁷ While the Religious Right has vocally opposed LGBT equality and civil rights for decades, the strategy behind its opposition, and thus its narrative, has drastically changed over the past forty-five years. What was once a narrative that attacked and pathologized LGBT people in the 1950s through the 1980s is today a narrative that frames the Religious Right as victims of secularism—embodied, in part, in the law—that infringes on their religious liberty.

There are twenty-eight states that do not include sexual orientation or gender identity as protected characteristics in their antidiscrimination statutes. In those states, marriage equality will do nothing to protect LGBT people from discrimination in employment, housing, or public accommodations.⁸ And in those states that *do* include such protections, marriage equality—ironically, and perhaps counterintuitively—has strengthened the backlash against LGBT equality. This deeper backlash occurs when for-profit businesses, such as photographers, bakers, and florists, argue that they should be exempt—based on religious beliefs about homosexuality, bisexuality, transgenderism, and marriage for same-sex couples—from complying with such antidiscrimination laws. These arguments have already been made in Colorado, New Mexico, New Jersey, and Oregon and are likely to arise in more states in the wake of *Obergefell* and the Supreme Court’s decision in *Burwell v. Hobby Lobby*.⁹

In *Hobby Lobby*, the Court held that three closely held, for-profit corporations could claim the protection of the federal Religious Freedom Restoration Act (“RFRA”) and could thus be exempt from a federal regulation that would have otherwise required the corporations to engage in conduct—paying for health insurance coverage that would have provided certain types of contraceptive care for female employees—that was contrary to the owners’ sincerely held religious beliefs “that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point.”¹⁰ *Hobby Lobby* was a remarkable opinion because, for the first time, the Court held that a for-profit corporation is a “person” that has religious liberty under the federal RFRA.¹¹ Non-profit religious organizations, such as churches and religious schools,

⁷ See Joshua E. Perry, *Biblical Biopolitics: Judicial Process, Religious Rhetoric, Terri Schiavo and Beyond*, 16 HEALTH MATRIX 553, 560, 611–616 (2006).

⁸ See Section III, *infra* (discussing state antidiscrimination and religious exemption laws).

⁹ 134 S. Ct. 2751 (2014); *see, e.g.*, *Elane Photography, LLC v. Willcock*, 309 P.2d 53 (N.M. 2013); *Craig v. Masterpiece Cakeshop*, 370 P.3d 272 (Colo. App. 2015), *cert. denied sub nom.*, *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, 2016 WL 1645027 (Colo. Apr. 25, 2016), *petition for cert. filed*, No. 16-111 (U.S. July 25, 2016); *Sweetcakes by Melissa*, Nos. 44-14 & 45-14, 2015 WL 4868796, at *19 (Ore. Bureau Labor & Indus. July 2, 2015); *Bernstein v. Ocean Grove Camp Meeting Ass’n*, CRT 6145-09, PN34XB-03008, at 12 (N.J. Div. Civil Rts. Oct. 22, 2012).

¹⁰ *Hobby Lobby*, 134 S. Ct. at 2766.

¹¹ *Id.* at 2767–75.

are exempt from federal law where such law burdens their religious beliefs. Prior to *Hobby Lobby*, however, that exemption had not been recognized for for-profit corporations.

Many in the progressive and LGBT communities greeted *Hobby Lobby* with fear and worry. Their overarching concern was that *Hobby Lobby* would lead courts to favor claims of religious liberty over claims of sexual orientation and gender identity discrimination under state antidiscrimination laws. They feared that *Hobby Lobby* would lead to a destabilization of the legal gains made by the LGBT community and thus make the protection of LGBT people from discrimination in the public, secular realm once again contested rather than settled.¹²

What is religious liberty? Why is it that the Religious Right has only recently changed its strategy and rejected an attacking narrative to embrace the religious-liberty narrative? What are the ways in which the Religious Right is pressing its claims of religious liberty to seek exemptions from state and federal antidiscrimination laws? What roles do *Obergefell*, *Hobby Lobby*, the federal RFRA, state RFRA, and the First Amendment play in the Religious Right's campaign for religiously based exemptions from antidiscrimination laws for for-profit corporations? And, most importantly, what are the legal arguments that the LGBT civil rights movement can make to defeat this campaign?¹³ The *Hobby Lobby* Court did not answer these particular questions. This Article does.

Notwithstanding *Hobby Lobby*'s silence on these questions, the Religious Right views that case as a new, powerful arrow in their quiver (the other two arrows being the free speech and free exercise clauses of the First Amendment) in their campaign to gain religious exemptions from state antidiscrimination laws.

This Article answers the questions left unanswered by *Hobby Lobby*. It addresses all of the legal claims—RFRA laws, First Amendment free speech, and First Amendment free exercise—asserted by the Religious Right in its campaign to secure exemptions from state antidiscrimination laws for

¹² These concerns about *Hobby Lobby* are not necessarily based on the direct impact of the decision itself for, as noted below, the federal RFRA does not apply to the states. Thus, *Hobby Lobby* is limited to the four states that have both a state RFRA and a state nondiscrimination law that includes sexual orientation and gender identity. See Section III, *infra*. The more general concern is that *Hobby Lobby* signaled a new receptiveness—both legally and normatively—to claims of religious liberty. That receptiveness, in turn, can lead to additional legal and cultural backlash against the LGBT civil rights movement's gains, such as the recent bill signed into law by North Carolina's governor in March 2016. That law blocks local governments from passing antidiscrimination rules to grant protections to gay and transgender people. Camila Domonoske, *North Carolina Passes Law Blocking Measures to Protect LGBT People*, NPR (Mar. 24, 2016, 11:29 AM), <http://www.npr.org/sections/thetwo-way/2016/03/24/471700323/north-carolina-passes-law-blocking-measures-to-protect-lgbt-people> [<https://perma.cc/V45M-DQN7>].

¹³ The issues raised by these questions are referred to as "the Antidiscrimination Question" throughout the remainder of this Article.

for-profit corporations and presents a comprehensive legal framework for dismantling those arguments.

There are three critical analytical axes of this issue: legal, normative or theoretical, and policy. In this article, my argument is predominantly within the legal axis.¹⁴ I contend that, notwithstanding its historic holding concerning the religious liberty of for-profit corporations, *Hobby Lobby* will not tip the balance towards permitting discrimination under either a state RFRA or the First Amendment. Instead, entrenched precedent concerning the compelling interest of the state in eradicating discrimination will carry the day—regardless of the legal theory presented by the Religious Right.

Do not get me wrong: *Hobby Lobby* understandably struck a chord of fear among the LGBT community and its allies. The case most certainly “transformed . . . the national conversation about the meaning and scope of religious freedom.”¹⁵ As a strongly situated LGBT-rights proponent, however, I take a more optimistic view, namely that *Hobby Lobby* will not be the death-knell for state antidiscrimination laws through the creation of “religious” exemptions for commercial, for-profit corporations¹⁶—an exception that could swallow the rule. Moreover, the First Amendment offers no refuge to for-profit corporations wishing to “opt out” of state antidiscrimination statutes for religious reasons—it did not do so before *Hobby Lobby*, and it does not do so after *Hobby Lobby*.

Section I describes the significant changes in the strategy and narrative of the Religious Right during the past ten years. The strategic change is evidenced in the new definition of “religious liberty” being pushed by the Religious Right; the shift in narrative from attacker to victim tracks this change in strategy. Highlighting and explaining the reasons for the new tactics and narrative of the Religious Right situates and contextualizes the current legal and normative landscape in which the antidiscrimination-versus-religious-liberty battle is taking place. It also demonstrates the importance of what is at stake in this fight: authentic and inclusive religious freedom in our pluralistic democracy, rather than the Christian theocracy to which the Religious Right aspires.

Section II gives a brief summary of the *Hobby Lobby* case and its social-cultural aftermath. Section III describes the current legal landscape in the United States with regard to antidiscrimination laws and religious exemption

¹⁴ The latter two axes are outside the scope of this Article, but are ones that I plan to address in future articles on this topic. With regard to the normative-theoretical axis, I will argue that courts should, as a normative matter, enforce antidiscrimination laws notwithstanding the assertion that religious liberty precludes enforcement of such laws. In a third article, I will argue that it is important as a matter of foreign policy and national security that courts enforce antidiscrimination laws notwithstanding the assertion that religious liberty precludes enforcement of such laws.

¹⁵ WHEN EXEMPTION IS THE RULE, *supra* note 2, at vi.

¹⁶ This Article addresses the antidiscrimination/religious-liberty question only vis-à-vis for-profit corporations. In the interest of avoiding repetition, unless specifically noted otherwise, this Article uses the term “corporations” to refer to “for-profit” corporations.

laws. Section IV presents the legal argument—through use of a hypothetical—to defeat the Religious Right’s claim that *Hobby Lobby*, in conjunction with state RFRA laws, supports the creation of religious exemptions from state antidiscrimination laws for for-profit corporations. Section V lays out the legal argument that enforcement of antidiscrimination laws does not violate the First Amendment’s free speech or free exercise clauses, which represent the other arguments advanced by the Religious Right in their quest for religious exemptions from antidiscrimination laws for for-profit corporations.

I. FROM ATTACKER TO VICTIM: THE RELIGIOUS RIGHT’S CHANGING ANTI-LGBT STRATEGY AND NARRATIVE

From the 1950s through the 1980s, the Religious Right regularly relied on a narrative that vilified “homosexuals”¹⁷ as pedophiles and child molesters and that pathologized homosexuality as a mental illness.¹⁸ Thus, the argument against LGBT civil rights was outwardly attacking: it was based on lashing out against LGBT people with blatant homophobic and antigay rhetoric based on personal qualities, characteristics, and conduct, rather than based on any qualities, characteristics, or conduct of those opposed to LGBT civil rights. This narrative was employed to create affirmatively anti-LGBT laws, such as bans on LGBT teachers in public schools, or to roll back civil rights protections for LGBT people.¹⁹ That

¹⁷ The term “homosexual” was (and is) most-often used by anti-LGBT individuals to pathologize and demonize LGBT people. As a result, most members of the LGBT community prefer the term “same-sex” or “LGBT.” See *GLAAD Media Reference Guide – Terms to Avoid*, GLAAD, <http://www.glaad.org/reference/offensive> [<https://perma.cc/U8BS-YFD9>].

¹⁸ For example, in the late 1970s, Anita Bryant led the “Save Our Children” campaign to repeal a Dade County, Florida ordinance preventing discrimination based on sexual orientation, which had passed by a margin of 69% to 31%. *Anita Bryant and the Save our Children Campaign*, GAY HISTORY (Aug. 13, 2009), <http://gayhistory4u.blogspot.com/2009/08/religious-right-has-been-on-attack.html> [<https://perma.cc/MS3G-9LR8>]. That campaign used expressly anti-LGBT rhetoric, such as: “[a]s a mother, I know that homosexuals cannot biologically reproduce children, therefore, they must recruit our children” and “[i]f gays are granted rights, next we’ll have to give rights to prostitutes and to people who sleep with Saint Bernards and to nail biters.” *Id.* Moreover, until 1973, homosexuality was categorized as a mental illness by the American Psychiatric Association. *Panelists Recount Events Leading to Deleting Homosexuality as a Psychiatric Disorder from DSM*, PSYCHIATRIC NEWS, <http://www.psychiatricnews.org/pnews/98-07-17/dsm.html> [<https://perma.cc/F69N-MCUI>] (last visited Oct. 4, 2016).

¹⁹ For example, the “Save Our Children” campaign was successful; the Dade County ordinance was repealed. Soon after, Oklahoma and Arkansas banned lesbians and gay men from teaching in public schools. See, e.g., Daniel C. Sanpietro, “*Gradually Triumphant Over Ignorance*”: *Rhode Island’s Treatment of Sexual Orientation Discrimination in the Workplace*, 30 SUFFOLK U.L. REV. 439, 460 (1997) (discussing the Oklahoma statute and subsequent constitutional challenges).

narrative was supported by the force of constitutional law.²⁰

The Religious Right's outward-attacking narrative changed dramatically in the late 1990s and into the 2000s as more people came out as gay, lesbian, bisexual, or transgender and as the LGBT community experienced victories—legislatively, through judicial decree, and in the court of public opinion.²¹ Today, the tables have largely turned. Gone (mostly) are the days attacking the “other”—of denigrating and maligning gay, lesbian, bisexual, and transgender people based simply on their sexual orientation or gender identity. Overtly anti-LGBT rhetoric has become socially unacceptable and thus no longer “utterable.”²² What was once an outwardly attacking anti-LGBT narrative has become an inwardly protective one that is couched in the narrative of “religious liberty.” In short, the Religious Right has gone from attacker to victim in the national dialogue about LGBT equality.

A change in the Religious Right's *strategy* to stop and reverse LGBT civil rights explains this shift in *narrative*. As members of the LGBT community gained more civil rights, the Religious Right had to take stock of its outwardly attacking strategy and narrative, which had previously worked to thwart progress for LGBT civil rights, and recalibrate both aspects to meet a changing normative environment in the public sphere—one that is decidedly more pro-LGBT. Rather than stopping or reversing LGBT civil rights gains through attacking LGBT people, this new strategy instead seeks to “shrink the public sphere and the arenas within which the government has legitimacy to defend people's rights, including . . . LGBTQ rights.”²³ A key tactic in this strategy is to redefine our collective idea of “religious freedom”—a concept and commitment that is foundational to our constitutional democracy—into something that would be unrecognizable to this country's founders.

What is “religious freedom”? Understanding our traditional definition

²⁰ See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (“[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.”), *overruled by* *Lawrence v. Texas*, 439 U.S. 558 (2003).

²¹ See *supra* note 5 (discussing significant progress and victories, including legal recourse for LGBT individuals who have been fired from jobs in states without an antidiscrimination statute that incorporates sexual orientation and gender identity).

²² Lawrence Lessig, *Understanding Federalism's Texts*, 66 GEO. WASH. L. REV. 1218, 1220–21 (1998).

²³ WHEN EXEMPTION IS THE RULE, *supra* note 2, at vi. This shift in the narrative is predominately with regard to the “gay” and “lesbian” populations of the LGBT community. Notably, the Religious Right still takes an outwardly attacking stance toward the transgender segment of the LGBT community. Nearly 200 bills have introduced in state legislatures in 2016 that target transgender people and transgender students' ability to use sex-segregated facilities consistent with their gender identity. Haley Miller, *Over 80 Anti-LGBT Bills Pending Across Nation as Arkansas State Legislative Session Begins*, HUM. RTS. CAMPAIGN (Apr. 14, 2016), <http://www.hrc.org/blog/over-80-anti-lgbt-bills-pending-across-nation-as-arkansas-state-legislative> [https://perma.cc/4GVA-5HYQ].

of this concept is an important normative starting point for analyzing and appreciating the fundamental change the Religious Right seeks in its retooled, *Hobby Lobby*-inspired strategy. Simply put, religious freedom, as originally described and defined at the time of the formation of the United States, “is the right of individual conscience; to believe as we will and to change our minds freely, without undue influence from government or from powerful religious institutions.”²⁴ Moreover, it is “integral to the idea of separation of church and state. Separation exists not to limit religious expression, but to *safeguard against creeping religious supremacism and the theocratic temptations* that have persisted throughout American history into the present.”²⁵

The Religious Right strategy—using *Hobby Lobby*, religious exemption laws, and First Amendment arguments—is to radically change this long-standing understanding of religious freedom. If the Religious Right has its way, there will be a “new normal” for religious freedom in America—one that is not “free” at all and one that contradicts the religious pluralism envisioned by the framers of the Constitution and the Bill of Rights.

The Religious Right began its effort to redefine religious freedom in America in 2009, with the publication of the *Manhattan Declaration: A Call to Christian Conscience*.²⁶ This declaration is a “manifesto linking three interrelated themes of ‘freedom of religion,’ ‘sanctity of life,’ and ‘dignity of marriage.’”²⁷ The *Declaration* had been signed by 150 leaders of the Christian Right and fifty Catholic bishops, archbishops, and cardinals.²⁸ Key statements in the *Declaration* include:

We are Christians who have joined together across historic lines of ecclesial differences to affirm our right—and more importantly, to embrace our obligation—to speak and act in defense of these truths. We pledge to each other, and to our fellow believers, that no power on earth, be it cultural or political, will intimidate us into silence of acquiescence.²⁹

Christians confess that God alone is Lord of the conscience. Immunity from religious coercion is the cornerstone of an unconstrained conscience. No one should be compelled to embrace any religion against his will, nor should persons of faith be forbidden to worship God according to the dictates of

²⁴ WHEN EXEMPTION IS THE RULE, *supra* note 2, at 2.

