The State of the Union: *Masterpiece Cakeshop* and Other LGBT Law Developments

Thursday, September 13, 2018
9 a.m.–4:15 p.m.

5.75 Access to Justice credits
SEMINAR PLANNERS

Mark Johnson Roberts, Oregon State Bar, Tigard, OR
Percy Wise, Portland, OR
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The State of the Union: *Masterpiece Cakeshop* and Other LGBT Law Developments
# SCHEDULE

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| 9:00  | Democracy or Theocracy? Reconciling Religious Liberty and Equal Justice Under the Law  
   - Delegating government authority to faith-based entities  
   - Religious exceptions to generally applicable laws  
   - Implications of *Masterpiece Cakeshop* for LGBT couples  
   - Judicial appointments and protection for underrepresented minority groups  
   Jennifer Pizer, *Lambda Legal, Los Angeles, CA* |
| 9:45  | “Because of Sex”: The State of LGBT Protections Under Federal Anti-Discrimination Laws  
   - Explicit LGBT anti-discrimination protections under state law  
   - Title VII case law on gender stereotypes  
   - Circuit survey—current developments in LGBT protection under Title VII  
   - LGBTQIA+ protections in education  
   - How Title IX compliance programs can support LGBTQIA+ and diverse students  
   Alexander Baldino, *Office of Equity and Inclusion, Portland Community College, Portland, OR*  
   Nora Broker, *Bennett Hartman Morris & Kaplan LLP, Portland, OR* |
| 10:45 | Break                                                                 |
| 11:00 | Representing Transgender Clients in Criminal Defense and Prison Cases  
   - Trans 101: terminology and basic competencies  
   - Prosecutors and juries: is information about your client probative, prejudicial, or simple curiosity?  
   - The discrimination-to-incarceration pipeline and incarceration conditions  
   - Prisoners and civil rights  
   - Oregon prison conditions cases  
   Tara Herivel, *Attorney at Law, Portland, OR*  
   Emma Lugo, *Cohost of Prison Pipeline, KBOO Community Radio, Portland, OR*  
   Karen Mockrin, *Attorney at Law, Portland, OR*  
   Percy Wise, *Portland, OR* |
| Noon  | Lunch                                                                 |
| 1:00  | Anatomy of a Civil Rights Case: *Klein dba Sweetcakes by Melissa v. Bureau of Labor & Industries*  
   - Public accommodations law and religion/conscience rights  
   - The forum: how BOLI is different from the courts  
   - The client perspective  
   - The role of media and social media  
   Moderator: Jennifer Pizer, *Lambda Legal, Los Angeles, CA*  
   Herb Grey, *Attorney at Law, Beaverton, OR*  
   Paul Thompson, *LTL PDX LLC, Portland, OR*  
   Carson Whitehead, *Appellate Division, Oregon Department of Justice, Salem, OR* |
| 2:30  | Break                                                                 |
2:45 Representing LGBTQ+ Immigrants in the Current Political Climate
   - Current immigration climate
   - Family immigration: options and challenges
   - Humanitarian protection: asylum, U, and T visas
Stephen Manning, Immigrant Law Group PC, Portland, OR
Eileen Sterlock, Immigration Law Office of Eileen Sterlock, Portland, OR

3:30 Family Affairs
   - Local developments, best practices, and potential pitfalls
   - Interstate family law issues affecting the LGBT community
   - Second parent adoption: a proper belt and suspenders or no longer necessary?
Gloria Trainor, Trainor Law PC, Portland, OR

4:15 Adjourn
FACULTY

Alexander Baldino, Office of Equity and Inclusion, Portland Community College, Portland, OR.

Nora Broker, Bennett Hartman Morris & Kaplan LLP, Portland, OR. Ms. Broker represents employees in litigation and before administrative agencies and licensing boards. She is a member of the OGALLA Board of Directors and chair of its Judiciary Committee, a member of the Oregon Trial Lawyers Association, and a pro bono attorney for the ACLU of Oregon Trans ID Project.

Herb Grey, Attorney at Law, Beaverton, OR. Mr. Grey’s practice includes estate planning, probate, advice to for-profit and nonprofit entities, and a variety of civil litigation, including constitutional and civil rights litigation focusing on free speech and religious liberty matters. He was involved in the 2004 case Li v. State of Oregon and the Sweet Cakes by Melissa case brought by BOLI in 2013. More recently, he has been involved in matters addressing the interaction of transgender rights and religious rights under Title VII, Title IX, and Oregon’s public accommodations law. Mr. Grey is admitted to practice before the United States Supreme Court.


Emma Lugo, Cohost of Prison Pipeline, KBOO Community Radio, Portland, OR.

Karen Mockrin, Attorney at Law, Portland, OR.

Stephen Manning, Immigrant Law Group PC, Portland, OR. Mr. Manning is a founding partner of Immigrant Law Group PC and the founder and director of the Innovation Law Lab, a nonprofit that combines technology and litigation to create next-generation activism against the mass incarceration of refugees and immigrants. He also serves as an adjunct professor at Lewis & Clark Law School. Mr. Manning is a past chair of the American Immigration Lawyers Association (AILA) Amicus Committee and a past chair of the Oregon AILA chapter. He is the author of several amicus briefs and practice advisories and the author of Ending Artesia: The Artesia Report (Jan. 2015). He was a presenter at the TEDxMtHood Conference on new ways to deploy legal strategies to protect refugees. Among other awards and honors, he is the recipient of the 2015 AILA Founders Award for the person who had the most impact on immigration policy.

Jennifer Pizer, Lambda Legal, Los Angeles, CA. Ms. Pizer is the Law and Policy Director for Lambda Legal, the oldest and largest national legal organization committed to achieving full recognition of the civil rights of LGBT people and people living with HIV. She has been a leading voice for ending marriage discrimination against lesbian and gay couples, for stopping anti-LGBT discrimination in employment, health care, and education, and against the misuse of religion to discriminate. In addition to litigating impact cases, she develops legislation, advises policymakers, and works with community advocates to advance family law and nondiscrimination protections and to oppose overbroad religious exemptions. She consulted extensively on the marriage bills enacted in Hawaii, Illinois, Minnesota, and Washington and on marriage equality ballot language for numerous other states. She is a lead drafter within the team providing technical support on LGBT nondiscrimination to Congressional leadership and to nondiscrimination campaigns in Arizona, Pennsylvania, and Ohio. Ms. Pizer has received many professional achievement and community service awards.
Eileen Sterlock, *Immigration Law Office of Eileen Sterlock, Portland, OR.* Ms. Sterlock’s practice focuses primarily on removal defense, humanitarian, and family immigration, as well as working with criminal defense counsel representing noncitizens. She is chair of the American Immigration Lawyers Association Oregon Chapter and has also served as the association’s CLE Chair.

Paul Thompson, *LTL PDX LLC, Portland, OR.*

Gloria Trainor, *Trainor Law PC, Portland, OR.*

Carson Whitehead, *Appellate Division, Oregon Department of Justice, Salem, OR.* Mr. Whitehead is an Assistant Attorney General in the Oregon Department of Justice Appellate Division. He litigates primarily civil appeals in state and federal court with an emphasis on free speech and natural resources issues. Mr. Whitehead represented the Bureau of Labor and Industries in the *Klein v. BOLI* case in the Oregon Court of Appeals.

Percy Wise, *Portland, OR.* Mr. Wise is an Oregon lawyer, a mortgage loan officer, and a community organizer. Mr. Wise is a transgender man, a veteran of the HIV/AIDS and LGBT civil rights movements, and a recipient of the Oregon State Bar Diversity Champions Award.
Chapter 1

Democracy or Theocracy? Reconciling Religious Liberty and Equal Justice Under the Law

Jennifer Pizer
Lambda Legal
Los Angeles, California

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Religious Freedom and LGBT Rights Continue to Coexist

By Jennifer C. Pizer

Reprinted with permission of author from GPSolo, January/February 2017.

Conservative religious voices have been condemning same-sex relationships since long before the marriage equality movement gained traction in the United States. As the freedom to marry became a reality for lesbian, gay, and bisexual (LGB) people in more and more states, some of those religious voices began to call for exemptions from secular laws to permit continued discrimination against those seeking to marry, or married to, a same-sex spouse.

As the Supreme Court prepared in the spring of 2015 to hear Obergefell v. Hodges, these calls came to dominate the legislatures of approximately half the states. More than 100 bills were introduced seeking to expand rights to discriminate against lesbian, gay, bisexual, and transgender (LGBT) people, with three-quarters of them seeking to do so by expanding religious rights. In 2016, following the Supreme Court’s marriage decision in Obergefell v. Hodges, 576 U.S. ___ (2015), the number of such bills roughly doubled.

Most of these proposals have not passed; however, those that have become law include permission for mental health professionals in Tennessee to refuse services to LGBT people on religious grounds, for certain child welfare agencies in Michigan to discriminate on religious grounds when providing publicly funded services, and for individuals and institutions in Mississippi to discriminate in many contexts based on religious beliefs about marriage, adult sexual relationships, and conceptions of gender. (As this article goes to print, the Mississippi law has been enjoined and is being reviewed by the Fifth Circuit Court of Appeals, Barber v. Bryant, No. 3:16-CV-417-CWR-LRA and No. 3:16-CV-442-CWR-LRA, 2016 U.S. Dist. LEXIS 86120 (S.D. Miss., June 30, 2016) (enjoining H.B. 1523).)

In Congress, U.S. Senator Mike Lee of Utah and U.S. Representative Raul Labrador of Idaho had introduced the First Amendment Defense Act (FADA, S.1598 and H.R. 2802) two weeks before the Obergefell decision. Providing the template for Mississippi’s now-enjoined law, FADA proposes exemptions from any federal law if complying would be inconsistent with one’s religious belief or moral conviction that marriage is for different-sex couples only, or that adult sexual relationships should be confined to such marriages. The bill’s sponsors assert that those who act negatively toward others based on such beliefs should not face penalties, including potential loss of government funding.

All this legislative activity shows the concern among some that equality and inclusion of LGBT people will mean lesser rights and marginalization of those who oppose these changes. But are such concerns well-founded? We certainly have seen headlines about clashes between same-sex couples and those who object on religious grounds. To many, these disputes have appeared new, dramatic, and sometimes confusing. But how significantly has the legal landscape changed? This article surveys common questions—some for which we have clear answers under current law, and others for which we all should stay tuned.

How Must the Government Treat Same-Sex Couples and LGBT Individuals?

We have known since the Supreme Court’s decision in Romer v. Evans, 517 U.S. 620 (1996), that government may not, without more, discriminate against LGB people based on the majority’s religious
views or notions of morality. The Court affirmed that principle in *Lawrence v. Texas*, 539 U.S. 558, 575 (2003), striking down the remaining state laws against same-sex intimacy (so-called sodomy laws), and again in 2013 in *United States v. Windsor*, 570 U.S. ___ (2013), striking down the federal Defense of Marriage Act (DOMA). *Obergefell* was a final confirming step, with Justice Anthony Kennedy stressing that the government’s duty to treat same-sex couples equally regarding marriage does not restrict the religious beliefs or free expression of those who disagree.

Chief Justice John Roberts and Justice Samuel Alito objected strongly that requiring equality for same-sex couples will lead to labeling opposing religious views as bigoted. Time will tell. Such shifts have happened to greater and lesser extents after other major civil rights decisions. This article will focus only on what current law requires.

The court order putting an end to County Clerk Kim Davis’s short-lived refusal of marriage licenses to same-sex couples in Rowan County, Kentucky, is among the best recognized illustrations of the principle that individual employees—including top-level employees—may not cause government to discriminate, regardless of the employees’ religious beliefs. Although there is less case law confirming the principle, we should expect the same result if a public employee were, for religious reasons, to refuse equal service to members of the public who are transgender. Public employees with religious objections to performing one or more job duties are entitled to an accommodation of their religious needs. But they only may be excused from particular duties when doing so does not impose an “undue” burden on the government employer. Causing the government to discriminate or otherwise harm members of the public is such a burden. If an agency has sufficient staff, and if an employee’s religious beliefs would require performance of a duty in a discriminatory manner, it can be possible for the agency to relieve the employee of that duty. But employees do not have a generally protected religious right to refuse to perform basic job duties, and to shift those duties onto others, and yet to keep their jobs.

**How Must Commercial Businesses Treat Same-Sex Couples and LGBT Individuals?**

**What the many state public accommodations cases tell us.** From Maine, to New York, to Iowa, to Colorado, to New Mexico, to California, to Oregon, to Washington, and to Hawaii, there have been cases and public arguments about religious refusals to rent event venues and lodging; to sell cakes, flowers, and other wedding-related goods and services; and to provide medical care and even haircuts. These cases only arise where there is a nondiscrimination law that applies. For wedding-related goods, services, and facilities, these generally are state public accommodations laws, there being no applicable federal law at present.

Consistently, these business owners have claimed religious exemption rights based on both the federal and their state constitutions. Most of these claims have failed, first, because the U.S. Constitution provides limited protection against enforcement of religiously neutral, generally applicable laws. Second, even when state law provides greater protection for exercise of religion in business contexts, the courts nonetheless have concluded there are compelling public interests in ending sexual orientation (and gender identity) discrimination, and that laws forbidding that conduct should be enforced like laws forbidding discrimination based on race, sex, marital status, or religion. We all need these laws to accomplish their goal—a public marketplace in which no one is turned away just because of who they are.
This body of case law has been evolving steadily since before same-sex couples could marry. Obergefell has put a brighter spotlight on these issues by requiring that same-sex couples may marry nationwide without changing whether federal nondiscrimination laws or laws of particular states protect those couples. Arizona, Indiana, and Georgia have exemplified this situation with their high-profile fights over legislation to expand religious rights to discriminate while still lacking those basic civil rights protections in state law.

**What the federal nondiscrimination rules and cases tell us.** There currently is no federal public accommodations law requiring businesses to treat same-sex couples and LGBT individuals equally when business owners have religious objections to doing so. However, other federal laws do offer significant protection in health care, employment, housing, and other contexts. For example, the Patient Protection and Affordable Care Act (ACA), often called “Obamacare,” bans sex discrimination in federally funded health services and programs. This ban has been construed as forbidding most discrimination against LGBT people. Similar protection for LGBT people is found under Title VII of the Civil Rights Acts of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, and the Education Amendments Act of 1972.

However, if the federal government seeks, for example, to enforce the ACA against owners of a business or for-profit medical clinic who object on religious grounds to treating LGBT people equally, the owners may invoke the federal Religious Freedom Restoration Act (RFRA) and demand an accommodation or exemption from the law. This is thanks to the Supreme Court’s reinterpretation of RFRA’s scope in *Burwell v. Hobby Lobby*, 573 U.S. ___ (2014), which held that owners of closely held corporations can claim to be exercising religion when operating their business. If they can show the federal law burdens their religious practices substantially, they can hold the government to the highest standard of compelling public need and narrowest tailoring in order to enforce the law.

The *Hobby Lobby* case concerned inclusion, or not, of birth control within employer-provided health insurance. The Court’s 5–4 ruling that commercial business owners may object on religious grounds to items in others’ health insurance has had alarming potential implications for LGBT people in employment, health care, and other settings. We will see in due course whether these concerns are justified.

Although the case law is divided, RFRA more generally has been understood as creating a right to object to government enforcement, but not a defense to claims of other private parties. It is less clear whether *Hobby Lobby* has opened the door for religious objections to federal laws—such as Title VII—that already have a specified accommodation for religious rights.

A recent federal district court decision concerning the employment rights of a transgender worker confirmed that businesses may assert RFRA defenses only against the government (*EEOC v. R.G. & G.R. Harris Funeral Homes*, Case No. 14-13710 (E.D. Mich., Aug. 18, 2016)). But the case involves a Title VII claim, and that statute includes a particular religious accommodation limited to religious organizations, not commercial businesses. The Sixth Circuit may have more to say about whether businesses have RFRA defenses against Title VII claims brought by the government because the U.S. Equal Employment Opportunity Commission (EEOC) has appealed *Harris Funeral Homes*. Other pending lawsuits challenge the numerous court decisions and federal agency guidance concluding that sex discrimination bans necessarily cover most anti-LGBT discrimination in health services and education programs that receive federal funding. One or more of these cases is likely to arrive in the Supreme Court sooner or later.
Meanwhile, members of Congress who believe the Supreme Court misinterpreted RFRA in \textit{Hobby Lobby} introduced the “Do No Harm Act” (H.R. 5272) in 2016. It clarifies that RFRA was not and is not intended to excuse discrimination, denial of access to health services, or other specified harms to third parties, including when the government is enforcing those third parties’ rights under federal laws.

**What rights do religious individuals have to refuse service to same-sex couples or LGBT individuals?**

As noted above, public employees are entitled to an accommodation when employment responsibilities conflict with their religious beliefs or practices. However, the duty to accommodate only requires employers to bear minimal (not “undue”) burdens. Past cases have concluded that the government is not required to accommodate public workers whose anti-LGBT religious beliefs require them to proselytize to co-workers or members of the public or to refuse services to LGBT people. Under Title VII, a similar analysis applies to private-sector employment. Employees are entitled to a reasonable accommodation for their religious needs in non-religious workplaces; however, the duty to accommodate does not protect harassment, proselytizing, or requiring others to participate in prayer.

**What rights do religious organizations have to exclude or to refuse services to same-sex couples or LGBT individuals?** \textit{Solemnization of marriage}. Houses of worship are not public accommodations and do have the strongest religious liberty protections. Religious denominations and clergy have full authority to solemnize only those marriages that comport with their religious tenets. Concerns that clergy or churches may face government penalties or discrimination claims for refusing to marry same-sex couples are baseless. Likewise, constitutional protections for free speech and free exercise of religion guarantee that there can be no punishment for sermons or religious teachings that condemn same-sex relationships or gender transition treatment. At the same time, of course, government can forbid particular conduct, regardless of religious motivation, if it is dangerous or otherwise harmful.

\textit{Rental of facilities for wedding ceremonies or receptions}. Whether a religious organization can be required to rent its facilities for a same-sex couple’s wedding or wedding reception depends on whether there is a public accommodations law that applies. These vary widely. Generally, it matters whether the facility is open to the public, as opposed to private membership clubs. Some laws exempt religious organizations entirely; others do not. If an organization routinely generates revenue by renting a facility to people of different faiths and does not keep the space for religious activities consistent with its faith, it may have a difficult time arguing why it should be exempt from an otherwise applicable public accommodations law. Its argument will become harder still if the organization receives public grants or free or subsidized use of public property subject to a nondiscrimination commitment.

\textit{Religiously affiliated medical and social services agencies}. Catholic hospitals and other religiously affiliated medical and social services providers play significant roles in our health, nursing, counseling, child welfare, and other professional services systems. Many of these systems receive substantial amounts of public funding, especially federal funding through Medicaid, Medicare, the ACA, the Fair Housing Act, and other federal programs that have nondiscrimination requirements.

Consequently, if a religiously affiliated provider denies visitation and medical decision making by the same-sex spouse of a patient, there likely will be an actionable sex discrimination claim under Section 1557 of the ACA. If that provider generally offers spousal health coverage but denies equal coverage for the same-sex spouses of its employees, or seeks to fire employees who have a same-sex spouse, actionable sex discrimination claims are similarly likely.
Further, the Section 1557 regulations issued by the U.S. Department of Health and Human Services (HHS) forbid discrimination against patients based on gender identity. This means providers may not deny medical care based on the transgender status of a patient. Section 1557 has no stated exemption for religious organizations; if they seek federal funding, the nondiscrimination rules would seem to apply. However, these organizations certainly may seek their own exemptions based on RFRA. We are starting to see cases presenting RFRA-based objections to the ACA’s nondiscrimination protections for LGBT people. It remains to be seen how courts will assess the relative burdens on the religious practices of these providers, the countervailing public interests in equality, and whether the proper result is to require that the service be provided.

Similar legal questions can arise when religiously affiliated homeless shelters, emergency relief agencies, and nursing homes discriminate against married same-sex couples or refuse to house transgender individuals in facilities appropriate for their gender identity. Often, the public contracts and grants on which these agencies depend do require equal, culturally competent treatment of beneficiaries, including LGBT people. Sometimes the contracts also require equal treatment of LGBT people in hiring and workplace benefits.

One high-profile lawsuit challenges HHS’s regulation that forbids most anti-LGBT discrimination as forms of sex discrimination. The case was filed in Texas by the Franciscan Alliance of Catholic health care providers, Texas and four other conservative states, and an association of Christian medical and dental providers (Franciscan Alliance, Inc., et al. v. Burwell, Case No. 7:16-cv-00108-O (filed Aug. 23, 2016, U.S.D.C., N.D. Tex., Wichita Falls Div.)). It follows objections the U.S. Conference of Catholic Bishops submitted in opposition to the HHS regulation, and it echoes arguments made consistently since the George W. Bush administration for why religious organizations should have a religious freedom right to receive taxpayer funding without being bound by nondiscrimination rules that protect members of the public.

Consequently, as more civil rights protections for LGBT people are invoked in the wake of marriage equality for same-sex couples, debates are heating up about the enforceability of nondiscrimination terms in public contracts and grants. For decades, governments at every level have conditioned eligibility for taxpayer funds on agreements to end specified forms of historic discrimination. Such incentives have catalyzed workplace diversity and greater compensation fairness, including widespread availability of domestic partnership benefits. But as noted above, there now are proposals in Congress (e.g., FADA) and some states to preempt such terms and to mandate exemptions from nondiscrimination requirements when there is a religious objection concerning marriage or sexual relationships. In Mississippi, a law to that effect (H.B. 1523) was enacted easily, although it has been enjoined preliminarily (Barber v. Bryant). Michigan passed three bills in 2015 to permit religiously affiliated child welfare agencies to discriminate against LGBT people in provision of publicly funded adoption and foster care services. The looming question is whether these and similar laws are anomalies marking the end of an era or whether they represent a future trend.

Employment for diverse religious duties, including religious education. Like concerns that government will require clergy to perform marriage ceremonies inconsistent with their faith, concerns that churches or other religious bodies will be required to hire LGBT people—or anyone else—as clergy or to teach religion, are entirely baseless. The U.S. Supreme Court has confirmed that the Constitution’s firm protections for religious freedom and free speech mandate a “ministerial exception” to civil rights laws to secure the freedom of denominations to select and manage their own clergy.
Recently, we have seen numerous religiously affiliated schools firing long-time, often-beloved teachers after they married their same-sex partner. Many of these schools have been Catholic. Often their terminations have prompted distressed responses from the local community and a belief that the employees should have rights of redress. Most frequently, if the employee had religious duties, including teaching of religious matters, the ministerial exception may apply, meaning the employee is stripped of employment protections that otherwise might exist under state or federal law. This means we also can anticipate some employers who choose not to fire employees with a same-sex spouse nonetheless objecting to providing equal benefits for employees’ same-sex spouses. The same may be true for employees with religious duties whose transgender status comes to be known.

**Employment by religious organizations to perform non-religious duties.** Can religious organizations end the employment of workers who marry a same-sex spouse or who come to be known as LGBT? The first question is whether a nondiscrimination law applies. Title VII, the federal law, accommodates religious-organization employers by allowing them to limit employment to people of the same faith. It does not, however, permit such organizations to discriminate on the other grounds forbidden by the statute—race, color, national origin, or sex. Thus, we can anticipate cases in which an LGBT employee who performs no religious functions and does identify as the same religion as the employer, and who is fired because of their sexual orientation or gender identity, will sue, relying on the protection against that type of sex discrimination.

The right of employees to bring such a claim is clearer under the laws of states that forbid discrimination based on sexual orientation or gender identity without an explicit accommodation for religiously affiliated employers. *Barrett v. Fontbonne Academy*, litigated to a successful settlement under Massachusetts law by GLBTQ Legal Advocates & Defenders (GLAD), illustrates that civil rights laws should protect workers from discrimination when their duties include no religious functions. Fontbonne Academy, a Catholic girls’ high school, hired Matt Barrett to direct its food services program but canceled his employment upon learning he had a husband. The Massachusetts Superior Court granted summary judgment to Barrett on liability, prompting the resolution (Memorandum of Decision and Order, No. CV2014-751, Norfolk Cty. Super. Ct. (Mass. Dec. 16, 2015)).

**Can religious schools reject LGBT students? Can they deny student or faculty housing?** These questions can be more complicated than they might appear. The first question always is whether there is a nondiscrimination rule that applies. Title IX of the Education Amendments Act of 1972 forbids schools that receive federal funding from discriminating based on sex. That protection has been interpreted as providing significant protection to LGBT students; however, the statute broadly exempts religious schools, meaning they may discriminate despite the public funding.

Many state and local civil rights laws that cover schools also either exempt religious schools or allow these schools to impose conduct rules and to limit access to on-campus housing. But religious schools exempted from state or local nondiscrimination rules can be held to have voluntarily assumed nondiscrimination obligations by seeking and accepting public funding. Although there is nothing remarkable about the fact that taxpayer dollars often come with requirements, including nondiscrimination commitments, some religious schools (like some religiously affiliated nonprofits) believe they are entitled to public funding if they serve the public. As noted above, however, the extent to which religious institutions can demand public subsidies is contested. The Supreme Court may provide new guidance this term when it decides *Trinity Lutheran Church of Columbia, Inc. v.*
Pauley, Supreme Court Case No. 15-577, which concerns whether a church school can demand public resources for resurfacing its playground.

From the other direction, California just enacted SB 1146, which requires religiously affiliated schools to give notice if they intend to rely on the religious exemption in Title IX, meaning they may refuse or expel students for noncompliance with their morality code, such as by coming out as LGBT.

What Are the Legal Implications for Organizations Such as the Boy Scouts?

The Boy Scouts of America is a social organization with religious and other membership requirements and constitutionally protected expressive purposes. The organization likely would not have been challenged for excluding gay young men, as well as atheists, if it had not claimed to be open to all males and thereby obtained significant public support. State public accommodations laws vary in whether they cover membership organizations such as the Boy Scouts. When they do, there can be close questions of how the equality interests of minorities weigh against the free speech and associational interests of others, as is illustrated by the Supreme Court’s sharply divided decision in Boy Scouts of America v. Dale, 530 U.S. 640, 659–61 (2000).

Obergefell does not change that legal analysis, but it may be influencing the social calculus. The Boy Scouts’ national leadership recently changed its rules to allow gay scout leaders, while leaving it to individual chapters to implement that change or not.

What Do Religious Organizations Risk When They Choose to Discriminate?

Some opponents of LGBT equality express alarm that churches risk losing their tax-exempt status for condemning same-sex relationships, and clergy risk hate speech prosecutions. Not true! Clergy and houses of worship are entirely protected in their beliefs and speech. Conduct, on the other hand, always may be regulated to preserve public safety.

The legal status of religious nonprofit schools, medical institutions, and social service agencies is different from churches. When these organizations engage with the general public to provide professional services, they can be regulated to protect the public. Unlike that of churches, their nonprofit status is not a constitutional entitlement; rather, it is a benefit granted because their purpose is to benefit the public. The Supreme Court reminded us that this special benefit can be withdrawn when it ended Bob Jones University’s tax-exempt status owing to its white supremacist interracial-relationship ban. But that sanction has been exceedingly rare.

Religious nonprofits and other organizations can face sanctions under state public accommodations laws when those laws apply and an organization lacks a persuasive free speech or religious liberty defense. As discussed above, however, there are interesting, emerging disputes concerning entitlement to valuable public contracts and other forms of subsidy to organizations that insist on discriminating in who they hire or how they treat beneficiaries.

Just Say No to Religious Exemptions from Civil Rights Laws and Rules

Religious freedom is a fundamental right and a core American value. It rightly is protected by the U.S. Constitution and the constitutions of every state. But those constitutional protections were never intended to excuse harming others. Whether the issue has been racial segregation, sex discrimination
in employment, domestic violence, child abuse, or fraud, the courts have rejected religious justifications for injurious conduct.

Martin R. Castro, chair of the U.S. Commission on Civil Rights, emphasized this point in the Commission’s recent briefing report to President Barack Obama:

Religious liberty was never intended to give one religion dominion over other religions, or a veto power over the civil rights and civil liberties of others. However, today, as in the past, religion is being used as both a weapon and a shield by those seeking to deny others equality. In our nation’s past religion has been used to justify slavery and later, Jim Crow laws. We now see “religious liberty” arguments sneaking their way back into our political and constitutional discourse . . . in an effort to undermine the rights of some Americans. This generation of Americans must stand up and speak out to ensure that religion never again be twisted to deny others the full promise of America. (tinyurl.com/jj768rl)

As Justice Kennedy recognized in United States v. Windsor when striking down the federal Defense of Marriage Act, discriminatory laws cause unequal treatment and also send a harmful, stigmatizing message. And when laws facilitate others’ discriminatory conduct, the losses and pain inflicted are not lessened if the motive was religious. Nationwide marriage equality certainly is affecting attitudes and inspiring more inclusion. But let’s be clear: These hard-won, legally binding celebrations of love and commitment must be followed by the protection of fully equal laws. We are not there yet.

Jennifer C. Pizer (jpizer@lambdalegal.org) is senior counsel and director of law and policy for Lambda Legal.
1-15.000 - Respect For Religious Liberty

1-15.100 - Background

To the greatest extent practicable and permitted by law, Department components and United States Attorneys' Offices must reasonably accommodate religious observance and practice in all activities, including litigation. See 82 Fed Reg. 49668. As set forth below, the Office of the Associate Attorney General has supervisory responsibility for overseeing the Department's respect for religious liberty in litigation.

[added January 2018]

1-15.200 - Religious Liberty Litigation Coordinators

Each litigating division should select a member of its front office and each United States Attorney's Office should assign its Civil Chief, or his/her designee, to coordinate religious liberty litigation issues and to implement this section.

[added January 2018]

1-15.220 – Approval, Notice, and Coordination Requirements for Religious Liberty Litigation

Where feasible, litigating divisions and United States Attorneys' Offices should rely on their designated religious liberty coordinators to facilitate the requirement that the Office of the Associate Attorney General be informed of religious liberty litigation in order to carry out its oversight responsibilities.

The notice, consultation, and approval activities described below should be carried out through the official assigned by the Office of the Associate Attorney General to coordinate religious liberty litigation handled by the Department.

A. Notice of Religious Liberty Claims Against the United States. Litigating divisions and United States Attorneys' Offices must inform the Office of the Associate Attorney General immediately upon receiving service of a suit filed against the United States raising any significant question concerning religious liberty, including claims under the Free Exercise or Establishment Clauses of the First Amendment.
Amendment to the United States Constitution or under the Religious Freedom Restoration Act (RFRA).

B. **Coordination of Litigation.** Decisions about merits arguments and significant litigation strategy questions in the cases described in paragraph A must be coordinated with the Office of the Associate Attorney General.

C. **Approval Requirement for Affirmative Civil Litigation that May Affect Religious Liberty Rights.** The Associate Attorney General must approve any affirmative civil suit that impinges rights under the Free Exercise or Establishment Clauses or RFRA, whether brought by a litigating division or by a United States Attorney’s Office. Moreover, United States Attorneys’ Offices and litigating divisions must notify the Office of the Associate Attorney General if defendants raise religious liberty defenses or objections to affirmative suits.

D. **Identification of Significant Religious Liberty Matters.** The principles of religious liberty set forth in USAM 1-15.300 should guide determinations of whether a question concerning religious liberty exists or a right under the Free Exercise or Establishment Clauses or RFRA may be affected.

E. **Notification Requirement for Affirmative Litigation Under Federal Civil Rights Statutes Barring Religious Discrimination and Protecting Religious Liberty.** The Department enforces a number of civil rights statutes barring religious discrimination and protecting religious freedom, including broader civil rights statutes that include religion among the protected classes, such as Titles II, III, IV, and VII of the Civil Rights Act of 1964, the Fair Housing Act, among others, as well as laws focused on protecting religious freedom, such as the Religious Land Use and Institutionalized Persons Act. These laws are enforced by the Civil Rights Division or by United States Attorneys’ Offices in coordination with the Civil Rights Division. When such civil rights suits involving religion are filed by the Department, the Civil Rights Division shall notify the official in the Office of the Associate Attorney General designated for coordinating religion-related matters.

[added January 2018]

**1-15.300 - Principles of Religious Liberty**

1. The freedom of religion is a fundamental right of paramount importance, expressly protected by federal law.

   Religious liberty is enshrined in the text of our Constitution and in numerous federal statutes. It encompasses the right of all Americans to exercise their religion freely, without being coerced to join an established church or to satisfy a religious test as a qualification for public office. It also encompasses the right of all Americans to express their religious beliefs, subject to the same narrow limits that apply to all forms of speech. In the United States, the free exercise of religion is not a mere policy preference to be traded against other policy preferences. It is a fundamental right.

2. The free exercise of religion includes the right to act or abstain from action in accordance with one's religious beliefs.

   The Free Exercise Clause protects not just the right to believe or the right to worship; it protects the right to perform or abstain from performing certain physical acts in accordance with one's beliefs. Federal statutes, including the Religious Freedom Restoration Act of 1993 ("RFRA"), support that protection, broadly defining the exercise of religion to encompass all aspects of observance and practice, whether or not central to, or required by, a particular religious faith.

3. The freedom of religion extends to persons and organizations.
The Free Exercise Clause protects not just persons, but persons collectively exercising their religion through churches or other religious denominations, religious organizations, schools, private associations, and even businesses.

4. Americans do not give up their freedom of religion by participating in the marketplace, partaking of the public square, or interacting with government.

Constitutional protections for religious liberty are not conditioned upon the willingness of a religious person or organization to remain separate from civil society. Although the application of the relevant protections may differ in different contexts, individuals and organizations do not give up their religious-liberty protections by providing or receiving social services, education, or healthcare; by seeking to earn or earning a living; by employing others to do the same; by receiving government grants or contracts; or by otherwise interacting with federal, state, or local governments.

5. Government may not restrict acts or abstentions because of the beliefs they display.

To avoid the very sort of religious persecution and intolerance that led to the founding of the United States, the Free Exercise Clause of the Constitution protects against government actions that target religious conduct. Except in rare circumstances, government may not treat the same conduct as lawful when undertaken for secular reasons but unlawful when undertaken for religious reasons. For example, government may not attempt to target religious persons or conduct by allowing the distribution of political leaflets in a park but forbidding the distribution of religious leaflets in the same park.

6. Government may not target religious individuals or entities for special disabilities based on their religion.

Much as government may not restrict actions only because of religious belief, government may not target persons or individuals because of their religion. Government may not exclude religious organizations as such from secular aid programs, at least when the aid is not being used for explicitly religious activities such as worship or proselytization. For example, the Supreme Court has held that if government provides reimbursement for scrap tires to replace child playground surfaces, it may not deny participation in that program to religious schools. Nor may government deny religious schools—including schools whose curricula and activities include religious elements—the right to participate in a voucher program, so long as the aid reaches the schools through independent decisions of parents.

7. Government may not target religious individuals or entities through discriminatory enforcement of neutral, generally applicable laws.

Although government generally may subject religious persons and organizations to neutral, generally applicable laws—e.g., across-the-board criminal prohibitions or certain time, place, and manner restrictions on speech—government may not apply such laws in a discriminatory way. For instance, the Internal Revenue Service may not enforce the Johnson Amendment—which prohibits 501(c)(3) non-profit organizations from intervening in a political campaign on behalf of a candidate—against a religious non-profit organization under circumstances in which it would not enforce the amendment against a secular non-profit organization. Likewise, the National Park Service may not require religious groups to obtain permits to hand out fliers in a park if it does not require similarly situated secular groups to do so, and no federal agency tasked with issuing permits for land use may deny a permit to an Islamic Center seeking to build a mosque when the agency has granted, or would grant, a permit to similarly situated secular organizations or religious groups.

8. Government may not officially favor or disfavor particular religious groups.

Together, the Free Exercise Clause and the Establishment Clause prohibit government from officially preferring one religious group to another. This principle of denominational neutrality means, for example, that government cannot selectively impose regulatory burdens on some denominations but not others. It likewise cannot favor some religious groups for participation in the Combined Federal Campaign over others based on the groups’ religious beliefs.

9. Government may not interfere with the autonomy of a religious organization.

Together, the Free Exercise Clause and the Establishment Clause also restrict governmental interference in intra-denominational disputes about doctrine, discipline, or qualifications for ministry or membership. For example, government may not impose its nondiscrimination rules to require Catholic seminaries or Orthodox Jewish yeshivas to accept female priests or rabbis.

10. The Religious Freedom Restoration Act of 1993 prohibits the federal government from substantially burdening any aspect of religious observance or practice, unless imposition of that burden on a particular religious adherent satisfies strict scrutiny.

RFRA prohibits the federal government from substantially burdening a person’s exercise of religion, unless the federal government demonstrates that application of such burden to the religious adherent is the least restrictive means of achieving a compelling governmental interest. RFRA applies to all actions by federal administrative agencies, including rulemaking, adjudication or other enforcement actions, and grant or contract distribution and administration.

11. RFRA’s protection extends not just to individuals, but also to organizations, associations, and at least some for-profit corporations.

RFRA protects the exercise of religion by individuals and by corporations, companies, associations, firms, partnerships, societies, and joint stock companies. For example, the Supreme Court has held that Hobby Lobby, a closely held, for-profit corporation with more than 500 stores and 13,000 employees, is protected by RFRA.

12. RFRA does not permit the federal government to second-guess the reasonableness of a religious belief.

RFRA applies to all sincerely held religious beliefs, whether or not central to, or mandated by, a particular religious organization or tradition. Religious adherents will often be required to draw lines in the application of their religious beliefs, and government is not competent to assess the reasonableness of such lines drawn, nor would it be appropriate for government to do so. Thus, for example, a government agency may not second-guess the determination of a factory worker that, consistent with his religious precepts, he can work on a line producing steel that might someday make its way into armaments but cannot work on a line producing the armaments themselves. Nor may the Department of Health and Human Services second-guess the determination of a religious employer that providing contraceptive coverage to its employees would make the employer complicit in wrongdoing in violation of the organization’s religious precepts.

13. A governmental action substantially burdens an exercise of religion under RFRA if it bans an aspect of an adherent’s religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice.
Because the government cannot second-guess the reasonableness of a religious belief or the adherent's assessment of the religious connection between the government mandate and the underlying religious belief, the substantial burden test focuses on the extent of governmental compulsion involved. In general, a government action that bans an aspect of an adherent's religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice, will qualify as a substantial burden on the exercise of religion. For example, a Bureau of Prisons regulation that bans a devout Muslim from growing even a half-inch beard in accordance with his religious beliefs substantially burdens his religious practice. Likewise, a Department of Health and Human Services regulation requiring employers to provide insurance coverage for contraceptive drugs in violation of their religious beliefs or face significant fines substantially burdens their religious practice, and a law that conditions receipt of significant government benefits on willingness to work on Saturday substantially burdens the religious practice of those who, as a matter of religious observance or practice, do not work on that day. But a law that infringes, even severely, an aspect of an adherent's religious observance or practice that the adherent himself regards as unimportant or inconsequential imposes no substantial burden on that adherent. And a law that regulates only the government's internal affairs and does not involve any governmental compulsion on the religious adherent likewise imposes no substantial burden.

14. The strict scrutiny standard applicable to RFRA is exceptionally demanding.

Once a religious adherent has identified a substantial burden on his or her religious belief, the federal government can impose that burden on the adherent only if it is the least restrictive means of achieving a compelling governmental interest. Only those interests of the highest order can outweigh legitimate claims to the free exercise of religion, and such interests must be evaluated not in broad generalities but as applied to the particular adherent. Even if the federal government could show the necessary interest, it would also have to show that its chosen restriction on free exercise is the least restrictive means of achieving that interest. That analysis requires the government to show that it cannot accommodate the religious adherent while achieving its interest through a viable alternative, which may include, in certain circumstances, expenditure of additional funds, modification of existing exemptions, or creation of a new program.

15. RFRA applies even where a religious adherent seeks an exemption from a legal obligation requiring the adherent to confer benefits on third parties.

Although burdens imposed on third parties are relevant to RFRA analysis, the fact that an exemption would deprive a third party of a benefit does not categorically render an exemption unavailable. Once an adherent identifies a substantial burden on his or her religious exercise, RFRA requires the federal government to establish that denial of an accommodation or exemption to that adherent is the least restrictive means of achieving a compelling governmental interest.

16. Title VII of the Civil Rights Act of 1964, as amended, prohibits covered employers from discriminating against individuals on the basis of their religion.

Employers covered by Title VII may not fail or refuse to hire, discharge, or discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of that individual's religion. Such employers also may not classify their employees or applicants in a way that would deprive or tend to deprive any individual of employment opportunities because of the individual's religion. This protection applies regardless of whether the individual is a member of a religious majority or minority. But the protection does not apply in the same way to religious
employers, who have certain constitutional and statutory protections for religious hiring decisions.

17. Title VII's protection extends to discrimination on the basis of religious observance or practice as well as belief, unless the employer cannot reasonably accommodate such observance or practice without undue hardship on the business.

Title VII defines "religion" broadly to include all aspects of religious observance or practice, except when an employer can establish that a particular aspect of such observance or practice cannot reasonably be accommodated without undue hardship to the business. For example, covered employers are required to adjust employee work schedules for Sabbath observance, religious holidays, and other religious observances, unless doing so would create an undue hardship, such as materially compromising operations or violating a collective bargaining agreement. Title VII might also require an employer to modify a no-head-coverings policy to allow a Jewish employee to wear a yarmulke or a Muslim employee to wear a headscarf. An employer who contends that it cannot reasonably accommodate a religious observance or practice must establish undue hardship on its business with specificity; it cannot rely on assumptions about hardships that might result from an accommodation.

18. The Clinton Guidelines on Religious Exercise and Religious Expression in the Federal Workplace provide useful examples for private employers of reasonable accommodations for religious observance and practice in the workplace.

President Clinton issued Guidelines on Religious Exercise and Religious Expression in the Federal Workplace ("Clinton Guidelines") explaining that federal employees may keep religious materials on their private desks and read them during breaks; discuss their religious views with other employees, subject to the same limitations as other forms of employee expression; display religious messages on clothing or wear religious medallions; and invite others to attend worship services at their churches, except to the extent that such speech becomes excessive or harassing. The Clinton Guidelines have the force of an Executive Order, and they also provide useful guidance to private employers about ways in which religious observance and practice can reasonably be accommodated in the workplace.

19. Religious employers are entitled to employ only persons whose beliefs and conduct are consistent with the employers' religious precepts.

Constitutional and statutory protections apply to certain religious hiring decisions. Religious corporations, associations, educational institutions, and societies—that is, entities that are organized for religious purposes and engage in activity consistent with, and in furtherance of, such purposes—have an express statutory exemption from Title VII's prohibition on religious discrimination in employment. Under that exemption, religious organizations may choose to employ only persons whose beliefs and conduct are consistent with the organizations' religious precepts. For example, a Lutheran secondary school may choose to employ only practicing Lutherans, only practicing Christians, or only those willing to adhere to a code of conduct consistent with the precepts of the Lutheran community sponsoring the school. Indeed, even in the absence of the Title VII exemption, religious employers might be able to claim a similar right under RFRA or the Religion Clauses of the Constitution.

20. As a general matter, the federal government may not condition receipt of a federal grant or contract on the effective relinquishment of a religious organization's hiring exemptions or attributes of its religious character.

Religious organizations are entitled to compete on equal footing for federal financial assistance used
to support government programs. Such organizations generally may not be required to alter their religious character to participate in a government program, nor to cease engaging in explicitly religious activities outside the program, nor effectively to relinquish their federal statutory protections for religious hiring decisions.


[added January 2018]
MEMORANDUM FOR ALL EXECUTIVE DEPARTMENTS AND AGENCIES
FROM: THE ATTORNEY GENERAL
SUBJECT: Federal Law Protections for Religious Liberty

The President has instructed me to issue guidance interpreting religious liberty protections in federal law, as appropriate. Exec. Order No. 13798 § 4, 82 Fed. Reg. 21675 (May 4, 2017). Consistent with that instruction, I am issuing this memorandum and appendix to guide all administrative agencies and executive departments in the execution of federal law.

Principles of Religious Liberty

Religious liberty is a foundational principle of enduring importance in America, enshrined in our Constitution and other sources of federal law. As James Madison explained in his Memorial and Remonstrance Against Religious Assessments, the free exercise of religion “is in its nature an unalienable right” because the duty owed to one’s Creator “is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.” Religious liberty is not merely a right to personal religious beliefs or even to worship in a sacred place. It also encompasses religious observance and practice. Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law. Therefore, to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity, including employment, contracting, and programming. The following twenty principles should guide administrative agencies and executive departments in carrying out this task. These principles should be understood and interpreted in light of the legal analysis set forth in the appendix to this memorandum.

1. The freedom of religion is a fundamental right of paramount importance, expressly protected by federal law.

Religious liberty is enshrined in the text of our Constitution and in numerous federal statutes. It encompasses the right of all Americans to exercise their religion freely, without being coerced to join an established church or to satisfy a religious test as a qualification for public office. It also encompasses the right of all Americans to express their religious beliefs, subject to the same narrow limits that apply to all forms of speech. In the United States, the free exercise of religion is not a mere policy preference to be traded against other policy preferences. It is a fundamental right.

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20. As a general matter, the federal government may not condition receipt of a federal grant or contract on the effective relinquishment of a religious organization’s hiring exemptions or attributes of its religious character.

Religious organizations are entitled to compete on equal footing for federal financial assistance used to support government programs. Such organizations generally may not be required to alter their religious character to participate in a government program, nor to cease engaging in explicitly religious activities outside the program, nor effectively to relinquish their federal statutory protections for religious hiring decisions.
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Guidance for Implementing Religious Liberty Principles

Agencies must pay keen attention, in everything they do, to the foregoing principles of religious liberty.

Agencies As Employers

Administrative agencies should review their current policies and practices to ensure that they comply with all applicable federal laws and policies regarding accommodation for religious observance and practice in the federal workplace, and all agencies must observe such laws going forward. In particular, all agencies should review the Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, which President Clinton issued on August 14, 1997, to ensure that they are following those Guidelines. All agencies should also consider practical steps to improve safeguards for religious liberty in the federal workplace, including through subject-matter experts who can answer questions about religious nondiscrimination rules, information websites that employees may access to learn more about their religious accommodation rights, and training for all employees about federal protections for religious observance and practice in the workplace.

Agencies Engaged in Rulemaking

In formulating rules, regulations, and policies, administrative agencies should also proactively consider potential burdens on the exercise of religion and possible accommodations of those burdens. Agencies should consider designating an officer to review proposed rules with religious accommodation in mind or developing some other process to do so. In developing that process, agencies should consider drawing upon the expertise of the White House Office of Faith-Based and Neighborhood Partnerships to identify concerns about the effect of potential agency action on religious exercise. Regardless of the process chosen, agencies should ensure that they review all proposed rules, regulations, and policies that have the potential to have an effect on religious liberty for compliance with the principles of religious liberty outlined in this memorandum and appendix before finalizing those rules, regulations, or policies. The Office of Legal Policy will also review any proposed agency or executive action upon which the Department’s comments, opinion, or concurrence are sought, see, e.g., Exec. Order 12250 § 1-2, 45 Fed. Reg. 72995 (Nov. 2, 1980), to ensure that such action complies with the principles of religious liberty outlined in this memorandum and appendix. The Department will not concur in any proposed action that does not comply with federal law protections for religious liberty as interpreted in this memorandum and appendix, and it will transmit any concerns it has about the proposed action to the agency or the Office of Management and Budget as appropriate. If, despite these internal reviews, a member of the public identifies a significant concern about a prospective rule’s compliance with federal protections governing religious liberty during a period for public comment on the rule, the agency should carefully consider and respond to that request in its decision. See Perez v. Mortgage Bankers Ass’n, 135 S. Ct. 1199, 1203 (2015). In appropriate circumstances, an agency might explain that it will consider requests for accommodations on a case-by-case basis rather than in the rule itself, but the agency should provide a reasoned basis for that approach.
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Agencies Engaged in Enforcement Actions

Much like administrative agencies engaged in rulemaking, agencies considering potential enforcement actions should consider whether such actions are consistent with federal protections for religious liberty. In particular, agencies should remember that RFRA applies to agency enforcement just as it applies to every other governmental action. An agency should consider RFRA when setting agency-wide enforcement rules and priorities, as well as when making decisions to pursue or continue any particular enforcement action, and when formulating any generally applicable rules announced in an agency adjudication.

Agencies should remember that discriminatory enforcement of an otherwise nondiscriminatory law can also violate the Constitution. Thus, agencies may not target or single out religious organizations or religious conduct for disadvantageous treatment in enforcement priorities or actions. The President identified one area where this could be a problem in Executive Order 13798, when he directed the Secretary of the Treasury, to the extent permitted by law, not to take any “adverse action against any individual, house of worship, or other religious organization on the basis that such individual or organization speaks or has spoken about moral or political issues from a religious perspective, where speech of similar character” from a non-religious perspective has not been treated as participation or intervention in a political campaign. Exec. Order No. 13798, § 2, 82 Fed. Reg. at 21675. But the requirement of nondiscrimination toward religious organizations and conduct applies across the enforcement activities of the Executive Branch, including within the enforcement components of the Department of Justice.

Agencies Engaged in Contracting and Distribution of Grants

Agencies also must not discriminate against religious organizations in their contracting or grant-making activities. Religious organizations should be given the opportunity to compete for government grants or contracts and participate in government programs on an equal basis with nonreligious organizations. Absent unusual circumstances, agencies should not condition receipt of a government contract or grant on the effective relinquishment of a religious organization’s Section 702 exemption for religious hiring practices, or any other constitutional or statutory protection for religious organizations. In particular, agencies should not attempt through conditions on grants or contracts to meddle in the internal governance affairs of religious organizations or to limit those organizations’ otherwise protected activities.

*   *   *

Any questions about this memorandum or the appendix should be addressed to the Office of Legal Policy, U.S. Department of Justice, 950 Pennsylvania Avenue N.W., Washington, D.C. 20530, phone (202) 514-4601.
APPENDIX

Although not an exhaustive treatment of all federal protections for religious liberty, this appendix summarizes the key constitutional and federal statutory protections for religious liberty and sets forth the legal basis for the religious liberty principles described in the foregoing memorandum.

Constitutional Protections

The people, acting through their Constitution, have singled out religious liberty as deserving of unique protection. In the original version of the Constitution, the people agreed that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” U.S. Const., art. VI, cl. 3. The people then amended the Constitution during the First Congress to clarify that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend. I, cl. 1. Those protections have been incorporated against the States. Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 15 (1947) (Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (Free Exercise Clause).

A. Free Exercise Clause

The Free Exercise Clause recognizes and guarantees Americans the “right to believe and profess whatever religious doctrine [they] desire[].” Empl’ t Div. v. Smith, 494 U.S. 872, 877 (1990). Government may not attempt to regulate religious beliefs, compel religious beliefs, or punish religious beliefs. See id.; see also Sherbert v. Verner, 374 U.S. 398, 402 (1963); Torcaso v. Watkins, 367 U.S. 488, 492–93, 495 (1961); United States v. Ballard, 322 U.S. 78, 86 (1944). It may not lend its power to one side in intra-denominational disputes about dogma, authority, discipline, or qualifications for ministry or membership. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 185 (2012); Smith, 494 U.S. at 877; Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724–25 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440, 451 (1969); Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 116, 120–21 (1952). It may not discriminate against or impose special burdens upon individuals because of their religious beliefs or status. Smith, 494 U.S. at 877; McDaniel v. Paty, 435 U.S. 618, 627 (1978). And with the exception of certain historical limits on the freedom of speech, government may not punish or otherwise harass churches, church officials, or religious adherents for speaking on religious topics or sharing their religious beliefs. See Widmar v. Vincent, 454 U.S. 263, 269 (1981); see also U.S. Const., amend. I, cl. 3. The Constitution’s protection against government regulation of religious belief is absolute; it is not subject to limitation or balancing against the interests of the government. Smith, 494 U.S. at 877; Sherbert, 374 U.S. at 402; see also West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (“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.”).

The Free Exercise Clause protects beliefs rooted in religion, even if such beliefs are not mandated by a particular religious organization or shared among adherents of a particular religious
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Importantly, the protection of the Free Exercise Clause also extends to acts undertaken in accordance with such sincerely-held beliefs. That conclusion flows from the plain text of the First Amendment, which guarantees the freedom to “exercise” religion, not just the freedom to “believe” in religion. *See Smith*, 494 U.S. at 877; *see also Thomas*, 450 U.S. at 716; *Paty*, 435 U.S. at 627; *Sherbert*, 374 U.S. at 403–04; *Wisconsin v. Yoder*, 406 U.S. 205, 219–20 (1972). Moreover, no other interpretation would actually guarantee the freedom of belief that Americans have so long regarded as central to individual liberty. Many, if not most, religious beliefs require external observance and practice through physical acts or abstention from acts. The tie between physical acts and religious beliefs may be readily apparent (e.g., attendance at a worship service) or not (e.g., service to one’s community at a soup kitchen or a decision to close one’s business on a particular day of the week). The “exercise of religion” encompasses all aspects of religious observance and practice. And because individuals may act collectively through associations and organizations, it encompasses the exercise of religion by such entities as well. *See, e.g., Hosanna-Tabor*, 565 U.S. at 199; *Church of the Lukumi Babalu Aye*, 508 U.S. at 525–26, 547; *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770, 2772–73 (2014) (even a closely held for-profit corporation may exercise religion if operated in accordance with asserted religious principles).

As with most constitutional protections, however, the protection afforded to Americans by the Free Exercise Clause for physical acts is not absolute, *Smith*, 491 U.S. at 878–79, and the Supreme Court has identified certain principles to guide the analysis of the scope of that protection. First, government may not restrict “acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display,” *id.* at 877, nor “target the religious for special disabilities based on their religious status,” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___, ___ (2017) (slip op. at 6) (internal quotation marks omitted), for it was precisely such “historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.” *Church of the Lukumi Babalu Aye*, 508 U.S. at 532 (internal quotation marks omitted). The Free Exercise Clause protects against “indirect coercion or penalties on the free exercise of religion” just as surely as it protects against “outright prohibitions” on religious exercise. *Trinity Lutheran*, 582 U.S. at ___ (slip op. at 11) (internal quotation marks omitted). “It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.” *Id.* (quoting *Sherbert*, 374 U.S. at 404).

Because a law cannot have as its official “object or purpose . . . the suppression of religion or religious conduct,” courts must “survey meticulously” the text and operation of a law to ensure that it is actually neutral and of general applicability. *Church of the Lukumi Babalu Aye*, 508 U.S. at 533–34 (internal quotation marks omitted). A law is not neutral if it singles out particular religious conduct for adverse treatment; treats the same conduct as lawful when undertaken for secular reasons but unlawful when undertaken for religious reasons; visits “gratuitous restrictions
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on religious conduct”; or “accomplishes . . . a ‘religious gerrymander,’ an impermissible attempt to target [certain individuals] and their religious practices.” Id. at 533–35, 538 (internal quotation marks omitted). A law is not generally applicable if “in a selective manner [it] impose[s] burdens only on conduct motivated by religious belief,” id. at 543, including by “fail[ing] to prohibit nonreligious conduct that endangers [its] interests in a similar or greater degree than . . . does” the prohibited conduct, id., or enables, expressly or de facto, “a system of individualized exemptions,” as discussed in Smith, 494 U.S. at 884; see also Church of the Lukumi Babalu Aye, 508 U.S. at 537.

“Neutrality and general applicability are interrelated, . . . [and] failure to satisfy one requirement is a likely indication that the other has not been satisfied.” Id. at 531. For example, a law that disqualifies a religious person or organization from a right to compete for a public benefit—including a grant or contract—because of the person’s religious character is neither neutral nor generally applicable. See Trinity Lutheran, 582 U.S. at ___—___ (slip op. at 9–11). Likewise, a law that selectively prohibits the killing of animals for religious reasons and fails to prohibit the killing of animals for many nonreligious reasons, or that selectively prohibits a business from refusing to stock a product for religious reasons but fails to prohibit such refusal for myriad commercial reasons, is neither neutral, nor generally applicable. See Church of the Lukumi Babalu Aye, 508 U.S. at 533–36, 542–45. Nonetheless, the requirements of neutral and general applicability are separate, and any law burdening religious practice that fails one or both must be subjected to strict scrutiny, id. at 546.

Second, even a neutral, generally applicable law is subject to strict scrutiny under this Clause if it restricts the free exercise of religion and another constitutionally protected liberty, such as the freedom of speech or association, or the right to control the upbringing of one’s children. See Smith, 494 U.S. at 881–82; Axson-Flynn v. Johnson, 356 F.3d 1277, 1295–97 (10th Cir. 2004). Many Free Exercise cases fall in this category. For example, a law that seeks to compel a private person’s speech or expression contrary to his or her religious beliefs implicates both the freedoms of speech and free exercise. See, e.g., Wooley v. Maynard, 430 U.S. 705, 707–08 (1977) (challenge by Jehovah’s Witnesses to requirement that state license plates display the motto “Live Free or Die”); Axson-Flynn, 356 F.3d at 1280 (challenge by Mormon student to University requirement that student actors use profanity and take God’s name in vain during classroom acting exercises). A law taxing or prohibiting door-to-door solicitation, at least as applied to individuals distributing religious literature and seeking contributions, likewise implicates the freedoms of speech and free exercise. Murdock v. Pennsylvania, 319 U.S. 105, 108–09 (1943) (challenge by Jehovah’s Witnesses to tax on canvassing or soliciting); Cantwell, 310 U.S. at 307 (same). A law requiring children to receive certain education, contrary to the religious beliefs of their parents, implicates both the parents’ right to the care, custody, and control of their children and to free exercise. Yoder, 406 U.S. at 227–29 (challenge by Amish parents to law requiring high school attendance).

Strict scrutiny is the “most rigorous” form of scrutiny identified by the Supreme Court. Church of the Lukumi Babalu Aye, 508 U.S. at 546; see also City of Boerne v. Flores, 521 U.S. 507, 534 (1997) (“Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law.”). It is the same standard applied to governmental classifications based on race, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007), and
restrictions on the freedom of speech, Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2228 (2015). See Church of the Lukumi Babalu Aye, 508 U.S. at 546–47. Under this level of scrutiny, government must establish that a challenged law “advance[s] interests of the highest order” and is “narrowly tailored in pursuit of those interests.” Id. at 546 (internal quotation marks omitted). “[O]nly in rare cases” will a law survive this level of scrutiny. Id.

Of course, even when a law is neutral and generally applicable, government may run afoul of the Free Exercise Clause if it interprets or applies the law in a manner that discriminates against religious observance and practice. See, e.g., Church of the Lukumi Babalu Aye, 508 U.S. at 537 (government discriminatorily interpreted an ordinance prohibiting the unnecessary killing of animals as prohibiting only killing of animals for religious reasons); Fowler v. Rhode Island, 345 U.S. 67, 69–70 (1953) (government discriminatorily enforced ordinance prohibiting meetings in public parks against only certain religious groups). The Free Exercise Clause, much like the Free Speech Clause, requires equal treatment of religious adherents. See Trinity Lutheran, 582 U.S. at ___ (slip op. at 6); cf. Good News Club v. Milford Central Sch., 533 U.S. 98, 114 (2001) (recognizing that Establishment Clause does not justify discrimination against religious clubs seeking use of public meeting spaces); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 837, 841 (1995) (recognizing that Establishment Clause does not justify discrimination against religious student newspaper’s participation in neutral reimbursement program). That is true regardless of whether the discriminatory application is initiated by the government itself or by private requests or complaints. See, e.g., Fowler, 345 U.S. at 69; Niemotko v. Maryland, 340 U.S. 268, 272 (1951).

B. Establishment Clause

The Establishment Clause, too, protects religious liberty. It prohibits government from establishing a religion and coercing Americans to follow it. See Town of Greece, N.Y. v. Galloway, 134 S. Ct. 1811, 1819–20 (2014); Good News Club, 533 U.S. at 115. It restricts government from interfering in the internal governance or ecclesiastical decisions of a religious organization. Hosanna-Tabor, 565 U.S. at 188–89. And it prohibits government from officially favoring or disfavoring particular religious groups as such or officially advocating particular religious points of view. See Galloway, 134 S. Ct. at 1824; Larson v. Valente, 456 U.S. 228, 244–46 (1982). Indeed, “a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.” Rosenberger, 515 U.S. at 839 (emphasis added). That “guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.” Id. Thus, religious adherents and organizations may, like nonreligious adherents and organizations, receive indirect financial aid through independent choice, or, in certain circumstances, direct financial aid through a secular-aid program. See, e.g., Trinity Lutheran, 582 U.S. at ___ (slip. op. at 6) (scrap tire program); Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (voucher program).

C. Religious Test Clause

Finally, the Religious Test Clause, though rarely invoked, provides a critical guarantee to religious adherents that they may serve in American public life. The Clause reflects the judgment
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of the Framers that a diversity of religious viewpoints in government would enhance the liberty of all Americans. And after the Religion Clauses were incorporated against the States, the Supreme Court shared this view, rejecting a Tennessee law that “established[d] as a condition of office the willingness to eschew certain protected religious practices.” Paty, 435 U.S. at 632 (Brennan, J., and Marshall, J., concurring in judgment); see also id. at 629 (plurality op.) (“[T]he American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.”).

Statutory Protections

Recognizing the centrality of religious liberty to our nation, Congress has buttressed these constitutional rights with statutory protections for religious observance and practice. These protections can be found in, among other statutes, the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb et seq.; the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.; and the American Indian Religious Freedom Act, 42 U.S.C. § 1996. Such protections ensure not only that government tolerates religious observance and practice, but that it embraces religious adherents as full members of society, able to contribute through employment, use of public accommodations, and participation in government programs. The considered judgment of the United States is that we are stronger through accommodation of religion than segregation or isolation of it.

A. Religious Freedom Restoration Act of 1993 (RFRA)

The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb et seq., prohibits the federal government from “substantially burden[ing] a person’s exercise of religion” unless “it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” Id. § 2000bb-1(a), (b). The Act applies even where the burden arises out of a “rule of general applicability” passed without animus or discriminatory intent. See id. § 2000bb-1(a). It applies to “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” see §§ 2000bb-2(4), 2000cc-5(7), and covers “individuals” as well as “corporations, companies, associations, firms, partnerships, societies, and joint stock companies,” 1 U.S.C. § 1, including for-profit, closely-held corporations like those involved in Hobby Lobby, 134 S. Ct. at 2768.

Subject to the exceptions identified below, a law “substantially burden[s] a person’s exercise of religion,” 42 U.S.C. § 2000bb-1, if it bans an aspect of the adherent’s religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice, see Sherbert, 374 U.S. at 405–06. The “threat of criminal sanction” will satisfy these principles, even when, as in Yoder, the prospective punishment is a mere $5 fine. 406 U.S. at 208, 218. And the denial of, or condition on the receipt of, government benefits may substantially burden the exercise of religion under these principles. Sherbert, 374 U.S. at 405–06; see also Hobbie v. Unemployment Appeals Comm’n of Fla., 480 U.S. 136, 141 (1987); Thomas, 450 U.S. at 717–18. But a law that infringes, even severely, an aspect of an adherent’s religious observance or practice that the adherent himself
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regards as unimportant or inconsequential imposes no substantial burden on that adherent. And a law that regulates only the government’s internal affairs and does not involve any governmental compulsion on the religious adherent likewise imposes no substantial burden. See, e.g., Lyng v. Nw. Indian Cemetery Protective Ass’n, 485 U.S. 439, 448–49 (1988); Bowen v. Roy, 476 U.S. 693, 699–700 (1986).

