EMPLOYMENT DISCRIMINATION: HOW HOBBY LOBBY ENABLES A RFRA AFFIRMATIVE DEFENSE AGAINST TITLE VII'S PROTECTIONS FOR LGBT PEOPLE IN THE WORKPLACE

ARTICLE

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> *Dear Friends and Co-Workers:*
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> *I have known many of you for some time now, and I count you all as my friends. What I must tell you is very difficult for me . . . . I am writing this both to inform you of a significant change in my life and to ask for your patience, understanding, and support, which I would treasure greatly.*
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> *I have a gender identity disorder that I have struggled with my entire life . . . .*
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> *. . . I have felt imprisoned in my body that does not match my mind, and this has caused me great despair and loneliness. With the support of my loving wife, I have decided to become the person that my mind already is. I cannot begin to describe the shame and suffering that I have lived with. Toward that end, I intend to have sex reassignment surgery. The first step I must take is to live and work full-time as a woman for one year. At the end of my vacation on August 26, 2013, I will return to work as my true self, Amiee Australia Stephens, in appropriate business attire.*
>
> *I realize that some of you may have trouble understanding this. . . It is my wish that I can continue my work at R.G. & G. R. Harris Funeral Homes doing what I have always done, which is my best!*

On August 15, 2013, Ms. Stephens was fired from her job.[1]

INTRODUCTION

IN RECENT YEARS, THE STRUGGLE FOR LESBIAN, GAY, BISEXUAL, AND TRANSgender (L.G.B.T.) rights has come to the forefront of politics and social issues in the United States and all over the world. There have been some positive achievements, the most notorious being the legalization of same-sex marriage in the United States through the Supreme Court's decision in *Obergefell v. Hodges*.[2] While this has unfolded in the public arena, conservative religious groups have stepped up to the plate, doubling down on their efforts to rescue their position of privilege within American society, a status which —in their view— is rapidly eroding.[3] According to the Pew Research Center:

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1 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837 (E.D. Mich. 2016) (*quoting* Stephen letter to her employers, R.G. & G.R. Harris Funeral Homes, Inc.).

2 Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that same-sex couples have a fundamental right to marry in all states and that there shall be no legal impediment to the recognition of said marriages in other states).

3 According to the research done by the Pew Research Center:

> [H]ighly religious Americans remain more likely than others to believe that homosexuality should be discouraged rather than accepted by society. And among those who attend religious services weekly or more frequently, fully two-thirds say that homosexuality conflicts with their religious beliefs (with 50% saying there is a great deal of conflict). In addition, religious commitment is strongly correlated with opposition to same-sex marriage.[4]

This conflict between religious beliefs and secular values has spawned a great deal of controversy. Scholars suggest that "*Obergefell* will energize an already growing movement to expand the coverage of laws prohibiting discrimination based on sexual orientation or gender identity, and *simultaneously invigorate religious resistance to that movement*."[5] Even though LGBT adults generally feel more accepted in society now than they did ten years ago,there are still pockets in the United States (especially in religious groups) that understand their constitutionally protected religious freedom as a license to discriminate.[6] For instance:

> [A]bout a third of U.S. adults (35%) believe [homosexuality] is morally wrong. And among those who say homosexual behavior is morally wrong, a large major-

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> A growing share of self-identified "evangelical or born-again" Protestants (41%) say it has become more *difficult* to be an evangelical Christian in the U.S. in recent years; just 34% answered the question the same way in September 2014. Only about one-in-ten evangelicals now say it has become *easier* for their community in the U.S., while nearly half (47%) say it has not changed very much.

Michael Lipka, *Evangelicals increasingly say it's becoming harder for them in America*, PEW RESEARCH CENTER (July 14, 2016), http://www.pewresearch.org/fact-tank/2016/07/14/evangelicals-increasingly-say-its-becoming-harder-for-them-in-america/ (last visited June 24, 2017).

4 *See* PEW RESEARCH CENTER, A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 12 (2013), http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT-Americans_06-2013.pdf.

5 Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. CIV. RTS. & CIV. LIB. L. REV. 1, 2 (2015) (emphasis added).

6 A 2013 survey indicated the following:

> When survey respondents were asked how the level of overall social acceptance of people who are LGBT has changed over the past decade, their reactions were overwhelmingly positive. About nine-in-ten LGBT adults (92%) say society is more accepting of gay, lesbian, bisexual and transgender people than it was 10 years ago. This breaks down to 52% who say society is a lot more accepting today and 40% who say society is a little more accepting. An additional 4% of LGBT adults say things are no different in this regard than they were 10 years ago, and 3% say society is either a lot or a little less accepting today.

PEW RESEARCH CENTER, *supra* note 4, at 32.

ity (76%) also say businesses that provide wedding services should be able to refuse to serve same-sex couples if the business owner has religious objections.[7]

Religiously motivated discrimination towards LGBT people can sometimes be state-sponsored. One only need look at the most recent cases of state legislatures enacting statutes such as *Indiana's Religious Freedom Restoration Act of 2015*.[8] Formerly known as Senate Bill 101, the Indiana law caused much controversy and mobilized civil rights groups and corporations alike in opposition; in particular, its detractors argued that "it would open the door to widespread discrimination against lesbian, gay, bisexual and transgender individuals."[9] Eventually, the now vice president Mike Pence had to sign a revised version of the law to avoid further loss of revenue to the state, since companies started to withdraw events, cancel plans of expansion, and publicly condemn the proposed legislation.[10] Recently, Mississippi's overly broad *Protecting Freedom of Conscience from Government Discrimination Act* was struck down by U.S. District Judge Carlton W. Reeves. That law "sought to protect Mississippians who had three specific religious beliefs: that marriage is between only one man and one woman, that sex is reserved for heterosexual married couples and that gender is determined at birth."[11] And who could forget North Carolina's House Bill 2, which "was prompted by the City of Charlotte's adoption of an ordinance barring discrimination against gay or transgender people."[12] Currently, twenty-one states have religious freedom restoration acts, and in 2016, ten states considered legislation on the topic.[13] But now that the issue of same sex marriage is "resolved," LGBT people and their allies are concentrating their efforts on employment protections

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7 *Where the Public Stands on Religious Liberty vs. Nondiscrimination*, PEW RESEARCH CENTER (Sept. 28, 2016), http://www.pewforum.org/2016/09/28/where-the-public-stands-on-religious-liberty-vs-nondiscrimination/ (last visited June 24, 2017).

