A NEW ERA IN THE BATTLE BETWEEN RELIGIOUS LIBERTY AND *SMITH*: SOGI LAWS, THEIR THREAT TO RELIGIOUS LIBERTY, AND HOW TO COMBAT THEIR TREND

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ABSTRACT

This Article addresses how Employment Division, Department of Human Resources v. Smith *has had a negative effect on religious liberty in the context of sexual orientation-gender identity (SOGI) laws. In* Smith*, the Supreme Court created a dangerous precedent, allowing government to create laws that infringe upon the free exercise of religion. The courts, when addressing SOGI laws, have upheld their constitutionality as a result, despite the fact that religious owners of businesses are being asked to forgo their sincerely held religious beliefs. This Article explains how religious freedom has not been protected under the neutral and generally applicable standard created by* Smith *and how statutory attempts to remedy* Smith *have fallen flat.*

However, this Article also proposes a new approach: the individualized assessment exception in Smith*. While rarely argued, the approach has proven to be an effective method of attack to* Smith *and could represent a shift in free exercise jurisprudence. The Court in* Smith *indicted that it would apply a different test, pursuant to* Sherbert v. Verner*, when a law gives deference to a government agency or official. If the law creates a system of implementation that could lead to disparate treatment toward religious people, the exception would apply. The theory offers an opportunity to expand* Smith *and better protect religious freedoms.*

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I. INTRODUCTION

In today's political and legal climate, the religious practices of Christian businesses are often treated as inferior to the desires of the LGBT community. Chai Feldblum, who became a Commissioner for the Equal Employment Opportunity Commission in 2010,[1] addressed the conflict between religious liberty and sexual liberty in a 2006 interview by stating, "I'm having a hard time coming up with any case in which religious liberty should win."[2] Justice Richard Bosson of the New Mexico Supreme Court has stated that Christian photographers "are compelled by law to compromise the very religious beliefs that inspire their lives."[3] In ruling against the religious convictions of the business owner, he stated, "at some point in our

1. *Chai R. Feldblum Commissioner*, U.S. EEOC, http://www.eeoc.gov/eeoc/feldblum.cfm (last visited Apr. 1, 2016).

2. Maggie Gallagher, *On Chai Feldblum's Claim That I Misquoted Her*, NAT'L REV. (Oct. 28, 2014), http://www.nationalreview.com/corner/391301/chai-feldblums-claim-i-misquoted-her-maggie-gallagher.

3. Elane Photography, LLC v. Willock, 309 P.3d 53, 79 (N.M. 2013) (Bosson, J., concurring).

lives all of us must compromise . . . to accommodate the contrasting values of others."[4] Such forced compromise is "the price of citizenship."[5]

At first glance, the Free Exercise Clause of the First Amendment seems to prohibit such a sentiment. It states that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof* . . . ."[6] Based on this language, forced compliance with another's beliefs or values that are in contrast with one's religious convictions would be a prohibition of the free exercise of one's religion. Free exercise jurisprudence, up until 1990, had a simple test commonly known as the "*Sherbert* test."[7] Under that test, the first determination was whether a law infringed upon a person's constitutional right of free exercise of religion, and, if so, the government was required to justify that infringement by establishing a compelling state interest that balanced violating the person's free exercise of religion or that "no alternative forms of regulation would combat such abuses without infringing upon First Amendment Rights."[8] This test was consistent with the language of the First Amendment.[9]

However, in 1990, the Supreme Court decided *Employment Division, Department of Human Resources v. Smith*.[10] This case represented a paradigm shift within the world of free exercise jurisprudence.[11] Justice Scalia created a new test—the *Smith* test—stating that if a valid law is neutral and generally applicable, it does not violate the First Amendment, even if the law incidentally burdens the exercise of religion.[12] This new test opened the door for laws to infringe upon the exercise of religion, so long as the language or application of the law did not target a religious person or

4. *Id.* at 79–80.

5. *Id.* at 80.

6. U.S. CONST. amend. I (emphasis added).

7. *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 469–70 (2010); Gregory D. Wellons, Employment Division, Department of Human Resources v. Smith: *The Melting of* Sherbert *Means a Chilling Effect on Religion*, 26 U.S.F. L. REV. 149, 149–50 (1991).

8. Sherbert v. Verner, 374 U.S. 398, 403, 406–07 (1963) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

9. *Compare* U.S. CONST. amend. I, *with Sherbert*, 374 U.S. at 403 (quoting *Button*, 371 U.S. at 438).

10. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 872 (1990).

11. *See* Lund, *supra* note 7, at 470.

12. *Smith*, 494 U.S. at 878; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

group.[13] Sensing the danger of this new test, Justice O'Connor, in a concurring opinion, accurately concluded that "laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion."[14]

This Article explores the statutes and policies creating the conflict between sexual autonomy and religious liberty and the cases that have resulted.[15] It then reviews in more detail the *Sherbert v. Verner* and *Smith* cases and their progenies.[16] Finally, this Article explores two options to return to the more common-sense *Sherbert* test: religious freedom and restoration acts (RFRAs) and the seldom-used individualized assessment exception in *Smith*.[17]

II. PUBLIC ACCOMMODATION AND SOGI LAWS

Currently, 22 states have laws in place that ban discrimination based upon sexual orientation or gender identity—SOGI laws.[18] In the cases that have been litigated, which are detailed in Part V, the ban on discrimination applies to so-called "public accommodations," which are similarly defined in the various laws. In New Mexico, "public accommodation" means "any establishment that provides or offers its services, facilities, accommodations or goods to the public."[19] In Colorado, "place of public accommodation" means "any place of business engaged in any sales to the public and any place offering services, facilities . . . or accommodations to the public."[20] In Washington, citizens have "the right to be free from discrimination because of . . . sexual orientation," including "the right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of

13. *See Smith*, 494 U.S. at 878.

14. *Id.* at 901 (O'Connor J., concurring).

15. *See infra* Part II.

16. *See infra* Parts III–V.

17. *See infra* Parts VI–X.

18. *Non-Discrimination Laws: State by State Information—Map*, ACLU, https://www.aclu.org/map/non-discrimination-laws-state-state-information-map (last visited Apr. 6, 2016). There are also municipalities and county governments that have passed SOGI laws. *E.g.*, LEXINGTON-FAYETTE CTY., KY., CODE OF ORDINANCES § 2-33 (Supp. 2016), https://www.municode.com/library/ky/lexington-fayette_county/codes/code_of_ordinances?nodeId=COOR_CH2AD_ARTIILEYECOHURICO_S2-33DIDUSEORGEID.

19. N.M. STAT. ANN. § 28-1-2(H) (West 2016).

20. COLO. REV. STAT. ANN. § 24-34-601(1) (West 2016).

public . . . accommodation."[21] In Oregon, "all persons . . . are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction . . . on account of . . . sexual orientation."[22] Though the language differs from jurisdiction to jurisdiction, each statute effectively prohibits businesses from refusing services based upon a prospective customer's sexual orientation or, in some cases, gender identity. As explained in Part V, these laws do not exempt privately owned businesses who refuse to provide services based upon sincerely held religious beliefs.

III. *SHERBERT* AND THE PRE-*SMITH* FREE EXERCISE JURISPRUDENCE

In 1963, the U.S. Supreme Court decided *Sherbert*.[23] In that case, a Seventh-day Adventist was discharged by her employer because she would not work on a Saturday, which is the Sabbath according to her faith.[24] When she applied for unemployment benefits, the state denied them because South Carolina's law required a claimant be "able to work and . . . available to work"; and if "he has failed, without good cause, . . . to accept available suitable work when offered him," the claimant would be ineligible.[25] The Supreme Court stated that an affirmation of South Carolina's denial of benefits

> must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate."[26]

This test came to be known as the *Sherbert* test.[27]

When applying this test to Sherbert's situation, the Court found that the law constituted a burden on her free exercise of religion.[28] South Carolina's ruling forced Sherbert "to choose between following the precepts

21. WASH. REV. CODE ANN. § 49.60.030 (West 2016).
22. OR. REV. STAT. ANN. § 659A.403(1) (West 2016).
23. Sherbert v. Verner, 374 U.S. 398, 398 (1963).
24. *Id.* at 399.
25. *Id.* at 400–01 n.3 (citing S.C. Code §§ 68-113–14).
26. *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
27. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760–61 (2014).
28. *Sherbert*, 374 U.S. at 409–10.

of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[29] The Court then asked whether South Carolina's interest in denying benefits was compelling enough to justify burdening the free exercise of religion of people such as Sherbert.[30] The Court reversed and remanded the case, ordering the lower court to determine whether the state's interests were compelling and whether the state could "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[31]

Subsequent state benefits cases followed the same analysis as *Sherbert*. In *Thomas v. Review Board of Indiana Employment Section Division*, a Jehovah's Witness quit his job because the factory where he worked transitioned to business "engaged directly in the production of weapons."[32] The State of Indiana denied Thomas unemployment benefits because benefits were "not intended to facilitate changing employment or to provide relief for those who quit work voluntarily for personal reasons."[33] The Court concluded, "Courts should not undertake to dissect religious beliefs."[34] Without directly saying so, the Court followed the same analysis as *Sherbert*, holding that "the coercive impact on Thomas is indistinguishable from *Sherbert*."[35] The Court then addressed the government interests—in this case, prevention of widespread unemployment and probing by employers into applicant's beliefs, which the Court did not find compelling.[36]

29. *Id.* at 404.