As with claims under the Free Exercise Clause, RFRA does not permit a court to inquire into the reasonableness of a religious belief, including into the adherent’s assessment of the religious connection between a belief asserted and what the government forbids, requires, or prevents. Hobby Lobby, 134 S. Ct. at 2778. If the proffered belief is sincere, it is not the place of the government or a court to second-guess it. Id. A good illustration of the point is Thomas v. Review Board of Indiana Employment Security Division—one of the Sherbert line of cases, whose analytical test Congress sought, through RFRA, to restore, 42 U.S.C. § 2000bb. There, the Supreme Court concluded that the denial of unemployment benefits was a substantial burden on the sincerely held religious beliefs of a Jehovah’s Witness who had quit his job after he was transferred from a department producing sheet steel that could be used for military armaments to a department producing turrets for military tanks. Thomas, 450 U.S. at 716–18. In doing so, the Court rejected the lower court’s inquiry into “what [the claimant’s] belief was and what the religious basis of his belief was,” noting that no one had challenged the sincerity of the claimant’s religious beliefs and that “[c]ourts should not undertake to dissect religious beliefs because the believer admits that he is struggling with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.” Id. at 714–15 (internal quotation marks omitted). The Court likewise rejected the lower court’s comparison of the claimant’s views to those of other Jehovah’s Witnesses, noting that “[i]ntrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences.” Id. at 715. The Supreme Court reinforced this reasoning in Hobby Lobby, rejecting the argument that “the connection between what the objecting parties [were required to] do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they [found] to be morally wrong (destruction of an embryo) [wa]s simply too attenuated.” 134 S. Ct. at 2777. The Court explained that the plaintiff corporations had a sincerely-held religious belief that provision of the coverage was morally wrong, and it was “not for us to say that their religious beliefs are mistaken or insubstantial.” Id. at 2779.

Government bears a heavy burden to justify a substantial burden on the exercise of religion. “[O]nly those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.” Thomas, 450 U.S. at 718 (quoting Yoder, 406 U.S. at 215). Such interests include, for example, the “fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation’s history,” Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983), and the interest in ensuring the “mandatory and continuous participation” that is “indispensable to the fiscal vitality of the social security system,” United States v. Lee, 455 U.S. 252, 258–59 (1982). But “broadly formulated interests justifying the general applicability of government mandates” are insufficient. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006). The government must establish a compelling interest to deny an accommodation to the particular claimant. Id. at 430, 435–38. For example, the military may have a compelling interest in its
uniform and grooming policy to ensure military readiness and protect our national security, but it does not necessarily follow that those interests would justify denying a particular soldier’s request for an accommodation from the uniform and grooming policy. See, e.g., Secretary of the Army, Army Directive 2017-03, Policy for Brigade-Level Approval of Certain Requests for Religious Accommodation (2017) (recognizing the “successful examples of Soldiers currently serving with” an accommodation for “the wear of a hijab; the wear of a beard; and the wear of a turban or under-turban/patka, with uncut beard and uncut hair” and providing for a reasonable accommodation of these practices in the Army). The military would have to show that it has a compelling interest in denying that particular accommodation. An asserted compelling interest in denying an accommodation to a particular claimant is undermined by evidence that exemptions or accommodations have been granted for other interests. See O Centro, 546 U.S. at 433, 436–37; see also Hobby Lobby, 134 S. Ct. at 2780.

The compelling-interest requirement applies even where the accommodation sought is “an exemption from a legal obligation requiring [the claimant] to confer benefits on third parties.” Hobby Lobby, 134 S. Ct. at 2781 n.37. Although “in applying RFRA ‘courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,’” the Supreme Court has explained that almost any governmental regulation could be reframed as a legal obligation requiring a claimant to confer benefits on third parties. Id. (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005)). As nothing in the text of RFRA admits of an exception for laws requiring a claimant to confer benefits on third parties, 42 U.S.C. § 2000bb-1, and such an exception would have the potential to swallow the rule, the Supreme Court has rejected the proposition that RFRA accommodations are categorically unavailable for laws requiring claimants to confer benefits on third parties. Hobby Lobby, 134 S. Ct. at 2781 n.37.

Even if the government can identify a compelling interest, the government must also show that denial of an accommodation is the least restrictive means of serving that compelling governmental interest. This standard is “exceptionally demanding.” Hobby Lobby, 134 S. Ct. at 2780. It requires the government to show that it cannot accommodate the religious adherent while achieving its interest through a viable alternative, which may include, in certain circumstances, expenditure of additional funds, modification of existing exemptions, or creation of a new program. Id. at 2781. Indeed, the existence of exemptions for other individuals or entities that could be expanded to accommodate the claimant, while still serving the government’s stated interests, will generally defeat a RFRA defense, as the government bears the burden to establish that no accommodation is viable. See id. at 2781–82.

B. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)

Although Congress’s leadership in adopting RFRA led many States to pass analogous statutes, Congress recognized the unique threat to religious liberty posed by certain categories of state action and passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to address them. RLUIPA extends a standard analogous to RFRA to state and local government actions regulating land use and institutionalized persons where “the substantial burden is imposed in a program or activity that receives Federal financial assistance” or “the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.” 42 U.S.C. §§ 2000cc(a)(2), 2000cc-1(b).
RLUIPA’s protections must “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by [RLUIPA] and the Constitution.” Id. § 2000cc-3(g). RLUIPA applies to “any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” id. § 2000cc-5(7)(A), and treats “[t]he use, building, or conversion of real property for the purpose of religious exercise” as the “religious exercise of the person or entity that uses or intends to use the property for that purpose,” id. § 2000cc-5(7)(B). Like RFRA, RLUIPA prohibits government from substantially burdening an exercise of religion unless imposition of the burden on the religious adherent is the least restrictive means of furthering a compelling governmental interest. See id. § 2000cc-1(a). That standard “may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.” Id. § 2000cc-3(c); cf. Holt v. Hobbs, 135 S. Ct. 853, 860, 864–65 (2015).

With respect to land use in particular, RLUIPA also requires that government not “treat[] a religious assembly or institution on less than equal terms with a nonreligious assembly or institution,” 42 U.S.C. § 2000cc(b)(1), “impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination,” id. § 2000cc(b)(2), or “impose or implement a land use regulation that (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction,” id. § 2000cc(b)(3). A claimant need not show a substantial burden on the exercise of religion to enforce these antidiscrimination and equal terms provisions listed in § 2000cc(b). See id. § 2000cc(b); see also Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 262–64 (3d Cir. 2007), cert. denied, 553 U.S. 1065 (2008). Although most RLUIPA cases involve places of worship like churches, mosques, synagogues, and temples, the law applies more broadly to religious schools, religious camps, religious retreat centers, and religious social service facilities. Letter from U.S. Dep’t of Justice Civil Rights Division to State, County, and Municipal Officials re: The Religious Land Use and Institutionalized Persons Act (Dec. 15, 2016).

C. Other Civil Rights Laws

To incorporate religious adherents fully into society, Congress has recognized that it is not enough to limit governmental action that substantially burdens the exercise of religion. It must also root out public and private discrimination based on religion. Religious discrimination stood alongside discrimination based on race, color, and national origin, as an evil to be addressed in the Civil Rights Act of 1964, and Congress has continued to legislate against such discrimination over time. Today, the United States Code includes specific prohibitions on religious discrimination in places of public accommodation, 42 U.S.C. § 2000a; in public facilities, id. § 2000b; in public education, id. § 2000c-6; in employment, id. §§ 2000e, 2000e-2, 2000e-16; in the sale or rental of housing, id. § 3604; in the provision of certain real-estate transaction or brokerage services, id. §§ 3605, 3606; in federal jury service, 28 U.S.C. § 1862; in access to limited open forums for speech, 20 U.S.C. § 4071; and in participation in or receipt of benefits from various federally-funded programs, 15 U.S.C. § 3151; 20 U.S.C. §§ 1066c(d), 1071(a)(2), 1087-4, 7231d(b)(2), 7914; 31 U.S.C. § 6711(b)(3); 42 U.S.C. §§ 290cc-33(a)(2), 300w-7(a)(2), 300x-57(a)(2), 300x-65(f), 604a(g), 708(a)(2), 5057(c), 5151(a), 5309(a), 6727(a), 9858l(a)(2), 10406(2)(B), 10504(a), 10604(e), 12635(c)(1), 12832, 13791(g)(3), 13925(b)(13)(A).
Invidious religious discrimination may be directed at religion in general, at a particular religious belief, or at particular aspects of religious observance and practice. See, e.g., Church of the Lukumi Babalu Aye, 508 U.S. at 532–33. A law drawn to prohibit a specific religious practice may discriminate just as severely against a religious group as a law drawn to prohibit the religion itself. See id. No one would doubt that a law prohibiting the sale and consumption of Kosher meat would discriminate against Jewish people. True equality may also require, depending on the applicable statutes, an awareness of, and willingness reasonably to accommodate, religious observance and practice. Indeed, the denial of reasonable accommodations may be little more than cover for discrimination against a particular religious belief or religion in general and is counter to the general determination of Congress that the United States is best served by the participation of religious adherents in society, not their withdrawal from it.

1. Employment

   i. Protections for Religious Employees

   Protections for religious individuals in employment are the most obvious example of Congress’s instruction that religious observance and practice be reasonably accommodated, not marginalized. In Title VII of the Civil Rights Act, Congress declared it an unlawful employment practice for a covered employer to (1) “fail or refuse to hire or to discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . religion,” as well as (2) to “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s . . . religion.” 42 U.S.C. § 2000e-2(a); see also 42 U.S.C. § 2000e-16(a) (applying Title VII to certain federal-sector employers); 3 U.S.C. § 411(a) (applying Title VII employment in the Executive Office of the President). The protection applies “regardless of whether the discrimination is directed against [members of religious] majorities or minorities.” Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 71–72 (1977).

   After several courts had held that employers did not violate Title VII when they discharged employees for refusing to work on their Sabbath, Congress amended Title VII to define “[r]eligion” broadly to include “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j); Hardison, 432 U.S. at 74 n.9. Congress thus made clear that discrimination on the basis of religion includes discrimination on the basis of any aspect of an employee’s religious observance or practice, at least where such observance or practice can be reasonably accommodated without undue hardship.

   Title VII’s reasonable accommodation requirement is meaningful. As an initial matter, it requires an employer to consider what adjustment or modification to its policies would effectively address the employee’s concern, for “[a]n ineffective modification or adjustment will not accommodate” a person’s religious observance or practice, within the ordinary meaning of that word. See U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 400 (2002) (considering the ordinary
Title VII does not, however, require accommodation at all costs. As noted above, an employer is not required to accommodate a religious observance or practice if it would pose an undue hardship on its business. An accommodation might pose an “undue hardship,” for example, if it would require the employer to breach an otherwise valid collective bargaining agreement, see, e.g., Hardison, 432 U.S. at 79, or carve out a special exception to a seniority system, id. at 83; see also U.S. Airways, 535 U.S. at 403. Likewise, an accommodation might pose an “undue hardship” if it would impose “more than a de minimis cost” on the business, such as in the case of a company where weekend work is “essential to [the] business” and many employees have religious observances that would prohibit them from working on the weekends, so that accommodations for all such employees would result in significant overtime costs for the employer. Hardison, 432 U.S. at 80, 84 & n.15. In general, though, Title VII expects positive results for society from a cooperative process between an employer and its employee “in the search for an acceptable reconciliation of the needs of the employee’s religion and the exigencies of the employer’s business.” Philbrook, 479 U.S. at 69 (internal quotations omitted).

The area of religious speech and expression is a useful example of reasonable accommodation. Where speech or expression is part of a person’s religious observance and practice, it falls within the scope of Title VII. See 42 U.S.C. §§ 2000e, 2000e-2. Speech or expression outside of the scope of an individual’s employment can almost always be accommodated without undue hardship to a business. Speech or expression within the scope of an individual’s employment, during work hours, or in the workplace may, depending upon the facts and circumstances, be reasonably accommodated. Cf. Abercrombie, 135 S. Ct. at 2032.

The federal government’s approach to free exercise in the federal workplace provides useful guidance on such reasonable accommodations. For example, under the Guidelines issued by President Clinton, the federal government permits a federal employee to “keep a Bible or Koran on her private desk and read it during breaks”; to discuss his religious views with other employees, subject “to the same rules of order as apply to other employee expression”; to display religious messages on clothing or wear religious medallions visible to others; and to hand out religious tracts to other employees or invite them to attend worship services at the employee’s church, except to the extent that such speech becomes excessive or harassing. Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, § 1(A), Aug. 14, 1997 (hereinafter “Clinton Federal Law Protections for Religious Liberty Page 10a
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Guidelines”). The Clinton Guidelines have the force of an Executive Order. See Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order, 24 Op. O.L.C. 29, 29 (2000) (“[T]here is no substantive difference in the legal effectiveness of an executive order and a presidential directive that is styled other than as an executive order.”); see also Memorandum from President William J. Clinton to the Heads of Executive Departments and Agencies (Aug. 14, 1997) (“All civilian executive branch agencies, officials, and employees must follow these Guidelines carefully.”). The successful experience of the federal government in applying the Clinton Guidelines over the last twenty years is evidence that religious speech and expression can be reasonably accommodated in the workplace without exposing an employer to liability under workplace harassment laws.

Time off for religious holidays is also often an area of concern. The observance of religious holidays is an “aspect[] of religious observance and practice” and is therefore protected by Title VII. 42 U.S.C. §§ 2000e, 2000e-2. Examples of reasonable accommodations for that practice could include a change of job assignments or lateral transfer to a position whose schedule does not conflict with the employee’s religious holidays, 29 C.F.R. § 1605.2(d)(1)(iii); a voluntary work schedule swap with another employee, id. § 1065.2(d)(1)(i); or a flexible scheduling scheme that allows employees to arrive or leave early, use floating or optional holidays for religious holidays, or make up time lost on another day, id. § 1065.2(d)(1)(ii). Again, the federal government has demonstrated reasonable accommodation through its own practice: Congress has created a flexible scheduling scheme for federal employees, which allows employees to take compensatory time off for religious observances, 5 U.S.C. § 5550a, and the Clinton Guidelines make clear that “[a]n agency must adjust work schedules to accommodate an employee’s religious observance—for example, Sabbath or religious holiday observance—if an adequate substitute is available, or if the employee’s absence would not otherwise impose an undue burden on the agency,” Clinton Guidelines § 1(C). If an employer regularly permits accommodation in work scheduling for secular conflicts and denies such accommodation for religious conflicts, “such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness.” Philbrook, 479 U.S. at 71.

Except for certain exceptions discussed in the next section, Title VII’s protection against disparate treatment, 42 U.S.C. § 2000e-2(a)(1), is implicated any time religious observance or practice is a motivating factor in an employer’s covered decision. Abercrombie, 135 S. Ct. at 2033. That is true even when an employer acts without actual knowledge of the need for an accommodation from a neutral policy but with “an unsubstantiated suspicion” of the same. Id. at 2034.

ii. Protections for Religious Employers

Congress has acknowledged, however, that religion sometimes is an appropriate factor in employment decisions, and it has limited Title VII’s scope accordingly. Thus, for example, where religion “is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise,” employers may hire and employ individuals based on their religion. 42 U.S.C. § 2000e-2(e)(1). Likewise, where educational institutions are “owned, supported, controlled or managed, [in whole or in substantial part] by a particular religion or by a particular religious corporation, association, or society” or direct their curriculum “toward the
propagation of a particular religion,” such institutions may hire and employ individuals of a particular religion. Id. And “a religious corporation, association, educational institution, or society” may employ “individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” Id. § 2000e-1(a); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335–36 (1987).

Because Title VII defines “religion” broadly to include “all aspects of religious observance and practice, as well as belief,” 42 U.S.C. § 2000e(j), these exemptions include decisions “to employ only persons whose beliefs and conduct are consistent with the employer’s religious precepts.” Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991); see also Killinger v. Samford Univ., 113 F.3d 196, 198–200 (11th Cir. 1997). For example, in Little, the Third Circuit held that the exemption applied to a Catholic school’s decision to fire a divorced Protestant teacher who, though having agreed to abide by a code of conduct shaped by the doctrines of the Catholic Church, married a baptized Catholic without first pursuing the official annulment process of the Church. 929 F.2d at 946, 951.

Section 702 broadly exempts from its reach religious corporations, associations, educational institutions, and societies. The statute’s terms do not limit this exemption to non-profit organizations, to organizations that carry on only religious activities, or to organizations established by a church or formally affiliated therewith. See Civil Rights Act of 1964, § 702(a), codified at 42 U.S.C. § 2000e-1(a); see also Hobby Lobby, 134 S. Ct. at 2773–74; Corp. of Presiding Bishop, 483 U.S. at 335–36. The exemption applies whenever the organization is “religious,” which means that it is organized for religious purposes and engages in activity consistent with, and in furtherance of, such purposes. Br. of Amicus Curiae the U.S. Supp. Appellee, Spencer v. World Vision, Inc., No. 08-35532 (9th Cir. 2008). Thus, the exemption applies not just to religious denominations and houses of worship, but to religious colleges, charitable organizations like the Salvation Army and World Vision International, and many more. In that way, it is consistent with other broad protections for religious entities in federal law, including, for example, the exemption of religious entities from many of the requirements under the Americans with Disabilities Act. See 28 C.F.R. app. C; 56 Fed. Reg. 35544, 35554 (July 26, 1991) (explaining that “[t]he ADA’s exemption of religious organizations and religious entities controlled by religious organizations is very broad, encompassing a wide variety of situations”).

In addition to these explicit exemptions, religious organizations may be entitled to additional exemptions from discrimination laws. See, e.g., Hosanna-Tabor, 565 U.S. at 180, 188–90. For example, a religious organization might conclude that it cannot employ an individual who fails faithfully to adhere to the organization’s religious tenets, either because doing so might itself inhibit the organization’s exercise of religion or because it might dilute an expressive message. Cf. Boy Scouts of Am. v. Dale, 530 U.S. 640, 649–55 (2000). Both constitutional and statutory issues arise when governments seek to regulate such decisions.

As a constitutional matter, religious organizations’ decisions are protected from governmental interference to the extent they relate to ecclesiastical or internal governance matters. Hosanna-Tabor, 565 U.S. at 180, 188–90. It is beyond dispute that “it would violate the First Amendment for courts to apply [employment discrimination] laws to compel the ordination of
women by the Catholic Church or by an Orthodox Jewish seminary.” *Id.* at 188. The same is true for other employees who “minister to the faithful,” including those who are not themselves the head of the religious congregation and who are not engaged solely in religious functions. *Id.* at 188, 190, 194–95; *see also* Br. of Amicus Curiae the U.S. Supp. Appellee, *Spencer v. World Vision, Inc.*, No. 08-35532 (9th Cir. 2008) (noting that the First Amendment protects “the right to employ staff who share the religious organization’s religious beliefs”).

Even if a particular associational decision could be construed to fall outside this protection, the government would likely still have to show that any interference with the religious organization’s associational rights is justified under strict scrutiny. *See Roberts v. U.S. Jaycees,* 468 U.S. 609, 623 (1984) (infringements on expressive association are subject to strict scrutiny); *Smith,* 494 U.S. at 882 (“[I]t is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.”). The government may be able to meet that standard with respect to race discrimination, *see Bob Jones Univ.*, 461 U.S. at 604, but may not be able to with respect to other forms of discrimination. For example, at least one court has held that forced inclusion of women into a mosque’s religious men’s meeting would violate the freedom of expressive association. *Donaldson v. Farrakan,* 762 N.E.2d 835, 840–41 (Mass. 2002). The Supreme Court has also held that the government’s interest in addressing sexual-orientation discrimination is not sufficiently compelling to justify an infringement on the expressive association rights of a private organization. *Boy Scouts,* 530 U.S. at 659.

As a statutory matter, RFRA too might require an exemption or accommodation for religious organizations from antidiscrimination laws. For example, “prohibiting religious organizations from hiring only coreligionists can ‘impose a significant burden on their exercise of religion, even as applied to employees in programs that must, by law, refrain from specifically religious activities.’” *Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act,* 31 Op. O.L.C. 162, 172 (2007) (quoting *Direct Aid to Faith-Based Organizations Under the Charitable Choice Provisions of the Community Solutions Act of 2001,* 25 Op. O.L.C. 129, 132 (2001)); *see also Corp. of Presiding Bishop,* 483 U.S. at 336 (noting that it would be “a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court w[ould] consider religious” in applying a nondiscrimination provision that applied only to secular, but not religious, activities). If an organization establishes the existence of such a burden, the government must establish that imposing such burden on the organization is the least restrictive means of achieving a compelling governmental interest. That is a demanding standard and thus, even where Congress has not expressly exempted religious organizations from its antidiscrimination laws—as it has in other contexts, *see, e.g.*, 42 U.S.C. §§ 3607 (Fair Housing Act), 12187 (Americans with Disabilities Act)—RFRA might require such an exemption.

2. Government Programs

Protections for religious organizations likewise exist in government contracts, grants, and other programs. Recognizing that religious organizations can make important contributions to government programs, *see, e.g.*, 22 U.S.C. § 7601(19), Congress has expressly permitted religious organizations to participate in numerous such programs on an equal basis with secular
With respect to government contracts in particular, Executive Order 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002), confirms that the independence and autonomy promised to religious organizations include independence and autonomy in religious hiring. Specifically, it provides that the employment nondiscrimination requirements in Section 202 of Executive Order 11246, which normally apply to government contracts, do “not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” Exec. Order No. 13279, § 4, amending Exec. Order No. 11246, § 204(c), 30 Fed. Reg. 12319, 12935 (Sept. 24, 1965).

Because the religious hiring protection in Executive Order 13279 parallels the Section 702 exemption in Title VII, it should be interpreted to protect the decision “to employ only persons whose beliefs and conduct are consistent with the employer’s religious precepts.” _Little_, 929 F.2d at 951. That parallel interpretation is consistent with the Supreme Court’s repeated counsel that the decision to borrow statutory text in a new statute is “strong indication that the two statutes should be interpreted pari passu.” _Northcross v. Bd. of Educ. of Memphis City Sch._, 412 U.S. 427 (1973) (per curiam); _see also_ _Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A._, 559
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U.S. 573, 590 (2010). It is also consistent with the Executive Order’s own usage of discrimination on the basis of “religion” as something distinct and more expansive than discrimination on the basis of “religious belief.” See, e.g., Exec. Order No. 13279, § 2(c) (“No organization should be discriminated against on the basis of religion or religious belief . . . “ (emphasis added)); id. § 2(d) (“All organizations that receive Federal financial assistance under social services programs should be prohibited from discriminating against beneficiaries or potential beneficiaries of the social services programs on the basis of religion or religious belief. Accordingly, organizations, in providing services supported in whole or in part with Federal financial assistance, and in their outreach activities related to such services, should not be allowed to discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.”). Indeed, because the Executive Order uses “on the basis of religion or religious belief” in both the provision prohibiting discrimination against religious organizations and the provision prohibiting discrimination “against beneficiaries or potential beneficiaries,” a narrow interpretation of the protection for religious organizations’ hiring decisions would lead to a narrow protection for beneficiaries of programs served by such organizations. See id. §§ 2(c), (d). It would also lead to inconsistencies in the treatment of religious hiring across government programs, as some program-specific statutes and regulations expressly confirm that “[a] religious organization’s exemption provided under section 2000e-1 of this title regarding employment practices shall not be affected by its participation, or receipt of funds from, a designated program.” 42 U.S.C. § 290kk-1(e); see also 6 C.F.R. § 19.9 (same).

Even absent the Executive Order, however, RFRA would limit the extent to which the government could condition participation in a federal grant or contract program on a religious organization’s effective relinquishment of its Section 702 exemption. RFRA applies to all government conduct, not just to legislation or regulation, see 42 U.S.C. § 2000bb-1, and the Office of Legal Counsel has determined that application of a religious nondiscrimination law to the hiring decisions of a religious organization can impose a substantial burden on the exercise of religion. Application of the Religious Freedom Restoration Act to the Award of a Grant, 31 Op. O.L.C. at 172; Direct Aid to Faith-Based Organizations, 25 Op. O.L.C. at 132. Given Congress’s “recognition that religious discrimination in employment is permissible in some circumstances,” the government will not ordinarily be able to assert a compelling interest in prohibiting that conduct as a general condition of a religious organization’s receipt of any particular government grant or contract. Application of the Religious Freedom Restoration Act to the Award of a Grant, 31 Op. of O.L.C. at 186. The government will also bear a heavy burden to establish that requiring a particular contractor or grantee effectively to relinquish its Section 702 exemption is the least restrictive means of achieving a compelling governmental interest. See 42 U.S.C. § 2000bb-1.

The First Amendment also “supplies a limit on Congress’ ability to place conditions on the receipt of funds.” Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc., 133 S. Ct. 2321, 2328 (2013) (internal quotation marks omitted). Although Congress may specify the activities that it wants to subsidize, it may not “seek to leverage funding” to regulate constitutionally protected conduct “outside the contours of the program itself.” See id. Thus, if a condition on participation in a government program—including eligibility for receipt of federally backed student loans—would interfere with a religious organization’s constitutionally protected rights, see, e.g,
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_Hosanna-Tabor_, 565 U.S. at 188–89, that condition could raise concerns under the “unconstitutional conditions” doctrine, see _All. for Open Soc’y Int’l, Inc._, 133 S. Ct. at 2328.

Finally, Congress has provided an additional statutory protection for educational institutions controlled by religious organizations who provide education programs or activities receiving federal financial assistance. Such institutions are exempt from Title IX’s prohibition on sex discrimination in those programs and activities where that prohibition “would not be consistent with the religious tenets of such organization[s].” 20 U.S.C. § 1681(a)(3). Although eligible institutions may “claim the exemption” in advance by “submitting in writing to the Assistant Secretary a statement by the highest ranking official . . . [that] conflict with a specific tenet of the religious organization,” 34 C.F.R. § 106.12(b), they are not required to do so to have the benefit of it, see 20 U.S.C. § 1681.

3. Government Mandates

Congress has undertaken many similar efforts to accommodate religious adherents in diverse areas of federal law. For example, it has exempted individuals who, “by reason of religious training and belief,” are conscientiously opposed to war from training and service in the armed forces of the United States. 50 U.S.C. § 3806(j). It has exempted “ritual slaughter and the handling or other preparation of livestock for ritual slaughter” from federal regulations governing methods of animal slaughter. 7 U.S.C. § 1906. It has exempted “private secondary school[s] that maintain[] a religious objection to service in the Armed Forces” from being required to provide military recruiters with access to student recruiting information. 20 U.S.C. § 7908. It has exempted federal employees and contractors with religious objections to the death penalty from being required to “be in attendance at or to participate in any prosecution or execution.” 18 U.S.C. § 3597(b). It has allowed individuals with religious objections to certain forms of medical treatment to opt out of such treatment. _See, e.g.,_ 33 U.S.C. § 907(k); 42 U.S.C. § 290bb-36(f). It has created tax accommodations for members of religious faiths conscientiously opposed to acceptance of the benefits of any private or public insurance, _see, e.g.,_ 26 U.S.C. §§ 1402(g), 3127, and for members of religious orders required to take a vow of poverty, _see, e.g.,_ 26 U.S.C. § 3121(r).

Congress has taken special care with respect to programs touching on abortion, sterilization, and other procedures that may raise religious conscience objections. For example, it has prohibited entities receiving certain federal funds for health service programs or research activities from requiring individuals to participate in such program or activity contrary to their religious beliefs. 42 U.S.C. § 300a-7(d), (e). It has prohibited discrimination against health care professionals and entities that refuse to undergo, require, or provide training in the performance of induced abortions; to provide such abortions; or to refer for such abortions, and it will deem accredited any health care professional or entity denied accreditation based on such actions. _Id._ § 238n(a), (b). It has also made clear that receipt of certain federal funds does not require an individual “to perform or assist in the performance of any sterilization procedure or abortion if [doing so] would be contrary to his religious beliefs or moral convictions” nor an entity to “make its facilities available for the performance of” those procedures if such performance “is prohibited by the entity on the basis of religious beliefs or moral convictions,” nor an entity to “provide any personnel for the performance or assistance in the performance of” such procedures if such performance or assistance “would be contrary to the religious beliefs or moral convictions of such
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personnel.” Id. § 300a-7(b). Finally, no “qualified health plan[s] offered through an Exchange” may discriminate against any health care professional or entity that refuses to “provide, pay for, provide coverage of, or refer for abortions,” § 18023(b)(4); see also Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. H, § 507(d), 129 Stat. 2242, 2649 (Dec. 18, 2015).

Congress has also been particularly solicitous of the religious freedom of American Indians. In 1978, Congress declared it the “policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.” 42 U.S.C. § 1996. Consistent with that policy, it has passed numerous statutes to protect American Indians’ right of access for religious purposes to national park lands, Scenic Area lands, and lands held in trust by the United States. See, e.g., 16 U.S.C. §§ 228i(b), 410aaa-75(a), 460uu-47, 543f, 698v-11(b)(11). It has specifically sought to preserve lands of religious significance and has required notification to American Indians of any possible harm to or destruction of such lands. Id. § 470cc. Finally, it has provided statutory exemptions for American Indians’ use of otherwise regulated articles such as bald eagle feathers and peyote as part of traditional religious practice. Id. §§ 668a, 4305(d); 42 U.S.C. § 1996a.

* * *

The depth and breadth of constitutional and statutory protections for religious observance and practice in America confirm the enduring importance of religious freedom to the United States. They also provide clear guidance for all those charged with enforcing federal law: The free exercise of religion is not limited to a right to hold personal religious beliefs or even to worship in a sacred place. It encompasses all aspects of religious observance and practice. To the greatest extent practicable and permitted by law, such religious observance and practice should be reasonably accommodated in all government activity, including employment, contracting, and programming. See Zorach v. Clauson, 343 U.S. 306, 314 (1952) ("[G]overnment follows the best of our traditions . . . [when it] respects the religious nature of our people and accommodates the public service to their spiritual needs.").
HHS Takes Major Actions to Protect Conscience Rights and Life

On Friday, January 19, 2018, the Department of Health and Human Services (HHS) announced two major actions to protect life and the conscience rights of Americans.

HHS’ Centers for Medicare & Medicaid Services (CMS) is issuing new guidance to state Medicaid directors restoring state flexibility to decide program standards. The letter issued today rescinds 2016 guidance that specifically restricted states’ ability to take certain actions against family-planning providers that offer abortion services.

Additionally, HHS’ Office for Civil Rights (OCR) is announcing a new proposed rule to enforce 25 existing statutory conscience protections for Americans involved in HHS-funded programs, which protect people from being coerced into participating in activities that violate their consciences, such as abortion, sterilization, or assisted suicide.

“Today’s actions represent promises kept by President Trump and a rollback of policies that had prevented many Americans from practicing their profession and following their conscience at the same time," said Acting HHS Secretary Eric D. Hargan. “Americans of faith should feel at home in our health system, not discriminated against, and states should have the right to take reasonable steps in overseeing their Medicaid programs and being good stewards of public funds."

“America’s doctors and nurses are dedicated to saving lives and should not be bullied out of the practice of medicine simply because they object to performing abortions against their conscience,” said OCR Director Roger Severino. “Conscience protection is a civil right guaranteed by laws that too often haven’t been enforced. Today’s proposed rule will provide our new Conscience and Religious Freedom Division with enforcement tools that will make sure our conscience laws are not empty words on paper, but guarantees of justice to victims of unlawful discrimination.”

Background

New Draft Conscience Regulation

• The proposed rule provides practical protections for Americans’ conscience rights and is modelled on existing regulations for other civil rights laws.
The laws undergirding the proposed regulation include the Coats-Snowe, Weldon, and Church Amendments, as well as parts of Medicare, Medicaid, the Affordable Care Act, and others (25 statutes in total).

The proposed rule applies to entities that receive funds through programs funded or administered in whole or in part through HHS.

The proposed rule requires, for instance, that entities applying for federal grants certify that they are complying with the above-mentioned conscience-protection statutes.

Since President Trump took office, OCR has stepped up enforcement of these conscience statutes, many of which saw little to no enforcement activity under the previous administration.

The proposed rule includes a public comment period of 60 days.

Friday’s proposed rule follows the announcement on Thursday of a new Conscience and Religious Freedom Division in OCR, charged with implementing the proposed regulation as finalized and enforcing statutes that protect individuals and organizations from being compelled to participate in procedures such as abortion, sterilization, and assisted suicide when it would violate their religious beliefs or moral convictions.

New Medicaid Guidance Restoring State Flexibility

On Friday, January 19, 2018, CMS issued a State Medicaid Director Letter restoring state flexibility to establish reasonable standards for their Medicaid programs.

The letter rescinded an April 2016 guidance (State Medicaid Directors Letter #16-005), which limited states’ long-standing authority to regulate providers operating within their states.

The 2016 letter had said that states that attempted to protect the integrity of their program standards by disqualifying abortion providers from their Medicaid programs would come under CMS scrutiny, and would be required to present to CMS evidence of criminal action or unfitness to perform healthcare services.

As stated in the Friday letter to state Medicaid directors, CMS is concerned that the 2016 letter may have gone beyond merely interpreting what the statute and current regulations require.

This decision returns CMS policy to what it was prior to the issuance of the 2016 letter.

States will still be required to comply with all applicable statutory and regulatory requirements, including the requirement that provider qualification standards be reasonable.

The conscience regulation can be found in the Federal Register here:
https://www.federalregister.gov/public-inspection/2018/01/19

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Note: All HHS press releases, fact sheets and other news materials are available at https://www.hhs.gov/news.

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Last revised: January 19, 2018
142 Hawai‘i 177

Intermediate Court of Appeals of Hawai‘i.

Diane CERVELLI and Taeko Bufford, Plaintiffs-Appellees,

v.

ALOHA BED & BREAKFAST, a Hawai‘i sole proprietorship, Defendant-Appellant,

and

William D. Hoshijo, as Executive Director of the Hawai‘i Civil Rights Commission, Plaintiff-Intervenor-Appellee.

NO. CAAP-13-0000806

FEBRUARY 23, 2018

Synopsis

Background: Lesbian couple, who were refused lodging at bed and breakfast, filed a complaint for injunctive relief, declaratory relief, and damages against bed and breakfast, which operated as a sole proprietorship, alleging discriminatory denial of public accommodations in violation of state law. The Hawai‘i Civil Rights Commission (HCRC) intervened in the case as a plaintiff. The Circuit Court of the First Circuit, Edwin C. Nacino, J., entered partial summary judgment for lesbian couple and HCRC on the issues of liability and injunctive relief. Bed and breakfast appealed.

Holdings: The Intermediate Court of Appeals, Nakamura, C.J., held that:

[1] bed and breakfast was “place of public accommodation” within meaning of statute prohibiting unfair discriminatory practices by places of public accommodation;

[2] the “Mrs. Murphy” exemption, providing that statutory prohibitions against discrimination in real estate transactions do not apply to rental of up to four rooms, did not authorize bed and breakfast’s discriminatory conduct;

[3] application of public accommodation statute to bed and breakfast owner did not violate owner’s right to privacy;

[4] application of public accommodation statute to bed and breakfast did not violate bed and breakfast owner’s constitutionally protected right to intimate association; and

[5] application of public accommodation statute to bed and breakfast did not violate bed and breakfast owner’s free exercise of religion.

Affirmed.

**922 APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT (CIVIL NO. 11-1-3103)**

Attorneys and Law Firms

On the briefs:

Shawn A. Luiz, James Hochberg, Honolulu, for Defendant-Appellant

Chapter 1—Democracy or Theocracy? Reconciling Religious Liberty and Equal Justice Under the Law
Defendant-Appellant Aloha Bed & Breakfast (Aloha B&B) is owned and operated by Phyllis Young (Young) as a sole proprietorship. Aloha B&B provides lodging to transient guests, averaging between one hundred and two hundred customers per year. Plaintiffs-Appellees Diane Cervelli (Cervelli) and Taeko Bufford (Bufford) (collectively, Plaintiffs), lesbian women in a committed relationship, planned a trip to Hawai‘i and sought lodging with Aloha B&B. Aloha B&B and Young refused to accommodate Plaintiffs’ request for lodging based solely on their sexual orientation.

Plaintiffs filed a Complaint in the Circuit Court of the First Circuit (Circuit Court) against Aloha B&B, alleging discriminatory denial of public accommodations in violation of Hawaii Revised Statutes (HRS) Chapter 489. The Hawai‘i Civil Rights Commission (HCRC) intervened in the case as a plaintiff, after it had determined that there was reasonable cause to believe that unlawful discriminatory practices had occurred.

Plaintiffs and the HCRC filed a partial motion for summary judgment on the issues of liability and injunctive relief, and Aloha B&B filed a competing cross-motion for summary judgment. The Circuit Court granted Plaintiffs and the HCRC’s motion and denied Aloha B&B’s motion. The Circuit Court ruled that Aloha B&B violated HRS § 489-3 by discriminating against the Plaintiffs on the basis of their sexual orientation. The Circuit Court also enjoined Aloha B&B from “engaging in any practices that operate to discriminate against same-sex couples as customers.”

On appeal, Aloha B&B argues that the Circuit Court erred in ruling that it is liable for discriminatory practices under HRS Chapter 489. Aloha B&B maintains that because Aloha B&B operates its business out of Young’s residence, the Circuit Court should have applied an exemption from prohibited discriminatory practices in real property transactions set forth in HRS Chapter 515 for the rental of rooms by a resident. Alternatively, Aloha B&B argues that the application of HRS Chapter 489 to prohibit discriminatory practices under the circumstances of this case would violate Young’s constitutional rights. Based on these arguments, Aloha B&B contends that the Circuit Court erred in granting Plaintiffs and the HCRC’s motion for partial summary judgment and in denying Aloha B&B’s motion for summary judgment. We affirm.

BACKGROUND

I.

Aloha B&B operates out of a four bedroom home in the Mariner’s Ridge section of Hawai‘i Kai, where Young and her husband reside. Young operates Aloha B&B as a sole proprietorship and offers three rooms in her residence to guests for overnight lodging. Rooms at Aloha B&B are offered at a nightly rate of $80 to $100, and there is a three-night minimum booking requirement. In addition to the nightly rate, Aloha B&B charges and collects general excise taxes from its customers as well as transient accommodation taxes, which only providers of transient accommodations are required to pay. Aloha B&B remits these taxes to the State of Hawai‘i.
Aloha B&B does not offer rooms to customers for use as a permanent residence, and Young never describes herself as a landlord to her guests. Aloha B&B averages one hundred to two hundred customers per year. The median length of stay for Aloha B&B customers is four to five days. The majority of customers stay for less than a week, about 95 percent or more stay for less than two weeks, and more than 99 percent stay for less than a month. In addition to overnight lodging, customers at Aloha B&B are provided breakfast, pool access, wireless internet access, and other amenities. Almost all of **924 *182 Aloha B&B customers, an estimated 99 percent, are travelers who do not live in Hawai‘i.

Aloha B&B advertises its services to the general public through its own website as well as through multiple third-party websites. Aloha B&B’s website, freely accessible through the internet, provides a phone number and email address for potential customers to contact Aloha B&B, and it contains graphics stating “Best Choice Hawaii Hotel” and “Best Choice Oahu Hotels.” Aloha B&B also advertises through various bed-and-breakfast-related websites to generate more business for itself, including paying an annual fee of between $400 to $500 to BedandBreakfast.com.

II.

Plaintiffs Cervelli and Bufford, two lesbian women in a committed relationship, began planning a trip to Hawai‘i to visit a friend. Plaintiffs, who resided in California, wanted to stay near their friend, who lived in Hawai‘i Kai. Cervelli emailed Aloha B&B to inquire if a room was available for their planned trip. Young responded by email the same day, stating that a room was available for six days and providing instructions on how to complete the reservation.

Two weeks later, Cervelli called Aloha B&B to book the reservation and spoke with Young, who indicated that the room was still available. While Young was writing up the reservation, Cervelli mentioned that she would be accompanied by another woman named “Taeko.” Young stopped and asked whether Cervelli and her companion were lesbians. When Cervelli said “yes,” Young responded, “[W]e’re strong Christians. I’m very uncomfortable in accepting the reservation from you.” Young refused to accept the reservation from Cervelli and terminated the phone call by hanging up.

Cervelli called Bufford in tears and explained what had happened. Bufford then called Young and attempted to reserve a room, but Young again refused to accept the reservation. Bufford ‘asked Young if her refusal was because Bufford and Cervelli were lesbians, to which Young responded “yes.” Bufford had two phone conversations with Young that day. Young referred to her religious beliefs in discussing her refusal to provide a room to Plaintiffs. Apart from Plaintiffs’ sexual orientation, there was no other reason for Young’s refusal to accept Plaintiffs’ request for a room.

III.

Cervelli and Bufford each filed a complaint against Aloha B&B with the HCRC alleging discrimination in public accommodations on the basis of sexual orientation. Young was interviewed during the HCRC’s investigation and was asked to describe the religious beliefs that she claimed precluded her from accepting Cervelli and Bufford’s reservation. Young stated that she is Catholic; that she believes that homosexuality is wrong; that she believes that sexual relations between same-sex couples (regardless of whether they are legally married) are immoral; and that she therefore refused to provide Cervelli and Bufford with a room. The HCRC found that there was reasonable cause to believe that Aloha B&B had committed an unlawful discriminatory practice against Cervelli and Bufford in violation of HRS § 489-3. The HCRC subsequently closed its cases based on Cervelli’s and Bufford’s election to pursue a court action, and it issued “right to sue” notices to Cervelli and Bufford.
Plaintiffs subsequently filed in the Circuit Court a Complaint for injunctive relief, declaratory relief, and damages against Aloha B&B, alleging discrimination on the basis of sexual orientation in violation of HRS Chapter 489. The HCRC filed a motion to intervene in the case as a plaintiff because it found the case was one of “general importance” given the HCRC’s mission to eliminate discrimination. The Circuit Court granted the HCRC’s motion to intervene as a plaintiff.

Plaintiffs and the HCRC filed a motion for partial summary judgment with respect to liability and injunctive relief. Aloha B&B filed a cross-motion for summary judgment.

**925*183 The Circuit Court held a hearing on the parties’ competing motions for summary judgment. At the hearing, counsel for Aloha B&B acknowledged that “discrimination is a horrible evil” and that “in places of public accommodation discrimination is a horrible evil.” Aloha B&B’s counsel also acknowledged that Aloha B&B admits that it “does provide lodging to transient guests.” However, Aloha B&B’s counsel argued that the law prohibiting discrimination in public accommodations, HRS Chapter 489, does not apply to Aloha B&B because it uses Young’s residence to provide lodging to transient guests. Aloha B&B’s counsel argued that Aloha B&B’s use of a residence means that it is not a “place of public accommodation” subject to the requirements of Chapter 489, but instead is governed by HRS Chapter 515.

The Circuit Court granted Plaintiffs and the HCRC’s motion for partial summary judgment with respect to liability and declaratory and injunctive relief, and it denied Aloha B&B’s cross-motion for summary judgment as moot. In its Summary Judgment Order, the Circuit Court found that:

[Aloha B&B] is governed by Chapter 489, HRS, not Chapter 515, HRS, and [Aloha B&B] constitutes a place of public accommodation under HRS § 489-2, because its goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors. [Aloha B&B] also constitutes “[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests” and “[a] facility providing services relating to travel or transportation.” HRS § 489-2. [Aloha B&B] violated HRS § 489-3 by discriminating against Plaintiffs Diane Cervelli and Taeko Bufford on the basis of their sexual orientation as lesbians.

(Certain brackets in original.) The Circuit Court enjoined and prohibited “Defendant Aloha Bed & Breakfast, a Hawai‘i sole proprietorship of Phyllis Young,” and its officers, agents, and employees “from engaging in any practices that operate to discriminate against same-sex couples as customers of Aloha Bed & Breakfast[].”

The Circuit Court entered its Summary Judgment Order on April 15, 2013. The parties subsequently submitted a stipulated application to file an interlocutory appeal from the Summary Judgment Order, which the Circuit Court granted.

DISCUSSION

I.

Aloha B&B argues that the Circuit Court erred in ruling that it is liable for discriminatory practices under HRS Chapter 489. Aloha B&B argues that it is not subject to HRS Chapter 489, but that its activities are governed by HRS Chapter 515. In particular, Aloha B&B asserts that an exemption from prohibited discriminatory practices in real property transactions set forth in HRS § 515-4(a)(2) protects it from liability in this case.

Plaintiffs and the HCRC, on the other hand, argue that Aloha B&B is clearly a place of public accommodation that is subject to HRS Chapter 489. Plaintiffs and the HCRC argue that Aloha B&B cannot “borrow” an exemption applicable to a different law (HRS Chapter 515) to avoid liability for violating the public accommodations law (HRS Chapter 489).
Chapter 489) on which Plaintiffs seek relief. They also argue that the HRS Chapter 515 exemption relied upon by Aloha B&B only applies to long-term living arrangements in which tenants are seeking permanent housing, and not to the short-term transient lodging provided by Aloha B&B to its customers.

As explained below, we conclude that the Circuit Court properly granted partial summary judgment in favor of Plaintiffs and the HCRC.

The statutory provisions relevant to this appeal are as follows.

Plaintiffs’ Complaint against Aloha B&B alleged discrimination on the basis of sexual orientation in public accommodations, in violation of HRS Chapter 489. HRS § 489-3 provides:

Unfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability are prohibited.

HRS § 489-2 (2008) defines the terms “place of public accommodation” and “sexual orientation” for purposes of HRS Chapter 489, in relevant part, as follows:

“Place of public accommodation” means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors. By way of example, but not of limitation, place of public accommodation includes facilities of the following types:

(1) A facility providing services relating to travel or transportation; [or]

(2) An inn, hotel, motel, or other establishment that provides lodging to transient guests;

“Sexual orientation” means having a preference for heterosexuality, homosexuality, or bisexuality, having a history of any one or more of these preferences, or being identified with any one or more of these preferences.

Aloha B&B argues that its activities are governed by HRS Chapter 515 and that it falls within the exemption from prohibited discriminatory practices set forth in HRS § 515-4(a)(2). HRS § 515-3 (2006), provides in relevant part:

It is a discriminatory practice for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesperson, because of race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection:

(1) To refuse to engage in a real estate transaction with a person;

HRS § 515-4(a)(2) (Supp. 2011) provides:

(a) Section 515-3 does not apply:

...
(2) To the rental of a room or up to four rooms in a housing accommodation by an owner or lessor if the owner or lessor resides in the housing accommodation.\[7\]

HRS § 515-2 (2006) defines the terms “housing accommodation,” “real estate transaction” and “real property” for purposes of HRS Chapter 515, in relevant part, as follows:

“Housing accommodation” includes any improved or unimproved real property, or part thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home or residence of one or more individuals.

....

“Real estate transaction” includes the sale, exchange, rental, or lease of real property.

**927 *185 “Real property” includes buildings, structures, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

The definition of “sexual orientation” in HRS § 515-2 is identical to the definition in HRS § 489-2.

B.

[1] In rendering its decision, the Circuit Court construed provisions of HRS Chapter 489 and HRS Chapter 515. Statutory construction is a question of law, which we review de novo under the right/wrong standard. Lingle v. Hawaiʻi Gov’t Empls. Ass’n. AFSCME, Local 152, AFL-CIO, 107 Hawai‘i 178, 183, 111 P.3d 587, 592 (2005). In interpreting a statute, we are guided by the following well-established principles:

When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.

In construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.

This court may also consider the reason and spirit of the law, and the cause which induced the legislature to enact it to discover its true meaning. Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another.


C.

Having identified the statutory provisions at issue and the established principles for statutory interpretation, we proceed to consider the parties’ statutory interpretation claims. We conclude that the Circuit Court properly ruled
that there are no material facts in dispute and that Aloha B&B violated HRS § 489-3 by discriminating against Plaintiffs on the basis of their sexual orientation.

HRS § 489-3 prohibits “[u]nfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of ... sexual orientation ....” Aloha B&B admitted that the sole reason it refused to provide lodging to Plaintiffs was because of their sexual orientation. Young testified in her deposition that there was no other reason for Aloha B&B’s refusal.

[2] It is also clear based on the plain statutory language that Aloha B&B is a “place of public accommodation.” That term is defined by HRS § 489-2 to mean “a business, accommodation, ... recreation, or transportation facility of any kind whose goods, services, facilities, ... or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors.” Aloha B&B admitted in its responsive pretrial statement that “it offers bed and breakfast services to the general public.” The evidence presented by Plaintiffs and the HCRC supports this admission. The evidence showed that Aloha B&B advertises and offers its services to the general public through its own website as well as through multiple third-party websites that are freely accessible over the internet; it makes its services available to a large number of customers, an average of between one hundred and two hundred per year; and aside from same-sex couples and smokers, it generally accepts anyone as a customer as long as the person is willing to pay and a room is available.

**928 *186 More importantly, the statutory definition of “place of public accommodation” specifically includes, “[b]y way of example, but not of limitation,” “[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests.” HRS § 489-2 (emphasis added). Aloha B&B admitted that it “does provide lodging to transient guests.” The undisputed evidence showed that Aloha B&B customers only stay for short periods of time - - the majority for less than a week and about 95 percent for less than two weeks. Aloha B&B does not offer rooms to customers for permanent housing or for use as a residence, and Young does not view herself as the landlord of the guests. In addition, Aloha B&B collects from its customers, and pays to the State, a transient accommodation tax, which only providers of transient accommodations are required to pay.

Based on Aloha B&B’s own admissions as well as the undisputed evidence, we conclude that Aloha B&B falls squarely within the statutory definition of “place of public accommodation” as an “establishment that provides lodging to transient guests.” Our conclusion is bolstered by the stated purpose of HRS Chapter 489 and the Legislature’s directive on how it should be construed. HRS § 489-1(a) (2006) states that the purpose of HRS Chapter 489 “is to protect the interests, rights, and privileges of all persons within the State with regard to access and use of public accommodations by prohibiting unfair discrimination.” HRS § 489-1(b) (2006) then directs that HRS Chapter 489 “shall be liberally construed to further” these purposes.

When the plain language of the statutory definition of “place of public accommodation” is liberally construed to further the anti-discrimination purposes of HRS Chapter 489, it reinforces our firm conclusion that Aloha B&B is a place of public accommodation. We conclude that the Circuit Court correctly ruled that Aloha B&B constitutes a place of public accommodation that is subject to HRS Chapter 489. It is undisputed that Aloha B&B refused to provide Plaintiffs with lodging on the basis of their sexual orientation. Therefore, we affirm the Circuit Court’s determination that Aloha B&B violated HRS § 489-3 by discriminating against Plaintiffs on the basis of their sexual orientation.8

D.

[3] In arguing that its actions were not prohibited by HRS 489-3, Aloha B&B relies on an exemption applicable to a different law, HRS Chapter 515, a law which generally prohibits discrimination in real property transactions. In particular, Aloha B&B relies on the exemption set forth in HRS § 515-4(a)(2), a so-called “Mrs. Murphy” exemption.9 HRS § 515-4(a)(2) provides that the prohibitions in HRS § 515-3 against discrimination in real estate transactions do not apply “[t]o the rental of ... up to four rooms in a housing accommodation by an owner or
lessor if the owner or lessor resides in the housing accommodation.” Aloha B&B argues that the HRS § 515-4(a)(2) exemption supersedes the prohibition against discrimination set forth in HRS § 489-3 and therefore authorized its discriminatory conduct in this case. We disagree.

1.

In analyzing Aloha B&B’s argument, we begin by focusing on our “foremost obligation ... to ascertain and give effect” to the Legislature’s intent in enacting the statutory provisions. As noted, through HRS § 489-1, the Legislature mandated that HRS Chapter 489 shall be liberally construed to further its purposes of protecting people’s rights to access and to use public accommodations by prohibiting unfair discrimination. HRS Chapter 515 is also directed at prohibiting discrimination and “shall be construed according to the fair import of its terms and shall be liberally construed.” HRS § 515-1 (2006).

[4] [5] [6] **929 *187** By providing remedies for discrimination and the injuries caused by discrimination, HRS Chapter 489 and HRS Chapter 515 are remedial statutes.10 “Remedial statutes are liberally construed to suppress the perceived evil and advance the enacted remedy.” Flores v. United Air Lines, Inc., 70 Haw. 1, 12, 757 P.2d 641, 647 (1988) (internal quotation marks, citation, and brackets omitted). In addition, “exceptions to a remedial statute should be narrowly construed[.]” EEOC v. Borden’s, Inc., 551 F.Supp. 1095, 1110 (D. Ariz. 1982); see State v. Russell, 62 Haw. 474, 479-80, 617 P.2d 84, 88 (1980) (“The importation of exceptions into statutes properly affected with a public interest is not lightly to be made. ... It is a well settled rule of statutory construction that exceptions to legislative enactments must be strictly construed.”); United States v. Columbus Country Club, 915 F.2d 877, 883 (1990) (construing exemptions to federal Fair Housing Act narrowly). Accordingly, we liberally construe the scope of the protection against discrimination provided by HRS Chapter 489, and we narrowly or strictly construe the scope of the exemption from prohibited discrimination provided by HRS § 515-4(a)(2).

The Hawai‘i Legislature’s actions in omitting a “Mrs. Murphy” exemption when it enacted HRS Chapter 489 indicates its intent that no such exemption would apply to discrimination in public accommodations and the type of conduct engaged in by Aloha B&B in this case. The “Mrs. Murphy” exemption in HRS Chapter 515 was enacted in 1967. See 1967 Haw. Sess. Laws Act 193, § 4 at 196. Almost twenty years later, the Hawai‘i Legislature enacted HRS Chapter 489, which was patterned after the public accommodation provisions of the federal 1964 Civil Rights Act. See State v. Hoshijo ex rel. White, 102 Hawai‘i 307, 317-18, 76 P.3d 550, 560 (2003). The federal public accommodation provisions contain the “Mrs. Murphy” exemption in the provision defining a “place of public accommodation” to include an “establishment which provides lodging to transient guests[.]” See 42 U.S.C. § 2000a(b)(1). Although the corresponding Hawai‘i provision adopts portions of the federal provision word for word, the “Mrs. Murphy” exemption is conspicuously omitted from the Hawai‘i provision.

A side by side comparison of the two provisions is as follows:

<table>
<thead>
<tr>
<th>Hawai‘i Public Accommodations Law</th>
<th>Federal Public Accommodations Law</th>
</tr>
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<tbody>
<tr>
<td>HRS § 489-2 defines a “place of public accommodation” to include:</td>
<td>42 U.S.C § 2000a(b)(1) defines a “place of public accommodation” to include:</td>
</tr>
<tr>
<td>“An inn, hotel, motel, or other establishment that provides lodging to transient guests[.]”</td>
<td>“[A]ny inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence[.]”</td>
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We conclude that the Hawaii Legislature’s omission of the “Mrs. Murphy” exemption in enacting HRS Chapter 489 provides persuasive evidence that it did not intend such an exemption to apply to establishments, like Aloha B&B, that provide lodging to transient guests. We also conclude that Congress’ inclusion of the “Mrs. Murphy” exemption is instructive, for it demonstrates that Congress believed that a person’s residence may constitute a “place of public accommodation” as an “establishment which provides lodging to transient guests.” If a person’s residence could not constitute a place of public accommodation, then the “Mrs. Murphy” exemption would not be necessary in the federal public accommodation provision. Congress’ inclusion of the “Mrs. Murphy” exemption in the federal public accommodation law supports our conclusion that a place of public accommodation includes a bed and breakfast business, like Aloha B&B, that uses the proprietor’s residence to provide lodging to transient guests.

2.

Contrary to Aloha B&B, we do not view HRS Chapter 489 and HRS § 515-4(a)(2) to be in irreconcilable conflict. In this regard, we note that the term “rental” as used in HRS § 515-4(a)(2) is not specifically defined. Also, because HRS § 515-4(a)(2) is an exception to a remedial statute, we construe it narrowly. We conclude that it is possible to reconcile HRS Chapter 489 and HRS § 515-4(a)(2) by construing the phrase “rental of a room” for purposes of HRS § 515-4(a)(2) to exclude short-term lodging provided to transient guests covered by HRS Chapter 489 and as applying only to longer-term living arrangements where more permanent housing is sought. Such a construction would be consistent with the manner in which the Legislature has characterized the “Mrs. Murphy” exemption set forth in HRS § 515-4(a)(2).

In enacting the HRS § 515-4(a)(2) exemption in 1967, the Legislature referred to it as the “tight living” exemption. See H. Stand. Comm. Rep. No. 874, in 1967 House Journal, at 819. Furthermore, in amending HRS Chapter 515 in 2005 to add sexual orientation to the types of discrimination precluded by HRS § 515-3, the Legislature described the “Mrs. Murphy” exemption set forth in HRS § 515-4(a)(2) as follows: “Housing laws presently permit landlords to follow their individual value systems in selecting tenants to live in the landlords’ own homes[.]” 2005 Haw. Sess. Laws Act 214, § 1 at 688 (emphasis added). This characterization of the “Mrs. Murphy” exemption indicates that the Legislature understood the exemption to apply to longer-term living or housing arrangements - - where a landlord-tenant relationship would be established. See State v. Sullivan, 97 Hawai‘i 259, 266, 36 P.3d 803, 810 (2001) ( “[S]ubsequent legislative history or amendments’ may be examined in order to confirm our interpretation of statutory provisions.” (citation omitted)).

[7] Here, Aloha B&B admitted that it provides lodging to transient guests and that no landlord-tenant relationship is established during the guests’ short-term stays. Construing the phrase “rental of a room” for purposes of HRS § 515-4(a)(2) to exclude short-term lodging provided to transient guests and as applying only to longer-term living arrangements would serve the Legislature’s purposes for enacting both HRS Chapter 489 and HRS § 515-4(a)(2). It would advance the Legislature’s goal of prohibiting discrimination in public accommodations, while permitting landlords “to follow their individual value systems” in selecting a tenant who will reside with them on a longer-term basis in their own homes. This construction would also avoid any irreconcilable conflict between HRS Chapter 489 and HRS § 515-4(a)(2). See State v. Valleseros, 84 Hawai‘i 295, 303, 933 P.2d 632, 640 (1997) ( “[W]here the statutes simply overlap in their application, effect will be given to both if possible, as repeal by implication is disfavored.” (block quote format and citation omitted)).

3.

[8] But even if there were an irreconcilable conflict between HRS Chapter 489 and HRS § 515-4(a)(2), we conclude that Chapter 489 would control as it is the more specific statute with respect to Aloha B&B and Aloha B&B’s actions that are at issue in this case. See id. (“[W]here there is a ‘plainly irreconcilable’ conflict between a general and a specific statute concerning the same subject matter, the specific will be favored.” (block quote format and citation omitted)). The plain language of HRS Chapter 489 specifically applies to and governs an “establishment that provides lodging to transient guests.” See HRS § 489-2. This language perfectly describes Aloha B&B. HRS Chapter...
489 also directly addresses the precise conduct at issue in this case - - the discriminatory refusal by a public accommodation **931 *189 establishment to provide lodging to transient guests based on their sexual orientation. See HRS § 489-3. HRS § 515-4(a)(2), on the other hand, applies more generally to the “rental of rooms,” without specifying the time period involved or whether the provision of lodging to transient guests is covered. We conclude that HRS Chapter 489 is the more specific statute regarding the subject matter of this case.11

II.

We now turn to address Aloha B&B’s constitutional claims. Aloha B&B contends that the application of HRS Chapter 489 to its conduct in this case would violate Young’s constitutional rights to privacy, intimate association, and free exercise of religion. We disagree.


A.

[12] Aloha B&B argues that applying HRS Chapter 489 to prohibit it from discriminating against Plaintiffs and others based on their sexual orientation violates Young’s right to privacy. We disagree.


Hawai‘i has a compelling state interest in prohibiting discrimination in’ public accommodations. “[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent].” Id. at 628, 104 S.Ct. 3244. A State’s interest in assuring equal access is not “limited to the provision of purely tangible goods and services,” and a State has broad authority to create rights of public access. Id. at 625, 104 S.Ct. 3244.

Aloha B&B argues that the right to privacy is “the right to be left alone.” However, to **932 *190 the extent that Young has chosen to operate her bed and breakfast business from her home, she has voluntarily given up the right to be left alone. In choosing to operate Aloha B&B from her home, Young, for commercial purposes, has opened up her home to over one hundred customers per year, charging them money for access to her home. Indeed, the success of Aloha B&B’s business and its profits depend on members of the general public entering Young’s home as customers. In other words, the success of Aloha B&B’s business requires that Young not be left alone.

[15] Aloha B&B also argues that the right to privacy has special force in a person’s own home. However, given Young’s choice to use her home for business purposes as a place of public accommodation, it is no longer a purely private home. “The more an owner, for [her] advantage, opens [her] property for use by the public in general, the more do [her] rights become circumscribed by the statutory and constitutional rights of those who use it.” State v. Viglielmo, 105 Hawai‘i 197, 206, 95 P.3d 952, 961 (2004) (internal quotation marks and citation omitted). In addition, the State retains the right to regulate activities occurring in a home where others are harmed or likely
to be harmed. See State v. Kam, 69 Haw. 483, 492, 748 P.2d 372, 378 (1988); Mueller, 66 Haw. at 618-19, 628, 671 P.2d at 1353-54, 1359 (finding no privacy right to engage in prostitution in one’s home). Aloha B&B’s discriminatory conduct caused direct harm to Plaintiffs and threatens to harm other members of the general public.

The privacy right implicated by this case is not the right to exclude others from a purely private home, but rather the right of a business owner using her home as a place of public accommodation to use invidious discrimination to choose which customers the business will serve. “The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State.” Roberts, 468 U.S. at 634, 104 S.Ct. 3244 (O’Connor, J., concurring). We conclude that Young’s asserted right to privacy did not entitle her to refuse to provide Plaintiffs with lodging based on their sexual orientation and that the application of HRS Chapter 489 to prohibit such discriminatory conduct does not violate her right to privacy. See Mueller, 66 Haw. at 618-19, 628, 671 P.2d at 1353-54, 1359.

B.

Aloha B&B claims that applying HRS Chapter 489 to prohibit it from denying accommodations to Plaintiffs and others based on their sexual orientation violates Young’s constitutionally protected right to intimate association. We disagree.

In recognizing the constitutional right of intimate association, the Supreme Court “has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.” Roberts, 468 U.S. at 617-18, 104 S.Ct. 3244. “[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs[.]” Id. at 618-19, 104 S.Ct. 3244. The right of intimate association protects family relationships and similar highly personal relationships, which “by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.” Id. at 619-20, 104 S.Ct. 3244. The protected relationships “are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.” Id. at 620, 104 S.Ct. 3244. Conversely, an association lacking these qualities, “such as a large business enterprise,” are not protected. Id.

The Supreme Court specifically referred to family relationships to exemplify and to suggest limitations on the kinds of relationships entitled to constitutional protection. Id. at 619, 104 S.Ct. 3244. The factors relevant for a court to consider in determining whether a particular relationship is entitled **933 *191 to protection are “the group’s size, its congeniality, its duration, the purposes for which it was formed, and the selectivity in choosing participants.” IDK, Inc. v. Clark County, 836 F.2d 1185, 1193 (9th Cir. 1988).

Considering these factors, we conclude that applying HRS Chapter 489 to Aloha B&B does not violate Young’s right to intimate association. The relationship between Aloha B&B and the customers to whom it provides transient lodging is not the type of intimate relationship that is entitled to constitutional protection against a law designed to prohibit discrimination in public accommodations.