²⁵ *Id.* (emphasis added).

²⁶ *Manhattan Declaration: A Call of Christian Conscience* (Nov. 20, 2009), MANHATTAN DECLARATION, http://www.manhattandeclaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf [https://perma.cc/3DKZ-S5DB].

²⁷ WHEN EXEMPTION IS THE RULE, *supra* note 2, at 4.

²⁸ *Id.*

²⁹ *Id.* (emphasis omitted).

conscience or to express freely and publicly their deeply held religious convictions. What is true for individuals applies to religious communities as well.³⁰

These ideas are central to the Religious Right's strategy to redefine religious freedom "as being only for people who believe as they do, and as under attack by those who believe differently."³¹ They also underlie and form the rationale for the campaign seeking religious exemptions from state antidiscrimination laws for for-profit corporations through state RFRAs and the First Amendment.³²

The new definition, and hence the new narrative, omit the essential and foundational premise of religious freedom, namely "that religious freedom is only possible in the context of religious pluralism."³³ The goal of redefining religious freedom and its attendant new narrative is "individual, institutional, and territorial exemptions from laws and regulations on religious grounds so they do not have to follow the same rules as the rest of society."³⁴ These "overlapping exemptions threaten to give rise to theocratic zones of control violating the religious liberty of those who find themselves under their sway."³⁵ What the Religious Right attempts to achieve through its campaign for religious exemptions is religious supremacy, not religious freedom.³⁶

By situating its members as victims in need of protection for their religious beliefs, the Religious Right's new narrative achieves at least two strategic advantages. First, it is able to engage in a national dialogue—in the press, the courtroom, and the legislature—with more legitimacy than if the approach was outwardly attacking. For example, arguing "I should not have to sell a wedding cake to a gay couple because my God teaches me that marriage is between one man and one woman" is more socially acceptable and thus seemingly more legitimate than arguing "I should not have to sell a wedding cake to a gay couple because I believe that homosexuality is a violation of the law of nature and of God's law, and because homosexuals are deviant, sick people who molest children." While the latter was perceived as legitimate thirty years ago,³⁷ it is not perceived as legitimate

³⁰ *Id.* at 5.

³¹ *Id.* at 4–5.

³² *Id.* at 5.

³³ *Id.* at 26.

³⁴ *Id.* at 14.

³⁵ *Id.*

³⁶ *Id.* at 16.

³⁷ Stephen Elkind and Peter Kauffman, *Gay Talk: Protecting Free Speech for Public School Teachers*, 43 J.L. & EDUC. 147, 154–155 (2014) ("As public support of gay rights has grown, gay rights opponents have had to abandon their most vitriolic arguments (that being gay is either sinful or a disease) for the more tempered 'protect the children' point, though they may soon need to abandon that rhetoric as well.").

today, at least not in the mainstream public square.

Second, this new rhetoric allows the Religious Right to distance itself from its real goal of achieving exemptions from antidiscrimination laws. In fact, in today's debates over religious freedom—in court documents, in legislatures, and in the mass media—legislators and business owners alike explicitly state that they are not “anti-gay” and are not discriminating based on sexual orientation at all.³⁸ They even argue “misunderstanding” and “confusion” when opponents argue that religious exemption laws are really about a license to discriminate.³⁹

The new narrative is thus a “bait and switch” tactic: what begins as a seemingly innocuous request to protect individual religious liberty is then revealed as a vehicle to engage in sexual orientation and gender-identity discrimination without fear of reprisal. No one should be fooled; this is an old trope in new clothing. The new, inwardly protecting narrative of religious liberty has but one goal: to support the Religious Right's argument that its followers and their for-profit businesses are exempt from neutral laws of general applicability, specifically state antidiscrimination laws, and, after *Obergefell*, from marriage laws.

In sum, keeping this new definition and narrative front-and-center is critically important when analyzing the Antidiscrimination Question discussed herein. The cases described below, and the overall legal strategy dismantled below, are not examples of a single photographer in New Mexico or a single baker in Colorado independently deciding to take a stand for themselves and their religious liberty. Rather, these cases are the result of an overt, strategic, and coordinated national effort—through alliances and coalitions of conservative religious leaders—to “appropriate and redefine

³⁸ See, e.g., *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 279 (Colo. App. 2015) (“Masterpiece asserts that its refusal to create the cake was ‘because of’ its opposition to same-sex marriage, not because of its opposition to their sexual orientation.”), *cert. denied sub nom.*, *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, 2016 WL 1645027 (Colo. Apr. 25, 2016), *petition for cert. filed*, No. 16-111 (U.S. Jul. 25, 2016); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 61 (N.M. 2013) (“Elane Photography reasons that it did not discriminate ‘because of . . . sexual orientation,’ . . . but because it did not wish to endorse Willock’s and Collinsworth’s wedding.”); *Sweetcakes by Melissa*, Nos. 44-14 & 45-14, 2015 WL 4868796, at *19 (Or. Bureau Labor & Indus. July 2, 2015) (“Respondents’ claim they are not denying service because of Complainants’ sexual orientation but rather because they do not wish to participate in their same sex wedding ceremony.”). The Supreme Court has soundly rejected this attempted distinction between status and conduct. See *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 689 (2010) (“CLS contends that it does not exclude individuals because of sexual orientation, but rather ‘on the basis of a conjunction of conduct and the belief that the conduct is not wrong.’ Our decisions have declined to distinguish between status and conduct in this context.”) (internal citations omitted).

³⁹ Tony Cook, *Gov. Mike Pence Signs ‘Religious Freedom’ Bill in Private*, INDYSTAR, (Apr. 2, 2015, 2:34 PM), <http://www.indystar.com/story/news/politics/2015/03/25/gov-mike-pence-sign-religious-freedom-bill-thursday/70448858/> [<https://perma.cc/J7YL-8DM8>] (“‘This bill is not about discrimination,’ Pence said, ‘and if I thought it legalized discrimination I would have vetoed it.’”).

religious freedom as justifying discrimination”⁴⁰ by reference to the First Amendment and state RFRA. Recognizing and understanding this empowers advocates for LGBT rights to undermine the new narrative and defeat the new legal strategy.

The legal and normative stakes are high—the choice is between true religious pluralism and a “theocratic supremacism” of the Religious Right’s “own religious beliefs inscribed in government.”⁴¹

II. *BURWELL V. HOBBY LOBBY*

A. *Factual Background*

Hobby Lobby required the Court to interpret the federal RFRA. The RFRA forbids the federal government from substantially burdening “a person’s exercise of religion even if the burden results from a rule of general applicability” unless the federal government can demonstrate that the “application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”⁴²

In some ways, *Hobby Lobby* was an unexceptional case because the answer to the question presented boiled down to routine statutory construction: whether the federal RFRA allowed the United States Department of Health and Human Services (“HHS”) to compel the plaintiff-corporations to provide health insurance coverage for certain methods of contraception that was, in turn, required by another federal law, the Patient Protection and Affordable Care Act (“ACA”).⁴³

The case involved three closely held, for-profit corporations, Hobby Lobby Stores, Inc., Mardel, Inc., and Conestoga Wood Specialties Corporation. Each is a family owned business with the shareholders comprised exclusively of family members.⁴⁴ The owners of the three businesses believed that they were required to run their business consistent with their personal religious beliefs; those beliefs included the viewpoint that life begins at conception and any form of birth control that acts as an abortifacient is a sin.⁴⁵

⁴⁰ WHEN EXEMPTION IS THE RULE, *supra* note 2, at 1.

⁴¹ *Id.* at 26 (emphasis omitted).

⁴² 42 U.S.C. §§ 2000bb-1(a), (b) (2012).

⁴³ *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2759 (2014).

⁴⁴ *Id.* at 2765–66. The Green family owns both Hobby Lobby and Mardel. *Id.* at 2755. Hobby Lobby and Mardel are referred to collectively as “Hobby Lobby” throughout this Article.

⁴⁵ *Id.* These beliefs were documented in various official corporation statements. Conestoga’s board of directors adopted a “Statement on the Sanctity of Human Life.” *Id.* at 2764. Hobby Lobby has a statement of purpose in which each family member committed to “operating the company in a manner consistent with Biblical principles” and each family member signed a pledge to run the business consistent with this statement of purpose. *Id.* at 2766.

Regulations promulgated by HHS under the ACA required the plaintiff corporations to provide coverage for all contraceptive methods approved by the federal Food and Drug Administration at no cost to the corporation's employee, including four methods that may act as an abortifacient.⁴⁶ However, the HHS regulations also permitted exemptions from the contraception mandate for religious employers (churches) and for certain religious non-profit organizations that hold themselves out as "religious organization[s]" and object to providing contraceptive coverage based on religious objections.⁴⁷ In such circumstances, the issuer of the insurance, rather than the employer, bears the cost of the contraceptive coverage.⁴⁸

HHS argued that the plaintiff-corporations could not seek relief under RFRA because (1) they were for-profit entities, and (2) the contraception regulations applied only to companies and not to their individual owners.⁴⁹

B. *The Majority Opinion*

The Court first had to determine whether a for-profit corporation like Hobby Lobby could invoke RFRA's protections, which explicitly apply to a "person."⁵⁰ It held that a plain-language analysis of RFRA compelled the holding that RFRA's reference to "person" did in fact include corporations.⁵¹ The Court noted, and HHS conceded, that RFRA applied to non-profit corporations, and the Court concluded that "no conceivable definition of the term [person] includes natural persons and nonprofit corporations, but not for-profit corporations."⁵²

The Court next addressed, and ruled in the plaintiff-corporations' favor, the question of whether a for-profit corporation may engage in the exercise of religion.⁵³ It based this holding on its conclusion that for-profit corporations are not required to "pursue profit at the expense of everything else."⁵⁴ The Court rejected HHS's argument that it is practically difficult to

⁴⁶ *Id.* at 2762–63.

⁴⁷ *Id.* at 2763 (citing 45 C.F.R. § 147.131(b) (2014)).

⁴⁸ *Id.*

⁴⁹ *Id.* at 2767.

⁵⁰ *Id.* at 2767–68.

⁵¹ *Id.* at 2768. RFRA did not define the term "person" so the Court looked to the Dictionary Act, which defines that term to include corporations. *Id.*

⁵² *Id.* at 2769.

⁵³ *Id.*

⁵⁴ *Id.* at 2771. In fact, the Green family, which owns Hobby Lobby, is explicit that its business is for more than just profit:

Hobby Lobby, [Steve Green] explained, is not just a business. It's a business that enables a ministry, and at the center of the ministry is the Bible. "We want to share this book with people all over the world," he said. "And the more resources we have, the more we're able to do that."

ascertain the religious “beliefs” of a for-profit corporation by noting that this case involved closely held corporations rather than publicly traded corporations; in this case, the religious beliefs of the plaintiff-corporations were clear and easy to discern.⁵⁵

Based on the forgoing reasoning, the Court held that HHS’s contraception regulations, as applied to for-profit, closely held corporations, must comply with RFRA.⁵⁶ Specifically, if the regulations substantially burdened the exercise of the plaintiff-corporation’s exercise of religion, HHS must show that the regulations (1) further a compelling government interest, and (2) that they are the least restrictive means of furthering that interest.⁵⁷

On the question of whether the contraception regulations substantially burdened the plaintiff-corporations’ exercise of religion, the Court had “little trouble” answering in the affirmative.⁵⁸ If the plaintiff-corporations did not comply with the HHS regulations, which violated their sincerely held religious beliefs, severe economic consequences would follow in the form of fines totaling in the tens of millions of dollars annually.⁵⁹ This alone demonstrated a substantial burden.⁶⁰

On the question of the existence of a compelling government interest, the Court assumed, without deciding, that HHS’s asserted state interest of “ensuring that all women have access to all FDA-approved contraceptives without cost sharing” was compelling.⁶¹

The Court then addressed the last prong of the RFRA test, namely whether the contraception mandate was the least restrictive means of attaining the compelling government interest.⁶² It held that the regulations did not meet this test, and they thus failed under RFRA.⁶³ The Court noted that one less restrictive means would be for the federal government to pay for the provision of the contraception coverage to the plaintiff-corporations’ employees.⁶⁴ The Court found it important that the federal government already had in place an accommodation for non-profit organizations with religious objections; certainly, the Court reasoned, that program easily could

Joel Baden & Candida Moss, *Can Hobby Lobby Buy the Bible?*, ATLANTIC, Jan./Feb. 2016, <http://www.theatlantic.com/magazine/archive/2016/01/can-hobby-lobby-buy-the-bible/419088/> [<https://perma.cc/U5JP-W77T>].

⁵⁵ *Hobby Lobby*, 134. S. Ct. at 2774. The Court expressly noted that it had “no occasion in these cases to consider RFRA’s applicability to such [publicly traded] companies.” *Id.*

⁵⁶ *Id.* at 2775.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 2775–76.

⁶⁰ *Id.*

⁶¹ *Id.* at 2779–80.

⁶² *Id.* at 2780.

⁶³ *Id.*

⁶⁴ *Id.*

include the closely held, for-profit corporations that were the plaintiffs in this case.⁶⁵ As such, the Court held that HHS's contraception regulations violated RFRA vis-à-vis the plaintiff-corporations.⁶⁶

The Court attempted to cabin its holding narrowly in response to the dissenting opinions, which are discussed below. It expressly noted that its holding "should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs."⁶⁷ Instead, the Court stated that religious objections to other requirements, such as one for immunizations, might be superseded by "different interests" or might present different arguments about the least restrictive means, such that the requirement would trump the asserted religious belief.⁶⁸ It went on to make several statements particularly important and relevant to the Antidiscrimination Question. First, the majority specifically addressed the potential of a religious belief being asserted as a license to discriminate:

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. . . . *Our decision today provides no such shield.* The Government has a compelling interest in providing equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.⁶⁹

Next, the majority distinguished its *Hobby Lobby* holding from *United States v. Lee*,⁷⁰ in which it decided that an employer, who was a member of the Old Order Amish, must withhold social security taxes for his employees notwithstanding the employer's articulated religious objection to doing so.⁷¹ The *Lee* Court held that requiring payment of social security taxes was not unconstitutional as applied to employers with conflicting religious beliefs because not all burdens on religion are unconstitutional; the state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.⁷² The *Lee* Court reasoned that the tax system "could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their

⁶⁵ *Id.* at 2781–82.

⁶⁶ *Id.* at 2785.

⁶⁷ *Id.* at 2783.

⁶⁸ *Id.*

⁶⁹ *Id.* (emphasis added).

⁷⁰ 455 U.S. 252 (1982).

⁷¹ *Id.* at 254–55, 261.

⁷² *Id.* at 257–58.

religious belief.”⁷³

The *Hobby Lobby* majority’s characterization of the *Lee* holding is important, and as discussed below, supports the argument that state RFRA do not provide a refuge from state antidiscrimination statutes for for-profit corporations, even after *Hobby Lobby*. Justice Alito wrote: “[I]f the issue in *Lee* were analyzed under the RFRA framework, the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes.”⁷⁴ Justice Alito further reasoned that “[b]ecause of the enormous variety of government expenditures funded by tax dollars, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos.”⁷⁵ The majority concluded that “[r]ecognizing a religious accommodation under RFRA for particular coverage requirements, therefore, does not threaten the viability of ACA’s comprehensive scheme in the way that recognizing religious objections to particular expenditures from general tax revenues would.”⁷⁶

As discussed more fully below, the religious exemptions to state antidiscrimination laws for for-profit corporations sought by the Religious Right—through state RFRA and the First Amendment—would create the same chaos that Justice Alito states is unacceptable as a matter of policy.

C. *The Concurrence*

Justice Kennedy wrote a concurring opinion in which he contends that the majority decision “does not have the breadth and sweep ascribed to it by the respectful and powerful dissent.”⁷⁷ To support that position, he emphasized that in this case there was “an existing, recognized, workable, and already-implemented framework” to satisfy the less-restrictive-alternative prong of RFRA.⁷⁸

Justice Kennedy’s thoughts on the issue of the interplay of religious liberty—as reflected in RFRA and the First Amendment—and antidiscrimination laws are important given his central role in the Court’s pro-LGBT rights jurisprudence.⁷⁹ Thus, if and when a case presenting the

⁷³ *Id.* at 260.