30. *Id.* at 406.

31. *Id.* at 407, 410 (finding no evidence to support State's justification "that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work").

32. Thomas v. Review Bd. of Ind. Emp't Section Div., 450 U.S. 707, 710 (1981).

33. *Id.* at 712 (quoting Thomas v. Review Bd. of Ind. Emp't Section Div., 391 N.E.2d 1127, 1129 (1979)) (internal quotation marks omitted).

34. *Id.* at 715.

35. *Id.* at 717.

36. *Id.* at 718–19. Though the case does not provide anything new to the free exercise approach, *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987), is worth mentioning. In *Hobbie*, an employee converted to the Seventh-day Adventist church after beginning employment, which meant she could no longer work from sundown on Friday to sundown on Saturday. 480 U.S. at 138. Despite the fact that Hobbie caused the change in circumstances, the Court found "no meaningful distinction among the situations of Sherbert, Thomas, and Hobbie." *Id.* at 141.

The Court has implemented the *Sherbert* test outside the context of government benefits as well. In perhaps the most well-known case, *Wisconsin v. Yoder*, Amish parents claimed that Wisconsin's compulsory school attendance law was "contrary to the Amish religion and way of life."[37] Wisconsin's law made it a crime for a parent to prevent a child between the ages of seven and 16 from attending school regularly.[38] However, while Amish believe in allowing children to be exposed to the secular world at a young age, they do not allow their children to attend "[f]ormal high school education beyond the eighth grade . . . because it places Amish children in an environment hostile to Amish beliefs" at a time in which they are preparing to "accept the heavy obligations imposed by adult baptism."[39]

In applying the two-step *Sherbert* test, the Court stated:

> [I]n order for Wisconsin to compel school attendance . . . [when] such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.[40]

The Court held that "the Wisconsin law affirmatively compels [Amish parents] . . . to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[41] Wisconsin asserted that the state had a compelling interest in universal compulsory education because it applies to all citizens,[42] it allows citizens to participate "effectively and intelligently" in the political system, and it protects children from "ignorance."[43] However, the Court was not persuaded.[44]

The *Sherbert* test has not always been a shield for religious people. In

37. Wisconsin v. Yoder, 406 U.S. 205, 209 (1972).

38. *Id.* at 207 n.2 (quoting WIS. STAT. § 118.15 (1969)).

39. *Id.* at 211.

40. *Id.* at 214.

41. *Id.* at 218.

42. *Id.* at 220. The Court's denial of this portion of its argument is important in light of the contrary *Smith* opinion that came two decades later. The *Yoder* Court stated, "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Id.* at 220 (citing Sherbert v. Verner, 374 U.S. 398, 409 (1963)).

43. *Id.* at 221–22.

44. *Id.* at 225.

United States v. Lee, an Amish farmer and carpenter claimed that Social Security taxes violated the Free Exercise Clause because Amish people are already bound by their religion to provide for their elderly and needy.[45] The Court implemented the same two-step test to determine first whether the law infringed upon a religious practice and, if so, whether the government interest was compelling.[46] While the Court found that paying Social Security taxes infringes upon Amish people's exercise of religion, "[t]he tax system could not function if denominations were allowed to challenge the tax system . . . ."[47] Therefore, the Court held "the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[48]

The Court came to the same conclusion in *Hernandez v. Commissioner of Internal Revenue*, which involved members of the Church of Scientology who alleged an infringement upon their exercise of religion because their "donations" to the church were not recognized as tax deductions.[49] They alleged that a donation made in exchange for spiritual "auditing" services[50] should be a tax deduction, despite the tax code only allowing deductions for a "contribution or gift."[51] The familiar two-step test used was "whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."[52] The Court did not conclude whether an infringement occurred but, quoting *Lee*, held that the tax system "must be uniformly applicable to all, except as *Congress* provides explicitly otherwise."[53] The Court held the free exercise challenge was "without merit" because if exemptions were allowed where a larger tax burden interfered with religious belief, the exemptions would "know[] no limitation."[54]

45. United States v. Lee, 455 U.S. 252, 254–55 (1982).

46. *Id.* at 256–60.

47. *Id.* at 257, 260.

48. *Id.* at 260.

49. Hernendez v. Comm'r, 490 U.S. 680, 686, 688 (1989).

50. *Id.* at 686. Auditing is a process through which "[a] person becomes aware of [their] spiritual dimension" and "involves a one-to-one encounter between a participant . . . and a Church official (known as an 'auditor')." *Id.* at 684.

51. *Id.* at 698–700.

52. *Id.* at 699.

53. *Id.* at 700 (quoting *Lee*, 455 U.S. at 261).

54. *Id.*

IV. THE FIRST AMENDMENT SHIFT RESULTING FROM *SMITH*

The Supreme Court's approach to the Free Exercise Clause changed in 1990 when it issued its ruling in *Smith*.[55] By creating the *Smith* test, Justice Scalia implemented what he called a "sounder approach" that he felt was "in accord with the vast majority of our precedents."[56] In *Smith*, Alfred Smith and Galen Black (referred to collectively as "Smith") were terminated from their jobs after ingesting peyote, a controlled substance under Oregon law, at a religious ceremony.[57] Accordingly, they were denied unemployment benefits because they were terminated for "work-related 'misconduct.'"[58] The controlling opinion held that an otherwise valid law that is neutral and generally applicable does not violate the First Amendment, even if that law has the incidental effect of burdening the exercise of religion.[59] Such a law does not violate the Free Exercise Clause as long as the law passes the low rational basis review standard.[60]

Smith did not overrule *Sherbert* but rather limited the *Sherbert* test to the "unemployment compensation field," "where the State has in place a system of individual exemptions."[61] In *Smith*, however, the statute was an "across-the-board criminal prohibition on a particular form of conduct."[62] By characterizing the criminal statute in that way, thus distinguishing the majority of laws from the individual considerations in *Sherbert*, the Court allowed states to create law that does not "depend on measuring the effects

55. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

56. *Id.* at 885. There was disagreement as to whether this was true; Justice O'Connor stated that Justice Scalia's holding "dramatically departs from well-settled First Amendment jurisprudence . . . ." *Id.* at 891 (O'Connor, J., concurring). O'Connor's position was that the *Sherbert* test applied to both "cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct." *Id.* at 898 (citing *Lee*, 455 U.S. at 257–60; Gillette v. United States, 401 U.S. 437, 462 (1971); Wisconsin v. Yoder, 406 U.S. 205, 215–34 (1972); Bowden v. Roy, 476 U.S. 693, 731–32 (1986); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141–42 (1987)).

57. *Smith*, 494 U.S. at 874 (majority opinion).

58. *Id.*

59. *Id.* at 878; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

60. *Smith*, 494 U.S. at 885.

61. *Id.* at 883–84.

62. *Id.* at 884.

of a governmental action on a religious objector's spiritual development."[63] Accordingly, the Court declared the prohibition of peyote ingestion by all persons, regardless of their religious beliefs, to be consistent with the Free Exercise Clause.[64]

The Court has addressed the *Smith* test on one additional occasion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, involving a Santeria church that had animal sacrifice as one of its principal forms of devotion.[65] The community of Hialeah, concerned that the practice was being conducted within their midst, banned the unnecessary killing of an animal and owning an animal for such a purpose.[66] However, the city ordinances also included various exemptions.[67] Expanding upon the *Smith* line of reasoning, the Court first determined that because the ordinances' object was to prohibit conduct central to Santeria worship—despite the ordinances' facial neutrality—they were not neutral.[68] The ordinances were created in such a way that the only conduct prohibited was "the religious exercise of Santeria church members."[69] The Court recognized, "[F]ew if any killings of animals are prohibited other than Santeria sacrifice. . . ."[70] In assessing the ordinances' general applicability, the Court stated that "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation,"[71] which, for similar reasons, led the Court to declare the ordinances to be "underinclusive."[72]

63. *Id.* at 885 (citing Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

64. *Smith*, 494 U.S. at 890.

65. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 580 U.S. 520, 524 (1993).

66. *Id.* at 527–28.

67. *Id.* (noting "exemption for slaughtering by 'licensed establishment[s]' of animals 'specifically raised for food purposes'" (quoting City of Hialeah, Fla. Ordinance 87-52 (Sept. 8, 1987) (alteration in original)).

68. *Id.* at 533–40. In finding the ordinance facially neutral, the Court determined the terms "sacrifice" and "ritual," as used in the ordinance, had secular meanings. *Id.* at 533–34. While not enough to make it facially discriminatory, the use of these terms suggested improper targeting of the Santeria religion. *Id.* at 534.

69. *Id.* at 535.

70. *Id.* at 536.

71. *Id.* at 542–43.

72. *Id.* at 542–46.