With respect to the group’s size, Aloha B&B provides transient lodging to between one hundred and two hundred customers per year. Aloha B&B has accommodated customers in up to three rooms at a time for twenty years. The hundreds of customer relationships Aloha B&B forms through its business is far from the “necessarily few” family-type relationships that are subject to constitutional protection. See Roberts, 468 U.S. at 620-21, 104 S.Ct. 3244 (holding that relationships formed through membership in business groups with 400 and 430 members were not protected); IDK, 836 F.2d at 1193 (concluding that while an escort and a client “are the smallest possible
association [,]” this relationship was not protected because, among other reasons, an escort may have many other clients, and the relationship “lasts for a short period and only as long as the client is willing to pay the fee”).

With respect to the purpose for which the relationship is formed, Aloha B&B forms relationships with its customers for commercial, business purposes, and it is only the commercial aspects of the relationship that HRS Chapter 489 regulates. Young testified that the primary purpose of Aloha B&B is to “make money.” She also admitted that if she could not make money by running Aloha B&B, she “wouldn’t operate it.” Young does not operate Aloha B&B for the purpose of developing “deep attachments and commitments” to its customers. See id. at 620, 104 S.Ct. 3244.

With respect to selectivity, duration, and congeniality, Aloha B&B generally is not selective about whom it will accept as customers, provides short-term, transient lodging, and does not form lasting relationships with customers. With narrow exceptions such as same-sex couples and smokers, Aloha B&B basically provides lodging to “any member of the public who is willing to pay.” Aloha B&B does not inquire into the background of its prospective customers, such as their political or religious beliefs, before allowing them to book a reservation. Aloha B&B’s customers only stay for short periods of time. The majority stay for less than a week, about 95 percent less than two weeks, and over 99 percent less than a month. While Young stated that “people come as guests and leave as friends,” she acknowledged that she had difficulty putting customers’ “faces to the name” a month after they left.

Aloha B&B and Young’s relationship with customers arising from the commercial operation of Aloha B&B does not constitute an intimate, family-type relationship that involves “deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.” Roberts, 468 U.S. at 620, 104 S.Ct. 3244. Applying HRS Chapter 489 to prohibit the discriminatory conduct engaged in by Aloha B&B in this case does not violate Young’s right to intimate association.

C.

[21]Aloha B&B contends that application of HRS Chapter 489 to its conduct in this case violates Young’s constitutional right to free exercise of religion. We disagree.

[22][934] *192 The Free Exercise Clause of the First Amendment, which is applicable to the States through the Fourteenth Amendment, provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ....” U.S. Const., amend. I. (emphasis added). The protections of the Free Exercise Clause apply to laws that target religious beliefs or religiously motivated conduct. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532-34, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). However, the Supreme Court has held that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’ ” Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (citation omitted). In Smith, the Supreme Court further held that neutral laws of general applicability need not be justified by a compelling governmental interest even when they have the incidental effect of burdening a particular religious practice. Id. at 882-85, 110 S.Ct. 1595.13

[23]Under Smith, to withstand a challenge based on the Free Exercise Clause of the First Amendment, a neutral state law of general applicability that has the incidental effect of burdening a particular religious practice need not be justified by a compelling state interest, but need only satisfy the rational basis test.14 Aloha B&B does not dispute that HRS Chapter 489 is a neutral law of general applicability. However, it argues that we should depart from Smith, impose a compelling state interest requirement, and apply strict scrutiny in deciding its free exercise claim under the Hawai‘i Constitution.15
We need not decide whether a higher level of scrutiny should be applied to a free exercise claim under the Hawai‘i Constitution than the United States Constitution. This is because we conclude that HRS Chapter 489 satisfies even strict scrutiny as applied to Aloha B&B’s free exercise claim. To satisfy strict scrutiny, a statute must further a compelling state interest and be narrowly tailored to achieve that interest. Nagle v. Board of Education, 63 Haw. 389, 392, 629 P.2d 109, 111 (1981) (“Under the strict scrutiny standard ... [a] court will carefully examine a statute to determine whether it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgment of constitutional rights.”); Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017) (en banc) (“To satisfy strict scrutiny, ... the challenged law [must be] ‘narrowly tailored to achieve a compelling governmental interest.’ ” (citation omitted)).

In evaluating Aloha B&B’s free exercise claim under the Hawai‘i Constitution, we balance the burden HRS Chapter 489 imposes on Young’s free exercise of religion against the State’s interest in prohibiting discrimination in public accommodations. See Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Hawai‘i 217, 246, 953 P.2d 1315, 1344 (1998). To establish a prima facie case for its free exercise claim, Aloha B&B must show that HRS Chapter 489 interferes with a religious belief that is sincerely held by Young and imposes a substantial burden on Young’s religious interests. See id. at 247, 953 P.2d at 1345.

Aloha B&B asserts that based on Young’s religion, she believes that sexual relations between individuals of the same sex are immoral; that providing a room to a same-sex couple would serve to facilitate conduct she believes is immoral; and thus requiring her to provide lodging to Plaintiffs and other same-sex couples would impose substantial burdens on her free exercise of religion. Plaintiffs have not challenged the sincerity of Young’s religious beliefs, but argue that Aloha B&B cannot show a substantial burden on Young’s religion. Plaintiffs argue that Young’s religious beliefs do not compel her to operate a bed and breakfast business. They also assert that Young can still use her home to generate income without any alleged conflict between her religious beliefs and the law by relying on the “Mrs. Murphy” exemption in HRS Chapter 515 and renting out rooms to tenants seeking long-term housing.

Assuming, without deciding, that Aloha B&B established a prima facie case of substantial burden to Young’s exercise of religion, we conclude that the application of HRS Chapter 489 to Aloha B&B’s conduct in this case satisfies the strict scrutiny standard. As previously discussed, Hawai‘i has a compelling state interest in prohibiting discrimination in public accommodations. The Hawai‘i Legislature has specifically found and declared that “the practice of discrimination because of ... sexual orientation ... in ... public accommodations ... is against public policy.” HRS § 368-1 (2015). Discrimination in public accommodations results in a “stigmatizing injury” that “deprives persons of their individual dignity” and injures their “sense of self-worth and personal integrity.” Roberts, 468 U.S. at 625, 104 S.Ct. 3244; King, 656 P.2d at 352, cited in Hoshijo ex rel. White, 102 Hawai‘i at 317 n.22, 76 P.3d at 560 n.22. Aloha B&B itself has acknowledged that “in places of public accommodation discrimination is a horrible evil.”

HRS Chapter 489 is narrowly tailored to achieve Hawai‘i’s compelling interest in prohibiting discrimination in public accommodations. See Roberts, 468 U.S. at 626, 104 S.Ct. 3244 (holding that Minnesota, in applying its public accommodations statute to prohibit the Jaycees from discriminating against women, advanced its interest “through the least restrictive means of achieving its ends”). HRS Chapter 489 “responds precisely to the substantive problem [of discrimination in public accommodations] which legitimately concerns the State.” Id. at 629, 104 S.Ct. 3244 (internal quotation marks and citation omitted). Because the application of HRS Chapter 489 to Aloha B&B’s discriminatory conduct in this case satisfies even strict scrutiny, Aloha B&B is not entitled to relief on its free exercise claim.16

CONCLUSION

Based on the foregoing, we affirm the Circuit Court’s Summary Judgment Order.
Footnotes

1 The Honorable Edwin C. Nacino presided.

2 HRS Chapter 489 is entitled “Discrimination in Public Accommodations.” HRS § 489-3 (2008) provides:

   **Discriminatory practices prohibition.** Unfair discriminatory practices that deny, or attempt to deny, a
   person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and
   accommodations of a place of public accommodation on the basis of race, sex, including gender identity
   or expression, sexual orientation, color, religion, ancestry, or disability are prohibited.

3 The only claim for which Plaintiffs and the HCRC did not seek summary judgment was the claim for damages
   in the Complaint.

4 As discussed infra, HRS § 489-2 defines “place of public accommodation” to include “[a]n inn, hotel, motel,
   or other establishment that provides lodging to transient guests[.]”

5 The Circuit Court’s Order was entitled “Order Granting Plaintiffs’ and [the HCRC’s] Motion for Partial
   Summary Judgment for Declaratory and Injunctive Relief and Denying [Aloha B&B’s] Motion for Summary
   Judgment,” which we will refer to as the “Summary Judgment Order.”

6 HRS § 515-3 identifies numerous other actions related to real estate transactions that constitute
   “discriminatory practice[s].”

7 At the time that Plaintiffs attempted to secure lodging with Aloha B&B, HRS § Section 515-4(a)(2) (2006)
   provided:

   (a) Section 515-3 does not apply:

   ...

   (2) To the rental of a room or up to four rooms in a housing accommodation by an individual if the
   individual resides therein.

   Although HRS § 515-4(a)(2) (2006) was subsequently amended, the differences between the pre-amended
   and post-amended statute are not material to our analysis in this case because Young was an
   owner/resident. For simplicity, we refer to the current version of the statute in our analysis.

8 Because we conclude that Aloha B&B falls within the statutory definition of “place of public
   accommodation” as “an establishment that provides lodging to transient guests,” we need not address
   whether the Circuit Court was correct in determining that Aloha B&B also constitutes a place of public
   accommodation as “[a] facility providing services relating to travel or transportation.” See HRS § 489-2.

9 “Mrs. Murphy” was a hypothetical widow running a boarding house, whose circumstances were first cited
   in the 1960s to argue that a person renting a small number of rooms in the person’s residence should be
   exempted from laws prohibiting discrimination.
Contrary to Aloha B&B’s contention, the doctrine of *ejusdem generis* does not support its claim that it falls outside the definition of a “place of public accommodation.” See Richardson v. City and County of Honolulu, 76 Hawai‘i 46, 74, 868 P.2d 1193, 1221 (1994) (Klein, J., dissenting) (describing the doctrine of *ejusdem generis* to mean: “[W]here words of general description follow the enumeration of certain things, those words are restricted in their meaning to objects of like kind and character with those specified.”). The doctrine is inapplicable where the statute’s plain meaning is apparent or where applying the *ejusdem generis* rule would conflict with other, clearer indications of the Legislature’s intent. United States v. West, 671 F.3d 1195, 1199 (10th Cir. 2012); Leslie Salt Co. v. United States, 896 F.2d 354, 359 (9th Cir. 1990). As we have concluded, the plain language of HRS Chapter 489 and the Legislature’s directive that it be liberally construed to further its anti-discrimination purposes clearly establishes that Aloha B&B falls within the definition of a “place of public accommodation.” In any event, Aloha B&B’s claim that the *ejusdem generis* doctrine supports its claim because a bed and breakfast operates out of a residence while an inn, hotel, and motel do not is without merit. The trait that unifies the items in the list is set forth in the statutory definition itself - - establishments “that provide [ ] lodging to transient guest.” It is undisputed that Aloha B&B possesses this unifying trait.

While Young stated that she will not accept reservations from smokers, same-sex couples, unmarried couples, and disabled people who cannot climb the stairs, Young stated that the standard questions she asks people in processing a reservation consists of the dates they want, whether they are smokers, what room they are asking about, requesting their names, addresses, and contact information, asking if they have any dietary needs, and asking about the deposit. Therefore, based on her standard questions, Young would not be able to determine the customers’ marital status or whether they are able to climb stairs.

The Supreme Court explained:

> The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, “cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.” To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is “compelling” - - permitting him, by virtue of his beliefs, “to become a law unto himself,” - - contradicts both constitutional tradition and common sense.

*Smith*, 494 U.S. at 885, 110 S.Ct. 1595 (citations and footnote omitted).

In response to the Supreme Court’s decision in *Smith*, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA),‘ which prohibits government from substantially burdening the exercise of religion, even through a neutral law of general applicability, unless the government can show that the law was in furtherance of a compelling government interest and was the least restrictive means of furthering that interest. See City of Boerne v. Flores, 521 U.S. 507, 515-16, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). In City of Boerne, however, the Supreme Court invalidated the RFRA as it applied to the States. Id. at 511, 536, 117 S.Ct. 2157. Thus, with respect to state laws, the *Smith* standard generally applies to claims under the Free Exercise Clause of the First Amendment. See Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Hawai‘i 217, 246 & n.31, 953 P.2d 1315, 1344 & n.31 (1998).

Similar to the United States Constitution, the Hawai‘i Constitution provides: “No law shall be enacted respecting the establishment of religion, or prohibiting the free exercise thereof ....” Haw. Const. art I, § 4 (emphasis added).
We reject Aloha B&B’s claim that Plaintiffs’ Complaint should have been dismissed for failing to name Young, who it maintains is an indispensable party, as a defendant. Aloha B&B is operated as a sole proprietorship with Young as its sole proprietor. “[I]n the case of a sole proprietorship, the firm name and the sole proprietor’s name are but two names for one person.” Credit Assoc. of Maui, Ltd. v. Carl bom, 98 Hawai‘i 462, 466, 50 P.3d 431, 435 (App. 2002) (block quote format and citation omitted).
United States Department of Labor  
Office of Federal Contract Compliance Programs

DIRECTIVE (DIR) 2018-03

U.S. DEPARTMENT OF LABOR  
Office of Federal Contract Compliance Programs

A Directive (DIR) is intended to provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. A DIR does not change the laws and regulations governing OFCCP's programs and does not establish any legally enforceable rights or obligations.

Effective Date: August 10, 2018

1. SUBJECT: Executive Order 11246 § 204(c), religious exemption.

2. PURPOSE: To incorporate recent developments in the law regarding religion-exercising organizations and individuals.

3. REFERENCE:

A. Executive Orders 11246 (Sept. 24, 1965), as amended; 13798 (May 4, 2017); 13831 (May 3, 2018);

B. 41 C.F.R. §§ 60-1.5(a)(5), 60-50.1 to 60-50.5; and

C. 48 C.F.R. §§ 22.807(b)(7); 52.222-26(b)(2).

4. AFFECTED POLICY: Described below.

5. BACKGROUND: The Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order (E.O.) 11246, as amended, Section 503 of the Rehabilitation Act of 1973 (Section 503), as amended, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended. Collectively, these laws prohibit federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. In addition, contractors and subcontractors are prohibited from discriminating against applicants or employees because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations. These laws also require federal contractors and subcontractors to take affirmative steps to ensure equal employment opportunity in their employment processes. In addition, these laws require that federal contracting agencies include in all covered contracts, and that contractors include in their subcontracts, an equal opportunity clause. For definitions of the terms "government contract," "subcontract," "prime contractor," and "subcontractor," see 41 C.F.R. § 60-1.3 (E.O. 11246), 41 C.F.R. § 60-300.2 (VEVRAA), and 41 C.F.R. § 60-741.2 (Section 503). The authority to administer these laws, and to promulgate these regulations, rests solely with the Secretary of Labor.

Section 202 of E.O. 11246 does not apply to "a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." E.O. 11246 § 204(c). This exemption is codified in OFCCP's regulations, see 41 C.F.R. § 60-1.5(a)(5), and is part of the equal opportunity clause, see 48 C.F.R. §§ 22.807(b)(7), 52.222-26(b)(2).

OFCCP's regulations at 41 C.F.R. §§ 60-50.1 to 50.5 "set forth the interpretations and guidelines of [OFCCP] regarding the implementation of Executive Order 11246 . . . for promoting and insuring equal employment opportunities for all persons employed or seeking employment with Government contractors and subcontractors or with contractors and subcontractors performing under federally assisted construction contracts, without regard to religion or national origin." 41 C.F.R. § 60-50.1(a). These regulations also "clarify the obligations of employers with respect to accommodating to the religious observances and practices of employees and prospective employees." Id. § 60-50.1(c).

Recent court decisions have addressed the broad freedoms and anti-discrimination protections that must be afforded religion-exercising organizations and individuals under the United States Constitution and federal law. See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018) (government violates the Free Exercise clause when its decisions are based on hostility to religion or a religious viewpoint); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022 (2017) (government violates the Free Exercise clause when it conditions a generally available public benefit on an entity's giving up its religious character, unless that condition withstands the strictest scrutiny); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775 (2014) (the Religious Freedom Restoration Act applies to federal regulation of the activities of for-profit closely held corporations).

Recent Executive Orders have similarly reminded the federal government of its duty to protect religious exercise and not to impede it. See E.O. 13831 § 1 ("The executive branch wants faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level..."), and E.O. 13798 § 2 ("...reasonable accommodations to religious beliefs and observances..."), and E.O. 13706 § 2 ("...religious beliefs and observances...")
playing field for grants, contracts, programs, and other Federal funding opportunities."); E.O. 13798 § 1 ("It shall be the policy of the executive branch to vigorously enforce Federal law's robust protections for religious freedom. The Founders envisioned a Nation in which religious voices and views were integral to a vibrant public square, and in which religious people and institutions were free to practice their faith without fear of discrimination or retaliation by the Federal Government. . . . Federal law protects the freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government.").

OFCCP has not yet addressed these legal developments in its regulations or formal guidance.1

6. POLICY: In line with the longstanding constitutional requirement that government must permit individuals and organizations, in all but the most narrow circumstances, to participate in a government program "without having to disavow [their] religious character,"2 OFCCP staff are instructed to take these legal developments into account in all their relevant activities, including when providing compliance assistance, processing complaints, and enforcing the requirements of E.O. 11246. OFCCP staff should bear in mind that:

- They "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices" and must "proceed in a manner neutral toward and tolerant of . . . religious beliefs." 3
- They cannot "condition the availability of [opportunities] upon a recipient's willingness to surrender his [or her] religiously impelled status."4
- "[A] federal regulation's restriction on the activities of a for-profit closely held corporation must comply with [the Religious Freedom Restoration Act]."5
- They must permit "faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for . . . [Federal] contracts."6
- They must respect the right of "religious people and institutions . . . to practice their faith without fear of discrimination or retaliation by the Federal Government."7

These instructions will remain in force in anticipation of an addition to the Department's regulatory agenda followed by rulemaking informed by public comment.

7. ATTACHMENT: None.

/S/
Craig E. Leen
Acting Director
Office of Federal Contract Compliance Programs

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1 This Directive supersedes any previous guidance that does not reflect these legal developments, for example, the section in OFCCP's Frequently Asked Questions: Sexual Orientation and Gender Identity regarding "Religious Employers and Religious Exemption." See https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html.

2 Trinity Lutheran, 137 S. Ct. at 2022.

3 Masterpiece Cakeshop, 138 S. Ct. at 1731.

4 Trinity Lutheran, 137 S. Ct. at 2022 (brackets and ellipses omitted) (quoting McDaniel v. Paty, 435 U.S. 618, 626 (1978) (alterations omitted) (plurality opinion)); see id at 2024 (requiring an entity "to renounce its religious character in order to participate in an otherwise generally available public benefit program . . . imposes a penalty on the free exercise of religion that must be subjected to the "most rigorous" scrutiny" (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993))).

5 Hobby Lobby, 134 S. Ct. at 2775; see 42 U.S.C. §§ 2000bb et seq.

6 E.O. 13831 § 1.

7 E.O. 13798 § 1.
Chapter 2

“Because of Sex”: The State of LGBT Protections Under Federal Anti-Discrimination Laws

ALEXANDER BALDINO
Office of Equity and Inclusion
Portland Community College
Portland, Oregon

NORA BROKER
Bennett Hartman Morris & Kaplan LLP
Portland, Oregon

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“Because of Sex”: The State of LGBT Protections Under Federal Anti-Discrimination Laws

LGBTQIA+ PROTECTIONS IN EDUCATION
HOW TITLE IX COMPLIANCE PROGRAMS CAN SUPPORT LGBTQIA+ AND DIVERSE STUDENTS

Alex Baldino (pronouns: he/him/his)
Director of Compliance and Title IX Co-Coordinator
Portland Community College

The Legal Landscape

- Title IX
- VAWA
- Cleary Act
- Title VII
- Executive Order 11246
- OCR Guidance Documents and Resolution Agreements
- Caselaw
- Forthcoming Department of Education rules?
- ORS 659.850 (plus ORS 174.100)
What does Title IX actually say?

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

What does Title IX mean?

The goal and mission of Title IX is to reduce and remove barriers to education based on sex.
What does Title IX cover?

- Athletics
- Sexual harassment
- Non-consensual sexual contact
- Non-consensual sexual intercourse
- IPV, DV, and dating violence
- Stalking
- Intimidation/coercion
- Sexual assault
- Sexual exploitation
- Retaliation

What does Title IX compliance look like in practice?

A Title IX compliance program has many functions. A compliant program must:

- Establish policies and grievance procedures.
- Coordinate responses to possible Title IX violations.
- Investigate and adjudicate allegations of Title IX violations.
- Provide assistance to victims and other impacted individuals.
- Ensure compliance with state, federal and local laws.
- Provide training and education to all faculty, staff, and students.
- Monitor and respond to culture and climate issues.
How your Title IX program is designed will have the greatest impact on how well it serves LGBTQIA+ members of your community.

Picture a rabbi.
Sexual Violence by the numbers

- Rates of sexual assault and misconduct are highest among undergraduate females and those identifying as transgender, genderqueer, non-conforming, or questioning.
- Among undergraduate students, 23.1% of females and 5.4% of males experience rape or sexual assault through physical force, violence, or incapacitation.
- 21% of transgender college students report having been sexually assaulted, compared to 18% of non-transgender females, and 4% of non-transgender males.


- Native Americans are twice as likely to experience a rape/sexual assault compared to all races.

Sexual Violence by the numbers

- 46.4% lesbians, 74.9% bisexual women and 43.3% heterosexual women reported sexual violence other than rape during their lifetimes, while 40.2% gay men, 47.4% bisexual men and 20.8% heterosexual men reported sexual violence other than rape during their lifetimes.

The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation

- Among developmentally disabled adults, up to 83% of females and 32% of males are victims of sexual violence.

Connecticut Alliance to End Sexual Violence

What we see

- Pronouns
- Names
- Bathroom access (single occupant and multi-stall)
- Bathroom designations (single occupant and multi-stall)
- Cisgenderism in the classroom
What to do in these uncertain times?

- Know, understand, and be invested with the institution’s values, mission and perspective.
- Take a broad approach, our current federal leadership may be moving toward a less expansive view of Title IX, or a view that is more favorable to Respondents. Use other laws, rules, or guidance documents.
- Know the difference between legal floors and ceilings. For example, Title IX may not require the creation of multi-stall all-user restrooms, but your institution can build them.
- Title IX is a big topic in education with a lot of focus on it. Use that attention to build an inclusive program and as a way to get off Title IX island.
- Your policy is the most important piece of the puzzle, you are enforcing policy, your policy will have a huge impact on the community.

What is the desired outcome?
Questions, comments or further discussion:

Alex Baldino (pronouns: he/him/his)
Director of Compliance and Title IX Co-Coordinator
Portland Community College
971.722.5843
alex.baldino@pcc.edu
"BECAUSE OF SEX": LGBT PROTECTION UNDER FEDERAL ANTI-DISCRIMINATION LAW

September 13, 2018

Nora J. Broker, Esq.
Bennett, Hartman, Morris, & Kaplan, LLP

with many thanks to:
Talia Y. Guerriero, Esq.
Bennett, Hartman, Morris, & Kaplan, LLP

STATISTICS

- 0.6% of adults in US, or 1.4 million individuals, identify as transgender – Williams Institute (2016)

  - Work – mistreatment, firing, denied promotion (30%)
    - 19% fired or denied promotion or job b/c of gender identity
    - 15% verbally harassed, physically attacked, and/or sexually assaulted at work
    - 23% other mistreatment - told to use wrong restroom, present as cisgender, shared confidential information
  - Poverty – 29% compared to 12% general population
  - Attempted Suicide – 40% compared to 4.6% gen pop
  - Race – disparities increased for people of color
  - Family – violence (10%); kicked out of home (8%)
  - Schools - verbally harassed (54%), physically attacked (24%), and sexually assaulted (13%)
Chapter 2—“Because of Sex”: The State of LGBT Protections Under Federal Anti-Discrimination Laws

### Categories of Workplace Protections & Rights

- **Title VII - Federal**
- **Equal Protection - Federal**
- **ORS 659A.030 - State**
- **Disability-related**
- **Non-Retaliation**

### Title VII of the Civil Rights Act of 1964
**42 U.S. Code § 2000E-2**

**Covers:** employers with 15 or more employees

**Illegal to:**
- refuse to hire or terminate;
- discriminate against in compensation;
- discriminate in terms, conditions, or privileges of employment;
- segregate or classify employees in a way that deprives opportunity

**Applies to discrimination “because of such individual's ... sex”**

**Protects against:**
- Intentional discrimination
- Hostile work environment
- “Disparate impact”
**Title VII of the Civil Rights Act of 1964**
42 U.S. Code § 2000E-2

- Raises the question: when is discrimination *because of sex*? What kinds of attitudes and motivations qualify?
- Does that include discrimination on account of traits, roles, or stereotypes?
- Is anti-transgender discrimination *per se* because of sex?

---

**Price Waterhouse v. Hopkins**
490 U.S. 228 (1989)

Plaintiff was perceived as too “macho” for a woman

Comments such as “take a course at charm school” and “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”

Such stereotypes are covered under Title VII: “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”
**DEVELOPMENT OF “BECAUSE OF SEX”**

*Oncale v. Sundowner, 523 U.S. 75 (1998)*
- Severe sexual harassment on all-male oil rig
- Title VII prohibits same-sex sexual harassment where plaintiff shows sex was motivating factor
- Harassment need not be motivated by sexual desire

*Nichols v. Azteca, 256 F.3d 864 (9th Cir. 2001)*
- Title VII prohibits harassment for exhibiting behavior or gender expression associated with opposite sex
- Here, male plaintiff stated a claim where he was harassed “for walking and carrying his tray ‘like a woman’ – i.e., for having feminine mannerisms.”

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**TRANSGENDER IDENTITY AND TITLE VII**

*Old Case Law: Transgender Status Not Covered*
- *Somers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982)
- *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984)
- *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977)
  - But see *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (interpreting Gender Motivated Violence Act)
TRANSGENDER IDENTITY AND TITLE VII

Recent Trend: Transgender Status Covered

- Doe v. Boyertown Area School District, 893 F.3d 179 (3rd Cir. 2018) (Title IX)
- EEOC v. Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018) (Title VII)
- Whitaker v. Kenosha Unified School District, 858 F.3d 1034 (7th Cir. 2017) (Title IX and Equal Protection)
- Dodds v. U.S. Dept. of Education, 845 F.3d 217 (6th Cir. 2016) (Title IX and Equal Protection)
- Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) (Equal Protection)
- Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) (Title VII)
- Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act)
- Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act)

TRANSGENDER IDENTITY AND TITLE VII

Recent Trend: The Exceptions

- Very few recent cases have rejected the view that sex discrimination laws protect transgender people.

  - Etsitty v. Utah Transit Authority, 502 F.3d 1214 (10th Cir. 2007)
    - Held: anti-transgender discrimination is not sex discrimination per se.
    - But recognized that it may be actionable under sex stereotypes theory in appropriate cases.
  - Texas v. United States, 201 F.Supp.3d 810 (N.D. Tex. 2016)
    - Title IX “because of sex” did not cover transgender people
    - Title IX “because of sex” did not cover transgender people
TRANSGENDER IDENTITY AND TITLE VII

Recent Trend cont.: EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560 (2017)

Held

- Anti-trans discrimination was unlawful sex stereotyping
- Discrimination on the basis of transgender status or transition status is per se sex discrimination.
- “It is analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex.” Id. at 575.
- “[A]n employer cannot discrimination on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try.” Id. at 576-77.

Rejected Arguments

- That “sex” refers only to the “binary characteristic” of male and female, defined by “chromosomal physiology and reproductive function,” distinct from any “self-assigned ‘gender identity’”
  - One cannot separate trans status from sex, and from “but for” perspective this treats trans women differently than cisgender women.
  - Analogized to case law holding that “because of religion” included discrimination for changing religion.
- That sex is a “biologically immutable trait” that cannot be changed, so desire to change is not protected.
  - Price Waterhouse required that sex be “irrelevant to the [ ] decisions,” so even if true, this basis doesn’t treat sex as irrelevant.
- That Congress only intended “sex” to refer to a person’s “physiology and reproductive role.”
  - The court noted that such a reading was inconsistent with Price Waterhouse and the bulk of “stereotype” case law, transgender issues notwithstanding.
  - A failure to anticipate Title VII would cover trans people is immaterial because statutes often cover both principle evils and comparable evils.
TRANSGENDER IDENTITY AND TITLE VII

Recent Trend cont.: EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560 (2017)

Rejected Defenses
- Title VII Ministerial Exception:
  - Defendant lacked sufficient “religious characteristics” and Plaintiff was not a “ministerial employee.”
- Religious Freedom Restoration Act:
  - Defendant failed to make prima facie case because they could not rely on presumed customer bias to found a “substantial burden,”
  - “Tolerating [Plaintiff’s] understanding of her sex and gender identity is not tantamount to supporting it.”
  - Extensive *dicta* applied strict scrutiny and concluded the action survived.

Certiorari petition filed on two questions:
1) whether Title VII “sex” covers gender identity and transgender status; and
2) whether *Price Waterhouse* prohibits application of sex-specific policies “according to their employees’ sex rather than their gender identity.”

*Not* on application of RFRA or other “religious freedom” grounds.

SEXUAL ORIENTATION AND TITLE VII

Uniform Case Law as of March 2017: Sexual Orientation Not Covered

- Simonton v. Runyon, 232 F.3d 33 (2nd Cir. 2000)
- Wrightson v. Pizza Hut of Am., 99 F.3d 138 (4th Cir. 1996)
- Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979)
- Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002)
- Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005)
- Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. Mar. 10, 2017)
SEXUAL ORIENTATION AND TITLE VII

**Breakthrough: Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017)(en banc)**

- First major Circuit case holding that sexual orientation was protected under Title VII
- Three bases for holding:
  - S/o discrimination as “but for” disparate treatment
  - S/o discrimination as gender stereotype
  - Associational theory – discrimination because of whom you associate with is discrimination based on your own trait.
- “It would require considerable calisthenics to remove the ‘sex’ from ‘sexual orientation.’”

**Breakthrough: Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018)(en banc)**

- Second major Circuit case holding that sexual orientation was protected under Title VII
- Decided on the same three bases as *Hively*
- Noteworthy that the Sessions-lead Department of Justice filed an unsolicited brief opposing protection, and thereby opposing the EEOC’s position, which drew significant attention from judges at argument as highly irregular.
SOME EEOC CASES ON TRANSGENDER EMPLOYEES

- Macy v. Dep’t of Justice, EEOC Appeal No. 0120120821 (April 20, 2012)
- Jameson v. U.S. Postal Service, EEOC Appeal No. 0120130992 (May 21, 2013)
- Eric S. v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120133123 (April 16, 2014)
- Lusardi v. Dep’t of the Army, EEOC Appeal No. 0120133395 (April 1, 2015)

Themes:
- Misgendering and Deadnaming
- Refusal to use correct pronouns
- Hostile behavior and comments
- Refusal to address complaints

POSITIONS OF THE FEDERAL GOVERNMENT

- 2006 – argued that Title VII doesn’t include transgender status per se
- 2011 – OPM issued guidance that its nondiscrimination policies covered transgender discrimination
- 2012 – EEOC ruled gender identity discrimination is sex discrimination. Macy v. Holder, No. 0120120821
- 2014 – Holder Memo: will no longer argue Title VII doesn’t include gender identity per se
- 2017 – Sessions Memo: withdrawing Holder Memo
- 2017 – DOJ Zarda Case Briefing
Chapter 2—“Because of Sex”: The State of LGBT Protections Under Federal Anti-Discrimination Laws

**TRANSGENDER MILITARY BAN**

- Obama-era investigation resulted in plan to remove barriers to trans military service.
- Trump announced the reversal of this policy and imposition of a ban by tweet in July 2017.
- Subsequent “study” ordered to justify the tweet resulted in a relatively cursory report, merely regurgitating standard anti-trans propaganda.
- The ban has been enjoined by several district courts as of this presentation.
- Significant for transgender rights across federal policy areas – potential for legal imprimatur for many anti-trans arguments.

**ORS 659A.030**

One or more employees

Illegal to:
- refuse to hire or terminate;
- discriminate against in compensation;
- discriminate in terms, conditions, or privileges of employment

On the basis of “sexual orientation”

“Sexual orientation’ means an individual's actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth.” ORS 174.100(7).

Protects against:
- Intentional discrimination
- Hostile work environment
- “Disparate impact”
QUESTIONS? DISCUSSION?

Nora J. Broker
brokern@bennetthartman.com
503-546-9624
Chapter 2—“Because of Sex”: The State of LGBT Protections Under Federal Anti-Discrimination Laws

Nora J. Broker, Esq
Bennett, Hartman, Morris & Kaplan, LLP
Supplementary Materials – Recent Federal Cases on LGBT Rights

Case compilation by:
National Center for Transgender Equality
Available at: https://transequality.org/federal-case-law-on-transgender-people-and-discrimination

**Federal Circuit Courts of Appeals - Transgender People Protected**

- *Doe v. Boyertown Area School District*, 893 F.3d 179 (3rd Cir. July 26, 2018) *(Title IX)* (stating that discrimination based on transgender status, including denial of equal access to restrooms, may violate Title IX and rejecting arguments that a school policy protecting transgender students violated other students’ rights).

- *EEOC v. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. March 8, 2018) *(Title VII)* (holding that termination of employee on the basis of transitioning or transgender status violates Title VII of the 1964 Civil Rights Act).


Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. Feb. 29, 2000) (Gender Motivated Violence Act (GMVA)) (holding that the GMVA applied to targeting of a transgender person).

Federal Circuit Courts of Appeals – Transgender People Not Protected

Etsitty v. Utah Transit Authority, 502 F.3d 1215 (10th Cir. 2007) (holding that discrimination against transgender workers may sometimes constitute sex discrimination under Title VII but that such discrimination was not covered in all cases).

Federal District Courts – Transgender People Protected


Flack v. Wisconsin Department of Health Services, No. 3:18-cv-00309-wmc (W.D. Wis. July 25, 2018) (holding that a Medicaid program's refusal to cover treatments related to gender transition is "textbook discrimination based on sex" in violation of the Affordable Care Act and the Equal Protection Clause).


Grimm v. Gloucester County School Board, No. 4:15-cv-54 (E.D. Va. May 22, 2018) (holding that denying a transgender boy access to school restrooms matching his gender violated Title IX and the Equal Protection Clause of the U.S. Constitution).


Karnoski v. Trump, C17-1297-MJP, 2017 WL 5668071 (W.D. Wash. Apr. 13, 2018) (maintaining a preliminary injunction on policy of excluding transgender individuals from serving openly in the military and holding that transgender people are entitled to heightened scrutiny under the Constitution).
Chapter 2—"Because of Sex": The State of LGBT Protections Under Federal Anti-Discrimination Laws


- *M.A.B. v. Board of Education of Talbot County*, 286 F.Supp.3d 704 (D. Md. March 12, 2018) (holding that prohibiting a transgender boy from boys’ locker room based on transgender status is a Title IX sex-discrimination claim as well as a gender-stereotyping claim).

- *F.V. v. Barron*, 286 F.Supp.3d 1131 (D. Idaho March 5, 2018) (finding the practice of denying transgender individuals' applications to change the sexes listed on their birth certificates violated Equal Protection Clause)


- *Students & Parents for Privacy v. U.S. Department of Education*, No. 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016) (recommendation by magistrate judge, holding that non-transgender students who objected to school district’s policy permitting transgender students to use facilities consistent with their gender identity do not have a viable claims to challenge the policy under Title IX).
Masterpiece Cakeshop and Other LGBT Law Developments


Chapter 2—“Because of Sex”: The State of LGBT Protections Under Federal Anti-Discrimination Laws


**Federal District Courts: Transgender People Not Protected**

- **Texas v. United States**, 201 F.Supp.3d 810 (N.D. Tex. Aug. 21, 2016) (holding that Title IX does not prohibit discrimination based on gender identity or transgender status).


**Sexual Orientation**

- **Hively v. Ivy Tech Community College of Indiana**, 853 F.3d 339 (7th Cir. Apr. 4, 2017) (en banc) (holding that discrimination based on sexual orientation is sex-based discrimination under Title VII, and rejecting the court’s reasoning for previously holding that anti-transgender discrimination is not covered).

- **Zarda v. Altitude Express, Inc.**, 883 F.3d 100 (2d Cir. Feb. 26, 2018) (holding that sexual orientation discrimination is motivated in part by sex and is a subset of sex discrimination for purposes of Title VII; employee was entitled to bring Title VII claim for discrimination based on sexual orientation).
Chapter 3

Trans* 101: Everyday People

PERCY WISE
Portland, Oregon

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TRANS* 101: EVERYDAY PEOPLE

TERMINOLOGY

- Cisgender
- Transgender, Transsexual, Trans*
- Gender Non-conforming/Non-Binary
- Intersex/DSD
- Transition
TRANSGENDER WOMEN & MEN

“Transgender woman”
Assigned male at birth and transitioned to live as female
May or may not use the term “MTF”

“Transgender man”
Assigned female at birth and transitioned to live as male
May or may not use the term “FTM”

GENDER IDENTITY VS. SEXUAL ORIENTATION

Everyone has a gender identity AND a sexual orientation

Gender Identity = Who You Are; Internal Self
Ex: man, woman, gender non-conforming

Sexual Orientation = Who You Love; Relationships
Ex: straight, gay, lesbian, bisexual, queer
PRONOUNS: HE/SHE/THEY/ZE

Words We’re Watching

Singular 'They'
Though singular ‘they’ is old, ‘they’ as a nonbinary pronoun is new—and useful

MICROAGGRESSIONS – MISSING THE MARK

Andrea Zekis
Yesterday at 7:16am

Walking down the street. The paper bag broke. Cups. Bottles of cream. Packets of sugar. They spilled over the sidewalk. A man and woman who look like they were backpacking stopped and took pity. Gave me a pink corded mesh bag. The man misgendered me and apologized for giving me pink. I walked a bit more. That bag broke. Called a taxi.

7 Comments
MACRO AGGRESSIONS

Trans* People of Color Living in Poverty

<table>
<thead>
<tr>
<th></th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Latino/a</td>
<td>43%</td>
</tr>
<tr>
<td>American Indian</td>
<td>41%</td>
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<tr>
<td>Multiracial</td>
<td>40%</td>
</tr>
<tr>
<td>Black</td>
<td>38%</td>
</tr>
<tr>
<td>General Population</td>
<td>14%</td>
</tr>
</tbody>
</table>

The State of the Union: Masterpiece Cakeshop and Other LGBT Law Developments
### Terminology

- **Cisgender** – Identifies with the gender assigned at birth
- **Transgender** – Identifies differently than the gender assigned at birth
- **Transwoman** – Identifies on female spectrum
- **Transman** – Identifies on male spectrum
- **Gender Non-conforming/Non-binary** person does not align with binary gender
- **Intersex/DSD** - born with anatomy/chromosomes that does not seem to fit typical definitions of male or female; may or may not identify as transgender
- **Transition** – process of living as one gender identity to living in another gender identity. Differs for everyone. May involve hormones or sexual reassignment surgeries (SRS).

### Microaggressions to avoid

- Asking/using old name when it is not relevant: “dead-naming”
- Asking medical/surgical status when it is not relevant
- Using wrong pronouns: “misgendering”
- Using arcane/disfavored terminology: “tranny” “crossdresser” “she-male” “transvestite” “sex change” “he-she” “transgendered”
- Confusing sexuality orientation with gender identity
- Disclosing someone’s trans* status without permission

### Litigation Tips

- Educate prosecutors, judges, and guards
- Use trans* demographics, stories, and disparate impacts of incarceration to mitigate plea and sentencing terms
- Object to misgendering/dead-naming
- Object to focus on trans* status if irrelevant
- Support client’s decisions about their gender identity and expression during the case
- Make housing recommendations based on client’s sense of safety
- Challenge discriminatory jurors for cause
- Do not use trans status to negatively support case (e.g. “trans panic defense”)
- Refer client to civil rights attys if abuse occurs
- Consult, consult, consult.

### Demographics

**2015 US Transgender Survey (USTS)**
- Only 29% have updated state ID docs
- 29% living in poverty; 12% homeless
- 38%-43% poverty rate if a person of color
- 60% homeless if undoc’d immigrant
- 23% faced housing discrimination
- 15% unemployed
- 46% verbally harassed in past year
- 10% sexually assaulted in past year
- 40% attempt suicide during lifetime

**Williams Institute research**
- 267,000 undocumented LGBT immigrants
- 637,000 documented LGBT immigrants

### Litigation Resources

- ACLU of Oregon
- TLC – Transgender Law Center
- TLDEF – Transgender Legal Defense & Education Fund
- Lambda Legal
- NCLR – National Center for Lesbian Rights

### Books

- Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law (Dean Spade)
- Transgender Rights (Currah, Juang, Minter)
- There is Room for You: Tales From a Transgender Defender’s Heart (Zoe Dolin)
- Becoming a Visible Man (Jamison Green)
- The First Man-Made Man (Pagan Kennedy)
- Redefining Realness (Janet Mock)
Chapter 4

Anatomy of a Civil Rights Case:
*Klein dba Sweetcakes by Melissa v. Bureau of Labor & Industries*

**Moderator: Jennifer Pizer**
Lambda Legal
Los Angeles, California

**Herb Grey**
Attorney at Law
Beaverton, Oregon

**Paul Thompson**
LTL PDX LLC
Portland, Oregon

**Carson Whitehead**
Appellate Division, Oregon Department of Justice
Salem, Oregon

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SELECTED OREGON REVISED STATUTES

174.100 Definitions. As used in the statute laws of this state, unless the context or a specially applicable definition requires otherwise:

1. “Any other state” includes any state and the District of Columbia.

2. “City” includes any incorporated village or town.

3. “County court” includes board of county commissioners.

4. “Husband and wife,” “husband or wife,” “husband” or “wife” means spouses or a spouse in a marriage.

5. “May not” and “shall not” are equivalent expressions of an absolute prohibition.

6. “Person” includes individuals, corporations, associations, firms, partnerships, limited liability companies and joint stock companies.

7. “Sexual orientation” means an individual’s actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.

8. “State Treasury” includes those financial assets the lawful custody of which are vested in the State Treasurer and the office of the State Treasurer relating to the custody of those financial assets.

9. “To” means “to and including” when used in a reference to a series of statute sections, subsections or paragraphs.


11. “Violate” includes failure to comply. [Amended by 1953 c.145 §2; 1957 c.360 §1; 1963 c.213 §1; 1965 c.518 §1; 1967 c.409 §1; 1983 c.327 §1; 1993 c.73 §1; 1995 c.93 §30; 2001 c.671 §1; 2007 c.100 §1; 2015 c.629 §33]

659A.003 Purpose of ORS chapter 659A. The purpose of this chapter is to encourage the fullest utilization of the available workforce by removing arbitrary standards of race, color, religion, sex, sexual orientation, national origin, marital status, age or disability as a barrier to employment of the inhabitants of this state, and to ensure the human dignity of all people within this state and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of unlawful discrimination of any kind based on race, color, religion, sex, sexual orientation, national origin, marital status, age, disability or familial status. To accomplish this purpose, the Legislative Assembly intends by this chapter to provide:
(1) A program of public education calculated to eliminate attitudes upon which practices of unlawful discrimination because of race, color, religion, sex, sexual orientation, national origin, marital status, age, disability or familial status are based.

(2) An adequate remedy for persons aggrieved by certain acts of unlawful discrimination because of race, color, religion, sex, sexual orientation, national origin, marital status, disability or familial status, or unreasonable acts of discrimination in employment based upon age.

(3) An adequate administrative machinery for the orderly resolution of complaints of unlawful discrimination through a procedure involving investigation, conference, conciliation and persuasion, to encourage the use in good faith of the machinery by all parties to a complaint of unlawful discrimination and to discourage unilateral action that makes moot the outcome of final administrative or judicial determination on the merits of the complaint. [Formerly 659.022; 2005 c.22 §467; 2007 c.100 §2; 2007 c.903 §1a]

659A.006 Declaration of policy against unlawful discrimination; opportunity to obtain employment without unlawful discrimination recognized as a civil right; exception of religious group. (1) It is declared to be the public policy of Oregon that practices of unlawful discrimination against any of its inhabitants because of race, color, religion, sex, sexual orientation, national origin, marital status, age, disability or familial status are a matter of state concern and that this discrimination not only threatens the rights and privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

(2) The opportunity to obtain employment or housing or to use and enjoy places of public accommodation without unlawful discrimination because of race, color, religion, sex, sexual orientation, national origin, marital status, age or disability hereby is recognized as and declared to be a civil right.

(3) It is not an unlawful practice for a bona fide church or other religious institution to take any action with respect to housing or the use of facilities based on a bona fide religious belief about sexual orientation as long as the housing or the use of facilities is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the church or institution.

(4) It is not an unlawful employment practice for a bona fide church or other religious institution, including but not limited to a school, hospital or church camp, to prefer an employee, or an applicant for employment, of one religious sect or persuasion over another if:

(a) The religious sect or persuasion to which the employee or applicant belongs is the same as that of the church or institution;

(b) In the opinion of the church or institution, the preference will best serve the purposes of the church or institution; and

(c) The employment involved is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the church or institution.
(5) It is not an unlawful employment practice for a bona fide church or other religious institution to take any employment action based on a bona fide religious belief about sexual orientation:

(a) In employment positions directly related to the operation of a church or other place of worship, such as clergy, religious instructors and support staff;

(b) In employment positions in a nonprofit religious school, nonprofit religious camp, nonprofit religious day care center, nonprofit religious thrift store, nonprofit religious bookstore, nonprofit religious radio station or nonprofit religious shelter; or

(c) In other employment positions that involve religious activities, as long as the employment involved is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the church or institution. [Formerly 659.020; 2007 c.100 §3; 2007 c.903 §2]

659A.400 Place of public accommodation defined. (1) A place of public accommodation, subject to the exclusions in subsection (2) of this section, means:

(a) Any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise.

(b) Any place that is open to the public and owned or maintained by a public body, as defined in ORS 174.109, regardless of whether the place is commercial in nature.

(c) Any service to the public that is provided by a public body, as defined in ORS 174.109, regardless of whether the service is commercial in nature.

(2) A place of public accommodation does not include:

(a) A Department of Corrections institution as defined in ORS 421.005.

(b) A state hospital as defined in ORS 162.135.

(c) A youth correction facility as defined in ORS 420.005.

(d) A local correction facility or lockup as defined in ORS 169.005.

(e) An institution, bona fide club or place of accommodation that is in its nature distinctly private. [Formerly 30.675; 2013 c.429 §1; 2013 c.530 §4]

659A.403 Discrimination in place of public accommodation prohibited. (1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is of age, as described in this section, or older.
(2) Subsection (1) of this section does not prohibit:

(a) The enforcement of laws governing the consumption of alcoholic beverages by minors and the frequenting by minors of places of public accommodation where alcoholic beverages are served;

(b) The enforcement of laws governing the use of marijuana items, as defined in ORS 475B.015, by persons under 21 years of age and the frequenting by persons under 21 years of age of places of public accommodation where marijuana items are sold; or

(c) The offering of special rates or services to persons 50 years of age or older.

(3) It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section. [Formerly 30.670; 2003 c.521 §1; 2005 c.131 §1; 2007 c.100 §5; 2015 c.614 §27]

659A.406 Aiding or abetting certain discrimination prohibited. Except as otherwise authorized by ORS 659A.403, it is an unlawful practice for any person to aid or abet any place of public accommodation, as defined in ORS 659A.400, or any employee or person acting on behalf of the place of public accommodation to make any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older. [Formerly 30.685; 2003 c.521 §2; 2007 c.100 §6]

659A.409 Notice that discrimination will be made in place of public accommodation prohibited; age exceptions. Except as provided by laws governing the consumption of alcoholic beverages by minors, the use of marijuana items, as defined in ORS 475B.015, by persons under 21 years of age, the frequenting by minors of places of public accommodation where alcoholic beverages are served and the frequenting by persons under 21 years of age of places of public accommodation where marijuana items are sold, and except for special rates or services offered to persons 50 years of age or older, it is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is of age, as described in this section, or older. [Formerly 659.037; 2003 c.521 §3; 2005 c.131 §2; 2007 c.100 §7; 2015 c.614 §28]
OAR 839-005-0003, DEFINITIONS: ENFORCEMENT OF LAWS PROHIBITING UNLAWFUL PRACTICES

As used in enforcing ORS Chapter 659A, including housing discrimination under 659A.145 or 659A.421 or the federal Fair Housing Act (42 U.S.C. §3601–3617):

(1) “Aggrieved Person” means either:

(a) A person who is, or was at any time, eligible to file a complaint under ORS 659A.820 or who is otherwise similarly situated; or

(b) A person who files a complaint under ORS 659A.825.

(2) “Bureau” means the Bureau of Labor and Industries.

(3) “Division” means the Civil Rights Division of the Bureau of Labor and Industries.

(4) “Employee” does not include:

(a) Any individual employed by that individual’s spouse or child; or

(b) Any individual employed by that individual’s parents, unless the individual is in the domestic service of their parent and is 26 years or older.

(5) “Employer” means any person in this state who, directly or through an agent, engages or utilizes the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed. Employer also includes any public body that, directly or through an agent, engages or utilizes the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed, including all officers, agencies, departments, divisions, bureaus, boards and commissions of the legislative, judicial and administrative branches of the state, all county and city governing bodies, school districts, special districts, municipal corporations and all other political subdivisions of the state. Employer also includes any person who is in an employment relationship with an intern as defined in subsection (10) of this rule.

(6) “Employment agency” includes any person undertaking to procure employees or opportunities to work.


(8) “Gender expression” means the manner in which an individual’s gender identity is expressed, including, but not limited to, through dress, appearance, manner, or speech, whether or not that expression is different from that traditionally associated with the individual’s assigned sex at birth.
“Gender identity” means an individual’s gender-related identity, whether or not that identity is different from that traditionally associated with the individual’s assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous.

“Intern” means a person who performs work for an employer for the purpose of training if:

(a) The employer is not committed to hire the person performing the work at the conclusion of the training period;

(b) The employer and the person performing the work agree in writing that the person performing the work is not entitled to wages for the work performed; and

(c) The work performed:

(A) Supplements training given in an education environment that may enhance employability of the intern;

(B) Provides experience for the benefit of the person performing the work;

(C) Does not displace regular employees;

(D) Is performed under the close supervision of existing staff; and

(E) Provides no immediate advantage to the employer providing the training and may occasionally impede the operations of the employer.


(e) “Intern” includes any person meeting the description set forth in this rule regardless of the title of the person’s position or whether they are currently enrolled in an education or training program.

“Labor organization” includes any organization that is constituted for the purpose, in whole or in part, of collective bargaining or in dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employees.

“Person” includes one or more individuals, partnerships, associations, labor organizations, limited liability companies, joint-stock companies, corporations, legal representatives, trustees, and trustees in bankruptcy or receivers. “Person” also includes a public body as defined in ORS 30.260. For the purposes of 659A.145 or 659A.421 or the federal Fair Housing Act (42 U.S.C. §3601–3617), “person” also includes fiduciaries, mutual companies, trusts and unincorporated organizations.
(13) “Protected class” means a group of people protected by law from discrimination on the basis of a shared characteristic, such as race, sex, sexual orientation, disability, or other, or a perception of that characteristic.

(14) “Respondent” includes any person against whom a complaint or charge of unlawful practices is filed with the division or whose name has been added to such complaint or charge pursuant to ORS 659A.835(1).

(15) “Sex” means the anatomical, physiological and genetic characteristics associated with being male or female.

(16) “Sexual orientation” means an individual’s actual or perceived heterosexuality, homosexuality, bisexuality, or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s assigned sex at birth.

Statutory/Other Authority: ORS 659A.805.

Statutes/Other Implemented: ORS 659A.001 & 659A.350

History: BLI 19-2015, f. 12-22-15, cert. ef. 1-1-16; BLI 11-2015, f. & cert. ef. 8-4-15; BLI 14-2013, f. & cert. ef. 12-30-13; BLI 8-2010, f. & cert. ef. 2-24-10; BLI 43-2008, f. 12-3-08, cert. ef. 12-5-08; BLI 40-2008(Temp), f. 11-10-08, cert. ef. 11-12-08 thru 5-1-09; Reverted to BLI 36-2007, f. 12-27-07 cert. ef. 1-1-08; BLI 7-2008(Temp), f. 3-20-08, cert. ef. 3-25-08 thru 9-21-08; BLI 36-2007, f. 12-27-07 cert. ef. 1-1-08; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 19-2000, f. & cert. ef. 9-15-00
Chapter 4—Anatomy of a Civil Rights Case: *Klein dba Sweetcakes by Melissa v. Bureau of Labor & Industries*

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Melissa Elaine KLEIN, dba Sweetcakes by Melissa; and Aaron Wayne Klein, dba Sweetcakes by Melissa, and, in the alternative, individually as an aider and abettor under ORS 659A.406, Petitioners,

v.

OREGON BUREAU OF LABOR AND INDUSTRIES, Respondent.

A159899

Court of Appeals of Oregon.

Argued and submitted March 2, 2017.  
December 28, 2017

Adam R.F. Gustafson, Washington, D.C., argued the cause for petitioners. With him on the briefs were Tyler Smith, Anna Harmon, and Tyler Smith & Associates; Herbert G. Grey; C. Boyden Gray, Derek S. Lyons, and Boyden Gray & Associates, Washington DC; and Matthew J. Kacsmaryk, Kenneth A. Klukowski, Cleve W. Doty, and First Liberty Institute, Texas.

Carson Whitehead, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Leigh A. Salmon, Assistant Attorney General.

Stefan C. Johnson and Lambda Legal Defense and Education Fund, Inc., California, filed the brief amicus curiae for Rachel Bowman-Cryer, Laurel Bowman-Cryer, and Lambda Legal Defense and Education Fund, Inc.


Julia E. Markley, Courtney R. Peck, and Perkins Coie LLP; Richard B. Katskee, Carmen Green, and Americans United for Separation of Church and State, filed the brief amicus curiae for Americans United for Separation of Church and State.
Before DeVore, Presiding Judge, and Garrett, Judge, and James, Judge.*

GARRETT, J.

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Melissa and Aaron Klein, the owners of a bakery doing business as Sweetcakes by Melissa (Sweetcakes), seek judicial review of a final order of the Bureau of Labor and Industries (BOLI) finding that the Kleins’ refusal to provide a wedding cake to the complainants, a same-sex couple, violated ORS 659A.403, which prohibits a place of public accommodation from denying “full and equal” service to a person “on account of * * * sexual orientation.” The order further concluded that the Kleins violated another of Oregon’s public accommodations laws, ORS 659A.409, by communicating an intention to unlawfully discriminate in the future. BOLI’s order awarded damages to the complainants for their emotional and mental suffering from the denial of service and enjoined the Kleins from further violating ORS 659A.403 and ORS 659A.409.

In their petition for judicial review, the Kleins argue that BOLI erroneously concluded that their refusal to supply a cake for a same-sex wedding was a denial of service “on account of” sexual orientation within the meaning of ORS 659A.403; alternatively, they argue that the application of that statute in this circumstance violates their constitutional

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rights to free expression and to the free exercise of their religious beliefs. The Kleins also argue that they were denied due process of law because BOLI’s commissioner did not recuse himself in this case after making public comments about it, that the damages award is not supported by substantial evidence or substantial reason, and that BOLI erroneously treated the Kleins’ public statements about this litigation as conveying an intention to violate public accommodation laws in the future.

As explained below, we reject the Kleins’ construction of ORS 659A.403 and conclude that their denial of service was “on account of” the complainants’ sexual orientation for purposes of that statute. As for their constitutional arguments, we conclude that the final order does not impermissibly burden the Kleins’ right to free expression under the First Amendment to the United States Constitution. We conclude that, under

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Employment Division, Oregon Department of Human Resources v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L. Ed. 2d 876 (1990), the final order does not impermissibly burden the Kleins’ right to the free exercise of their religion because it simply requires their compliance with a neutral law of general applicability, and the Kleins have made no showing that the state targeted them for enforcement because of their religious beliefs. For substantially the same reasons for which we reject their federal constitutional arguments, we reject the Kleins’ arguments under the Oregon Constitution. We also reject the Kleins’ arguments regarding the alleged bias of BOLI’s commissioner and their challenge to BOLI’s damages award. We agree with the Kleins, however, that the evidence does not support BOLI’s conclusion that they violated ORS 659A.409.
Accordingly, we reverse the order as to that determination and the related grant of injunctive relief. BOLI’s order is otherwise affirmed.

I. BACKGROUND

We will discuss the relevant evidence and factual findings in greater detail within our discussion of particular assignments of error, but the following overview provides context for that later discussion.¹ The complainants, Rachel Bowman-Cryer and Laurel Bowman-Cryer, met in 2004 and had long considered themselves a couple. In 2012, they decided to marry.

As part of the wedding planning, Rachel and her mother, Cheryl, attended a Portland bridal show.² Melissa Klein had a booth at that bridal show, and she advertised wedding cakes made by her bakery business, Sweetcakes. Rachel and Cheryl visited the booth and told Melissa that they would like to order a cake from her. Rachel and Cheryl were already familiar with Sweetcakes; two years earlier,

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Sweetcakes had designed, created, and decorated a wedding cake for Cheryl’s wedding, paid for by Rachel.

After the bridal show, on January 17, 2013, Rachel and Cheryl visited the Sweetcakes bakery shop in Gresham for a cake-tasting appointment, intending to order a wedding cake. At the time of the appointment, Melissa was at home providing childcare, so her husband, Aaron, conducted the tasting.

During that tasting, Aaron asked for the names of the bride and groom. Rachel told him that there were two brides and that their names were Rachel and Laurel. At that point, Aaron stated that he was sorry, but that Sweetcakes did not make wedding cakes for same-sex ceremonies because of his and Melissa’s religious convictions. Rachel began crying, and Cheryl took her by the arm and walked her out of the shop. On the way to their car, Rachel became “hysterical” and kept apologizing to her mother, feeling that she had humiliated her.

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Cheryl consoled Rachel once they were in their car, and she assured her that they would find someone to make the wedding cake. Cheryl drove a short distance away, but then turned around and returned to Sweetcakes. This time, Cheryl reentered the shop by herself to talk with Aaron. During their conversation, Cheryl told Aaron that she had previously shared his thinking about homosexuality, but that her “truth had changed” as a result of having “two gay children.” In response, Aaron quoted a Bible passage from the Book of Leviticus, stating, “You shall not lie with a male as one lies with a female; it is an abomination.” Cheryl left and returned to the car, where Rachel had remained, “holding [her] head in her hands, just bawling.”

When Cheryl returned to the car, she told Rachel that Aaron had called her “an abomination,” which further upset Rachel. Rachel later said that “[i]t made me feel like they were saying God made a mistake when he made me, that I wasn’t supposed to be, that I wasn’t supposed to love or be loved or have a family or live a good life and one day go to heaven.”
When Rachel and Cheryl arrived home, Cheryl told Laurel what had happened. Laurel, who had been raised Catholic, recognized the “abomination” reference from Leviticus and felt shame and anger. Rachel was inconsolable, which made Laurel even angrier. Later that same night, Laurel filled out an online complaint form with the Oregon Department of Justice (DOJ), describing the denial of service at Sweetcakes.

In addition to the DOJ complaint, Laurel eventually filed a complaint with BOLI, as did Rachel, alleging that the Kleins had refused to make them a wedding cake because of their sexual orientation. BOLI initiated an investigation.

Meanwhile, the controversy had become the subject of significant media attention. The Kleins were interviewed by, among others, the Christian Broadcast Network (CBN) and later by a radio talk show host, Tony Perkins. In the CBN interview, which was broadcast in September 2013, the Kleins explained that they did not want to participate in celebrating a same-sex marriage, wanted to live their lives in the service of God, and that, although they did not want to see their bakery business go “belly up,” they had “faith in the Lord and he’s taken care of us up to this point and I’m sure he will in the future.” The CBN broadcast also showed a handwritten sign, taped to the inside of the bakery’s front window, which stated:

“Closed but still in business. You can reach me by email or facebook. www.sweetcakesweb.com or Sweetcakes by Melissa facebook page. New phone number will be provided on my website and facebook. This fight is not over. We will continue to stand strong. Your religious freedom is becoming not free anymore. This is ridiculous that we cannot practice our faith. The LORD is good and we will continue to serve HIM with all our heart [heart symbol].”

(Uppercase and underscoring in original; spacing altered).

In the Perkins interview, which occurred in February 2014, Aaron explained that he and Melissa “had a feeling that [requests for same-sex wedding cakes were] going to become an issue” and that they had discussed the issue. During the interview, Aaron stated that “it was one of those situations where we said ‘well I can see it is going to become an issue but we have to stand firm. It’s our belief and we have a right to it, you know.’”

BOLI’s investigation determined that substantial evidence supported the complaints, and the agency eventually issued formal charges against the Kleins that described the initial refusal of service as well as the Kleins’ subsequent participation in the CBN broadcast and Perkins interview. Specifically, BOLI alleged that the Kleins had violated ORS 659A.403, which entitles all persons “to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of *** sexual orientation,” ORS 659A.403(1), and further makes it “an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section,” ORS 659A.403(3).
BOLI further alleged that the Kleins’ subsequent statements had violated another provision of the state’s public accommodations laws, ORS 656A.409, which makes it unlawful to communicate an intention to discriminate in the future on account of sexual orientation.

After the issuance of formal charges, BOLI designated an ALJ to handle the contested case proceedings, and the Kleins and BOLI engaged in extensive motions practice before the ALJ. Among those motions, the Kleins sought to disqualify BOLI’s commissioner, Brad Avakian, on the ground that he was biased against them, as evidenced by his public statements about the cake controversy. In a Facebook post shortly after Laurel filed the DOJ complaint, Avakian had provided a link to a story on www.kgw.com related to the refusal of service; in that post, he wrote, “Everyone has a right to their religious beliefs, but that doesn’t mean they can disobey laws that are already in place. Having one set of rules for everybody ensures that people are treated fairly as they go about their daily lives.” Later, shortly after the first of the BOLI complaints was filed, an article in *The Oregonian* quoted Avakian as saying that “[e]veryone is entitled to their own beliefs, but that doesn’t mean that folks have the right to discriminate.” According to the Kleins, those statements and others indicated that Avakian had prejudged their case before the hearing. The ALJ disagreed and denied the motion to disqualify.

The Kleins and BOLI also filed cross-motions for summary judgment on multiple issues involving the merits of the case, including, as relevant on judicial review: (1) whether the complainants were denied service “on account of” their sexual orientation for purposes of Oregon’s public accommodation laws; (2) if so, whether the application of those laws violates the Kleins’ rights to free expression and religious worship under the state and federal constitutions; and (3) whether Aaron Klein’s statements during the CBN and Perkins interviews, and the note on the Sweetcakes window, were the kinds of statements of a future intention to discriminate that are prohibited by ORS 659A.409. In an interim order on the cross-motions, the ALJ agreed with BOLI on the first two questions, concluding that the Kleins’ refusal to provide a wedding cake violated ORS 659A.403, and that the statute was constitutional, both facially and as applied under the circumstances. However, the ALJ agreed with the Kleins that Aaron’s statements during the CBN and Perkins interviews had not been prospective; rather, the ALJ determined that those statements “are properly construed as the recounting of past events that led to the present Charges being filed,” and therefore did not violate ORS 659A.409.