⁷⁴ *Hobby Lobby*, 134 S. Ct. at 2784.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 2785 (Kennedy, J., concurring).

⁷⁸ *Id.* at 2786.

⁷⁹ Justice Kennedy wrote the majority opinions in every victory for the LGBT community that the Court has issued. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (finding that same-sex couples have a fundamental right to marry under the Fourteenth Amendment’s Due Process and Equal Protection Clauses); *United States v. Windsor*, 133 S. Ct. 2675, 2693–95 (2013) (invalidating the Defense of Marriage Act’s federal definitions of “marriage” as between one man and one woman and “spouse” as a person of the opposite sex as violations of the Fifth Amendment); *Lawrence v. Texas*, 539 U.S. 558, 562, 578 (2003) (holding that a Texas statute “making it a crime for two persons of the same sex to

Antidiscrimination Question reaches the Court, all eyes will be on Justice Kennedy.⁸⁰

D. *The Fallout*

The *Hobby Lobby* opinion met with swift reactions and predictions from many segments of American society, particularly from the LGBT community and its allies.⁸¹ Many decried what they described as the destructive potential of the opinion.⁸² They characterized *Hobby Lobby* as a contestation of LGBT rights, particularly marriage equality, as much as it was about reproductive freedom or religious liberty.⁸³ Three states enacted religious exemption laws.⁸⁴ Some predicted the dawning of an era of a Gay

engage in certain intimate sexual conduct” was unconstitutional because it violated homosexuals’ right to liberty under the Due Process Clause); *Romer v. Evans*, 517 U.S. 620, 624, 635 (1996) (voiding an amendment to the Colorado Constitution that prohibited “all legislative, executive or judicial action at any level of state or local government designed to protect” homosexuals as a violation of the Equal Protection Clause). He has attained hero status in the LGBT community. *See, e.g.*, Adam Liptak, *Surprising Friend of Gay Rights in a High Place*, N.Y. TIMES (Sept. 1, 2013), http://www.nytimes.com/2013/09/02/us/surprising-friend-of-gay-rights-in-a-high-place.html?_r=0 [https://web.archive.org/web/20160617232446/http://www.nytimes.com/2013/09/02/us/surprising-friend-of-gay-rights-in-a-high-place.html?_r=0] (“Justice Kennedy has emerged as the most important judicial champion of gay rights in the nation’s history, having written three landmark opinions on the subject [prior to *Obergefell*] Those rulings collectively represent a new chapter in the nation’s civil rights law, and they have cemented his legacy as a hero to the gay rights movement.”); Eric Sasson, *The LGBT Movement’s Supreme Court Hero: Anthony Kennedy*, NEW REPUBLIC (June 26, 2015) <https://newrepublic.com/article/122182/lgbt-movements-supreme-court-hero-anthony-kennedy> [<https://perma.cc/324P-JWWY>] (“As he’s done for almost all decisions involving LGBT rights during his tenure, Justice Anthony Kennedy once again took up his pen to write the majority opinion in a 5-4 ruling that went as far as the [C]ourt possibly could in defending the rights of same-sex couples.”).

⁸⁰ Justice Ginsburg wrote a dissenting opinion, which was joined by Justices Sotomayor, Breyer, and Kagan. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting). She characterized the majority’s opinion as one of “startling breadth” and worried that the opinion would lead to any commercial enterprise being permitted to “opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.” *Id.* Additionally, she disagreed with the majority’s conclusions that RFRA’s “person” provision applied to a for-profit corporation, *id.* at 2794, that the contraception coverage requirement was a substantial burden to the plaintiffs’ exercise of religion, *id.* at 2799, and that the contraception coverage requirement was not the least restrictive means of achieving the government’s compelling interest, *id.* at 2801–02.

⁸¹ *See, e.g.*, Pema Levy, *Does the Hobby Lobby Decision Threaten Gay Rights?*, NEWSWEEK (July 9, 2014, 4:24 PM), <http://www.newsweek.com/does-hobby-lobby-decision-threaten-gay-rights-258098> [<https://perma.cc/P3CN-55F8>] (explaining why LGBT advocates view the *Hobby Lobby* decision as a “slippery slope”).

⁸² *See id.* (considering the potential for discrimination against LGBT people).

⁸³ *See, e.g.*, Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 176–77 (2014) (“How to reconcile religious objections and LGBT equality, by contrast, remains very much in the foreground of current contestation. Obviously, the debate over same-sex marriage and religious liberty is responsible neither for the contraception mandate nor for the litigation it produced. But the debate has a great deal to do with just how large *Hobby Lobby* loomed in the public conversation—and still does.”).

⁸⁴ *See infra* Section III.B (summarizing the states with religious exemption laws).

Jim Crow.⁸⁵

Ironically, the predictions of doom and gloom for the LGBT community only multiplied after the Court issued its marriage equality holding in *Obergefell*. *Obergefell* fueled the fire of the Religious Right, as seen by pockets of hateful reactions to the decision as well as a redoubling of efforts to press the Religious Right's new definition of, and narrative about, religious liberty.⁸⁶ With a renewed sense of personal and religious outrage and injury, and with *Hobby Lobby* in their pocket as a (perceived) sword to fight off LGBT equality, a perfect storm has been created in which the next chapter of the LGBT civil rights movement will play out: raising the question, *are for-profit corporations entitled to religious exemptions from state antidiscrimination laws, either under a state RFRA or the First Amendment?*⁸⁷

III. STATE ANTIDISCRIMINATION LAWS AND MINI-RFRAS

A. State Antidiscrimination Laws

As of early 2016, twenty-three states have some form of an antidiscrimination statutory scheme that protects on the basis of sexual

⁸⁵ See, e.g., Jeremy Quittner, *When Religious Freedom and Basic Rights Collide, It's Bad for Business*, INC. (Dec. 16, 2014), <http://www.inc.com/jeremy-quittner/anti-lgbt-businesses-and-religious-objections.html> [<https://perma.cc/JAL5-LQND>] (comparing the national dialogue that existed during the Civil Rights Movement to the modern-day Gay Rights Movement); Adam Winkler, *Will the Supreme Court License Anti-Gay Discrimination?*, HUFFINGTON POST (Mar. 24, 2014, 9:28 AM), http://www.huffingtonpost.com/adam-winkler/will-the-supreme-court-li_b_5020848.html [<https://perma.cc/JC8V-DMY2>] (predicting that a pro-plaintiff ruling in the *Hobby Lobby* case will lead to "a new era of legally sanctioned discrimination").

⁸⁶ See, e.g., Peter Montgomery, *Liberty Counsel Tells Kentucky Clerk to Defy Federal Court Ruling, Keep Refusing Marriage Licenses to Same-Sex Couples*, RIGHT WING WATCH (Aug. 13, 2015, 1:30 PM), <http://www.rightwingwatch.org/content/liberty-counsel-tells-kentucky-clerk-defy-federal-court-ruling-keep-refusing-marriage-licens> [<https://perma.cc/G5PJ-44R6>] ("Religious Right legal group Liberty Counsel, which opposes LGBT equality in the U.S. and around the world, has been urging resistance in the form of mass civil disobedience to the Supreme Court's marriage equality ruling."); see also Peter Montgomery, *Ryan Anderson's Road Map for Marriage Resisters*, RIGHT WING WATCH (July 2, 2015, 3:56 PM), <http://www.rightwingwatch.org/content/ryan-andersons-road-map-marriage-resisters> [<https://perma.cc/2EU3-V9LD>] ("There is an urgent need for policy to ensure the government never penalizes anyone for standing up for marriage. We must work to protect the freedom of speech, association, and religion of those who continue to abide by the truth of marriage as one man and one woman.").

⁸⁷ In fact, there has been a surge in the number of "religious freedom" bills introduced since *Obergefell* was decided. See Dominic Holden, *Religious Freedom Bills Surge After Last Year's Same-Sex Marriage Ruling*, BUZZFEED NEWS (Feb. 26, 2016, 10:40 AM), <http://www.buzzfeed.com/dominicholden/religious-freedom-bills-surge-after-last-years-same-sex-marriage-ruling> [<https://perma.cc/78TP-B44V>] (summarizing some of the at least 105 religious freedom bills that were introduced in various states during the first two months of 2016).

orientation.⁸⁸ Thirteen of these states protect against discrimination based on sexual orientation and gender identity or expression in employment, housing, public accommodations, and credit or lending services.⁸⁹ Six of these states protect against discrimination based on sexual orientation and gender identity or expression in employment, housing, and public accommodations, but not in credit or lending services.⁹⁰ One state protects against discrimination based on sexual orientation and gender identity or expression in employment, housing, and public accommodations, but only protects against sexual orientation discrimination in credit or lending services.⁹¹ Two states protect against discrimination based on sexual orientation only in employment, housing, and public accommodations, but not in credit or lending services.⁹² Finally, one state protects against discrimination based on sexual orientation and gender identity or expression in employment and housing, but not in public accommodations and credit or lending services.⁹³

The Antidiscrimination Question—whether state antidiscrimination laws should trump religious exemption laws and First Amendment arguments—necessarily requires that a state have an antidiscrimination statute.⁹⁴ Thus, the Antidiscrimination Question may only arise in the twenty-three states that have an antidiscrimination law that includes protections based on sexual orientation or gender identity or both. In the other states without such an antidiscrimination law, businesses may freely discriminate against LGBT people in employment, housing, public accommodations, and credit or lending services.

B. *Religious Exemption Laws*

Twenty-one states have religious exemption laws, either through a statute or constitutional amendment.⁹⁵ Three of these laws took effect after

⁸⁸ See *Equality Maps*, MOVEMENT ADVANCEMENT PROJECT, <http://www.lgbtmap.org/equality-maps> [<https://perma.cc/MP2S-4BBQ>] (last visited Mar. 7, 2016) (providing a map of states).

⁸⁹ See *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws/employment [<https://perma.cc/X95P-JZHX>] (follow “Table Format” hyperlink) (last updated July 8, 2016) (listing Colorado, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Rhode Island, Vermont, and Washington).

⁹⁰ See *id.* (listing California, Delaware, the District of Columbia, Hawaii, Nevada, and Oregon).

⁹¹ See *id.* (listing only New York).

⁹² See *id.* (listing New Hampshire and Wisconsin).

⁹³ See *id.* (listing only Utah).

⁹⁴ To date, there is no federal antidiscrimination law that explicitly protects against sexual orientation or gender-identity discrimination. See *supra* note 4.

⁹⁵ See *State Religious Exemption Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/religious_exemption_laws [<https://perma.cc/B6TH-YMJM>] (last visited Mar. 7, 2016) (providing a map of states).

the *Hobby Lobby* decision.⁹⁶

As originally and traditionally conceptualized, “religious freedom” laws were based on a definition of religious freedom that emphasized “an individual’s free exercise of religion and conscience.”⁹⁷ In recent years, however—and particularly since *Hobby Lobby* made its way through the federal court system—religious freedom is “being redefined as the right to discriminate and impose a conservative social order in the name of religion.”⁹⁸

The backers of these religious exemption laws have become more transparent in two ways. First, they have made explicit what members of the LGBT rights movement have understood to be their goal all along, namely to use religious exemption laws (which they call “religious freedom” laws) to target and discriminate against LGBT people.⁹⁹ Second, they have begun to argue more vigorously that religious exemption laws should trump antidiscrimination laws.¹⁰⁰

Passage of new religious exemption laws, in addition to amendments of existing religious exemption laws that explicitly discriminate, were considered in the states 2016 legislative session; this trend is expected to continue when state legislatures convene in 2017. For example, Georgia,¹⁰¹ Hawaii,¹⁰² Iowa,¹⁰³ Michigan,¹⁰⁴ and North Carolina¹⁰⁵—states that currently do not have a religious exemption law—are considering them in the 2016

⁹⁶ ARK. CODE ANN. § 16-123-404 (West 2016); IND. CODE ANN. § 34-13-9-8 (West 2016); MISS. CODE ANN. § 11-61-1 (West 2016).

⁹⁷ Patricia Miller, *Religious Freedom Advocates Warn of “Theocratic Zones of Control,”* RELIGION DISPATCHES (Jan. 13, 2016), <http://religiondispatches.org/religious-freedom-advocates-warn-of-theocratic-zones-of-control/> [https://perma.cc/3BBA-PVG2].

⁹⁸ *Id.*

⁹⁹ See *id.* (explaining the recent strategy of religious groups).

¹⁰⁰ See, e.g., Jenn Stanley, *Indiana Governor: ‘Religious Freedom’ Should Trump Civil Rights*, REWIRE (Jan. 14, 2016, 9:03 AM), <https://rewire.news/article/2016/01/14/indiana-governor-religious-freedom-trump-civil-rights/> [https://perma.cc/J4VE-YGHP] (providing a statement from Indiana Governor Michael R. Pence).

¹⁰¹ S. 129, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016), <http://www.legis.ga.gov/legislation/en-US/Display/20152016/SB/129> [https://perma.cc/U95M-JX4S]; H.R. 29, 153rd Gen. Assemb., Reg. Sess. (Ga. 2016), <http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/29> [https://perma.cc/876Z-YFNC].

¹⁰² H.R. 1160, 28th Leg., Reg. Sess. (Haw. 2015), http://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=HB&billnumber=1160&year=2016 [https://perma.cc/V7XU-7SHR].

¹⁰³ H.R. 2032, 86th Gen. Assemb., 2015 Sess. (Iowa 2016), <https://www.legis.iowa.gov/legislation/BillBook?ga=86&ba=HF%202032> [https://perma.cc/NN5A-8S72].

¹⁰⁴ S. 4, 98th Leg., Reg. Sess. (Mich. 2015), <http://www.legislature.mi.gov/documents/2015-2016/billintroduced/Senate/htm/2015-SIB-0004.htm> [https://perma.cc/7734-QJY3].

¹⁰⁵ S. 550, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015), <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015&BillID=sb550> [https://perma.cc/NUN7-9M7X].

legislative session.¹⁰⁶ These proposed new laws and amendments have the express goal of creating “zones of legal exemption.”¹⁰⁷

As noted above, the Antidiscrimination Question only arises when a state has an antidiscrimination statute. However, the existence of a religious exemption law is not required. This is because commercial actors may raise either or both of two defenses to claims of discrimination: (1) a religious exemption from the antidiscrimination law under a state RFRA, or (2) a defense that the antidiscrimination law, as applied, violates the First Amendment’s guarantees of free speech and free exercise of religion. Thus, in states with an antidiscrimination law but no RFRA, a for-profit business may try to avoid compliance with the antidiscrimination law by invoking the First Amendment.

All told, in four states—Connecticut, Illinois, New Mexico, and Rhode Island—for-profit businesses will have *both* a religious exemption law *and* the First Amendment to argue against compliance with their state’s antidiscrimination law.¹⁰⁸ In nineteen states, for-profit businesses will have *only* the First Amendment to argue against compliance with their state’s antidiscrimination law.¹⁰⁹ In the next two parts of this Article, both the RFRA argument and the First Amendment argument are dismantled.

IV. THE LEGAL ARGUMENT FOR ANTIDISCRIMINATION LAWS TRUMPING STATE RFRA LAWS: WHY *HOBBY LOBBY* IS DISTINGUISHABLE

Hobby Lobby’s legal questions, as well as facts, are distinguishable from the Antidiscrimination Question. Thus, *Hobby Lobby* should not compel a negative outcome for LGBT people in the antidiscrimination context. In fact, as discussed below, Justice Alito himself distinguished the *Hobby Lobby* situation from the Antidiscrimination Question, at least as it pertains to discrimination based on race. Based on the majority’s distinction alone, courts should address the Antidiscrimination Question with a fresh doctrinal eye, unobstructed by *Hobby Lobby*.