Professor Christopher C. Lund identifies the problem with *Smith*'s reasoning by stating that the *Smith* test incentivizes the government to ignore the effect of a law on religious practice.[73] Before *Smith*, when passing a law, a government would first have to "consider[] the negative impact its action will have on religious communities," but now a government can "pretend[] not to see the impact it has on religious groups," so long as the law appears neutral and generally applicable.[74] In effect, *Smith* rewards the government's efforts to neglect the concerns of religious communities.[75] In the context of religious business practices subject to public accommodation laws, the results have been consistent with Professor Lund's analysis.

V. OVERVIEW OF THE CASES WHICH HAVE BEEN, OR ARE BEING, LITIGATED

The cases involving the sexual-autonomy-versus-religious-liberty conflict follow the same general fact pattern. In those cases, a state has passed a non-discrimination law, whereby a public accommodation is prohibited from discriminating based upon, among other things, sexual orientation. In each case, a gay person and his or her partner has come to a Christian business owner seeking services for their commitment ceremony or wedding. In each case, the Christian business owner has declined to provide services for those ceremonies based upon his or her sincerely held religious beliefs that marriage is between a man and a woman.[76] When this conflict occurs, it must be determined which interest, sexual autonomy or religious liberty, statutory right or constitutional right, receives greater priority.[77] With one exception, each time this conflict has arisen, the *Smith* test has been applied to the detriment of religious liberty.

The first in this line of cases, and the only case that is now final, came out of New Mexico in *Elane Photography, LLC v. Willock*.[78] In New Mexico, the legislature amended the New Mexico Human Rights Act (NMHRA) to

73. Lund, *supra* note 7, at 471.

74. *Id.*

75. *Id.*

76. *See generally Genesis* 2:22–24; *Mark* 10:6–9; *Matthew* 19:4–6; 1 *Corinthians* 7:1–16.

77. Other legal arguments are made in each case, including free speech, free association, and arguments with regard to the state laws. However, for the purposes of this Article, the free exercise aspect of each case will be the focus.

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

include sexual orientation in its public accommodation anti-discrimination provision.[79] Vanessa Willock, a gay woman, contacted Elane Photography, which was run by Elaine Huguenin, to photograph her commitment ceremony.[80] Huguenin was personally opposed to same-sex marriage according to her religious beliefs and informed Willock that she could only photograph "traditional weddings."[81] Willock filed a discrimination complaint with the New Mexico Human Rights Commission, which concluded that Elane Photography had discriminated on the basis of sexual orientation.[82]

In affirming the New Mexico Human Rights Commission and the subsequent lower courts, the New Mexico Supreme Court made findings that have proven to be foundational for the sexual-autonomy-versus-religious-liberty cases. Huguenin testified that her objection was not that Willock was gay; instead, it was the endorsement of a same-sex wedding to which she had a religious objection.[83] However, the court found that "conduct that is inextricably tied to sexual orientation" falls under the purview of NMHRA.[84] The court's constitutional free exercise analysis relied upon *Smith*, stating, "[T]he 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)."[85] The court found the NMHRA neutral and generally applicable; therefore, the religious free exercise defense made by Elane Photography failed.[86]

The next in the line of cases was *Craig v. Masterpiece Cakeshop*.[87] Like

79. N.M. STAT. ANN. §§ 28-1-1 to -13; *Elane Photography*, 309 P.3d at 58–59 (citing N.M. STAT. ANN. § 28-1-7).

80. *Elane Photography*, 309 P.3d at 59.

81. *Id.* at 59–60. Subsequently, in an e-mail exchange, Huguenin additionally stated, "Yes, you are correct in saying we do not photograph same-sex weddings . . . ." *Id.* at 60.

82. *Id.*

83. *Id.*

84. *Id.* at 62 (stating that a contrary holding would protect same-sex couples "only to the extent that they do not openly display their same-gender sexual orientation").

85. *Id.* at 73 (quoting Emp't Div., Dep't Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990)).

86. *Id.* at 75. The Court also rejected Elane Photography's New Mexico Religious Freedom and Restoration Act defense as inapplicable. *Id.* at 77.

87. Craig v. Masterpiece Cakeshop, Inc., No. 14CA1351, 2015 WL 4760453 (Colo. Ct. App. Aug. 13, 2015).

in *Elane Photography*, Colorado had amended its public accommodation anti-discrimination law to include sexual orientation.[88] In 2012, Charlie Craig and David Mullins entered Masterpiece Cakeshop, owned by Jack Phillips, to request that Masterpiece Cakeshop provide a cake for their same-sex wedding.[89] Phillips informed the two men that he did not create wedding cakes for same-sex weddings based upon his religious belief that "the Bible commands him to avoid doing anything that would displease God, and not to encourage sin in any way," but that he would make them any other type of cake, such as birthday or shower cakes.[90] The Colorado Court of Appeals, relying heavily on *Lukumi*, found that the Colorado law was "generally applicable because it [did] not exempt secular conduct from its reach . . . [o]n its face."[91] It found the law to be neutral because the law "forbids all discrimination based on sexual orientation regardless of its motivation."[92] The Court added that "[t]he law merely prohibits Masterpiece from discriminating," and that "Masterpiece remains free to continue espousing its religious beliefs."[93] The Court affirmed the Colorado Civil Rights Commission's decision that Phillips was to implement "comprehensive staff training," submit "quarterly compliance reports . . . describing the remedial measures taken," and "document[] all patrons who are denied service and the reasons for the denial."[94]

The next case came from the New York State Division of Human Rights in *McCarthy v. Liberty Ridge Farm*, in which Melisa and Jennifer McCarthy filed a complaint against Liberty Ridge Farm, LLC.[95] New York's

88. COLO. REV. STAT. ANN. § 24-34-601(2) (West 2016); *Masterpiece Cakeshop*, 2015 WL 4760453, at *5.

89. *Masterpiece Cakeshop*, 2015 WL 4760453, at *1.

90. Craig v. Masterpiece Cakeshop, Inc., CR 2013-0008, at 2–3 (Colo. Office of Admin. Courts Dec. 6, 2013), https://www.aclu.org/sites/default/files/assets/initial_decision_case_no._cr_2013-0008.pdf (initial agency decision).

91. *Masterpiece Cakeshop*, 2015 WL 4760453, at *16.

92. *Id.*

93. *Id.* at *17.

94. *Id.* at *1, *2.

95. McCarthy v. Liberty Ridge Farm, LLC, Nos. 10157952 & 10157963, at 1–2 (N.Y. State Div. of Human Rights July 2, 2014), http://www.dhr.ny.gov/sites/default/files/pdf/commissioners-orders/mccarthy-v-liberty-ridge-farm.pdf (Recommended Findings of Fact, Opinion and Decision, and Order). The New York State Division of Human Rights also participated in these proceedings. *Id.*

public accommodation anti-discrimination law, like in the previous cases, included sexual orientation in its protected classifications.[96] Robert and Cynthia Gifford run, own, and operate Liberty Ridge Farm, which serves as both their home and as a public attraction.[97] They open the farm for fall festivals, fruit picking, a corn maze, and parties, including weddings.[98] Melisa McCarthy contacted Cynthia Gifford about holding a wedding at Liberty Ridge Farm, but when McCarthy referred to her fiancé as "she," Gifford informed McCarthy that "we do not hold same sex marriages here at the farm" due to her and her husband's religious beliefs on marriage.[99] The Division of Human Rights awarded damages of $1,500 to both Melisa and Jennifer McCarthy and assessed a civil fine of $10,000, payable to the State of New York.[100] Not only was Liberty Ridge Farm held liable for the civil fine and damages, but the Giffords were held individually liable as well, despite doing business as an LLC.[101] On appeal, in finding no free exercise violation, the appellate division of the New York Supreme Court, citing *Smith*, held that the New York human rights law does not target religion, and thus is neutral and generally applicable.[102]

Perhaps the most extreme of this line of cases comes out of the Bureau of Labor and Industries of the State of Oregon in *In re Sweetcakes by Melissa*,[103] a business operated by Aaron and Melissa Klein.[104] Rachel Cryer and Laurel Bowman-Cryer were tasting cakes at Sweetcakes by Melissa

96. N.Y. EXEC. Law § 292.27 (McKinney 2016) (establishing protected classifications include "heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived").

97. *Liberty Ridge Farm*, at 3 (N.Y. State Div. of Human Rights July 2, 2014) (Recommended Findings of Fact, Opinion and Decision, and Order).

98. *Id.* at 4.

99. Gifford v. McCarthy, 23 N.Y.S.3d 422, 428 (N.Y. App. Div. 2016).

100. *Id.* at 426–27; *see also Liberty Ridge Farm*, at 21 (N.Y. State Div. of Human Rights July 2, 2014) (Recommended Findings of Fact, Opinion and Decision, and Order).

101. *Liberty Ridge Farm*, at 18–19 (N.Y. State Div. of Human Rights) (Recommended Findings of Fact, Opinion and Decision, and Order); *see also Gifford*, 23 N.Y.S.3d at 426–27.

102. *Gifford*, 23 N.Y.S.3d at 429–30.