8 Religious Freedom Restoration Act of 2015, P. L. No. 4-2015, IND. CODE §§ 34-13-9-0.7 - 34-13-9-11 (2015).

9 Amanda Terkel, *Mike Pence's Religious Freedom Law Continues to Hang Over Indiana*, THE HUFFINGTON POST (Sept. 1, 2016), http://www.huffingtonpost.com/entry/mike-pence-religious-freedom-law-indiana_us_57c839b9e4b0a22de09446d8 (last visited June 24, 2017).

10 Amanda Terkel, *Mike Pence Signs Revised Indiana 'Religious Freedom' Law*, THE HUFFINGTON POST (Apr. 2, 2015), http://www.huffingtonpost.com/2015/04/02/mike-pence-religious-freedom_n_6996144.html (last visited June 24, 2017).

11 Neely Tucker, *U.S. district judge strikes down Mississippi's 'religious freedom' law*, THE WASHINGTON POST (July 1, 2016), https://www.washingtonpost.com/lifestyle/style/us-district-judge-strikes-down-mississippis-religious-freedom-law/2016/07/01/f98dc2ca-3ec9-11e6-a66f-aa6c1883b6b1_story.html (last visited June 24, 2017).

12 Alan Blinder et al., *Countersuits Over North Carolina's Bias Law*, THE NEW YORK TIMES (May 9, 2016), https://www.nytimes.com/2016/05/10/us/north-carolina-governor-sues-justice-department-over-bias-law.html?mcubz=2 (last visited June 24, 2017).

13 *2016 State Religious Freedom Restoration Act Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/civil-and-criminal-Justice/2016-state-religious-freedom-restoration-act-legislation.aspx (last visited June 24, 2017).

at the state level.[14] As of 2013, 57% of LGBT survey respondents agreed that equal employment rights for LGBT people was a priority.[15]

This article argues that the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc*.[16] has created the appropriate climate for defendants with *sincerely held religious beliefs* to apply the federal *Religious Freedom Restoration Act of 1993* (R.F.R.A.)[17] as an affirmative defense against Title VII of the *Civil Rights Act*, especially in suits by LGBT workers. This article also argues that we are already seeing what Justice Ruth B. Ginsburg warned us about in her scathing dissent in *Hobby Lobby*, that is, that the decision would be used to justify various forms of discrimination. Part I of the article takes us through Supreme Court decisions (*Sherbert v. Verner* and *Wisconsin v. Yoder*)[18] that established the standard of review to apply in free exercise cases, the Supreme Court's doctrinal shift in *Employment Division, Department of Human Resources of Oregon v. Smith*,[19] and Congress's response to *Smith* by enacting the *Religious Freedom Restoration Act of 1993*. Part I will also discuss *Hobby Lobby* and Justice Ginsburg's dissent. Part II will briefly discuss Title VII in the context of sexual orientation discrimination, the theories that understand RFRA as applicable to suits between private parties and explore the application of RFRA as an affirmative defense in Title VII cases. Part III will discuss *EEOC v. R.G. & G.R. Harris Funeral*

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14 There are currently twenty-five states that prohibit sexual orientation and/or gender identity discrimination in the workplace through statutes, executive orders, or jurisprudence. Some of these are restricted in their application, such as those limited to state employees and to those who contract with the state government. These are: California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Washington and Wisconsin. CAL. GOV'T CODE § 12940 (West 2016); COLO. REV. STAT. ANN. §§ 24-34-301(7), 24-34-401(7.5), 24-34-402(1) (West 2016); CONN. GEN. STAT. ANN. §§ 46a-60(a), 46a-81, (West 2016); DEL. CODE ANN. tit. 19, § 711 (West 2016); D.C. CODE ANN. § 2-1402.11 (West 2017); HAW. REV. STAT. § 378-2(a) (West 2016); 775 ILL. COMP. STAT. §§ 5/1-103(O-1), 5/1-103(Q), 5/2-102(A) (West 2016); IOWA CODE ANN. § 216.6(1) (West 2016); ME. REV. STAT. ANN. tit. 5 §§ 4553(9-C), 4572(1) (2017); MD. CODE ANN., STATE GOV'T § 20-606 (West 2016); (MASS. GEN. LAWS ANN. ch. 151B § 4) (West 2016); MINN. STAT. ANN. §§ 363A.03, 363A.08 (West 2016); NEV. REV. STAT. § 613.330 (West 2015); N.H. STAT. ANN. § 354-A:7 (West 2016); N.J. STAT. ANN. § 10:5-12 (West 2017); N.M. STAT. ANN. § 28-1-7 (West 2017); N.Y. EXEC. LAW. §§ 292(21), 296 (West 2017); 9 NYCRR § 466.13 (West 2016); OR. REV. STAT. §§ 174.100(6), 659A.030(1) (West 2016); 28 R.I. GEN. LAWS ANN. § 28-5-7 (West 2016); UTAH CODE ANN. § 34A-5-106 (West 2016); VT. STAT. ANN. tit. 21, § 495 (West 2016); WASH. REV. CODE ANN §§ 49.60.040(26), 49.60.180 (West 2016); WIS. STAT. ANN §§ 111.321- 11.322, 111.36(1)(d) (West 2016); Exec. Order No. JBE 2016-11 (La.); Exec. Order No. 2016-04 (Pa.); Exec. Order No. 2016-05 (Pa.); *see also* Doe v. Electro-Craft Corp., 1988 WL 1091932 (N.H. 1988). For recent developments on Louisiana's Executive Order *see* Jon Herskovitz, *Louisiana judge throws out executive order to protect LGBT rights*, REUTERS (December 14, 2016), http://www.reuters.com/article/us-louisiana-LGBTLGBT-idUSKBN1432HF.