As a threshold matter, *Hobby Lobby* addressed a completely different question than the Antidiscrimination Question. *Hobby Lobby* is a statutory construction case, one that pitted a statute—the federal RFRA—against an agency’s regulatory mandate.¹¹⁰ To analogize the *Hobby Lobby* decision to

¹⁰⁶ See Lisa Keen, *Strength and Longevity of Legal Gains May Change in 2016 Politics and Lawsuits*, KEEN NEWS SERV. (Jan. 5, 2016), <http://www.keennewsservice.com/2016/01/05/strength-and-longevity-of-legal-gains-may-change-in-2016-politics-and-lawsuits/> [https://perma.cc/D3XG-ACB5] (“[A]ccording to the National Conference of State Legislatures, 12 more states will consider adopting [religious freedom restoration] legislation this year.”).

¹⁰⁷ Miller, *supra* note 97.

¹⁰⁸ Compare *Equality Maps*, *supra* note 88 (providing a map of states with an antidiscrimination law), with *State Religious Exemption Laws*, *supra* note 95 (providing a map of states with a religious freedom law).

¹⁰⁹ *Id.*

¹¹⁰ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

the Antidiscrimination Question (which currently is being addressed in several states), the case presented to the Court would have to have been a situation in which RFRA was pitted against an antidiscrimination statute, which was *not* the circumstance presented.

A. *The State Antidiscrimination Hypothetical*

A hypothetical illustrates the differences between *Hobby Lobby* and the Antidiscrimination Question. It also demonstrates that *Hobby Lobby* does not undermine the argument that state antidiscrimination laws trump state RFRA and, in its most favorable reading, it supports the argument that state antidiscrimination laws trump state RFRA.

In our hypothetical, State A has enacted a nondiscrimination law that includes sexual orientation and gender identity as protected characteristics; the statute thus protects against sexual-orientation and gender-identity discrimination in employment, public accommodations, and housing. State A also has a RFRA law that mirrors the federal RFRA.

Imagine further that a lesbian married couple comes into a Hobby Lobby store in State A. They arrive right as the store opens and are the only customers in the store for most of their visit there. One of the women is visibly pregnant; both wear wedding bands. They are there to buy scrapbooking supplies and photo albums for their soon-to-be child. They browse the aisles holding hands and engaging in other public displays of affection that are socially appropriate and clearly indicate that they are lesbian. A Hobby Lobby employee observes all of this. He approaches the couple and tells the women that they must leave the store because Hobby Lobby has a strong religious belief that homosexuality and marriage for same-sex couples are sins and will therefore not sell its products to customers that it knows are LGBT. The women sue Hobby Lobby for violation of the state antidiscrimination law and, in its defense, Hobby Lobby contends that State A's RFRA exempts it from complying with State A's antidiscrimination statute.¹¹¹ That is the Antidiscrimination Question

¹¹¹ The New Mexico Supreme Court has determined that its state RFRA does not provide an exemption from compliance with New Mexico's antidiscrimination statute in a case where a wedding photographer denied services to a lesbian bridal couple. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 77 (N.M. 2013) (holding that the New Mexico Religious Freedom Restoration Act "is inapplicable to disputes in which a government agency is not a party"). Moreover, there is a circuit split among the federal courts of appeal on the question of whether the federal RFRA even provides a defense in a suit between private parties. *Compare* *Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010) ("McGill cannot claim the benefit of RFRA, however, because as we explain, the defense does not apply in suits between private parties."), *and* *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) ("RFRA is applicable only to suits to which the government is a party."), *abrogated on other grounds by* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012), *and* *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834, 843 (9th Cir. 1999) (holding that private parties are not state actors under RFRA unless they acted jointly with government officials to violate free-exercise rights), *with* *Hankins v. Lyght*, 441 F.3d 96, 103 (2d

that has started to percolate throughout the states, and it is a question that was not addressed in *Hobby Lobby*. I contend that, even after *Hobby Lobby*, the court in this hypothetical case would hold that the state RFRA does not require the creation of an exemption to compliance with the state antidiscrimination law. The reasoning behind this conclusion is straightforward and even consistent with *Hobby Lobby*'s structure and legal reasoning, and proceeds as follows.

State A's RFRA, like the federal RFRA, forbids the government from substantially burdening "a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can demonstrate that the "application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest."¹¹² In our hypothetical, like the plaintiff corporations in *Hobby Lobby*, Hobby Lobby argues that State A's antidiscrimination law violates State A's RFRA because: (1) under *Hobby Lobby*, it, as a for-profit corporation, may hold a religious belief and is entitled to exercise that belief; (2) it has a sincere religious belief that homosexuality is inherently sinful and that marriage is only proper between one man and one woman; (3) application of State A's antidiscrimination law substantially burdens its religious beliefs; (4) State A's antidiscrimination law does not further a compelling government interest; and (5) even if State A's antidiscrimination law does further a compelling government interest, it is not the least restrictive means of furthering that compelling governmental interest.

Each of these arguments may be defeated as follows.

1. "*Personhood*" under RFRA and Hobby Lobby's *Sincerely Held Religious Belief*

First, *Hobby Lobby* directs that Hobby Lobby is a "person" under State A's RFRA and thus may claim protection under the RFRA for its sincerely held religious beliefs and the concomitant free exercise of those beliefs.¹¹³

Cir. 2006) (holding that RFRA's language is broad enough to apply to an action between two private parties). This question was not raised in *Hobby Lobby* because the act complained about was taken by the federal government. The discussion of the hypothetical proceeds on an assumption that some states will hold that their state RFRA creates a defense in a dispute between private parties.

¹¹² 42 U.S.C. § 2000bb-1(a), (b) (2012), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (declaring the federal RFRA unconstitutional as it applied to the states).

¹¹³ See *Hobby Lobby*, 134 S. Ct. at 2769, 2775 ("[W]e hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA."). Of course, the Supreme Court's *Hobby Lobby* holding would not be binding precedent on State A's determination of whether a for-profit corporation is a "person" under State A's RFRA because *Hobby Lobby* interpreted the federal RFRA, and state courts are free to interpret their state RFRA's as they see fit. Nevertheless, *Hobby Lobby*'s holding regarding "personhood" under the federal RFRA likely would be very persuasive authority for a state court when considering the same question vis-à-vis a state RFRA because most state RFRA's closely, if not completely, track the federal RFRA. As noted above, however, *Obergefell* has led

In *Hobby Lobby*, the corporations asserted their sincerely held religious belief that life starts at conception, such that abortion is a sin.¹¹⁴ In our hypothetical, Hobby Lobby's asserted sincerely held religious belief is that homosexuality itself is inherently sinful and that marriage is only between one man and one woman.¹¹⁵ Thus, a RFRA analysis would be triggered and the court would next determine whether State A's antidiscrimination law substantially burdens Hobby Lobby's exercise of religion; if it does, the court would next consider whether State A's antidiscrimination law (1) furthers a compelling government interest, and (2) is the least restrictive means of furthering that compelling government interest.¹¹⁶

While *Hobby Lobby* supports a determination that the Hobby Lobby in our hypothetical is protected by State A's RFRA because it may (and does) have a sincerely held religious belief, *Hobby Lobby* supports *only* that determination; it does *not* support the conclusion that the remaining requirements of State A's RFRA are satisfied.

2. Substantial Burden on the Free Exercise of Religion

Having concluded, pursuant to *Hobby Lobby*, that Hobby Lobby can and does hold a sincere religious belief about either or both LGBT people and marriage for same-sex couples, the next step in the RFRA analysis is to determine whether State A's antidiscrimination law substantially burdens Hobby Lobby's exercise of its sincerely held religious beliefs.¹¹⁷

Hobby Lobby found that the ACA regulations at issue substantially burdened the corporations because non-compliance with those regulations would result in fines of "roughly \$26 million."¹¹⁸ In stark contrast,

to backlash in some states, namely by the introduction of state RFRA bills that—unlike the federal RFRA—explicitly protect the right of business owners to discriminate against LGBT people. *See, e.g.,* John Cheves, *In Kentucky, Gays Could be Refused Business Over Faith if Bill Passes*, MYRTLE BEACH ONLINE (Feb. 25, 2016, 6:45 PM), <http://www.myrtlebeachonline.com/news/nation-world/national/article62532452.html> [<https://perma.cc/MP8K-FBG4>] ("The bill expands the state's 2013 Religious Freedom Restoration Act to clarify that businesses could not be punished in such cases for violating local ordinances that prohibit discrimination based on sexual orientation or gender identity."). While the reasoning of the hypothetical would be less persuasive if bills like the one proposed in Kentucky pass, there would be strong grounds to challenge such laws under the Equal Protection Clause. In contrast, prior Supreme Court precedent on the free speech and free exercise clauses of the First Amendment *are* binding on state courts, as described in Section V, *infra*.

¹¹⁴ *Hobby Lobby*, 134 S. Ct. at 2759.

¹¹⁵ The latter belief has already been asserted in Colorado and New Mexico, the two states in which the Antidiscrimination Question has reached appellate courts. *See* *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015) (hearing religious objections from a baker who refused to make a wedding cake for a same-sex couple), *cert. denied sub nom.* *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n*, No. 15SC738, 2016 WL 1645027, at *1 (Colo. Apr. 25, 2016), *petition for cert. filed*, No. 16-111 (U.S. Jul. 25, 2016); *Elane Photography*, 309 P.3d at 59–60 (hearing religious objections from a photographer who refused to photograph a same-sex wedding).

¹¹⁶ *See* 42 U.S.C. § 2000bb-1(a), (b) (containing the federal RFRA).

¹¹⁷ *Id.* at § 2000bb-1(a).

¹¹⁸ *Hobby Lobby*, 134 S. Ct. at 2776–77.

compliance with State A's antidiscrimination law costs nothing for a for-profit corporation. In fact, compliance with state antidiscrimination statutes often have a positive economic impact on for-profit corporations: when a bakery sells a wedding cake to a gay couple, it makes money; when a for-profit company does not fire a gay employee, it sees return on its investment from its already trained employee and saves the costs associated with recruiting and training a new employee; when an apartment complex rents to a lesbian couple, it reaps the economic benefits of the rent payments. This important difference alone sets the Antidiscrimination Question in our hypothetical apart from the *Hobby Lobby* case—there simply is no substantial burden on the religious beliefs of for-profit corporations in complying with State A's antidiscrimination law.

Another approach to determining whether a governmental action substantially burdens the religious beliefs of a for-profit corporation—completely removed from any economic burden—is to inquire whether the governmental action “imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*.”¹¹⁹ This inquiry is much broader than the economic impact approach in that it considers the “circumstances under which it is wrong for a person to perform an act that is innocent in itself but has the effect of enabling or facilitating the commission of an immoral act by another.”¹²⁰

Hobby Lobby determined that the contraceptive mandate burdened Hobby Lobby's free exercise of religion because the owners of that closely held corporation—all of whom were related family members—had religious objections to abortion.¹²¹ According to the Court, a burden on free exercise of religion arose because compliance with the contraceptive mandate represented a causal link to the destruction of an embryo (the company would provide the insurance, which included—pursuant to the mandate—women's access to abortion-inducing drugs, which in turn could cause the destruction of an embryo), which Hobby Lobby believed was morally wrong on religious grounds.¹²² Put another way, compliance with the mandate would *create* or *result in* the “sin”—abortion—and such a causal link impermissibly burdened the plaintiffs' free exercise of religion.

As described above, the religious objections most commonly articulated regarding the LGBT community are (1) that homosexuality (and, by association, bisexuality and transgenderism) is against the will of God and thus a sin, and (2) that God's will is that marriage is *only* the union of one man and one woman and marriage for same-sex couples is thus a sin.¹²³

¹¹⁹ *Id.* at 2778.

¹²⁰ *Id.*

¹²¹ *Id.* at 2759.

¹²² *Id.* at 2777.

¹²³ *Religious Groups' Official Positions on Same-Sex Marriage*, PEW RESEARCH CTR. (Dec. 7,

These are the religious beliefs asserted by Hobby Lobby in our hypothetical. Unlike the scenario presented in *Hobby Lobby*, there simply is no causal connection between the acts required by antidiscrimination statutes and the “sin” would-be discriminators allege they are forced to participate in.

Returning to our hypothetical, no such but-for causal link between the alleged sin and the conduct required of the would-be discriminator is present in compliance with State A’s antidiscrimination law. If Hobby Lobby is not given a religious exemption from State A’s antidiscrimination law and thus compelled, as a place of public accommodation, to sell its crafting goods to LGBT people, that action of selling easels, paint, or scrapbooking materials will not *make* the customer gay, lesbian, bisexual, or transgender; the lesbian couple in our hypothetical was LGBT and in a same-sex marriage when they entered the Hobby Lobby store and will continue to be LGBT and in a same-sex marriage whether Hobby Lobby complies with State A’s antidiscrimination law or not—the “sin” exists well before the commercial transaction required under State A’s antidiscrimination law, and nothing about that transaction contributes to or accentuates the “sin.” Similarly, if a bakery, as a place of public accommodation, is required to comply with State A’s antidiscrimination law and make a wedding cake for a gay couple, the creation and sale of the cake does not create the alleged sin—marriage for same-sex couples. The gay couple will marry whether or not the bakery sells the cake to them; there is simply no argument that selling a wedding cake to LGBT people *causes* or *results in* the “sin” of entering a same-sex marriage.

Hobby Lobby touched directly on this notion of causation in its discussion of “coercion.” The Court distinguished *Tilton v. Richardson*¹²⁴ and *Board of Education of Central School District v. Allen*¹²⁵ from the question before it in *Hobby Lobby*.¹²⁶ *Tilton* and *Allen* both held that use of general tax revenues to subsidize secular activities of religious organizations did not violate the Free Exercise Clause.¹²⁷ These cases noted that the religious objectors were “unable to identify any coercion directed at the practice or exercise of their religi[on]”¹²⁸ Additionally, the plaintiffs in

2012), <http://www.pewforum.org/2012/12/07/religious-groups-official-positions-on-same-sex-marriage/> [https://perma.cc/E4LM-JTD7] (“[T]he American Baptist Churches USA affirmed that ‘God’s design for sexual intimacy places it within the context of marriage between one man and one woman’ and that ‘homosexuality is incompatible with Biblical teaching.’”); see also, e.g., Americans United for Separation of Church and State, *The Religious Right’s War On LGBT Americans*, AMS. UNITED (Feb. 2013), <https://www.au.org/resources/publications/the-religious-rights-war-on-lgbt-americans> [https://perma.cc/XS44-GRNL] (“[Religious Right leader Pat] Robertson once asserted that being gay is ‘a sickness, and it needs to be treated’ and has even said, ‘Many of those people involved with Adolf Hitler were Satanists, many of them were homosexuals. The two things seem to go together.’”).

¹²⁴ 403 U.S. 672 (1971).

¹²⁵ 392 U.S. 236 (1968).

¹²⁶ *Hobby Lobby*, 134 S. Ct. at 2779.

¹²⁷ *Tilton*, 403 U.S. at 689; *Allen*, 392 U.S. at 248–49.

¹²⁸ *Tilton*, 403 U.S. at 689.

these cases failed to present an argument that the laws in question “in any way coerced[d] them as individuals in the practice of their religion.”¹²⁹

The Court’s use of the concept of coercion to frame the discussion of RFRA’s substantial burden requirement is significant. Coercion is the “use of force or intimidation to obtain compliance.”¹³⁰ The *Hobby Lobby* majority held that this threshold was met in that case because the mandate created a causal link between the law and the religious belief; by requiring Hobby Lobby to provide health insurance to its employees (which provided abortion-inducing drugs), the government (through its mandate) coerced Hobby Lobby in the practice of its religion because the belief that life begins at conception is a central part of Hobby Lobby’s religious beliefs.¹³¹

Religious objectors cannot meet this high threshold in the antidiscrimination context because, as explained above, there simply is no coercion of the exercise of religion involved in compliance with antidiscrimination statutes. Returning to our hypothetical in which Hobby Lobby believes that homosexuality and marriage for same-sex couples are sins, Hobby Lobby may continue to hold those beliefs and may practice those beliefs in their homes and houses of worship—all while complying with antidiscrimination laws. Like *Tilton* and *Allen* cited in *Hobby Lobby*, Hobby Lobby, in our hypothetical, cannot show coercion in its free exercise of religion when it is required to sell crafting supplies to the married lesbian couple under State A’s antidiscrimination law.¹³²

¹²⁹ *Allen*, 392 U.S. at 249.

¹³⁰ *Coercion*, DICTIONARY.COM, <http://dictionary.reference.com/browse/coercion> [<https://perma.cc/6BQD-WAF6>] (last visited Mar. 7, 2016).