103. Klein, Case Nos. 44-14 & 45-14 (Or. Bureau of Labor & Indus. Jan. 29, 2015), http://media.oregonlive.com/business_impact/other/BOLI-sweetcakes.pdf (Interim Order - Ruling on Respondents' Re-Filed Motion for Summary Judgment and Agency's Cross-Motion for Summary Judgment).

104. *Id.* at 1.

(Sweetcakes) when it became known by Aaron Klein that they would be "two brides."[105] Klein informed them that Sweetcakes did not make wedding cakes for same-sex ceremonies based upon his and Melissa Klein's religious convictions.[106] Cryer and Bowman-Cryer filed a complaint with the Civil Rights Division, which then filed the complaint against Sweetcakes.[107] Like some other states, Oregon has a public accommodation anti-discrimination law that includes sexual orientation as a protected classification.[108] The Civil Rights Division stated, "There is simply no reason to distinguish between services for a wedding ceremony between two persons of the same sex and the sexual orientation of that couple," and, using the same language as the previously discussed cases, "[t]he conduct, a marriage ceremony, is inextricably linked to a person's sexual orientation."[109] When addressing the constitutional defense of free exercise, the Oregon commission, using the *Smith* test, found that the anti-discrimination provisions are a "valid and neutral law of general applicability."[110] As a result, the administrative judge recommended a fine of $135,000 to be paid to Rachel Cryer and Laurel Bowman-Cryer.[111]

The most recent adverse decision comes out of the Superior Court of the State of Washington in the County of Benton in *State of Washington v. Arlene's Flowers, Inc*.[112] In the case, Barronelle Stutzman, owner and operator of Arlene's Flowers, Inc., had sold flower arrangements to Robert Ingersoll, a gay man, approximately 20 times while knowing his sexual orientation.[113] Based on her religion, Stutzman believes that marriage can only be between a man and a woman.[114] When Ingersoll approached her to provide flowers for his same-sex wedding, she informed him she could not

105. *Id.* at 5–6.

106. *Id.* at 6.

107. *Id.*

108. OR. REV. STAT. ANN. §§ 659A.400–409 (West 2016).

109. Klein, at 15–16 (Or. Bureau of Labor & Indus. Jan. 29, 2015) (first alteration in original) (interim order).

110. *Id.* at 38.

111. Klein, Nos. 44-14 & 45-14, at 110 (Or. Bureau of Labor & Indus. Apr. 21, 2015), http://downloads.frc.org/EF/EF15D71.pdf (Proposed Order).

112. Washington v. Arlene's Flowers, Inc., No. 13-2-00871-5 (Wash. Super. Ct. Feb. 18, 2015), http://www.adfmedia.org/files/ArlenesFlowersSJruling.pdf.

113. *Id.* at 5–7.

114. *Id*. at 6.

"do his wedding."[115] The State of Washington, Ingersoll, and his partner brought suit[116] pursuant to Washington's Consumer Protection Act (CPA), which bars "[u]nfair methods of competition and unfair or deceptive acts or practices,"[117] and the Washington Law Against Discrimination (WLAD), which provides the "right to be free from discrimination because of . . . sexual orientation."[118] The court, quoting *Reynolds v. United States*, stated, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[119] In applying the *Smith* test, the court declared the CPA and WLAD laws to be neutral and generally applicable because "WLAD looks to discriminatory impact" and "CPA prohibits acts because of unfairness or capacity to deceive a consumer," and therefore, the laws "apply to [the] relevant conduct in reference to its effect, not the motivation of the actor."[120] Unique to this case, this court indicated that Arlene's Flowers and Stutzman's free exercise may have been substantially burdened.[121] However, even if a strict scrutiny test were applied, the court found "the eradication of discrimination to be a compelling state interest," indicating that Arlene's Flowers may have lost even under *Sherbert*.[122] The court ominously concluded, "Stutzman cannot comply with both the law and her faith if she continues to provide flowers for weddings as part of her duly-licensed business, Arlene's Flowers."[123] The court understood the consequences of opinions such as this. However, if one cannot keep his or her faith and simultaneously earn a living, one must wonder: Was this truly the intent of the First Amendment?

One case stands in contrast to the others. In the Fayette Circuit Court of Kentucky, in *Hands on Originals, Inc. v. Lexington-Fayette Urban County Human Rights Commission* (an appeal from the Human Rights

115. *Id.* at 8.

116. *Id.* at 10.

117. WASH. REV. CODE. ANN. § 19.86.020 (West 2016).

118. *Id.*

119. *Arlene's Flowers*, No. 13-2-00871-5, at 14 (alteration in original) (quoting Reynolds v. United States, 98 U.S. 145, 166 (1878)).

120. *Id.* at 41.

121. *See id.* at 47 ("[T]he Court will assume for the purposes of analysis that a substantial burden exists . . . .") (citations omitted).

122. *Id.* at 42; *see* Sherbert v. Verner, 374 U.S. 398, 403 (1963). This Article will explore whether this conclusion is correct in Part IX.

123. *Arlene's Flowers*, No. 13-2-00871-5, at 58.

Commission), the facts were similar to the preceding cases.[124] Lexington-Fayette Urban County in Kentucky has a local ordinance[125] prohibiting discrimination against individuals based upon sexual orientation in public accommodations.[126] Hands on Originals (HOO) is a printing business that prints materials such as shirts, hats, and bags and is owned by "Christians who believe that the Holy Bible is the inspired Word of God."[127] HOO has a policy that it will "refuse any order that would endorse positions that conflict with the convictions of the ownership."[128] Gay and Lesbian Services Organization (GLSO), run by Aaron Baker, wished to have shirts printed by HOO stating "Lexington Pride Festival," which HOO declined to create.[129] However, different from the other cases, HOO had also declined to fulfill at least 13 other orders that it deemed inconsistent with its beliefs, including strip club promotions, "pens promoting a sexually explicit video, and shirts containing a violence related message."[130] For this reason, the court found that it was not the sexual orientation represented by GLSO that it objected to, but rather the message that the shirts would convey.[131] The court also concluded that the commission's order violated HOO's free exercise rights because the order punished HOO and its owners for exercising their sincerely held religious beliefs.[132] Further, the court did not find the ordinance's purpose to be compelling because GLSO was able to find printing of the shirts at a substantially reduced price.[133] While the court

124. Hands on Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rts. Comm'n, No. 14-CI-04474 (Ky. Cir. Ct. Apr. 27, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2015/04/HandsOnOriginals.pdf.

125. LEXINGTON-FAYETTE CTY., KY., CODE OF ORDINANCES § 2:33.

126. *Hands on Originals*, No. 14-CI-04474, at 2 (Ky. Cir. Ct. Apr. 27, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2015/04/HandsOnOriginals.pdf.

127. *Id.* at 2–3.

128. *Id.* at 3.

129. *Id.* at 4–6.

130. *Id.* at 9.

131. *Id.*

132. *Id.* at 14–15 ("Because the Commission's Order requires HOO and its owners to print shirts that convey messages contrary to their faith, that Order inflicts a substantial burden on their free exercise of religion.").

133. *Id.* at 15 (finding the HOO owner extended an offer "in the initial phone conversation with a GLSO representative to refer GLSO to another printing company to do the work for the same price quoted by HOO").

did affirm HOO's free exercise rights, it did so based upon Kentucky's religious freedom and restoration act (RFRA)[134] and did not delve into a *Smith* analysis.[135]

VI. RELIGIOUS FREEDOM AND RESTORATION ACTS

A. *RFRAs as a Response to* Smith

Whether or not the courts are correctly applying *Smith* in the public accommodation law cases,[136] it is clear they are not often ruling in favor of for-profit businesses owned by religious people. Because of this trend, it is necessary to explore what other options or approaches can be used to avoid continuing these results. The most common response to *Smith* is enactment of RFRAs.[137]

Soon after *Smith*, there was significant criticism of the Supreme Court's new approach to the First Amendment's Free Exercise Clause.[138] Likewise, the U.S. Congress was critical of the Court's decision, which led to the passage of the federal RFRA in 1993.[139] In its findings, Congress stated that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise" and that "governments

134. KY. REV. STAT. ANN. § 446.350 (West 2016).

135. *See Hands on Originals*, No. 14-CI-04474, at 15.

136. These laws usually provide exemptions for religious congregations, but do not provide exemptions for religious people and their businesses. *See, e.g.*, COLO. REV. STAT. ANN. § 24-34-601(1) (West 2013). The laws are not generally applicable to all members of society. As applied, the laws specifically target religious morality, while leaving alone the consensus secular morality of today, meaning that the laws are not neutral toward religious practice. For example, in Colorado, the baker in *Craig v. Masterpiece Cakeshop* was held in violation of the public accommodation statute, while a baker who refused to bake a cake with a message condemning homosexuality was not in violation of the statute. *Compare* Craig v. Masterpiece Cakeshop, No. 14CA1351, 2015 WL 4760453, at *1 (Colo. Ct. App. Aug. 13, 2015), *with* Jack v. Azucar Bakery, Charge No. P20140069X, at 2–4 (Colo. Civil Rights Div. Mar. 24, 2015), http://www.adfmedia.org/files/AzucarDecision.pdf.