15 PEW RESEARCH CENTER, *supra* note 4, at 9.

16 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

17 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb-4 (2012).

18 Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

19 Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

Homes[20] and how *Hobby Lobby's* reading of RFRA eviscerates protections under Title VII for LGBT workers due to employers' *sincerely held religious beliefs* in for-profit corporations. Finally, Part IV will discuss the applicability of RFRA to Puerto Rico and its significance with regards to Act 22-2013.[21]

I. RELIGIOUS EXEMPTIONS BEFORE HOBBY LOBBY

A. Pre-Hobby Lobby case law

Respect for religious liberty is enshrined in the Constitution of the United States. The First Amendment's Establishment and Free Exercise of Religion clauses plainly state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."[22] More times than not, the Free Exercise Clause is interpreted broadly by the courts in favor of the person whose religious exercise is being burdened. According to Professor Laycock, "America's history of sporadic religious intolerance shows the need for vigorous enforcement of the Free Exercise Clause."[23] The test for analyzing claims under the Free Exercise Clause is formulaic and follows a burden-shifting framework. In other words, it requires that a plaintiff make an initial showing of how his or her religious exercise is burdened by the government. If this requirement is met, then the government must demonstrate that the burden is in furtherance of a compelling governmental interest and that it is the least restrictive means of accomplishing said interest. If the government fails to prove its case, "the plaintiff is entitled to exemption from the law or practice at issue."[24] The decisions that follow set the standards for the interpretation of religious freedom claims before the courts. This review of Free Exercise jurisprudence will show the trajectory followed by the Supreme Court in its analysis of laws that impinged on the religious freedom of the plaintiffs. This history will later set the stage for Congress to enact the *Religious Freedom Restoration Act*, as a response to the Court's application of its Free Exercise doctrine.

i. *Sherbert v. Verner*

In *Sherbert*, a member of the Seventh-day Adventist Church was discharged from her job when she declined to work on Saturdays (which was the Sabbath of

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20 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837 (E.D. Mich. 2016).

21 *See* Act 22 of May 29, 2013, 2013 LPR 151 (*codified at* 29 LPRA § 146-151, 156 (2009 & Supl. 2014) (amending Act 100-1959 to establish a nondiscriminatory public policy repudiating employment discrimination based on sexual orientation and gender identity in the public or the private sectors).

22 U.S. CONST. amend. I.

23 Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 213 (1994).

24 Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1417 (1990).

her faith). Furthermore, she was denied unemployment compensation benefits under the *South Carolina Unemployment Compensation Act*, which required that she be able and available for work.[25] The Employment Security Commission found that Sherbert's unavailability for work was without good cause, a decision that barred her from receiving unemployment benefits.[26] This finding was affirmed by the South Carolina Supreme Court, which held that:

> [The] appellant's ineligibility infringed no constitutional liberties because such a construction of the statute "place[d] no restriction upon the appellant's freedom of religion nor [did] it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."[27]

The U.S. Supreme Court reversed and remanded, deciding that the disqualification for benefits substantially burdened Sherbert's exercise of religion (indirectly through a generally applicable law) by forcing "her to choose between following the precepts 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."[28] The government, having failed the first part of the test, had to show that it had a "compelling state interest . . . , [to justify] the substantial infringement of appellant's First Amendment right."[29] It did not. The U.S. Supreme Court found that the mere possibility of fraudulent claims for unemployment

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25 In *Sherbert*:

> The pertinent sections of the South Carolina Unemployment Compensation Act [were] as follows:
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> §68-113. Conditions of eligibility for benefits. – An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that:
>
> (3) He is able to work and is available for work . . . .
>
> §68-114. Disqualification for benefits. – Any insured worker shall be ineligible for benefits:
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> . . . .
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> (3) Failure to accept work. – (a) If the Commission finds that he has failed, without good cause, (i) either to apply for available suitable work, when so directed by the employment office or the Commission, (ii) to accept available suitable work when offered him by the employment office or the employer
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> . . . .

Sherbert v. Verner, 374 U.S. 398, 400 n.3 (1963) (citation omitted).

26 Professor Lupu states that *Sherbert* "implicitly suggested that the state must treat her religious commitments as good cause in light of the state's constitutional duty to avoid burdening religious freedom . . . . *Sherbert* is a decision about a constitutionally mandatory extension of benefits, rather than an exemption from general norms." Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 50 (2015) [hereinafter *Dubious Enterprise*].

27 *Sherbert*, 374 U.S. at 401 (*citing* Sherbert v. Verner, 125 S.E.2d 737 S.C. 737 (1962)).

28 *Id.* at 404.

29 *Id.* at 406.

benefits was not a compelling state interest and that, even if it was, the state had to "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[30]

ii. *Wisconsin v. Yoder*

Yoder is considered "the true and only lynchpin of a doctrine of free exercise exemptions . . . . [It] is indeed an exemption case, and it is expressly limited to religiously motivated claims to such an exemption."[31] In *Yoder*, members of the Amish community refused to send their children, of fourteen and fifteen years old, to public school after having completed the eighth grade, in violation of the state's compulsory school—attendance law.[32] Upon being fined and convicted of violating the law, the children's parents argued that "the application of the compulsory—attendance law violated their rights under the First and Fourteenth Amendments."[33] After an extensive description of the Amish core beliefs and the possible impact the application of this law represented for respondents, the Court came to the conclusion that the "[s]tate's interest in universal education, however highly [ranked], is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment . . . ."[34] Here, the state

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30 *Id.* at 407.

31 *Dubious Enterprise*, *supra* note 27, at 50.