¹³¹ *Hobby Lobby*, 134 S. Ct. at 2779.

¹³² A final and related reason that for-profit corporations are not substantially burdened in the free exercise of their sincerely held religious beliefs lies in the essential characteristics of the corporate form. When a corporation becomes incorporated in a state, in addition to gaining beneficial rights and privileges such as tax breaks, tax incentives, and limited liability, it implicitly and explicitly takes on obligations, such as compliance with statutory and regulatory requirements and legal restrictions imposed on powers and businesses. See JAMES D. COX & THOMAS LEE HAZEN, 1 THE LAW OF CORPORATIONS § 1:6, at 110 (3d ed. 2010); PAUL J. GALANTI, 17 INDIANA PRACTICE SERIES: BUSINESS ORGANIZATIONS § 2.2, at 525 (2012). Once the state permits incorporation, that corporation becomes a kind of public citizen of that state. This is the notion of the “corporate citizen”—the idea that businesses are socially responsible for meeting legal, ethical, and economic responsibilities and should create higher standards of living and quality of life in the communities in which they operate, while still preserving profitability for stakeholders. *Corporate Citizenship*, INVESTOPEDIA, <http://www.investopedia.com/terms/c/corporatecitizenship.asp> [<https://perma.cc/3STB-46GK>] (last visited Feb. 23, 2016). Compliance with a state’s antidiscrimination law is, arguably, part of being a good corporate citizen. See, e.g., *Thomas v. Exxon Mobil*, No. 2:06-CV-144-RL-PRC, 2007 WL 489225, at *2 (N.D. Ill. Feb. 8, 2007) (“Plaintiff argues . . . transfer to the Northern District of Illinois will serve the interests of justice because residents of the Northern District of Illinois have an interest in ensuring that their corporate citizens adhere to antidiscrimination statutes.”). When the corporation outwardly discriminates against members of the public, not only does its private reputation suffer, so too does its reputation as a corporate citizen. Moreover, such action is contrary to the state’s compelling interest in antidiscrimination—an interest that is extended to the corporation because it is a corporate citizen of the

Moreover, profit, rather than proselytizing, is arguably the main goal of a corporation's outward-looking behavior;¹³³ thus, requiring compliance with State A's antidiscrimination law does not substantially burden religion in the way the contraceptive mandate did in *Hobby Lobby*.¹³⁴ Even though *Hobby Lobby* held that for-profit corporations can have religious beliefs and exercise them, compliance with State A's antidiscrimination law simply does not burden those beliefs—let alone substantially burden them—because selling scrapbooking supplies, easels, and paints to LGBT customers cannot be construed as burdening any religious practice.

3. *The Government's Compelling Interest in Antidiscrimination*

As noted above, compliance with antidiscrimination laws does not substantially burden corporations' religious beliefs. However, even assuming *arguendo* that the court in our hypothetical did determine that *Hobby Lobby's* religious freedom was substantially burdened by State A's antidiscrimination law, that determination would not end the inquiry. Rather, the Court would turn to the next question: *does State A's antidiscrimination law reflect a compelling state interest?* In *Hobby Lobby*, the Court presumed without deciding that the government had a compelling interest in the contraceptive mandate.¹³⁵ No such presumption is necessary in the antidiscrimination context.

For over 30 years, federal and state courts alike have declared that eradicating discrimination is a compelling state interest. In *Roberts v. United States Jaycees*,¹³⁶ the Court considered whether a state antidiscrimination statute, as applied to a non-profit, all-male educational and charitable association, impermissibly violated the members' First Amendment right to association.¹³⁷ It held that application of the statute did not violate the First Amendment because the state had a compelling interest in the law;

state. As a reflection and embodiment of the state itself, outwardly-manifesting corporate violations of antidiscrimination laws, together with the argument that such violations should be exempted and excused, may appear as the state talking out of two sides of its mouth—from one side it prohibits discrimination as a violation of a compelling interest, and from the other side it undermines and diminishes its own professed compelling interest when one of “its own” publicly argues that it is exempt from that compelling interest.

¹³³ *But see* Baden & Moss, *supra* note 54, at 72–73 (quoting Steve Green, president of *Hobby Lobby*: “*Hobby Lobby* . . . is not just a business. It’s a business that enables a ministry, and at the center of that ministry is the Bible. ‘We want to share this book with people all over the world . . . [a]nd the more resources we have, the more we’re able to do that.’”).

¹³⁴ In addition to informing the legal (statutory) determination of whether compliance with antidiscrimination law substantially burdens the religious liberty of a corporation, companies seeking corporate status should, as a normative matter, be determined to agree to regulation of their outward-looking discrimination, and thus should lose when they invoke RFRA or the First Amendment to justify an exemption from antidiscrimination laws.

¹³⁵ *Hobby Lobby*, 134 S. Ct. at 2759.

¹³⁶ *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

¹³⁷ *Id.* at 612.

The right to associate for expressive purposes is not [] absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. We are persuaded that *Minnesota's compelling interest in eradicating discrimination* against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms.¹³⁸

The state's compelling interest in eradicating discrimination inheres to discrimination in all forms: gender, race, and sexual orientation.¹³⁹

Of particular significance to the Antidiscrimination Question, the Court has held that ending racial discrimination is a compelling state interest that permits the government to take state action to end discrimination, even over religious objections. In *Bob Jones University v. United States*,¹⁴⁰ Bob Jones University, a non-profit, private, religious college, had enforced a racially discriminatory admissions policy, which it argued was based on its religious beliefs.¹⁴¹ The Internal Revenue Service ("IRS") determined that it could not bestow tax-exempt status to Bob Jones because of its discriminatory admissions policy.¹⁴²

The Court affirmed the IRS's determination, stating that "[n]ot all burdens on religion are unconstitutional"¹⁴³ and that "[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding government interest."¹⁴⁴ The Court provided examples of circumstances in which it held governmental interests "so compelling as to allow even regulations prohibiting religiously based conduct"¹⁴⁵ and went on to hold that while denying tax benefits "inevitably" would have a "substantial impact" on Bob Jones University's operation, "[t]he governmental interest at stake here is compelling. . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious

¹³⁸ *Id.* at 623 (emphasis added) (citations omitted).

¹³⁹ *See, e.g.,* Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 38 (D.C. App. 1987) ("[A]ll forms of discrimination based on anything other than individual merit are equally injurious, to the immediate victims and to society as a whole.").

¹⁴⁰ 461 U.S. 574 (1983).

¹⁴¹ *Id.* at 577.

¹⁴² *Id.* at 578.

¹⁴³ *Id.* at 603 (quoting *United States v. Lee*, 455 U.S. 252, 257–58 (1982)).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 603–04.

beliefs.”¹⁴⁶

There can thus be no doubt that, in our hypothetical, the court would hold that State A has a compelling interest in its antidiscrimination law—namely, eradicating discrimination. In fact, dicta in *Hobby Lobby* suggest the same result: “The principal dissent raises the possibility that discrimination in hiring, for example, on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield.”¹⁴⁷ Chief Justice Roberts went on to state that the “Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”¹⁴⁸

Bob Jones University and *Hobby Lobby* both suggest that the court in our hypothetical would find that there is a compelling government interest in the enforcement of State A’s antidiscrimination law, such that State A’s RFRA is not violated by requiring for-profit corporations to comply with State A’s antidiscrimination law; thus, no religious exemption would be found. However, before reaching that ultimate conclusion, one last step must be satisfied: the government action must be the least restrictive alternative to achieve the compelling government interest.

4. The “Least Restrictive Alternative” Analysis

The *Hobby Lobby* Court found that the contraceptive mandate was *not* the least restrictive alternative—it did so by pointing to an existing federal program that addressed the exemption of non-profit corporations from the contraceptive mandate—and thus concluded that the contraceptive mandate violated RFRA.¹⁴⁹ The same conclusion cannot be reached in the antidiscrimination context. Like the existence of a compelling state interest in eradicating discrimination, there is little, if any, dispute that antidiscrimination laws are the least restrictive means to achieve that compelling state interest.¹⁵⁰ There simply is no less restrictive alternative to

¹⁴⁶ *Id.* at 603–04 (emphasis added).

¹⁴⁷ *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2783 (2014) (internal citations omitted).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 2780–81.

¹⁵⁰ *But see* *Hands On Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rights Comm’n*, No. 14-CI-04474 (Ky. Fayette Cir. Ct. Apr. 27, 2015), <https://adfllegal.blob.core.windows.net/web-content-dev/documents/hands-on-originals-v-lexington-fayette-urban-county-human-rights-commission--trial-court-decision.pdf?sfvrsn=10> [<https://perma.cc/P773-KZTR>] (holding the defendant city failed to show a compelling interest in enforcing its antidiscrimination ordinance against a t-shirt maker who refused to make t-shirts for an LGBT group). This case is currently on appeal. *Brief of Appellee, Lexington-Fayette Urban Cty. Human Rights Comm’n v. Hands on Originals, Inc.*, No. 2015-CA-000745 (Ky. Ct. App. filed Feb. 5, 2016), <https://adfllegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/baker-v.-hands-on-originals/lexington-fayette-urban-county-human-rights-commission-v-hands-on-originals--brief-of-appellee-filed-with-kentucky-court-of-appeals.pdf?sfvrsn=4> [<https://perma.cc/7735-LRUH>].

achieve the compelling interest of eradicating discrimination on the basis of LGBT status.

Case law supports this conclusion. The *Roberts* Court held that the Minnesota Human Rights Act, which mandated that the Jaycees admit women as members, “advanced those interests [in eradicating discrimination] through the least restrictive means of achieving its ends.”¹⁵¹ *Bob Jones* held that the IRS regulations were the least restrictive means to achieve the compelling state interest in eradicating discrimination and thus concluded that Bob Jones University’s interests in its religiously based admission policy “cannot be accommodated.”¹⁵² The court in our hypothetical should follow *Bob Jones University* and hold that State A’s antidiscrimination law is the least restrictive alternative to achieving State A’s compelling interest in eradicating discrimination, even in the face of religious objections. As a result, the court should find that Hobby Lobby’s religiously based desire to discriminate against LGBT customers cannot be accommodated under State A’s RFRA.

B. Hobby Lobby’s *Explicit Support of the Hypothetical*

The foregoing analysis, standing alone, demonstrates that *Hobby Lobby* is not the death-knell to antidiscrimination protections that many in the LGBT community feared it might be. In fact, the foregoing analysis makes clear that *Hobby Lobby* does *not* compel religious exemptions from antidiscrimination laws for for-profit corporations, even if compliance with such laws substantially burdens a corporation’s religious beliefs. In addition, *Hobby Lobby* itself—through language in the majority, as well as in the concurring and dissenting opinions—supports the foregoing analysis.

Writing for the majority, Chief Justice Roberts emphasized the narrowness of the Court’s holding:

[O]ur holding is very specific. We do not hold . . . that for-profit corporations and other commercial enterprises can ‘opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.’ . . . Nor do we hold . . . that such corporations have free rein to take steps that impose ‘disadvantages . . . on others’¹⁵³

This language is directly applicable to the Antidiscrimination Question because the Religious Right is making exactly the argument that Chief Justice Roberts rejects, namely that its members should be allowed to “opt out” of antidiscrimination laws simply because they judge those laws to be incompatible with their sincerely held religious beliefs. Moreover, Chief

¹⁵¹ *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984).

¹⁵² *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

¹⁵³ *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2760 (2014).

Justice Roberts addressed the Antidiscrimination Question head-on:

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. . . . Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.¹⁵⁴

Finally, the *Hobby Lobby* majority placed great emphasis on the fact that the plaintiffs in that case were closely held corporations, as opposed to large publicly traded companies.¹⁵⁵ The Court uses the term “closely held” nine times to describe the *Hobby Lobby* plaintiffs, and it does so in the following three key parts of its holding: its statement of the issue,¹⁵⁶ its determination that the plaintiff-companies hold sincerely held religious beliefs,¹⁵⁷ and its ultimate holding under RFRA.¹⁵⁸ The Court goes even further to suggest that its holding that for-profit corporations can have sincerely held religious beliefs may come out differently when the for-profit corporation making the RFRA claim is publicly traded:

These cases . . . do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which [defendant] HHS refers [in arguing that it is difficult as a practical matter to discern a for-profit corporation’s religious beliefs] will often assert RFRA claims. HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring.¹⁵⁹

Justice Kennedy’s concurrence also suggests that the Court would reach a different conclusion in our hypothetical. Justice Kennedy emphasized the importance of the availability of a less restrictive alternative in the *Hobby Lobby* case and wrote separately to point out that, in many other contexts—like the antidiscrimination context—a less restrictive alternative simply will not be available in order for the government to achieve its compelling

¹⁵⁴ *Id.* at 2783 (internal citations omitted).

¹⁵⁵ *Id.* at 2774.

¹⁵⁶ *Id.* at 2759.

¹⁵⁷ *See id.* at 2774 (“The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.”).

¹⁵⁸ *See id.* at 2775 (“[W]e hold that a federal regulation’s restriction on the activities of a for-profit closely held corporation must comply with RFRA.”); *id.* at 2785 (“The contraceptive mandate, as applied to closely held corporations, violates RFRA.”).

¹⁵⁹ *Id.* at 2774.

interest:

[T]his existing model [of a system for religious non-profits to exempt them from the contraceptive mandate], designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise.¹⁶⁰

The question of whether state antidiscrimination laws should trump claims of religious liberty under state RFRA is exactly one in which “it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise.”¹⁶¹ In fact, it is impossible to accommodate the “government program” of antidiscrimination protections to “countless religious claims” because to do so would undermine the rule of law so extensively so as to render meaningless the protections set forth in such antidiscrimination statutes. Moreover, allowing for-profit corporations with anti-LGBT religious beliefs to pick and choose which portions of the law they want to follow undermines and destabilizes our national commitment to the rule of law more generally.

In sum, given different legal issues raised by *Hobby Lobby* and the Antidiscrimination Question, and the factual differences in each of the cases, the court in our hypothetical should hold that State A’s antidiscrimination law trumps State A’s RFRA no matter the size or nature of the for-profit corporation.¹⁶²

V. THE LEGAL ARGUMENT FOR ANTIDISCRIMINATION LAWS TRUMPING FIRST AMENDMENT CLAIMS OF FREE SPEECH AND RELIGIOUS LIBERTY

If a court determines that a would-be discriminator may not use a state’s religious exemption law as a defense to compliance with a state antidiscrimination law, or if a state does not have a religious exemption law, a court determining the Antidiscrimination Question will be required to address the First Amendment arguments presented by would-be discriminators seeking an exemption from a state’s antidiscrimination law.

Would-be discriminators rely on the free expression and free exercise provisions of the First Amendment to argue for exemptions from compliance with antidiscrimination laws. Specifically, they contend that antidiscrimination statutes (1) compel speech or expressive conduct, and (2)

¹⁶⁰ *Id.* at 2785–87.

¹⁶¹ *Id.*

¹⁶² The Court’s distinction between publicly traded and closely held corporations indicates that if the Court were to find that RFRA trumps a federal antidiscrimination statute that might be enacted in the future, it would limit such a holding to closely-held corporations.

violate the right to free exercise of religion, both of which are prohibited by the First Amendment.

Neither of these First Amendment arguments should prevail. Rather, state courts have solid doctrinal ground on which to rule that compliance with antidiscrimination laws in the for-profit, commercial context does not violate the First Amendment. *Hobby Lobby* does not demand a different outcome; the Court did not reach Hobby Lobby's First Amendment arguments because it held that Hobby Lobby won under the federal RFRA.¹⁶³ Since *Hobby Lobby*, one state appellate court has considered the First Amendment arguments and has rejected them.¹⁶⁴

A. *Antidiscrimination Statutes Do Not Compel Expressive Conduct or Speech*

Business owners who seek exemptions from compliance with antidiscrimination statutes argue that such statutes compel speech in violation of the First Amendment.¹⁶⁵ Specifically, these businesses contend that compliance with antidiscrimination laws impermissibly compel expressive conduct and symbolic speech.