137. Another approach is to argue that the public accommodation laws violate the religious business' free speech or free association rights. However, this Article's discussion will be limited to options within the realm of religion.

138. Lucien J. Dhooge, *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?*, 21 WM. & MARY J. WOMEN & L. 319, 331 & n.56 (2015).

139. 42 U.S.C. § 2000bb (1993), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

should not substantially burden religious exercise without compelling justification."[140] Further, "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[141] The purpose of the federal RFRA was to "restore the compelling interest test" from *Sherbert* and *Yoder*.[142] The federal RFRA simply states, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[143] The bill passed convincingly, with a 97–3 vote in the Senate and a roll call vote in the House.[144]

Religious freedom, nationwide, was only protected for a few short years following the passage of the federal RFRA. In 1997, in *City of Boerne v. Flores*, the Supreme Court found that the federal RFRA was unconstitutional as applied to state and local laws.[145] As a result, individual states began to pass their own versions of RFRAs. In the first three years following *City of Boerne*, ten states passed their own versions of RFRAs.[146] As of the time of this publication, 21 states have passed their own versions, though not all versions mirror the federal law.[147]

140. 42 U.S.C. § 2000bb(a)(2)–(3) (2012).

141. *Id.* § 2000bb(a)(5).

142. *Id.* § 2000bb(b)(1).

143. *Id.* § 2000bb-1.

144. *Bill Summary & Status, 103rd Congress (1993-1994) H.R. 1308*, LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d103:HR01308:@@@S (last visited July 10, 2016).

145. City of Boerne v. Flores, 521 U.S. 507, 532–36 (1997) (finding the federal RFRA's application to state and local governments exceeded the power of Congress' authority under the Fourteenth Amendment). While *City of Boerne v. Flores* did not address the federal RFRA's constitutionality as applied to federal laws, *Gonzalez v. O Centro Espirita Uniao Do Vegetal*, did decide that issue, holding that the federal RFRA applied to federal laws. 546 U.S. 418, 439 (2006).

146. Lund, *supra* note 7, at 475.

147. *State Religious Freedom Restoration Acts*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 15, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx. Other states have been found to have strict scrutiny level protections similar to the federal law already in their state constitution. *See, e.g.*, Humphrey v. Lane, 728 N.E.2d 1039 (Ohio 2000), *interpreting* OHIO CONST. art. I, § 7.

The federal RFRA has proven to be a valuable piece of legislation to protect religious freedom. In 2014, the Supreme Court issued two major opinions that expanded protection of religious peoples. The first and more high-profile case involved a closely held corporation, Hobby Lobby, which was owned by a family who had religious objections to abortion.[148] The Department of Health and Human Services (HHS) had mandated that employers provide health insurance including contraception coverage that encompassed "morning after" pills and intrauterine devices, which the owners of Hobby Lobby believed to be a form of abortion.[149] Using the RFRA analysis, the Court held that the law constituted a substantial burden on Hobby Lobby.[150] The Court did not find it necessary to conclude whether the HHS mandate was compelling[151] but did find that the HHS mandate, as applied to corporations, was not the least restrictive means to achieve the mandate's goal.[152] The Court came to this conclusion in part because the HHS had created a different system for non-profit religious organizations that would allow employees to have access to contraception without making the non-profit organization violate its beliefs.[153]

A few months later, the Court decided *Holt v. Hobbs*, in which a Muslim prisoner wished to grow his beard out one-half of an inch in accordance with his religious faith.[154] In this instance, the law the Court analyzed was the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which mirrors the federal RFRA.[155] The Arkansas Department of Corrections had a grooming policy that prohibited beards.[156] The prisoner established that he had a sincerely held religious belief that required him to grow a beard, which had been substantially burdened by the policy.[157] The lower court found there was no violation of RLUIPA because

148. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2764–65 (2014).

149. *Id.*

150. *Id.* at 2775–77. It would cost the company $1.3 million per day and $475 million per year not to comply. *Id.* at 2775–76.

151. *Id.* at 2780.

152. *Id.* at 2759.

153. *Id.*

154. Holt v. Hobbs, 135 S. Ct. 853, 859 (2015).

155. *Id.*; *compare* 42 U.S.C. § 2000cc, *with* 42 U.S.C. § 2000bb.

156. *Hobbs*, 135 S. Ct. at 859.

157. *Id.* at 862 (qualifying that the Arkansas Department of Corrections did "not dispute the sincerity of petitioner's belief" and that petitioner "easily satisfied" his "burden of proving that the Department's grooming policy substantially burdened that

the prison adhered to his dietary restrictions and allowed him to have a prayer rug and to review Islamic materials.[158] The Supreme Court disagreed and found a substantial religious burden.[159] The lower court also erred in weighing the severity of the burden and considering that some Muslims do not believe it is necessary to grow a beard, which the Court found to not be a relevant factor.[160] Once the burden on the prisoner's exercise of religion was established, the burden shifted to the prison to establish it had a compelling interest and that such an interest was being served by the least restrictive means.[161] The compelling reasons proposed were safety and security—preventing contraband and accurately identifying prisoners.[162] The Court found those interests compelling but also found the prison failed the least restrictive means requirement (in part because the prison could search beards and could identify prisoners by using two photos—beardless and bearded—to identify the prisoners).[163]

B. *Why RFRAs Are Becoming Less Viable Options*

While, in light of *Smith*, RFRAs are better for religious liberty than relying on First Amendment protection, a number of obstacles still remain. The media has largely misunderstood or misrepresented RFRAs, causing public support of the laws to decline and some legislatures not to pass proposed RFRAs. Other legislatures pass laws that defeat the purpose of the RFRA law in the first place. Judges also have a tendency to misinterpret RFRAs. Each of these obstacles makes it necessary for religious freedom proponents to find other strategies.[164]

1. *The Media's Portrayal of RFRAs*

In recent years, the media has portrayed RFRAs as allowing blanket discrimination on the LBGT community. During Arizona's attempt to expand its RFRA to include its application to laws used in private lawsuits,

exercise of religion").

158. *Id.*

159. *Id.* at 863.

160. *Id.* at 862–63.

161. *Id.* at 863.

162. *Id.* at 863–64.

163. *Id.* at 863–65.

164. One such strategy, proposed by the author, is discussed in Part VII of this Article.

the *Daily Kos* described the bill as an "okay-to-discriminate bill" and that "the main goal is to prevent businesses from getting in trouble for refusing to serve LGBT people."[165] MSNBC's headline was "Arizona Passes Law Allowing Discrimination," and it had a poll that called the bill "the LGBT discrimination bill."[166] A year later, when Indiana tried to pass a similar measure, *Huffington Post* stated that there is "no real mystery" as to the purpose, which the publication stated is to "give business owners a stronger legal defense if they refuse to serve lesbian, gay, bisexual and transgender customers."[167] NPR posted a number of social media references, all negative toward the Indiana RFRA, including a tweet from George Takei that stated "we won't stand for bigotry in the name of religion," and another tweet with a picture of African-Americans sitting at a lunch counter stating, "We already had this conversation."[168]

It is not lost on the Author that one of the focuses of this Article is on Christian businesses that have refused to assist marriages inconsistent with the owners' religious beliefs. However, RFRAs do not reference the LGBT community.[169] RFRAs have existed for 22 years, and only twice has a RFRA been used in the context of the LGBT community.[170] RFRAs have not resulted in blanket discrimination similar to the civil rights movement. In fact, RFRAs help those of all faiths and address a wide variety of laws. RFRAs have helped, among others, an Apache man who wanted to collect

165. Laura Clawson, *Arizona Okay-to-Discriminate Bill Passes Legislature, Headed to Brewer's Desk*, DAILY KOS (Feb. 21, 2014), http://www.dailykos.com/story/2014/02/21/1279319/-Arizona-okay-to-discriminate-bill-passes-legislature-headed-to-Brewer-s-desk#.

166. Adam Serwer, *Arizona Passes Law Allowing Discrimination*, MSNBC (Feb. 21, 2014), http://www.msnbc.com/msnbc/arizona-passes-law-allowing-discrimination#50450.

167. Jonathan Cohn, *Why Indiana's Religious Freedom Law Is Such a Big Deal*, HUFFINGTON POST (Apr. 2, 2015), http://www.huffingtonpost.com/2015/04/01/indiana-religious-freedom_n_6984156.html.

168. Scott Neuman, *Indiana's 'Religious Freedom' Bill Sparks Firestorm of Controversy*, NPR (Mar. 28, 2015), http://www.npr.org/sections/thetwo-way/2015/03/28/395987537/indianas-religious-freedom-bill-sparks-firestorm-of-controversy.

169. *See, e.g.*, 42 U.S.C. §§ 2000bb–bb-4.