32 The Wisconsin Statute read, in its pertinent part:

> 118.15 *Compulsory school attendance*
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> (1)(a) Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age.
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> . . . .
>
> (3) This section does not apply to any child who is not in proper physical or mental condition to attend school, to any child exempted for good cause by the school board of the district in which the child resides or to any child who has completed the full 4-year high school course. The certificate of a reputable physician in general practice shall be sufficient proof that a child is unable to attend school.

Wisconsin v. Yoder, 406 U.S. 205, 207-08 n.2 (1972) (citation omitted).

33 *Id.* at 208-09.

34 *Id.* at 214. Regarding the Amish's beliefs, the Court indicated that:

> Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. . . . Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs . . . , but also because it takes them away from their community.

failed to demonstrate how allowing an exemption from the compulsory education requirement for these particular claimants undermined the purpose of the law.

Both, *Sherbert* and *Yoder*, provided protection of the highest order to religious claimants. In both cases strict scrutiny was applied to analyze the statutes at issue which were both of general applicability. The Court found on both cases that the compelling governmental interests were not so compelling as to render *Sherbert* ineligible for unemployment benefits or compel the *Yoder* children to go to public school. Things would change, though, with the next important religious freedom case to arrive at the Supreme Court.

iii. *Employment Division v. Smith*

> The "compelling government interest" requirement seems benign . . . . But using it as the standard that must be met before the government may accord different treatment on the basis of race, or before the government may regulate the content of speech, is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields . . . are constitutional norms; what it would produce here —a private right to ignore generally applicable laws— is a constitutional anomaly.[35]

In *Smith*, two members of the Native American Church were fired from their jobs as drug rehabilitation counselors after they ingested peyote as part of the sacraments of their church. The Employment Division of Oregon's Department of Human Resources denied them unemployment benefits "because they had been discharged for work-related 'misconduct.'"[36] This determination was reversed by Oregon's Court of Appeals that held "that the denial of benefits violated respondents' free exercise rights under the First Amendment."[37] The Supreme Court of the State of Oregon, on remand, determined that the "religiously inspired use of peyote fell within the prohibition of the Oregon statute, which ma[de] no exception for [its] sacramental use . . . ."[38] Therefore, that Court concluded that "the State could not deny unemployment benefits to respondents for having engaged in that practice," since the prohibition ran afoul with the Free Exercise Clause.[39] In the voice of the late Justice Antonin Scalia, the Supreme Court declared that "to say that if prohibiting the exercise of religion . . . is not

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Id. at 210-11. The Court cited Dr. Hostetler who understood that "compulsory high school attendance could not only result in great psychological harm to Amish children . . . but would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today." *Id.* at 212.

35 Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872, 885-86 (1990) (citations omitted).

36 *Id.* at 874.

37 *Id.*

38 *Id.* at 876.

39 *Id.*

the object [of a law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[40] This decision, however, was different in the sense that respondents were asking to be exempted from a *generally applicable criminal statute*, which prohibited the use of peyote.[41] Thus, the Court declined to apply the *Sherbert* test, which would have required the state to justify substantially burdening the exercise of religion by showing a compelling governmental interest.[42]

The significance of this decision is that it effectively dialed down the level of scrutiny that had to be applied to determine whether a law substantially burdened the exercise of religion down to rational basis review, where the government need only show that its actions are rationally related to a legitimate governmental interest. Furthermore, *Smith* circumscribed the stricter *Sherbert* test to cases related to unemployment compensation, but declined to apply it this case because the law at issue was a *criminal statute of general applicability*.[43] This, in turn, made future claimants chances of success doubtful since as the dissent expressed, almost every law could be traced back to some legitimate governmental interest.[44]

Congress acted to correct what was perceived by a diverse coalition of secular and religious organizations as a threat to religious liberty, and thus enacted RFRA. [45]

A. Congress's enactment of RFRA

After the unpalatable results of the Supreme Court's decision in *Smith*,[46] Congress found that "governments should not substantially burden religious exercise without compelling justification . . . [and understood that *Smith*] virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . . ."[47] Thus, by enacting RFRA, Congress set out to restore *Sherbert* and *Yoder*'s compelling interest test in order to "guarantee its application in all cases where free exercise of religion is substantially burdened; and [ ] to provide a claim or defense to persons whose reli-

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40 *Id.* at 878.

41 *Id.* at 874.

42 *See id.* at 883-85.

43 *Id.* at 884.

44 *Id.* at 910 (Blackmun, J. dissenting).

45 Peter Steinfels, *Clinton Sings Law Protecting Religious Practices*, THE NEW YORK TIMES (Nov. 17, 1993), http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html (last visited June 24, 2017).

46 *See* Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of Religion*, 39 HASTINGS CONST. L.Q. 357, 364 (2012) ("While the academic response to Smith was mixed, reaction in the political world was sharply negative. Religious conservatives saw a threat to believers, while religious and secular liberals saw an unfortunate contraction of individual rights.").

47 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb-4, 2000bb (2012).

gious exercise is substantially burdened by government."[48] The relevant part of RFRA reads as follows:

> (a) In general. - Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
> (b) Exception. - Government may substantially burden a person's exercise of religion only if 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. [49]

Some scholars believe that RFRA is unconstitutional in its entirety.[50] According to Professor Hamilton:

> RFRA is *ultra vires* legislation which would have provided Congress the power to amend the Constitution unilaterally. . . . In the words of Justice Kennedy, RFRA's [s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. . . . Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.[51]

Twenty-three years later, it seems RFRA is here to stay. Since its enactment, RFRA has undergone some changes; most notably, its definition of *exercise of religion* was amended when Congress passed the *Religious Land Use and Institutionalized Persons Act of 2000* (R.L.U.I.P.A.).[52] RLUIPA defines religious exercise as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[53] This change is certainly a reminder to the Courts that "[j]udging the centrality of different religious practices is akin to the unaccepta-

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48 *Id.* § 2000bb(b).

49 *Id.* § 2000bb-1.