After the ALJ’s rulings on the various motions, only the issue of damages remained to be decided at a hearing. BOLI alleged that each complainant was claiming damages of “at least $75,000,” and it adduced evidence at the hearing—through testimony of the complainants and others—concerning emotional harm that the complainants suffered in the wake of the Kleins’ refusal to make their wedding cake. During closing arguments, BOLI also asked that the ALJ award damages for the distress that the complainants suffered as a result of media and social-media attention after the denial of service. In response, the Kleins argued that the
complainants were not credible but that, even if the ALJ were to find them credible, their emotional distress was attributable to sources other than the denial of service that were not lawful bases for a damages award, such as media attention and family conflicts. The Kleins also argued that the amount of damages requested by BOLI far exceeded

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anything that the agency had previously sought for similar violations.

After six days of testimony and argument regarding the damages issue, the ALJ issued a proposed final order that encompassed his earlier summary judgment and procedural rulings and also addressed the question of damages. With respect to damages, the ALJ found that Rachel had testified credibly about her emotional distress, but that Laurel had not been present at the cake refusal and had, in some respects, exaggerated the extent and severity of her emotional suffering. The ALJ concluded that there was no basis in law for awarding damages to the complainants for their emotional suffering caused by media and social-media attention. Ultimately, the ALJ determined that $75,000 was an appropriate award to compensate Rachel for her suffering as a result of the denial of service, and that a lesser amount, $60,000, was appropriate to compensate Laurel.

Both the Kleins and the agency filed exceptions to the ALJ’s proposed final order. BOLI, through its commissioner, Avakian, then issued its final order that, for the most part, was consistent with the ALJ’s reasoning in his proposed order. Specifically, BOLI’s final order affirmed the ALJ’s determinations that the Kleins violated ORS 659A.403, it affirmed the ALJ’s conclusion that application of that statute did not violate the Kleins’ constitutional rights, and it affirmed the damages awards. However, the final order departed from the ALJ’s determination in one respect: whether the Kleins had violated ORS 659A.409 by conveying an intent to discriminate in the future. On that question, the final order determined that, based on Aaron’s statements during the CBN and Perkins interviews, and the handwritten sign taped to the bakery’s window (stating

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that the “fight is not over” and vowing to “continue to stand strong”), the Kleins had conveyed an intention to unlawfully discriminate in the future by refusing service based on sexual orientation. Thus, BOLI reversed the ALJ’s ruling on that matter and concluded that the Kleins violated ORS 659A.409; but, BOLI did not award any damages based on that particular violation “because there is no evidence in the record that Complainants experienced any mental, emotional, or physical suffering because of it.” This petition for judicial review followed.

II. ANALYSIS

In their petition, the Kleins raise four assignments of error. In their first assignment, they argue that BOLI erred by applying ORS 659A.403 to their refusal to make the wedding cake. Within that assignment, they argue that BOLI misinterpreted the statute to apply to the refusal; alternatively, they argue that, as applied under these circumstances, the statute abridges their rights to freedom of expression and religious exercise under the federal and state constitutions. In their second assignment, the Kleins argue that their due process rights were violated by the commissioner’s failure to recuse himself. The Kleins’ third assignment asserts that BOLI’s damages award is not
supported by substantial evidence or substantial reason. And, in their fourth assignment, they argue that BOLI erred by applying ORS 659A.409 because their statements after the refusal did not communicate an intention to discriminate in the future. We address each assignment of error in turn.

A. First Assignment: Interpretation and Application of ORS 659A.403

1. Meaning and scope of ORS 659A.403

In their first assignment of error, the Kleins argue that BOLI misinterpreted ORS 659A.403 — specifically, what it means to deny equal service “on account of” sexual orientation. According to the Kleins, they did not decline service to the complainants “on account of” their sexual orientation; rather, “they declined to facilitate the celebration of a union that conveys messages about marriage to which they do not [subscribe] and that contravene their religious beliefs.” BOLI rejected that argument, reasoning that the Kleins’ “refusal to provide a wedding cake for Complainants because it was for their same-sex wedding was synonymous with refusing to provide a cake because of Complainants’ sexual orientation.” We, like BOLI, are not persuaded that the text, context, or history of ORS 659A.403 contemplates the distinction proposed by the Kleins.

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We review BOLI’s interpretation of ORS 659A.403 for legal error, without deference to the agency’s construction of the statute. ORS 183.482(8)(a); see Multnomah County Sheriff’s Office v. Edwards, 361 Or. 761, 770-71, 399 P.3d 969 (2017) (where statutory terms are inexact, courts determine the meaning of the statute most likely intended by the legislature that enacted it, without any deference to an agency charged with enforcing the statute). To determine the legislature’s intended meaning of ORS 659A.403, we use the analytic framework set forth in State v. Gaines, 346 Or. 160, 171-72, 206 P.3d 1042 (2009), whereby we look to the text of the statute in its context, along with any helpful legislative history.

The text of ORS 659A.403(1) leaves little doubt as to its breadth and operation. It provides, in full:

“(1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is of age, as described in this section, or older.”

(Emphases added.) The phrase “on account of” is unambiguous: In ordinary usage, it is synonymous with “by reason of” or “because of.” Webster’s Third New Int’l Dictionary 13 (unabridged ed. 2002); id. at 194 (defining “because of” as “by reason of: on account of”). And it has long been understood to carry that meaning in the context of antidiscrimination statutes. E.g., 18 USC § 242 (1948) (making it unlawful to deprive a person of “any rights, privileges, or
immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or

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penalties, on account of such inhabitant being an alien, or by reason of his color, or race” (emphases added)).

Thus, by its plain terms, the statute requires only that the denial of full and equal accommodations be causally connected to the protected characteristic or status—in this case, “sexual orientation,” which is defined to mean “an individual’s actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.” Former ORS 174.100(6) (2013), renumbered as ORS 174.100(7) (2015). Accord Hopper v. SAIF, 265 Or. App. 465, 470, 336 P.3d 530 (2014) (explaining that, because the ordinary meaning of the term “for” in context was “because of” or “on account of,” the workers’ compensation statute at issue “requires a worker to prove that any failure to cooperate was because of—in other words, causally connected to—reasons beyond the worker’s control” (first emphasis in original; second emphasis added)); Elk Creek Management Co. v. Gilbert, 353 Or. 565, 580-81, 303 P.3d 929 (2013) (explaining that antidiscrimination statutes often use the term “retaliation” “in conjunction with the word ‘because’ or other words that require a causal connection between one party’s acts and another party’s protected activity” (emphasis added)).

In this case, Sweetcakes provides a service—making wedding cakes—to heterosexual couples who intend to wed, but it denies the service to same-sex couples who likewise intend to wed. Under any plausible construction of the plain text of ORS 659A.403, that denial of equal service is “on account of,” or causally connected to, the sexual orientation of the couple seeking to purchase the Kleins’ wedding-cake service.

The Kleins do not point to any text in the statute or provide any context or legislative history suggesting that we should depart from the ordinary meaning of those words. What they argue instead is that the statute is silent as to

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whether it encompasses “gay conduct” as opposed to sexual orientation. The Kleins state that they are willing to serve homosexual customers, so long as those customers do not use the Kleins’ cakes in celebration of same-sex weddings. As such,

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according to the Kleins, they do not discriminate against same-sex couples “on account of” their status; rather, they simply refuse to provide certain services that those same-sex couples want. The Kleins contend that BOLI’s “broad equation of celebrations (weddings) of gay conduct (marriage) with gay status rewrites and expands Oregon’s public accommodations law.”

We see no evidence that the drafters of Oregon’s public accommodations laws intended that type of distinction between status and conduct. First, there is no reason to believe that the legislature
intended a “status/conduct” distinction specifically with regard to the subject of “sexual orientation.” When the legislature in 2007 added “sexual orientation” to the list of protected characteristics in ORS 659A.403, Or. Laws 2007, ch. 100, § 5, it was unquestionably aware of the unequal treatment that gays and lesbians faced in securing the same rights and benefits as heterosexual couples in committed relationships. During the same session that the legislature amended ORS 659A.403 (and other antidiscrimination statutes) to include “sexual orientation,” it adopted the Oregon Family Fairness Act, which recognized the “numerous obstacles” that gay and lesbian couples faced and was intended to “extend[ ] benefits, protections and responsibilities to committed same-sex partners and their children that are comparable to those provided to married individuals and their children by the laws of this state.” Or. Laws 2007, ch. 99, §§ 2(3), (5). To that end, section 9 of that law provided:

“Any privilege, immunity, right or benefit granted by statute, administrative or court rule, policy, common law or any other law to an individual because the individual is or was married, or because the individual is or was an in-law in a specified way to another individual, is granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a domestic partnership or because the individual is or was, based on a domestic partnership, related in a specified way to another individual.”

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Or. Laws 2007, ch. 99, § 9(1). The Kleins have not provided us with any persuasive explanation for why the legislature would have intended to grant equal privileges and immunities to individuals in same-sex relationships while simultaneously excepting those committed relationships from the protections of ORS 659A.403.  

Nor does the Kleins’ proposed distinction find support in the context or history of ORS 659A.403 more generally. As originally enacted in 1953, the statute (then numbered ORS 30.670) prohibited “any distinction, discrimination or restriction on account of race, religion, color or national origin.” Or. Laws 1953, ch. 495, § 1. One of the purposes of the statute, the Supreme Court has observed, was “to prevent ‘operators and owners of businesses catering to the general public to subject Negroes to oppression and humiliation.’” Schwenk v. Boy Scouts of America, 275 Or. 327, 332, 551 P.2d 465 (1976) (quoting a statement by one of the principal sponsors of the statute (emphasis removed)). Yet, under the distinction proposed by the Kleins, owners and operators of businesses could continue to oppress and humiliate black people simply by recasting their bias in terms of conduct rather than race. For instance, a restaurant could refuse to serve an interracial couple, not on account of the race of either customer, but on account of the conduct—interracial dating—to which the proprietor objected. In the absence of any textual or contextual support, or legislative history

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on that point, we decline to construe ORS 659A.403 in a way that would so fundamentally undermine its purpose. See King v. Greyhound Lines, Inc., 61 Or. App. 197, 203, 656 P.2d 349 (1982) (adopting an interpretation of Oregon’s

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public accommodation laws that recognizes that “the chief harm resulting from the practice of discrimination by establishments serving the general public is not the monetary loss of a commercial transaction or the inconvenience of limited access but, rather, the greater evil of unequal treatment, which is the injury to an individual’s sense of self-worth and personal integrity”).

Tellingly, the Kleins’ argument for distinguishing between “gay conduct” and sexual orientation is rooted in principles that they derive from United States Supreme Court cases rather than anything in the text, context, or history of ORS 659A.403. Specifically, the Kleins draw heavily on the Supreme Court’s reasoning in Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 113 S.Ct. 753, 122 L. Ed. 2d 34 (1993), which concerned the viability of a federal cause of action under 42 USC section 1985(3) against persons obstructing access to abortion clinics. In that case, the Supreme Court addressed, among other things, whether the petitioners’ opposition to abortion reflected an animus against women in general—that is, whether, because abortion is “an activity engaged in only by women, to disfavor it is ipso facto to discriminate invidiously against women as a class.” Id. at 271, 113 S.Ct. 753 (footnote omitted).

In rejecting that theory of ipso facto discrimination, the Court observed:

“Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews. But opposition to voluntary abortion cannot possibly be considered such an irrational surrogate for opposition to (or paternalism towards) women. Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class—as is evident from the fact that men and women are on both sides of the issue, just as men and women are on both sides of petitioners’ unlawful demonstrations.”

Id. at 270, 113 S.Ct. 753.

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The Kleins argue that “[t]he same is true here. Whatever one thinks of same-sex weddings, there are respectable reasons for not wanting to facilitate them.” They contend that BOLI simply “ignores Bray “ and that BOLI’s construction of ORS 659A.403”fails the test for equating conduct with status” that the Supreme Court announced in that case.

Bray, which involved a federal statute, does not inform the question of what the Oregon legislature intended when it enacted ORS 659A.403. But beyond that, Bray does not articulate a relevant test for analyzing the issue presented in this case. Bray addressed the inferences that could be drawn from opposition to abortion as a “surrogate” for sex-based animus, and it was in that context that the Supreme Court described “irrational object[s] of disfavor” that “happen to be engaged in exclusively or predominantly by a particular class of people,” 506 U.S. at 270, 113 S.Ct. 753, such that intent to discriminate against that class can be presumed.

Here, by contrast, there is no surrogate. The Kleins refused to make a wedding cake for the complainants precisely and expressly because of the relationship between sexual orientation and
the conduct at issue (a wedding). And, where a close relationship between status and conduct exists, the Supreme Court has repeatedly rejected the type of distinction urged by the Kleins. See Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez, 561 U.S. 661, 689, 130 S.Ct. 2971, 177 L. Ed. 2d 838 (2010) (“[Christian Legal Society] 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.”) (Citation and internal quotation marks omitted.);

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Lawrence v. Texas, 539 U.S. 558, 575, 123 S.Ct. 2472, 156 L. Ed. 2d 508 (2003) (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”). We therefore reject the Kleins’ proposed distinction between status and conduct, and we hold that their refusal to serve the complainants is the type of discrimination “on account of *** sexual orientation” that falls within the plain meaning of ORS 659A.403.6

The reasons for the Kleins’ discrimination on account of sexual orientation—regardless of whether they are “common and respectable” within the meaning of Bray—raise questions of constitutional law, not statutory interpretation. The Kleins, in the remainder of their argument concerning the construction of ORS 659A.403, urge us to consider those constitutional questions and to interpret the statute in a way that avoids running afoul of the “Speech and Religion Clauses of the Oregon and United States constitutions.” See generally State v. McNally, 361 Or. 314, 337, 392 P.3d 721 (2017) (describing the interpretive canon by which courts will “avoid an interpretation that would raise constitutional problems in application, if another reasonable interpretation of the statute would not”). However, that canon applies only where the court is faced with competing plausible constructions of the statute. See State v. Lane, 357 Or. 619, 637, 355 P.3d 914 (2015) (“The canon of interpretation that counsels avoidance of unconstitutionality applies only when a disputed provision remains unclear after examination of its text in context and in light of its enactment history.”). Here, the Kleins have not made that threshold showing of ambiguity. Accordingly, we affirm BOLI’s order with regard to its construction of ORS 659A.403, and we turn to the merits of the Kleins’ constitutional arguments.

2. Constitutional challenges to ORS 659A.403

The Kleins invoke both the United States and the Oregon constitutions in arguing that the final order violates their rights to free expression and the free exercise of their religion. Oregon courts generally seek to resolve arguments under the state constitution before turning to the federal constitution. See State v. Babson, 355 Or. 383, 432-33, 326 P.3d 559 (2014) (discussing policy reasons for analyzing state constitutional claims first). In this case, however, the

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Kleins draw almost entirely on well-developed federal constitutional principles, and they do not meaningfully develop any independent state constitutional theories. Accordingly, in the discussion
that follows, we address the Kleins’ federal constitutional arguments first and their state arguments second. See Church at 295 S. 18th St. v. Employment Dept., 175 Or. App. 114, 123 n. 2, 28 P.3d 1185, rev. den., 333 Or. 73, 36 P.3d 974 (2001) (noting that “[t]he Supreme Court likewise does not always pause to consider state constitutional arguments before addressing federal constitutional arguments, particularly when the parties have not asserted any independent state constitutional analysis”); see also Neumann v. Liles, 358 Or. 706, 716 n. 6, 369 P.3d 1117 (2016) (“Ordinarily, we would look to our state constitution before addressing any federal constitutional issues. As noted, however, the parties to this case have argued this issue solely under the First Amendment and have not invoked Article I, section 8, of the Oregon Constitution.”).

a. Free expression

The Kleins argue that BOLI’s final order violates their First Amendment right to freedom of speech. BOLI argues that the order simply enforces ORS 659A.403, a content-neutral regulation of conduct that does not implicate the First Amendment at all. And each side argues that United States Supreme Court precedent is decisively in its favor.

The issues before us arise at the intersection of two competing principles: the government’s interest in promoting full access to

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the state’s economic life for all of its citizens, which is expressed in public accommodations statutes like ORS 659A.403, and an individual’s First Amendment right not to be compelled to express or associate with ideas with which she disagrees. Although the Supreme Court has grappled with that intersection before, it has not yet decided a case in this particular context, where the public accommodation at issue is a retail business selling a service, like cake-making, that is asserted to involve artistic expression.7

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It is that asserted artistic element that complicates the First Amendment analysis—and, ultimately, distinguishes this case from the precedents on which the parties rely. Generally speaking, the First Amendment does not prohibit government regulation of “commerce or conduct” whenever such regulation indirectly burdens speech. Sorrell v. IMS Health Inc., 564 U.S. 552, 567, 131 S.Ct. 2653, 180 L. Ed. 2d 544 (2011). When, however, the government regulates activity that involves a “significant expressive element,” some degree of First Amendment scrutiny is warranted. Arcara v. Cloud Books, Inc., 478 U.S. 697, 706, 106 S.Ct. 3172, 92 L. Ed. 2d 568 (1986); id. at 705, 106 S.Ct. 3172 (reasoning that the “crucial distinction” between government actions that trigger First Amendment scrutiny and those that do not is whether the regulated activity “manifests” an “element of protected expression”).

In the discussion that follows, we conclude that the Kleins have not demonstrated that their wedding cakes invariably constitute fully protected speech, art, or other expression, and we therefore reject the Kleins’ position that we must subject BOLI’s order to strict scrutiny under the First Amendment. At most, the Kleins have shown that their cake-making business includes some arguably expressive elements as well as non-expressive elements, so as to trigger intermediate scrutiny. We assume (without deciding) that that is true, and then conclude that BOLI’s order
nonetheless survives intermediate scrutiny because any burden on the Kleins’ expressive activities is no greater than is essential to further Oregon’s substantial interest in promoting the ability of its citizens to participate equally in the marketplace without regard to sexual orientation.

(1) “Public accommodations” and the First Amendment

Oregon enacted its Public Accommodation Act in 1953. See Or. Laws 1953, ch. 495. The original act guaranteed the provision of “full and equal accommodations, advantages, facilities and privileges *** without any distinction,

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discrimination or restriction on account of race, religion, color, or national origin.” Former ORS 30.670 (1953), renumbered as ORS 659A.403 (2001). It applied to “any hotel, motel or motor court, any place offering to the public food or drink for consumption on the premises, or any place offering to the public entertainment, recreation or amusement.” Former ORS 30.675 (1953), renumbered as ORS 659A.400 (2001). Oregon’s statute was thus similar in scope to Title II of the federal Civil Rights Act of 1964, which prohibits discrimination “on the ground of race, color, religion, or national origin” in three broad categories of public accommodations: those that provide lodging to transient guests, those that sell food for consumption on the premises, and those that host “exhibition[s] or entertainment,” such as theaters and sports arenas. Pub. L. 88-352, Title II, § 201, 78 Stat. 243 (1964), codified as 42 USC § 2000a(b). When the United States Supreme Court upheld the public accommodations provisions of Title II in 1964, it observed that the constitutionality of state public accommodations laws at that point had remained “unquestioned,” citing previous instances in which it had “rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty.” Atlanta Motel v. United States, 379 U.S. 241, 260-61, 85 S.Ct. 348, 13 L. Ed. 2d 258 (1964).

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Over two decades, the Oregon legislature incrementally expanded the definition of “place of public accommodation” to include “trailer park[s]” and “campground[s],” Or. Laws 1957 ch. 724, § 1, and then to places “offering to the public food or drink for consumption on or off the premises,” Or. Laws 1961, ch. 247, § 1 (emphasis added). Then, in 1973, the legislature significantly expanded the definition to include “any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise,” subject to an exception for “any institution, bona fide club or place of accommodation which is in its nature distinctly private.” Or. Laws 1973, ch. 714, § 2 (emphasis added). Other states similarly enlarged the scope of their public-accommodations laws over time. See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 571-72, 115 S.Ct. 2338, 132 L. Ed. 2d 487 (1995) (describing the ways in

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which the Massachusetts legislature had “broaden[ed] the scope of” the state’s public accommodations law); Roberts v. United States Jaycees, 468 U.S. 609, 624, 104 S.Ct. 3244, 82 L. Ed. 2d 462 (1984) (observing that Minnesota had “progressively broadened the scope of its public accommodations law in the years since it was first enacted, both with respect to the number and
type of covered facilities and with respect to the groups against whom discrimination is forbidden’

First Amendment challenges to the application of public-accommodations laws—and other forms of anti-discrimination laws—have been mostly unsuccessful. See, e.g., Roberts, 468 U.S. at 625-29, 104 S.Ct. 3244 (rejecting argument that a private, commercial association had a First Amendment right to exclude women from full membership); Hishon v. King & Spalding, 467 U.S. 69, 78, 104 S.Ct. 2229, 81 L. Ed. 2d 59 (1984) (rejecting law firm’s claim that prohibiting the firm from discriminating on the basis of gender in making partnership decisions violated members’ First Amendment rights to free expression and association); Runyon v. McCrory, 427 U.S. 160, 175-76, 96 S.Ct. 2586, 49 L. Ed. 2d 415 (1976) (rejecting private schools’ claim that they had a First Amendment associational right to discriminate on the basis of race in admitting students).

The United States Supreme Court has repeatedly acknowledged that public accommodations statutes in particular are “well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination.” Hurley, 515 U.S. at 572, 115 S.Ct. 2338. The Court has further acknowledged that states enjoy “broad authority to create rights of public access on behalf of [their] citizens,” in order to ensure “wide participation in political, economic, and cultural life” and to prevent the “stigmatizing injury” and “the denial of equal opportunities” that accompanies invidious discrimination in public accommodations. Roberts, 468 U.S. at 625, 104 S.Ct. 3244. And the Court has recognized a state’s interest in preventing the “unique evils” that stem from “invidious discrimination in the distribution of publicly available goods, services, and other advantages.” Id. at 628, 104 S.Ct. 3244.

However, as states adopted more expansive definitions of “places of public accommodation,” their anti-discrimination statutes began to reach entities that were different in kind from the commercial establishments that were the original target of public accommodations laws. As a result, on two occasions, the Court held that the application of such laws violated the First Amendment.

First, in Hurley, the court held that Massachusetts’s public accommodations law could not be applied to require a St. Patrick’s Day parade organizer to include a gay-rights group in its parade. 515 U.S. at 573, 115 S.Ct. 2338. Observing that state public accommodations laws do not, “as a general matter, violate the First or Fourteenth Amendments,” the Court went on to conclude that the Massachusetts law had been “applied in a peculiar way” to a private parade, a result that “essentially require[ed]” the parade organizers to “alter the expressive content of their parade” by accommodating a message (of support for gay rights) that they did not want to include. Id. at 572-73, 115 S.Ct. 2338 (emphasis added). The Court further reasoned that such an application of the statute “had the effect of declaring the [parade] sponsors’ speech itself to be the public accommodation,”

which violated “the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.” Id. at 573, 115 S.Ct. 2338.
Following Hurley, the Court decided Boy Scouts of America v. Dale, 530 U.S. 640, 120 S.Ct. 2446, 147 L. Ed. 2d 554 (2000) (Dale), in which it held that applying New Jersey’s public accommodations law to require the Boy Scouts to admit a gay scoutmaster violated the group’s First Amendment right to freedom of association. The Court observed that, over time, public accommodations laws had been expanded to cover more than just “traditional places of public accommodation—like inns and trains.” Id. at 656, 120 S.Ct. 2446. According to the Court, New Jersey’s definition of a “place of public accommodation” was “extremely broad,” particularly because the state had “applied its public accommodations law to a private entity without even attempting to tie the term ‘place’ to a physical location.” Id. at 657, 120 S.Ct. 2446. The court distinguished Dale from prior cases in which it held that public accommodations laws posed no First Amendment problem, observing that, in those prior cases, the law’s enforcement did not “materially interfere with the ideas that the organization sought to express.” Id.

Thus, Hurley and Dale demonstrate that the First Amendment may stand as a barrier to the application of state public accommodations laws when such laws are applied to “peculiar” circumstances outside of the usual commercial context. See Dale, 530 U.S. at 657, 120 S.Ct. 2446 (“As the definition of ‘public accommodation’ has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.”).

In this case, the Kleins concede that Sweetcakes is a “place of public accommodation” under Oregon law because it is a retail bakery open to the public. But the Kleins contend that, as in Hurley and Dale, application of ORS 659A.403 in this case violates their First Amendment rights.

(2) First Amendment precedent

BOLI and the Kleins offer competing United States Supreme Court precedent that, they argue, clearly requires a result in their respective favors. We begin our analysis by explaining why we do not regard the authorities cited by the parties as controlling.

The Kleins argue that the effect of BOLI’s final order is to compel them to express a message—a celebration of same-sex marriage—with which they disagree. They primarily draw on two interrelated lines of First Amendment cases that, they contend, preclude the application of ORS 659A.403 here.

First, the Kleins rely on cases holding that the government may not compel a person to speak or promote a government message with which the speaker does not agree. See, e.g., Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L. Ed. 1628 (1943) (holding that a state may not sanction a public-school student or his parents for the student’s refusal to recite the Pledge of Allegiance or salute the flag of the United States); Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L. Ed. 2d 752 (1977) (holding that New Hampshire could not force a person to display the “Live Free or Die” state motto on his license plate).

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We do not consider that line of cases to be helpful here. In “compelled speech” cases like *Barnette* and *Wooley*, the government prescribed a specific message that the individual was required to express. ORS 659A.403 does nothing of the sort; it is a content-neutral regulation that is not directed at expression at all. It does not even regulate cake-making; it simply prohibits the refusal of service based on membership in a protected class. The United States Supreme Court has repeatedly held that such content-neutral regulations—although they may have incidental effects on an individual’s expression—are an altogether different, and generally permissible, species of government action than a regulation of speech. See *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62, 126 S.Ct. 1297, 164 L. Ed. 2d 156 (2006) (FAIR) ("[I]t has never been deemed an abridgement of

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freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." (Internal quotation marks omitted.)); *R. A. V. v. St. Paul*, 505 U.S. 377, 385, 112 S.Ct. 2538, 120 L. Ed. 2d 305 (1992) ("We have long held *** that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses ***."). In short, we reject the Kleins’ analogy of this case to *Barnette* and *Wooley*.

Second, the Kleins rely heavily on *Hurley* and *Dale*, which, as discussed above, invalidated the application of public accommodations statutes in “peculiar” circumstances outside of the usual commercial context. The difficulty with that analogy is that this case does involve the usual commercial context; Sweetcakes is not a private parade or membership organization, and it is hardly “peculiar,” as that term was used in *Hurley*, to apply ORS 659A.403 to a retail bakery like Sweetcakes that is open to the public and that exists for the purpose of engaging in commercial transactions. Indeed, the Kleins accept the premise that Sweetcakes is a place of public accommodation under Oregon law, and that, as such, it must generally open its doors to customers of all sexual orientations, regardless of the Kleins’ religious views about homosexuality. Thus, if the Kleins are to succeed in avoiding compliance with the statute, it cannot be because

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their activity occurs outside the ordinary commercial context that the government has wide latitude to regulate, as was the case in *Hurley* and *Dale*. The Kleins must find support elsewhere.

In BOLI’s view, on the other hand, the Kleins’ arguments are disposed of by the United States Supreme Court’s decision in *FAIR*. In that case, an association of law schools and law faculty (FAIR) sought to enjoin the enforcement of the Solomon Amendment, a federal law that requires higher-education institutions, as a condition for receiving federal funds, to provide military recruiters with the same access to their campuses as non-military recruiters. 547 U.S. at 52-55, 126 S.Ct. 1297. Because FAIR opposed the military’s policy at that time regarding homosexual service-members, FAIR argued that the equal-access requirement violated the schools’ First Amendment rights to freedom of speech and association. *Id.* at 52-53, 126 S.Ct. 1297.

The Court rejected FAIR’s compelled-speech argument, reasoning that the Solomon Amendment “neither limits what law schools may say nor requires them to say anything,” and, therefore, the
law was a “far cry” from the compulsions at issue in *Barnette* and *Wooley*. *Id.* at 60, 62, 126 S.Ct. 1297. The Court acknowledged that compliance with the Solomon Amendment would indirectly require the schools to “speak” in a sense because it would require the schools to send emails and post notices on behalf of the military if they chose to do so for other recruiters. Nevertheless, the Court found it dispositive that the Solomon Amendment did not “dictate the content of the speech at all, which is only ‘compelled’ if, and to the extent [that,] the school provides such speech for other recruiters.” *Id.* The Court distinguished that situation from those where “the complaining speaker’s own message was affected by the speech it was forced to accommodate.” *Id.* at 63-64, 126 S.Ct. 1297 (citing, *inter alia*, *Hurley*, 515 U.S. at 568, 115 S.Ct. 2338).

In BOLI’s view, this case is like *FAIR* because ORS 659A.403 does not directly compel any speech; even if one considers the Kleins’ cake-making to involve some element of expression, the law only compels the Kleins to engage in that expression for same-sex couples “if, and to the extent” that the Kleins do so for the general public.

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This case is distinguishable from *FAIR*, however, in a significant way. Essential to the holding in *FAIR* was that the schools were not compelled to express a message with which they disagreed. The schools evidently did not assert, nor did the Supreme Court contemplate, that there was a meaningful ideological or expressive component to the emails or notices themselves, which merely conveyed factual information about the presence of recruiters on campus. The Court thus distinguished the case from *Barnette* and *Wooley*, cases that addressed the harm that results from true compelled

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speech—that is, depriving a person of autonomy as a speaker and “inva [ding]” that person’s “‘individual freedom of mind,’” *Wooley*, 430 U.S. at 714, 97 S.Ct. 1428 (quoting *Barnette*, 319 U.S. at 637, 63 S.Ct. 1178); see *Hurley*, 515 U.S. at 576, 115 S.Ct. 2338 (“[W]hen dissemination of a view contrary to one’s own is forced upon a speaker intimately connected with the communication advanced, the speaker’s right to autonomy over the message is compromised.”).

Here, unlike in *FAIR*, the Kleins very much do object to the substantive content of the expression that they believe would be compelled. They argue that their wedding cakes are works of art that express a celebratory message about the wedding for which they are intended, and that the Kleins cannot be compelled to create that art for a wedding that they do not believe should be celebrated. And there is evidentiary support for the Kleins’ view, at least insofar as every wedding cake that they create partially reflects their own creative and aesthetic judgment. Whether that is sufficient to make their cakes “art,” the creation of which the government may not compel, is a question to which we will turn below, but even the Kleins’ subjective belief that BOLI’s order compels them to express a specific message that they ideologically oppose makes this case different from *FAIR*.

That fact is also what makes this case difficult to compare to other public accommodations cases that the United States Supreme Court has decided. It appears that the Supreme Court has never decided a free-speech challenge to the application of a public accommodations law to a retail
establishment selling highly customized, creative goods and services that arguably are in the nature of art or other expression.

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To put the problem into sharper focus, we see no reason in principle why the services of a singer, composer, or painter could not fit the definition of a “place of public accommodation” under ORS 659A.400. One can imagine, for example, a person whose business is writing commissioned music or poetry for weddings, or producing a sculpture or portrait of the couple kissing at an altar. One can also imagine such a person who advertises and is willing to sell those services to the general public, but who holds strong religious convictions against same-sex marriage and would feel her “freedom of mind” violated if she were compelled to produce her art for such an occasion. Cf. *Barnette*, 319 U.S. at 637, 63 S.Ct. 1178. For the Kleins, this is that case. BOLI disagrees that a wedding cake is factually like those other examples, but the legal point that those examples illustrate is that existing public accommodations case law is awkwardly applied to a person whose “business” is artistic expression. The Court has not told us how to apply a requirement of nondiscrimination to an artist.

We believe, moreover, that it is plausible that the United States Supreme Court would hold the First Amendment to be implicated by applying a public accommodations law to require the creation of pure speech or art. If BOLI’s order can be understood to compel the Kleins to create pure “expression” that they would not otherwise create, it is possible that the Court would regard BOLI’s order as a regulation of content, thus subject to strict scrutiny, the test for regulating fully protected expression. See *Hurley*, 515 U.S. at 573, 115 S.Ct. 2338 (application of public accommodations statute violated the First Amendment where it “had the effect of declaring the sponsors’ speech itself to be the public accommodation,” thus infringing on parade organizers’ “autonomy to choose the content of [their] own message”); see also *Riley v. National Federation of the Blind*, 487 U.S. 781, 795-98, 108 S.Ct. 2667, 101 L. Ed. 2d 669 (1988) (explaining that “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech,” and subjecting such regulation to “exact[ing] First Amendment scrutiny”).

Although the Court has not clearly articulated the extent to which the First Amendment protects visual art

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and its creation, it has held that the First Amendment covers various forms of artistic expression, including music, *Ward v. Rock Against Racism*, 491 U.S. 781, 790, 109 S.Ct. 2746, 105 L. Ed. 2d 661 (1989); “live entertainment,” such as musical and dramatic performances, *Schad v. Mount Ephraim*, 452 U.S. 61, 65, 101 S.Ct. 2176, 68 L. Ed. 2d 671 (1981); and video games, *Brown v. Entertainment Merchants Assn*, 564 U.S. 786, 790, 131 S.Ct. 2729, 180 L. Ed. 2d 708 (2011). See also *Kaplan v. California*, 413 U.S. 115, 119-20, 93 S.Ct. 2680, 37 L. Ed. 2d 492 (1973) (“[P]ictures, films, paintings, drawings, and engravings * * * have First Amendment protection.”). The Court has also made clear that a particularized, discernible message is not a prerequisite for First Amendment protection. See *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338 (“[A]
narrow, succinctly articulable message is not a condition of constitutional protection, which if
confined to expressions conveying a particularized message, would never reach the unquestionably
shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis
Carroll.” (Citation and internal quotation marks omitted.)); see also Ward, 491 U.S. at 790, 109
S.Ct. 2746 (concluding that music is protected expression, due to “its capacity to appeal to the
intellect and to the emotions”).

In short, although ORS 659A.403 is a content-neutral regulation that is not directed at expression,
the Kleins’ arguments cannot be dismissed on that ground alone. Rather, we must decide whether
the Kleins’ cake-making activity is sufficiently expressive, communicative, or artistic so as to
implicate the First Amendment, and, if

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it is, whether BOLI’s final order compelling the creation of such expression in a particular
circumstance survives First Amendment scrutiny.

(3) Whether these cakes implicate the First Amendment

If, as BOLI argues, the Kleins’ wedding cakes are just “food” with no meaningful artistic or
communicative component, then, as the foregoing discussion illustrates, BOLI’s final order does
not implicate the First Amendment; the Kleins’ objection to having to “speak” as a result of ORS
659A.403 is no more powerful than it would be coming from the seller of a ham sandwich. On the
other hand, if and to the extent that the Kleins’ wedding cakes constitute artistic or communicative
expression, then the First Amendment is implicated by BOLI’s final order. In short, we must decide
whether the act that the Kleins refused to perform—to design and create a wedding cake—is
“sufficiently imbued with elements of communication” so as to “fall within the scope” of the First

On this point, BOLI makes a threshold argument that we must address, which is that, because the
Kleins refused service to Rachel and Laurel before even finding out what kind of cake the couple
wanted, there is no basis for assessing the “artistic” component of whatever cake might have
resulted. For all we know, BOLI reasons, Rachel and Laurel might have wanted a standardized
cake that would not have involved any meaningful expressive activity on the part of the Kleins.
However, we believe the fair interpretation of this record is that the Kleins do not offer such
“standardized” or “off the shelf” wedding cakes; they testified that their practice for creating
wedding cakes includes a collaborative and customized design process that is individual to the
customer. According to the Kleins, they intend—and their “clients expect”—that “each cake will
be uniquely crafted to be a statement of each customer’s personality, physical tastes, theme and
desires, as well as their palate.” According to Melissa, she “almost never make[s] a cake without
creating a unique

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element of style and

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customization.” Furthermore, the complainants expressly stated that they wanted a cake “like” the one that the Kleins had created for Rachel’s mother’s wedding, which was a custom-designed cake. On this record, we therefore assume that any cake that the Kleins made for Rachel and Laurel would have followed the Kleins’ customary practice.

Consequently, the question is whether that customary practice, and its end product, are in the nature of “art.” As noted above, if the ultimate effect of BOLI’s order is to compel the Kleins to create something akin to pure speech, then BOLI’s order may be subject to strict scrutiny. If, on the other hand, the Kleins’ cake-making retail business involves, at most, both expressive and non-expressive components, and if Oregon’s interest in enforcing ORS 659A.403 is unrelated to the content of the expressive components of a wedding cake, then BOLI’s order need only survive intermediate scrutiny to comport with the First Amendment. See United States v. O’Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L. Ed. 2d 672 (1968) (“[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”); see also Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 662, 114 S.Ct. 2445, 129 L. Ed. 2d 497 (1994) (applying intermediate scrutiny to a content-neutral regulation that compelled cable operators to carry certain channels).

The record reflects that the Kleins’ wedding cakes follow a collaborative design process through which Melissa uses her customers’ preferences to develop a custom design, including choices as to “color,” “style,” and “other decorative detail.” Melissa shows customers previous designs “as inspiration,” and she then draws “various designs on sheets of paper” as part of a dialogue with the customer. From that dialogue, Melissa “conceives” and customizes “a variety of decorating suggestions” as she ultimately finalizes the design. Thus, the process does not simply involve the Kleins executing precise instructions from their customers; instead, it is clear that Melissa uses her own design skills and aesthetic judgments.

Therefore, on this record, the Kleins’ argument that their products entail artistic expression is entitled to be taken seriously. That being said, we are not persuaded that the Kleins’ wedding cakes are entitled to the same level of constitutional protection as pure speech or traditional forms of artistic expression. In order to establish that their wedding cakes are fundamentally pieces of art, it is not enough that the Kleins believe them to be pieces of art. See Nevada Comm’n on Ethics v. Carrigan, 564 U.S. 117, 127, 131 S.Ct. 2343, 180 L. Ed. 2d 150 (2011) (“[T]he fact that a nonsymbolic act is the product of deeply held personal belief—even if the actor would like to convey his deeply held personal belief—does not transform action into First Amendment speech.” (Emphasis in original.)); see also Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 n. 5, 104 S.Ct. 3065, 82 L. Ed. 2d 221 (1984) (the burden of proving that an activity is protected expression is on the person asserting First Amendment protection for that activity). For First Amendment purposes, the expressive character of a thing must turn not only on how it is subjectively perceived by its maker, but also on how it will be perceived and experienced by others. See Spence, 418 U.S. at 409-10, 94 S.Ct. 2727 (looking to subjective and objective considerations in assessing whether an act constitutes First Amendment protected expression, including “the factual context and environment in which it was undertaken”). Here, although we accept that the Kleins imbue each wedding cake with their own aesthetic choices, they have made no showing
that other people will necessarily experience any wedding cake that the Kleins create predominantly as “expression” rather than as food.

Although the Kleins’ wedding cakes involve aesthetic judgments and have decorative elements, the Kleins have not demonstrated that their cakes are inherently “art,” like sculptures, paintings, musical compositions, and other works that are both intended to be and are experienced predominantly as expression. Rather, their cakes, even when custom-designed for a ceremonial occasion,

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are still cakes made to be eaten. Although the Kleins themselves may place more importance on the communicative aspect of one of their cakes, there is no information in this record that would permit an inference that the same is true in all cases for the

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Kleins’ customers and the people who attend the weddings for which the cakes are created. Moreover, to the extent that the cakes are expressive, they do not reflect only the Kleins’ expression. Rather, they are products of a collaborative process in which Melissa’s artistic execution is subservient to a customer’s wishes and preferences. For those reasons, we do not agree that the Kleins’ cakes can be understood to fundamentally and inherently embody the Kleins’ expression, for purposes of the First Amendment.9

We also reject the Kleins’ argument that, under the facts of this case, BOLI’s order compels them to “host or accommodate another speaker’s message” in a manner that the Supreme Court has deemed to be a violation of the First Amendment. See FAIR, 547 U.S. at 63, 126 S.Ct. 1297 (listing cases). In the only such case that involved the enforcement of a content-neutral public accommodations law, Hurley, the problem was that the speaker’s autonomy was affected by the forced intermingling of messages, with consequences for how others would perceive the content of the expression. 515 U.S. at 576-77, 115 S. Ct. 2338 (reasoning that parades, unlike cable operators, are not “understood to be so neutrally presented or selectively viewed,” and “the parade’s overall message is distilled from the individual presentations along the way, and each unit’s expression is perceived by spectators as part of the whole” (emphasis added)). Here, because the Kleins refused to provide their wedding-cake service to Rachel and Laurel altogether, this is not a situation where the Kleins were asked to articulate, host, or accommodate a specific message that they found offensive. It would be a different case if BOLI’s order had awarded damages against the Kleins for refusing to decorate a cake with a specific message requested by a customer (“God Bless This Marriage,” for example) that they found offensive or contrary to their beliefs. Cf.

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the refusal to decorate a cake with a specific message, such as “Homosexuality is a detestable sin. Leviticus 18:2.”).

The Kleins’ additional concern, as we understand it, is that a wedding cake communicates a “celebratory message” about the wedding for which it is intended, and the Kleins do not wish to “host” the message that same-sex weddings should be celebrated. But, unlike in Hurley, the Kleins have not raised a nonspeculative possibility that anyone attending the wedding will impute that message to the Kleins. We think it more likely that wedding attendees understand that various commercial vendors involved with the event are there for commercial rather than ideological purposes. Moreover, to the extent that the Kleins subjectively feel that they are being “associated” with the idea that same-sex marriage is worthy of celebration, the Kleins are free to engage in their own speech that disclaims such support. Cf. FAIR, 547 U.S. at 65, 126 S.Ct. 1297 (rejecting argument that law schools would be perceived as supporting any speech by recruiters by simply complying with the Solomon Amendment; noting that nothing prevented the schools from expressing their views in other ways).

In short, we disagree that the Kleins’ wedding cakes are invariably in the nature of fully protected speech or artistic expression,

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and we further disagree that BOLI’s order forces the Kleins to host, accommodate, or associate with anyone else’s particular message. Thus, because we conclude that BOLI’s order does not have the effect of compelling fully protected expression, it does not trigger strict scrutiny under the First Amendment.

As noted above, however, BOLI’s order is still arguably subject to intermediate First Amendment scrutiny if the Kleins’ cake-making activity involves both expressive and non-expressive elements. O’Brien, 391 U.S. at 376, 88 S.Ct. 1673 (“[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”); see also Turner Broadcasting System, Inc., 512 U.S. at 661-62, 114 S.Ct. 2445. Here, we acknowledge that the Kleins’ cake-making process is not a simple matter of combining ingredients and following a customer’s precise specifications. Instead, based on the Kleins’ customary practice, the ultimate effect of BOLI’s order is to compel them to engage in a collaborative process with a customer and to create a custom product that they would not otherwise make. The Kleins’ argument that that process involves individualized aesthetic judgments that are themselves within the realm of First Amendment protected expression is not implausible on its face.

Ultimately, however, we need not resolve whether that argument is correct. That is because, even assuming (without deciding) that the Kleins’ cake-making business involves aspects that may be deemed “expressive” for purposes of the First Amendment, BOLI’s order is subject, at most, to intermediate scrutiny, and it survives such scrutiny, as explained below.
Neither ORS 659A.403 nor BOLI’s order is directed toward the expressive content of the Kleins’ business. When a content-neutral regulation indirectly imposes a burden on protected expression, it will be sustained if

“‘it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.’”


We first address the state’s interest in enforcing its public-accommodations law. As noted above, the United States Supreme Court has consistently acknowledged that states have a compelling interest both in ensuring equal access to publicly available goods and services and in

preventing the dignitary harm that results from discriminatory denials of service. That interest is no less compelling with respect to the provision of services for same-sex weddings; indeed, that interest is particularly acute when the state seeks to prevent the dignitary harms that result from the unequal treatment of same-sex couples who choose to exercise their fundamental right to marry. See Obergefell v. Hodges, — U.S. ——, 135 S.Ct. 2584, 2600, 192 L. Ed. 2d 609 (2015) (“The right to marry thus dignifies couples who wish to define themselves by their commitment to each other.”) (Internal quotation marks omitted.). Thus, we readily conclude that BOLI’s order furthers “an important or substantial governmental interest.”

Furthermore, Oregon’s interest is in no way related to the suppression of free expression. Rather, Oregon has an interest in preventing the harms that result from invidious discrimination that is “wholly apart from the point of view such conduct may transmit.” Roberts, 468 U.S. at 628, 104 S.Ct. 3244. BOLI’s order reflects a concern with ensuring equal access to products like wedding cakes when a seller chooses to sell them to the general public, not a concern with influencing the expressive choices involved in designing or decorating a cake.

Finally, we conclude that any burden imposed on the Kleins’ expression is no greater than essential to further the state’s

interest. Again, it is significant that BOLI’s order does not compel the Kleins to express an articulable message with which they disagree; rather, their objection is to being compelled to engage in any conduct that they regard as expressive. “‘[A]n incidental burden on speech is no greater than is essential, and therefore is permissible’” if “‘the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’” FAIR, 547 U.S. at 67, 126 S.Ct. 1297 (quoting United States v. Albertini, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L. Ed. 2d 536 (1985)). Given that the state’s interest is to avoid the “evil of unequal treatment, which is the injury to an individual’s sense of self-worth and personal integrity,” King,
61 Or. App. at 203, 656 P.2d 349, there is no doubt that that interest would be undermined if businesses that market their goods and services to the “public” are given a special privilege to exclude certain

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groups from the meaning of that word. Thus, we conclude that the final order in this case survives First Amendment scrutiny.

(5) Oregon Constitution, Article I, section 8

The Kleins assert that BOLI’s final order also violates their rights under Article I, section 8, of the Oregon Constitution, which provides that “[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever.” The Kleins’ argument is limited to the observation that Article I, section 8, has been held to establish broader protection for speech than the First Amendment, a premise from which they conclude that, “since BOLI’s Final Order violates the federal Constitution’s Speech Clause, it also violates the Oregon Constitution’s broader counterpart a fortiori.” We have rejected the First Amendment predicate for that derivative argument, and the Kleins do not offer any separate analysis under the state constitution. Accordingly, we reject their argument under Article I, section 8, without further discussion. See, e.g., State v. Dawson, 277 Or. App. 187, 189-90, 369 P.3d 1244, rev. den., 359 Or. 847, 383 P.3d 851 (2016) (declining to consider inadequately developed argument under the state constitution on appeal).

b. Free exercise of religion

We turn to the Kleins’ contention that BOLI’s order violates their constitutional right to the free exercise of their religion. The Kleins advance two arguments under the United States Constitution: (1) BOLI’s final order is not merely the application of a “neutral and generally applicable” law because it impermissibly “targets” religion, and (2) the order implicates the Kleins’ “hybrid rights,” subjecting it to heightened scrutiny that it cannot survive. The Kleins also invoke the Oregon Constitution’s free-exercise clauses in Article I, sections 2 and 3, contending that: (1) as under the federal constitution, the final order impermissibly targets religion, and (2) even if the final order does not impermissibly target religion, they should be granted an exemption to ORS 659A.403 on religious grounds. For the reasons explained below, we reject the Kleins’ arguments.

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The First Amendment proscribes laws “prohibiting the free exercise of” religion. The question presented by this case is whether BOLI’s final order enforcing ORS 659A.403 against the Kleins runs afoul of that constitutional guarantee; if it does, the order is invalid unless it can survive strict scrutiny. See Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546-47, 113 S.Ct. 2217, 124 L. Ed. 2d 472 (1993); United States v. Lee, 455 U.S. 252, 257-58, 102 S.Ct. 1051, 71 L. Ed. 2d 127 (1982).

The answer begins with Employment Division, Oregon Department of Human Resources v. Smith, in which the United States Supreme Court held that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the
ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” 494 U.S. at 879, 110 S.Ct. 1595 (quoting Lee, 455 U.S. at 263 n. 3, 102 S.Ct. 1051 (Stevens, J., concurring)). Put another way, neutral and generally applicable laws do not offend the Free Exercise Clause simply because “the law has the incidental

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effect of burdening a particular religious practice.” Church of Lukumi Babalu Aye, Inc., 508 U.S. at 531, 113 S.Ct. 2217.

To determine whether a law is “neutral,” courts first ask whether “the object of [the] law is to infringe upon or restrict practices because of their religious motivation.” Id. at 533, 113 S.Ct. 2217. To determine a law’s object, we begin with the text, as “the minimum requirement of neutrality is that a law not discriminate on its face.” Id. “A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.” Id. “Apart from the text, the effect of a law in its real operation is strong evidence of its object.” Id. at 535, 113 S.Ct. 2217; see id. (cautioning that mere “adverse impact will not always lead to a finding of impermissible targeting”). Additionally, whether a law is “generally applicable” depends on whether the government selectively seeks to advance its interests “only against conduct with a religious motivation.” Id. at 543, 113 S.Ct. 2217.

Nothing in the text of ORS 659A.403 or BOLI’s final order is facially discriminatory towards the exercise of religious beliefs. Rather, the statute prohibits any “place

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of public accommodation” from discriminating “on account of” protected characteristics, including “sexual orientation.” Similarly, BOLI’s order is, on its face, a neutral application of ORS 659A.403 that gives no indication that the result would have been different if the Kleins’ refusal of service was based upon secular rather than religious convictions.

A law that is written in neutral terms may still violate the Free Exercise Clause, however. In Church of Lukumi Babalu Aye, Inc., the Court concluded that the city ordinances in question—which prohibited certain animal slaughtering for “ritual[s]” and “sacifice”—were not neutral because some important terms, as the ordinances defined them, targeted the Santeria religion’s practice of ritualistic animal sacrifice while exempting other secular and religious practices like hunting and kosher slaughter. 508 U.S. at 535-36, 113 S.Ct. 2217. The laws were also not “generally applicable” because they were substantially underinclusive in advancing the government’s stated interests of protecting the public health and preventing cruelty to animals. Id. at 543, 113 S.Ct. 2217. Rather, the laws were “drafted with care to forbid few killings but those occasioned by religious sacrifice.” Id.

Here, the Kleins advance a similar argument that BOLI’s order violates the Free Exercise Clause because it applies ORS 659A.403 in a way that impermissibly “targets” religion for disfavored treatment. They contend that the final order was a “novel expansion” of ORS 659A.403 that “was, at best, discretionary and done for the specific purpose of forcing business owners with moral reservations about same-sex marriage to either violate their consciences or go out of business.”
BOLI responds that no evidence exists to support the Kleins’ assertions, which are “pure speculation and utterly without merit.”

On review of the record, we agree with BOLI. The Kleins have directed us to no evidence whatsoever that ORS 659A.403 was enacted for the purpose of singling out religiously motivated action, or that BOLI has selectively targeted religion in its enforcement of the statute. The Kleins likewise fail to support their assertion that BOLI’s final order constitutes a “novel expansion” of the statute, rather than a straightforward application of a facially neutral statute to the facts of this case. For those reasons, the Kleins’ “targeting” argument is meritless.

The Kleins’ second argument under the federal Free Exercise Clause is that the final order burdens their “hybrid rights.” That is, the final order burdens both Free Exercise rights and other constitutional rights, a combination that purportedly triggers an exception to Smith and subjects even neutral laws of general applicability to strict scrutiny. The Kleins’ argument relies on the following passage from Smith:

“The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech ***. ***

“The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity ***.”

494 U.S. at 881-82, 110 S.Ct. 1595.

We have previously expressed skepticism about whether a “hybrid-rights “doctrine” exists, and, to the extent it does, how it could be properly applied. In Church at 295 S. 18th Street, St. Helens, we referred to the Smith passage as “dictum,” observing that it merely “noted—without reference to any particular standard—that, in the past, the Court had struck down neutral, generally applicable laws when a case ‘involved’ both the Free Exercise Clause and some other constitutional protection.” 175 Or. App. at 114, 127-28, 28 P.3d 1185. We questioned whether that dictum could be soundly applied as a legal standard in other cases:

“Why the addition of another constitutional claim would affect the standard of review of a free exercise claim is not immediately obvious. Indeed, if the mere allegation of an additional constitutional claim has the effect of altering the standard articulated in Smith, then the ‘hybrid’ exception likely would swallow the Smith rule; free exercise claims will frequently also pose at least a colorable free speech claim. On the other hand, if the Court meant that strict scrutiny pertains only when an additional constitutional

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claim is successfully asserted, then the rule of *Smith* becomes mere surplusage, as the church already would win under the alternate constitutional theory.”

*Id.* at 127-28, 28 P.3d 1185.

Other courts have similarly called the *Smith* passage *dictum* and have declined to follow it. *See, e.g., Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 247 (3d Cir. 2008) (“Until the Supreme Court provides direction, we believe the hybrid-rights theory to be *dicta.*”); *Watchtower Bible & Tract Soc. of New York, Inc. v. Vill. of Stratton*, 240 F.3d 553, 561 (6th Cir. 2001), *rev’d on other grounds*, 536 U.S. 150, 123 S.Ct. 2080, 153 L. Ed. 2d 205 (2002) (“That language was *dicta* and therefore not binding.”); *Knight v. Conn. Dep’t of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (“[T]he language relating to hybrid claims is *dicta* and not binding on this court.”). *But see Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (applying a “*colorable claim*” approach, under which strict scrutiny applies if the person asserting a free-exercise claim brings an additional constitutional claim that has a “fair probability or likelihood, but not a certitude, of success on the merits” (internal quotation marks omitted)); *accord Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295 (10th Cir. 2004).

The intervening years have given us no reason to reconsider our view that the *Smith* passage was *dictum*. Despite the considerable doubts about the “hybrid-rights doctrine” that have been expressed in case law and academic commentary, the United States Supreme Court has taken no further steps to embrace such a doctrine. We therefore agree with the Sixth Circuit’s reasoning that, “at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause.” *Kissinger v. Bd. of Trs. of Ohio State Univ.* , 5 F.3d 177, 180 (6th Cir. 1993). Accordingly, we reject the Kleins’ “hybrid-rights doctrine” argument.

As noted, the Kleins also invoke Article I, sections 2 and 3, of the Oregon Constitution (the free-exercise clauses). Under those clauses, when a law is not neutral and expressly targets religion, courts examine the law with “exacting scrutiny”; when the law is “neutral toward religion,” the Oregon Supreme Court has framed the proper inquiry as whether there is “statutory authority to make such a regulation” and whether an individual claims “exemption on religious grounds.” *State v. Hickman/Hickman*, 358 Or. 1, 15-16, 358 P.3d 987 (2015) (internal quotation marks omitted) (applying only a “targeting” analysis).

The Kleins’ first argument is that the statute and final order are not neutral toward religion because they “target” the Kleins’ religious practice. In support of that contention, the Kleins essentially incorporate their arguments under the federal Free Exercise Clause; they do not contend that the analysis meaningfully differs under the state constitution, and we therefore reject that argument for the same reasons discussed above.
Second, the Kleins argue that, even in the absence of impermissible targeting, they should be granted a religious exemption from compliance with ORS 659A.403. They rely on two cases—Hickman and Cooper v. Eugene Sch. Dist., 301 Or. 358, 723 P.2d 298 (1986). As BOLI correctly points out, however, neither of those cases actually created a religious exemption to a neutral law, or discussed the criteria, methodology, or standards that a court would use in determining whether to grant one. Cooper dealt with a law that was “not neutral toward religion,”12 which the Supreme Court distinguished from a “general” and “neutral” regulation that could present an issue of an “individual claim to exemption on religious grounds.” 301 Or. at 368-69, 723 P.2d 298. Nearly two decades later, Hickman simply cited Cooper, see 358 Or. at 15-16, 358 P.3d 987 in a case that similarly did not present the issue of whether to grant a religious exemption, see id. at 17, 358 P.3d 987 (“The issue before us, then, is not whether and under what circumstances religiously motivated conduct is entitled to an exemption from a generally applicable and neutral law. Nor is the issue before us the more specific one of whether the defendants in this case are entitled to an exemption ***.”).

In short, although the Kleins argue that the Oregon Constitution requires that they be granted an exemption on religious grounds to an otherwise neutral law, the cases on which they rely did not impose such a requirement, but merely acknowledged an abstract possibility that it could happen in a future case. The Kleins have not offered a focused argument for why the Oregon Constitution requires an exemption in this case, under the methodology for interpreting our constitution. See, e.g., Priest v. Pearce, 314 Or. 411, 415-16, 840 P.2d 65 (1992) (identifying “three levels” on which to interpret the Oregon Constitution: its “specific wording, the case law surrounding it, and the historical circumstances that led to its creation”). They simply assert that a religious exemption to ORS 659A.403’s requirement of nondiscrimination on account of sexual orientation would impair the state’s nondiscrimination goals “minimally, if at all,” while furthering goals of “respect and tolerance for people of different beliefs.” That argument does not amount to solid constitutional ground in which to root an individual exemption to a valid and neutral statute.

Moreover, it is far from clear that a religious exemption as proposed by the Kleins would have only a “minimal” effect on the state’s antidiscrimination objectives. The Kleins seek an exemption based on their sincere religious opposition to same-sex marriage; but those with sincere religious objections to marriage between people of different races, ethnicities, or faiths could just as readily demand the same exemption. The Kleins do not offer a principled basis for limiting their requested exemption in the manner that they propose, except to argue that there are “decent and honorable” reasons, grounded in religious faith, for opposing same-sex marriage, as recognized by the United States Supreme Court in Obergefell, — U.S. ——, 135 S.Ct. at 2602. That is not in dispute. But neither the sincerity, nor the religious basis, nor the historical pedigree of a particular belief has been held to give a special license for discrimination. See, e.g., Bob Jones Univ. v. United States,
461 U.S. 574, 602-03, 103 S.Ct. 2017, 76 L. Ed. 2d 157 (1983) (a religious school’s interests in practicing its sincerely held religious beliefs by prohibiting interracial dating and marriage did not outweigh the government’s “overriding interest in eradicating racial discrimination in education” (internal quotation marks omitted)).

For the foregoing reasons, we reject the Kleins’ arguments that BOLI’s final order violates the federal Free Exercise Clause or Article I, sections 2 and 3, of the Oregon Constitution.

B. Second Assignment: Commissioner’s Failure to Recuse Himself

In their second assignment of error, the Kleins assert that BOLI’s commissioner, Avakian, “the ultimate decision[ ]maker in this case, violated the Kleins’ [d]ue [p]rocess rights by failing to recuse himself despite numerous public comments revealing his intent to rule against them.” Specifically, they argue that Avakian’s comments about the cake controversy in a Facebook post and in an article that appeared in The Oregonian show that he judged the Kleins’ case before giving them an opportunity to present their version of the facts and the law. We agree with BOLI that Avakian’s comments reflect, at most, his general views about the law and public policy, and therefore are not the kind of comments that require disqualification.

To establish a due-process violation, “[o]ne claiming that a decision [ ]maker is biased has the burden of showing actual bias.” Becklin v. Board of Examiners for Engineering, 195 Or. App. 186, 207-08, 97 P.3d 1216 (2004), rev. den., 338 Or. 16, 107 P.3d 26 (2005); see Teledyne Wah Chang v. Energy Fac. Siting Council, 298 Or. 240, 262, 692 P.2d 86 (1984) (same) (citing Boughan v. Board of Engineering Examiners, 46 Or. App. 287, 611 P.2d 670, rev. den., 289 Or. 588 (1980)). When that claim of bias is based on prejudgment, the relevant inquiry is whether “the decision maker has so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented.” Columbia Riverkeeper v. Clatsop County, 267 Or. App. 578, 602, 341 P.3d 790 (2014).

Importantly, in assessing bias, courts have long distinguished between a decision-maker’s prejudgment of facts as opposed to preconceptions about law or policy, particularly in the context of quasi-judicial decisions. See 1000 Friends of Oregon v. Wasco Co. Court, 304 Or. 76, 82-83, 742 P.2d 39 (1987), cert. den., 486 U.S. 1007, 108 S.Ct. 1733, 100 L.Ed.2d 197 (1988) (explaining that the combination of executive, legislative, and adjudicative functions within a single government body “leaves little room to demand that an elected [official] who actively pursues a particular view of the community’s interest in his policymaking role must maintain an appearance of having no such view when the decision is to be made by an adjudicatory procedure”). As we explained in Samuel v. Board of Chiropractic Examiners, 77 Or. App. 53, 60, 712 P.2d 132 (1985), rev. den., 302 Or. 36, 726 P.2d 935 (1986), “[a] preconceived point of view concerning an issue of law *** is not an independent basis for disqualification.” (Citing, inter alia, Trade Comm’n v. Cement Inst., 333 U.S. 683, 68 S.Ct. 793, 92 L. Ed. 1010 (1948).). In Cement Inst., the United States Supreme Court articulated that principle in the context of a challenge to the impartiality of the Federal Trade Commission:
“[No previous] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law.

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In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involved questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under

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stronger constitutional compulsions in this respect than a court.”

333 U.S. at 702-03, 68 S.Ct. 793 (footnote omitted); accord Rombough v. Fed. Aviation Admin., 594 F.2d 893, 900 (2d Cir. 1979) (“[I]t is not improper for members of regulatory commissions to form views about law and policy on the basis of their prior adjudications of similar issues which may influence them in deciding later cases. An agency’s conclusions as to general principles of law do not require disqualification.”) (Citing, inter alia, Cement Inst., 333 U.S. at 700-03, 68 S.Ct. 793; citations omitted.).)

Accordingly, public comments that convey preconceptions about law or policy related to a dispute do not automatically disqualify a decision-maker from judging that controversy. As Judge Jerome Frank succinctly observed in In re J.P. Linahan, Inc., 138 F.2d 650, 651 (2d Cir. 1943), if “‘bias’ and ‘partiality’ be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will.” The touchstone of bias, instead, is whether the comments show that the decision maker is not capable of judging the controversy fairly on its own facts. See Hortonville Dist. v. Hortonville Educ. Ass’n, 426 U.S. 482, 493, 96 S.Ct. 2308, 49 L. Ed. 2d 1 (1976) (“Nor is a decision[ ]maker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not ‘capable of judging a particular controversy fairly on the basis of its own circumstances.’”) (Quoting United States v. Morgan, 313 U.S. 409, 421, 61 S.Ct. 999, 85 L. Ed. 1429 (1941), and citing Cement Institute, 333 U.S. at 701, 68 S.Ct. 793.).

In assessing a decision-maker’s capability in that regard, we presume that public officials will perform their duties lawfully. Gilmore v. Board of Psychologist Examiners, 81 Or. App. 321, 324, 725 P.2d 400, rev. den., 302 Or. 460, 730 P.2d 1250 (1986) (citing ORS 40.135(1)(j)); see Morgan, 313 U.S. at 421, 61 S.Ct. 999 (“Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of

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judging a particular controversy fairly on the basis of its own circumstances.”).

In this case, Avakian’s comments on Facebook and in the The Oregonian fall short of the kinds of statements that reflect prejudgment of the facts or an impermissibly closed-minded view of law or
policy so as to indicate that he, as a decision maker, cannot be impartial. On Facebook, before a BOLI complaint had been filed, Avakian posted:

“Everyone has a right to their religious beliefs, but that doesn’t mean they can disobey laws that are already in place. Having one set of rules for everybody ensures that people are treated fairly as they go about their daily lives.”

Below that paragraph, Avakian provided a link to “Ace of Cakes” [offers free wedding cake for Ore. Gay couple www.kgw.com.,” followed by another paragraph:

“That Oregon Department of Justice is looking into a complaint that a Gresham bakery refused to make a wedding cake for a same sex marriage. *** It started when a mother and daughter showed up at Sweet Cakes by Melissa looking for a wedding cake.”