For example, in *Craig v. Masterpiece Cakeshop, Inc.*, a Colorado bakery, owned by an individual, was held to have violated the Colorado Anti-Discrimination Act ("CADA") when it refused to bake a wedding cake for a gay male couple.¹⁶⁶ In its defense, the bakery argued that "wedding cakes inherently convey a celebratory message about marriage and, therefore, the . . . order [finding a CADA violation] unconstitutionally compels it to convey a celebratory message about same-sex marriage in conflict with its religious beliefs."¹⁶⁷

Similarly, in *Elane Photography, LLC v. Willcock*,¹⁶⁸ a commercial photography studio, co-owned by a husband and wife, was found to have violated the New Mexico Human Rights Act ("NMHRA") when it refused

¹⁶³ *Hobby Lobby*, 134 S. Ct. at 2785.

¹⁶⁴ See *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 283 (Colo. App. 2015) (concluding that even government-compelled nondiscrimination against potential customers in violation of CADA is insufficiently expressive to warrant First Amendment protections), *cert. denied sub nom.*, *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 2016 WL 1645027 (Colo. Apr. 25, 2016), *petition for cert. filed*, No. 16-111 (U.S. Jul. 25, 2016).

¹⁶⁵ See, e.g., *id.* ("Masterpiece contend[ed] that the Commission's cease and desist order compel[ed] speech in violation of the First Amendment by requiring it to create wedding cakes for same-sex weddings."); *Elane Photography, LLC v. Willcock*, 309 P.3d 53, 63 (N.M. 2013) ("Elane Photography [argued] that enforcement of the law violate[d] its right to free speech and the free exercise of its religion under the First Amendment to the United States Constitution."); *Sweetcakes by Melissa*, Nos. 44-14 & 45-14, 2015 WL 4868796, at *26 (Ore. Bureau Labor & Indus. July 2, 2015);.

¹⁶⁶ *Masterpiece Cakeshop*, 370 P.3d at 283.

¹⁶⁷ *Id.*

¹⁶⁸ 309 P.2d 53 (N.M. 2013).

to photograph a lesbian wedding.¹⁶⁹ In its defense, Elane Photography argued that forcing it to comply with NMHRA, when such compliance was against the owners' personal religious beliefs, impermissibly compelled speech: "Elane Photography concludes that by requiring it to photograph same-sex weddings . . . the NMHRA unconstitutionally compels it to 'create and engage in expression' that sends a positive message about same-sex marriage not shared by its owner."¹⁷⁰

The appellate courts in both states rejected these arguments; New Mexico before *Hobby Lobby*, and Colorado after *Hobby Lobby*. These courts got it right. As explained below, under *Employment Division v. Smith*,¹⁷¹ the First Amendment neither compels nor permits a religious exemption from compliance with antidiscrimination laws for for-profit corporations, and *Hobby Lobby* did not alter the First Amendment analysis.

1. *Antidiscrimination Statutes Do Not Violate the Right to Free Speech*

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . ."¹⁷² The Supreme Court has interpreted this clause as one that protects both the right to speak *and* the right to refrain from speaking;¹⁷³ thus, no law may compel speech with which an actor disagrees.¹⁷⁴ As noted above, commercial actors in the antidiscrimination context contend they are entitled to an exemption from compliance with antidiscrimination laws because complying with such laws would compel a pro-LGBT message with which they have a religious disagreement.

The Court's compelled speech doctrine falls into two doctrinal strands: (1) the right not to speak a governmental message, and (2) the right to be free from the compulsion to adopt the message of another, non-governmental speaker. In addition, the Court has recognized that some "symbolic speech" is entitled to First Amendment protection.

a. Antidiscrimination Laws Do Not Compel Adoption of a Government Message

The "right not to speak" a government message was first recognized in *West Virginia Board of Education v. Barnette*,¹⁷⁵ in which the Court held that schoolchildren cannot be compelled to recite the Pledge of

¹⁶⁹ *Id.* at 60.

¹⁷⁰ *Id.* at 63.

¹⁷¹ 494 U.S. 872, 877 (1990). This decision is discussed *infra* at Section V.B.

¹⁷² U.S. CONST. amend. I.

¹⁷³ See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

¹⁷⁴ See, e.g., *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 61 (2006) ("[F]reedom of speech prohibits the government from telling people what they must say.").

¹⁷⁵ 319 U.S. 624 (1943).

Allegiance.¹⁷⁶ The Court reasoned:

To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind. . . .

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.¹⁷⁷

More than 30 years later, in *Wooley v. Maynard*,¹⁷⁸ the Court reinforced the “right not to speak” a government message when it held that New Hampshire could not force its residents to accept the state motto on vehicle license plates.¹⁷⁹ In both of these cases, the government had chosen a specific message—allegiance to the flag and “Live Free or Die”—and required individual speakers to endorse those government messages.

The antidiscrimination context is distinguishable. First, such statutes do not compel endorsement of any government message whatsoever. Second, unlike the laws in *Barnette* and *Wooley*, neither of which has any purpose beyond coercing the adoption of a government-sanctioned message, the purpose behind antidiscrimination laws goes well beyond expressing any government’s message because they (1) protect individuals from humiliation and dignitary harm, and (2) guarantee that goods and services are freely obtainable in the marketplace.¹⁸⁰

Thus, the Antidiscrimination Question is more akin to *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*¹⁸¹ In *FAIR*, a federal law—the Solomon Amendment—required universities to allow the military to recruit on campus on the same basis as non-military recruiters; refusal to do so would result in loss of federal funding.¹⁸² A group of law schools

¹⁷⁶ *Id.* at 642.

¹⁷⁷ *Id.* at 634, 642.

¹⁷⁸ 430 U.S. 705 (1977).

¹⁷⁹ *Id.* at 713 (holding that the government cannot require expression of “an ideological message by displaying it on [an individual’s] private property in a manner and for the express purpose that it be observed and read by the public”).

¹⁸⁰ See *Elane Photography, LLC v. Willcock*, 309 P.3d 53, 64–65 (N.M. 2013) (citing *Daniel v. Paul*, 395 U.S. 298, 307–08 (1969) (stating that the purpose of Title II of the Civil Rights Act of 1964 was “to [re]move the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public”), and *Katzenbach v. McClung*, 379 U.S. 294, 299–300 (1964) (discussing the economic impact of discrimination in public accommodations)).

¹⁸¹ 547 U.S. 47 (2006).

¹⁸² *Id.* at 51. Many campuses began banning the military from recruiting on campus after President Bill Clinton signed the “Don’t Ask, Don’t Tell” policy, under which members of the military would be discharged if they came out as LGBT. Lindsay Gayle Stevenson, *Military Discrimination on the Basis*

challenged the law on several grounds, including that the law compelled speech (i.e., required law schools to speak the government's message) in violation of the First Amendment.¹⁸³ The Court disagreed. It held that the law did not compel speech because "[t]here is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse" and, as a result, the law "neither limit[ed] what law schools may say nor require[d] them to say anything."¹⁸⁴ It further noted that law schools "remain free . . . to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds."¹⁸⁵ Finally, it held that the law "regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*."¹⁸⁶

Antidiscrimination laws are analogous to the Solomon Amendment. There is nothing "approaching a Government-mandated pledge or motto"¹⁸⁷ that for-profit, commercial enterprises must endorse when complying with such laws. A state antidiscrimination law "does not require any affirmation of belief by regulated public accommodations; instead, it requires businesses that offer services to the public at large to provide those services without regard for race, sex, sexual orientation, or other protected classifications."¹⁸⁸

The two state appellate courts that have considered the Antidiscrimination Question both held that antidiscrimination laws do not compel anyone to speak the government's message. The court in *Elane Photography* noted that the "[NMHRA] does not even require Elane Photography to take photographs. The NMHRA only mandates that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation."¹⁸⁹

The *Masterpiece Cakeshop* court agreed with this reasoning, and similarly rejected the bakery's compelled speech argument: "[T]he act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it."¹⁹⁰ Moreover, the court reasoned, any

of Sexual Orientation: "Don't Ask, Don't Tell" and the Solomon Amendment, 37 LOY. L.A. L. REV. 1331, 1332–33, 1336–37, 1365 (2004). Congress responded by passing the law challenged in *FAIR*. *FAIR*, 547 U.S. at 51.

¹⁸³ *FAIR*, 547 U.S. at 53. The schools argued that speech involved advertising the military recruiters through the sending of emails and the distribution of flyers. *Id.* at 60.

¹⁸⁴ *Id.* at 60, 62.

¹⁸⁵ *Id.* at 60.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 62.

¹⁸⁸ *Elane Photography, LLC v. Willock*, 309 P.3d 53, 65 (N.M. 2013).

¹⁸⁹ *Id.* at 64.

¹⁹⁰ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 286 (Colo. App. 2015), *cert. denied sub nom.*, *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 2016 WL 1645027 (Colo. Apr. 25, 2016), *petition for cert. filed*, No. 16-111 (U.S. Jul. 25, 2016).

attribution of a pro-same-sex-marriage message was only to the customer:

[T]o the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to Masterpiece. . . . because CADA prohibits all places of public accommodation from discriminating against customers because of their sexual orientation, it is unlikely that the public would view Masterpiece's creation of a cake for a same-sex wedding celebration as an endorsement of that conduct.¹⁹¹

As such, the court held that “a reasonable observer would understand that Masterpiece's compliance with the law is not a reflection of its own beliefs.”¹⁹²

The *Elane Photography* and *Masterpiece Cakeshop* courts got it right: requiring compliance with antidiscrimination statutes does not compel businesses to adopt any governmental message.

b. Antidiscrimination Laws Do Not Compel Adoption of the Message of Another

A second line of Supreme Court cases holds that the government is prohibited from requiring an individual to adopt the message of another, non-governmental speaker. This precedent is not applicable to the Antidiscrimination Question.¹⁹³

In *Miami Herald Publishing Co. v. Tornillo*,¹⁹⁴ the Court considered a challenge to Florida's “right-of-reply,” which provided that, if a candidate could demand that a newspaper print a response of equal prominence and space to an editorial in the newspaper attacking a candidate's character or record.¹⁹⁵ The Court struck down that statute because it directly interfered with the newspaper's right to speak—by penalizing the newspaper's own expression (by requiring the publication of a response) and by infringing on the newspaper's “exercise of editorial control and judgment.”¹⁹⁶

Moreover, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,¹⁹⁷ the Supreme Court struck down a California Public Utilities Commission regulation that permitted intervenors in ratemaking

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See, e.g., *FAIR*, 547 U.S. 47, 63 (2006) (noting the Court's prior holdings that the government may not require someone “to host or accommodate another speaker's message.”) (citations omitted); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 243–45, 258 (1974) (striking down a Florida law requiring that a local newspaper publish, free of charge, a piece authored by a political candidate written in direct response to the newspaper's criticism of that candidate).

¹⁹⁴ 418 U.S. 241 (1974).

¹⁹⁵ *Id.* at 243–44.

¹⁹⁶ *Id.* at 258.

¹⁹⁷ 475 U.S. 1 (1986).

proceedings to include messages in the utility's billing envelopes, which it distributed to customers.¹⁹⁸ It reasoned that, under *Tornillo*, the regulation impermissibly restricted Pacific Gas & Electric's speech "to certain topics or views" and forced it "to respond to views that others may hold."¹⁹⁹

Together, these cases stand for the principle that the government may not hijack a private speaker's method of communicating with its audience by mandating dissemination of a third person's message. In the antidiscrimination context, would-be discriminators rely on this line of cases to argue that compliance with antidiscrimination statutes impermissibly compels them to adopt the message of another, namely pro-LGBT messages championed by LGBT people and their allies.²⁰⁰

This simply is not the case. Customers and other members of the public can and will appreciate that compliance with an antidiscrimination law is not a reflection of these entities' beliefs on a myriad of subjects, including LGBT people and marriage for same-sex couples. Unlike *Tornillo* and *Pacific Gas & Electric*, "which involved direct government interference with the speaker's own message[,] the Antidiscrimination Question involves a situation of "a message-for-hire."²⁰¹ Because these for-profit entities charge their customers for goods and services, the possibility that customers or the general public will make any connection between the for-profit corporation's sale of goods or services to LGBT people or same-sex couples, and the views of the for-profit corporation on either of those topics, is remote at best.²⁰²

Finally, no discussion of compelled speech in the antidiscrimination context would be complete without consideration of *Boy Scouts of America v. Dale*²⁰³ and *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of*

¹⁹⁸ *Id.* at 5–7.

¹⁹⁹ *Id.* at 11.

²⁰⁰ *See, e.g.,* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 ("Masterpiece argues that wedding cakes inherently convey a celebratory message about marriage and, therefore, the . . . order [to comply with CADA] unconstitutionally compels it to convey a celebratory message about same-sex marriage in conflict with its religious beliefs."), *cert. denied sub nom.*, Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 2016 WL 1645027 (Colo. Apr. 25, 2016), *petition for cert. filed*, No. 16-111 (U.S. Jul. 25, 2016); Elane Photography, LLC v. Willock, 309 P.3d 53, 65 (N.M. 2013) ("Elane Photography argues . . . that by requiring it to accept a client who is having a same-sex wedding, the NHMRA compels it to facilitate the messages inherent in that event. Elane Photography argues that there are two messages conveyed by a same-sex wedding . . . : first, that such ceremonies exist, and second, that these occasions deserve celebration and approval.").

²⁰¹ *Elane Photography, LLC*, 309 P.3d at 66 ("It may be that Elane Photography expresses its clients' messages in its photographs, but only because it is hired to do so.").

²⁰² *See, e.g., id.* (refuting a for-hire photographer's argument that the expressive nature of its work permits it to eschew antidiscrimination laws so as not to adopt a message of its client); *Masterpiece Cakeshop, Inc.*, 370 P.3d at 287 ("The fact that an entity charges for its goods and services reduces the likelihood that a reasonable observer will believe that it supports the message expressed in its finished product.").

²⁰³ 530 U.S. 640 (2000).

Boston,²⁰⁴ in which the Supreme Court considered a state antidiscrimination law vis-à-vis a claim of First Amendment protection and held in favor of the discriminating entities on First Amendment grounds. Both, however, are distinguishable from the Antidiscrimination Question.

In *Dale*, an assistant scoutmaster sued the Boy Scouts of America (“BSA”) because the BSA expelled him after he came out as a gay man.²⁰⁵ He alleged that BSA violated New Jersey’s antidiscrimination law, which included sexual orientation as a protected characteristic.²⁰⁶ The Court held that although BSA was subject to the antidiscrimination law, it did not have to admit a gay leader because forcing it to would infringe on the BSA’s First Amendment expressive rights.²⁰⁷ The Court based its holding on its finding that the BSA is an association of purportedly like-minded people that is engaged in “instilling its system of values in young people” and not intended to be open to everyone.²⁰⁸ In taking an official position against homosexuality, the Court reasoned, the BSA took an expressive stand worthy of First Amendment protection, thus exempting the BSA from the antidiscrimination statute.²⁰⁹

Dale is distinguishable on its facts and thus should not present an obstacle for courts to find that an antidiscrimination statute trumps both a state RFRA and a First Amendment challenge in the commercial setting.²¹⁰ While the Boy Scouts is properly characterized as an association, and thus may have a collective, associational viewpoint entitled to First Amendment protections, for-profit, commercial entities do not have any characteristics of an association. They are not associations of like-minded people; rather, they exist to sell goods and provide services to the general public—a diffuse, diverse, unassociated collection of people. That for-profit, commercial actors are not associations is bolstered by the fact that for-profit businesses do not raise freedom of association claims—which was the claim in *Dale*—in cases raising the Antidiscrimination Question.²¹¹

Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, also is distinguishable. In *Hurley*, GLIB, a group of LGBT Irish-Americans, applied for a permit to march in Boston’s annual Saint Patrick’s Day

²⁰⁴ 515 U.S. 557 (1995).

²⁰⁵ *Dale*, 530 U.S. at 643–44.

²⁰⁶ *Id.* at 645.

²⁰⁷ *Id.* at 656.

²⁰⁸ *Id.* at 644.

²⁰⁹ *Id.* at 650, 653.

²¹⁰ But see Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 596 (2001) (“Unfortunately, there is no way to cabin the Court’s approach in *Dale* so that it applies only to the Boy Scouts, or only to sexual orientation discrimination, or only to New Jersey’s law.”).