50 *See* Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 2–4 (1998). Professor Marci Hamilton argues that *City of Boerne v. Flores* holds that RFRA violates principles of separation of powers because RFRA is an intrusion into the Courts function as the arbiter as to what the law is and its power to "issue the final word on the meaning of the existing Constitution." *Id.* at 3. Accordingly, she argues that "RFRA is a blatant attempt by Congress to rewrite the meaning of the Free Exercise Clause in contravention to Supreme Court's interpretation." *Id.* Congress's intent is not to be divined as it is self-evident from the face of the statute. *But see*, Laycock & Thomas, *supra* note 23, at 219 ("The Act is only a statute, not a constitutional amendment, but it is a statute designed to perform a constitutional function. It is designed to restore the rights that previously existed under the Free Exercise Clause, rights that Congress believes should exist if the Constitution were properly interpreted.").

51 Hamilton, *supra* note 50, at 2-3 (*quoting* City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).

52 Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc-2000cc-5 (2012).

53 *Id.* § 2000cc-5(7)(A).

ble 'business of evaluating the relative merits of differing religious claims.'"[54] Accordingly, RLUIPA's definition was incorporated into RFRA which now states that "the term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title."[55] The Supreme Court has understood this change as "an obvious effort [by Congress] to effect a complete a separation from First Amendment case law, [when it] deleted the reference to the First Amendment and defined the 'exercise or religion' to include 'any exercise of religion'. . . ."[56]

Critics of RFRA argue that, instead of "restoring constitutional doctrine" prior to *Smith*, its result was "to institute a new doctrine: a single super-strict scrutiny standard to be applied across the board to all laws . . . ."[57] For Hamilton, the *least restrictive means* is a burden almost too difficult for the government to satisfy, [58] one in which:

> [T]he believer has a significantly higher likelihood of success, and the people protected by the law have a lower likelihood of protection. The standard, in fact, demands that the law be tailored to this particular individual. It turns each believer into a 'law unto himself,' which is precisely what the Supreme Court warned against in its first free exercise case and its more recent cases.[59]

After decades of development in its religious freedom doctrine, the departure in *Smith* created the perfect conditions for the public to unite in outcry and lobby for a comeback of the stricter standard that was available before. Not only that, what was to follow would eventually permit a religious claimant to assert his religious beliefs against the welfare of third parties. In none of the previous cases, (*Yoder*, *Sherbert* and even *Smith*) were the claimants denying somebody else a right to which they were entitled to. Most people understand why religious

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54 Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872, 887 (1990) (*citing* United States *v.* Lee, 455 U.S. 252, 263 n.2 (1982)).

55 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb-4, 2000bb, 2000bb-2(4) (2012).

56 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761–62 (2014).

57 Marci A. Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act Is Bad Public Policy*, 9 HARV. L. & POL'Y REV. 129, 135 (2015) (internal quotation marks omitted).

58 *Id.* at 135, 140. Hamilton points out that the *least restrictive means* test was not required by *Sherbert* nor *Yoder*. Those two cases only required *ordinary strict scrutiny* that mandated that the compelling interest be *narrowly tailored*. Instead, she argues that RFRA adopted a new *super-strict scrutiny* which she attributes to Professor Laycock (who while arguing for the church in the case of *Church of Lukumi Babalu Aye v. City of Hialeah*, introduced the term). Professor Laycock asserted that:

> [S]uper-strict scrutiny should be the test, stating that the "[g]overnment cannot regulate religion, except as the incidental effect of neutral and generally applicable laws, or to serve a compelling interest by *the least restrictive means*." In other words, he substituted "least restrictive means" for the "narrowly tailored" requirement from the Court's prior cases.

Id. at 134.

59 *Id.* at 140 (note ommited).

adherents abstain or do things mandated by their religion. It is harder to fathom, though, when religious adherents say "*you* can't do that because of *my* religion." Ultimately, time will tell if Professor Hamilton's observations prove to be accurate. A recent case seems to give credence to those observations. That case is *Hobby Lobby*.

i. *Burwell v. Hobby Lobby*

In a decision surrounding one of the nation's most divisive issues (abortion),[60] the Supreme Court ruled in *Hobby Lobby* that closely held corporations that had sincerely held religious beliefs could opt out of the contraceptive mandate of the *Patient Protection and Affordable Care Act of 2010*,[61] which stipulated that businesses include contraceptive coverage in their employees' health insurance as preventative care. The Court reasoned that "the regulations that impose this obligation [to provide contraception that they believe to be abortifacient] violate RFRA, which prohibits the federal government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest."[62]

Hobby Lobby consolidated the cases of Conestoga Wood Specialties and Hobby Lobby, both of which are for-profit corporations.[63] In the case of Conestoga, "the Hahns exercise[d] sole ownership of the closely held business; [controlling] its board of directors and hold[ing] all of its voting shares."[64] They believed they had to "run their business 'in accordance with their religious beliefs and moral principles'", and their company's mission reflected that.[65] The Hahns also believed that life began at conception, as stated in the *Statement on the Sanctity of Human Life* adopted by their company's board of directors.[66] As for Hobby Lobby, owned by the Greens, "[e]ach family member [ ] signed a pledge

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60 According to the research done by the Pew Research Center: "More than four-in-ten Americans (44%) say having an abortion is morally wrong, while 19% thinks it is morally acceptable and 34% say it is not a moral issue. These views also differ by religious affiliation. . . ." Michael Lipka, *5 facts about abortion*, PEW RESEARCH CENTER (January 26, 2017), http://www.pewresearch.org/fact-tank/2017/01/26/5-facts-about-abortion/ (last visited June 24, 2017).

61 Patient Protection and Affordable Care Act of 2010, 42 U.S.C. §§ 1801-18121 (2012).

62 Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2759 (2014).

63 A third corporation (Mardel) was owned by one of the Greens' sons. The opinion does not say much about it besides establishing its ownership and that both businesses (Hobby Lobby and Mardel) are operated through a management trust which is also governed according to the family's religious principles. *Id.* at 2765.