170. *See* Elane Photography, LLC v. Willock, 309 P.3d 53, 60 (N.M. 2013); Hands on Originals, Inc. v. Lexington-Fayette Urban Cty. Human Rts. Comm'n, No. 14-CI-04474 (Ky. Cir. Ct. Apr. 27, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2015/04/HandsOnOriginals.pdf.

eagle feathers, a Sikh who wanted to wear a religious emblem resembling a small knife to work, a Santeria priest who wanted to perform ritualistic animal sacrifices, a Native-American who was told to cut his hair by a school, a Christian non-profit organization that was zoned out of its city limits, a Muslim prisoner who was required to cut his beard, and a Jewish prisoner who was denied kosher meals.[171] Clearly, RFRAs are not specifically about Christians, nor are they about the LGBT community. The laws are designed to protect people of every faith and in the context of almost any type of law.[172] Should all religious communities be denied their religious freedoms because of one narrow issue? Further, religious persons should not be denied the ability to challenge a law that burdens religion, regardless of the subject matter.

2. *Recent Legislative Trends*

In 2015, 17 states introduced legislation to incorporate RFRA language into state statutes or constitutions or to expand existing laws to enlarge religious liberty.[173] Of those 17 states, only two passed legislation.[174] However, the first of those states effectively neutered the law by adding provisions that the law does not (1) authorize a public accommodation to refuse service to any member of the general public; (2) apply to a civil lawsuit between private parties; or (3) negate any provision of the Indiana Constitution.[175] The second of those states, Arkansas, passed a RFRA that mirrors the federal RFRA language but removed the language that would make the RFRA apply to private lawsuits as well as government actions.[176]

171. Mollie Hemingway, *Meet 10 Americans Helped by Religious Freedom Bills Like Indiana's*, THE FEDERALIST (Mar. 30, 2015), http://thefederalist.com/2015/03/30/meet-10-americans-helped-by-religious-freedom-bills-like-indianas/.

172. 139 CONG. REC. S14461-01 (daily ed. Oct. 27, 1993) (statement of Sen. Simpson).

173. *2015 State Religious Freedom Restoration Legislation*, NAT'L CONF. OF ST. LEGISLATURES (Sept. 3, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx.

174. *Id.*

175. IND. CODE ANN. § 34-13-9-0.7 (West 2016).

176. ARK. CODE ANN. § 16-123-405 (West 2016); *see* Amendment to S. 975, 90th Gen. Assemb., Reg. Sess. (Ark. 2015), http://www.arkleg.state.ar.us/assembly/2015/2015R/Amendments/sb975-S1.pdf. Why is it a concern that both states removed language from their bills that would make the RFRAs apply to civil lawsuits between private parties? It is because in *Elane Photography, LLC v. Willock*, the New Mexico Supreme Court ruled that New Mexico's

The routes to passage in Indiana and Arkansas are concerning for religious liberty. Indiana's RFRA, for any business owner, is worse than no RFRA at all. The Indiana law effectively affirms the idea that a business cannot refuse to provide services that would violate their sincerely held religious beliefs or their conscience.[177] A Christian business owner could not refuse to participate in a non-traditional marriage. A Muslim business owner could not refuse to serve at a bar mitzvah. A gay person could not refuse to serve at a Westboro Baptist function. An African American business owner could not refuse service to a KKK event. A person in Indiana may no longer be permitted to run a business in a manner consistent with his or her sincerely held beliefs.

3. *Judicial Interpretations of RFRAs*

At the state level, Professor Christopher C. Lund points out that despite RFRAs being designed to restore *Sherbert*- or *Yoder*-style review, state courts have proven unwilling to interpret the laws in that way.[178] For example, a RFRA claim was denied in Florida, even when a free exercise violation was found under the higher bar of the *Smith* test, and the court did not find a violation under the low bar of the RFRA test.[179] Again in Florida, a court stated that "as long as the laws are neutral and generally applicable to the citizenry, they must be obeyed."[180] In Connecticut, an appellate court reverted back to a *Smith*-style test that if a "regulation is religiously neutral and for secular purposes," churches can be regulated.[181] The court cited to *Smith*, as if the RFRA was synonymous with current First Amendment jurisprudence.[182] While judicial applications of RFRAs are limited, those that can be found clearly do not apply the laws as they are intended.[183]

The media, which controls public opinion, mischaracterizes RFRAs.

RFRA does not apply to suits between private parties. 309 P.3d 53, 77 (N.M. 2013).

177. *See* IND. CODE ANN. § 34-13-9-0.7.

178. Lund, *supra* note 7, at 485.

179. *Id.* (first citing First Vagabonds Church of God v. City of Orlando, 578 F. Supp. 2d 1353, 1362 (M.D. Fla. 2008); then citing Hollywood Cmty. Synagogue, Inc. v. City of Hollywood, 430 F. Supp. 2d 1296, 1321–22 (S.D. Fla. 2006)).

180. *Id.* at 489 (citing Freeman v. Dep't of Highway Safety & Motor Vehicles, 924 So. 2d 48, 57 (Fla. Dist. Ct. App. 2006)).

181. *Id.* at 486 (quoting Grace Cmty. Church v. Town of Bethel, Nos. 306994, AC11312, 1992 WL 174923, at *4 (Conn. Super. Ct. July 16, 1992)).

182. *Id.*

183. *See, e.g.*, *id.*

Legislatures, perhaps also affected by the media's misrepresentations, will no longer pass meaningful laws to protect religious freedoms. The courts will not correctly apply the laws. For each of these reasons, other methods are needed to protect the religious freedom of businesses.

VII. THE INDIVIDUALIZED ASSESSMENT EXEMPTION

When the majority in *Smith* changed the test for First Amendment cases, the Court first explained why *Sherbert* was not followed.[184] The majority explained, "We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation."[185] The Court contemplated, "Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from generally applicable criminal law."[186] This indicates that there are circumstances in which the Court would apply the *Sherbert* test, even after declining to do so in *Smith.* The Court explained that "[t]he *Sherbert* test . . . was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."[187]

The Court gave the example of a prior decision of theirs, *Bowen v. Roy*,[188] in which unemployment compensation programs determined their eligibility criteria by "invit[ing] consideration of the particular circumstances behind an applicant's unemployment."[189] Specifically, the government in that case was given the opportunity to assess whether an employee, who had quit work, quit "without good cause."[190] It was the "good cause standard [that] created a mechanism for individualized exemptions."[191] The Court in *Smith* additionally used *Sherbert* as an example, noting that in *Sherbert* the government was given the ability to assess "personal reasons" when

184. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 883 (1990).

185. *Id.* Perhaps Justice Scalia forgot about *Wisconsin v. Yoder*. *See* 406 U.S. 205, 220 (1972) (addressing Amish parents' right "to direct the education of their children"). *But see Smith*, 494 U.S. at 881 (distinguishing *Yoder* as a free exercise challenge in conjunction with another constitutional protection).

186. *Smith*, 494 U.S. at 884.

187. *Id.*

188. Bowen v. Roy, 476 U.S. 693 (1986).

189. *Smith*, 494 U.S. at 884.

190. *Id.* (quoting *Roy*, 476 U.S. at 708).

191. *Id.* (quoting *Roy*, 476 U.S. at 708) (internal quotation marks omitted).

determining if it would allow unemployment benefits.[192] The Court concluded that its "decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[193] It appears as if the Court is wary of handing government officials a discretionary function when a religious person's sincerely held beliefs could be held against him or her and would allow the officials to impose uneven or inconsistent treatment.

The Supreme Court has yet to revisit the individualized assessment exception in *Smith*. The opinion in *Lukumi* is consistent with the spirit of the exception. It states that: "[I]n circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'"[194] Additionally, the Court rejected the idea that "our inquiry must end with the text of the laws at issue."[195] However, ultimately, the Court's focus in *Lukumi* was on the substance of the city ordinances and the effect of the ordinances, not any discretionary function given to a government agency or official.[196] The Court stated, "It becomes evident that *these ordinances* target Santeria sacrifice when the ordinances' operation is considered."[197] Additionally, the general applicability analysis was forgone because "the *ordinances* [were] underinclusive" and "fail[ed] to prohibit nonreligious conduct."[198]

Individualized assessments do not focus on the substance of a law. The analysis is not concerned with what behavior is prohibited. Rather, the focus is on the system created by the law to enforce the law. A system that falls under this exception is one "in which case-by-case inquiries are routinely made, such that there is an 'individualized governmental assessment of the reasons for the relevant conduct' that 'invite[s] considerations of the particular circumstances' involved in the particular case."[199] If such a case-

192. *Id.* (citing Sherbert v. Verner, 374 U.S. 398, 401 n.4 (1963)).

193. *Id.* (citing *Roy*, 476 U.S. at 708).

194. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993) (quoting *Roy*, 476 U.S. at 708).

195. *Id.* at 534.

196. *See id.* at 535.

197. *Id.* at 535 (emphasis added).

198. *Id.* at 543 (emphasis added).