Viewed in context with the rest of the post, Avakian’s statements that “[e]veryone has a right to their religious beliefs, but that doesn’t mean they can disobey laws that are already in place,” and that “[h]aving one set of rules for everybody ensures that people are treated fairly as they go about their daily lives,” are comments about the controversy between the Kleins and the complainants. However, they do not describe particular

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facts of the case, suggest that Avakian has already investigated or decided those facts, or even suggest that he has fixed views as to any defenses or interpretations of the law that might be advanced in the context of a contested proceeding. That is, they reflect his general views of law and policy regarding public accommodations laws, but not the type of prejudgment that casts doubt on whether he is capable of judging the controversy fairly in an official proceeding.

Avakian’s statements in The Oregonian article likewise fail to demonstrate that he was incapable of fairly

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judging this case. As BOLI points out, the Kleins selectively quote from that article to create an impression that Avakian was commenting specifically on their conduct. For instance, in quoting excerpts, the Kleins argue that Avakian “said that ‘folks’ in Oregon do not have a ‘right to discriminate’ and stated that those who use their ‘beliefs’ to justify discrimination need to be ‘rehabilitate[d].’” (Alterations by the Kleins.) Later, the Kleins characterize Avakian as stating that “the Kleins *** needed to be ‘rehabilitate[d].’”

The full quotations from that article, viewed in context, present a different picture. The article states, “‘Everybody is entitled to their own beliefs, but that doesn’t mean that folks have the right to discriminate,’ Avakian said, speaking generally.” (Emphasis added.) That sentence follows a paragraph in which the author describes the antidiscrimination law generally. Given that context, and the author’s express qualification that Avakian was “speaking generally,” there is no basis on which to conclude that Avakian was commenting specifically on the merits of the Kleins’ case.
Similarly, and contrary to the Kleins’ suggestion, the article does not quote Avakian as saying that the Kleins must be “rehabilitated.” Rather, the article quotes Avakian concerning a more general proposition: “The goal is never to shut down a business. The goal is to rehabilitate,’ Avakian said. ‘For those who do violate the law, we want them to learn from that experience and have a good, successful business in Oregon.’” Again, nothing in that quote suggests that Avakian was responding to a question about the Kleins in particular, as opposed to BOLI investigations in general. Indeed, the context again suggests the latter. The next sentence in the article states, “The bureau’s civil rights division conducts about 2,200 investigations a year on all types of discrimination, Avakian said.”

There is, in fact, only one quote attributed to Avakian in The Oregonian article that appears to relate specifically to the Kleins’ case—one that they do not mention. With regard to BOLI’s investigation of the complaint against the Kleins, Avakian is quoted as saying, “We are committed to a fair and thorough investigation to determine whether there’s substantial evidence of unlawful discrimination.”

In sum, the public comments on which the Kleins rely do not demonstrate anything more than Avakian’s general views about law and policy related to antidiscrimination statutes. Because those types of public comments do not establish a lack of impartiality for purposes of due process, we reject the Kleins’ second assignment of error.

C. Third Assignment: Damages Award

In their third assignment of error, the Kleins argue that BOLI’s damages award of $75,000 and $60,000 to Rachel and Laurel, respectively, is not supported by substantial evidence or substantial reason. See ORS 183.482 (8)(c) (“The court shall set aside or remand the order if the court finds that the order is not supported by substantial evidence in the record.”); Hamilton v. Pacific Skyline, Inc., 266 Or. App. 676, 680, 338 P.3d 791 (2014) (explaining that the “substantial reason requirement inheres in our substantial evidence standard of review under ORS 183.482(8)(c)”)). Within the assignment of error, they make three distinct contentions: (1) the damages award is inconsistent with BOLI’s findings and ignores the Kleins’ mitigating evidence and evidence of the complainants’ discovery abuses; (2) the damages award is “internally contradictory” with regard to recovery for emotional distress resulting from publicity of the case; and (3) the damages award is out of line with BOLI’s awards in other cases. As discussed below, we reject each of those challenges.

To better frame the arguments, we provide additional context for the damages award. Under ORS 659A.850(4)(a)(B), BOLI is authorized to “[e]liminate the effects of the unlawful practice that the respondent is found to have engaged in, including but not limited to paying an award of actual damages suffered by the complainant and complying with injunctive or other equitable relief[.]” In this case,
BOLI’s formal charges alleged that, pursuant to that statute, each complainant claimed “[d]amages for emotional, mental, and physical suffering in the amount of at least $75,000.”

At the hearing on damages, BOLI offered evidence of the emotional distress that the complainants suffered as a result of the Kleins’ denial of service, including testimony from Rachel and Laurel. The Kleins offered evidence to rebut BOLI’s evidence that the refusal of service was the source of the complainants’ distress, including evidence that, during the relevant time period, the complainants were engaged in a custody dispute for their two foster children. They also elicited testimony from Rachel’s brother to support their theory that the complainants were pursuing the case for political reasons rather than to remedy emotional distress.

During closing arguments, BOLI’s prosecutor explained that the agency was seeking damages related to two different causes:

“[There are two distinct causes of emotional distress damages in this case. The first is the damage that’s based on the refusal itself, and for that the Agency is seeking $75,000 for each Complainant. There is also the damages that resulted from the media scrutiny of this case, and for that amount we would defer to the forum’s discretion.”

BOLI’s prosecutor then proceeded to argue the two causes separately, first recounting testimony about the feelings of embarrassment, depression, sadness, and anger that Rachel and Laurel experienced around the time of the refusal and thereafter, including the strain that it put on their relationship and their relationships with others. The prosecutor then argued that “[t]he second cause of emotional distress is this media scrutiny.” She contended that the media coverage had made Rachel and Laurel fearful for their lives, afraid for the safety of their foster children, and anxious that it would jeopardize their then-pending efforts to adopt the children.

Anticipating a challenge to the amount of the damages sought, BOLI’s prosecutor argued that emotional distress damages are “very fact specific,” and that “$75,000 for the refusal itself is very well within the parameters of what’s appropriate.” (Emphasis added.)

The Kleins responded that the complainants had not told a consistent story throughout; that there was no credible evidence that the emotional distress suffered by the complainants was actually caused by the denial of service as opposed to other factors in the complainants’ lives, such as the custody dispute; that neither Rachel nor Laurel was present for Aaron’s “abomination” statement when Cheryl returned to the shop and that, in any event, there was disagreement as to what he actually said; and that the previous cases referenced by BOLI’s prosecutor involved more severe instances of discriminatory treatment.

In rebuttal, BOLI’s prosecutor emphasized that whether Aaron called the complainants “an abomination” or quoted a Bible verse using that word was “beside the point”: “[H]ow it was couched doesn’t really matter; the word is what resonated with the Complainants.”
In his proposed final order, the ALJ set forth extensive factual findings, including express credibility determinations regarding the witnesses at the hearing. The ALJ found that Rachel, despite being an “extremely emotional witness,” had “answered questions directly in a forthright manner” and “did not try to minimize the effect of media exposure on her emotional state as compared to how

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the cake denial affected her.” The ALJ explained that it credited Rachel’s testimony “about her emotional suffering in its entirety,” but that he “only credited her testimony about media exposure when she testified about specific incidents.”

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The ALJ found Laurel less credible. That was because Laurel “was a very bitter and angry witness who had a strong tendency to exaggerate and over-dramatize events,” argued with the Kleins’ attorney and “had to be counseled by the ALJ to answer the questions asked of her instead of editorializing about the cake refusal and how it affected her,” and her “testimony was inconsistent in several respects with more credible evidence.” Thus, the ALJ “only credited her testimony about media exposure when she testified about specific incidents” and otherwise credited her testimony only “when it was either (a) undisputed, or (b) disputed but corroborated by other credible testimony.”

The ALJ then set forth his reasoning regarding a damages award, describing specific aspects of each complainant’s emotional suffering and distinguished “suffering from the cake refusal” from “suffering from publicity about the case.” With regard to the latter, the ALJ ultimately concluded that, as a factual matter, the Kleins were “responsible” for at least some of the publicity that had followed the initial refusal, but that “there is no basis in law for awarding damages to Complainants for their emotional suffering caused by media and social media attention related to this case.”

The ALJ’s proposed final order then set forth his conclusion on the amount of damages related to the initial refusal:

“In this case, the forum concludes that $75,000 and $60,000, are appropriate awards to compensate Complainants [Rachel] and [Laurel], respectively, for the emotional suffering they experienced from Respondents’ cake refusal. [Laurel] is awarded the lesser amount because she was not present at the cake refusal and the forum found her testimony about the extent and severity of her emotional suffering to be exaggerated in some respects.”

BOLI, in its final order, largely adopted the reasoning and conclusions proposed by the ALJ, including his credibility determinations. BOLI, like the ALJ, separately discussed the emotional suffering of each complainant with regard to the denial of service and from publicity. And, like the ALJ, BOLI concluded that damages for emotional suffering caused by media attention were not recoverable.

BOLI’s final order also adopted the ALJ’s analysis of the amount of damages to each complainant. The order states:
“In this case, the ALJ proposed that $75,000 and $60,000, are appropriate awards to compensate [Rachel and Laurel], respectively, for the emotional suffering they experienced from Respondents’ denial of service. The proposal for [Laurel] is less because she was not present at the denial and the ALJ found her testimony about the extent and severity of her emotional suffering to be exaggerated in some respects. In this particular case, the demeanor of the witnesses was critical in determining both the sincerity

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and extent of the harm that was felt by [Rachel and Laurel]. As such, the Commissioner defers to the ALJ’s perception of the witnesses and evidence presented at hearing and adopts the noneconomic award as proposed, finding also that this noneconomic award is consistent with the forum’s prior orders.”

In a footnote to that paragraph, the order cites specific BOLI cases in which damages were awarded, in amounts ranging from $50,000 to $350,000 per complainant.

With that background, we return to the issues presented by the Kleins’ third assignment of error.

1. **Countervailing evidence**

The Kleins assert that BOLI’s order “is inconsistent with its credibility determinations”—specifically, BOLI’s findings regarding what Aaron actually said to Cheryl when she returned to Sweetcakes after the initial refusal of service. According to the Kleins, BOLI found as fact that Aaron did not actually refer to Rachel as an “abomination” but had only quoted a verse from the Book of Leviticus, stating, “You shall not lie with a

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male as one lies with a female; it is an abomination.” Yet, BOLI awarded damages to both complainants “for harm attributable to being called ‘abomination[s].’”

We do not read BOLI’s order to rest on a finding that Aaron specifically called the complainants “an abomination” as opposed to quoting a biblical verse. As described above, BOLI argued during the damages hearing that exactly how the word was “couched” was beside the point. BOLI’s final order likewise reflects a focus on the effect of the word “abomination” on the complainants, including their recognition of that biblical reference and their associations with the reference. For instance, the order states that Rachel, who was brought up as a Southern Baptist, “interpreted [Aaron’s] use of the word ‘abomination’ [to] mean that God made a mistake when he made her, that she wasn’t supposed to exist, and that she had no right to love or be loved [.]” Similarly, the order states that Laurel recognized the statement as a reference from Leviticus and, based on her religious background, “understood the term ‘abomination’ to mean ‘this is a creature not created by God, not created with a soul. They are unworthy of holy love. They are not worthy of life.’”

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Viewing the final order as a whole, we see no inconsistency. BOLI found that Aaron used the term “abomination” in the course of explaining why he was denying service to the complainants on account of their sexual orientation, and further found that the complainants experienced emotional distress based on the use of that term. It is that nexus that underlies BOLI’s damages award.

The Kleins also argue that the final order does not account for certain evidence that undermined the damages case, including evidence that the complainants were pursuing the case out of a desire for political change and that they were experiencing stress from their custody dispute at the time. The Kleins also argue that the final order fails to account for ways in which the complainants frustrated the Kleins efforts to “discover the true extent of their alleged emotional harm.” According to the Kleins, the final order therefore lacks substantial reason.

The Kleins’ argument in that regard “misconceives the nature of the substantial reason requirement.” Jenkins v. Board of Parole, 356 Or. 186, 208, 335 P.3d 828 (2014). As the Supreme Court explained in Jenkins, an order satisfies the substantial reason requirement so long as it “provide[s] an explanation connecting the facts of the case and the result reached, and [there is] no indication that, in making its decision, the [agency] relied on evidence that did not qualify as substantial evidence.” Id. Beyond that, an agency generally is not required to explain why it was not persuaded by particular evidence. See D. T. v. Dept. of Human Services, 247 Or. App. 293, 304 n. 5, 269 P.3d 96 (2011) (“The ‘substantial reason’ test does not require an agency to expressly reject each of a petitioner’s arguments or recount all the evidence that the agency considered; rather, it requires that an agency adequately explain ‘the reasoning that leads *** from the facts that it has found to the conclusions that it draws from those facts.’” (Quoting Drew v. PSRB, 322 Or. 491, 500, 909 P.2d 1211 (1996); emphases removed.)); Kaiser Permanente v. Bonfiglio, 241 Or. App. 287, 291, 249 P.3d 158, rev. den., 350 Or. 573, 258 P.3d 1239 (2011) (“[T]he board relied primarily

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on Stigler’s opinion, and adequately explained why it found his opinion to be the most persuasive. The board was not required to explain why all the other opinions were less persuasive. Stigler’s opinion constitutes substantial evidence and supports the board’s findings.”); see also Jenkins, 356 Or. at 200 n. 6, 335 P.3d 828 (“Nothing in [a previous decision, Gordon v. Board of Parole, 343 Or. 618, 175 P.3d 461 (2007),] suggests that, for purposes of substantial reason review under ORS 183.482(8)(c), the court believed that the board was required to identify specific evidence in the record that supported its ultimate determinations of fact and law.”).

In this case, BOLI’s order includes extensive factual findings regarding the emotional suffering that the complainants experienced and it connects the amount of damages to that suffering. That is sufficient to satisfy the substantial reason requirement, and we decline to reweigh, under the guise of substantial

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reason, the competing evidence as to the extent of the complainants’ damages. See Multnomah County Sheriff’s Office v. Edwards, 277 Or. App. 540, 562, 373 P.3d 1099 (2016), aff’d, 361 Or.
2. **Damages from publicity and media attention**

Next, the Kleins argue that the damages award is internally inconsistent in its treatment of harm caused by media attention from the case. According to the Kleins, BOLI’s formal charges “sought $150,000 in total damages based on alleged emotional suffering stemming from the denial of service and subsequent media exposure.” (Emphases by the Kleins.) But then, despite concluding that the complainants were not entitled to recover for harm attributable to media exposure, the final order awards an amount close to the prayer.

The Kleins’ argument proceeds from a mistaken premise. BOLI’s formal charges did not seek “$150,000 in total damages based on alleged emotional suffering stemming from the denial of service and subsequent media exposure.” (Emphases by the Kleins.) Rather, the formal charges sought damages in “the amount of at least $75,000” for each complainant. (Emphasis added.) And, as described above, BOLI’s prosecutor clearly expressed during the damages hearing—and the ALJ plainly understood—that BOLI was seeking $75,000 for each complainant for the refusal itself and additional damages, at the ALJ’s discretion, for harm attributable to media and social media attention. Both the ALJ’s preliminary order and BOLI’s final order reflect that understanding of the damages request. Thus, there is no plausible basis on which to infer that, by awarding $75,000 to Rachel and $60,000 to Laurel, BOLI relied to any extent on emotional suffering from media attention, particularly when BOLI’s order expressly says otherwise.

The Kleins’ alternative contention regarding publicity damages is based on a statement that BOLI made in the context of denying recovery for those damages. In that part of the order, BOLI concluded that “complainants’ emotional harm related to the denial of service continued throughout the period of media attention and that the facts related solely to emotional harm resulting from media attention do not adequately support an award of damages.” (Emphases added.) According to the Kleins, that emphasized text reflects that BOLI “awarded damages for harm lasting over twenty-six months” related solely to the initial denial of service, yet the proposed final order and final order “note a near total lack of any such evidence” regarding persistent harm from the initial refusal.

The Kleins’ mischaracterize the relevant orders. In his proposed final order, the ALJ distinguished testimony about specific incidents involving emotional suffering from testimony about emotional suffering more generally. The

ALJ credited Laurel’s testimony that she “still feels emotional effects from the denial of service because [Rachel and their two children] ‘were’ still suffering and that ‘was’ tearing me apart.” The ALJ also specifically found that Rachel had not tried “to minimize the effect of media exposure
on her emotional state as compared to how the cake denial affected her,” and he credited Rachel’s testimony “about her emotional suffering in its entirety.” His order further states:

“Without giving any specific examples, [Rachel] credibly testified that, in a gener-

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al sense, the cake refusal has caused her continued emotional suffering up to the time of hearing. Other than that, she did not testify as to any specific suffering she experienced after February 1 that was directly attributable to the cake refusal.”

(Emphasis added; footnote omitted.)

In adopting the ALJ’s reasoning, BOLI’s final order similarly distinguished between generalized testimony and testimony about specific instances of suffering, and it repeated the ALJ’s findings in that regard.

Viewed in context, BOLI’s findings and conclusions demonstrate that it credited Laurel’s and Rachel’s testimony that, at the time of the hearing, they continued to experience some degree of emotional suffering from the initial refusal, but the final order also reflects that BOLI understood that evidence to be generalized and limited. Nothing in the final order indicates that BOLI gave that evidence more weight than it could bear, or suggests that the agency relied on evidence that was not substantial when determining damages. Rather, the complainants’ generalized evidence of continued suffering until the time of the hearing is one among the many facts on which the agency relied to support the damages award in the final order. See Edwards, 277 Or. App. at 563, 373 P.3d 1099 (“[A] complainant’s testimony, if believed, is sufficient to support a claim for emotional distress damages.”); id. (citing Peery v. Hanley, 135 Or. App. 162, 165, 897 P.2d 1189, adh’d to on recons, 136 Or. App. 492, 902 P.2d 602 (1995), for the proposition that a “plaintiff’s testimony, if believed, is sufficient to establish [the] causation element of [an] emotional distress claim”).

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3. Consistency with other BOLI awards

Finally, the Kleins argue that BOLI’s award lacks substantial reason because it is “out of line with comparable cases.” The Kleins contend, as they did below, that the complainants’ suffering relates to a single, discrete incident, whereas past BOLI cases with such significant damages awards involved ongoing harassment and typically involved emotional suffering so severe that it required medical treatment.

Fact-matching, when considering emotional distress damages, is of limited value. As we explained in Edwards, BOLI must consider “the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the [c]omplainant.” 277 Or. App. at 563, 373 P.3d 1099 (internal quotation marks omitted; alteration in original). The actual amount of any award, therefore, depends on the facts presented by each complainant. Id.
As BOLI notes in its final order, the agency has awarded far greater damages than $75,000 and $60,000 to a complainant in cases involving invidious discrimination. E.g., *In the Matter of Andrew W. Engel, DMD*, 32 BOLI 94, 114, 140-41 (2012) (awarding $325,000 in damages for “emotional, mental, and physical suffering” to a complainant subjected to harassment for religious beliefs, which resulted in anxiety, stress, insomnia, gastrointestinal problems and weight loss requiring medical treatment); *In the Matter of From the Wilderness, Inc.*, 30 BOLI 227, 284-85, 292-93 (2009) (awarding $125,000 in damages for “mental and emotional suffering” to a complainant subjected to verbal and physical sexual harassment for more than two months before being fired and then retaliated against, and who then suffered panic attacks requiring medical treatment). BOLI has also awarded lesser amounts in cases involving significant trauma, e.g., *In the Matter of Charles Edward Minor*, 31 BOLI 88, 99, 104-05 (2010) (awarding $50,000 in damages for “emotional, mental, and physical suffering” to a complainant subjected to verbal and physical sexual harassment, with the abuse culminating in the respondent striking her in the head with his fist, and the abuse caused anxiety,

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reclusiveness, and fear). Nonetheless, given BOLI’s detailed factual findings about the effect of the refusal of service on these particular complainants—including anger, depression, questioning their own identity and self-worth, embarrassment, shame, frustration, along with anxiety and reduced excitement about the wedding itself—we cannot say that the order is so far out of line with previous cases that it lacks substantial reason. *See Edwards*, 277 Or. App. at 542-43, 564-65, 373 P.3d 1099 (reaching

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a similar conclusion with regard to BOLI’s $50,000 emotional-distress award to a complainant who had not received the veterans’ preference during a hiring process, and the complainant experienced physical symptoms of stress, was “upset,” “felt that he was not receiving the respect to which he was entitled,” and his “relationships suffered”; and observing that the award “was comparable to the awards given in [one previous BOLI case] and significantly less than the award given in [another case] to a complainant who suffered similar symptoms of emotional distress”).

For the foregoing reasons, we reject the third assignment of error and affirm the damages award.

D. **Fourth Assignment: Application of ORS 659A.409**

In their fourth assignment of error, the Kleins contend that BOLI erred in concluding that they violated ORS 659A.409. That statute provides, as pertinent here, that

“it is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display, or cause to be published, circulated, issue or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of race, color, religion, sex, sexual orientation, national origin, marital status or age ***.”
ORS 659A.409. In essence, the statute makes it unlawful to threaten to commit unlawful discrimination. In its final order, BOLI concluded that the Kleins did so through several statements, as discussed below, and enjoined them from committing further violations.

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The Kleins acknowledge that BOLI “may enjoin people from threatening to discriminate on the basis of sexual orientation,” without implicating the First Amendment. Cf. FAIR, 547 U.S. at 62, 126 S.Ct. 1297 (observing that Congress may, for example, require employers to “take down a sign reading ‘White Applicants Only’”). However, the Kleins argue that the statements that BOLI found objectionable did not communicate any intention to discriminate in the future, but merely expressed the Kleins’ views about the ongoing controversy and their belief in the validity of their legal and moral position.

The final order describes three discrete statements attributed to the Kleins. First, in the February 2014 interview with Tony Perkins, Aaron described his brief conversation with Rachel at Sweetcakes that led to him telling her, “[W]e don’t do same-sex marriage, same-sex wedding cakes.” Second, at a different point in that same interview, Aaron related an earlier conversation that he had had with Melissa regarding the prospect of legalized same-sex marriage; in that conversation, according to Aaron, he and Melissa agreed that they could “see it is going to become an issue but we have to stand firm.” Third, BOLI relied on the handwritten sign that was taped to the inside of Sweetcakes’ front window, which read, in part, “Closed but still in business. * * * This fight is not over. We will continue to stand strong. Your religious freedom is becoming not free anymore. This is ridiculous that we cannot practice our faith. The LORD is good and we will continue to serve HIM with all our heart.”

In the final order, BOLI reasoned that the above statements, considered in “text and context,” were properly construed as “the recounting of past events,” but also “constitute notice that discrimination will be made in the future by refusing such services.” As a result, BOLI’s final order included language ordering the Kleins “to cease and desist” from making any communication “to the effect that” they would discriminate in the future “on account of sexual orientation.” The language in the order precisely tracks the statutory language in ORS 659A.409, quoted above.

On judicial review, the Kleins essentially make two arguments. First, they argue that BOLI erred in concluding

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that the three statements, individually or collectively, violated ORS 659A.409 by communicating an intention to discriminate in the future. In the Kleins’ view, those statements simply describe

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“the facts of this case, their view of the law, and their intent to vindicate that view.” Second, the Kleins argue that BOLI’s injunction is overbroad to the extent that it purports to restrict the Kleins from expressing those views.
We agree with the Kleins’ first point. Aaron’s statements in the February 2014 interview can be reasonably understood only one way: as describing past events. BOLI’s order states that Aaron “did not say only that he would not do complainants’ specific marriage and cake but, that respondents ‘don’t do’ same-sex marriage and cakes.” But regardless of whether his words can be understood to refer generally to same-sex marriage and cakes, BOLI ignores the context in which he made that remark during the interview. Aaron was asked by the interviewer, “Tell us how this unfolded and your reaction to that.” He responded by describing what had happened on the day of the refusal, including, “I said, ‘I’m very sorry, I feel like you may have wasted your time. You know we don’t do same-sex marriage, same-sex wedding cakes.’ And she got upset, noticeably, and I understand that.” (Emphasis added.) Viewed in that context, Aaron’s recounting of those historical events cannot be understood as a statement that he would deny service in the future.

Likewise, Aaron’s recounting, during the interview, of past conversations that he and Melissa had engaged in before the denial of service cannot reasonably be understood as an assertion of their plans to discriminate in the future. Aaron was asked by the interviewer whether the controversy with the complainants had caught him off guard, and he responded, “[I]t was one of those situations where we said ‘well I can see it is going to become an issue but we have to stand firm.’” That statement plainly recounted his past thinking and cannot reasonably be construed as the kind of threat of prospective discrimination that ORS 659A.409 prohibits.

That leaves the note taped to the Sweetcakes window. Again, that note read:

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“Closed but still in business. You can reach me by email or facebook. www.sweetcakesweb.com or Sweetcakes by Melissa facebook page. New phone number will be provided on my website and facebook. This fight is not over. We will continue to stand strong. Your religious freedom is becoming not free anymore. This is ridiculous that we cannot practice our faith. The LORD is good and we will continue to serve HIM with all our heart [heart symbol].”

(Uppercase and underscoring in original; spacing altered.) BOLI concedes that the statement could refer to their intention to stand strong in their legal fight, but argues that it “also could refer to the denial of services to same-sex couples.”

We are not persuaded that, given the ambiguity in the note, it can serve as an independent basis for BOLI’s determination that the Kleins violated ORS 659A.409—and, indeed, BOLI did not purport to rely on the note alone. As explained above, in overturning the ALJ’s determination regarding ORS 659A.409, BOLI relied heavily on statements in the Perkins interview—taken out of context—to conclude that the Kleins had communicated an intention to discriminate in the future. When those statements and the note are viewed in their proper context, the record does not support BOLI’s conclusion that the Kleins violated ORS 659A.409. We therefore reverse that part of BOLI’s order.16

Reversed as to BOLI’s conclusion that the Kleins violated ORS 659A.409 and the related grant of injunctive relief; otherwise affirmed.

The State of the Union: *Masterpiece Cakeshop* and Other LGBT Law Developments
Notes:

* James, J., *vice* Duncan, J. pro tempore.

1 Because the Kleins do not challenge BOLI’s findings of historical fact, we take those facts—as described here and within particular assignments of error—from the findings set forth in BOLI’s final order. *Meltebeke v. Bureau of Labor and Industries*, 322 Or. 132, 134, 903 P.2d 351 (1995), *abrogated on other grounds by State v. Hickman/Hickman*, 358 Or. 1, 24, 358 P.3d 987 (2015) (unchallenged factual findings are the facts for purposes of judicial review of an administrative agency’s final order).

2 Because multiple parties and witnesses share the same last names, we at times use first names throughout this opinion for clarity and readability.

3 The formal charges had alleged that Melissa and Aaron each violated ORS 659A.403, and that Aaron had aided and abetted Melissa’s violation. *See* ORS 659A.406 (making it an unlawful practice for any person to aid or abet unlawful discrimination by any place of public accommodation). The ALJ granted the Kleins’ motion for summary judgment on the allegations that Melissa had violated ORS 659A.403, and on the allegations that Aaron had aided and abetted her in violation of ORS 659A.406. However, the ALJ, and later BOLI, concluded that the Kleins were jointly and severally liable for Aaron’s violation of ORS 659A.403, and the parties have not distinguished between Aaron’s and Melissa’s liability for purposes of judicial review. For readability, we likewise discuss the Kleins’ liability jointly and do not further discuss theories of aiding and abetting, which are not at issue before us.

4 On judicial review, the Kleins do not dispute that Sweetcakes is a “place of public accommodation” within the meaning of ORS 659A.403. *See* ORS 659A.400 (defining “a place of public accommodation” for purposes of ORS chapter 659A).

5 At the time that the Oregon Family Fairness Act was enacted, Article XV, section 5a, of the Oregon Constitution defined “marriage” to be limited to the union of one man and one woman, and the Oregon Family Fairness Act expressly states that it “cannot bestow the status of marriage on partners in a domestic partnership.” Or. Laws 2007, ch. 99, § 2(7). Nonetheless, the act contemplated, but did not require, the performance of “solemnization ceremony[ies]” and left it to the “dictates and conscience of partners entering into a domestic partnership to determine whether to seek a ceremony or blessing over the domestic partnership.” Or. Laws 2007, ch. 99, § 2(8). Thus, the legislature was aware that same-sex couples would be participating in wedding ceremonies, and when it simultaneously chose to extend the protections of ORS 659A.403 to cover sexual orientation, there is no reason to believe that it intended to exempt places of public accommodation—such as cake shops, dress shops, or flower shops—so as to permit them to discriminate with regard to services related to those anticipated ceremonies.

6 In doing so, we join other courts that have declined to draw a “status/conduct” distinction similar to that urged by the Kleins. *See, e.g., State v. Arlene’s Flowers, Inc.*, 187 Wash. 2d 804, 823, 389 P.3d 543, 552 (2017) (stating that “numerous courts—including our own—have rejected this kind of status/conduct distinction in cases involving statutory and constitutional claims of discrimination,” and citing cases to that effect).

The First Amendment’s protection of artwork is distinct from the protections that extend to so-called “expressive conduct.” Expressive conduct involves conduct that may be undertaken for any number of reasons but, in the relevant instance, is undertaken for the specific purpose of conveying a message. See, e.g., Texas v. Johnson, 491 U.S. 397, 405, 109 S.Ct. 2533, 105 L. Ed. 2d 342 (1989) (reasoning that not every action taken with respect to the flag of the United States is necessarily expressive); United States v. O’Brien, 391 U.S. 367, 375, 88 S.Ct. 1673, 20 L. Ed. 2d 672 (1968) (recognizing that a person may knowingly destroy a draft card without necessarily intending to express any particular view). For example, a person may camp in a public park for any number of reasons, only some of which are intended to express an idea. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L. Ed. 2d 221 (1984). In contrast (as we understand the Supreme Court to have held), because the creation of artwork and other inherently expressive acts are unquestionably undertaken for an expressive purpose, they need not express an articulable message to enjoy First Amendment protection.

To be clear, we do not foreclose the possibility that, on a different factual record, a baker (or chef) could make a showing that a particular cake (or other food) would be objectively experienced predominantly as art—especially when created at the baker’s or chef’s own initiative and for her own purposes. But, as we have already explained, the Kleins never reached the point of discussing what a particular cake for Rachel and Laurel would look like; they refused to make any wedding cake for the couple. Therefore, in order to prevail, the Kleins (as they implicitly acknowledge) must demonstrate that any cake that they make through their customary practice constitutes their own speech or art. They have not done so.

See, e.g., Church of Lukumi Babalu Aye, Inc., 508 U.S. at 567, 113 S.Ct. 2217 (Souter, J., concurring) (dismissing the doctrine as “ultimately untenable”); Kissinger v. Bd. of Trs. of the Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993) (calling the “hybrid-rights doctrine” “completely illogical”); Erwin Chemerinsky, Constitutional Law: Principles and Policies § 12.3.2.3 at 1261-62 (3d ed. 2006) (describing the doctrine’s status as unclear); Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U Chi. L. Rev. 1109, 1122 (1990) (“[A] legal realist would tell us * * * that the Smith Court’s notion of ‘hybrid’ claims was not intended to be taken seriously.”).

Article I, sections 2 and 3, provide:

“Section 2. Freedom of worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.

“Section 3. Freedom of religious opinion. No law shall in any case whatever control the free exercise, and enjoyment of religious [sic] opinions, or interfere with the rights of conscience.”

Former ORS 342.650 (1965), repealed by Or. Laws 2010, ch. 105, § 3 (spec. sess.), provided:
“No teacher in any public school shall wear any religious dress while engaged in the performance of his duties as a teacher.”

13 “Ace of Cakes” refers to a television show, the host of which provided the complainants with a free wedding cake.

14 The Kleins’ opening brief appears to include, by way of an appendix, material that was not part of the administrative record. We have confined our review to public comments by Avakian that were raised in the Kleins’ motion to disqualify and that were before the ALJ and BOLI in the proceedings below.

15 The ALJ’s order states, “The Formal Charges seek damages for emotional, mental and physical suffering in the amount of ‘at least $75,000’ for each Complainant. In addition to any emotional suffering experienced by Complainants as a direct result of Sweetcakes’ refusal to bake them a cake (‘cake refusal’), the Agency also seeks damages for suffering caused to Complainants by media publicity and social media responses to this case.”

The final order likewise explains that the formal charges sought “at least $75,000” for each complainant and, “[i]n addition to any emotional suffering experienced by Complainants as a direct result of Sweetcakes’ refusal to bake them a cake (‘denial of service’), the Agency also seeks damages for suffering caused to Complainants by media publicity and social media responses to this case.”

16 BOLI expressly declined to award damages based on the violation of ORS 659A.409, so our decision affects only the part of BOLI’s order that grants injunctive relief.
Melissa Elaine KLEIN, dba Sweetcakes by Melissa; and Aaron Wayne Klein, dba Sweetcakes by Melissa, and, in the alternative, individually as an aider and abettor under ORS 659A.406, Petitioners,

v.

OREGON BUREAU OF LABOR AND INDUSTRIES, Respondent.

No. A159899.

August 30, 2016.

Agency Nos. 44-14, 45-14

Brief of Amici Curiae ( ) and Lambda Legal Defense and Education Fund, Inc. in Support of Respondent

Stefan C. Johnson, OSB No. 923480, Lambda Legal Defense and Education Fund, Inc., 4221 Wilshire Boulevard, Suite 280, Los Angeles, CA 90010, Telephone: 213.382.7600, Email: sjohnson@lambdalegal.org, for Amici Curiae.

Tyler Smith, OSB No. 075287, Anna Harmon, OSB No. 122696, Tyler Smith & Associates, 181 N. Grant Street, Suite 212, Canby, OR 97013, Telephone: 202.955.0620, Email: tyler@ruralbusinessattorneys.com, for petitioners.

Herbert G. Grey, OSB No. 810250, 4800 SW Griffith Drive, Suite 320, Beaverton, OR 97005, Telephone: 503.641.4908, Email: herb@greylaw.org, for petitioners.

Denise G. Fjordbeck, OSB No. 822578, Leigh A. Salmon, OSB No. 064202, Oregon Department of Justice, 1162 Court Street NE, Salem, OR 97301, Telephone: 503.378.4402, Email: leigh.a.salmon@doj.state.or.us, for respondent.


Matthew J. Kacsmaryk*, Kenneth A. Klukowski*, Cleve W. Doty, First Liberty Institute, 2001 West Piano Parkway, Suite 1600, Piano, TX 75075, Telephone: 972.941.4444, Email: cdoty@firstliberty.org, for petitioners.

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*1 INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns sexual orientation discrimination by a for-profit business and its owners who make money selling baked goods - including wedding cakes - to the general public.
Amici Curiae agree with Respondent Oregon Bureau of Labor and Industries (“BOLI” or “the Bureau”) on every key point of the Bureau’s brief. In particular, Amici Curiae agree that Petitioners Melissa and Aaron Klein (“the Kleins”), co-owners of Sweetcakes by Melissa, violated the rights of [ ] and [ ] (“[ ] and [ ]” or “the - [ ] a same-sex couple, in violation of the Oregon Public Accommodations Law, ORS 659A.400 to ORS 659A.417 (“Oregon Public Accommodations Law”), when they refused to provide the couple with wedding cake services and thereafter attempted to justify their discrimination by referring to the couple using profoundly offensive language. As the Bureau argues, refusing such a public accommodation to a same-sex couple constitutes sexual orientation discrimination, despite the Kleins’ free speech and free exercise arguments. The Kleins’ constitutional defenses fail because, as the Bureau explains, providing a wedding cake is not inherently expressive activity for First Amendment purposes, and the Kleins waived any free expression claims under the Oregon Constitution (Resp. Br. 20-33). Amici further agree that the Kleins’ free exercise defense is fatally flawed because the Public Accommodations Law is a neutral law of general applicability and this case does not implicate “hybrid rights.” (Resp. Br. 38-43).

Amici write separately to provide supplemental information regarding the state’s strong interest in providing protections against sexual orientation and gender identity discrimination, protections that are not rendered toothless by exemptions allowing discrimination in the name of religion. In particular, this Court should reject the Kleins’ claimed religious right to refuse cake services to same-sex couples (in this case, [ ] and [ ] while providing those same services to different-sex couples. BOLI Final Order, Sweetcakes, 44-14 & 45-15, at 70, ¶¶ 7-8 (July 2, 2012).

Amici Curiae agree with the Bureau that even if the Kleins’ constitutional rights were implicated in this case, the highest level of scrutiny that could apply is the intermediate scrutiny level applicable to free speech violations, see Resp. Br. At 33-34, citing United States v. O’Brien, 391 US 367, 382 (1968). That said, Amici Curiae’s particular emphasis here is to reinforce that under any level of scrutiny, the state has a strong (indeed, compelling) interest in requiring the continued protection of lesbian, gay, bisexual and transgender (“LGBT”) Oregonians against discrimination.

With a particular emphasis on Oregon-specific data and other evidence of anti-LGBT discrimination, this brief confirms the critical need for public accommodations and other anti-discrimination laws. The brief also addresses how Oregon’s strong interest in enforcing anti-discrimination laws requires rejection of the Kleins’ inappropriately broad religious exemption arguments. Such religious exemption claims should not be permitted to undermine the state’s critical interests in protecting LGBT individuals and same-sex couples from discrimination, whatever the owners’ personal beliefs about same-sex couples.

In its final order issued July 2, 2015, the Bureau considered and properly rejected the Kleins’ free speech and free exercise defenses to ORS 659A.403, as well as the Kleins’ claim to a general exemption from the public accommodations statute. Amici Curiae support Respondent Oregon Bureau of Labor and Industries’ request for an order affirming BOLI’s final order.

*7 STATEMENT OF THE CASE

Amici Curiae join in Respondent Oregon Bureau of Labor and Industries’ statement of the case.

*4 IDENTITY AND INTERESTS OF AMICI CURIAE

Amici Curiae [ ] - [ ] and [ ] - [ ] were the original complainants before the Bureau of Labor and Industries in this case. They are a same-sex couple to whom Melissa and Aaron Klein, dba Sweetcakes by Melissa, refused to sell a wedding cake. After being denied the public accommodation of the Kleins’ business services because of their sexual orientation, [ ] and [ ] suffered significant emotional distress. Although and [ ] are not named parties in this appeal, as the original victims and complainants in this case, they have been most directly harmed by the Kleins’ actions.
Further, since this case began, [ ] and [ ] have been subjected to additional abuse, having received countless harassing messages from supporters of the Kleins who called them evil and “the dumb lesbians who ruined those Christian bakers’ lives,” for example. Casey Parks, The Hate Keeps Coming: Pain Lingers for Lesbian Couple Denied in Sweet Cakes Case, The Oregonian (July 2, 2016), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/07/[ ] /sweet_cakes_lesbians.html. [ ] and [ ] understand the discrimination they have suffered to be part of the larger reality of anti-LGBT discrimination in Oregon. They have an interest in this case and the repercussions it could have across the state, both directly and as members of the broader LGBT community in Oregon. The experience of the [ ] - [ ] along with the abuse reported by many other LGBT Oregonians, illustrates the importance of sexual orientation and gender identity discrimination protections remaining intact and fully enforceable by the state, regardless of the religious or personal beliefs of some business owners.

Amicus Curiae Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is the nation’s oldest and largest legal organization working for full recognition of the civil rights of LGBT people and people living with HIV through impact litigation, education, and policy advocacy. See, e.g., Obergefell v. Hodges, 135 S Ct 2584, 2591-92 (2015) (affirming equal right of same-sex couples to marry and to marriage recognition); Lawrence v. Texas, 539 US 558, 561 (2003) (invalidating Texas ban on same-sex adult intimacy as unconstitutional denial of liberty).

Lambda Legal has represented same-sex couples or appeared as an amicus curiae in numerous discrimination cases in which religious freedom has been asserted as a justification. See, e.g., Gifford v. McCarthy, 23 NYS3d 422, 137 AD3d 30 (NY App Div 2016); Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, 370 P3d 272 (Colo App 2015); North Coast Women’s Care Med. Grp., Inc. v. Superior Court, 44 Cal 4th 1145, 189 P3d 959 (Cal 2008). The issues raised in this appeal are similar to those addressed in those and numerous other cases. Lambda Legal’s membership includes approximately 2,500 Oregonians. Because the Court’s decision here is likely to affect many thousands of LGBT people across

ARGUMENT

I. Strict Scrutiny is Not the Applicable Standard in this Case.

Careful consideration of the Kleins’ claimed constitutional defenses against compliance with the Oregon Public Accommodations Law requires an assessment of the government’s interest in preventing discrimination. As an initial matter, the Kleins misrepresent the applicable level of scrutiny in this case. They describe the holding of Employment Division v Smith, 494 US 872, 881-82 (1990), as establishing that laws burdening both free speech rights and another fundamental right (such as religious free exercise) are subject to strict scrutiny.

In fact, this Court has rejected that argument in the past, explaining that:

Precisely what the Court’s dictum [in Smith] signifies is difficult to divine. Strictly speaking, the Court did not say that, in any particular class of cases, a neutral, generally applicable law will be subject to strict scrutiny. It simply noted -- without reference to any particular standard -- that, in the past, the Court had struck down neutral, generally applicable laws when a case “involved” both the Free Exercise Clause and some other constitutional protection. The church nevertheless insists that the upshot of Smith is that neutral, generally applicable laws will be subject to strict scrutiny in cases in which a free exercise claim is conjoined with a free speech claim....

Why the addition of another constitutional claim would affect the standard of review of a free exercise claim is not immediately obvious. Indeed, if the mere allegation of an additional constitutional claim has the effect of altering the standard articulated in Smith, then the “hybrid” exception likely would swallow the Smith rule; free exercise claims will frequently also pose at least a colorable free speech claim. On the other hand, if the Court meant that strict scrutiny pertains only when an additional constitutional claim is successfully asserted, then the rule of Smith becomes mere surplusage, as the church already would win under the alternate constitutional theory.
Thus, as the Bureau explains, even if the Kleins’ free speech rights were infringed in this case, which they are not, the highest applicable level of scrutiny to determine if the infringement were justified would be the intermediate scrutiny level applicable to free speech claims, see Resp. Br. at 33-34, citing United States v. O’Brien, 391 US 367, 406 (1968).

Applying the actual holding of Smith, per Church at 295 S. 18th Street, St. Helens v. Employment Dept., no similar heightened scrutiny applies to the free exercise claim. This is because the Oregon Public Accommodations Law is a neutral law of general applicability. Smith, 494 US at 879 (“the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)’” (citation omitted).

That said, even if this Court were to apply a heightened form of scrutiny, Respondent Oregon Bureau of Labor and Industries should still prevail. Under any level of scrutiny, the state has a compelling interest in enforcing the right of and [ ] to be protected from public accommodation discrimination notwithstanding the Kleins’ religious objections to their same-sex relationship.

II. Oregon’s Compelling Interest in Ending Discrimination Against LGBT People Warrants Enforcement of the Oregon Public Accommodations Law Without a New Judicially Created Religious Exemption.

Oregon history is replete with documentation of discrimination against LGBT individuals and same-sex couples, which establishes the critical need to protect these Oregonians from discrimination. LGBT Oregonians have historically suffered significant discrimination in public accommodations, as well as in other contexts. The state’s efforts to prevent that discrimination should not be thwarted by allowing the proposed religious exemption from Oregon’s anti-discrimination laws.

To begin with, the facts of the present case illustrate how important it is to protect LGBT Oregonians from discrimination in places of public accommodation. Aaron Klein’s egregious discrimination against [ ] and [ ] began when he refused to sell them a wedding cake. The humiliation they suffered was compounded when [ ] mother (with whom [ ] was only beginning to develop a relationship that included her mother’s recent acceptance of her sexual orientation) subsequently returned to the bakery to try to reason with Klein, only to have him call her daughter and future daughter-in-law “abominations.” See Final Order at 6, ¶11. The Kleins’ actions, and their devastating effect on [ ] and [ ] along with the many threats and harassment they subsequently faced from a number of people supporting the Kleins’ discriminatory actions, id. at 16-19, are powerful illustrations of the harms that result from anti-LGBT discrimination in places of public accommodation. The state has a strong interest in ensuring that, whether in bakeries or other commercial settings, same-sex couples like [ ] and [ ] are not treated as second-class citizens and denied services because of their sexual orientation. *11 [ ] and [ ] are but one of many same-sex couples in need of this state’s anti-discrimination protections. Oregon’s demographic landscape reveals the extent to which protecting LGBT individuals and same-sex couples is a strong state interest. Oregon is home to a significant LGBT population that would be harmed if discrimination against them were allowed to proliferate in the name of religion. According to an analysis of 2010 U.S. Census data by the Williams Institute at the UCLA School of Law, 11,773 same-sex couples make their home in Oregon, with nearly 2,000 of those couples raising children. Gary J. Gates & Abigail M. Cooke, Oregon Census Snapshot: 2010 at 1, 3 (2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot _Oregon_v2.pdf.

Moreover, marriage is something many same-sex couples desire. In 2010, 2,002 of Oregon’s same-sex couples already were spouses. Gates & Cooke, *12 Oregon Census Snapshot* at 1. That figure doubtless is much higher today, after the U.S District Court of Oregon in *Geiger v. Kitzhaber*, 994 F Supp 2d 1128 (D Or 2014), held Oregon’s ban on marriage for same-sex couples was unconstitutional, and after the right of same-sex couples in every state to marry subsequently was recognized by the Supreme Court. *Obergefell v. Hodges*, 135 S Ct 2584 (2015). See Casey Parks, *The Hate Keeps Coming: Pain Lingers for Lesbian Couple Denied in Sweet Cakes Case*, The Oregonian (July 2, 2016), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/07/sweet_cakes_lesbians.html.

Historically, treatment of same-sex couples and LGBT individuals in Oregon has not been kind. Indeed, Oregon’s ballot initiative history from the past few decades involves repeated attempts to mandate discrimination against LGBT persons in Oregon. These efforts to use the ballot initiative process to compel discrimination in Oregon are so numerous that they have been estimated to outnumber those in all other states. See George T. Nicola, *Oregon Anti-Gay Ballot Measures*, Gay & Lesbian Archives of the Pacific Northwest (April 20, 2013), http://www.glapn.org/6013OregonAntiGayMeasures.html (“Nicola, Oregon Anti-Gay Ballot Measures”).


Although this Court subsequently struck down Measure 8 as unconstitutional, *id.*, numerous other anti-LGBT measures have been proposed over the years in Oregon and have received broad public support. For example, Ballot Measure 9 (1992), titled, “Government Cannot Facilitate, Must Discourage Homosexuality, Other ‘Behaviors,’” provided:

> All governments in Oregon may not use their monies or properties to promote, encourage or facilitate homosexuality, pedophilia, sadism or masochism. All levels of government, including public education systems, must assist in setting a standard for Oregon’s youth which recognizes that these behaviors are abnormal, wrong, unnatural and perverse and they are to be discouraged and avoided.

*See Oregon Bluebook.*

Measure 9 was described as “part of a burgeoning backlash against homosexuals,” and an even more extreme measure than Colorado Amendment 2, which was later the subject of the Supreme Court’s condemnation in *Romer v. *14 Evans*, 517 US 620 (1996). *See Timothy Egan, Oregon Measure Asks State to Repress Homosexuality, N.Y. Times, Aug. 16, 1992, at A34. The Oregon initiative went farther than the Colorado amendment in requiring the state government to actively discourage homosexuality, and even teach that homosexuality is comparable to pedophilia. *Id.* Measure 9 ultimately was defeated, but not before 638,527 voters cast ballots to approve the measure. *See Oregon Bluebook.*

Also in 1992, a town in Oregon, Springfield, by a 55 percent to 45 percent vote, became the first in the nation to include anti-LGBT language in its city charter. Egan, *Oregon Measure Asks State to Repress Homosexuality*. The harassment of LGBT Oregonians in that town increased following the vote. *Id.*

In the aftermath of Measure 9, twenty-nine cities and counties across Oregon considered initiatives prohibiting both sexual orientation civil rights protections and the “promotion of homosexuality” through public
expenditures. See Nicola, Oregon Anti-Gay Ballot Measures. The vast majority of those discriminatory initiatives passed, sometimes by dramatically large margins. See Oregon Bluebook.

The Oregon legislature responded in 2007 by enacting ORS 659.165 (renumbered 659.870 in 2001), which provides:

A political subdivision of the state may not enact or enforce any charter provision, ordinance, resolution or policy granting special rights, privileges or treatment to any citizen or group of citizens on account of sexual orientation, or enact or enforce any charter provision, ordinance, resolution or policy that singles out citizens or groups of citizens on account of sexual orientation.

However, even after the enactment of ORS 659.165, the onslaught of ballot initiatives singling out LGBT persons for negative treatment continued.

In 1994, an initiative titled “Measure 13: Amends Constitution: Governments Cannot Approve, Create Classifications Based on, Homosexuality,” failed by only a 3.1%, margin. See Oregon Bluebook; see also Nicola, Oregon Anti-Gay Ballot Measures.

In 2000, by an only slightly larger margin, voters rejected another anti-LGBT initiative, a second Measure 9, this one subtitled “Prohibits Public School Instruction Encouraging, Promoting, Sanctioning Homosexual, Bisexual Behaviors.” Nicola, Oregon Anti-Gay Ballot Measures. In 2004, by a 13% margin, voters approved Measure 36, which banned marriage for same-sex couples in Oregon. Id.

By 2013, Oregon had adopted 35 anti-LGBT ballot measures, which, as noted above, has been estimated as being “probably more than any other state in the country.” See Nicola, Oregon Anti-Gay Ballot Measures.

In addition to a referendum history revealing substantial hostility toward LGBT Oregonians, there is plentiful anecdotal evidence of anti-LGBT discrimination in Oregon. Such evidence abounds both in the context of public accommodations and more generally.

*16 In the year preceding the enactment of the Oregon Public Accommodations Law, the Governor’s Task Force on Equality in Oregon embarked upon an extensive fact-finding mission across the state gathering evidence to assess the need for sexual orientation and gender identity protections. The report issued by the Task Force emphasized the essential nature of Oregon’s public policy goal of “ensur[ing] the human dignity of all people within this state,” and that “for many years non-discrimination has been the declared public policy of the state.” Governor’s Task Force on Equality in Oregon, Report to Governor at 9-10, 16 (Dec. 15, 2006) http://archivedwebsites.sos.state.or.us/Governor_Kulongoski_2011/governor.oregon.gov/Gov/pdf71etters/TaskforceOnEquality.pdf. The report documented how LGBT Oregonians continue to be “victimized by prejudice or are today denied rights and benefits available to their fellow citizens because of their sexual orientation.” Id. at 11. In conclusion, the Task Force recommended enacting both anti-discrimination laws (including the law that is subject of this case) and civil union protections for same-sex couples. Id. at 3, 18-26.

In reaching these conclusions, the Task Force compiled extensive accounts from LGBT individuals across the state describing the discrimination they had encountered. The Task Force also compiled statements from businesses explaining the need for uniform anti-discrimination laws to alleviate the confusion of an inconsistent patchwork of laws and to make the state globally competitive. See id. at 5-6 and Appx. C; also Hearing on Senate Bill (SB) 2 Before the Oregon Senate *17 Judiciary Committee, Part I (March 12, 2007), http://oregon.granicusxom/MediaPlayer.php?clip_id=15672 via “download audio” link, at 11:55-14:37. In addition, Dr. Delta Ferguson, Women’s Resource Center Director at Southern Oregon University, detailed for the Task Force the multitude of legal and financial difficulties faced by same-sex couples in Oregon that different-sex couples do not face. Id. at 6, 11-12.
Chapter 4—Anatomy of a Civil Rights Case: *Klein dba Sweetcakes by Melissa v. Bureau of Labor & Industries*

The many personal stories Oregonians across the state shared with the Task Force included “the painful story of [a man who was] excluded from his dying partner’s hospital room [after which] that partner’s family removed all of his personal effects from the home they had built together.” *Id.* The Task Force also compiled examples of same-sex couples’ children and aging LGBT individuals being particularly vulnerable to discrimination. *Id.*

The Task Force Report explained that treating LGBT Oregonians with equal respect and offering them protections against discrimination similar to those offered to other groups commonly subject to discrimination is consistent with this state’s strong public policy of promoting equality and preventing discrimination. Without strong, uniform statewide protections, the Task Force reported, the existing patchwork of inconsistent local nondiscrimination ordinances failed to satisfactorily protect Oregonians. *Id.* at 17-26. *See also* March 12, 2007, Hearing, Part I at 17:58-18:06.

*18* The 2007 legislative committee hearings on the Oregon Public Accommodations Law and other legislative proposals to extend legal protections to LGBT people also brought extensive testimony about the discrimination LGBT Oregonians were facing, warranting anti-discrimination protections. The March 12, 2007, hearing before the Oregon Senate Judiciary Committee began with a representative of the Governor’s Task Force for Equality explaining that the Task Force had concluded after extensive investigations that the legislation was necessary because of the large amount of LGBT people suffering from the “scourge of discrimination” which would continue as long as discrimination remained legal in the contexts of housing, employment, and public accommodations (*Id.* at 7:48-18:35). A minister contributed to those findings by testifying about having heard “pain and fear” from LGBT members of the faith community in Oregon again and again (*Id.* at 21:10-23:55). The Commissioner of BOLI testified about 300 cases of anti-gay discrimination that had been brought in Oregon under local anti-discrimination ordinances (*Id.* at 23:55-26:30).

In addition, numerous others testified about their personal experiences with anti-LGBT discrimination. For example, a college student described having suffered verbal harassment and assault because of her sexual orientation, including having been harassed in front of her children. (Hearing on SB 2 Before the Oregon Senate Judiciary Committee, Part II (March 12, 2007), http://oregon.granicus.com/MediaPlayer.php?clip_id=15672, at 1:13:58-1:15:00). *19* A high school student with lesbian parents described the discrimination she had faced from teachers, administrators, and other students who had shunned and ridiculed her because of her parents (*Id.* at 1:25:28-1:26:53). A lesbian college student testified about having been called sinful, an abomination, and undeserving of life, and having witnessed her LGBT friends being harassed to the point one was driven to suicide (*Id.* at 1:37:20-1:39:08). A young bisexual man testified about having been called a “fag” and other pejoratives, and having witnessed harmful abuse against his LGBT friends (*Id.* at 1:39:25-1:41:33). A woman described having had her employment threatened, her house shot at, and having received death threats and other verbal harassment because of her perceived sexual orientation (*Id.* at 1:42:00-1:44:05).

During the April 9, 2007, Committee on Elections, Ethics and Rules hearing, a UCC minister similarly shared the story of two of his parishioners, a gay couple, who had needed to install video monitors and cameras in their front yard to try to stop anti-gay vandalism of their home and cars (Hearing on SB 2 and House Bill (HB) 2007 Before the Oregon House of Representatives, Committee on Elections, Ethics and Rules Testimony (April 9, 2007), http://oregon.granicus.com/MediaPlayer.php?clip_id=17530, at 3:25:30-3:26:54). Another college student described abuse based on her perceived sexual orientation as an everyday occurrence, including her car having been vandalized, her life threatened, and other violence and harassment against her (*Id.* at 4:09:40-4:10:36).

*20* A former high school teacher testified about having been fired because of homophobic discrimination after she tried to help protect LGBT students through work with the Gay Straight Alliance (March 12, 2007, Hearing, Part II, at 1:13:18-1:15:50). Similarly, a former high school theater arts director testified about having suffered sexual orientation discrimination, including having been forced to cancel a planned production of The Laramie Project, a play about the brutal hate crime murder of Matthew Shepard (*Id.* at 1:55:53-1:58:19). Another gay man testified about having been fired from his job for being gay, and, when younger, having been harassed at school.
Another man testified about having been fired from a job after a customer complained he was “too gay” (April 9, 2007, Hearing at 2:28:10-2:29:08). A transgender woman with an illustrious military and law enforcement career testified about having lost her job as a deputy sheriff after her gender identity was revealed and the sheriff declared that she was a “freak” who could no longer perform her duties (Id. at 5:10:45-5:13:38). A state senator shared the story of a constituent, a former high school student whose school principal’s response to anti-gay harassment of the student had been to tell him to drop out of school (March 12, 2007, Hearing, Part II, at 3:33:52-3:34:35). A program coordinator for the Human Dignity Coalition, which provides support for LGBT students, described similar callousness by school administrators. She testified that a high school student in central Oregon had recently attempted suicide after experiencing severe sexual orientation *21 discrimination, including threats to “kill the fags,” which had been dismissed by faculty with a casual “boys will be boys” response (April 9, 2007, Hearing at 3:07:30-3:08:30).

Most pertinently, multiple people testified about having been discriminated against in places of public accommodation because of their sexual orientation or gender identity. For example, a transgender woman testified about having been harassed when she was at a restaurant with her partner (March 12, 2007, Hearing, Part II, at 2:36:35-2:37:12). A transgender man spoke about having felt unsafe traveling within the state of Oregon, and about having felt vulnerable to being refused service at hotels and restaurants (Id. at 2:32:33-2:34:45). A woman who had suffered discrimination because others perceived her as being too masculine testified about having been verbally harangued and refused access to seats on city buses while bus drivers passively allowed the harassment, until the point she had to stop taking the bus. She also testified about physical and verbal harassment she had experienced on public sidewalks (Id. at 2:42:25-2:44:35).

A lesbian state representative testified about having been personally discriminated against by a bank that told her to take her money elsewhere when she tried to open up a joint bank account with her same-sex partner. She also testified about the public accommodations discrimination reported to her by her LGBT constituents, including in the contexts of restaurants and lodging (April 9, 2007 Hearing at 2:18:20-2:18:40).

*22 An Oregon CEO with a gay daughter described how his daughter and her partner had been refused service at an inn. He testified that the two had saved money to celebrate their anniversary and made a reservation in advance, but when they had arrived at their destination after driving for six hours and revealed they were there to celebrate their anniversary, the desk clerk had told them there was no room in the inn after all. This despite their having made a reservation in advance, having a confirmation number, and arriving at the agreed-upon time. “The message could not have been more clear: lesbians were not welcome,” the father testified (Id. at 2:25:07-2:26:00).

A mother who co-parents her son with her same-sex partner testified about a frightening and traumatic day when her son had suffered a head injury and was rushed to the hospital. After the two mothers had ensured their seriously injured child was admitted to the hospital, only one mother was then allowed to be by his side. The other mother was turned away, and told that “only one mother” was allowed in his hospital room with him (Id. at 2:52:18-2:53:50).

These examples are among many others about anti-LGBT discrimination in public accommodations settings across the state presented through testimony to the legislature (see, e.g, March 12, 2007, Hearing, Part II, at 2:47:05-2:48:18; 3:19:41:-50).

On the other side, those opposed to legal protections for LGBT Oregonians testified for hours, and at times making inflammatory attacks, with their testimony *23 actually underscoring the need for anti-discrimination protections. Much of the testimony from LGBT-rights opponents revealed deep animus toward LGBT individuals framed in terms of religious doctrine. For example, a former state senator engaged in heated, defamatory smears against LGBT people, arguing that the life expectancy of gay people is forty years and that gay people - who he asserted are “identified only by the sexual practice that they engage in” - will “force their moral values upon the rest of us” and pose a huge cost to the government. (March 12, 2007, Hearing, Part I, at 1:33:15-1:38:40) He concluded that
protecting LGBT rights is an assault on Christianity. *Id.* Others testified that legislation protecting the “homosexual lifestyle” will “destroy our young people” (March 12, 2007, Hearing, Part II at 44:18-45:24). One man testified that enacting anti-discrimination protections amounts to “legisl[at]ing morality,” and “forc[ing] me … to take on their lifestyle, and that is absolutely abhorrent to me” (*Id.* at 1:20:1-1:21:08). A school teacher, implying a false dichotomy between being a Christian child and being an LGBT child, testified inaccurately that Christian children suffer worse harassment than gay children*2 and that child molesters are *24 more likely to be homosexual than heterosexual*3 (March 12, 2007, Hearing, Part II at 1:48:55-1:52:38).

Some testified from explicit religious perspectives. For example, a self-described former pastor from a Communist country testified that “in Sodom and Gomorrah there was lesbianism and they burned. And I proclaim, God Bless America. America will not burn; you will not pass this bill” (*Id.* at 3:13:00-3:14:30).

A woman with an advocacy group for Roman Catholic activists in Oregon testified similarly, calling legal protections against sexual orientation discrimination tantamount to protecting “every form of sexual expression and behavior, no matter how disordered,” and opining that the meaning of “sexual *25 orientation” under anti-discrimination bills seemed to her to be “based on what gives a person sexual pleasure, animal, vegetable, or mineral” and on the “subjective world of pleasing one’s genitals.” She testified that the purpose of LGBT-rights protections under civil rights laws was to “sexually indoctrinate children from the earliest age” by giving LGBT people harmful access to innocent children. (*Id.* at 2:27:32-2:29:40).

Testimony before the Committee on Elections, Ethics and Rules included statements that “Homosexuality is considered normal; the next group they will demand be called normal will be pedophiles. Studies show that pedophiles are more common among homosexuals than heterosexuals…. Homosexuality is not normal but is an illness, or perversion of nature” (April 9, 2007, Hearing at 3:01:40-3:02:22) and that gays “prey on our children” and “are going against what the Bible says directly against them” (*Id.* at 3:05:12-3:05:28). Other testimony included that “giving a lifestyle a preferred status” leads to men trying to marry their dogs (*Id.* at 3:36:35-3:37:02).

This testimony evidencing widespread animus and discrimination against LGBT people is just the tip of the iceberg. As discussed, there have been 300 anti-LGBT discrimination cases brought to BOLI (March 12, 2007, Hearing, Part I, at 23:55-26:30). In addition, other cases evidencing Oregon’s unfortunate history of anti-LGBT discrimination have worked their way through Oregon courts. This Court itself recognized in *Tanner* that because “homosexuals in our society have *26 been and continue to be the subject of adverse social and political stereotyping and prejudice,” sexual orientation classifications are “suspect.” *Tanner v. Or. Health Scis Univ.*, 157 Or App 502, 524, 97 P2d 435 (1998) (holding the university’s denial of health care benefits to same-sex partners of employees was unconstitutional).

*Tanner*, along with other cases in Oregon and across the country,*4 confirm the state’s critical interest in the prevention and remediation of discrimination, even in the face of religious objections. Other significant Oregon cases in which this Court recognized the harmful nature of anti-LGBT discrimination have included, for example, *Wheeler v. Marathon Printing, Inc.*, 157 Or App 290, 974 P2d 207 (1998); and *Whelan v. Albertson’s*, 129 Or App 501, 879 P2d 888 (1994).

In *Wheeler*, an employee victimized by anti-gay discrimination was subject to frequent obscene gestures and comments, including being called a “zit nose faggot” and a “crazy lunatic faggot.” He was driven by the harassment to severe depression with suicidal ideations, and, eventually, lost his job because of it. *Wheeler*, 157 Or App at 293-95. In *Whelan*, a security guard was harassed for being perceived as gay. The harassment included being called a “fucking queer asshole,” questioned about his sex life, and physically assaulted. *Whelan*, 129 Or App at 503-04.