64 *Id.* at 2764.

65 *Id.* ("[The] company's mission as they see it, is to 'operate in a professional environment founded upon the highest ethical, moral, and Christian principles.' The company's 'Vision and Values Statements' affirm that Conestoga endeavors to 'ensur[e] a reasonable profit in [a] manner that reflects [the Hahns'] Christian heritage.'").

66 *Id.*

to run the businesses in accordance with the family's religious beliefs . . . .",[67] and the company's "statement of purpose commit[ted] the Greens to '[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.'"[68]

The Court's analysis starts by determining whether these companies where *persons* to which RFRA could be applied. The answer was in the affirmative. Since RFRA did not define *person*,[69] the Court reasoned, it had to look into the *Dictionary Act* under in which "the wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies and joint stock companies, as well as individuals."[70] Once RFRA was found to be applicable to these corporations, the Court then turned to whether the contraceptive mandate substantially burdened their religious exercise. In deciding that it did, the Court emphasized the economic consequences were the Hanhs and the Greens to disoblige the mandate.[71] Finally, the Court ruled that this imposition was not the least restrictive means of accomplishing a compelling governmental interest,[72] since there was "already [an] established . . . accommodation for nonprofit organizations with religious objections" to the mandate.[73]

i. "The Court, I fear, has ventured into a minefield" [74]

The practical consequences of the Court's ruling in *Hobby Lobby* did not escape Justice Ginsburg. One of her main objections to the Court's decision rested

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67 *Id.* at 2766.

68 *Id.*

69 *Id.* at 2768.

70 *Id.*

71 *Id.* at 2775.

72 *Id.* at 2780.

73 *Id.* at 2782. The Court expressed that:

> Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. . . . [Then] the organization's insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "[p]rovide separate payments for any contraceptive services required to be covered' without imposing 'any cost-sharing requirements . . . ."

Id. (citations omitted). For recent developments regarding this accommodation, see Zubik v. Burwell, 136 S. Ct. 1557 (2016); Garrett Epps, *The U.S. Supreme Court's Nonsense Ruling in Zubik*, THE ATLANTIC (May 16, 2016), http://www.theatlantic.com/politics/archive/2016/05/the-supreme-courts-nonsensical-ruling-in-zubik/482967/ ("[I]n *Zubik*, the non-profits insisted that even that arrangement violates RFRA, because employees would still get contraceptive coverage through their existing insurance.") (last visited June 24, 2017).

74 *Id.* at 2805 (Ginsburg, J. dissenting).

on what it was that RFRA actually did.[75] She understood the ruling as one of "startling breadth" and stressed the significance of the Court carving out a religious exemption that had a considerable effect on third parties who may not share the corporation owners' religious beliefs.[76] Justice Ginsburg's dissent relied heavily on *United States v. Lee*,[77] a case for religious exemption from payment of social security taxes by an employer who was also a member of the Old Order Amish.

Justice Ginsburg objected to the Court's characterization of *Lee* as just a tax case while ignoring the Court's pronouncements. In that case, the Court reasoned that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[78] *Lee's* Court also noted that "allowing a religion-based exemption to a commercial employer would 'operat[e] to impose the employer's religious faith on the employees.'"[79]

Pursuant to the above arguments, Justice Ginsburg's dissent goes on to posit that "[n]o tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others . . . ."[80] Scholars concur with Ginsburg on this point; for instance, Professors Lupu and Tuttle understand the Establishment Clause to require a construction of RFRA that does not permit the imposition of significant harms on third parties.[81]

As a response to the Court's decision in *Hobby Lobby*, the *Do No Harm Act* was introduced in the House of Representatives in May of 2016.[82] The bill, which unfortunately has no chance of passing in the current political climate, proposes to "amend the *Religious Freedom Restoration Act of 1993* to protect civil rights and otherwise prevent meaningful harm to third parties . . . ."[83] It contains an amendment to section 3 of RFRA by adding, in its pertinent part, the following:

> (d) Additional exception from application of act where federal law prevents harm to others —This section does not apply—

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75 "The government thus argued that RFRA incorporated the pre-*Smith* free exercise decisions by reference . . . . In particular, . . . on the proposition in *Lee* that commercial entities should not be able to secure exemptions from generally applicable regulatory regimes. . . . Ginsburg's dissent argued that RFRA had essentially codified this *Lee* principle . . . ." *Dubious Enterprise*, *supra* note 26, at 76.

76 *Hobby Lobby*, 134 S. Ct. at 2787.

77 United States v. Lee, 455 U.S. 252 (1982).

78 *Id.* at 261.

79 *Hobby Lobby*, 134 S. Ct. at 2804 (*quoting Lee*, 455 U.S. at 261).))

80 *Id.* at 2801.

81 Ira C. Lupu & Robert W. Tuttle, *Symposium: Religious questions and saving constructions*, SCOTUSBLOG (Feb. 18, 2014), http://www.scotusblog.com/2014/02/symposium-religious-questions-and-saving-constructions/ (last visited June 24, 2017).

82 Do No Harm Act, H.R. 5272, 114th Cong. (2016).

83 *Id.* (*emphasis added*).

> (1) to any provision of law or its implementation that provides for or requires-
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> (A) protections against discrimination or the promotion of equal opportunity including the Civil Rights Act of 1964, . . . Executive Order 11246, . . . and Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity;
>
> (B) employers to provide wages, other compensation, or benefits including leave . . . .
>
> . . . .
>
> (2) to any term requiring goods, services, functions, or activities to be performed or provided to beneficiaries of a government contract, grant, cooperative agreement, or other award; or
>
> (3) to the extent that application would result in denying a person the full and equal enjoyment of a good, service, benefit, facility, privilege, advantage, or accommodation, provided by the government.[84]

The drafters of this bill were certainly not oblivious to Justice Ginsburg's warnings.