199. Axson-Flynn v. Johnson, 356 F.3d 1277, 1297 (10th Cir. 2004) (alteration in

by-case analysis exists, the state "may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[200]

The leading example of an individualized system of assessment came in *Axson-Flynn*, in which a Mormon student at the University of Utah's Actor Training Program refused to use the f-word or take God's name in vain during classroom exercises.[201] She refused to do so because, as a Mormon, she believed that using God's name in vain violated God's commands given through the Ten Commandments and that the f-word vulgarized a sacred act.[202] During her first semester in the program, the professors applied increasing pressure on Axson-Flynn to use the f-word and to use God's name in vain, to the point that she eventually had to leave the program.[203]

The Tenth Circuit addressed the case on other constitutional grounds, but this opinion is unique because it found a violation of Axson-Flynn's First Amendment right to free exercise based upon the individualized assessment exception to *Smith*.[204] The court noted that receipt of unemployment benefits "requires claimants to show 'good cause' as to why they were unable to find work."[205] Good cause "required an official to examine an applicant's specific, personal circumstances."[206] In *Axson-Flynn*, a Jewish student had received permission to avoid doing improvisational exercises on Yom Kippur and did not receive adverse consequences, despite a policy of not allowing students to make-up missed assignments.[207] The court stated that

original) (quoting *Smith*, 494 U.S. at 884).

200. *Id.* at 1298 (citing *Smith*, 494 U.S at 884).

201. *Id.* at 1280.

202. *Id.* at 1281 (quoting Axson-Flynn v. Johnson, 151 F. Supp. 2d 1326, 1328 (D. Utah. 2001)).

203. *Id.* at 1281–83. Axson-Flynn first substituted other words, which went unnoticed, and received an "A" grade. *Id.* at 1281. Later, she raised objections to her professor, who demanded that she use the words. *Id.* at 1282. The professor eventually relented, and Axson-Flynn received more high marks. *Id.* At the semester review, the panel of professors insisted that Axson-Flynn's objections were "unacceptable behavior" and suggested if she would not modify her values, she should leave the program. *Id.* Early in her second semester, Axson-Flynn withdrew from the program, and attended Utah Valley State College, which allowed her accommodation. *Id.* at 1282–83.

204. *See id*. at 1287–99.

205. *Id.* at 1297 (citing Sherbert v. Verner, 374 U.S. 398, 401 (1963)).

206. *Id.* at 1298 (citing *Sherbert*, 374 U.S. at 401).

207. *Id.*

individualized exemptions do not need to be a written policy but rather can be demonstrated through a pattern of behavior.[208] Here, because some religious accommodations were made for one student, but they were not made for Axson-Flynn, Axson-Flynn's First Amendment free exercise rights were invoked.[209]

Though court cases analyzing the individualized assessment are limited, the results have helped clarify the line to be drawn between what does and what does not qualify for the exception. In one case, a native Hawaiian was convicted of illegally entering a reserve, where he wished to perform religious practices without being specifically authorized to do so.[210] The native established a free exercise violation because the law prohibiting entry allowed for a waiver process whereby a government agency could individually assess whether someone could enter.[211] In another case, a Lenape Native American, who wished to possess two black bears for religious purposes, applied for a fee waiver and was denied because the ownership was not for "sound game or wildlife management activities."[212] He was able to establish a free exercise claim because the Pennsylvania Gaming Commission had a mechanism in place allowing fee waivers to occur in case-by-case basis that resulted in places like zoos and circuses being able to own bears, despite not being for "sound game or wildlife management activities," but not him.[213]

Courts have, in some instances, not granted the individualized assessment exception. Zoning disputes, for example, have been declared to be in line with the requirements of *Smith*, despite having individualized procedures for obtaining special use permits or variances.[214] In another example, a law requiring that employers verify the immigration status of its employees, despite exceptions for contractors, household employees, and employees who predated the law, was also found not to fit the criteria of the

208. *Id.* at 1299.

209. *Id.*

210. State v. Armitage, 319 P.3d 1044, 1048–49 (Haw. 2014).

211. *Id.* at 1067.

212. Black Hawk v. Pennsylvania, 225 F. Supp. 2d 465, 469, 474 (M.D. Pa. 2002).

213. *Id.* at 474–76.

214. *See* Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 653 (10th Cir. 2006). In *Grace United Methodist Church v. City of Cheyenne*, the City of Cheyenne had a zoning ordinance prohibiting day cares with more than twelve children but would allow exceptions for other institutions such as a church or a school. *Id.* at 650 n.1.

individualized assessment.[215] It is clear from the language of *Sherbert* and the results mentioned herein that in cases where a government agency can review each person or entity's individual circumstances, the individualized assessment applies. It does not apply, however, when the statute itself allows for exemptions. The key to this exception is discretion given to a government official or agency.

VIII. HOW THE PROCESS CREATED BY PUBLIC ACCOMMODATION LAWS IS INDIVIDUALIZED

The process for applying for unemployment benefits at issue in *Sherbert*, which *Smith* explicitly states is individualized, allowed an employment security commission to deny benefits for "workers who fail, without good cause, to accept 'suitable work when offered.'"[216] In doing so, the power was given to the commission to determine what was or was not good cause or what work was or was not suitable.[217] Public accommodation laws similarly provide government agency discretion to determine what cases are brought. For example, under the New Mexico Human Rights Act, an aggrieved party will first file a complaint with the Human Rights Division of the New Mexico Labor Department; the director of the department will then investigate the allegations and determine whether probable cause exists.[218] The director, after a conciliation process, will file a complaint in the name of the Human Rights Commission against the alleged offender of the act.[219] By granting the director investigatory authority and the authority to determine whether probable cause exists, a case-by-case determination must be made by a government authority, similar to the process described in *Sherbert*.[220]

New Mexico is not unique. In Colorado, an aggrieved party may also file its complaint with the Colorado Civil Rights Division.[221] After the filing

215. Am. Friends Serv. Comm. Corp. v. Thornburgh, 951 F.2d 957, 961 (9th Cir. 1991) (finding "those exceptions exclude entire, objectively-defined categories of employees from the scope of the statute; they are not 'individualized exemptions' within the meaning of *Smith*").

216. Sherbert v. Verner, 374 U.S. 398, 401 (1963).

217. *Id.*

218. N.M. STAT. ANN. § 28-1-10(F) (West 2016).

219. *Id.*

220. *See Sherbert*, 374 U.S. at 400 n.3.

221. COLO. REV. STAT. ANN. § 24-34-306(1)(a) (West 2016).

of a complaint, the division director will investigate the charges and determine whether probable cause exists.[222] If the Colorado Civil Rights Commission determines that the "circumstances warrant" action, it will file a complaint against the alleged offender.[223] Colorado, like New Mexico, requires an individualized assessment of the facts, made by an administrative body.[224] Similar procedures are in place in Oregon,[225] Washington,[226] New York,[227] and Lexington-Fayette County, Kentucky.[228]

To demonstrate how such a system gives government agencies broad and powerful discretion, one could look to proceedings in the Colorado Civil Rights Division. In *Jack v. Gateaux*,[229] a Christian asked a baker to bake a cake stating "God hates sin. Psalm 45:7" and "Homosexuality is a detestable sin. Leviticus 18:2."[230] Despite initially stating it could bake a cake with a picture of a Bible with verses, once the baker read the verses, she declined.[231] Ultimately, the commission found that the denial of service was not based on the charging party's creed but rather based upon "understanding of the Charging Party's request."[232] The same charging party made similar requests of Le Bakery Sensual[233] and Azucar Bakery,[234] yet the commission denied those claims as well.[235] While the wisdom of the requests made by William Jack is debatable, the similarities between his complaint and those involving Masterpiece Cakeshop are undeniable, yet have drastically different results.[236] It is clear that Colorado's Civil Rights Commission reviews on a

222. *Id.* § 24-34-306(2)(a)–(b).

223. *Id.* § 24-34-306(4).

224. *Id.* § 24-34-306(2)(a).

225. OR. REV. STAT. ANN. § 659A.835 (West 2016).

226. WASH. REV. CODE. ANN § 49.60.240 (West 2016).

227. N.Y. EXEC. LAW pt. 297 (West 2016).

228. LEXINGTON-FAYETTE CTY., KY., CODE OF ORDINANCES, § 2-32(2).

229. Jack v. Gateaux, Ltd., Charge No. P20140071X (Colo. Civil Rights Div. Mar. 24, 2015), http://www.adfmedia.org/files/GateauxDecision.pdf.

230. *Id.* at 2.

231. *Id.*

232. *Id.* at 4.

233. Jack v. Le Bakery Sensual, Charge No. P20140070X, at 1 (Colo. Civil Rights Div. Mar. 24, 2015), http://www.adfmedia.org/files/LeBakerySensualDecision.pdf.

234. Jack v. Azucar Bakery, Charge No. P20140069X, at 1 (Colo. Civil Rights Div. Mar. 24, 2015), http://www.adfmedia.org/files/AzucarDecision.pdf

235. *See id.* at 4; *Le Bakery Sensual*, at 4 (Colo. Civil Rights Div. Mar. 24, 2015).

236. *Compare* Azucar Bakery, at 2–4 (Colo. Civil Rights Div. Mar. 24, 2015), *and* Le

case-by-case basis,[237] just as the individualized assessment exception to *Smith* contemplates.[238]

Surprisingly, the Christian business owners who have been affected by public accommodation laws have not argued for the individualized assessment exemption.[239] The only case to mention the exception was *Elane Photography*, where the court stated that "Elane Photography does not claim that the individualized assessment situation is applicable to the present case."[240] With the court acknowledging that the exception could have been a part of its analysis,[241] it is surprising it has not been tried in the subsequent cases, especially considering the lack of success these business owners have seen.