*27 In a public accommodations context specifically, this Court affirmed the importance of protecting LGBT Oregonians against discrimination by a business owner in *Blachana, LLC v. Oregon Bureau of Labor & Industries*, 273 Or App 806, 359 P3d 574 (2015). In *Blachana*, this Court upheld a BOLI order concluding that a bar had unlawfully discriminated against a social group because of the sexual orientation of its members. After the group
had a gathering at the bar, the bar asked them not to meet there again because “People think that (a) we’re a tranny bar or (b) that we’re a gay bar. We are neither. People are not coming in because they just don’t want to be there on a Friday night now ...”. Id. at 810.


Religious reinforcement of anti-LGBT bias and discrimination often increases the negative impact on mental health. See Ilan H. Meyer, Merilee Teylan & Sharon Schwartz, The Role of Help-Seeking in Preventing Suicide Attempts among Lesbians, Gay Men, and Bisexuals, 1-12, Suicide and Life-Threatening Behavior (2014) (journal of The American Association of Suicidology) (research shows anti-gay messages from religious leaders or organizations increases severe mental health reactions), https://www.researchgate.net/publication/262308758_The_Role_of_Help-Seeking_in_Preventing_Suicide_Attempts_among_Lesbians_Gay_Men_and_Bisexuals.

*29 Although, as the government has explained, strict scrutiny does not apply in this case, even if this Court were to conclude that a higher degree of scrutiny did apply, the state’s strong (indeed, compelling) interest in ending discrimination, under any level of scrutiny, justifies enforcing its antidiscrimination protections and not rendering them toothless by the religious exemption sought in this case.


In the United States, differing religious beliefs about family life and gender roles often have generated disputes not only in public accommodations, but also in education, employment, medical services, and other arenas. Although some forms of religiously motivated discrimination have receded, history finds successive generations asking anew whether protections for religious liberty provide exemptions from laws protecting others’ liberty and right to participate equally in civic life. Courts have provided a consistent answer to that question: Religious beliefs do not entitle any of us to exemptions from generally applicable laws protecting all of us.

The Supreme Court has described free exercise defenses to antidiscrimination law as “so patently frivolous that a denial of counsel fees to the [plaintiffs] would be manifestly inequitable.” Newman v. Piggie Park Enters., Inc., 390 US 400, 403 n.5 (1968) (referring to argument that Civil Rights Act of 1964 *30 “constitutes an interference with the ‘free exercise of the Defendant’s religion’” (internal citation omitted)).
Throughout the ages, however, opponents of civil rights for various groups frequently have invoked religion as a reason to perpetuate discrimination. During the past century’s struggles over racial integration, some Christian schools excluded Black applicants based on the view that “mixing of the races is regarded as a violation of God’s command.” See Bob Jones Univ. v. United States, 461 US 574, 580, 583 n.6 (1983). Some restaurant owners refused to serve Black customers, citing religious objections to “integration of the races.” See Newman v. Piggie Park Enters., Inc., 256 F Supp 941, 944-45 (DSC 1966), rev’d 377 F2d 433 (4th Cir 1967), aff’d, 390 US 400 (1968). Religion also was used to justify laws and policies against interracial relationships and marriage. See Loving v. Virginia, 388 US 1, 3 (1967) (invalidating state interracial marriage ban where trial judge had opined that “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents” and therefore “did not intend for the races to mix”); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F Supp 1363 (SDNY 1975) (holding that free exercise clause could not excuse church’s violation of Civil Rights Act for firing white clerk for her friendship with a black man).

Likewise, as women entered the workplace, some objected on religious grounds and sought exemptions from employment non-discrimination laws. *31 Despite the longstanding religious traditions on which such claims often were premised, courts recognized that accommodating religious objections would vitiate the antidiscrimination protections on which workers are entitled to depend. See, e.g., EEOC v. Fremont Christian Sch., 781 F2d 1362, 1367-69 (9th Cir 1986) (rejecting religious school’s argument that free exercise clause excused offering unequal spousal benefits to female employees).

Similarly, after state and local governments enacted fair housing laws that protected unmarried couples, landlords unsuccessfully sought exemptions on the belief that they themselves commit sin by providing residences in which tenants might commit fornication. See, e.g., Smith v. Fair Emp’t and Hous. Comm’n, 12 Cal 4th 1143, 913 P2d 909, 928-29 (Cal 1996) (rejecting religion-based defenses because antidiscrimination requirements did not impose substantial burden, as landlord’s religion did not require investing in rental apartments); Swanner v. Anchorage Equal Rights Comm’n, 874 P2d 274, 279-80 (Alaska 1994) (same).

Thus, across generations, the question already has been asked and answered with reassuring consistency. Courts have consistently over time recognized the public’s abiding interests in fair access and peaceful co-existence in the marketplace, which requires protecting all members of society in their access to public accommodations, regardless of discriminatory beliefs any given business owner may have about particular groups of people.

*32 Today, these interests are tested once again as LGBT people seek full participation in American life. While some businesses and their owners have raised religious objections to interacting with LGBT people in the marketplace and argue for religious exemptions, courts have remained true to the principle that the need to prevent discrimination remains a constraint on religiously motivated conduct in commercial contexts. See, e.g., Gifford v. McCarthy, 23 NYS3d 422, 137 AD3d 30 (NY App Div 2016) (rejecting free speech and free exercise arguments of event venue owners who refused to rent facility for wedding of same-sex couple); Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, 370 P3d 272 (Colo App 2015) (same for bakery that refused wedding cake requested by same-sex couple); North Coast Women’s Care Med. Grp., Inc. v. Superior Court, 44 Cal 4th 1145, 189 P3d 959 (Cal 2008) (same for infertility physicians refusing to treat member of lesbian couple); Hyman v. City of Louisville, 132 F Supp 2d 528, 539-40 (WD Ky 2001) (rejecting physician’s religious justifications for refusing to employ gay people), vacated on other grounds, 53 Fed Appx 740 (6th Cir 2002); see also Bodett v. Coxcom, Inc., 366 F3d 736 (9th Cir 2004) (rejecting religious discrimination claim of supervisor terminated for religiously harassing lesbian subordinate); Peterson v. Hewlett-Packard Co., 358 F3d 599 (9th Cir 2004) (rejecting religious discrimination claim of employee terminated for antigay proselytizing intended to provoke coworkers); Knight v. Conn. Dep’t. of Pub. Health, 275 F.3d 156 (2d Cir 2001) (holding nurse not entitled to proselytize to homebound AIDS patient); Erdmann v. Tranquility, Inc., 155 F Supp 2d 1152 (ND Cal 2001) (holding that gay employee could proceed with harassment claim where supervisor had told the employee he would “go to hell” and pressured the employee to attend workplace prayers).
Perpetuating anti-LGBT discrimination in the context of the denial of public accommodations humilates and reinforces stigma against same-sex couples. When the Kleins refused to provide its wedding cake services to [], and despite routinely providing wedding cakes to different-sex couples of all faiths, they imposed precisely the sort of “exclusion that ... demeans [and] stigmatizes.” Obergefell, 135 S Ct at 2602. See also Douglas NeJaime, Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 Yale L.J. 2516, 2574-78 (2015) (discussing how complicity-based conscience claims result in increased dignitary harms to the third parties targeted by such claimed exemptions).

The Kleins’ discrimination against [], is part of a broader pattern of business proprietors in states throughout the country claiming religious rights to deny public accommodations to LGBT customers - including by refusing to provide not just wedding cakes, but also facility rentals, and other wedding services. See, e.g., Bob Brawdy, State Supreme Court to Hear Arlene’s Flowers Case, Bellingham Herald (Mar. 3, 2016), http://www.bellinghamherald.com/news/state/washington/article63870252.html (flowers); Sharyn Jackson, Gortz Haus *34 Owners File Suit Against Iowa Civil Rights Commission, Des Moines Register (Oct. 8, 2013), http://perma.cc/B9MB-NRN2 (event venue); Douglas Dowty, Gay Couple: Otisco B&B Refused to Host Wedding; Business: We Don’t Discriminate, Syracuse.com (July 2, 2015), http://www.syracuse.com/crime/index.ssf/2015/07/gay_couple_otisco_bb_refused_to_host_wedding_business_we_dont_discriminate.html (event venue).


Most pertinent is a case with facts that parallel those in this case, Craig v. Masterpiece Cakeshop. In that case, as in this one, a bakery refused to provide a wedding cake for a same-sex couple and then claimed a religious exemption from the state’s public accommodations laws. Craig, 370 P3d at 276-77. As in this *35 case, the same-sex couple in Craig never got to the point of specifying what the design on their cake would be before being told the bakery would not provide them with a cake for a same-sex wedding reception. Id. at 276. As in this case, the bakery owner in Craig argued that his refusal to provide a cake to the same-sex couple was because of opposition to same-sex couples marrying, not to the couple’s sexual orientation. However, the Court rejected that argument, finding there was not a meaningful difference between same-sex couples marrying and having a same-sex sexual orientation. Id. at 279. The Colorado court also rejected another distinction the bakery attempted to make that parallels one of the Kleins’ in the instant case: the distinction between discriminating on the basis of status and on the basis of conduct. Id. at 280-81. That distinction, the Colorado court pointed out, is one that the United States Supreme Court explicitly rejected in Christian Legal Society v. Martinez, 561 US 661, 689 (2010). Id.

The Craig court’s treatment of the asserted constitutional defenses in that case, which parallel those asserted here, can provide guidance to this Court. Craig first rejected the claim that baking and selling wedding cakes is expressive conduct within the meaning of constitutional free speech protections. The court explained that “to 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” and that “Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law *36 and serving its customers equally.” Craig, 370 P3d at 286. Importantly, the Craig court cited Rumsfeld v. FAIR, in which the United States Supreme Court explained that observers of the schools’ conduct in that case (allowing military recruiters on campus despite the schools’ objection to the military’s exclusion of gays, lesbians and bisexuals) “can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do
so.” Craig, 370 P3d at 286, quoting Rumsfeld v. Forum for Acad. and Institutional Rights, Inc., 547 US. 47, 65 (2006). Craig also rejected the free exercise defenses raised in that case, because public accommodations laws are neutral laws of general applicability, and cases such as this do not involve “hybrid” rights. See id. at 292. The Colorado court further explained, “[a] law need not apply to every individual and entity to be generally applicable; rather, it is generally applicable so long as it does not regulate only religiously motivated conduct.” Id. at 290-91, citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 US 520, 542-43 (1993). Because the public accommodations anti-discrimination law applied equally to all business establishments without targeting religion-based conduct, it was a neutral law of general applicability. Id.

*37 This Court should adopt the highly persuasive reasoning of the Colorado court in Craig on all counts.5

Additional precedent from the United States Supreme Court further compels rejecting the use of free exercise claims as a sword wielded against discrimination law compliance, and, as a result, against third parties who suffer from the resulting discrimination. Given our nation’s history, most Americans have come to recognize that being told “we don’t serve your kind here” is discrimination that not only inflicts immediate dignitary harm on those rejected, but also stigmatizes the entire disparaged group and corrodes our civil society. This is true today in the context of LGBT issues as it was last century in the context of race discrimination.

The United States Supreme Court unequivocally has held that non-discrimination laws “serve[] compelling state interests of the highest order.” Roberts v. U.S. Jaycees, 468 US 609, 624 (1984) (upholding enforcement of Minnesota public accommodations law). In the context of public accommodations, specifically, the Supreme Court also has acknowledged the “moral and social wrong” of discrimination. Heart of Atlanta Motel v. United States, 379 US 241, 257 (1964).

*38 That religion might motivate the discriminatory act does not mitigate the harm. Time and again, as discussed above, religion has been proffered to excuse invidious discrimination. Given the immense demographic diversity and religious pluralism of our nation, the law must remain crystal clear: each person’s religious liberty ends where legally prohibited harm to another begins. That well-settled principle of American law must apply equally with regard to invocations of religious belief, whether urged to justify racial, gender, or marital status discrimination or discrimination based on sexual orientation. Religious liberty cannot shield invidious deprivations of another’s basic rights. Our shared pledge calling for “liberty and justice for all” demands nothing less.

The exemption the Kleins seek here would mark a sea change, opening the door to similar denials of goods and access to services, and to other inequitable treatment of LGBT people, persons living with HIV, and anyone else whose family life or minority status is disfavored by a merchant’s asserted religious convictions. Many business owners hold religious and other beliefs that guide their lives. Permitting those engaged in for-profit commerce to apply religion to decide which would-be customers they will serve not only would embolden other businesses to do the same, but would subvert the compelling state interests in equality served by the Oregon Public Accommodations Law. The Kleins offer no limiting principle and, indeed, there is none. Religious critiques of marriage for same-sex couples can be leveled just as easily at interracial and interfaith marriage, at all same-sex *39 relationships, at heterosexual cohabitation, at divorce, at contraception, sterilization, and infertility care, at unwed motherhood, and at innumerable other personal decisions about family life.

Moreover, the “go elsewhere” approach the Kleins defend will not stay confined to discrimination on the basis of such family relationships or decisions. The notion that the owner of a commercial business sins by engaging in a commercial transaction with a “sinful” customer could apply just as well to transactions concerning any goods or services, medical care, housing, or employment. Acceptance of the Kleins’ arguments would eviscerate bedrock doctrine that has been reaffirmed consistently over time. The settled approach permits and encourages a flourishing coexistence of the diverse religious, secular, and other belief systems that animate our nation while ensuring equal opportunity for everyone in the public marketplace. The proposed alternative would transform that marketplace into segregated dominions within which each business owner with religious convictions “become[s] a law unto himself,” Smith, 494 US at 879, and would force members of minority groups to suffer the
harm and indignities of being required to go from shop to shop searching for places where they will not be treated as pariahs.

The Oregon Public Accommodations Law provides critically needed protections against discrimination, including discrimination against same-sex couples by for-profit businesses. Allowing religiously motivated discrimination in *40 secular commerce would obliterate essential antidiscrimination protections in contexts going well beyond same-sex couples and their weddings.

Oregon enacted its antidiscrimination laws to protect vulnerable members of our diverse society from discrimination in public life regardless of others’ religious reasons for wanting to refuse them goods, services, or other benefits offered to everyone else. Despite this country’s long history recognizing that religious exemptions to civil rights laws would eviscerate such laws, the Kleins nonetheless ask this Court to let them single out LGBT individuals and same-sex couples for rejection, humiliation, and stigma as they operate their businesses. The answer must be “no.”

CONCLUSION

For the foregoing reasons, Amici Curiae [ ] and [ ] and Lambda Legal respectfully asks this Court to affirm the July 2, 2015, order of the Oregon Bureau of Labor and Industries.

Dated: August 29, 2016

Respectfully submitted,

By:

STEFAN C. JOHNSON*

OSB No. 923480

LAMBDA LEGAL DEFENSE AND

EDUCATION FUND, INC.

4221 Wilshire Boulevard, Suite 280

Los Angeles, CA 90010

Telephone: 213.382.7600

*41 Email: sjohnson@lambdalegal.org

Counsel for Amici Curiae

[ ] and Lambda Legal Defense and Education Fund, Inc.

*Counsel for amici curiae acknowledges the significant contributions to this brief of Lambda Legal senior attorneys Nancy C. Marcus and Jennifer C. Pizer.
Footnotes

1. Admitted pro hac vice

As Justice Souter has pointed out, if a hybrid exception existed, it would have applied in Smith itself, where the peyote ritual at issue implicated both speech and associational rights. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 US 520, 567 (1993). Yet Smith applied no such exception. Thus, the United States Supreme Court’s reference to hybrid claims seems little more than a respectful nod at now-obsolete cases. See Knight v. Conn. Dep’t of Pub. Health, 275 F3d 157, 167 (2d Cir. 2001) (describing Smith’s hybrid reference as “dicta and not binding on this court” and declining to apply such analysis); Kissinger v. Bd. of Trustees of Ohio State Univ., 5 F3d 177 180 (6th Cir. 1993) (describing hybrid exception as “completely illogical” and declining to apply it).

Law review commentators likewise have looked askance at any hybrid exception. See, e.g., Note, William L. Esser IV, Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?, 74 Notre Dame L. Rev. 211, 242-243 (1998) (concluding that hybrid exception accomplishes little because lower courts find hybrid rights to exist only when the religious litigant would win anyway based on the other asserted constitutional right); Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1122 (1990) (concluding that “a legal realist would tell us ... that the Smith Court’s notion of hybrid claims was not intended to be taken seriously”).

2. In fact, however, recent studies reveal that “[b]ullying and homophobic victimization occur more frequently among LGBT youth in American schools than among students who identify as heterosexual” and that “84.6% of LGBT students reported being verbally harassed [in a 2009 survey],” and “40.1% reported being physically assaulted at school in the past year because of their sexual orientation.” See Dorothy L. Espelage, Bullying and the Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Community, in White House 2011 Conference on Bullying Prevention, http://www.stopbullying.gov/at-risk/groups/lgbt/white_house_conference_materials.pdf at 65. See also GLSEN School Climate in Oregon 2013 State Snapshot, https://www.glsen.org/sites/default/files/GLSEN2013_OregonStateSnapshot.pdf at 1 (finding that 70% of LGBT students in Oregon had experienced verbal harassment and 33% had experienced physical bullying due to their sexual orientation in 2013); GLSEN The 2013 National School Climate Survey, http://www.glsen.org/sites/default/files/20130NationalSchoolClimateSurvey00FullReport_0.pdf at 22-23 (Oregon statistics are in line with national average of 74.1 of LGBT students having been verbally harassed and 32.6 % having been physically harassed due to their sexual orientation).


Cases from states other than Oregon are discussed in the following section of this brief.

Note that the Kleins appear to be confused in their description of Craig, especially in their puzzling citation of footnote 8 of the Craig opinion. In that footnote, the Colorado court distinguished the same-sex wedding cake case from a case in which a refusal to bake a cake was determined to be justifiable because the customer had requested specific derogatory text of “offensive nature.” Compare Pet. Br. at 28 with Craig, 370 P3d at 282, n.8.
MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS
v.
COLORADO CIVIL RIGHTS COMMISSION, ET AL.

No. 16-111

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017
Argued December 5, 2017
June 4, 2018

(Slip Opinion)

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

CERTIORARI TO THE COURT OF APPEALS OF COLORADO

Masterpiece Cakeshop, Ltd., is a Colorado bakery owned and operated by Jack Phillips, an expert baker and devout Christian. In 2012 he told a same-sex couple that he would not create a cake for their wedding celebration because of his religious opposition to same-sex marriages—marriages that Colorado did not then recognize—but that he would sell them other baked goods, e.g., birthday cakes. The couple filed a charge with the Colorado Civil Rights Commission (Commission) pursuant to the Colorado Anti-Discrimination Act (CADA), which prohibits, as relevant here, discrimination based on sexual orientation in a “place of business engaged in any sales to the public and any place offering services . . . to the public.” Under CADA’s administrative review system, the Colorado Civil Rights Division first found probable cause for a violation and referred the case to the Commission. The Commission then referred the case for a formal hearing before a state Administrative Law Judge (ALJ), who ruled in the couple’s favor. In so doing, the ALJ rejected Phillips’ First Amendment claims: that requiring him to create a cake for a same-sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion. Both the Commission and the Colorado Court of Appeals affirmed.


(a) The laws and the Constitution can, and in some instances must, protect gay persons and gay couples in the exercise of their civil rights, but religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. See Obergefell v. Hodges, 576 U. S. ____, ____. While it is unexceptional
that Colorado law can protect gay persons in acquiring products and services on the same terms and conditions as are offered to other members of the public, the law must be applied in a manner that is neutral toward religion. To Phillips, his claim that using his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation, has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. His dilemma was understandable in 2012, which was before Colorado recognized the validity of gay marriages performed in the State and before this Court issued United States v. Windsor, 570 U. S. 744, or Obergefell. Given the State’s position at the time, there is some force to Phillips’ argument that he was not unreasonable in deeming his decision lawful. State law at the time also afforded storekeepers some latitude to decline to create specific messages they considered offensive. Indeed, while the instant enforcement proceedings were pending, the State Civil Rights Division concluded in at least three cases that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. Phillips too was entitled to a neutral and respectful consideration of his claims in all the circumstances of the case. Pp. 9-12.

(b) That consideration was compromised, however, by the Commission’s treatment of Phillips’ case, which showed elements of a clear and impermissible hostility toward the sincere religious beliefs motivating his objection. As the record shows, some of the commissioners at the Commission’s formal, public hearings endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, disparaged Phillips’ faith as despicable and characterized it as merely rhetorical, and compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. No commissioners objected to the comments. Nor were they mentioned in the later state-court ruling or disavowed in the briefs filed here. The comments thus cast doubt on the fairness and impartiality of the Commission’s adjudication of Phillips’ case.

Another indication of hostility is the different treatment of Phillips’ case and the cases of other bakers with objections to anti-gay messages who prevailed before the Commission. The Commission ruled against Phillips in part on the theory that any message on the requested wedding cake would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the cases involving requests for cakes depicting anti-gay marriage symbolism. The Division also considered that each bakery was willing to sell other products to the prospective customers, but the Commission found Phillips’ willingness to do the same irrelevant. The State Court of Appeals’ brief discussion of this disparity of treatment does not answer Phillips’ concern that the State’s practice was to disfavor the religious basis of his objection. Pp. 12-16.

(c) For these reasons, the Commission’s treatment of Phillips’ case violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. The government, consistent with the Constitution’s guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520. Factors relevant to the assessment of governmental neutrality include “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members
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of the decisionmaking body.” *Id.*, at 540. In view of these factors, the record here demonstrates that the Commission’s consideration of Phillips’ case was neither tolerant nor respectful of his religious beliefs. The Commission gave “every appearance,” *id.*, at 545, of adjudicating his religious objection based on a negative normative “evaluation of the particular justification” for his objection and the religious grounds for it, *id.*, at 537, but government has no role in expressing or even suggesting whether the religious ground for Phillips’ conscience-based objection is legitimate or illegitimate. The inference here is thus that Phillips’ religious objection was not considered with the neutrality required by the Free Exercise Clause. The State’s interest could have been weighed against Phillips’ sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. But the official expressions of hostility to religion in some of the commissioners’ comments were inconsistent with that requirement, and the Commission’s disparate consideration of Phillips’ case compared to the cases of the other bakers suggests the same. Pp. 16-18.

370 P. 3d 272, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, ALITO, KAGAN, and GORSUCH, JJ., joined. KAGAN, J., filed a concurring opinion, in which BREYER, J., joined. GORSUCH, J., filed a concurring opinion, in which ALITO, J., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.

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Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

JUSTICE KENNEDY delivered the opinion of the Court.

In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop’s owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages—marriages the State of Colorado itself did not recognize at that time. The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.

The Commission determined that the shop’s actions violated the Act and ruled in the couple’s favor. The Colorado state courts affirmed the ruling and its enforcement order, and this Court now must decide whether the Commission’s order violated the Constitution.
The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.

One of the difficulties in this case is that the parties disagree as to the extent of the baker’s refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker’s creation can be protected, these details might make a difference.

The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker’s refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.

Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality. The reason and motive for the baker’s refusal were based on his sincere religious beliefs and convictions. The Court’s precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission’s actions here violated the Free Exercise Clause; and its order must be set aside.
Masterpiece Cakeshop, Ltd., is a bakery in Lakewood, Colorado, a suburb of Denver. The shop offers a variety of baked goods, ranging from everyday cookies and brownies to elaborate custom-designed cakes for birthday parties, weddings, and other events.

Jack Phillips is an expert baker who has owned and operated the shop for 24 years. Phillips is a devout Christian. He has explained that his “main goal in life is to be obedient to” Jesus Christ and Christ’s “teachings in all aspects of his life.” App. 148. And he seeks to “honor God through his work at Masterpiece Cakeshop.” Ibid. One of Phillips’ religious beliefs is that “God’s intention for marriage from the beginning of history is that it is and should be the union of one man and one woman.” Id., at 149. To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.

Phillips met Charlie Craig and Dave Mullins when they entered his shop in the summer of 2012. Craig and Mullins were planning to marry. At that time, Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception for their family and friends in Denver. To prepare for their celebration, Craig and Mullins visited the shop and told Phillips that they were interested in ordering a cake for “our wedding.” Id., at 152 (emphasis deleted). They did not mention the design of the cake they envisioned.

Phillips informed the couple that he does not “create” wedding cakes for same-sex weddings. Ibid. He explained, “I’ll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same sex weddings.” Ibid. The couple left the shop without further discussion.

The following day, Craig’s mother, who had accompanied the couple to the cakeshop and been present for their interaction with Phillips, telephoned to ask Phillips why he had declined to serve her son. Phillips explained that he does not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage, and also because Colorado (at that time) did not recognize same-sex marriages. Id., at 153. He later explained his belief that “to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into.” Ibid. (emphasis deleted).

For most of its history, Colorado has prohibited discrimination in places of public accommodation. In 1885, less than a decade after Colorado achieved statehood, the General Assembly passed “An Act to Protect All Citizens
in Their Civil Rights,” which guaranteed “full and equal enjoyment” of certain public facilities to “all citizens,” “regardless of race, color or previous condition of servitude.” 1885 Colo. Sess. Laws pp. 132-133. A decade later, the General Assembly expanded the requirement to apply to “all other places of public accommodation.” 1895 Colo. Sess. Laws ch. 61, p. 139.

Today, the Colorado Anti-Discrimination Act (CADA) carries forward the state’s tradition of prohibiting discrimination in places of public accommodation. Amended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation as well as other protected characteristics, CADA in relevant part provides as follows:

“It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.” Colo. Rev. Stat. §24-34-601(2)(a) (2017).

The Act defines “public accommodation” broadly to include any “place of business engaged in any sales to the public and any place offering services . . . to the public,” but excludes “a church, synagogue, mosque, or other place that is principally used for religious purposes.” §24-34-601(1).

CADA establishes an administrative system for the resolution of discrimination claims. Complaints of discrimination in violation of CADA are addressed in the first instance by the Colorado Civil Rights Division. The Division investigates each claim; and if it finds probable cause that CADA has been violated, it will refer the matter to the Colorado Civil Rights Commission. The Commission,

in turn, decides whether to initiate a formal hearing before a state Administrative Law Judge (ALJ), who will hear evidence and argument before issuing a written decision. See §§24-34-306, 24-4-105(14). The decision of the ALJ may be appealed to the full Commission, a seven-member appointed body. The Commission holds a public hearing and deliberative session before voting on the case. If the Commission determines that the evidence proves a CADA violation, it may impose remedial measures as provided by statute. See §24-34-306(9). Available remedies include, among other things, orders to cease-and-desist a discriminatory policy, to file regular compliance reports with the Commission, and “to take affirmative action, including the posting of notices setting forth the substantive rights of the public.” §24-34-605. Colorado law does not permit the Commission to assess money damages or fines. §§24-34-306(9), 24-34-605.

C

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips in August 2012, shortly after the couple’s visit to the shop. App. 31. The complaint alleged that Craig and Mullins had been denied “full and equal service” at the bakery because of their sexual orientation, id., at 35, 48, and that it was Phillips’ “standard business practice” not to provide cakes for same-sex weddings, id., at 43.
The Civil Rights Division opened an investigation. The investigator found that “on multiple occasions,” Phillips “turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception” because his religious beliefs prohibited it and because the potential customers “were doing something illegal” at that time. *Id.*, at 76. The investigation found that Phillips had declined to sell custom wedding cakes to about six other same-sex couples on this basis. *Id.*, at 72. The investigator also recounted that, according to affidavits submitted by Craig and Mullins, Phillips’ shop had refused to sell cupcakes to a lesbian couple for their commitment celebration because the shop “had a policy of not selling baked goods to same-sex couples for this type of event.” *Id.*, at 73. Based on these findings, the Division found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission. *Id.*, at 69.

The Commission found it proper to conduct a formal hearing, and it sent the case to a State ALJ. Finding no dispute as to material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple’s favor. The ALJ first rejected Phillips’ argument that declining to make or create a wedding cake for Craig and Mullins did not violate Colorado law. It was undisputed that the shop is subject to state public accommodations laws. And the ALJ determined that Phillips’ actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage as Phillips contended. App. to Pet. for Cert. 68a-72a.

Phillips raised two constitutional claims before the ALJ. He first asserted that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed. The ALJ rejected the contention that preparing a wedding cake is a form of protected speech and did not agree that creating Craig and Mullins’ cake would force Phillips to adhere to “an ideological point of view.” *Id.*, at 75a. Applying CADA to the facts at hand, in the ALJ’s view, did not interfere with Phillips’ freedom of speech.

Phillips also contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First Amendment. Citing this Court’s precedent in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), the ALJ determined that CADA is a “valid and neutral law of general applicability” and therefore that applying it to Phillips in this case did not violate the Free Exercise Clause. *Id.*, at 879; App. to Pet. for Cert. 82a-83a. The ALJ thus ruled against Phillips and the cakeshop and in favor of Craig and Mullins on both constitutional claims.

The Commission affirmed the ALJ’s decision in full. *Id.*, at 57a. The Commission ordered Phillips to “cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples.” *Ibid.* It also ordered additional remedial measures, including “comprehensive staff training on the Public Accommodations section” of CADA “and changes to any and all company policies to comply with
... this Order.” Id., at 58a. The Commission additionally required Phillips to prepare “quarterly compliance reports” for a period of two years documenting “the number of patrons denied service” and why, along with “a statement describing the remedial actions taken.” Ibid.

Phillips appealed to the Colorado Court of Appeals, which affirmed the Commission’s legal determinations and remedial order. The court rejected the argument that the “Commission’s order unconstitutionally compels” Phillips and the shop “to convey a celebratory message about same sex marriage.” Craig v. Masterpiece Cakeshop, Inc., 370 P. 3d 272, 283 (2015). The court also rejected the argument that the Commission’s order violated the Free Exercise Clause. Relying on this Court’s precedent in Smith, supra, at 879, the court stated that the Free Exercise Clause “does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability” on the ground that following the law would interfere with religious practice or belief. 370 P. 3d, at 289. The court concluded that requiring Phillips to comply with the statute did not violate his free exercise rights. The Colorado Supreme Court declined to hear the case.

Phillips sought review here, and this Court granted certiorari. 582 U. S. ___ (2017). He now renew his claims under the Free Speech and Free Exercise Clauses of the First Amendment.

II

A

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in Obergefell v. Hodges, 576 U. S. ___ (2015), “[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.” Id., at ___ (slip op., at 27). Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. See Newman v. Piggy Park Enterprises, Inc., 390 U. S. 400, 402, n. 5 (1968) (per curiam); see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U. S. 557, 572 (1995) (“Provisions like these are well within the State’s usual power to enact when a legislature has reason to

believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments”).
When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court’s precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law. See Tr. of Oral Arg. 4-7, 10.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers’ rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Phillips’ dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of service all occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages performed in its own State. See Colo. Const., Art. II, §31 (2012); 370 P. 3d, at 277. At the time of the events in question, this Court had not issued its decisions either in United States v. Windsor, 570 U. S. 744 (2013), or Obergefell. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.

At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. Indeed, while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases

There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying “no goods or services will be sold if they will be used for gay marriages,” something that would impose a serious stigma on gay persons. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

B

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission’s treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

That hostility surfaced at the Commission’s formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips’ case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado’s business community. One commissioner suggested that Phillips can believe “what he wants to believe,” but cannot act on his religious beliefs “if he decides to do business in the state.” Tr. 23. A few moments later, the commissioner restated the same position: “[I]f a businessman wants to do business in the state and he’s got an issue with the—the law’s impacting his personal belief system, he needs to look at being able to compromise.” *Id.*, at 30. Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor’s personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips’ free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.

On July 25, 2014, the Commission met again. This meeting, too, was conducted in public and on the record. On this occasion another commissioner made specific reference to the previous meeting’s discussion but said far more to disparage Phillips’ beliefs. The commissioner stated:
“I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.” Tr. 11-12.

To describe a man’s faith as “one of the most despicable pieces of rhetoric that people can use” is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips’ invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s antidiscrimination law—a law that protects discrimination on the basis of religion as well as sexual orientation.

The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission’s decision did not mention those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission’s adjudication of Phillips’ case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 540-542 (1993); *id.*, at 558 (Scalia, J., concurring in part and concurring in judgment). In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.

Another indication of hostility is the difference in treatment between Phillips’ case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

As noted above, on at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included “wording and images [the baker] deemed derogatory,” *Jack v. Gateaux, Ltd.*, Charge No. P20140071X, at 4; featured “language and images [the baker] deemed hateful,” *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X, at 4; or displayed a message the baker “deemed as discriminatory, *Jack v. Azucar Bakery*, Charge No. P20140069X, at 4.
The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission’s treatment of Phillips’ objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips’ willingness to sell “birthday cakes, shower cakes, [and] cookies and brownies,” App. 152, to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips’ case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission’s consideration of Phillips’ religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers’ conscience-based objections as legitimate, but treated his as illegitimate—thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed the disparity only in passing and relegated its complete analysis of the issue to a footnote. There, the court stated that “[t]his case is distinguishable from the Colorado Civil Rights Division’s recent findings that [the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed” when they refused to create the requested cakes. 370 P. 3d, at 282, n. 8. In those cases, the court continued, there was no impermissible discrimination because “the Division found that the bakeries . . . refuse[d] the patron’s request . . . because of the offensive nature of the requested message.” Ibid.

A principled rationale for the difference in treatment of these two instances cannot be based on the government’s own assessment of offensiveness. Just as “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,” West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 642 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. See Matal v. Tam, 582 U. S. ___, ___, ___-___ (2017) (opinion of ALITO, J.) (slip op., at 22-23). The Colorado court’s attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips’ religious beliefs. The court’s footnote does not, therefore, answer the baker’s concern that the State’s practice was to disfavor the religious basis of his objection.

C

For the reasons just described, the Commission’s treatment of Phillips’ case violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.
In *Church of Lukumi Babalu Aye*, *supra*, the Court made clear that the government, if it is to respect the Constitution’s guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even “subtle departures from neutrality” on matters of religion. *Id.*, at 534. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips’ religious beliefs. The Constitution “commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.” *Id.*, at 547.

Factors relevant to the assessment of governmental neutrality include “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.” *Id.*, at 540. In view of these factors the record here demonstrates that the Commission’s consideration of Phillips’ case was neither tolerant nor respectful of Phillips’ religious beliefs. The Commission gave “every appearance,” *id.*, at 545, of adjudicating Phillips’ religious objection based on a negative normative “evaluation of the particular justification” for his objection and the religious grounds for it. *Id.*, at 537. It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips’ conscience-based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips’ religious objection was not considered with the neutrality that the Free Exercise Clause requires.

While the issues here are difficult to resolve, it must be concluded that the State’s interest could have been weighed against Phillips’ sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners’ comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission’s disparate consideration of Phillips’ case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

III

The Commission’s hostility was inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the
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future, for these reasons the rulings of the Commission and of the state court that enforced the Commission’s order must be invalidated.

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

The judgment of the Colorado Court of Appeals is reversed.

It is so ordered.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

JUSTICE KAGAN, with whom JUSTICE BREYER joins, concurring.

“[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” Ante, at 9. But in upholding that principle, state actors cannot show hostility to religious views; rather, they must give those views “neutral and respectful consideration.” Ante, at 12. I join the Court’s opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation. I write separately to elaborate on one of the bases for the Court’s holding.

The Court partly relies on the “disparate consideration of Phillips’ case compared to the cases of [three] other bakers” who “objected to a requested cake on the basis of conscience.” Ante, at 14, 18. In the latter cases, a customer named William Jack sought “cakes with images that conveyed disapproval of same-sex marriage, along with religious text”; the bakers whom he approached refused to make them. Ante, at 15; see post, at 3 (GINSBURG, J., dissenting) (further describing the requested cakes). Those bakers prevailed before the Colorado Civil Rights Division and Commission, while Phillips—who objected for religious reasons to baking a wedding cake for a same-sex couple—did not. The Court finds that the legal reasoning of the state agencies differed in significant ways as between the Jack cases and the Phillips case. See ante, at 15. And the Court takes especial note of the suggestion made by the Colorado Court of Appeals, in comparing those cases, that the state agencies found the message Jack requested “offensive [in] nature.” Ante, at 16 (internal quotation marks omitted). As the Court states, a “principled rationale for the difference in treatment” cannot be “based on the government’s own assessment of offensiveness.” Ibid.

What makes the state agencies’ consideration yet more disquieting is that a proper basis for distinguishing the cases was available—in fact, was obvious. The Colorado Anti-Discrimination Act (CADA) makes it unlawful for a place of public accommodation to deny “the full and equal enjoyment” of goods and services to individuals based on certain characteristics,
including sexual orientation and creed. Colo. Rev. Stat. §24-34-601(2)(a) (2017). The three bakers in the Jack cases did not violate that law. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA’s demand that customers receive “the full and equal enjoyment” of public accommodations irrespective of their sexual orientation. \textit{Ibid}. The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief.\textsuperscript{2}

I read the Court’s opinion as fully consistent with that view. The Court limits its analysis to the \textit{reasoning} of the state agencies (and Court of Appeals)—”quite apart from whether the [Phillips and Jack] cases should ultimately be distinguished.” \textit{Ante}, at 15. And the Court itself recognizes the principle that would properly account for a difference in \textit{result} between those cases. Colorado law, the Court

\hspace{1cm} says, “can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.” \textit{Ante}, at 10. For that reason, Colorado can treat a baker who discriminates based on sexual orientation differently from a baker who does not discriminate on that or any other prohibited ground. But only, as the Court rightly says, if the State’s decisions are not infected by religious hostility or bias. I accordingly concur.

\hspace{1cm} ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

\hspace{1cm} JUSTICE GORSUCH, with whom JUSTICE ALITO joins, concurring.

\hspace{1cm} In \textit{Employment Div., Dept. of Human Resources of Ore. v. Smith}, this Court held that a neutral and generally applicable law will usually survive a constitutional free exercise challenge. 494 U. S. 872, 878-879 (1990). \textit{Smith} remains controversial in many quarters. Compare McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990), with Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992). But we know this with certainty: when the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored. \textit{Church of Lukumi Babalu Aye, Inc. v. Hialeah}, 508 U. S. 520, 546 (1993).
Today’s decision respects these principles. As the Court explains, the Colorado Civil Rights Commission failed to act neutrally toward Jack Phillips’s religious faith. Maybe most notably, the Commission allowed three other bakers to refuse a customer’s request that would have required them to violate their secular commitments. Yet it denied the same accommodation to Mr. Phillips when he refused a customer’s request that would have required him to violate his religious beliefs. *Ante*, at 14-16. As the Court also explains, the only reason the Commission seemed to supply for its discrimination was that it found Mr. Phillips’s religious beliefs “offensive.” *Ibid.* That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all. Because the Court documents each of these points carefully and thoroughly, I am pleased to join its opinion in full.

The only wrinkle is this. In the face of so much evidence suggesting hostility toward Mr. Phillips’s sincerely held religious beliefs, two of our colleagues have written separately to suggest that the Commission acted neutrally toward his faith when it treated him differently from the other bakers—or that it could have easily done so consistent with the First Amendment. See *post*, at 4-5, and n. 4 (GINSBURG, J., dissenting); *ante*, at 2-3, and n. (KAGAN, J., concurring). But, respectfully, I do not see how we might rescue the Commission from its error.

A full view of the facts helps point the way to the problem. Start with William Jack’s case. He approached three bakers and asked them to prepare cakes with messages disapproving same-sex marriage on religious grounds. App. 233, 243, 252. All three bakers refused Mr. Jack’s request, stating that they found his request offensive to their secular convictions. *Id.*, at 231, 241, 250. Mr. Jack responded by filing complaints with the Colorado Civil Rights Division. *Id.*, at 230, 240, 249. He pointed to Colorado’s Anti-Discrimination Act, which prohibits discrimination against customers in public accommodations because of religious creed, sexual orientation, or certain other traits. See *ibid.*; Colo. Rev. Stat. §24-34-601(2)(a)

(2017). Mr. Jack argued that the cakes he sought reflected his religious beliefs and that the bakers could not refuse to make them just because they happened to disagree with his beliefs. App. 231, 241, 250. But the Division declined to find a violation, reasoning that the bakers didn’t deny Mr. Jack service because of his religious faith but because the cakes he sought were offensive to their own moral convictions. *Id.*, at 237, 247, 255-256. As proof, the Division pointed to the fact that the bakers said they treated Mr. Jack as they would have anyone who requested a cake with similar messages, regardless of their religion. *Id.*, at 230-231, 240, 249. The Division pointed, as well, to the fact that the bakers said they were happy to provide religious persons with other cakes expressing other ideas. *Id.*, at 237, 247, 257. Mr. Jack appealed to the Colorado Civil Rights Commission, but the Commission summarily denied relief. App. to Pet. for Cert. 326a-331a.

Next, take the undisputed facts of Mr. Phillips’s case. Charlie Craig and Dave Mullins approached Mr. Phillips about creating a cake to celebrate their wedding. App. 168. Mr. Phillips
explained that he could not prepare a cake celebrating a same-sex wedding consistent with his religious faith. *Id.*, at 168-169. But Mr. Phillips offered to make other baked goods for the couple, including cakes celebrating other occasions. *Ibid.* Later, Mr. Phillips testified without contradiction that he would have refused to create a cake celebrating a same-sex marriage for any customer, regardless of his or her sexual orientation. *Id.*, at 166-167 (“I will not design and create wedding cakes for a same-sex wedding regardless of the sexual orientation of the customer”). And the record reveals that Mr. Phillips apparently refused just such a request from Mr. Craig’s mother. *Id.*, at 38-40, 169. (Any suggestion that Mr. Phillips was willing to make a cake celebrating a same-sex marriage for a heterosexual customer or was not willing to sell other products to a homosexual customer,

then, would simply mistake the undisputed factual record. See *post*, at 4, n. 2 (GINSBURG, J., dissenting); *ante*, at 2-3, and n. (KAGAN, J., concurring)). Nonetheless, the Commission held that Mr. Phillips’s conduct violated the Colorado public accommodations law. App. to Pet. for Cert. 56a-58a.

The facts show that the two cases share all legally salient features. In both cases, the effect on the customer was the same: bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service intending only to honor a personal conviction. To be sure, the bakers knew their conduct promised the effect of leaving a customer in a protected class unserved. But there’s no indication the bakers actually intended to refuse service because of a customer’s protected characteristic. We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). So, for example, the bakers in the first case would have refused to sell a cake denigrating same-sex marriage to an atheist customer, just as the baker in the second case would have refused to sell a cake celebrating same-sex marriage to a heterosexual customer. And the bakers in the first case were generally happy to sell to persons of faith, just as the baker in the second case was generally happy to sell to gay persons. In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.

The distinction between intended and knowingly accepted effects is familiar in life and law. Often the purposeful pursuit of worthy commitments requires us to accept unwanted but entirely foreseeable side effects: so, for example, choosing to spend time with family means the foreseeable loss of time for charitable work, just as opting for more time in the office means knowingly forgoing time at home with loved ones. The law, too, sometimes distinguishes between intended and foreseeable effects. See, e.g., ALI, Model Penal Code §§1.13, 2.02(2)(a)(i) (1985); 1 W. LaFave, Substantive Criminal Law §5.2(b), pp. 460-463 (3d ed. 2018). Other times, of course, the law proceeds differently, either conflating intent and knowledge or presuming intent as a matter of law from a showing of knowledge. See, e.g., Restatement (Second) of Torts §8A (1965); *Radio Officers v. NLRB*, 347 U. S. 17, 45 (1954).
The problem here is that the Commission failed to act neutrally by applying a consistent legal rule. In Mr. Jack’s case, the Commission chose to distinguish carefully between intended and knowingly accepted effects. Even though the bakers knowingly denied service to someone in a protected class, the Commission found no violation because the bakers only intended to distance themselves from “the offensive nature of the requested message.” *Craig v. Masterpiece Cakeshop, Inc.,* 370 P. 3d 272, 282, n. 8 (Colo. App. 2015); App. 237, 247, 256; App. to Pet. for Cert. 326a-331a; see also Brief for Respondent Colorado Civil Rights Commission 52 (“Businesses are entitled to reject orders for any number of reasons, including because they deem a particular product requested by a customer to be ‘offensive’”). Yet, in Mr. Phillips’s case, the Commission dismissed this very same argument as resting on a “distinction without a difference.” App. to Pet. for Cert. 69a. It concluded instead that an “intent to disfavor” a protected class of persons should be “readily . . . presumed” from the knowing failure to serve someone who belongs to that class. *Id.,* at 70a. In its judgment, Mr. Phillips’s intentions were “inextricably tied to the sexual orientation of the parties involved” and essentially “irrational.” *Ibid.*

Nothing in the Commission’s opinions suggests any neutral principle to reconcile these holdings. If Mr. Phillips’s objection is “inextricably tied” to a protected class,

then the bakers’ objection in Mr. Jack’s case must be “inextricably tied” to one as well. For just as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths. In both cases the bakers’ objection would (usually) result in turning down customers who bear a protected characteristic. In the end, the Commission’s decisions simply reduce to this: it *presumed* that Mr. Phillip harbored an intent to discriminate against a protected class in light of the foreseeable effects of his conduct, but it declined to presume the same intent in Mr. Jack’s case even though the effects of the bakers’ conduct were just as foreseeable. Underscoring the double standard, a state appellate court said that “no such showing” of actual “animus”—or intent to discriminate against persons in a protected class—was even required in Mr. Phillips’s case. 370 P. 3d, at 282.

The Commission cannot have it both ways. The Commission cannot slide up and down the *mens rea* scale, picking a mental state standard to suit its tastes depending on its sympathies. Either actual proof of intent to discriminate on the basis of membership in a protected class is required (as the Commission held in Mr. Jack’s case), or it is sufficient to “assume” such intent from the knowing failure to serve someone in a protected class (as the Commission held in Mr. Phillips’s case). Perhaps the Commission could have chosen either course as an initial matter. But the one thing it can’t do is apply a more generous legal test to secular objections than religious ones. See *Church of Lukumi Babalu Aye,* 508 U. S., at 543-544. That is anything but the neutral treatment of religion.

The real explanation for the Commission’s discrimination soon comes clear, too—and it does anything but help
its cause. This isn’t a case where the Commission selfconsciously announced a change in its legal rule in all public accommodation cases. Nor is this a case where the Commission offered some persuasive reason for its discrimination that might survive strict scrutiny. Instead, as the Court explains, it appears the Commission wished to condemn Mr. Phillips for expressing just the kind of “irrational” or “offensive . . . message” that the bakers in the first case refused to endorse. Ante, at 16. Many may agree with the Commission and consider Mr. Phillips’s religious beliefs irrational or offensive. Some may believe he misinterprets the teachings of his faith. And, to be sure, this Court has held same-sex marriage a matter of constitutional right and various States have enacted laws that preclude discrimination on the basis of sexual orientation. But it is also true that no bureaucratic judgment condemning a sincerely held religious belief as “irrational” or “offensive” will ever survive strict scrutiny under the First Amendment. In this country, the place of secular officials isn’t to sit in judgment of religious beliefs, but only to protect their free exercise. Just as it is the “proudest boast of our free speech jurisprudence” that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive. See Matal v. Tam, 582 U. S. ___, ___ (2017) (plurality opinion) (slip op., at 25) (citing United States v. Schwimmer, 279 U. S. 644, 655 (1929) (Holmes, J., dissenting)). Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country’s commitment to serving as a refuge for religious freedom. See Church of Lukumi Babalu Aye, supra, at 547; Thomas v. Review Bd. of Indiana Employment Security Div., 450 U. S. 707, 715-716 (1981); Wisconsin v. Yoder, 406 U. S. 205, 223-224 (1972); Cantwell v. Connecticut, 310 U. S. 296, 308-310 (1940).

Nor can any amount of after-the-fact maneuvering by

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our colleagues save the Commission. It is no answer, for example, to observe that Mr. Jack requested a cake with text on it while Mr. Craig and Mr. Mullins sought a cake celebrating their wedding without discussing its decoration, and then suggest this distinction makes all the difference. See post, at 4-5, and n. 4 (GINSBURG, J., dissenting). It is no answer either simply to slide up a level of generality to redescribe Mr. Phillips’s case as involving only a wedding cake like any other, so the fact that Mr. Phillips would make one for some means he must make them for all. See ante, at 2-3, and n. (KAGAN, J., concurring). These arguments, too, fail to afford Mr. Phillips’s faith neutral respect.

Take the first suggestion first. To suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in Mr. Jack’s case while penalizing Mr. Phillips—is irrational. Not even the Commission or court of appeals purported to rely on that distinction. Imagine Mr. Jack asked only for a cake with a symbolic expression against same-sex marriage rather than a cake bearing words conveying the same idea. Surely the Commission would have approved the bakers’ intentional wish to avoid participating in that message too. Nor can anyone reasonably doubt that a wedding cake without words conveys a message. Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding. See 370 P. 3d, at 276 (stating that Mr. Craig and Mr. Mullins “requested that Phillips design and create a cake to celebrate their same-sex wedding”) (emphasis added). Like “an emblem or flag,” a cake for a same-sex wedding is a symbol that serves as “a short cut from mind to mind,” signifying approval of a specific “system, idea, [or]
institution.” *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 632 (1943). It is precisely that approval that Mr. Phillips intended to withhold in keeping with his religious faith. The Commission denied Mr. Phillips that choice, even as it afforded the bakers in Mr. Jack’s case the choice to refuse to advance a message they deemed offensive to their secular commitments. That is not neutral.

Nor would it be proper for this or any court to suggest that a person must be forced to write words rather than create a symbol before his religious faith is implicated. Civil authorities, whether “high or petty,” bear no license to declare what is or should be “orthodox” when it comes to religious beliefs, *id.*, at 642, or whether an adherent has “correctly perceived” the commands of his religion, *Thomas*, *supra*, at 716. Instead, it is our job to look beyond the formality of written words and afford legal protection to any sincere act of faith. See generally *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 569 (1995) (“[T]he Constitution looks beyond written or spoken words as mediums of expression,” which are “not a condition of constitutional protection”).

The second suggestion fares no better. Suggesting that this case is only about “wedding cakes”—and not a wedding cake celebrating a same-sex wedding—actually points up the problem. At its most general level, the cake at issue in Mr. Phillips’s case was just a mixture of flour and eggs; at its most specific level, it was a cake celebrating the same-sex wedding of Mr. Craig and Mr. Mullins. We are told here, however, to apply a sort of Goldilocks rule: describing the cake by its ingredients is *too general*; understanding it as celebrating a same-sex wedding is *too specific*; but regarding it as a generic wedding cake is *just right*. The problem is, the Commission didn’t play with the level of generality in Mr. Jack’s case in this way. It didn’t declare, for example, that because the cakes Mr. Jack requested were just cakes about weddings generally, and all such cakes were the same, the bakers had to produce them. Instead, the Commission accepted the bakers’ view that the specific cakes Mr. Jack requested conveyed a message offensive to their convictions and allowed them to refuse service. Having done that there, it must do the same here.

Any other conclusion would invite civil authorities to gerrymander their inquiries based on the parties they prefer. Why calibrate the level of generality in Mr. Phillips’s case at “wedding cakes” exactly—and not at, say, “cakes” more generally or “cakes that convey a message regarding same-sex marriage” more specifically? If “cakes” were the relevant level of generality, the Commission would have to order the bakers to make Mr. Jack’s requested cakes just as it ordered Mr. Phillips to make the requested cake in his case. Conversely, if “cakes that convey a message regarding same-sex marriage” were the relevant level of generality, the Commission would have to respect Mr. Phillips’s refusal to make the requested cake just as it respected the bakers’ refusal to make the cakes Mr. Jack requested. In short, when the same level of generality is applied to both cases, it is no surprise that the bakers have to be treated the same. Only by adjusting the dials *just right*—fine-tuning the level of generality up or down for each case based solely on the identity of
the parties and the substance of their views—can you engineer the Commission’s outcome, handing a win to Mr. Jack’s bakers but delivering a loss to Mr. Phillips. Such results-driven reasoning is improper. Neither the Commission nor this Court may apply a more specific level of generality in Mr. Jack’s case (a cake that conveys a message regarding same-sex marriage) while applying a higher level of generality in Mr. Phillips’s case (a cake that conveys no message regarding same-sex marriage). Of course, under Smith a vendor cannot escape a public accommodations law just because his religion frowns on it. But for any law to comply with the First Amendment and

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Smith, it must be applied in a manner that treats religion with neutral respect. That means the government must apply the same level of generality across cases—and that did not happen here.

There is another problem with sliding up the generality scale: it risks denying constitutional protection to religious beliefs that draw distinctions more specific than the government’s preferred level of description. To some, all wedding cakes may appear indistinguishable. But to Mr. Phillips that is not the case—his faith teaches him otherwise. And his religious beliefs are entitled to no less respectful treatment than the bakers’ secular beliefs in Mr. Jack’s case. This Court has explained these same points “[r]epeatedly and in many different contexts” over many years. Smith, 494 U. S. at 887. For example, in Thomas a faithful Jehovah’s Witness and steel mill worker agreed to help manufacture sheet steel he knew might find its way into armaments, but he was unwilling to work on a fabrication line producing tank turrets. 450 U. S., at 711. Of course, the line Mr. Thomas drew wasn’t the same many others would draw and it wasn’t even the same line many other members of the same faith would draw. Even so, the Court didn’t try to suggest that making steel is just making steel. Or that to offend his religion the steel needed to be of a particular kind or shape. Instead, it recognized that Mr. Thomas alone was entitled to define the nature of his religious commitments—and that those commitments, as defined by the faithful adherent, not a bureaucrat or judge, are entitled to protection under the First Amendment. Id., at 714-716; see also United States v. Lee, 455 U. S. 252, 254-255 (1982); Smith, supra, at 887 (collecting authorities).

It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons

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sacramental bread is just bread or a kippah is just a cap.

Only one way forward now remains. Having failed to afford Mr. Phillips’s religious objections neutral consideration and without any compelling reason for its failure, the Commission must afford him the same result it afforded the bakers in Mr. Jack’s case. The Court recognizes this by reversing the judgment below and holding that the Commission’s order “must be set aside.” Ante, at 18. Maybe in some future rulemaking or case the Commission could adopt a new “knowing” standard for all refusals of service and offer neutral reasons for doing so. But, as the Court observes, “[h]owever later cases raising these or similar concerns are resolved in the future, . . . the rulings of the Commission and of the state court that enforced the Commission’s order” in
The case “must be invalidated.” *Ibid.* Mr. Phillips has conclusively proven a First Amendment violation and, after almost six years facing unlawful civil charges, he is entitled to judgment.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part and concurring in the judgment.

I agree that the Colorado Civil Rights Commission (Commission) violated Jack Phillips’ right to freely exercise his religion. As JUSTICE GORSUCH explains, the Commission treated Phillips’ case differently from a similar case involving three other bakers, for reasons that can only be explained by hostility toward Phillips’ religion. See *ante*, at 2-7 (concurring opinion). The Court agrees that the Commission treated Phillips differently, and it points out that some of the Commissioners made comments disparaging Phillips’ religion. See *ante*, at 12-16. Although the Commissioners’ comments are certainly disturbing, the discriminatory application of Colorado’s public-accommodations law is enough on its own to violate Phillips’ rights. To the extent the Court agrees, I join its opinion.

While Phillips rightly prevails on his free-exercise claim, I write separately to address his free-speech claim. The Court does not address this claim because it has some uncertainties about the record. See *ante*, at 2. Specifically, the parties dispute whether Phillips refused to create a custom wedding cake for the individual respondents, or whether he refused to sell them any wedding cake (including a premade one). But the Colorado Court of Appeals resolved this factual dispute in Phillips’ favor. The court described his conduct as a refusal to “design and create a cake to celebrate [a] same-sex wedding.” *Craig v. Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 276 (2015); see also *id.*, at 286 (“designing and selling a wedding cake”); *id.*, at 283 (“refusing to create a wedding cake”). And it noted that the Commission’s order required Phillips to sell “any product [he] would sell to heterosexual couples,” including custom wedding cakes. *Id.*, at 286 (emphasis added).

Even after describing his conduct this way, the Court of Appeals concluded that Phillips’ conduct was not expressive and was not protected speech. It reasoned that an outside observer would think that Phillips was merely complying with Colorado’s public-accommodations law, not expressing a message, and that Phillips could post a disclaimer to that effect. This reasoning flouts bedrock principles of our free-speech jurisprudence and would justify virtually any law that compels individuals to speak. It should not pass without comment.

I

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits state laws that abridge the “freedom of speech.” When interpreting this command, this Court has distinguished between regulations of speech and regulations of conduct. The latter generally do not abridge the freedom of speech, even if they impose “incidental burdens” on

Although public-accommodations laws generally regulate conduct, particular applications of them can burden protected speech. When a public-accommodations law “ha[s] the effect of declaring . . . speech itself to be the public accommodation,” the First Amendment applies with full force. *Id.*, at 573; accord, *Boy Scouts of America v. Dale*, 530 U. S. 640, 657-659 (2000). In *Hurley*, for example, a Massachusetts public-accommodations law prohibited “‘any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation.’” 515 U. S., at 561 (quoting Mass. Gen. Laws §272:98 (1992); ellipsis in original). When this law required the sponsor of a St. Patrick’s Day parade to include a parade unit of gay, lesbian, and bisexual Irish-Americans, the Court unanimously held that the law violated the sponsor’s right to free speech. Parades are “a form of expression,” this Court explained, and the application of the public-accommodations law “alter[ed] the expressive content” of the parade by forcing the sponsor to add a new unit. 515 U. S., at 568, 572-573. The addition of that unit compelled the organizer to “bear witness to the fact that some Irish are gay, lesbian, or bisexual”; “suggest . . . that people of their sexual orientation have as much claim to unqualified social acceptance as heterosexuals”; and imply that their participation “merits celebration.” *Id.*, at 574. While this Court acknowledged that the unit’s exclusion might have been “misguided, or even hurtful,” *ibid.*, it rejected the notion that governments can mandate “thoughts and statements acceptable to some groups or, indeed, all people” as the “antithesis” of free speech, *id.*, at 579; accord, *Dale, supra*, at 660-661.

The parade in *Hurley* was an example of what this Court has termed “expressive conduct.” See 515 U. S., at 568-569. This Court has long held that “the Constitution looks beyond written or spoken words as mediums of expression,” *id.*, at 569, and that “[s]ymbolism is a primitive but effective way of communicating ideas,” *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 632 (1943). Thus, a person’s “conduct may be ‘sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.’” *Texas v. Johnson*, 491 U. S. 397, 404 (1989). Applying this principle, the Court has recognized a wide array of conduct that can qualify as expressive, including nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag.1

Of course, conduct does not qualify as protected speech simply because “the person engaging in [it] intends thereby to express an idea.” *United States v. O’Brien*, 391 U. S. 367, 376
(1968). To determine whether conduct is sufficiently expressive, the Court asks whether it was “intended to be communicative” and, “in context, would reasonably be understood by the viewer to be communicative.” *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 294 (1984). But a “particularized message” is not required, or else the freedom of speech “would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll.” *Hurley*, 515 U. S., at 569.

Once a court concludes that conduct is expressive, the

Constitution limits the government’s authority to restrict or compel it. “[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say’” and “tailor” the content of his message as he sees fit. *Id.*, at 573 (quoting *Pacific Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U. S. 1, 16 (1986) (plurality opinion)). This rule “applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.” *Hurley, supra*, at 573. And it “makes no difference” whether the government is regulating the “creation, distribution, or consumption” of the speech. *Brown v. Entertainment Merchants Assn.*, 564 U. S. 786, 792, n. 1 (2011).

II

A

The conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive. Phillips considers himself an artist. The logo for Masterpiece Cakeshop is an artist’s paint palate with a paintbrush and baker’s whisk. Behind the counter Phillips has a picture that depicts him as an artist painting on a canvas. Phillips takes exceptional care with each cake that he creates—sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding. Examples of his creations can be seen on Masterpiece’s website. See http://masterpiececakes.com/wedding-cakes (as last visited June 1, 2018).

Phillips is an active participant in the wedding celebration. He sits down with each couple for a consultation before he creates their custom wedding cake. He discusses their preferences, their personalities, and the details of their wedding to ensure that each cake reflects the couple who ordered it. In addition to creating and delivering the cake—a focal point of the wedding celebration—Phillips sometimes stays and interacts with the guests at the wedding. And the guests often recognize his creations and seek his bakery out afterward. Phillips also sees the inherent symbolism in wedding cakes. To him, a wedding cake inherently communicates that “a wedding has occurred, a marriage has begun, and the couple should be celebrated.” App. 162.

Wedding cakes do, in fact, communicate this message. A tradition from Victorian England that made its way to America after the Civil War, “[w]edding cakes are so packed with symbolism that it is hard to know where to begin.” M. Krondl, *Sweet Invention: A History of Dessert* 321
(2011) (Krondl); see also ibid. (explaining the symbolism behind the color, texture, flavor, and cutting of the cake). If an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding. The cake is “so standardised and inevitable a part of getting married that few ever think to question it.” Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 95 (1987). Almost no wedding, no matter how spartan, is missing the cake. See id., at 98. “A whole series of events expected in the context of a wedding would be impossible without it: an essential photograph, the cutting, the toast, and the distribution of both cake and favours at the wedding and afterwards.” Ibid. Although the cake is eventually eaten, that is not its primary purpose. See id., at 95 (“It is not unusual to hear people declaring that they do not like wedding cake, meaning that they do not like to eat it. This includes people who are, without question, having such cakes for their weddings”); id., at 97 (“Nothing is made of the eating itself “); Krondl 320-321 (explaining that wedding cakes have long been described as “inedible”). The cake’s purpose is to mark the beginning of a new marriage and to celebrate the couple.2

Accordingly, Phillips’ creation of custom wedding cakes is expressive. The use of his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage clearly communicates a message—certainly more so than nude dancing, Barnes v. Glen Theatre, Inc., 501 U. S. 560, 565-566 (1991), or flying a plain red flag, Stromberg v. California, 283 U. S. 359, 369 (1931).3 By forcing Phillips to create custom wedding cakes for same-

sex weddings, Colorado’s public-accommodations law “alter[s] the expressive content” of his message. Hurley, 515 U. S., at 572. The meaning of expressive conduct, this Court has explained, depends on “the context in which it occur[s].” Johnson, 491 U. S., at 405. Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are “weddings” and suggest that they should be celebrated—the precise message he believes his faith forbids. The First Amendment prohibits Colorado from requiring Phillips to “bear witness to [these] fact[s],” Hurley, 515 U. S., at 574, or to “affir[m] . . . a belief with which [he] disagrees,” id., at 573.

B

The Colorado Court of Appeals nevertheless concluded that Phillips’ conduct was “not sufficiently expressive” to be protected from state compulsion. 370 P. 3d, at 283. It noted that a reasonable observer would not view Phillips’ conduct as “an endorsement of same-sex marriage,” but rather as mere “compliance” with Colorado’s public-accommodations law. Id., at 286-287 (citing Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U. S. 47, 64-65 (2006) (FAIR); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U. S. 819, 841-842 (1995); PruneYard Shopping Center v. Robins, 447 U. S. 74, 76-78 (1980)). It also emphasized that Masterpiece could “disassociat[e]” itself from same-sex marriage by posting a “disclaimer” stating that Colorado law “requires it not to discriminate” or that “the provision of its services does not constitute an endorsement.” 370 P. 3d, at 288. This reasoning is badly misguided.
The Colorado Court of Appeals was wrong to conclude that Phillips’ conduct was not expressive because a rea-
sonable observer would think he is merely complying with Colorado’s public-accommodations law. This argument would justify any law that compelled protected speech. And, this Court has never accepted it. From the beginning, this Court’s compelled-speech precedents have rejected arguments that “would resolve every issue of power in favor of those in authority.” *Barnette*, 319 U. S., at 636. *Hurley*, for example, held that the application of Massachusetts’ public-accommodations law “requir[ed] [the organizers] to alter the expressive content of their parade.” 515 U. S., at 572-573. It did not hold that reasonable observers would view the organizers as merely complying with Massachusetts’ public-accommodations law.