Furthermore, this Justice argued that the Court's interpretation of RFRA would open the door for other kinds of discrimination by commercial enterprises (such as racial and/or *sexual orientation discrimination*) and insisted that the Court failed to recognize that the adopted exception would require evaluating which religious objections are worthy of accommodation, a task that runs afoul the well-established principle that "courts must not presume to determine . . . the plausibility of a religious claim."[85] Interestingly —but not surprisingly— Justice Samuel Alito, responding to Ginsburg's dissent, completely ignores her references to sexual orientation discrimination:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.[86]

And provide a shield it did.

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84 *Id.* § 3 (citation omitted). Executive Order 11246 "prohibits federal contractors and federally–assisted construction contractors and subcontractors, . . . from discriminating in employment decisions on the basis of race, color, religion, sex, *sexual orientation, gender identity* or national origin." *Office of Federal Contract Compliance Programs: Executive Order 11246-Equal Employment Opportunity*, UNITED STATES DEPARTMENT OF LABOR, https://www.dol.gov/ofccp/regs/compliance/ca_11246.htm (last visited June 24, 2017).

85 *Hobby Lobby*, 134 S. Ct. at 2805.

86 *Id.* at 2783 (citation omitted).

II. RFRA'S APPLICATION TO TITLE VII AS AN AFFIRMATIVE DEFENSE IN EMPLOYMENT LITIGATION

A. Title VII

Title VII of the *Civil Rights Act of 1964* is the federal statute that forbids employment discrimination based on five protected categories, one of which is sex.[87] The interpretation of what constitutes *sex* discrimination under Title VII has allowed for some expansion. *Price Waterhouse v. Hopkins* allowed sex discrimination claims under a *gender stereotyping theory* that "forbid[s] employers [from taking] gender into account in making employment decisions," that is, "that gender must be irrelevant to employment decisions."[88] This ruling has made it possible to redress unlawful discrimination based on the employee's perceived non-conformity to socially established gender norms.[89] Thus, for example, under Sixth Circuit precedent, a transgender individual can state a Title VII claim for sex discrimination under the gender stereotyping theory set forth in *Price Waterhouse:*

> *Price Waterhouse*, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. . . . Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gendernon-conformity.[90]

On the other hand, it has been exceedingly difficult for employees to state a successful claim for sexual orientation discrimination under Title VII. Since 2015, however, the Equal Employment Opportunity Commission (E.E.O.C.) —the

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87 The Civil Rights Act of 1964, establishes that:

> It shall be an unlawful employment practice for an employer-
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> (1) to fail to or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (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 race, color, religion, sex or national origin.

The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, 2000e-2(a) (2012).

88 Price Waterhouse v. Hopkins, 490 U.S. 228, 239-40 (1989).

89 In now familiar language, the Court declared that "we are beyond the day when an employer could evaluate employees by assuming or insisting they match the stereotype associated with their group . . . ." *Id.* at 251.

90 Smith v. City of Salem of Ohio, 378 F.3d 566, 574-75 (6th Cir. 2004).

Federal Agency tasked with the interpretation and enforcement of Title VII—has recognized sexual orientation as sex discrimination under the statute: "A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account."[91]

Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. "Sexual orientation" as a concept cannot be defined or understood without reference to sex.[92]

Although this interpretation of Title VII is not binding on courts, it is persuasive, and it is a matter of time until we see more sexual orientation discrimination cases taken up by the courts of appeals,[93] and maybe even the Supreme Court. As stated in the introduction to this work, employment discrimination towards LGBT persons is an issue of utmost importance to the gay, lesbian, bisexual, transsexual, and transgender community. Currently, there is "[n]o federal statute [that] explicitly prohibits employment discrimination based on sexual orientation or gender identity,"[94] and with both houses of Congress occupied by Republicans and a Republican President sitting in the White House, this is probably not going to change anytime soon. Protections for the LGBT community are sometimes difficult to navigate and, in the absence of an all-encompassing antidiscrimination statute, plaintiffs are left with little to no protection depending on their state of residence. The difficulty for LGBT plaintiffs is exacerbated when exemptions to antidiscrimination statutes are taken into account. RFRA, for instance, could be used as a defense against Title VII protections for LGBT persons in the workplace, since Title VII is indeed a federal law to which RFRA could be applied.

A. Differing views: The issue of RFRA 's applicability... "judicial relief" for whom?

As stated previously, RFRA prescribes that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ," but may do so "only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling govern-

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91 Baldwin, EEOC Appeal No. 0120133080 6 (July 15, 2015).

92 *Id.*

93 *See* Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698 (7th Cir. 2016) (For audio recording of the oral argument visit SEVENTH CIRCUIT COURT OF APPEALS PUBLIC ACCESS TO ORAL ARGUMENT RECORDINGS, http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=15&casenumber=1720&listCase=List+case%28s%29 (last visited June 24, 2017)).

94 Jennifer C. Pizer, *et al.*, *Evidence of Persistent and Pervasive Workplace Discrimination against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 742 (2012).

mental interest."[95] Even though the statute's phrasing seems straightforward, there is controversy regarding RFRA's sphere of application; in particular, whether RFRA is equally applicable to suits between private plaintiffs as to those where the government is a party.