IX. CAN PUBLIC ACCOMMODATION LAWS PASS STRICT SCRUTINY?

If a religious business owner were to widen the individualized assessment exception to *Smith*, that owner would still have to establish that the public accommodation law "imposes any burden" on the appellant's exercise of his or her religion.[242] If so, the state would be required to establish that its interest in imposing that burden is compelling and that "no alternative forms of regulation would combat such abuses without infringing upon First Amendment rights."[243] To date, only Washington has stated whether the business owner would pass this test.[244] In *State v. Arlene's Flowers*, the court equated the public accommodation laws to laws prohibiting gender discrimination, which has been found to be compelling.[245] It also concluded that "'there is no realistic or sensible less restrictive means'

Bakery Sensual, at 1 (Colo. Civil Rights Div. Mar. 24, 2015), *with* Craig v. Masterpiece Cakeshop, Inc., No. 14CA1351, 2015 WL 4760453, at *1, *4 (Colo. Ct. App. Aug. 13, 2015).

237. *See, e.g.*, *Le Bakery Sensual*, at 2–4 (Colo. Civil Rights Div. Mar. 24, 2015).

238. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884–85 (1990).

239. *See, e.g.*, *Le Bakery Sensual*, at 2–4 (Colo. Civil Rights Div. Mar. 24, 2015).

240. Elane Photography, LLC v. Willock, 309 P.3d. 53, 73 (N.M. 2013).

241. *See id.*

242. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

243. *Id.* at 403, 406–07.

244. State v. Arlene's Flowers, Inc., No. 13-2-00871-5, at 42 (Wash. Super. Ct. Feb. 18, 2015) (granting partial summary judgment).

245. *Id.* at 42 (citing Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987)); *id.* at 49 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984)).

to end discrimination in public accommodations than prohibiting the discrimination itself."[246] Other courts have analyzed whether these public accommodation laws pass rational basis review.[247] For example, the Colorado Court of Appeals found that states do have a compelling interest in preventing racial and gender discrimination;[248] therefore, by logical extension, the state of Colorado had a rational basis in passing its public accommodation law including sexual orientation.[249]

Blanket reliance upon prior public accommodation cases is misguided in that it oversimplifies those cases. For example, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Court made the following observation: "[T]he evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes."[250] By contrast, a business owner's purpose would be significantly altered, in that they would no longer be able to live out their sincerely held religious beliefs while they work. In *Roberts*, a free association and free speech opinion, the Court found a compelling interest in combating gender discrimination.[251] In finding a compelling interest, the Court conducted a "balancing-of-interests test," which Justice O'Connor stated could potentially "gain protection for discrimination."[252] One factor considered by the Court was whether that law "imposes any serious burdens on the male members' freedom of expressive association."[253] In this line of cases, those businesses that are affected have a serious burden on the fundamental right at issue.

The Colorado Court of Appeals in *Masterpiece Cakeshop*[254] cited to *Bob Jones University v. United States*, where the Supreme Court found a compelling interest for the Internal Revenue Service to remove the tax-exempt status of Bob Jones University for its racially discriminatory

246. *Id.* at 50 (quoting State v. Balzer, 954 P.2d 931, 941 (Wash. Ct. App. 1998)).

247. *See* Craig v. Masterpiece Cakeshop, Inc., No. 14CA1351, 2015 WL 4760453, at *19 (Colo. Ct. App. Aug. 13, 2015).

248. *Id.* (citing Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 572 (1995)).

249. *Masterpiece Cakeshop*, 2015 WL 4760453, at *19.

250. *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 548.

251. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

252. *Id.* at 632 (O'Connor, J., concurring).

253. *Id.* at 626.

254. *Masterpiece Cakeshop*, 2015 WL 4760453, at *5.

admissions policy.[255] However, as in *Roberts*, the Court in *Bob Jones* used a balancing test. The Court stated that the "governmental interest [in preventing racial discrimination] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[256] In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, cited in *Masterpiece Cakeshop*,[257] the Supreme Court addressed sexual orientation.[258] In addressing a public accommodation law, the Court in *Hurley* held that that an organization may prevent an LGBT organization from entering a float into a St. Patrick's Day parade.[259] The Court found no "legitimate interest" in compelling speech contrary to the parade organizer's message.[260] In coming to that conclusion, the Court stated that those with dissenting views could get their own permit to express those views.[261] Likewise, those who wish to receive goods or services have other options to receive those goods or services.

In describing what type of law would be compelling, the Supreme Court described them as "[o]nly the gravest abuses, endangering paramount interest."[262] It is hard to describe the concern over these laws as preventing a "grave abuse" or endangerment of a "paramount interest," primarily because the goods and services offered in this line of cases are widely available. Bakers, florists, photographers, t-shirt designers, and wedding venues are among the most common and easy to find services. In *Sweet Cakes*, the complaining parties found another baker to bake them a cake, at a cheaper rate than what Sweet Cakes would have charged.[263] In the case of *Arlene's Flowers*, the complaining party was only damaged $7.91 for mileage

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

256. *Id.*

257. *E.g.*, *Masterpiece Cakeshop*, 2015 WL 4760453, at *20. The Colorado Court of Appeals merely cited the case to stand for the proposition that "[p]ublic accommodation laws '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 . . . .'" *Id.* at *19 (quoting Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 572 (1995)).

258. *See generally Hurley*, 515 U.S. at 557.

259. *Id.* at 580–81.

260. *Id.* at 578.

261. *Id.*

262. Sherbert v. Verner, 374 U.S. 398, 406 (1963) (alteration in original) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

263. Klein, Nos. 44-14 & 45-14, at 84–85 (Or. Bureau of Labor & Indus. Apr. 21, 2015), http://downloads.frc.org/EF/EF15D71.pdf (Proposed Order).

when they found an alternative source for flowers at their wedding.[264] The outcome of the "discrimination" that occurs is not severe, not when considering that a citizen is being asked to violate his or her sincerely held religious beliefs.

If these laws are designed with the worry that people of the protected classes would not have access to goods and services at all, the laws could have been drafted to enforce provision of uncommon services differently than common ones. For example, the law could require a complaining party to conduct a reasonable search at other establishments for the services. Or, they could allow the business owner to refer the customer to another provider. For this reason, these laws are not narrowly tailored to address that specific concern. If these laws are designed simply to combat discrimination, that interest should not outweigh the first right granted in the Bill of Rights—the right to the free exercise of religion.

X. CONCLUSION

For decades, the First Amendment and *Sherbert* stood for a common theme. Both stood for the proposition that government can neither burden the free exercise of religion without a compelling reason nor single out religious exercise for disfavored treatment. *Smith* and its subsequent line of cases diverged from that theme, as demonstrated by *Smith*'s impact on SOGI laws and their effect on religious business owners and their businesses. Congress recognized the theme by passing the federal RFRA in an attempt to rectify the perceived wrongs created by *Smith*. In *Lukumi*, Justice Kennedy understood this theme when reviewing ordinances that intended to target a specific religious practice, despite their facial neutrality. Many states, either by passing RFRAs or by having RFRA-like protections in their constitutions, have understood that theme as well.

Justice Scalia's "neutral and generally applicable" test in *Smith* serves as a departure from that theme, but his opinion left open an opportunity to rectify the test to match the spirit of the First Amendment. If the individualized assessment exception can gain traction, post-*Smith* free exercise analysis can become a two-part test: First, is the substance neutral and generally applicable?[265] Second, if so, does the system that is in place to enforce the law allow for disparate treatment of religious practice through

264. State v. Arlene's Flowers, Inc., No. 13-2-00871-5, at 9 (Wash. Super. Ct. Feb. 18, 2015).

265. If no, strict scrutiny must apply.

unfettered discretion?[266] Such a test would be consistent with purpose of *Smith*[267] and *Sherbert*[268] and would be within the spirit of the First Amendment.

The ramifications of *Smith*, as applied, have infringed upon the free exercise of religion for far too long. *Sherbert* and *Lukumi* share a consistent theme that religious exercise should not be singled out for unfavorable treatment. But *Sherbert* needs life breathed back into it in order to balance the unanticipated negative effects of *Smith*. Hopefully, the individualized assessment exception can do just that. However, in the meantime, for the sake of all religious people, RFRAs need to be passed. If neither happens, this nation's rich history of religious practice may fade into oblivion.

266. If yes, strict scrutiny must apply.

267. S*mith* dealt with a substantive question, not a procedural question. It was clear that peyote possession was not being targeted because of religion, but rather because it was an intoxicating and controlled substance. The employee in *Smith* would have been terminated regardless of whether the ingestion of peyote was for religious purposes.

268. *Sherbert* was an analysis of the system of enforcement, rather than the substance of the law, because the Commission could determine what "good cause" was in the context of unemployment. Sherbert v. Verner, 374 U.S. 398, 401 (1963).