The decisions that the Colorado Court of Appeals cited for this proposition are far afield. It cited three decisions where groups objected to being forced to provide a forum for a third party’s speech. See *FAIR*, *supra*, at 51 (law school refused to allow military recruiters on campus); *Rosenberger*, *supra*, at 822-823 (public university refused to provide funds to a religious student paper); *PruneYard*, *supra*, at 77 (shopping center refused to allow individuals to collect signatures on its property). In those decisions, this Court rejected the argument that requiring the groups to provide a forum for third-party speech also required them to endorse that speech. See *FAIR*, *supra*, at 63-65; *Rosenberger*, *supra*, at 841-842; *PruneYard*, *supra*, at 85-88. But these decisions do not suggest that the government can force speakers to alter their own message. See *Pacific Gas & Elec.*, 475 U. S., at 12 (“Notably absent from *PruneYard* was any concern that access . . . might affect the shopping center owner’s exercise of his own right to speak”); *Hurley*, *supra*, at 580 (similar).

The Colorado Court of Appeals also noted that Masterpiece is a “for-profit bakery” that “charges its customers.” 370 P. 3d, at 287. But this Court has repeatedly rejected the notion that a speaker’s profit motive gives the gov-
The Colorado Court of Appeals also erred by suggesting that Phillips could simply post a disclaimer, disassociating Masterpiece from any support for same-sex marriage. Again, this argument would justify any law compelling speech. And again, this Court has rejected it. We have described similar arguments as “beg[ging] the core question.” *Tornillo*, *supra*, at 256. Because the government cannot compel speech, it also cannot “require speakers to affirm in one breath that which they deny in the next.” *Pacific Gas & Elec.*, 475 U. S., at 16; see also *id.*, at 15, n. 11 (citing *Prune Yard*, 447 U. S., at 99 (Powell, J., concurring in part and concurring in judgment)). States cannot put individuals to the choice of “be[ing] compelled to affirm someone else’s belief “ or “be[ing] forced to speak when [they] would prefer to remain silent.” *Id.*, at 99.

Because Phillips’ conduct (as described by the Colorado Court of Appeals) was expressive, Colorado’s public-accommodations law cannot penalize it unless the law withstands strict scrutiny. Although this Court sometimes reviews regulations of expressive conduct under the more lenient test articulated in *O’Brien*,⁴ that test does not apply unless the government would have punished the conduct regardless of its expressive component. See, e.g., *Barnes*, 501 U. S., at 566-572 (applying *O’Brien* to evaluate the application of a general nudity ban to nude dancing); *Clark*, 468 U. S., at 293 (applying *O’Brien* to evaluate the application of a general camping ban to a demonstration in the park). Here, however, Colorado would not be punishing Phillips if he refused to create any custom wedding cakes; it is punishing him because he refuses to create custom wedding cakes that express approval of same-sex marriage. In cases like this one, our precedents demand “‘the most exacting scrutiny.’” *Johnson*, 491 U. S., at 412; accord, *Holder v. Humanitarian Law Project*, 561 U. S. 1, 28 (2010).

The Court of Appeals did not address whether Colorado’s law survives strict scrutiny, and I will not do so in the first instance. There is an obvious flaw, however, with one of the asserted justifications for Colorado’s law. According to the individual respondents, Colorado can compel Phillips’ speech to prevent him from “‘denigrat[ing] the dignity’” of same-sex couples, “‘assert[ing] [their] inferiority,’” and subjecting them to “‘humiliation, frustration, and embarrassment.’” Brief for Respondents Craig et al. 39 (quoting *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 142 (1994); *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, 292 (1964) (Goldberg, J., concurring)). These justifications are completely foreign to our free-speech jurisprudence.
States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” Johnson, supra, at 414. A contrary rule would allow the government to stamp out virtually any speech at will. See Morse v. Frederick, 551 U. S. 393, 409 (2007) (“After all, much political and religious speech might be perceived as offensive to some”). As the Court reiterates today, “it is not . . . the role of the State or its officials to prescribe what shall be offensive.” Ante, at 16. “Indeed, if it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.” Hustler Magazine, Inc. v. Falwell, 485 U. S. 46, 55 (1988); accord, Johnson, supra, at 408-409. If the only reason a public-accommodations law regulates speech is “to produce a society free of . . . biases” against the protected groups, that purpose is “decidedly fatal” to the law’s constitutionality, “for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.” Hurley, 515 U. S., at 578-579; see also United States v. Playboy Entertainment Group, Inc., 529 U. S. 803, 813 (2000) (“Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails”). “[A] speech burden based on audience reactions is simply government hostility . . . in a different guise.” Matal v. Tam, 582 U. S. ___, ___ (2017) (KENNEDY, J., concurring in part and concurring in judgment) (slip op., at 4).

Consider what Phillips actually said to the individual respondents in this case. After sitting down with them for a consultation, Phillips told the couple, “I’ll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same sex weddings.” App. 168. It is hard to see how this statement stigmatizes gays and lesbians more than blocking them from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say “God Hates Fags”—all of which this Court has deemed protected by the First Amendment. See Hurley, supra, at 574-575; Dale, 530 U. S., at 644; Snyder v. Phelps, 562 U. S. 443, 448 (2011). Moreover, it is also hard to see how Phillips’ statement is worse than the racist, demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions. Concerns about “dignity” and “stigma” did not carry the day when this Court affirmed the right of white supremacists to burn a 25-foot cross, Virginia v. Black, 538 U. S. 343 (2003); conduct a rally on Martin Luther King Jr.’s birthday, Forsyth County v. Nationalist Movement, 505 U. S. 123 (1992); or circulate a film featuring hooded Klan members who were brandishing weapons and threatening to “‘Bury the niggers,’” Brandenburg v. Ohio, 395 U. S. 444, 446, n. 1 (1969) (per curiam).

Nor does the fact that this Court has now decided Obergefell v. Hodges, 576 U. S. ___ (2015), somehow diminish Phillips’ right to free speech. “It is one thing . . . to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share [that view] as bigoted” and unentitled to

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express a different view. \textit{Id.}, at ___ (ROBERTS, C. J., dissenting) (slip op., at 29). This Court is not an authority on matters of conscience, and its decisions can (and often should) be criticized. The First Amendment gives individuals the right to disagree about the correctness of \textit{Obergefell} and the morality of same-sex marriage. \textit{Obergefell} itself emphasized that the traditional understanding of marriage “long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.” \textit{Id.}, at ___ (majority opinion) (slip op., at 4). If Phillips’ continued adherence to that understanding makes him a minority after \textit{Obergefell}, that is all the more reason to insist that his speech be protected. See \textit{Dale, supra}, at 660 (“[T]he fact that [the social acceptance of homosexuality] may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view”).

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In \textit{Obergefell}, I warned that the Court’s decision would “inevitab[ly] . . . come into conflict” with religious liberty, “as individuals . . . are confronted with demands to participate in and endorse civil marriages between same-sex couples.” 576 U. S., at ___ (dissenting opinion) (slip op., at 15). This case proves that the conflict has already emerged. Because the Court’s decision vindicates Phillips’ right to free exercise, it seems that religious liberty has lived to fight another day. But, in future cases, the freedom of speech could be essential to preventing \textit{Obergefell} from being used to “stamp out every vestige of dissent” and “vilify Americans who are unwilling to assent to the new orthodoxy.” \textit{Id.}, at ___ (ALITO, J., dissenting) (slip op., at 6). If that freedom is to maintain its vitality, reasoning like the Colorado Court of Appeals’ must be rejected.

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\textbf{ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO}

\textbf{JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting.}

There is much in the Court’s opinion with which I agree. “[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” \textit{Ante}, at 9. “Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.” \textit{Ante}, at 10. “[P]urveyors of goods and services who object to gay marriages for moral and religious reasons [may not] put up signs saying ‘no goods or services will be sold if they will be used for gay marriages.’” \textit{Ante}, at 12. Gay persons may be spared from “indignities when they seek goods and services in an open market.” \textit{Ante}, at 18. I

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strongly disagree, however, with the Court’s conclusion that Craig and Mullins should lose this case. All of the above-quoted statements point in the opposite direction.

The Court concludes that “Phillips’ religious objection was not considered with the neutrality that the Free Exercise Clause requires.” \textit{Ante}, at 17. This conclusion rests on evidence
said to show the Colorado Civil Rights Commission’s (Commission) hostility to religion. Hostility is discernible, the Court maintains, from the asserted “disparate consideration of Phillips’ case compared to the cases of ‘three other bakers who refused to make cakes requested by William Jack, an amicus here. Ante, at 18. The Court also finds hostility in statements made at two public hearings on Phillips’ appeal to the Commission. Ante, at 12-14. The different outcomes the Court features

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do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below.

I

On March 13, 2014—approximately three months after the ALJ ruled in favor of the same-sex couple, Craig and Mullins, and two months before the Commission heard Phillips’ appeal from that decision—William Jack visited three Colorado bakeries. His visits followed a similar pattern. He requested two cakes

“made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red ‘X’ over the image. On one cake, he requested [on] one side[,] . . . ‘God hates sin. Psalm 45:7’ and on the opposite side of the cake ‘Homosexuality is a detestable sin. Leviticus 18:2.’ On the second cake, [the one] with the image of the two groomsmen covered by a red ‘X’ [Jack] requested [these words]: ‘God loves sinners’ and on the other side ‘While we were yet sinners Christ died for us. Romans 5:8.’” App. to Pet. for Cert. 319a; see id., at 300a, 310a.

In contrast to Jack, Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.

One bakery told Jack it would make cakes in the shape of Bibles, but would not decorate them with the requested messages; the owner told Jack her bakery “does not discriminate” and “accept[s] all humans.” Id., at 301a (internal quotation marks omitted). The second bakery owner

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told Jack he “had done open Bibles and books many times and that they look amazing,” but declined to make the specific cakes Jack described because the baker regarded the messages as “hateful.” Id., at 310a (internal quotation marks omitted). The third bakery, according to Jack, said it would bake the cakes, but would not include the requested message. Id., at 319a.6

Jack filed charges against each bakery with the Colorado Civil Rights Division (Division). The Division found no probable cause to support Jack’s claims of unequal treatment and denial of goods or services based on his Christian religious beliefs. Id., at 297a, 307a, 316a. In this regard, the Division observed that the bakeries regularly produced cakes and other baked goods with Christian symbols and had denied other customer requests for designs demeaning people whose
dignity the Colorado Antidiscrimination Act (CADA) protects. See *id.*, at 305a, 314a, 324a. The Commission summarily affirmed the Division’s no-probable-cause finding. See *id.*, at 326a-331a.

The Court concludes that “the Commission’s consideration of Phillips’ religious objection did not accord with its treatment of [the other bakers’] objections.” *Ante*, at 15. See also *ante*, at 5-7 (GORSUCH, J., concurring). But the cases the Court aligns are hardly comparable. The bakers would have refused to make a cake with Jack’s requested message for any customer, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked goods they would have sold anyone else. The bakeries’ refusal to make Jack cakes of a kind they would not make for any customer scarcely resembles Phillips’ refusal to serve Craig and Mullins: Phillips would *not* sell to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others. When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating their wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied. Cf. *ante*, at 3-4, 9-10 (GORSUCH, J., concurring). Colorado, the Court does not gainsay, prohibits precisely the discrimination Craig and Mullins encountered. See *supra*, at 1. Jack, on the other hand, suffered no service refusal on the basis of his religion or any other protected characteristic. He was treated as any other customer would have been treated—no better, no worse. 7

The fact that Phillips might sell other cakes and cookies to gay and lesbian customers8 was irrelevant to the issue Craig and Mullins’ case presented. What matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple. In contrast, the other bakeries’ sale of other goods to Christian customers was relevant: It shows that there were no goods the bakeries would sell to a non-Christian customer that they would refuse to sell to a Christian customer. Cf. *ante*, at 15.

Nor was the Colorado Court of Appeals’ “difference in treatment of these two instances . . . based on the government’s own assessment of offensiveness.” *Ante*, at 16. Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display. As the Court recognizes, a refusal “to design a special cake with words or images . . . might be different from a refusal to sell any cake at all.” *Ante*, at 2.9 The Colorado Court of Appeals did not distinguish Phillips and the other three bakeries based simply on its or the Division’s finding that messages

in the cakes Jack requested were offensive while any message in a cake for Craig and Mullins was not. The Colorado court distinguished the cases on the ground that Craig and Mullins were denied
service based on an aspect of their identity that the State chose to grant vigorous protection from discrimination. See App. to Pet. for Cert. 20a, n. 8 (“The Division found that the bakeries did not refuse [Jack’s] request because of his creed, but rather because of the offensive nature of the requested message. . . . [T]here was no evidence that the bakeries based their decisions on [Jack’s] religion . . . [whereas Phillips] discriminated on the basis of sexual orientation.”). I do not read the Court to suggest that the Colorado Legislature’s decision to include certain protected characteristics in CADA is an impermissible government prescription of what is and is not offensive. Cf. ante, at 9-10. To repeat, the Court affirms that “Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.” Ante, at 10.

II

Statements made at the Commission’s public hearings on Phillips’ case provide no firmer support for the Court’s holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips’ refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one. See App. to Pet. for Cert. 5a-6a. First, the Division had to find probable cause that Phillips violated CADA. Second, the ALJ entertained the parties’ cross-motions for summary judgment. Third, the Commission heard Phillips’ appeal. Fourth, after the Commission’s ruling, the Colorado Court of Appeals considered the case de novo. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips’ case is thus far removed from the only precedent upon which the Court relies, Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520 (1993), where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council, see id., at 526-528.

* * *

For the reasons stated, sensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance of the Colorado Court of Appeals’ judgment. I would so rule.

Footnotes:

JUSTICE GORSUCH disagrees. In his view, the Jack cases and the Phillips case must be treated the same because the bakers in all those cases “would not sell the requested cakes to anyone.” Post, at 4. That description perfectly fits the Jack cases—and explains why the bakers there did not engage in unlawful discrimination. But it is a surprising characterization of the Phillips case, given that Phillips routinely sells wedding cakes to opposite-sex couples. JUSTICE GORSUCH can make the claim only because he does not think a “wedding cake” is the relevant
product. As JUSTICE GORSUCH sees it, the product that Phillips refused to sell here—and would refuse to sell to anyone—was a “cake celebrating same-sex marriage.” *Ibid.*; see *post*, at 3, 6, 8-9. But that is wrong. The cake requested was not a special “cake celebrating same-sex marriage.” It was simply a wedding cake—one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike. See *ante*, at 4 (majority opinion) (recounting that Phillips did not so much as discuss the cake’s design before he refused to make it). And contrary to JUSTICE GORSUCH’S view, a wedding cake does not become something different whenever a vendor like Phillips invests its sale to particular customers with “religious significance.” *Post*, at 11. As this Court has long held, and reaffirms today, a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers whether defined by sexual orientation, race, sex, or other protected trait. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402, n. 5 (1968) (*per curiam*) (holding that a barbeque vendor must serve black customers even if he perceives such service as vindicating racial equality, in violation of his religious beliefs); *ante*, at 9. A vendor can choose the products he sells, but not the customers he serves—no matter the reason. Phillips sells wedding cakes. As to that product, he unlawfully discriminates: He sells it to opposite-sex but not to same-sex couples. And on that basis—which has nothing to do with Phillips’ religious beliefs—Colorado could have distinguished Phillips from the bakers in the Jack cases, who did not engage in any prohibited discrimination.


2. The Colorado Court of Appeals acknowledged that “a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage,” depending on its “design” and whether it has “written inscriptions.” *Craig v. Masterpiece Cakeshop, Inc.*, 370 P. 3d 272, 288 (2015). But a wedding cake needs no particular design or written words to communicate the basic message that a wedding is occurring, a marriage has begun, and the couple should be celebrated. Wedding cakes have long varied in color, decorations, and style, but those differences do not prevent people from recognizing wedding cakes as wedding cakes. See Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 96 (1987). And regardless, the Commission’s order does not distinguish between plain wedding cakes and wedding cakes with particular designs or inscriptions; it requires Phillips to make any wedding cake for a same-sex wedding that he would make for an opposite-sex wedding.

3. The dissent faults Phillips for not “submitting . . . evidence” that wedding cakes communicate a message. *Post*, at 2, n. 1 (opinion of GINSBURG, J.). But this requirement finds no support in our precedents. This Court did not insist that the parties submit evidence detailing the expressive nature of parades, flags, or nude dancing. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 568-570 (1995); *Spence*, 418 U. S., at 410-411; *Barnes*, 501 U. S., at 565-566. And we do not need extensive evidence here to conclude that Phillips’ artistry is expressive, see *Hurley*, 515 U. S., at 569, or that wedding cakes at least communicate the basic fact that “this is a wedding,” see *id.*, at 573-575. Nor does it matter that the
couple also communicates a message through the cake. More than one person can be engaged in protected speech at the same time. See id., at 569-570. And by forcing him to provide the cake, Colorado is requiring Phillips to be “intimately connected” with the couple’s speech, which is enough to implicate his First Amendment rights. See id., at 576.

4. “[A] government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” United States v. O’Brien, 391 U. S. 367, 377 (1968).

5. As JUSTICE THOMAS observes, the Court does not hold that wedding cakes are speech or expression entitled to First Amendment protection. See ante, at 1 (opinion concurring in part and concurring in judgment). Nor could it, consistent with our First Amendment precedents. JUSTICE THOMAS acknowledges that for conduct to constitute protected expression, the conduct must be reasonably understood by an observer to be communicative. Ante, at 4 (citing Clark v. Community for Creative Non-Violence, 468 U. S. 288, 294 (1984)). The record in this case is replete with Jack Phillips’ own views on the messages he believes his cakes convey. See ante, at 5-6 (THOMAS, J., concurring in part and concurring in judgment) (describing how Phillips “considers” and “sees” his work). But Phillips submitted no evidence showing that an objective observer understands a wedding cake to convey a message, much less that the observer understands the message to be the baker’s, rather than the marrying couple’s. Indeed, some in the wedding industry could not explain what message, or whose, a wedding cake conveys. See Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 100-101 (1987) (no explanation of wedding cakes’ symbolism was forthcoming “even amongst those who might be expected to be the experts”); id., at 104-105 (the cake cutting tradition might signify “the bride and groom . . . as appropriating the cake” from the bride’s parents). And Phillips points to no case in which this Court has suggested the provision of a baked good might be expressive conduct. Cf. ante, at 7, n. 2 (THOMAS, J., concurring in part and concurring in judgment); Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc., 515 U. S. 557, 568-579 (1995) (citing previous cases recognizing parades to be expressive); Barnes v. Glen Theatre, Inc., 501 U. S. 560, 565 (1991) (noting precedents suggesting nude dancing is expressive conduct); Spence v. Washington, 418 U. S. 405, 410 (1974) (observing the Court’s decades-long recognition of the symbolism of flags).

6. The record provides no ideological explanation for the bakeries’ refusals. Cf. ante, at 1-2, 9, 11 (GORSUCH, J., concurring) (describing Jack’s requests as offensive to the bakers’ “secular” convictions).

7. JUSTICE GORSUCH argues that the situations “share all legally salient features.” Ante, at 4 (concurring opinion). But what critically differentiates them is the role the customer’s “statutorily protected trait,” ibid., played in the denial of service. Change Craig and Mullins’ sexual orientation (or sex), and Phillips would have provided the cake. Change Jack’s religion, and the bakers would have been no more willing to comply with his request. The bakers’ objections to Jack’s cakes had nothing to do with “religious opposition to same-sex weddings.” Ante, at 6 (GORSUCH, J., concurring). Instead, the bakers simply refused to make cakes bearing statements demeaning to people protected by CADA. With respect to Jack’s second cake, in particular, where
he requested an image of two groomsmen covered by a red “X” and the lines “God loves sinners” and “While we were yet sinners Christ died for us,” the bakers gave not the slightest indication that religious words, rather than the demeaning image, prompted the objection. See supra, at 3. Phillips did, therefore, discriminate because of sexual orientation; the other bakers did not discriminate because of religious belief; and the Commission properly found discrimination in one case but not the other. Cf. ante, at 4-6 (GORSUCH, J., concurring).

8 But see ante, at 7 (majority opinion) (acknowledging that Phillips refused to sell to a lesbian couple cupcakes for a celebration of their union).

9 The Court undermines this observation when later asserting that the treatment of Phillips, as compared with the treatment of the other three bakeries, “could reasonably be interpreted as being inconsistent as to the question of whether speech is involved.” Ante, at 15. But recall that, while Jack requested cakes with particular text inscribed, Craig and Mullins were refused the sale of any wedding cake at all. They were turned away before any specific cake design could be discussed. (It appears that Phillips rarely, if ever, produces wedding cakes with words on them—or at least does not advertise such cakes. See Masterpiece Cakeshop, Wedding, http://www.masterpiececakes.com/wedding-cakes (as last visited June 1, 2018) (gallery with 31 wedding cake images, none of which exhibits words).) The Division and the Court of Appeals could rationally and lawfully distinguish between a case involving disparaging text and images and a case involving a wedding cake of unspecified design. The distinction is not between a cake with text and one without, see ante, at 8-9 (GORSUCH, J., concurring); it is between a cake with a particular design and one whose form was never even discussed.
2017 WL 5127317 (U.S.) (Appellate Brief)

Supreme Court of the United States.

MASTERPIECE CAKESHOP, LTD., et al., Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, et al., Respondents.

No. 16-111.

October 30, 2017.

On Writ of Certiorari to the Colorado Court of Appeals


Jennifer C. Pizer, Nancy C. Marcus, Lambda Legal Defense and Education Fund, Inc., 4221 Wilshire Blvd., Suite 280, Los Angeles, CA 90010, (213) 382-7600, jpizer@lambdalegal.org, for amici curiae.

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The State of the Union: Masterpiece Cakeshop and Other LGBT Law Developments


*1 INTERESTS OF AMICI CURIAE

Amici Curiae are Lambda Legal Defense and Education Fund, Inc. (Lambda Legal), Family Equality Council (Family Equality), and eleven other national and state-based organizations working to secure full civil rights, inclusion, safety and equal dignity for lesbian, gay, bisexual and transgender (LGBT) Americans and their families.1

Lambda Legal is the nation’s oldest and largest nonprofit legal organization working for full recognition of the civil rights of LGBT people and everyone living with HIV, through impact litigation, education, and policy advocacy. See, e.g., Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

Lambda Legal has represented same-sex couples or appeared as amicus curiae in numerous cases in which religious freedom and/or free speech was asserted to justify discrimination against same-sex couples. See, e.g., Washington v. Arlene’s Flowers, Inc., 389 P.3d 543 (Wash. 2017); Klein, dba Sweetcakes by Melissa v. Oregon Bureau of Lab. & Indus., No. CA A159899 (Or. Ct. App. filed April 25, 2016); Cervelli v. Aloha Bed & Breakfast, No. CAAP-13-0000806 (Haw. Ct. App. filed May 13, 2013); *2 N. Coast Women’s Care Med. Grp., Inc. v. Superior Ct. (Benitez), 189 P.3d 959 (Cal. 2008).

Family Equality is a national organization that connects, supports, and represents the three million LGBT parents in this country and their six million children. The organization is committed to changing attitudes and policies to ensure that all families are respected, loved, and celebrated - including families with LGBT parents. For over thirty years, Family Equality has been a community of parents and children, grandparents and grandchildren, reaching across the country and raising voices toward fairness for all families.

Also joining this brief are American Federation of Teachers, AFL-CIO; Equality California; Equality Federation; The LGBT Bar Association of Greater New York; Mazzoni Center; National Center for Transgender Equality; National Education Association; PFLAG National; PROMO; The Trevor Project; and Whitman-Walker Health. Full statements of interest for these amici are provided in Appendix A.

SUMMARY OF THE ARGUMENT

Across America, LGBT people are subjected to pervasive discrimination. This discrimination often blindsides its targets, hitting without warning during the myriad transactions that make up daily life. As a result, many LGBT people live defensively, always on guard against the next humiliating, ostracizing incident. From casual shaming to harassment to outright refusals of service, the treatment visited *3 upon this minority effectively subordinates to others’ biases their freedom to live with equal dignity.

Whether or not couched as religion and/or free speech, discrimination against LGBT people inflicts immediate and lasting harm. This is true regardless of whether there are alternative accommodations possibly available. In the aftermath of discrimination, victims often must redirect their energy from the completion of ordinary daily tasks - or what should be joyful, celebratory planning for a significant life event - to recovery mode, focusing instead on
managing the painful fall-out of the discrimination. Residual effects can include psychological and physical health problems, as well as difficulties due to delay or lack of appropriate alternatives.

It is bad enough when private actors ignore anti-discrimination laws. But, when discrimination is excused in the name of religion or free speech, its victims are abandoned, forced to endure the corrosive effects of stigmatizing discrimination without recourse. This brief contains numerous first-person accounts of anti-LGBT discrimination showing its harmful effects. These are a small but representative sampling of the vast amount of discrimination encountered by LGBT people in their daily lives.

Colorado has chosen a path of peaceful coexistence and equal access in public life by enacting protections against sexual orientation and gender identity discrimination. A ruling from this Court granting Petitioners’ requested exemptions would invite increased discrimination, threaten the rule of law, and, as a practical matter, sentence LGBT people and their families to remain pariahs in many public settings. It would prove the accuracy of this Court’s past admonition that the transition from “outlaw to outcast” is inadequate to safeguard “the full promise of liberty.” Obergefell, 135 S. Ct. at 2600.

LGBT people would not be the only ones endangered by such a result. There is no limiting principle to keep the requested loopholes from swallowing the rule of law, including civil rights laws generally. The Court should say “no,” and instead allow states that choose to forbid discrimination to continue enforcing these critical safeguards for vulnerable minorities.

ARGUMENT

1. ANTI-LGBT DISCRIMINATION IS PERVERSIVE IN OUR SOCIETY.


However, many people of goodwill remain unaware of the grinding personal costs exacted by anti-LGBT social stigma and mistreatment. Accordingly, this brief complements Respondents’ briefing with examples showing the range of public accommodations contexts in which LGBT people experience discrimination, both motivated by religion and otherwise, and the significant impacts of that discrimination.

Nothing is new about efforts to justify anti-LGBT discrimination as protected exercises of religion or free speech. See Douglas NeJaime, Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination, 100 Cal. L. Rev. 1169 (2012); David Cruz, Note, Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination, 69 N.Y.U. L. Rev. 1176 (1994). But these demands have accelerated in recent years. Timothy Wang et al., The Current Wave of Anti-LGBT Legislation: Historical context and implications for LGBT health, Fenway Institute (June 2016), http://fenwayhealth.org/wp-content/uploads/The-Fenway-Institute-Religious-Exemption-Brief-June-2016.pdf. Petitioners thus are mistaken when they contend there is no compelling interest at stake here because “‘no one’” is claiming a right not to serve LGBT people. Pet’r’s Br. *54 (citation omitted). Petitioners similarly misstate the depth of the problem when they assert that “few … expressive professionals” will decline to provide wedding-related services involving an
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expressive component, *id. *54-55, and that a ruling granting their requested exemptions will not “open the floodgates to other people of faith seeking similar freedom” because few such cases have occurred. *Id. *60.

*Amici* offer the information in this brief because to this day, much of the damage of anti-LGBT discrimination occurs out of public view. For those at risk of rejection based on their sexual orientation or gender identity, it can seem safer to absorb the denial and try to avoid further conflict rather than publicly protest. This is especially true when social support and legal protections are uncertain.²

Many of the examples presented here have never been made public. Those who share their experiences in this brief do so to offer the Court a fuller picture of what many LGBT people must navigate daily, including and beyond the context of wedding planning. Contrary to Petitioners’ suggestions, these challenges - depicted here through personal narratives and related research - should not be dismissed as speculation. The burdens are real and wrongfully diminish lives that should have equal dignity under our laws and in our public spheres.

*7 A. Discrimination Against LGBT People in Places of Public Accommodation Is a Serious, Pervasive Problem.*

Discrimination against LGBT people occurs throughout public life, often without warning in places where most people would not expect to be denied service or treated as a second-class citizen. Researchers at UCLA have studied complaints filed in state agencies in the District of Columbia and the twenty-one states that expressly prohibit sexual orientation and/or gender identity discrimination in public accommodations. Christy Mallory & Brad Sears, *Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008-2014,* UCLA Williams Institute 1, 7 (Feb. 2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Accommodations-Discrimination-Complaints-2008-2014.pdf. They found that, as of 2016, the rate of anti-LGBT discrimination exceeded the rate of race³ and other forms of sex-based discrimination in public accommodations. LGBT people of color and those with disabilities suffer even higher rates of discrimination than others within the LGBT community. Singh & Durso.

*8* Consistent with these studies documenting prevalent anti-LGBT bias are the innumerable firsthand reports of those who experienced discrimination in public accommodations. These testimonials reveal an ugly truth: with disturbing frequency, LGBT people are confronted by “we don’t serve your kind” refusals and other unequal treatment in a wide range of public accommodations contexts.

Lambda Legal⁴ and Family Equality⁵ collectively have received more than a thousand reports from across the country detailing discrimination in public accommodations reaching from cradle to grave: from denials of infertility treatment, birthing classes, midwifery services, and child care to the indignity of being refused funeral services for a deceased loved one. Ranging from humiliating harassment to outright service denials, the reports describe discrimination by pharmacies, hospitals, dental offices, and other medical settings; professional accounting services, automobile dealerships and repair shops, gas stations, convenience stores, restaurants, bars, and other lodging; barber shops and beauty salons; stores such as big box retailers, discount stores, pet stores, clothing stores, and toy stores; swimming pools and gyms; libraries and homeless shelters; and transportation services including busses, taxis, ride-shares, trains, air travel, and cruise ships. Discrimination reports included contexts with limited alternate options, such as by tow truck drivers, post office employees, and repair service technicians working in the homes of LGBT customers.

Many reports come from transgender people, which is consistent with findings that “among transgender people who visited a place of public accommodation where staff knew or believed they were transgender, nearly one in three experienced discrimination or harassment”⁶ - including denials of equal services and even physical attacks. Singh & Durso. See also Sandy James et al., *The Report of the 2015 U.S. Transgender Survey* 212-23, National Center for Transgender Equality (2016), http://www.ustranssurvey.org/reports.

The discrimination experienced by LGBT people in commercial settings sometimes is vulgar, expressing contempt for these customers. Examples include a California car salesperson calling a woman a “fucking carpet muncher”
(A.S. Statement) and a group of friends in Washington, D.C. being called *10 “GAY BITCHES” on their restaurant receipt. A.G. Statement.

Even licensed health care professionals can display bias, such as the degrading treatment of a gay man who checked into a New York City hospital with a severe infection. He later reported:

I was treated roughly physically and emotionally and called a faggot on more than one occasion by a health aide. At one point, I was dragged down the hall roughly in an office chair, because they said they were short on beds, and I fell out of the chair. ... I was left on the floor, where I went into convulsions and urinated on myself. I was later told I had a seizure and a cyanotic episode ... I could hear the nurse running toward me yelling that she was going to lose her job over this. The health aide responded: “This junky faggot isn’t going to make you lose your job.”

M.H. Statement.

Of course, not all anti-LGBT discrimination cases involve obscenities. But the reports reflect that epithets are common, as are invocations of religion to excuse discrimination. One example is the account of an LGBT Lyft ride-service customer subjected to verbal abuse and religious admonitions by his driver, who self-identified as an evangelical pastor:

I was on my way in a Lyft to Shabbat lunch. My driver ... noticed my yarmulke and told me I should not be riding in a car on Saturday because it *11 makes me a bad Jew. The comments continued after the driver noticed a rainbow flag stitched to my yarmulke. “Good Jews don’t have sex on Shabbat” ... [He] added “the Bible forbids gay sex” along with a slew of homophobic slurs. ... [T]he insults lasted for about eight minutes until the driver pulled over sharply and kicked me out - about a half-mile from my destination.

M.A. Statement.

To the person treated this way, an asserted religious motive does not ameliorate the harmful impacts. *Amici*’s review of discrimination reports for this brief revealed many examples of parallel fact patterns showing that “you aren’t welcome here” messages greeted LGBT people in many contexts - sometimes voiced in religious terms and sometimes secular in tone - but always inflicting similar injuries.

For example, Lambda Legal has received numerous calls reporting discriminatory medical care denials and other unequal treatment by health professionals, some in the name of religion and others not. In one case culminating in litigation, *North Coast Women’s Care Medical Group, Inc. v. San Diego County Superior Court (Benitez)*, 189 P.3d 959, 959 (Cal. 2008), Lambda Legal’s client was denied a common infertility treatment she had sought after two years of unsuccessful pregnancy attempts. As she explained: “[g]iven how long I had been trying to become pregnant, I expected that [the doctor] would recommend [intrauterine insemination] without delay. Instead, she told me that she had a religiously *12 based prejudice against assisting a homosexual to conceive a child by artificial insemination.” Benitez Decl. Opp’n Defs.’ Mot. Summ. Adjudication at 2:11-14 (¶7), *N. Coast Women’s Care Med. Grp., Inc. v. San Diego Cty. Superior Court*, No. GIC 770165 (Cal. Super. Ct. filed March 25, 2004), https://www.lambdalegal.org/in-court/legal-docs/ca_benitez_20040325_declaration-of-guadalupe-benitez (“Benitez Decl.”).

J.M., an Alabama resident, faced discrimination by a health care provider that took the form of invasive, anti-gay proselytizing:

When my partner was a hospital patient, he told the treating physician he was gay on the first day of his hospitalization. The physician responded, “I’m sorry for that.” During a subsequent hospitalization, he was treated by the same physician. During that stay an uninvited guest showed up to the room to pray over my partner, and
the following day the physician left a pamphlet on my partner’s tray that said you must “repent and be filled with the spirit or you will go to hell.” The physician continued to question my partner about his religion.

J.M. Statement.

Other callers sought help from mental health professionals, only to be treated so abusively that it worsened their condition. K.S., a transgender woman in Dallas who sought help because she had become suicidal, recounted:

*13 On several occasions, I was asked by nurses and orderlies intrusive questions about my genitals as well as other inappropriate questions about my transgender status. When I complained ..., a nurse told me that I should just “expect to be treated like this.” On multiple occasions, they made me sleep on the hallway floor rather than in a room, and when I was finally given a room, it was an isolation room. ... I was also prevented from using the bathroom for hours at a time ... [and] denied use of [my electric shaver] for a week, which caused me to grow a beard. The staff of the facility discussed my transgender status loudly ..., and as a result, within the first couple days of my arrival all of the patients around me knew, which caused me to suffer sexual harassment from two male patients.

K.S. Statement. Due to this treatment, K.S. attempted suicide twice while at that facility. Id.

As with lesbian, gay and bisexual patients, sometimes health care providers invoke religion to justify refusing to treat transgender patients equally. Lambda Legal client Jionni Conforti was refused a medically necessary hysterectomy that his physician was prepared to perform because the local hospital where the physician had admitting privileges forbids all gender-dysphoria-related care on religious grounds. *14 Conforti v. St. Joseph’s Healthcare System, No. 2:17-cv-00050-JLL-JAD (D.N.J, filed Jan. 5 2017), https://www.lambdalegal.org/in-court/cases/nj-conforti-v-st-josephs.

In the context of transportation services, a quintessential public accommodation, LGBT people have encountered sudden, jarring discrimination - sometimes in the name of religion and other times not - while simply trying to get from one place to another. Taxi and ride-share drivers, for example, have harassed and even ejected LGBT passengers from their vehicles short of their destinations. The previously described experience of M.A., who was subjected to anti-gay slurs and religious condemnation by the self-described evangelical ride-share driver, exemplifies this. M.A. Statement.

So, too, does the 2013 experience of Steven W. and Matthew M., then a couple, whose Chicago taxi driver threatened to eject them at the side of the highway late at night during a rainstorm. They explain: “On the way home, we exchanged a quick kiss in the backseat of the cab. When the driver saw us kiss, he pulled the cab over on the side of the Kennedy Expressway and demanded we exit the cab right there on the side of the highway.” M.M. and S.W Statement.

This incident parallels the report of a Portland, Oregon, couple who actually was ejected from a cab late at night on the side of the interstate. Aimee Green, Lesbian couple sues Broadway Cab, driver for $38,000 after left beside Interstate 84, The Oregonian (July 28, 2014), http://www.oregonlive.com/portland/index.ssf/2014/07/lesbian_couple_sues_broadway_c.html.

Likewise, the hospitality industry often is inhospitable to LGBT people. Same-sex couples report having been turned away from lodging both in the name of religion and without that reason.

For example, a California-resident lesbian couple was refused by a bed and breakfast in Hawaii, the owner telling them she “felt uncomfortable renting a room to homosexuals, citing her personal religious views.” Mot. Summ. J. Bufford Decl. at ¶4, Cervelli v. Aloha Bed & Breakfast, No. 11-1-3103-12 (Haw. 1st Cir. Ct. filed Feb. 4, 2013), https://www.lambdalegal.org/in-court/legal-ocs/hi_cervelli_20130213_declaration-of-taeko-bufford. But, a gay male couple seeking to reserve a vacation rental in California reported that their application was rejected simply due to their “unacceptable ‘homosexual orientation.’” M.O. Statement.

*16 L.M., an African American gay journalist, was reviewing a Chicago hotel for a magazine for LGBT people of color. As he approached the front desk, he “heard an older African American male employee saying ‘fag,’ ‘fucking homo,’ and ‘he needs to find another hotel because he ain’t staying here’ to his co-worker.” L.M. Statement. As he explained, L.M. felt deeply humiliated:

It wasn’t whispered but blatantly directed towards to me.... When it was my turn [at] ... the front desk, ... I confronted him about those nasty comments and he didn’t deny them. The folks behind just continued to laugh ... Never have I felt so powerless and vulnerable. That day stole a part of me. ... I began to lose my confidence, self-worth and felt invisible to the world. I shall never forget his face and the sea of laughter from his audience.

Id.

Among all these contexts of disparagement and service denial, one of the most painful is when LGBT people grieving the death of a loved one are not even allowed the dignity and comfort of respectful funeral services. In one Lambda Legal case, after a Mississippi funeral home refused to pick up the body of a deceased gay resident as pre-planned by the decedent’s family, the nursing home manager testified that the funeral home worker had objected, stating: “This goes against everything I believe in. I’m a Christian.” McClendon Dep. at 14:14-16, *17 Zawadski v. Brewer Funeral Servs., No. 55C11:17-cv-00019-CM (Miss. Pearl River Cty. Circ. Ct. June 14, 2017). See also https://www.lambdalegal.org/in-court/cases/ms_zawadski-v-brewer-funeral-services; WATE Staff, Tennessee widow says funeral home refused to serve her over same-sex marriage (Aug. 2, 2017), http://wncn.com/2017/08/02/tennessee-widow-says-funeral-home-refused-to-serve-her-over-same-sex-marriage/.

Other examples of discrimination further reinforce the diversity of settings in which same-sex couples and their families are vulnerable. Consider the series of rejections visited upon A.S. and R.S., a married couple living outside Nashville, Tennessee. When A.S. became pregnant, she wanted to deliver at home with a midwife due to her medical history. They investigated and made initial calls. But then,

excitement quickly turned to doubt, embarrassment, and sadness when the first midwife turned us down ... [saying] her midwifery practice was a part of her ministry and therefore she was not comfortable working with a same-sex couple. While I had experienced similar situations when we were planning our wedding, this felt more profound ... it was now affecting our child. As we ... were turned down by every midwife for the same reason, I felt utterly powerless and began to wonder if we would be able to find a qualified provider at all. My access to quality medical care, and that of our unborn child, was greatly reduced because of who I love. Our son was *18 discriminated against before he was ever born.

A.S. Statement.
The couple met rejection again when trying to enroll in birthing classes. The instructor said they should do private classes because “she didn’t feel the other couples in a group class would accept” a same-sex couple. But private classes were too expensive, leaving A.S. and R.S. with “the sense of powerlessness.” *Id.*

Then, when their son was two, A.S. and R.S. chose a childcare facility attended by many neighboring children, only to have history repeat. A.S. recounts:

> When our son was denied an application because he had two Moms, we were heartbroken. He had been very excited about going to school with his friends and didn’t understand when we had to tell him he couldn’t. These events altered the bonds he had formed with the neighborhood children from birth and his personal connection with his community.

*Id.*

The family of H.C. and L.C., a lesbian couple of Austin, Texas, likewise met rejection. When their two-year-old daughter, M.C., fell and knocked out her front tooth, L.C. rushed the crying, bleeding child to a pediatric dentist. H.C. recounts:

> I was at work at the time. When my wife and daughter arrived at the dentist’s office, he asked my wife “who *19 is the real mother?”… My wife … explained that M.C. has two mothers. The dentist told my wife that “a child cannot have two mothers” and said that he would only see the biological mother (me) of our daughter with a birth certificate as proof. My wife called me sobbing, and told me, “They want the real mom to be here. You have to come and bring M.C.’s birth certificate before they will treat her.” I was shocked.… We were blindsided by this whole encounter.

H.C. Statement. The devastation of this experience was greater because it came at the hands of a health professional, as H.C. explained:

> Although my wife and I … expected we might face discrimination at some point in our lives …, we never expected to face discrimination from a medical provider - especially from someone taking care of our child. I don’t think anything could have prepared us for this.


*20 Refusals to accept a child’s same-sex parents can last into that child’s adulthood. While on a family cruise, S.S. of New York wanted to purchase a beer/wine package for her son. S.S. Statement. Given his age, parental approval was required. But, because they have different last names, the sales clerk did not believe she was his parent and insisted on speaking with the father. S.S. presented her son’s birth certificate with her name and his other mother’s name. The clerk then questioned how there could be two mothers and continued to ask for “the father.” As S.S. recounts,

> by this time she had caused quite a scene. Both of my children, along with a whole crowd of people, had gathered and witnessed the entire situation…. I was shocked that in 2016 on a major cruise line, docked in New York City, I would face discrimination because I am a lesbian and my son has two mothers. … It was … humiliating, and upsetting to my entire family.

*Id.*

These incidents are merely a representative sampling of the approximately one thousand records reviewed by Lambda Legal and Family Equality, which in turn represent a small fraction of the discrimination against LGBT
people across the country. With discrimination in fact so common for this population, Petitioners’ assertions to the contrary are misleading and, especially given the many voices joining their effort, are a telling indication of why this reality persists.

*21 B. Anti-LGBT Denials of Wedding-Related Services And Goods In Particular Are Increasingly Common.

In the context of wedding-related services and goods specifically, Petitioners inaccurately contend that anti-LGBT denials are rare. They likewise are mistaken in claiming that wedding-related goods and services represent a distinguishable area of commerce in which desires to refuse equal service to same-sex couples are novel and deserve special solicitude. In fact, court records and news reports confirm a proliferation of wedding-related discrimination problems, building on a sizable prior record of religion-based discrimination cases.


Petitioners’ claim that such discrimination is rare is particularly curious because their counsel here, Alliance Defending Freedom (ADF), has represented many of the businesses seeking to evade public accommodations laws in these service-denial cases. Indeed, ADF encourages such conduct by businesses and invites them to contact the organization for legal representation. See ADF’s “You Are Free to Believe, But Are You Free to Act?” at https://www.adflegal.org/issues/religious-freedom/conscience.


Separate from this organized effort, such discrimination is occurring spontaneously in the south and north, in larger cities and small towns. One recent example is the treatment of A.R. and S.F., a lesbian couple who won the public drawing for event-planning services at a bridal expo in Atlanta this spring, only to be rejected. The planners informed them:

*23 … we have decided the only way to stay true to who we are will be to decline serving as the planners for your wedding. Please understand, we had every intention of following through with what we offered because we are women of our word; but what we have come to realize is that we are also women of our faith.


C.D., who lives in a small town in Minnesota, gives another example. She was preparing for her gay son’s wedding and wanted to patronize the local floral shop. But as she was giving the order,

… and it came out that it was a gay wedding, she stopped writing and said “oh boy, that’s a tough one.” I asked “what do you mean, because it’s a gay wedding?” She said “yes.” I went into Mom mode and asked what she
would do if one of her children came to her and told her they were gay. She said they would pray. She told me she
didn’t think she could support providing flowers for a gay wedding.

CD. Statement.

Looking forward, Petitioners’ argument that this case will not “open the floodgates” is further belied by the
Nashville Statement, issued in August 2017 by a large group of self-identified Christians. Coalition for Biblical
for those intending to *24 assert religious defenses to discrimination claims, it forcefully condemns LGBT
individuals and characterizes contemporary anti-LGBT bias as religious doctrine. If this Court opens the door, the
Statement promises a stampede of cases seeking exemptions from civil rights laws.

II. PUBLIC ACCOMMODATIONS NONDISCRIMINATION LAWS MUST BE ENFORCED TO PREVENT THE MANY
HARMFUL EFFECTS OF DISCRIMINATION.

A. Anti-LGBT Discrimination Has Immediate Harmful Effects.

The immediate harmful effects of public accommodations discrimination take many forms. There are dignitary
and emotional injuries from being told one is not worthy of being served on equal footing with others, and tangible
repercussions as well. Ultimately, discrimination is harmful whether or not the goods or services can be readily
obtained elsewhere.

The dignitary and emotional injuries that LGBT people commonly report after having been refused service include
feeling “insulted, hurt, and upset, and ... degraded” (Oliver Statement); “upset, distressed, and humiliated” (Mot.
testimony), appeal pending, No. CA A159899 (Or. Ct. App. filed April 25, 2016).

*25 When same-sex couples are turned away from wedding-related services, the contrast between what should
have been a celebratory experience and the humiliation of the rejection is wounding. “It really hurt because it was
somebody I knew,” acknowledged Robert Ingersoll, a plaintiff in Arlene’s Flowers, who was refused service by his
florist. Barronelle Stutzman, Arlene’s Flower Shop Florist, Refuses Washington Gay Wedding Job Because Of
Religion, Huffington Post (Mar. 7, 2013), http://www.huffingtonpost.com/2013/03/07/arlenes-flower-shop-gay-
edding-washington_n_2828195.html. Mr. Ingersoll recalled, “We laid awake all night Saturday. It was eating at
our souls.” Id. See also Arlene’s Flowers at 566.

As Jennifer McCarthy, a member of the lesbian couple in Gifford v McCarthy, explained:

When we were rejected for being a same-sex couple, beyond losing what we thought was the perfect venue, I felt
judged and dismissed for who I was and for my relationship. Nobody should feel like that.

It is difficult to describe how heartbreaking it is when someone says to you that, because you are marrying
someone of the same sex, you cannot have the options that heterosexual couples have.

Farm owners appeal $13,000 fine they were given after refusing to host lesbian wedding at their venue, Associated
Press (Nov. 23, 2015), http://www.dailymail.co.uk *26/news/article-3330025/NY-farm-owners-denied-lesbian-
couple-wedding-appeal.html.

The emotional and dignitary injuries of discrimination can be more acute due to the circumstances. For example,
those seeking medical care often are particularly vulnerable because they must place themselves or their children
in others’ hands and trust they will be cared for according to medical standards and with respect. One former
Lambda Legal client, Illinois resident Naya Taylor, described the emotional effects of being denied medical care as

Similarly, Jionni Conforti said being denied care by a New Jersey hospital made him feel humiliated and “completely disrespected. ... That’s not how any hospital should treat any person regardless of who they are. A hospital is a place where you should feel safe and taken care of. Instead I felt like I was rejected.” Derek Hawkins, Catholic hospital approved his hysterectomy, then refused because he was transgender, suit says, Wash. Post (Jan. 6, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/01/06/catholic-hospital-okd-his-hysterectomy-then-denied-him-because-he-was-transgender-suit-says. See also Conforti, https://www.lambdalegal.org/in-court/cases/nj-conforti-v-st-josephs.

*27 Trauma from discrimination also is compounded when people are rejected in front of their loved ones, which results in additional humiliation and impacts family members, too. Rachel Bowman-Cryer, a member of the same-sex couple in Sweetcakes by Melissa, experienced this. Her mother, Cheryl McPherson, had only recently accepted Rachel’s sexual orientation when Rachel and Laurel began planning their wedding. Showing support, Cheryl accompanied Rachel to order the cake. The bakery owner then shocked them both by refusing service, citing religious objections:

[Rachel] began crying. She felt that she had humiliated her mother and was anxious whether [Cheryl] was ashamed of her, in that [Cheryl] had believed that being a homosexual was wrong until only a few years earlier.... On the way out to their car and in the car, [Rachel] became hysterical and kept telling [Cheryl] “I’m sorry” because she felt that she had humiliated [Cheryl].

In the Matter of Klein, 34 BOLI 102 at *3 (quoting hearing testimony including Cheryl’s testimony that the owner “had told her that ‘her children were an abomination unto God.’ ”).

Arbitrary refusals also affect family members of LGBT individuals. CD. of Minnesota, who sought to purchase flowers for her son’s wedding, described the impact on her of the rejection of her son:

I left, went back to work and cried, not for myself but for anyone who is currently being discriminated against *28 for any reason. To make someone feel they are not worthy of a service because of their sexual orientation or race is a horrible way to treat a human being.

CD. Statement.

A mother whose daughter was refused by a Vermont event venue similarly expressed her own emotional trauma from seeing her child rejected:

I had been so excited to help plan my only daughter’s wedding reception, so when the Wildflower Inn told me that my daughter wasn’t welcome there, it was like being kicked in the stomach, ... Someone who didn’t even know us was telling me that my daughter wasn’t good enough to have her reception at their facility while everyone else who sees the resort’s website is welcome.


Even informing loved ones about discrimination after the fact can aggravate the emotional turmoil of the prior incident. A.R. and S.F., describing how “offensive and dehumanizing” it was to be refused a wedding planner’s
service after winning the public raffle, “especially in the midst of assembling what should be a delightful celebration,” explained that it was additionally “difficult sharing the devastating *29 news with our family and friends the next morning.” A.R. and S.F. Statement.

Especially for children, discriminatory treatment that denies the validity of their families can inflict deep psychological and emotional wounds. See Obergefell, 135 S. Ct. at 2600-01 (noting the “harm and humiliat[ion]” for children of same-sex couples due to stigma and discrimination against their parents). As A.B. recounted, when an airline employee repeatedly refused to allow her, her wife, and their son to board an international flight out of JFK Airport because the attendant refused to recognize them as a family:

[T]his episode was extremely distressing to us and to our son. I felt frustrated, humiliated and disempowered. Being belittled and demeanded in front of our child was a terrible injustice. Having our child’s connection to us questioned - in front of him! - was terrifying for each member of our family. Afterward, three-year-old [R.] repeatedly asked us, “Why the mean lady wouldn’t let us on the plane?”

That IS the question, isn’t it?

A.B. Statement.

Another same-sex couple similarly was refused family boarding access; they explained, “[a]s two gay men raising children, we are particularly concerned that actions by other people may engrain in our children a belief that our family is not a ‘real’ family or is somehow inadequate.” G.M. and S.B. Statement. They said being denied recognition at an airline gate *30 was “particularly upsetting to our daughter, who is old enough to understand that her family was being treated differently despite our best efforts to shield her from what was happening.” Id.

Religious reinforcement of anti-LGBT bias often increases the mental health impacts of discrimination. Ilan H. Meyer et al., The Role of Help-Seeking in Preventing Suicide Attempts among Lesbians, Gay Men, and Bisexuals, 8, Suicide & Life-Threatening Behavior (2014), http://www.columbia.edu/~im15/papers/meyer-2014-suicide-and-life.pdf (“although religion and spirituality can be helpful to LGB people, negative attitudes toward homosexuality in religious settings can lead to adverse health effects”).

The Center for American Progress has found that 47.7% of LGBT people who reported discrimination in a one-year period said the discrimination negatively impacted their spiritual well-being. Singh & Durso. The experience of Guadalupe Benitez illustrates this point. Upon being denied medical care, she felt “surprised and profoundly distressed” by the doctors’ refusal to treat her the same as other patients, and “was particularly upset by [her doctor’s] references to her religion and the fact that she would permit her religious beliefs to result in a situation where she would withhold medical procedures she provided to her other patients.” Benitez Decl. at 2:15-16, 19-22 (¶8).

Government-regulated settings such as post offices similarly might seem an obviously improper place for discrimination based on employees’ religious beliefs. The surprise only increased the humiliation for Illinois resident A.R., a transgender man who had legally changed his name, but was laughed at by postal workers who forced him to keep his previous female name on his post office box. A.R. Statement. A.R. recounted that “a supervisor made it clear that her reason for refusing to accommodate me was that she was Catholic and being transgender was against her religion.” Id.

Respectful treatment also should be a reliable norm from licensed financial professionals. But, such was not the experience of S.C., a Missouri resident, who reported that when she brought her same-sex fiancée and their paperwork to the accountant her family had used for years, and requested help filing the next year’s taxes as a married couple, the accountant’s representative:

> got a hostile look on her face and stated, “Oh we don’t do that.” I said, “What, taxes for married people?” Then she loudly whispered (while glancing over at the gentleman in the lobby waiting) “Same-Same” ... as if to say same-sex couples. I asked to speak with the CPA and after a bit was taken back to his office. One of the first things he told us was “We are a Christian organization.” ... he didn’t feel he could sign a tax return attesting to us being a married couple due to his religious beliefs.

S.C. Statement. This rejection compounded a prior discriminatory rejection the couple had experienced when trying to order a wedding cake from a highly rated baker, only to be refused. As S.C. recalled, “This left my fiancé in tears.” Id.

As is clear from these narratives, public accommodations discrimination also can cause other immediate injuries, beyond emotional trauma. Those who are rejected by a place of business must spend time and resources to find another business to accommodate them, which can be difficult. Having to start anew, for example with wedding or travel planning, imposes costs. Some denials, such as by accountants or medical providers, can have legal or medical consequences. In the case of funeral services, sudden logistical nightmares inflict stress and indignities that no bereaved should have to bear. *33 Virtually all who reported public accommodations discrimination to Lambda Legal or Family Equality described harmful emotional and dignitary impacts.

Finally, ejection from a public accommodation can be frightening and life-endangering. As Matthew M., who was rejected by a taxi driver in 2013 after sharing a brief kiss with his then-partner, reported, “[w]hen the driver demanded that we get out of the cab, I was afraid. It was late, there was a rainstorm, we were on an expressway and I can’t imagine what would have happened if the driver had actually kicked us out of the cab.” See https://www.lambdalegal.org/blog/20131028_cab-driver-kicks-out-couple-for-kiss.

**B. Anti-LGBT Discrimination Can Cause Long-Lasting Residual Injuries**


*34 Furthermore, the resulting stress can cause physical as well as mental disorders. Meyer & Frost at 252; see a/so David Lick et al., *Minority Stress and Physical Health Among Sexual Minorities*, 8 Perspect. Psychol. Sci. 527-30 (2013), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.948.2105&rep=rep1&type=pdf. M.H.
described such emotional and physical injuries from the discrimination he suffered at the hands of biased hospital staff:

I became extremely depressed as a result of what happened. ... I am still suffering some physical (gastro-intestinal) and emotional effects, including post-traumatic stress disorder. I cannot go into a hospital any more without feeling traumatized, and the shame of the experience has also made it difficult for me to even talk about the experience with a therapist, even though I am a therapist myself.

M.H. Statement.

Similarly, K.S. who, as previously described, became even more suicidal after abuse at a mental hospital, reported that she remains deeply traumatized to this day. K.S. Statement. And Guadalupe Benitez, after being denied donor insemination following nearly a year of other treatments, recounted that she felt “duped, humiliated” and “was devastated and cried for several days.” Benitez Decl. at ¶35. She became “wary and distrustful of others” and her “prior difficulties with anxiety and stress-related headaches, which had resolved ... resumed.” Id. at *35 ¶45. She ended “with a sense of vulnerability due to [her] sexual orientation that [she] did not have before...” Id.


These changes include avoidance behavior. As Singh and Durso explain, among LGBT people who had not experienced a prejudice event in the last year, only 9.2% made a specific decision about where to live, 8.4% about where to shop, 15.1% avoided social situations, 5.9% moved away from rural areas, and 2.7% avoided doctors’ offices, but among those who had experienced a prejudice event in the last year, those rates increased to 48.6%, 46.9%, 49.8%, 28.8% and 18.4%, respectively. Singh & Durso. Other documented changes in behavior include concealing personal relationships, changing the way one speaks, choosing where to obtain an education, and avoiding public transportation. Id.

Not everyone has the ability to avoid the sources of their discrimination; some must continue to suffer ongoing encounters. For example, A.S., whom a car sales agent called a “fucking carpet muncher,” still must see that agent periodically:

*36 Having to bring my car in there for service was the most uncomfortable thing ever .... But the fact that they kept a woman there who did this is really horrible. It stressed me out any time I had to go there and the only reason I had to go there was because of where I live, and the other dealership was 45 miles away. I am not on a budget to get me out that way all the time. It was very upsetting, and no one should ever have to experience anything like that.

A.S. Statement.

The residual impact on the psychological well-being of LGBT people can include loss of trust and constant anticipation of more discrimination. Day-to-day interactions can become alienating. Even the simple task of going to the post office can become emotionally fraught when one has been singled out for demeaning treatment there, as A.R. described: “I feel that their mistreatment of me showed they would not work with transgender people, and that left me feeling vulnerable to abuse and discrimination.” A.R. Statement.

The rejection sensitivity that results can lead to social inhibition, withdrawal, and isolation - responses associated with poor mental and physical health outcomes. Lick, Minority Stress and Physical Health Among Sexual Minorities,
8 Perspect. Psychol. Sci. at 534-35. A lesbian who grew up in North Carolina and suffered various forms of discrimination throughout her life illustrates this point, explaining:

*37 [T]he violent and often hurtful and intimidating actions taken directly against me have negatively affected the trajectory of my life in damaging and life-long lasting ways. … [F]acing direct discrimination, particularly as a person who is “identifiable,” has been harmful to my personal health and welfare and interfered with my ability to pursue happiness and improve my health and personal countenance. I have found myself withdrawing from going out much and engaging with the outside world, to protect myself from more harassment and painful discrimination.

J.T. Statement.

Similarly, in Oregon, a group of women banned from a popular bar because they are transgender described how “[a]fterwards, they couldn’t sleep, missed work and pulled away from friends.” Casey Parks, Chris Penner, whose bar was shuttered by BOLI fines concerning transgender patrons, waging write-in campaign for labor commissioner, The Oregonian (May 6, 2014), http://www.oregonlive.com/portland/index.ssf/2014/05/chris_penner_whose_bar_was_shu.html.

Because anti-LGBT discrimination is pervasive and results in fears that hostility may lurk behind any counter or storefront, this community has created “safe spaces,” in which to relax and let down their guard. See Julio Capó Jr., Gay Bars Were Supposed to be Safe Spaces. But They Often Weren’t, Wash. Post (June 24, 2016), https://www.washingtonpost.com/posteverything/wp/2016/06/14/gay-bars-were-supposed-to-be-safe-spaces-but-they-often-werent. Tragically, as the violent Pulse nightclub massacre in Florida last year shows, even in such safe spaces members of the LGBT community may be targets of life-shattering, even life-ending, bigotry. See id.; see also Daniel D’Addario, The Gay Bar as Safe Space Has Been Shattered, Time (June 12, 2016), http://time.com/4365403/orlando-shooting-gay-bar-pulse-nightclub/.

III. THE CREATION OF NEW RELIGION- OR SPEECH-BASED EXEMPTIONS FROM CIVIL RIGHTS PROTECTIONS WOULD WORSEN THE HARMFUL EFFECTS OF DISCRIMINATION.


Civil rights laws thus offer LGBT people the “opportunity to live and love free from … injustice” (J.T. Statement) that many have sought for so long. However, in too many states, LGBT people still lack non-discrimination protections. Thanks to cases like this one, even those living in places with protections must confront the reality that they remain *39 vulnerable. The risk of continued discrimination is particularly acute when those providing services to the public believe they are entitled, in the name of religion or free speech, to refuse service to others based on who they are.

Again, Petitioners’ assertion that this case will not “open the floodgates” is undermined by its own nationwide outreach campaign and the Nashville Statement. Such efforts to codify religion-framed discrimination as official doctrine, endorsed as a special exemption under law, threaten not just the wellbeing of LGBT people but the rule of law itself. This is because there is no limiting principle to temper the inevitable harms of the requested exemptions. As has been demonstrated, anti-LGBT refusals of service and other discrimination have not been limited to wedding-related services, whether “expressive” or not, but occur in myriad contexts.
Nor would the dangerous ripple effects of a decision in Petitioners’ favor necessarily be limited to sexual orientation and gender identity discrimination. As the District Court in Minnesota recently explained in Telescope Media Group, 2017 WL 4179899, at *13, a business’s announcement that it will not cater to same-sex couples is akin to a “White Applicants Only” sign, which certainly may be prohibited without implicating the First Amendment (citing Rumsfeld v. Forum for Acad. & Inst’l Rights, Inc., 547 U.S. 47, 62 (2006)).

When even “sincere, personal opposition” to treating LGBT people equally “becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.” Obergefell, 135 S. Ct. at 2602 (2015). See also Stanley Milgram, Behavioral Study of Obedience, 67 J. Abnormal & Social Psych. 371-78 (1963) (exploring how authority bias shapes attitudes). The stamp of governmental approval on discrimination has dangerous repercussions. Not only would a ruling that in effect condones discrimination lead to more discrimination, it would increase the risk of anti-LGBT violence. See, e.g., Christopher R. Leslie, Creating Criminals: The Injuries Inflicted by ‘Unenforced’ Sodomy Laws, 35 Harv. C.R.-C.L. L. Rev. 103, 124, 137-43 (2000) (describing how violence and other anti-LGBT discrimination were rationalized by reference to anti-sodomy laws). “State-sanctioned condemnation of a group of citizens … sends the clear message that this group is not entitled to the freedom from physical violence provided other citizens.” Id. at 126. See also Charlene L. Smith, Undo Two: An Essay Regarding Colorado’s Anti-Lesbian and Gay Amendment 2, 32 Washburn L.J. 367, 369-70 (1993) (documenting a three-fold increase in anti-gay violence after Colorado Amendment 2 was passed).

Similarly, discrimination can breed more dangerous discrimination if deemed socially acceptable. See Christian Crandall et al., Social norms and the expression and suppression of prejudice— The struggle for internalization, 82(3) J. Personality & Soc. Psych. 359-78 (2002) (examining effect of group norms on individual opinions). When unchecked, those biases and segregationist tendencies harm society as a whole as well the targeted groups. See Reva Siegel, From Colorblindness to Anti-Balkanization: An Emerging Ground of Decision in Race Equality Cases, 120 Yale L. J. 1278, 1300-02 (2011) (emphasizing Court’s role in warding off divisive threats to a cohesive society).

In contrast, continued commitment to civil rights laws promotes social cohesion and reduces harmful factional strife. The court below properly respected Colorado’s nondiscrimination law, which “prevents the economic and social balkanization prevalent when businesses decide to serve only their own ‘kind,’ and ensures that the goods and services provided by public accommodations are available to all of the state’s citizens.” Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 293-94 (Col. Ct. App. 2016).

Through its anti-discrimination laws, Colorado has committed to honoring longstanding principles of equal dignity for all. The Court should not allow Petitioners’ requested exemptions to render these protections effectively meaningless.