²¹¹ See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53, 66 n.2 (N.M. 2013) (“*Dale* also was decided on freedom of association grounds Elane Photography has not argued that its right of expressive association was violated.”).

parade.²¹² After the organizers, a private non-profit group, rejected GLIB's application, GLIB sued, alleging that its exclusion from the parade violated Massachusetts's public accommodation law.²¹³ The organizers responded that application of the public accommodation law violated their First Amendment right to expressive association.²¹⁴

The *Hurley* Court held that the organizers were exempt from the public accommodation law because application of that law violated the First Amendment right of expressive association.²¹⁵ It grounded its holding in the fact that parades are inherently expressive; parades are "marchers who are making some sort of collective point, not just to each other but to bystanders along the way."²¹⁶ In addition, the Court noted that the likelihood of misattribution of GLIB's message (to show that there are LGBT people within the Irish-American community and that they deserve "unqualified social acceptance"²¹⁷) to the organizers was a factor in its decision.²¹⁸ While the Court held that the public accommodation statute was not unconstitutional on its face, it held that, the statute violated First Amendment expressive-association rights as applied to the parade organizers.²¹⁹

Like *Dale*, *Hurley* is distinguishable from the circumstances addressed here. First, would-be discriminators in the commercial setting cannot assert a right to expressive association because there simply is no "collective point" or "inherent expressiveness" in the sale of goods and services, as there is in a parade. Second, the commercial activity of selling crafting supplies, wedding cakes, and wedding photographs is not fundamentally expressive. Rather, it is a transaction that does not make any "collective point,"²²⁰ other

²¹² 515 U.S. 557, 561 (1995).

²¹³ *Id.*

²¹⁴ *Id.* at 563. As an initial matter, this distinguishes *Hurley* from the circumstances addressed here, where the discriminating entities claim First Amendment free-speech rights and free exercise of religion rights, not freedom of expressive association rights, as the ground for their exemption from an antidiscrimination statute. Would-be discriminators in the commercial context would have a hard time establishing an expressive association claim because to prevail on such a claim, a group must "be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion." *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988). As an initial matter, companies like Hobby Lobby, bakeries, and photographers, do not have "members"—they have customers. The only expressive purpose that could be said to exist within these companies would be a general one of maximizing profit, which arguably is not an expressive purpose at all. Finally, even if maximizing profit were found to be an express purpose, it is not "specific," as required by *New York State Club Association*. Moreover, these customers are the public at large, which can hardly be said to have a single desired viewpoint, let alone as having the shared expressive viewpoint of the craft store, bakery, or photographer.

²¹⁵ *Hurley*, 515 U.S. at 580–81.

²¹⁶ *Id.* at 568.

²¹⁷ *Id.* at 574–55.

²¹⁸ *Id.* at 576–77.

²¹⁹ *Id.* at 572–73.

²²⁰ *Id.* at 568.

than, perhaps, that the LGBT customer desired a good or service offered by the business entity, which the business entity provided consistent with its goal as a commercial actor.²²¹

This distinction from *Dale* and *Hurley* does not change simply because the good or service at issue is artistic in nature, such as a photograph or the creation of a wedding cake, because antidiscrimination laws apply to the *operation of a business*, specifically the decision to deny goods or services on the basis of a protected characteristic, and not to the content of the allegedly artistic product or service.²²² “While photography may be expressive, the operation of a photography business is not.”²²³ Similarly, protecting LGBT people from discrimination in employment does not make any “collective point”²²⁴ about homosexuality *per se*, but rather any collective point it does make is one of a collective commitment to fairness and antidiscrimination.

It strains credulity to argue that the commercial work of a baker, photographer, or crafting store either makes or is perceived to make a collective point. Observers are extremely unlikely to believe that the proprietors of commercial enterprises personally share in every message that might be conveyed on items produced by customers (e.g., on a cake). Thus, even assuming that there is some kind of message in the sale of crafting goods, cakes, or photographs to LGBT people, or in the hiring of an LGBT employee, or in the renting of a hotel room to an LGBT couple, there is no risk of misattribution of that message to the commercial actor that there was in the parade context.

In fact, the *Hurley* Court recognized this distinction directly when it stated that the enforcement of the state’s antidiscrimination law in that case

[did] not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. [Parade organizers] disclaim any intent to exclude homosexuals as such, and *no individual member of GLIB claims to have been excluded* from parading as a

²²¹ The New Jersey Division on Civil Rights articulated this distinction in *Bernstein v. Ocean Grove Camp Meeting Ass’n*, CRT 6145-09, PN34XB-03008 (N.J. Div. Civil Rts., Oct. 22, 2012). There, New Jersey’s antidiscrimination law was applied to compel a boardwalk owner to offer its venue for a same-sex commitment ceremony. *Id.* at 12. The Division distinguished the case from *Hurley* in finding that the law’s compulsion of the venue owner did not violate the First Amendment: “[T]he element of forced inclusion or forced speech that characterize associational rights cases is simply not present Unlike the parade in *Hurley*, there is nothing inherently expressive in the secular business activity of renting a boardwalk pavilion” *Id.*

²²² See *Elane Photography, LLC v. Willock*, 309 P.3d 53, 68 (N.M. 2013) (“[T]he NMHRA applies not to Elane Photography’s photographs but to its business operation, and in particular, its business decision not to offer its services to protected classes of people.”).

²²³ *Id.* at 68.

²²⁴ *Id.* at 71 (citing *Hishon v. King & Spalding*, 467 U.S. 69, 71–73 (1984)).

member of any group . . . approved to march.²²⁵

As a result, the Court found that Massachusetts's antidiscrimination law was "applied in a peculiar way" by the lower courts, a way that impermissibly burdened the parade organizers' First Amendment rights.²²⁶

In contrast, the situation addressed herein is one in which corporations seek exemptions from antidiscrimination laws in order to refuse goods and services, employment, or accommodation to *individual* LGBT people who in no way touch on any expressive right of the commercial actor—acts of discrimination that the *Hurley* Court suggested rather explicitly *would* be subject to redress under an antidiscrimination law, notwithstanding claims of First Amendment protections made by the discriminators.²²⁷ Thus, application of antidiscrimination statutes in the commercial and employment contexts addressed herein is entirely ordinary, unlike the circumstances in *Hurley*, thus rendering *Hurley* inapposite.

State courts considering *Hurley* have similarly distinguished it and found it to be no barrier to enforcing antidiscrimination statutes against claims of expressive activity alleged to be protected by the First Amendment.²²⁸ As an analogy to *Hurley*, the *Elane Photography* court offered that an antidiscrimination law "could not dictate which groups a parade organizer had to include. However, if a business sold parade-planning services, and that business operated as a public accommodation, the [antidiscrimination law] would prohibit that business from refusing to offer parade-organizing services to persons because of their sexual orientation."²²⁹ Thus, *Dale* and *Hurley* are inapposite to the Antidiscrimination Question.²³⁰

²²⁵ *Hurley*, 515 U.S. at 573 (emphasis added).

²²⁶ *Id.* at 572–73.

²²⁷ *See id.* at 572 ("[The antidiscrimination law's] enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual *individuals* in various units admitted to the parade.") (emphasis added).

²²⁸ *See* Craig v. Masterpiece Cakeshop, 370 P.3d 272, 287 (Colo. App. 2015) ("[T]his case also differs from *Hurley* Central to the Court's conclusion was the 'inherent expressiveness of marching to make a point,' The Court concluded that spectators would likely attribute each marcher's message to the parade organizers as a whole. . . . In contrast, it is unlikely that the public would understand Masterpiece's sale of wedding cakes to same-sex couples as endorsing a celebratory message about same-sex marriage."), *cert. denied sub nom.*, Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 2016 WL 1645027 (Colo. Apr. 25, 2016), *petition for cert. filed*, No. 16-111 (U.S. July 25, 2016).

²²⁹ *Elane Photography, LLC*, 309 P.3d at 68; *see also* Sweetcakes by Melissa, Nos. 44-14 & 45-14, 2015 WL 4868796, at *72 (Ore. Bureau of Labor & Indus. July 2, 2015) ("*Hurley* is distinguishable because Respondents' provision of a wedding cake . . . was not for a public event, but for a private event. Whatever message the cake conveyed was expressed only to Complainants and the persons they invited to their wedding ceremony, not to the public at large. In addition, . . . whether or not making a wedding cake may be expressive, the operation of Respondents' bakery, including Respondents' decision not to offer services to a protected class of persons, is not.").

²³⁰ While the antidiscrimination cases do not present a claim of "freedom of association," the reasoning in *Roberts v. United States Jaycees* nonetheless supports a conclusion that would-be

c. Antidiscrimination Laws Do Not Regulate Symbolic Speech

Finally, the Supreme Court has also recognized that some forms of conduct are symbolic speech and deserve First Amendment protections. For example, the burning of the American flag to protest government policies, the public burning of draft cards during an anti-war protest, and wearing an arm band to express an anti-war sentiment are all forms of expressive conduct entitled to First Amendment protection.²³¹ Not all conduct is expressive, however, and the Court has been unambiguous that the category of conduct-as-speech is very narrow.²³² Thus, First Amendment protections extend only to conduct that is “inherently expressive.”²³³

Conduct is “inherently expressive” when there is “[a]n intent to convey a particularized message” and there is a great likelihood that the “message would be understood by those who viewed it.”²³⁴ The Supreme Court recognized expressive conduct in *Hurley* based on the inherently expressive nature of a parade when it noted that “every participating unit affects the message conveyed by the private organizers.”²³⁵ As a result, the application of the antidiscrimination statute was unconstitutional because using state power in that way violated “the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”²³⁶

Other decisions, however, have refused to recognize conduct as expressive. For example, courts have held that legislators’ acts of voting²³⁷ and students’ wearing of nondescript school uniforms²³⁸ do not convey

discriminators may not raise free speech arguments under the First Amendment to claim an exemption from such laws. 468 U.S. 609, 628–29 (1984). In *Roberts*, the Court rejected a claim by the Jaycees that it has a right to freedom of association such that they could exclude women members in violation of the Minnesota antidiscrimination law. *Id.* at 626–27. Instead, the Court held that “Minnesota’s compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members’ associational freedoms.” *Id.* at 623.

²³¹ *United States v. Eichman*, 496 U.S. 310, 312 (1990) (flag burning); *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (draft-card burning); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (armband wearing).

²³² *See, e.g., City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (“It is possible to find some kernel of expression in almost every activity a person undertakes”); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 65–66 (2006) (rejecting the view that “conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea”).

²³³ *FAIR*, 547 U.S. at 66.

²³⁴ *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (internal quotations and citations omitted).

²³⁵ *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557, 572 (1995).

²³⁶ *Id.* at 573.

²³⁷ *Nevada Comm’n on Ethics v. Carrigan*, 546 U.S. 117, 125–126 (2011).

²³⁸ *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 428 (9th Cir. 2008). Further, even if antidiscrimination laws do compel expressive conduct that does not mean they are unconstitutional. First Amendment protections are not absolute. The government “can regulate communicative conduct if it has an important interest unrelated to the suppression of the message and if the impact on the communication is no more than necessary to achieve the government’s purpose.” *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 283 (Colo. App. 2015) (citing *United States v. O’Brien*, 391 U.S. 367, 376 (1968)), *cert.*

particularized messages so as to render them inherently expressive.

Compliance with antidiscrimination statutes do not compel symbolic speech because such compliance is not inherently expressive. First, the compelled conduct is *refraining* from discriminating against customers because of a protected characteristic.²³⁹ Second, refraining from such discrimination does not send any particular message about the would-be discriminator's views on LGBT people or marriage for same-sex couples. Third, even if such a particularized message was sent, it is unlikely that a reasonable observer would both comprehend that message and attribute it to the would-be discriminator.²⁴⁰ Finally, these for-profit corporations retain their First Amendment right to express their religious views.²⁴¹

In sum, because antidiscrimination laws regulate non-expressive conduct in a manner that fulfills a compelling government interest, they do not impermissibly burden the free speech rights of corporations. This conclusion is as proper after *Hobby Lobby* as it was before because *Hobby Lobby* did not address a free speech claim.

B. *Antidiscrimination Statutes Do Not Violate the Free Exercise Clause*

The final argument made by would-be discriminators is that antidiscrimination laws violate the Free Exercise Clause of the First Amendment. The scope of the Free Exercise Clause—which provides that “Congress shall make no law . . . prohibiting the free exercise”²⁴² of religion—has been interpreted and refined by the Supreme Court for many decades.

Most importantly, the Free Exercise Clause means “the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all ‘governmental regulation of religious

denied sub nom., *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, 2016 WL 1645027 (Colo. Apr. 25, 2016), *petition for cert. filed*, No. 16-111 (U.S. July 25, 2016). Because the government has not only an important interest in eradicating discrimination, but a compelling one, and because antidiscrimination laws are unrelated to any suppression of speech, any incidental impact on speech or expression is permissible.

²³⁹ See *Masterpiece Cakeshop, Inc.*, 370 P.3d at 286 (“Masterpiece does not convey a message supporting same-sex marriage merely by abiding by the law and serving its customers equally.”); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 69–70 (N.M. 2013) (“Reasonable observers are unlikely to interpret Elane Photography’s photographs as an endorsement of the photographed events. It is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the happy couple’s views on issues ranging from the minor (color scheme, the hors d’oeuvres) to the decidedly major (the religious service, the choice of bride or groom).”).

²⁴⁰ See *Masterpiece Cakeshop, Inc.*, 370 P.3d at 286 (“Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally.”).

²⁴¹ See *Elane Photography, LLC*, 309 P.3d at 70 (“They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws.”).

²⁴² U.S. CONST. amend. I.

beliefs as such.”²⁴³ Moreover, the government is prohibited from forcing the affirmation of any religious belief,²⁴⁴ from “punish[ing] the expression of religious doctrines it believes to be false,”²⁴⁵ from “impos[ing] special disabilities on the basis of religious views or religious status,”²⁴⁶ and from “lend[ing] its power to one or the other side in controversies over religious authority or dogma.”²⁴⁷

In *Employment Division v. Smith*, the Court addressed an issue very similar to the Antidiscrimination Question and held that a neutral law of general applicability does not violate the First Amendment’s Free Exercise Clause.²⁴⁸ Additionally, the Court suggested that a party might state a valid First Amendment free exercise claim if it demonstrates that its challenge implicates both free exercise and an independent constitutional protection—this is known as a “hybrid” claim.²⁴⁹

In *Smith*, drug counselors in Oregon were fired for ingesting peyote, which they did as part of a religious ceremony in the Native American Church.²⁵⁰ Possession of peyote was a felony under Oregon law, punishable by imprisonment.²⁵¹ Because they were fired for “misconduct”—ingestion of the drug—they were denied unemployment benefits.²⁵² They challenged that denial by arguing that the Oregon criminal statute prohibiting the use of peyote, even for religious reasons, and the unemployment compensation law that relied on the criminal statute to determine that the ingestion of peyote was “misconduct” sufficient to justify denying unemployment benefits, infringed on their right of the free exercise of religion under the First Amendment.²⁵³ In essence, then, they argued for a religious exemption from the state’s criminal law, and thus from the unemployment law.²⁵⁴

The Court rejected this argument, instead noting: “We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On

²⁴³ *Emp’t Div. of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)), *superseded by statute*, 42 U.S.C. § 2000bb (1993), *as recognized in* *Holt v. Hobbs*, 135 S. Ct. 853, 859–60 (2015).

²⁴⁴ *Torcaso v. Watkins*, 367 U.S. 488, 495–96 (1961).

²⁴⁵ *Smith*, 494 U.S. at 878–79 (citing *United States v. Ballard*, 322 U.S. 78, 86–88 (1944)).

²⁴⁶ *Id.* (citing *McDaniel v. Paty*, 435 U.S. 618 (1978)).

²⁴⁷ *Id.* (citing *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 445–52 (1969)).

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

²⁴⁹ *Id.* at 882.

²⁵⁰ *Id.* at 874.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 876.

²⁵⁴ *See id.* at 878 (“Respondents . . . seek to carry the meaning of ‘prohibiting the free exercise [of religion]’ one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons.”).

the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.”²⁵⁵ To support this holding, the Court harkened back to 1940, when Justice Frankfurter wrote,

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.²⁵⁶

The Court then went back even further, to the 1878 case of *Reynolds v. United States*, in which a resident of Utah sought a religious exemption from that state’s polygamy law.²⁵⁷ The Court declined to create a religious exemption, noting that “[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”²⁵⁸ The Court went on to wonder, “[c]an a man excuse his practices to the contrary because of his religious belief?”²⁵⁹ To which the Court responded: “To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to *permit every citizen to become a law unto himself*.”²⁶⁰ One hundred and thirty-six years later, in *Hobby Lobby*, Justice Alito echoed this sentiment when he explained that there are some instances in which laws or regulations have no less restrictive alternative and thus must be followed, even if compliance burdens religious freedoms.²⁶¹ One of those instances are tax laws, whereby “allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos.”²⁶²

This precedent makes clear that there are well-defined limits to the right to free exercise of religion.²⁶³ Nothing in *Hobby Lobby* altered this principle;

²⁵⁵ *Id.* at 878–79.

²⁵⁶ *Id.* at 879 (quoting *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594–95 (1939)).

²⁵⁷ 98 U.S. 145 (1878).

²⁵⁸ *Id.* at 166.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 167 (emphasis added).

²⁶¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2784 (2014).

²⁶² *Id.*

²⁶³ The *Smith* Court also held that neutral laws of general applicability that burden religion do *not* need to meet the “compelling government interest” test. *Emp’t Div. of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). This holding, which is inapplicable here because antidiscrimination statutes *do* meet the compelling state-interest test, created a national uproar and resulted in the eventual passage of the federal RFRA. See Louise Melling, *Opinion: ACLU: Why We Can No Longer Support the Federal ‘Religious Freedom’ Law*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html?utm_term=.df02f2e13475 [<https://perma.cc/29DJ-JQ7D>] (describing how the RFRA was passed in 1993 in response

that case merely held that for-profit corporations can possess and exercise religious beliefs under RFRA, consistent with these well-defined constitutional limits.²⁶⁴ Like the tax laws referenced by Justice Alito as an example of the “chaos” that will result if religious exemptions are created,²⁶⁵ antidiscrimination laws fall squarely within the kinds of recognized and permissible limits that can be placed on the free exercise of religion. If we permit commercial actors to pick and choose the antidiscrimination laws they wish to follow based on their religious beliefs, the rule of law will fall into the chaos that Justice Alito has said must, and can, be constitutionally avoided by compelling compliance.

All of the *Smith* requirements are met by antidiscrimination laws. First, it is beyond dispute that antidiscrimination laws are “valid law[s] prohibiting conduct that the State is free to regulate.”²⁶⁶ Even when declared inapplicable, as in *Hurley*, such laws are proper exercises of state power.²⁶⁷

Second, these laws are neutral because they are not grounded in any religious ideology, but rather, are grounded in a commitment to antidiscrimination in order to realize the state’s important purpose of protecting all residents and visitors from discrimination based on membership in protected characteristics. Such discrimination results in both economic and dignity harm.²⁶⁸ The antidiscrimination laws also embody an important state purpose of promoting and ensuring a robust and fair free-market economy; these laws “prevent[] the economic and social balkanization prevalent when businesses serve only their own ‘kind,’ and ensure[] that the goods and services provided by public accommodations are available to all of the state’s citizens.”²⁶⁹ As powerfully explained by the

to the *Smith* case). In its original form, the federal RFRA purported to apply to both the federal and state governments, thus completely abrogating *Smith*. See *Boerne v. Flores*, 521 U.S. 507, 516 (1997) (indicating that the RFRA applies to “all Federal and State law”), *superseded by statute*, 42 U.S.C. § 2000cc (2000), *as recognized in Hobby Lobby*, 134 S. Ct. at 2761). However, the Court held in *City of Boerne v. Flores* that Congress overstepped its authority in extending the federal RFRA to state governments. *Id.* at 533–34 (1997). Thus, *Smith* continues to be controlling precedent on the states on the issue of religious exemptions from neutral, generally applicable laws based on the Free Exercise Clause.

²⁶⁴ *Hobby Lobby*, 134 S. Ct. at 2775.

²⁶⁵ *Id.* at 2784.

²⁶⁶ *Smith*, 494 U.S. at 879.

²⁶⁷ *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp.*, 515 U.S. 557, 572 (1995).

²⁶⁸ See Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodation Laws*, 22 J.L. & POL’Y 705, 707 (2014) (describing the effects of dignity harm upon the LGBT community when faced with discrimination).

²⁶⁹ *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 293 (Colo. App. 2015), *cert. denied sub nom. Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm’n*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *petition for cert. filed*, No. 16-111 (U.S. July 25, 2016). The Oregon Bureau of Labor and Industry articulated this point well in a related case:

Free enterprise provides a great opportunity for entrepreneurs to take an idea, create a business and achieve whatever success they can. It is a system open to all but, to

Oregon Bureau of Labor and Industry in *Sweetcakes by Melissa*, a post-*Hobby Lobby* case,

to allow Respondents, a for profit business, to deny any services to people because of their protected class, would be tantamount to allowing legal separation of people based on their sexual orientation from at least some portion of the public marketplace. This would clearly be contrary to Oregon law as well as any standard by which people in a free society should choose to treat each other.²⁷⁰

The order went on to observe that “[w]ithin Oregon’s public accommodations law is the basic principle of human decency that every person, regardless of their sexual orientation, has the freedom to fully participate in society. [That freedom includes] [t]he ability to enter public places, to shop, to dine, to move about unfettered by bigotry.”²⁷¹ Applying these principles to the facts of that case, the order held that when the bakery denied a lesbian couple a wedding cake, that act was more than the mere denial of a product:

It was, and is, a denial of RBC’s and LBC’s freedom to participate equally. It is the epitome of being told there are places you cannot go, things you cannot do . . . or be. Respondent’s conduct was a clear and direct statement that RBC and LBC lacked an identity worthy of being recognized. The denial of these basic freedoms to which all are entitled devalues the human condition of the individual, and in doing so, devalues the humanity of us all.²⁷²

Third, antidiscrimination laws are generally applicable because they do not target religiously motivated conduct and do not provide broad opportunities for secular exemptions.²⁷³

Finally, cases that address the Antidiscrimination Question do not present a “hybrid” claim because the independent constitutional claim that a plaintiff attempts to attach to his or her free exercise claim is a free speech

participate fairly, businesses must follow the laws of that apply to each of them equally. A business that disregards the law erodes the free marketplace for law abiding citizens and patrons alike.

Sweetcakes by Melissa, Nos. 44-14 & 45-14, 2015 WL 4868796, at *19 (Ore. Bureau Labor & Indus. July 2, 2015).

²⁷⁰ *Sweetcakes by Melissa*, 2015 WL 4868796 at *19.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53, 75 (N.M. 2013) (noting that the state’s antidiscrimination statute did not offend the Constitution because it is a “neutral law of general applicability” that does “not prefer secular conduct over religious conduct or evince any hostility toward religion”).

claim. As explained above, the free speech fails, thus rendering the hybrid claim untenable.²⁷⁴

State courts that have addressed the Antidiscrimination Question have applied *Smith* to conclude that antidiscrimination laws are neutral laws of general applicability and thus do not impermissibly violate the right to the free exercise of religion.²⁷⁵ Two of these cases were decided after *Hobby Lobby*.²⁷⁶

In *Masterpiece Cakeshop, Inc.*, the baker argued that *Smith*'s rational basis test did not apply because (1) CADA is neither neutral nor generally applicable because it exempts "places principally used for religious purposes," but does not exempt Masterpiece Cakeshop,²⁷⁷ and (2) it asserted a "hybrid" claim based on free exercise and free expression rights.²⁷⁸ The same arguments were raised by the photographer in *Elane Photography*.²⁷⁹ The photographer and the baker made these arguments because if a law is neither neutral nor generally applicable, it is subject to strict scrutiny—rather than to rational basis review—which would mean that the law would have to be justified by a compelling state interest and be narrowly tailored to advance that interest.²⁸⁰

The Colorado Court of Appeals and the New Mexico Supreme Court disagreed with Masterpiece Cakeshop and Elane Photography, respectively. On the neutrality requirement, the courts rejected the arguments that the laws were not neutral because they contain some religious exemptions.²⁸¹ The Colorado court held that

Masterpiece does not contend that its bakery is primarily used for religious purposes. CADA forbids all discrimination based on sexual orientation regardless of motivation. Further the existence of an exemption for religious entities undermines

²⁷⁴ *Masterpiece Cakeshop, Inc.*, 370 P.3d at 293 (noting that defendant's free-speech claim failed as a basis to invalidate the antidiscrimination law because the underlying statute was rationally related to a compelling state interest).

²⁷⁵ See e.g. *Elane Photography, LLC*, 309 P.3d at 75 ("We hold that the NMHRA is a neutral law of general applicability, and as such it does not offend the Free Exercise Clause of the First Amendment.").

²⁷⁶ E.g., *Masterpiece Cakeshop, Inc.*, 370 P.3d at 272.

²⁷⁷ *Id.* at 290.

²⁷⁸ *Id.* at 292.

²⁷⁹ 309 P.3d at 59.

²⁸⁰ E.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

²⁸¹ See, e.g., *Masterpiece Cakeshop*, 370 P.3d at 290 (describing the defendant's argument that CADA exempted "places principally used for religious purposes" and the court's subsequent rejection of this argument); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 74–75 (N.M. 2013) (describing the defendant's argument that since NMHRA exempted the sale of single-family homes or rental of small multi-family dwellings in very limited circumstances, as well as permitted religious organizations to limit or give preference to persons of the same religion in very limited circumstances it is not generally applicable, and court's ultimate rejection of this argument).

Masterpiece's contention that the law discriminates against its conduct because of its religious character.²⁸²

Finally, the Colorado court declared CADA neutral because it "does not compel Masterpiece to support or endorse any particular religious views" but instead "merely prohibits Masterpiece from discriminating against potential customers on account of their sexual orientation."²⁸³

The New Mexico court held that the photographer relied on a "distorted reading of the statute" and further reasoned that the exemptions are "ordinary exemptions for religious organizations and for certain limited employment and real-estate transactions. The exemptions do not prefer secular conduct over religious conduct or evidence any hostility toward religion."²⁸⁴

Both courts further held that the respective antidiscrimination laws were generally applicable because they did "not regulate only religiously motivated conduct"²⁸⁵ and because they do "not exempt secular conduct from its reach."²⁸⁶

Having decided that CADA is a neutral law of general applicability, which thus triggered the rational basis test, the Colorado court applied that test and concluded that CADA is rationally related to Colorado's interest in eliminating discrimination in places of public accommodation, an interest that rises to the level of compelling state interest and, thus, easily satisfies the rational basis test.²⁸⁷

Unlike *Elane Photography*, *Masterpiece Cakeshop* was decided after *Hobby Lobby* and did not find that *Hobby Lobby* presented any obstacle.²⁸⁸ The Colorado court addressed *Hobby Lobby* in the course of its discussion of Masterpiece Cakeshop's free exercise claims. It noted that the parties had not addressed whether for-profit entities like Masterpiece Cakeshop have free exercise rights, but also noted that the Court in *Hobby Lobby* had held, in the limited context of the federal RFRA, that RFRA's reference to

²⁸² *Masterpiece Cakeshop, Inc.*, 370 P.3d at 291.

²⁸³ *Id.*

²⁸⁴ *Elane Photography, LLC*, 309 P.3d at 74–75.

²⁸⁵ *Masterpiece Cakeshop, Inc.*, 370 P.3d at 290; *see also Elane Photography, LLC*, 309 P.3d at 75 (concluding that the exceptions "do not prevent the NMHRA from being generally applicable").

²⁸⁶ *Masterpiece Cakeshop, Inc.*, 370 P.3d at 291 (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993)). On the hybrid claim, the court held that such claims are dubious because they are based on dicta from the Supreme Court. *Id.* at 292. However, even assuming such a claim is viable, the court held it would not succeed because of the finding that CADA did not violate Masterpiece Cakeshop's free speech rights. *Id.*

²⁸⁷ *Id.* at 293.

²⁸⁸ The Supreme Court denied *Elane Photography*'s petition for writ of certiorari on April 7, 2014. 134 S. Ct. 1787 (2014). *Hobby Lobby* was argued on March 25, 2014 and decided on June 20, 2014. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2751 (2014). *Masterpiece Cakeshop* was decided on August 13, 2015. 370 P.3d at 272.

“persons” included for-profit corporations.²⁸⁹ It reasoned that “because RFRA does not apply to state laws infringing on religious freedoms . . . it is unclear whether Masterpiece (as opposed to Phillips) [its owner] enjoys First Amendment free exercise rights.”²⁹⁰ The court went on, however, to “assume, without deciding, that Masterpiece has free exercise rights under . . . the First Amendment.”²⁹¹

This was the proper reading of *Hobby Lobby*’s narrow holding—a holding that does not touch on the Antidiscrimination Question, but rather, at most, creates standing for a for-profit corporation to raise First Amendment defenses to comply with antidiscrimination laws. As explained above, the First Amendment does not support the creation of religious exemptions to antidiscrimination statutes, even for those for-profit corporations who have newly recognized religious beliefs and freedoms under *Hobby Lobby*.

CONCLUSION

The Religious Right has launched a campaign to “profoundly reorganize our relationship to law, religion, government, and to each other.”²⁹² That campaign is a cultural one, in which a new form of anti-LGBT narrative has been unveiled. The campaign is also a legal one—one that argues *Hobby Lobby* and the First Amendment should be interpreted and applied in unprecedented and expansive ways to allow for-profit corporations to opt out of state antidiscrimination laws. In sum, the Religious Right is fighting to “generate popular resistance to legal and cultural safeguards against religious supremacy.”²⁹³ It is attempting to leverage case law and the constitution to establish *its* religious belief as normative; as part of this strategy it argues that it has “no religious freedom unless [its] restrictive moral code is written into the Constitution.”²⁹⁴

The Religious Right is wrong: there is no legal justification under *Hobby Lobby* or the First Amendment for creating religious exemptions to antidiscrimination laws for for-profit corporations.²⁹⁵ Rather, as set forth in

²⁸⁹ *Masterpiece Cakeshop, Inc.*, 370 P.3d at 289 n.13.

²⁹⁰ *Id.* (internal citation omitted).

²⁹¹ *Id.*

²⁹² Clarkson, *supra* note 2, at 27.

²⁹³ *Id.* at 16.

²⁹⁴ *Id.* at v.

²⁹⁵ The 2016 legislative sessions in the states saw the emergence of a new kind of anti-LGBT law, one that differs from the state RFRA laws analyzed in this article. The new laws, most notably illustrated by House Bill 2 in North Carolina and House Bill 1523 in Mississippi, go beyond the general religious-freedom language of states’ RFRAs and instead expressly permit businesses to discriminate against LGBT people and/or same-sex married couples. See NC Gov. *Signs Radical Bill Into Law Attacking Transgender Students & Overturning LGBT Protections*, HUMAN RIGHTS CAMPAIGN (Mar. 23, 2016), <http://www.hrc.org/press/nc-gov.-signs-radical-bill-into-law-attacking-transgender-students-overturm> [<https://perma.cc/D5Q2-QB3R>]; see also H.R. 1523 § 2, 2016 Reg. Sess. (Miss. 2016). An analysis of

this comprehensive legal framework, the aims of protecting religious freedom and enforcing antidiscrimination laws can coexist as a matter of both statutory and constitutional law—enforcement of state antidiscrimination laws against such entities simply does not infringe on religious freedom. To reach any other conclusion will “turn America into a theocratic state, or a collection of theocratic mini-states, governed by the very narrowest of religious points of views.”²⁹⁶

The stakes are high but the law is clear. State antidiscrimination laws may—consistent with RFRAs and the First Amendment—be applied to for-profit corporations, regardless of their purported religious beliefs. Moreover, they *should* be so applied to protect both the rule of law and genuine religious freedom, which can only truly exist in the context of religious pluralism.

how to defeat this new brand of explicitly anti-LGBT law is beyond this Article’s reach; however, these laws likely are facially unconstitutional under the United States Supreme Court’s equal protection jurisprudence addressing laws that classify based on sexual orientation, as well as under *Obergefell*.

²⁹⁶ Rev. Dr. John C. Dorhauer, *The Religious Right and The Erosion of Religious Liberty*, HUFFINGTON POST (Jan. 20, 2016, 6:19 PM), http://www.huffingtonpost.com/rev-dr-john-c-dorhauer/the-religious-right-and-t_b_8977922.html [https://perma.cc/LNX7-3RRH].