*42 CONCLUSION

The Colorado Court of Appeals’ decision affirming the Commission’s order should be affirmed.

*1A APPENDIX A

Additional Amici Curiae Statements of Interest

American Federation of Teachers, AFL-CIO

The American Federation of Teachers (AFT), an affiliate of the AFL-CIO, was founded in 1916 and today represents approximately 1.7 million members who are employed across the nation in K-12 and higher education, public employment, and healthcare. The AFT has a diverse membership, which includes a variety of protected classes, including many members who identify as lesbian, gay, bisexual, transgender or queer (LGBTQ). The AFT has a
longstanding history of advocating for the civil rights of its members and the communities they serve, and fighting discrimination in the workplace and beyond.

**Equality California**

Founded in 1998, Equality California (EQCA) is the nation's largest statewide LGBTQ civil rights organization. Equality California brings the voices of LGBTQ people and allies to institutions of power in California and across the United States, striving to create a world that is healthy, just, and fully equal for all LGBTQ people. EQCA advances civil rights and social justice through education, advocacy, mobilization, legislative, electoral, and communications programs. EQCA is dedicated to combatting discrimination and injustice on the basis of sexual orientation or gender identity, and protecting the needs and interests of those within the LGBTQ community and vulnerable communities of which LGBTQ people are a part.

*2a Equality Federation*

Equality Federation is the movement builder and strategic partner to state-based organizations advocating for LGBTQ people. From Equality Florida to Freedom Oklahoma to Basic Rights Oregon, the organization amplifies the power of the state-based LGBTQ movement. Equality Federation works collaboratively with its state-based partners and others on many critical issues - from advancing workplace fairness and family recognition to defeating anti-transgender “bathroom bans” and HIV criminalization laws - that affect how LGBTQ people experience the world from cradle to grave. Together with their partners they work on cross-cutting issues impacting the LGBTQ community such as racial equity, reproductive justice, and immigration. In their advocacy program they partner with leaders on the ground to fend off attacks on the LGBTQ community and advance protections for LGBTQ people in state legislatures, where hundreds of bills affecting the community are introduced annually. In its leadership program Equality Federation ensures that state equality groups build power by training strong, resilient, and adaptive leaders in sustainable organizations.

**The LGBT Bar Association of Greater New York**

The LGBT Bar Association of Greater New York (LeGaL) was one of the nation’s first bar associations of the LGBT legal community and remains one of the largest and most active organizations of its kind in the country. Serving the New York metropolitan area, LeGaL is dedicated to improving the administration of the law, ensuring full equality for members of the LGBT community, and promoting the expertise and advancement of LGBT legal professionals.

**Mazzoni Center**

Mazzoni Center is the only health care and wellness provider in the Philadelphia region specifically targeting the unique health care needs of the LGBTQ community. Founded in 1979, Mazzoni Center has expanded over time to meet more of this community’s needs and now offers a full array of primary health care services, mental and behavioral health services, and direct legal services. Mazzoni’s legal services team assists LGBTQ people, including same-sex couples, to respond to discrimination in many areas, including places of public accommodation. Mazzoni’s behavioral health team helps LGBTQ people cope with the emotional and psychic damage caused by discrimination against them because of their identity or the gender of the person they love. For these individuals and families, the question of whether commercial business owners are able to disregard laws that prohibit discrimination - whether based on professed religious belief or for other reasons - will determine whether they are protected against discrimination at all. Accordingly, Mazzoni Center and its clients have a strong interest in the issues before this Court.
Chapter 4—Anatomy of a Civil Rights Case: *Klein dba Sweetcakes by Melissa v. Bureau of Labor & Industries*

The National Center for Transgender Equality, founded in 2003, is dedicated to advocating for fairness, opportunity, and wellbeing for transgender people. In 2015, NCTE conducted the U.S. Transgender Survey of over 27,000 adults across the country.

*National Education Association*

The National Education Association is the nation’s largest professional association representing over three million members, the vast majority of whom serve as educators, counselors, and education support professionals in our nation’s public schools. NEA recognizes the full dignity and humanity of all students and educators, and stands against discrimination based on race, gender, sexual orientation, gender identity, disability, ethnicity, immigration status, occupation, and religion. NEA believes that a great public school is a fundamental right of every child, and that our schools and communities must be free from intimidation and harassment, and safe for all educators, students, and their families, including those who identify as gay, lesbian, bisexual, and transgender.

PFLAG National

Founded in 1972 with the simple act of a mother publicly supporting her gay son, PFLAG National is the nation’s largest organization uniting families, allies, and LGBTQ people. Now entering its 45th year of providing support, education, and advocacy, PFLAG has nearly 400 chapters and 200,000 supporters crossing multiple generations of American families in major urban centers, small cities and rural areas across the United States, Washington D.C., Puerto Rico, and the largest non-stateside U.S. military installation and base in the world, located in Germany.

PROMO

PROMO is Missouri’s statewide organization advocating for LGBT equality through legislative action, electoral politics, grassroots organizing, and community education. PROMO envisions a Missouri where everyone has full equality in the hearts and minds of citizens, in all areas of the law, regardless of sexual orientation, gender identity, or gender expression. A non-profit organization founded in 1986, PROMO represents the interests of an estimated 160,000 LGBT Missourians whose legal rights to be free from discrimination in public accommodations due to their sexual orientation or gender identity are impacted by the issues in this case.

The Trevor Project

The Trevor Project is the nation’s largest LGBTQ youth crisis intervention and suicide prevention organization. Founded in 1998, the Trevor Project offers unique, free, and confidential crisis intervention services for LGBTQ youth, which are utilized by thousands of individuals each month. By monitoring and analyzing data obtained from these services, the Trevor Project also produces innovative research with implications for policy affecting LGBTQ youth. Furthermore, as an expert voice on issues affecting LGBTQ youth, the Trevor Project provides in-person trainings for adults who work with youth, a free online learning module for middle school and high school teachers, and other resources for youth and adults.

Whitman-Walker Health

Whitman-Walker Health is a community-based health center in Washington, DC, providing primary health care and HIV specialty care; mental health and addiction treatment services; dental care; community health services; and legal assistance to more than 18,000 individuals and families annually. Approximately one-half of Whitman-Walker’s health care patients and legal clients identify as lesbian, gay or bisexual; and the health center has one of the largest transgender and gender-nonconforming patient/client populations in the nation - almost 1,600 individuals. Whitman-Walker health care providers, lawyers and counselors frequently hear from their LGBT
patients and clients of discriminatory incidents that have caused trauma and had harmful effects on the individuals’ health.

**1AA APPENDIX B**

### Source of Narratives’ Referenced in Brief

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The State of the Union: *Masterpiece Cakeshop* and Other LGBT Law Developments
Footnotes

1. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici, their members, or their counsel made a monetary contribution to its preparation or submission.


4. Lambda Legal staffs a Help Desk to provide information regarding sexual orientation, gender identity, and HIV-status discrimination. See https://www.lambdalegal.org/helpdesk. Its professional staff maintains a confidential electronic database of these inquiries, with records going back to January 1, 2008. A search of the database for preparing this brief found nearly a thousand inquiries concerning public accommodations problems between January 1, 2008, and August 28, 2017. For each account included in this brief, staff counsel confirmed consent to include the account and its accuracy. The correspondence and written statements of each reporting party are retained on file with counsel. Appendix B hereto is a chart with identifying information for each account discussed herein.

5. Family Equality collects stories of LGBT families and children, including reports of discrimination, to further its education, policy, and amicus work. For this brief, staff counsel conducted individual interviews and received written accounts of the incidents discussed herein. The interview notes and written submissions are retained on file with counsel, and the referenced incidents are included in Appendix B.

* Other than from case law, litigation documents, and media accounts. These first-hand narratives were conveyed directly to Lambda Legal’s Help Desk and/or to attorneys for amici.

** State of residence at time of incident.

FN*** State of residence undisclosed by request of S.C.

No. 1 CA-CV 16-0602

ARIZONA COURT OF APPEALS DIVISION ONE

June 7, 2018

Appeal from the Superior Court in Maricopa County
No. CV2016-052251
The Honorable Karen A. Mullins, Judge

AFFIRMED AS MODIFIED

COUNSEL

Alliance Defending Freedom, Scottsdale
By Jeremy D. Tedesco, Jonathan A. Scruggs, Samuel D. Green
Co-Counsel for Plaintiffs/Appellants/Cross-Appellees

Helm, Livesay & Worthington, Tempe
By Roberta S. Livesay
Co-Counsel for Plaintiffs/Appellants/Cross-Appellees

Osborn Maledon, P.A., Phoenix
By Colin F. Campbell, Eric M. Fraser, Joshua David Rothenberg Bendor
Co-Counsel for Defendant/Appellee/Cross-Appellant

Phoenix City Attorney’s Office, Phoenix
By Brad Holm, Heidi E. Gilbert
Co-Counsel for Defendant/Appellee/Cross-Appellant

Margrave Celmins, P.C., Scottsdale
By Michael Kitchen
Counsel for Amici Curiae Constitutional Jurisprudence

Law Offices of Kevin L. Beckwith, P.C., Phoenix
By Kevin Beckwith
Counsel for Amici Curiae Law and Economics Scholars

Center for Arizona Policy, Phoenix
By William M. Clark
Co-counsel for Amici Curiae Center for Religious Expression and Center for Arizona Policy
OPINION

Presiding Judge Lawrence F. Winthrop delivered the opinion of the Court, in which Judge Jennifer B. Campbell and Judge Paul J. McMurdie joined.

WINTHROP, Presiding Judge:

¶1 Joanna Duka and Breanna Koski (“Appellants”) are the owners of Brush & Nib Studio, LC (“Brush & Nib”). Appellants filed a pre-enforcement action against the City of Phoenix
Chapter 4—Anatomy of a Civil Rights Case: Klein dba Sweetcakes by Melissa v. Bureau of Labor & Industries

Chapter 4—Anatomy of a Civil Rights Case: Klein dba Sweetcakes by Melissa v. Bureau of Labor & Industries

The State of the Union: Masterpiece Cakeshop and Other LGBT Law Developments

¶2 Brush & Nib is a for-profit limited liability company, which sells pre-fabricated and design artwork for home décor, weddings, and special events. Appellants provide retail goods and services to the public and acknowledge they operate a place of public accommodation as defined in Phoenix City Code § 18.1.

¶3 Appellants are devout Christians and believe their work is inextricably related to their religious beliefs. Appellants’ goods and services include both customer-directed projects (work created through a consultation between Appellants and their customer) and pre-fabricated merchandise (work created without Appellants’ knowledge of how the items will be used or who will use those products). Appellants believe their customer-directed and designed wedding products “convey messages about a particular engaged couple, their upcoming marriage, their upcoming marriage ceremony, and the celebration of that marriage.” Appellants also strongly believe in an ordained marriage between one man and one woman, and argue that they cannot separate their religious beliefs from their work. As such, they believe being required to create customer-specific merchandise for same-sex weddings will violate their religious beliefs.

¶4 Appellants want to be able to legally refuse to create custom-made merchandise for all same-sex weddings. Additionally, Appellants desire to post a public statement explaining their religious beliefs. Appellants’ proposed statement, in part, would notify potential customers that “Brush & Nib Studio won’t create any artwork that violates [their] vision as defined by [their] religious and artistic beliefs and identity,” which includes “artwork that demeans others, endorses racism, incites violence, contradicts [their] Christian faith, or promotes any marriage except marriage between one man and one woman.” Appellants have not posted this statement because they believe it would violate Section 18-4(B). Instead, Appellants sought a preliminary injunction to bar Phoenix from enforcing Section 18-4(B) and a declaration that Section 18-4(B) violates the Arizona Constitution’s free speech clause, religious toleration clause, equal protection clause, due process clause, and the Arizona Free Exercise of Religion Act (“FERA”).

¶5 Phoenix filed a motion to dismiss and the case proceeded to a bench trial before the superior court. The superior court denied Phoenix’s motion to dismiss, finding Appellants had standing and the case was justiciable. The court then denied Appellants’ motion for a preliminary injunction, finding Section 18-4(B) did not violate Appellants’ freedom of speech nor substantially burden their exercise of religion. Appellants timely appealed the denial of the preliminary injunction to this court and moved to stay proceedings before the superior court. The court denied Appellants’
request. Appellants then moved, and Phoenix cross-moved, for summary judgment. The court granted Phoenix’s motion for summary judgment on all claims. Appellants filed a timely appeal from the court’s summary judgment ruling and moved to consolidate that appeal with the appeal from the denial of the preliminary injunction. We granted Appellants’ request, and have jurisdiction over this consolidated appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (“A.R.S.”) sections 12-120.21(A)(1) (2016) and 12-2101(A)(1) (2016).

ANALYSIS


¶7 In 2014, however, the Arizona legislature sought to amend FERA to expand the definition of a protected person from “a religious assembly or institution” to “any individual, association, partnership, corporation, church, religious assembly or institution, estate, trust, foundation or other legal entity.” S.B. 1062, 2014 Leg., 51st 2d. Reg. Sess. (Ariz. 2014). Although S.B. 1062 was ultimately vetoed, it was viewed by some as a reaction to the development of antidiscrimination ordinances, which included sexual orientation as a protected class, and the national trend in favor of granting broader rights to same-sex couples. Dinita L. James, Amid SB 1062 Frenzy, Tempe Becomes 4th AZ City to Protect LGBT Status, 20 No. 11 Ariz. Emp. L. Letter 1 (2014).

¶8 Currently, nineteen states have enacted public accommodation antidiscrimination laws which include sexual orientation and gender identity as protected classes. See Equality Maps/Non-Discrimination Laws, Movement Advancement Project (2018), http://www.lgbtmap.org/equality-maps/non_discrimination_laws. Arizona’s public accommodation antidiscrimination statute, however, does not specifically include sexual orientation as a protected class. See A.R.S. § 41-1442(A) (2017). Accordingly, several Arizona cities have enacted broader ordinances to prohibit discrimination based on sexual orientation in places of public accommodation. See TEMPE CODE CH. 2 Art. VIII § 2-601 (2014); FLAGSTAFF CODE CH. 14 § 14-02-001-0001 (2013); TUCSON CODE Art. II § 17-1 (1999). Like Tempe, Flagstaff, and Tucson, Phoenix’s Code, Section 18-4(B), as amended in 2013, prohibits discrimination in places of public accommodation based on sexual orientation. Section 18-4(B) provides that:

No person shall, directly or indirectly, refuse, withhold from, or deny to any person, or aid in or incite such refusal, denial or withholding of, accommodations, advantages, facilities or privileges thereof because of race, color, religion, sex, national origin, marital status, sexual orientation,
gender identity or expression, or disability nor shall distinction be made with respect to any person based on race, color, religion, sex, national origin, marital status, sexual orientation, gender identity or expression, or disability in connection with the price or quality of any item, goods or services offered by or at any place of public accommodation.

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It is unlawful for any owner, operator, lessee, manager, agent or employee of any place of public accommodation to directly or indirectly display, circulate, publicize or mail any advertisement, notice or communication which states or implies that any facility or service shall be refused or restricted because of race, color, religion, sex, national origin, marital status, sexual orientation, gender identity or expression, or disability or that any person, because of race, color, religion, sex, national origin, marital status, sexual orientation, gender identity or expression, or disability would be unwelcome, objectionable, unacceptable, undesirable or not solicited.

Phoenix City Code § 18-4(B)(2)-(3) (2013).3

¶9 On appeal, Appellants raise a myriad of constitutional issues, arguing that Section 18-4(B) is unconstitutional, both on its face and as-applied, and that any enforcement of Section 18-4(B) would violate their First Amendment right to free speech and free exercise of religion under state law. Appellants are not the first to attempt to use their religious beliefs to justify practices others consider overtly discriminatory. See Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (finding a school, which prohibited interracial dating and marriage, could no longer receive tax-exempt status). Although the law has at times recognized religious beliefs as justification for discriminatory practices, modern societal trends are to the contrary. See

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McLaughlin v. Jones, 243 Ariz. 29, 33, ¶ 13 (2017) (“Denying same-sex couples ‘the same legal treatment’ in marriage . . . and ‘all the benefits’ afforded opposite-sex couples, ‘works a grave and continuing harm’ on [same-sex couples] in various ways—demeaning them, humiliating and stigmatizing their children and family units, and teaching society that they are inferior in important respects.”) (citing Obergefell v. Hodges, 135 S. Ct. 2584, 2600-02, 2604 (2015)); see also Lawrence v. Texas, 539 U.S. 558, 575 (2003) (finding when the state criminalizes same-sex couples’ conduct it “is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres”).

¶10 While this case may be the first of its kind in Arizona, Brush & Nib is only one of numerous national litigants who seek to preserve and define their religious freedoms in the face of ordinances which prohibit places of public accommodation from discriminating based on sexual orientation. See Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (finding a photographer’s refusal to take photographs of a same-sex wedding violated New Mexico’s antidiscrimination laws), cert. denied, 134 S. Ct. 1787 (2014); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015) (finding Colorado’s antidiscrimination statute, which prohibits places of public accommodation from refusing services on the basis of sexual orientation, did not violate the baker’s freedom of speech or freedom of religion), cert. denied, No. 15SC738 (Colo. Apr. 25, 2016), reversed on other grounds, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n,
In light of these cases and consistent with the United States Supreme Court’s decisions, we recognize that a law allowing Appellants to refuse service to customers based on sexual orientation would constitute a “grave and continuing harm.” Obergefell, 135 S. Ct. at 2604. As most recently expressed by the Supreme Court:

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Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in Obergefell v. Hodges, 135 S. Ct. at 2584, “[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.” Id. at 2607. Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. See Newman v. Piggy Park Enterprises, Inc., 390 U.S. 400, 402 n.5 (1968) (per curiam); see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 572 (1995) (“Provisions like these are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments”).

Masterpiece Cakeshop, Ltd., slip op. at 9-10.

With this background in mind, we address each of the parties’ arguments in turn.

Standing

As an initial matter, Phoenix argues in its cross-appeal that Appellants’ claims fail for lack of standing and ripeness because no case or controversy exists. The parties agree that, in this case, the underlying concerns for standing and ripeness are the same; accordingly, we address both issues under one analytical framework. See Thomas v. Anchorage Equal Rights Comm’n, 220 F.3d 1134, 1138 (9th Cir. 2000) (“The constitutional component of the ripeness inquiry is often treated
under the rubric of standing and, in many cases, ripeness coincides squarely with standing’s injury in fact prong.”).

¶14 The Arizona Constitution, unlike that of the United States, does not expressly limit courts to only deciding matters which involve a case or controversy. Bennett v. Napolitano, 206 Ariz. 520, 525, ¶ 19 (2003). We find, however, “that as a matter of sound jurisprudence a litigant seeking relief in the Arizona courts must first establish standing to sue.” Id. This is especially true “in actions in which constitutional relief is sought against the government.” Id. at 524, ¶ 16 (citing Sears v. Hull, 192 Ariz. 65, 71 (1998)). Further, although federal law does not govern our standing analysis, we look to federal law as instructive on the issue. Id. at 525, ¶ 22.

¶15 Phoenix relies on Thomas v. Anchorage Equal Rights Comm’n to argue Appellants have not asserted a justiciable claim. 220 F.3d 1134. In Thomas, the Ninth Circuit addressed its ability to hear a pre-enforcement action which alleged that Alaska’s housing law, which prohibited landlords from discriminating against couples based on marital status, violated the landlords’ First Amendment rights. Id. The Thomas court found that “neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the ‘case or controversy’ requirement.” Id. at 1139. Instead, a party may establish standing if she shows she suffered a “genuine threat of imminent prosecution.” Id. (quoting San Diego Cty. Gun Rights Comm’n v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996)). A “genuine threat of imminent prosecution” exists if a party establishes a concrete plan to violate the law, the authorities intend to prosecute the party, and there is a history of past prosecution or enforcement. Id. (citing San Diego Cty. Gun Rights Comm’n, 98 F.3d at 1126-27). A party, thus, need not suffer arrest or actual prosecution before challenging a law. Susan B. Anthony List v. Dreihaus, 134 S. Ct. 2334, 2342 (2014); see also MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128-29 (2007) (“[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.”).

¶16 Although Appellants have not yet refused services to a same-sex couple, we find their claims are justiciable. Here, Appellants have a concrete plan to violate Section 18-4(B) by refusing to create “custom-made” announcements and invitations for same-sex weddings and by posting a statement about their commitment to their religious beliefs, which includes refusing to create design-on-request merchandise for same-sex weddings. Additionally, Phoenix acknowledges that Appellants would violate Section 18-4(B) if they posted their proposed statement. Moreover, unlike Thomas, where the parties brought a pre-enforcement challenge to a statute that had been in effect for over twenty years, but had never been enforced, here, Section 18-4(B) has only been in effect since 2013 and Phoenix has received and investigated complaints arising from the ordinance. Appellants’ concrete plan to refuse to provide services for same-sex weddings, Phoenix’s likelihood of prosecution, and the history of enforcement, although brief, is sufficient to confer standing onto Appellants.
II. Standard of Review

¶17 Summary judgment is proper if there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a); Orme Sch. v. Reeves, 166 Ariz. 301, 305 (1990). We review the grant of summary judgment de novo, and view the evidence in the light most favorable to the party opposing the motion.8 Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund, 201 Ariz. 474, 482, ¶ 13 (2002).

¶18 Appellants appear to have raised both facial and as-applied challenges to Section 18-4(B). Generally, to succeed on a facial challenge a party “must establish that no set of circumstances exists under which the [law] would be valid.” State v. Seyrafi, 201 Ariz. 147, 153, ¶ 28 (App. 2001) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). This heavy burden lightens, however, if a party raises a facial challenge which implicates First Amendment rights. Boehler, 228 at 35, ¶ 5. In a First Amendment challenge we consider whether the application of that law “as a whole prohibits a ‘substantial’ amount of protected speech in relation to its many legitimate applications.” Virginia v. Hicks, 539 U.S. 113, 124 (2003). Even if a law burdens a substantial amount of free speech, we will not prohibit its enforcement if the law “reflects ‘legitimate state interests in maintaining comprehensive control over harmful, constitutionally unprotected conduct.’” Id. at 119 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

¶19 Here, we need not distinguish between Appellants’ facial and as-applied challenge because it has no bearing on the ultimate outcome of the case. See Isaacson v. Horne, 716 F.3d 1213, 1230 (9th Cir. 2013) (finding the “precise characterization of the Physicians’ complaint . . . has little bearing on the resolution of the legal question”); see also Citizens United v. Fed. Election Comm’n, 588 U.S. 310, 331 (2010) (noting the distinction between facial and as-applied challenges is not well defined). Although Appellants are subject to a heavier burden for their facial claims, the difference is irrelevant because, as discussed below, Appellants fail to succeed on both their as-applied and facial challenges.

III. Free Speech

¶20 Appellants argue Section 18-4(B) impermissibly burdens their freedom of speech by forcing them to create custom-made goods for same-sex weddings and by prohibiting them from posting a statement that describes their religious objection to providing stationery and other services for same-sex weddings. Appellants attempt to distinguish their refusal to create custom-made work for same-sex weddings—which they argue is a lawful exercise of their freedom of speech and religion—from the refusal to serve a customer based on the customer’s sexual orientation. We are unpersuaded by Appellants’ distinction. Courts have consistently found “there is no basis for distinguishing between discrimination based on sexual orientation and discrimination based on someone’s conduct of publicly committing to a person of the same sex.” Gifford, 137 A.D.3d at 37 (quoting Elane Photography, LLC, 309 P.3d at 62, ¶ 18). Further, the Supreme Court disfavors the conduct/status distinction that Appellants advocate. See, e.g., Obergefell, 135 S. Ct. at 2604.
(finding discrimination based on sexual orientation deprives individuals of their fundamental right to marry the person of their choice); Lawrence, 539 U.S. at 575 (by criminalizing same-sex sodomy the state essentially discriminated against gay men); Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 270 (1993) (noting “a tax on wearing yarmulkes is a tax on Jews”).

¶21 In support, Appellants rely on Coleman v. City of Mesa, 230 Ariz. 352 (2012), to argue that custom-made works for weddings and the stationery business constitute pure speech, and thus Section 18-4(B) is only constitutional if it survives strict scrutiny. In Coleman, the Arizona Supreme Court held that the process of tattooing, as well as the associated business

of tattooing, constituted pure speech, and was entitled to First Amendment protections. Id. at 360, ¶ 31. Notably, the court did not address whether Mesa’s denial of a permit to operate a tattoo parlor violated the business owners’ free speech rights. Id. at 361, ¶ 36. Moreover, Coleman did not address the dichotomy between the speech of the artist and the speech of the patron choosing the message to be applied, and we do not read Coleman to approve using the First Amendment as a shield to protect a business owner’s decision to discriminate against customers based on sexual orientation.

¶22 Whether we agree with Appellants that in certain hypothetical circumstances the operation of a stationery store, as well as the creation of design-on-request wedding-related merchandise, may constitute pure speech is irrelevant, because these hypotheticals are not at issue in this case. Instead, our inquiry is whether Section 18-4(B), which requires that Appellants provide equal services to customers regardless of sexual orientation, infringes their First Amendment rights, not whether Appellants have a free speech right to operate their stationery store. Thus, Appellants reliance on Coleman is misplaced.

¶23 The Arizona Constitution guarantees that “[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.” Ariz. Const. art. II, § 6. Appellants assert that the Arizona Constitution provides broader free speech protections than the United States Constitution. Even assuming this to be true, Appellants do not explain how, in this case, our analysis under Arizona’s free speech clause would differ from our analysis under federal free speech jurisprudence. Thus, we analyze Appellants’ free speech claim pursuant to federal law. See State v. Stummer, 219 Ariz. 137, 142, ¶ 16 (App. 2008) (applying federal free speech jurisprudence because courts have had limited opportunities to develop Arizona’s free speech clause).

¶24 Appellants argue Section 18-4(B) compels them to speak in favor of same-sex marriages. We disagree. Although Section 18-4(B) may have an incidental impact on speech, its main purpose is to prohibit discrimination, and thus Section 18-4(B) regulates conduct, not speech. Because Section 18-4(B) regulates conduct, we find the Court’s analysis and holding in Rumsfeld v. Forum for Acad. & Inst’l Rights, Inc., 547 U.S. 47 (2006), to be most applicable to the issue here. In Rumsfeld, the Supreme Court upheld the constitutionality of the Solomon Amendment, which required that institutions seeking federal funding must allow military recruiters the same access to students as other employers. Id. at 54. The Forum for Academic and Institutional Rights, Inc. (“FAIR”), an association of law
schools and law faculties, sought to bar the military’s presence on campus because it opposed the military’s policy of forbidding individuals from joining the Armed Forces if they “engaged in homosexual acts,” identified as “homosexual,” or “married a person of the same sex.” Id. at 52 n.1. FAIR argued that the Solomon Amendment violated its First Amendment right of free speech and freedom of association by forcing the schools to allow military recruiters on campus. Id. at 52-53. The Supreme Court rejected FAIR’s argument, finding the Solomon Amendment did not limit what schools could say, but rather what they could do. Id. at 60. The Supreme Court recognized that while in some circumstances the Solomon Amendment may require the schools to speak, such as by sending out e-mails notifying students about the military recruiters’ presence, this speech was merely incidental to the properly mandated conduct. Id. at 61-62.

¶25 We find Rumsfeld controlling in this case. Here, the primary purpose of Section 18-4(B) is to prohibit places of public accommodation from discriminating based on certain protected classes, i.e., sexual orientation, not to compel speech. See Elane Photography, LLC, 309 P.3d at 64, ¶ 27 (finding New Mexico Human Rights Act “only mandates that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation,” but does not compel speech). Like Rumsfeld, Section 18-4(B) requires that places of public accommodation provide equal services if they want to operate their business. While such a requirement may impact speech, such as prohibiting places of public accommodation from posting signs that discriminate against customers, this impact is incidental to properly regulated conduct.

¶26 Appellants try to distinguish Rumsfeld by relying on Coleman’s holding that tattoos, and the business of tattooing, are pure speech, and by citing dicta in the Colorado Court of Appeals’ decision in Masterpiece Cakeshop that “a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage, and in such cases, First Amendment speech protections may be implicated.” 370 P.3d at 288, ¶ 71. We are unpersuaded by this argument. We do not doubt that “words” are generally considered pure speech. Or that, in some instances,
allowing a vendor who provides goods and services for marriages and weddings to refuse similar services for gay persons would result in “a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.” Masterpiece Cakeshop, Ltd., slip op. at 10.

¶28 Although Section 18-4(B) regulates conduct, this is not the end our inquiry. Next, we must determine whether the conduct regulated by Section 18-4(B) is inherently expressive. Rumsfeld, 547 U.S. at 65. Conduct is entitled to full First Amendment protections if the “speaker” intended to convey a particularized message by the conduct and if, given the surrounding circumstances, there was a strong likelihood that the speaker’s message would be understood by those who viewed it. Spence v. Washington, 418 U.S. 405, 410-11 (1974). Like many similar cases decided in other jurisdictions, we find Appellants’ act of creating design-to-order wedding announcements, invitations, and the like is not inherently expressive. See Elane Photography, LLC, 309 P.3d at 68, ¶ 41 (“While photography may be expressive, the operation of a photography business is not.”); Arlene’s Flowers, Inc., 389 P.3d at 557 (finding the creation of floral arrangements is not inherently expressive); Masterpiece Cakeshop, Inc., 370 P.3d at 286, ¶ 62 (concluding “the 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”); Gifford, 137 A.D.3d at 42 (finding “there is no real likelihood that the Giffords would be perceived as endorsing the values or lifestyle of the individuals renting their facilities as opposed to merely complying with anti-discrimination laws”).

¶29 The mere fact that Section 18-4(B) requires Appellants to comply with the law does not render their creation of design-to-order merchandise for same-sex weddings expressive conduct. The items Appellants would produce for a same-sex or opposite-sex wedding would likely be indistinguishable to the public. Take for instance an invitation to the marriage of Pat and Pat (whether created for Patrick and Patrick, or Patrick and Patricia), or Alex and Alex (whether created for Alexander and Alexander, or Alexander and Alexa). This invitation would not differ in creative expression. Further, it is unlikely that a general observer would attribute a company’s product or offer of services, in compliance with the law, as indicative of the company’s speech or personal beliefs. See Rumsfeld, 547 U.S. at 65 (finding observers can appreciate the difference between sponsored speech and speech which is permitted because it is required by law). The operation of a stationery store—including the design and sale of customized wedding event merchandise—is not expressive conduct, and thus, is not entitled to First Amendment free speech protections.

¶30 The law has long recognized a state’s authority to “create rights of public access on behalf of its citizens.” Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984) (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)). It follows that a state may prohibit businesses from posting discriminatory signs. See Rumsfeld, 547 U.S. at 62 (finding if Congress prohibits employment-based racial discrimination, then states can require employers to remove “White Applicants Only” signs as a proper restriction on conduct not speech); accord Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011); Pickup v. Brown, 740 F.3d 1208, 1225 (9th Cir. 2014). See also R.A.V. v.
City of St. Paul, 505 U.S. 377, 389 (1992) (“[W]ords can in some circumstances violate laws directed not against speech but against conduct.”). Thus, “[p]osting language on a website telling potential customers that a business will discriminate based on sexual orientation is part of the act of sexual orientation discrimination itself; as conduct carried out through language, [and] this act is not protected by the First Amendment.” Telescope Media Grp., 271 F.3d at 1112 (citing Rumsfeld, 547 U.S. at 62); see also Masterpiece Cakeshop, Ltd., slip op. at 12 (noting that a baker interposing a sincere religious objection to providing a wedding cake for a gay couple was entitled to a neutral and respectful consideration of his claim, but disapproving of the baker or other businesses posting signs saying “no goods or services will be sold if they will be used for gay marriages,” observing such would “impose a serious stigma on gay persons.”).

¶31 Although Appellants are prohibited from posting discriminatory statements about their intent to refuse services for same-sex weddings, they may post a statement endorsing their belief that marriage is between a man and a woman and may post a disclaimer explaining that, notwithstanding that belief, Section 18-4(B) requires them to provide goods and services to everyone regardless of sexual orientation. Or they may post a disclaimer that the act of selling their goods and services to same-sex couples does not constitute an endorsement of their customers’ exercise of their constitutional right to marry or any other activities. See Hurley, 515 U.S. at 576-77 (noting, in some circumstances, an individual can distance himself from expressive conduct by providing disclaimers that he does not identify with the speaker’s viewpoint).

¶32 Appellants may have to change their proposed posting to ensure that they comply with Section 18-4(B). However, “an incidental burden on speech is no greater than is essential, and therefore is permissible . . . so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” Rumsfeld, 547 U.S. at 67 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). Section 18-4(B) satisfies this requirement. Antidiscrimination laws, like Section 18-4(B), are content and viewpoint neutral. See Hurley, 515 U.S. at 572 (finding Massachusetts’ antidiscrimination statute, which is similar to Section 18-4(B), “does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds”); see also Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 801 (9th Cir. 2011) (“As the Supreme Court has made clear, antidiscrimination laws intended to ensure equal access to the benefits of society serve goals ‘unrelated to the suppression of expression’ and are neutral as to both content and viewpoint.”) (quoting Jaycees, 468 U.S. at 623-24)). Further, Phoenix clearly has a substantial interest in discouraging discrimination in places of public accommodation. The way to effectively accomplish this goal is to explicitly prohibit places of public accommodation from discriminating. While it is imaginable that there may be other ways to achieve this goal, that does not render Section 18-4(B) unconstitutional.
IV. Expressive Association

¶33 Appellants additionally argue Section 18-4(B) compels expressive association. Concurrent with the First Amendment’s right to free speech is the “right of expressive association.” Rumsfeld, 547 U.S. at 68 (citing Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000)). The right to associate, or not associate, “is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.” Dale, 530 U.S. at 647-48 (citing Jaycees, 468 U.S. at 622). Thus, “implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” IDK, Inc. v. Clark Cty., 836 F.2d 1185, 1194 (9th Cir. 1988) (citing Jaycees, 468 U.S. at 622). The right to associate, however, is not absolute and “may be curtailed if necessary to further a significant governmental interest like eliminating . . . public evils.” 3613 Ltd. v. Dep’t of Liquor Licenses & Control, 194 Ariz. 178, 186, ¶ 36 (App. 1999) (quoting Jaycees, 468 U.S. at 622).

¶34 Although the First Amendment “fully protects expression about philosophical, social, artistic, economic, literary, ethical, and other topics . . . , it does not protect every communication or every association that touches these topics.” IDK, Inc., 836 F.2d at 1194 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977)). Importantly, a state does not lose its ability to regulate commercial activity merely because the activity has a speech component. Id. A law, however, will be found to violate the right to “expressive association” if it requires the inclusion of an unwanted member, and that inclusion would significantly affect the group’s association. Dale, 530 U.S. at 648-50.

¶35 We are unpersuaded by Appellants’ argument that Section 18-4(B) infringes their freedom of association by requiring that they provide equal services to same-sex couples. Appellants operate an economic entity and a place of public accommodation; as such, they are prohibited from discriminating against customers based on a protected class. Further, although Appellants argue they created Brush & Nib pursuant to their religious beliefs, this alone does not bestow on Appellants the unfettered right of expressive association in their business. We do not dispute that some aspects of Appellants’ operation of Brush & Nib may implicate speech in some regard, but the primary purpose of Brush & Nib is not to convey a particular message but rather to engage in commercial sales activity. Thus, Appellants’ operation of Brush & Nib is not the type of expressive association that the First Amendment is intended to protect. See IDK, Inc., 836 F.2d at 1195 (finding an association is not fully protected by the First Amendment if its “activities are not predominately of the type protected by the First Amendment” (quoting Jaycees, 468 U.S. at 635, (O’Connor, J., concurring in part)). Section 18-4(B)’s requirement that Appellants provide equal goods and services does not infringe their primary goal of operating a business; if anything, such mandate is more aligned with their commercial interests by requiring services be provided to a broader customer base.

¶36 Even assuming, arguendo, that Appellants’ business constitutes an expressive association, Section 18-4(B) remains constitutional in scope and application. The right to associate may permissibly be infringed if the regulation is adopted to “serve compelling state interests, unrelated
to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Fraternal Order of Eagles, Inc., Tucson Aerie No. 180 v. City of Tucson*, 168 Ariz. 598, 602

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(App. 1991) (quoting *Jaycees*, 468 U.S. at 623). We have previously found that eliminating discrimination constitutes a compelling interest. See *Jaycees*, 468 U.S. at 626 (“Assuring women equal access to such goods, privileges, and advantages clearly furthered compelling state interests.”). Further we have found that antidiscrimination ordinances are not aimed at the suppression of speech, but at the elimination of discriminatory conduct. *Id.* at 625; accord *Telescope Media Grp.*, 271 F.Supp.3d at 1112. Appellants’ compliance with Section 18-4(B) does not hinder their freedom to associate; as previously noted, Appellants remain free to disclaim and/or post their belief that their religion only recognizes marriage between one man and one woman. That said, however, Appellants cannot deny access to their goods and services based on potential customers’ sexual orientation.

V. Overbroad and Vague

¶37 Appellants argue Section 18-4(B) is both overbroad and vague because it is unclear which actions would violate Section 18-4(B)(3), and because the ordinance applies to a substantial amount of protected speech. While certain words or phrases in Section 18-4(B), in isolation, may appear to be overbroad or vague, that does not render the ordinance unconstitutional. See *State v. Baldwin*, 184 Ariz. 267, 270 (App. 1995), corrected (Jan. 10, 1996) (finding we strive to give statutes a constitutional construction, and thus, shall give a limiting construction, where appropriate, to cure a statute of any “constitutional infirmity”) (quoting *State v. Takacs*, 169 Ariz. 392, 295 (App. 1991)).

¶38 A statute is unconstitutionally overbroad if it burdens or punishes constitutionally protected activities. *State v. Kessler*, 199 Ariz. 83, 87, ¶ 15 (App. 2000) (quoting *State v. Jones*, 177 Ariz. 94, 99 (App. 1993)). To determine whether a statute which regulates conduct is overly broad, we must assess on a case-by-case basis whether the overbreadth of the statute is real and substantial as it relates to its plainly legitimate sweep. *Broadrick*, 413 U.S. at 615. Thus, the mere fact that there are some impermissable applications of the ordinance is insufficient to render the entire ordinance overbroad. *Id.; see also United States v. Williams*, 553 U.S. 285, 293 (2008) (invalidating a provision as overbroad is a “strong medicine”) (citing *Los Angeles Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 39 (1999)).

¶39 Section 18-4(B) does not by its terms implicate speech. Thus, Appellants must prove that Section 18-4(B)’s overbreadth is real and substantial, which they have failed to do. We decline to entertain Appellants and amici’s parade of hypotheticals that, if present, could potentially render Section 18-4(B) overbroad. Instead, we review on a case-by-case basis whether the ordinance is overbroad. Here, Section 18-4(B) properly restricts Appellants from announcing they will discriminate against customers based on sexual orientation.
As previously mentioned, Appellants are free to proclaim their religious beliefs, but must do so within the confines of the law.

¶40 Appellants additionally argue that Section 18-4(B) is unconstitutionally vague because it “encourage[s] arbitrary and discriminatory enforcement.” In response, Phoenix urges that we must construe Section 18-4(B) as objective because it prohibits statements which indicate that a person would be unwelcome as opposed to the subjective interpretation that Section 18-4(B)(3) prohibits statements that make a person feel unwelcome.

¶41 A statute is unconstitutionally vague if it “fails to give a person of average intelligence reasonable notice of what behavior is prohibited or permits arbitrary and discriminatory enforcement.” Kessler, 199 Ariz. at 87, ¶ 15 (quoting State v. Steiger, 162 Ariz. 138, 141-42 (App. 1989)). A statute, however, need not define proscribed conduct with absolute precision, but it must adequately warn an individual of the proscribed conduct. State v. Burke, 238 Ariz. 322, 325-26, ¶ 6 (App. 2015) (quoting State v. McMahon, 201 Ariz. 548, 551, ¶ 8 (App. 2002)); see also Baldwin, 184 Ariz. at 270 (finding undefined terms susceptible to multiple meanings does not necessarily render a statute unconstitutionally vague).

¶42 Section 18-4(B)(3) provides that:

It is unlawful for any owner . . . of any place of public accommodation to directly or indirectly display, circulate, publicize or mail any advertisement, notice or communication which states or implies that any facility or service shall be refused or restricted because of . . . sexual orientation . . . or that any person, because of . . . sexual orientation . . . would be unwelcome, objectionable, unacceptable, undesirable or not solicited.

(Emphasis added.)

¶43 We are unable to interpret Section 18-4(B)(3)’s use of the words “unwelcome,” “objectionable,” “unacceptable,” and “undesirable” in a way that would render Section 18-4(B)(3) constitutional. The presence of one invalid prohibition, however, does not invalidate all of Section 18-4(B)(3). See City of Tempe v. Outdoor Sys., Inc., 201 Ariz. 106, 110, ¶ 12 (App. 2001) (“We need not invalidate the entire Ordinance if the invalid portion can be severed from the remaining valid portions of the Ordinance.”) (citing Randolph v. Groscost, 195 Ariz. 423, 426-27, ¶ 13 (1999)). Instead, we consider whether the invalid portion of Section 18-4(B)(3) can be severed from the remainder of the ordinance and assess whether “the valid portion, considered separately, can operate independently and is enforceable and workable.” Randolph, 195 Ariz. at 427, ¶ 15.

¶44 Here, striking the second half of Section 18-4(B)(3)—which bans an owner of a place of public accommodation from making a person feel “unwelcome,” “objectionable,” “unacceptable,” and “undesirable” based on sexual orientation—does not render the remainder of the ordinance unenforceable or unworkable. Moreover, removing this clause from Section 18-4(B)(3) does not “produce a result so irrational or absurd as to compel the conclusion that an informed [drafter] would not have adopted one portion without the other.” Randolph, 195 Ariz. at 427, ¶ 15. The
remainder of Section 18-4(B)(3) operates independently and is enforceable as intended. Given this construction, we need not find Section 18-4(B) unconstitutional; instead we construe the ordinance as lawfully prohibiting discriminatory speech, but allowing Appellants to disclaim personal support for same-sex marriage and to proclaim their religious beliefs. See *LaFaro v. Cahill*, 203 Ariz. 482, 488, ¶ 21 (App. 2002) (“We attempt to construe statutes with ‘a reasonable and constitutional meaning’ whenever possible in order to remove potential doubts regarding the statute’s viability.”) (quoting *McGovern v. McGovern*, 201 Ariz. 172, 178, ¶ 20 (App. 2001)).

¶45 We therefore sever the invalid portion of Section 18-4(B)(3), but leave the remainder of the ordinance intact.12

VI. Free Exercise of Religion

¶46 Appellants argue Section 18-4(B) burdens their free exercise of religion under state law by requiring them to create “custom artwork to

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celebrate and promote . . . marriage[s] outside of God’s design for marriage as an institution between one man and one woman.”13

¶47 FERA protects an individual’s exercise of religion from undue governmental interference. A.R.S. § 41-1493.01 (2017); see also *State v. Hardesty*, 222 Ariz. 363, 365, ¶ 8 (2009). Under the statute, the “government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the rule is both “[i]n furtherance of a compelling government interest [and is] [t]he least restrictive means of furthering that compelling governmental interest.” A.R.S. § 41-1493.01(B)-(C). Pursuant to FERA, a party must establish that her act or refusal to act is motivated by her religious belief, that the religious belief is sincerely held, and that the governmental action substantially burdens the exercise of religious beliefs. *Hardesty*, 222 Ariz. at 366, ¶ 10. Once a party establishes those elements, the burden shifts to the government to prove the action “furthers a compelling governmental interest” and is “[t]he least restrictive means of furthering that compelling governmental interest.” *Id.* (citing A.R.S. § 41-1493.01(C)). What constitutes the “least restrictive means” depends on the compelling interest at stake. *Id.* at 368, ¶ 19. FERA parallels the Federal Religious Freedom Restoration Act of 1993; as such we look to federal law as instructive on this issue. See *Hardesty*, 222 Ariz. at 365, ¶ 8.

¶48 On appeal, Phoenix does not dispute that Appellants’ desire to refuse to create wedding-related merchandise for same-sex weddings and to post an explanatory statement is motivated by their religious beliefs, nor does Phoenix dispute the sincerity of Appellants’ beliefs. Thus, we

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focus our inquiry on Appellants’ burden to demonstrate that Section 18-4(B) substantially burdens their exercise of religious beliefs. A substantial burden on the free exercise of religion requires more than a government action which merely “decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion,” and instead is akin to the government coercing an individual to act contrary to her religious beliefs or penalizing faith. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008). To determine whether Section 18-4(B)
places a substantial burden on religion we analyze whether the ordinance will force Appellants “to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to accept work, on the other hand,” *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), or whether the regulation “affirmatively compels [Appellants], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.” *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

¶49 Here, Appellants have failed to prove that Section 18-4(B) substantially burdens their religious beliefs by requiring that they provide equal goods and services to same-sex couples. Appellants are not penalized for expressing their belief that their religion only recognizes the marriage of opposite-sex couples. Nor are Appellants penalized for refusing to create wedding-related merchandise as long as they equally refuse similar services to opposite-sex couples. Section 18-4(B) merely requires that, by operating a place of public accommodation, Appellants provide equal goods and services to customers regardless of sexual orientation. Appellants are free to discontinue selling custom wedding-related merchandise and maintain the operation of Brush & Nib for its other business operations. What Appellants cannot do is use their religion as a shield to discriminate against potential customers. Although providing the same goods and services to same-sex couples might “decrease . . . the satisfaction” with which Appellants’ practice their religion this does not, *a fortiori*, make their compliance with Section 18-4(B) a substantial burden to their religion. See *Navajo Nation*, 535 F.3d at 1063.

¶50 Even if Appellants had met their burden of proof to demonstrate that Section 18-4(B) places a substantial burden on their religious exercise, Section 18-4(B) is still constitutional because Phoenix has a compelling interest in preventing discrimination, and has done so here through the least restrictive means. When faced with similar contentions, other jurisdictions have overwhelmingly concluded that the government has a compelling interest in eradicating discrimination. See *Arlene’s Flowers, Inc.*, 389 P.3d at 565-66, ¶¶ 74-75 (compiling cases where the state’s compelling interest in eradicating discrimination survived strict scrutiny). It goes without saying that providing equal access to places of public accommodation does “not simply guarantee access to goods or services,” but “serve[s] a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace.” *Id.* at 566, ¶ 77. Appellants, however, argue that Phoenix does not suffer from pervasive sexual orientation discrimination, as evident from the historic lack of lawsuits to date, and that Phoenix could have used other means to achieve its goal, such as posting lists of businesses that will provide services for same-sex weddings. Other courts have addressed this “go elsewhere” argument and found it unpersuasive. We agree with those courts. See *Arlene’s Flowers, Inc.*, 389 P.3d at 566, ¶ 77 (rejecting Arlene’s “go elsewhere” argument and finding that the “case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches”). Prohibiting places of public accommodation from discriminating against customers is not just about ensuring equal access, but about eradicating the construction of a second-class citizenship and diminishing humiliation and social stigma. The least restrictive way to eliminate discrimination in places of public accommodation is to expressly prohibit such places from discriminating.
VII. Equal Protection

¶51 Appellants’ final argument is that Section 18-4(B) violates their right to equal protection under state law because Section 18-4(B) “favor[s] artists who support same-sex marriage and punish[es] those who oppose it.” We disagree.

¶52 Arizona’s equal protection clause provides that “[n]o law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.” Ariz. Const. art. II, § 13. In interpreting Arizona’s equal protection clause, we use the same standard as the federal equivalent. Coleman, 230 Ariz. at 361, ¶ 39. If a law discriminates against a suspect class or denies fundamental rights to one group it must meet a higher level of scrutiny to be constitutional. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). A law which does not infringe on any fundamental rights, however, is subject to rational basis review, and is constitutional if it “relat[e] to a legitimate government purpose.” State v. Panos, 239 Ariz. 116, 118-19, ¶ 8 (App. 2016) (quoting State v. Lowery, 230 Ariz. 536, 541, ¶ 13 (App. 2012)).

¶53 Appellants have not alleged they are members of a suspect class; instead, they argue they are treated differently than other similarly situated businesses because “[a]rtists who support same-sex marriage can operate their businesses in accordance with their beliefs” whereas Appellants purportedly cannot. Even assuming this to be true, it does not render Section 18-4(B) unconstitutional. Section 18-4(B) applies to all places of public accommodation and all business owners equally, regardless of their beliefs. Contrary to Appellants assertions, Section 18-4(B) does not infringe their fundamental rights by requiring that they provide equal goods and services to all customers regardless of sexual orientation. As such, the provisions of Section 18-4(B) must only be rationally related to a legitimate governmental purpose. As previously demonstrated, Phoenix has a legitimate governmental purpose in curtailing discriminatory practices, and prohibiting businesses from sexual orientation discrimination is rationally related to that purpose. Thus, Section 18-4(B) does not violate Appellants’ equal protection.

VIII. Attorneys’ Fees

¶54 Both parties request attorneys’ fees on appeal pursuant to A.R.S. § 12-342 (2016) and A.R.S. § 12-348 (Supp. 2017). In the exercise of our discretion, we decline both requests, but award Phoenix its taxable costs, to be determined upon compliance with ARCAP 21.

CONCLUSION

¶55 We affirm as modified the superior court’s summary judgment in favor of Phoenix.

Footnotes:

1. Section 18-3 defines places of public accommodation as:
[A]ll public places of entertainment, amusement or recreation, all public places where food or beverages are sold, public places operated for the lodging of transients or for the benefit, use or accommodation of those seeking health or recreation and all establishments offering their services, facilities or goods to or soliciting patronage from the members of the general public. Any dwelling, any private club or any place which is in its nature distinctly private is not a place of public accommodation.

2. Appellants may utilize hand-painting and hand-lettered calligraphy in designing announcements, invitations, table and place cards, menus, wedding signs, and other specialized wedding décor.

3. Appellants do not raise in this appeal alleged violations of the religious toleration clause or their due process rights.

4. Phoenix filed a cross-appeal, arguing Appellants lacked standing.

5. Section 18-4(B)(4) provides an exemption for bona fide religious organizations. Appellants have not asserted that they qualify as a bona fide religious organization.

6. In Loving v. Virginia, the trial court sentenced the Lovings to jail because of their interracial marriage and stated that:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

The United States Supreme Court vacated the sentence, finding laws which criminalized interracial marriage unconstitutional. 388 U.S. 1, 3 (1967).

7. At the time Appellants filed their complaint they had not yet received a request to provide services for a same-sex wedding. After they filed their complaint, however, they received such a request, though both the court and Appellants agreed the request was likely in retaliation for Appellants’ lawsuit. Appellants did not respond to the inquiry.

8. We recognize the standard of review for a preliminary injunction is different from that of a summary judgment. See Planned Parenthood Ariz., Inc. v. Am. Ass’n of Pro-Life Obstetricians & Gynecologists, 227 Ariz. 262, 268, ¶ 9 (App. 2011). We need not address Appellants’ appeal from the superior court’s preliminary injunction ruling because we find Appellants failed to establish that they are entitled to relief pursuant to a de novo review. It follows that Appellants would fail to establish they are entitled to preliminary injunctive relief pursuant to an abuse of discretion review.

9. To the extent Appellants argue that Section 18-4(B) imposes unconstitutional conditions, this argument fails. To find an unconstitutional condition we must first find the waiver of a constitutional right. See Niehaus v. Huppenthal, 233 Ariz. 195, 202, ¶ 23 (App. 2013). Here, there is no such waiver.
At oral argument, Appellants primarily relied on *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995), to argue that forcing them to provide services for same-sex weddings violated their First Amendment right to free speech. Appellants’ reliance on *Hurley* is misplaced. In *Hurley*, the United States Supreme Court found a parade was expressive conduct and that forcing an organization to include a gay, lesbian and bisexual group would alter the message of that expressive conduct. *Id.* at 573. As explained throughout this opinion, Appellants’ act of creating stationery and wedding-related goods is not expressive conduct. Accordingly, the fact that Section 18-4(B) requires Appellants to provide the same services for same-sex weddings as opposite-sex weddings does not implicate their First Amendment rights.

Even assuming Section 18-4(B) directly regulates speech, it still survives constitutional scrutiny. Laws which are content and viewpoint neutral are subject to intermediate scrutiny. *See State ex rel. Napolitano v. Gravano*, 204 Ariz. 106, 112, ¶ 19 (App. 2002) (“If a regulation serves purposes unrelated to the content of the expression, it is neutral, even if it incidentally affects some speakers or messages but not others.”) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Thus, to be constitutional, under this test, Section 18-4(B) needs only to further a substantial government interest unrelated to the suppression of free speech. *See United States v. O’Brien*, 391 U.S. 367, 377 (1968). We have previously found that antidiscrimination statutes are content and viewpoint neutral and unrelated to the suppression of speech. *See Hurley*, 515 U.S. at 572; *accord Alpha Delta Chi-Delta Chapter*, 648 F.3d at 801. Accordingly, Section 18-4(B), as an antidiscrimination ordinance which regulates the conduct of providing services in a place of public accommodation, is content and viewpoint neutral. Moreover, as explained throughout this opinion Phoenix has a substantial, if not compelling, interest in eradicating discrimination based on sexual orientation.

We strike the following language from Section 18-4(B)(3), “or that any person, because of race, color, religion, sex, national origin, marital status, sexual orientation, gender identity or expression, or disability would be unwelcome, objectionable, unacceptable, undesirable or not solicited.”

Brush & Nib does not explicitly argue on appeal that §18-4(B) violates the Free Exercise Clause of the First Amendment; however, even assuming such an argument was advanced, Phoenix’s obligation is to not enact, interpret or apply its laws or regulations based on hostility to a religion or religious viewpoint. There is no evidence in the record to support any suggestion that Phoenix’s adoption of §18-4(B), or its interpretation as it relates to Brush & Nib, has been anything other than neutral toward and respectful of their sincerely-expressed religious beliefs. *See Masterpiece Cakeshop, Ltd.*, slip op. at 16-18. Further, as noted by Justice Kagan in her concurring opinion in *Masterpiece Cakeshop, Ltd.*, “As this Court has long held, and reaffirms today, a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait. A vendor can choose the product he sells, but not the customers he serves—no matter the reason.” (Internal citation omitted.)
Chapter 5

Representing LGBTQ+ Immigrants
in the Current Political Climate
Stephen Manning
Immigrant Law Group PC
Portland, Oregon
Eileen Sterlock
Immigration Law Office of Eileen Sterlock
Portland, Oregon
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Chapter 5—Representing LGBTQ+ Immigrants in the Current Political Climate

Representing LGBTQ+ Immigrants in the Current Political Climate:

**Humanitarian Protection: Asylum, U and T Visas**

There are options available to acquire lawful immigration status and avoid deportation for victims of mistreatment both in their home countries and in the United States.

I. For victims of very serious harm in their home country:

   a. **Asylum:**
      
      i. Suffered past persecution or has a well-founded of future persecution.
      
      ii. On account of (motivated by) race, religion, nationality, political opinion, or membership in a particular social group.
      
      iii. Persecution was committed by the government or by actors that the government is unable or unwilling to control.
      
      iv. Show that there is at least 10% chance you will be persecuted if returned to home country.
      
      v. File within one year of most recent entry into the United States.
      
      vi. Not have certain types of criminal convictions.

   b. **Withholding of Removal:**
      
      i. Same requirements as asylum, but must show more likely than not (51% chance) that will be persecuted.
      
      ii. Option if disqualified from asylum because filing beyond deadline, previous deportation, or certain criminal convictions.

   c. **Convention Against Torture:**
      
      i. Must show will be tortured or killed by government of home country or that the government is aware that you will be tortured or killed and will not protect you.
         
         1. Motivation for the harm does not matter, only that the harm is committed by gov't or with gov't acquiescence.

II. For victims of crimes that occurred in the United States:

   a. **U visa:**
      
      i. Must be a victim of a qualifying crime (includes domestic violence, sexual abuse, kidnapping, felonious assault, rape, blackmail, false imprisonment, witness tampering, and more...).
      
      ii. Must have been helpful to law enforcement investigation or prosecution of the crime.
1. *A law enforcement agency will need to sign a certification as to Victim’s helpfulness
   iii. Must demonstrate that suffered substantial physical or mental abuse as a result of the crime.
   iv. The crime occurred in the United States.
   v. Eligible for a waiver of certain grounds of inadmissibility.

b. **T visa:**
   i. Victim of a severe form of human trafficking--
      1. Sex trafficking: When someone recruits, harbors, transports, provides, solicits, patronizes, or obtains a person for the purpose of a commercial sex act, where the commercial sex act is induced by force, fraud, or coercion, or the person being induced to perform such act is under 18 years of age; or
      2. Labor trafficking: When someone recruits, harbors, transports, provides, or obtains a person for labor or services through the use of force, fraud, or coercion for the purpose of involuntary servitude, peonage, debt bondage, or slavery.
   ii. Present in the United States due to the trafficking.
   iii. Comply with any reasonable request from a law enforcement agency for assistance in the investigation or prosecution of human trafficking (unless under the age of 18 or unable to cooperate due to trauma).
      1. *No certification from law enforcement is required.*
   iv. Demonstrate would suffer extreme hardship if removed from the United States.
   v. Eligible for a waiver of certain grounds of inadmissibility.
Recent developments, practice tips, and looking ahead

Gloria J. Trainor

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I’m Still Learning!

- The language of the LGBTQI+ community is ever-changing and evolving, and using the correct language is important.
- If I make a language mistake today, please approach me and let me know if I don’t correct myself, I want to keep learning.
- It’s on us to avoid deadnaming and misgendering.
We’ve Come a Long Way

- Marriage licenses issued in Multnomah County in 2004 (and were later determined to be void)
  - Measure 36 defined marriage as between one man and one woman and survived for ten years
- 2007: Oregon Family Fairness Act legalized same sex RDP’s
- May 2014: same-sex marriage legalized in Oregon
- June 2015: same-sex marriage recognized by the Federal Government

We’ve Come a Long Way

- June 2016: Multnomah County Judge rules that a transgender person can legally change gender to nonbinary rather than to male or female.
- July 2017: Oregon 1st state to allow residents to identify as nonbinary for purposes of driver licenses and i.d. cards by choosing “X.”
- Next school year, students in Oregon will be able to identify as nonbinary by choosing “X.”
**Dissolution: A Quick Overview**

- **ORS 107.005 et seq.**
- Oregon has jurisdiction over dissolution of marriage so long as one of the parties has been a resident of Oregon for six consecutive months preceding the Petition
- One party files a Petition alleging irreconcilable differences. The filing of a Response triggers a trial date. Mediation is mandatory, but if the parties don’t settle, a bench trial results
- Presumption of equal contribution

**OR Marriage Laws Apply**

- **ORS 106.300 et seq. can be cited as the Oregon family Fairness Act**
- The Act brought marriage rights to same-sex couples in 2007
- Although the word “marriage” was absent in the Act, ORS 106.340 put RDP’s on equal footing with marriage in Oregon
- This significantly changed things for the LGBTQI+ community in Oregon, whose members previously could not avail themselves to the rights or privileges (or liabilities) of marriage
Unmarried Couples

• Prior to 2007, same-sex couples in Oregon didn’t have the option of the protection of marriage

• LGBTQI+ couples and families suffered inequities as a result (and unmarried opposite-sex couples as well, but importantly, they had the option to marry)

• Unmarried and un-RDP’d couples still experience these inequities, which continue to disproportionately affect the LGBTQI+ community

Unmarried Couples

Temporary Relief

• Financial restraining order pursuant to ORS 107.093 is not available

• Financial assistance is not available (ex: suit money)

• Family Abuse Prevention Act (FAPA) orders are available (family or household member), but other temporary relief is not

• Pendente Lite Relief ORS 107.095 examples:
  • (c) Refrain from molesting and interfering in any manner with the party or party’s children (no abuse has to have occurred)
  • (d) Exclusive use of the marital home
Unmarried Couples

Final Relief

- Spousal support is not available
- Division of retirement assets by QDRO is not available
- Beal et. seq. standard of equitable division, no presumption of equal contribution

Parentage

- ORS 109.070: presumption of parentage to the spouse married to the birth mother at the time of the child’s birth (also see ORS 109.243 re: artificial insemination)
- For unmarried heterosexual couples, same rights and obligations as married parents, so long as paternity is established
- Filiation, Voluntary Acknowledgement, and Adoption also establish parentage for unmarried heterosexual couples
Parentage

- For unmarried same-sex couples, it’s not so easy:
- RDP or Marriage is not necessarily enough
- Second parent adoption is prudent but controversial (interstate issues)

Legal Change of Gender/Name by Court Order

- Done by simple petition and general judgment
- Currently $117.00 filing fee
- Must provide certification to court that petitioner has undergone, “surgical, hormonal, or other treatment appropriate to [petitioner] for the purpose of affirming [petitioner's] gender identity.”
- May request that case be sealed so that gender/name change is not included in OJIN/public record searches
Locally, what’s the latest?

- **State Senate Bill 512** - Replaces Husband with Spouse for purposes related to parentage
- **Oregon House Bill 2673** – Updates name and gender change process for Oregon birth certificates
- Are full, former names required in divorce judgment?

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**Oregon Senate Bill 512**

- Effective January 1, 2018, changes to multiple ORS provisions to provide presumption of parentage to Spouse of birth mother
- Previously, presumption was provided only to Husband of the birth mother
- **NOTE:** This is still problematic for the trans/NB community, as not only women give birth. Trans men, for example may give birth and are not “mothers.” So, this is progress, but again, we’re not there yet!
Oregon House Bill 2673

- Beginning January 1, 2018, Oregon-born residents no longer need to petition for a court order to change the name and gender on their birth certificate.
- A notarized form is sent to Oregon Health Authority with a $35 fee. $25 fee for certified copy of the revised birth certificate.
- Must be 18 years or older, or have permission of parent/legal guardian if under 18.
- There is no indication on the revised birth certificate that any change has been made.

ORS 107.085(4)

- Embodies the requirement to file with the court “... a written statement setting forth the full names and any former names of the parties ... This information shall be incorporated in and made a part of the judgment.”
- This requirement causes transgender and non-binary litigants publicly report their deadnames, which is at least uncomfortable and is potentially dangerous.
- Consider using the CIF instead: A party’s former name is an example of “confidential personal information.” If included in the CIF, it must not be included in the judgment, still not a perfect fix.
- Another protective option is to seal a name change.
Looking Ahead – Legal Custody of Queer, Gender Non-Conforming and Trans Children

When divorcing or divorced parents disagree on whether to support their LGBTQI+ child, how do courts decide who is "correct" for purposes of child custody and parenting time?

Oregon Custody Statute

ORS 107.137: Factors considered in determining custody of child.
...the court shall give primary consideration to the best interests and welfare of the child. In determining the best interests and welfare of the child, the court shall consider the following relevant factors:

(a) The emotional ties between the child and other family members;
(b) The interest of the parties in and attitude toward the child;
(c) The desirability of continuing an existing relationship;
(d) The abuse of one parent by the other;
(e) The preference for the primary caregiver of the child, if the caregiver is deemed fit by the court; and
(f) The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child. However, the court may not consider such willingness and ability if one parent shows that the other parent has sexually assaulted or engaged in a pattern of behavior of abuse against the parent or a child and that a continuing relationship with the other parent will endanger the health or safety of either parent or the child.
Questions and Comments