This controversy arises in situations "when an individual either: (1) brings a RFRA claim against a private party who has acted in accordance with federal law; or (2) raises RFRA as a defense to a private cause of action created by a federal statute."[96] Currently, "[t]hree United States Courts of Appeals have concluded that [the language of RFRA] makes clear that Congress intended [that it] apply only in cases where the 'government' is a party."[97] These are the Sixth, Seventh and Ninth Circuits. [98]

The Sixth Circuit case is *General Conference Corporation of Seventh-Day Adventists v. McGill*. There, the defendant founded a church using a name which he alleged came to him through "divine revelation."[99] Subsequently, a copyright infringement action was filed against him. He argued that:

> [T]he enforcement of the plaintiffs' trademarks would violate his Free Exercise Clause rights because his religion mandates him to call his church "Creation Seventh Day Adventist [Church]." [And that], in essence, . . . his religious beliefs *require* him to violate the law and that the enforcement of the law against him is therefore unconstitutional.[100]

The Court, without questioning the sincerity of McGill's beliefs, recognized that "[b]eing compelled to stop [infringing the plaintiff's trademarks] could substantially burden his religious practice" and that applying RFRA would trigger strict scrutiny; however, the Court ruled that the statute "does not apply in suits between private parties."[101] In reaching this conclusion, the Sixth Circuit applied the reasoning of then Judge Sonia Sotomayor's dissent in *Hankins v. Lyght*,[102] a case for the Second Circuit, which it cited extensively. In *Hankins*, Justice Sotomayor argued that:

[RFRA] implicitly limit[s] its application to disputes in which the government is a party. Section 2000bb-1(c) [which] states that "[a] person whose religious exercise has been burdened in violation of this section may assert that vio-

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95 Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2012).

96 Sara Lunsford Kohen, *Religious Freedom in Private Lawsuits: Untangling When RFRA Applies to Suits Involving Only Private Parties*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 43, 49 (2011) (note omitted).

97 Mathis v. Christian Heating & Air Conditioning, Inc., 158 F. Supp. 3d 317, 326 (E.D. Pa. 2016).

98 *See* General Conference Corp. v. McGill, 617 F.3d 402 (6th Cir. 2010); Listecki v. Comm. of Unsecured Creditors, 780 F.3d 731 (7th Cir. 2015); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826 (9th Cir. 1999).

99 *General Conference Corp.*, 617 F.3d at 405.

100 *Id.* at 409.

101 *Id.* at 410.

102 Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006).

lation as a claim or defense in a judicial proceeding and obtain appropriate relief against a *government*." . . . When read in conjunction with the rest of the statute, [ ] it becomes clear that this section reflects Congress's understanding that RFRA claims and defenses would be raised only against the government.[103]

Furthermore, in support of Justice Sotomayor's theory, the Sixth Circuit turned to the findings and purposes section of RFRA, where said statute plainly states that:

"*[G]overnments* should not substantially burden religious exercise . . . ." [and] that the *pre-Smith* regime had required that "the *government* justify burdens on religious exercise," and that strict scrutiny was necessary for "striking sensible balances between religious liberty and competing prior *governmental* interests." Congress described RFRA 's purpose as "to provide a claim or defense to persons whose religious exercise is substantially burdened *by government*."[104]

The Sixth Circuit critiqued that "RFRA's text does not support the *Hankins* majority's interpretation,"[105] which was that "RFRA's language [is] broad enough to apply 'to an action by a private party seeking relief under a federal statute against another private party who claims that the federal statute substantially burdens his or her exercise of religion.'"[106] There, the Second Circuit reasoned that RFRA was available as a defense in a private suit brought under the *Age Discrimination in Employment Act* (ADEA),[107] since this provision can be enforced by the government and private plaintiffs alike.

Justice Sotomayor recognized that even though RFRA is applicable "to all Federal law,"[108] this does not necessarily mean that it should apply to suits between private parties. She argued that when "[r]ead in conjunction with the rest of the statute, the provision simply requires courts to apply RFRA 'to all Federal law' in any lawsuit to which the government is a party."[109]

Furthermore, the Seventh Circuit has expressed that in the judicial relief section of the statute[110] "[t]he relief is clearly and unequivocally limited to that from

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103 *Id.* at 114 (*quoting* 42 U.S.C. § 2000bb-1 (2012)).

104 *General Conference Corp.*, 617 F.3d. at 411 (*quoting* Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb(a)-2000bb(b) (2012)).

105 *Id.*

106 *Id.* (*quoting Hankins*, 441 F. 3d at 103).

107 Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2012).

108 *Hankins*, 441 F.3d at 103 (*quoting* 42 U.S.C. § 2000bb-3. (2012)).

109 *Id.* at 115.

110 The judicial relief section of the statute is as follows:

> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-1(c) (2012). *But see,* Shruti Chaganti, *Why the Religious Freedom Restoration Act Provides A Defense in Suits by Private Plaintiffs,* 99 VA. L. REV. 343, 350 (2013) (discussing two alternative interpretations of the judicial relief section). Shruti Chaganti states that:

the 'government.' If the government is not a party, no one can provide the appropriate relief."[111] The Ninth Circuit, on the other hand, emphasized Congress' failure to explicitly indicate if RFRA is applicable to private employers: "[w]hen Congress has intended to regulate private employers, in statutes such as Title VII and the Americans with Disabilities Act (ADA), it has done so explicitly. . . . Ordinarily, this court must give effect to such a difference in wording."[112] Nonetheless, in this decision, the Court left that door slightly ajar in certain cases:

> [A] plaintiff may state a claim under RFRA against a private defendant when the federal government's close involvement in the [private] defendant's conduct makes the defendant a state actor within the meaning of [section] 1983, but not when the defendant merely acts as compelled by federal law. The court reached this conclusion because it presumed Congress intended for the reference to parties who act "under color of law" in RFRA to have the same meaning courts have given it in [section] 1983.[113]

The foundations of the Court's reasoning in *Hankins*, however, appear to be eroding. Since then, another panel of the Second Circuit has cast doubts over the soundness of that decision:

> First, we think the text of RFRA is plain, in that it requires *the government* to demonstrate that application of a burden to a person is justified by a compelling governmental interest. "Where . . . the government is not a party, it cannot 'go [ ] forward' with any evidence." Thus, we do not understand how it can apply to a suit between private parties, regardless of whether the government is capable of enforcing the statute at issue. Second, there are strong policy reasons not to apply RFRA to an action by a private party seeking relief against another pri-

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Once it is understood that only defendants who bring *claims* under RFRA (and not merely defenses) can ever "obtain appropriate relief against a government," it becomes clear that the "limitation" theory adopted by nondefense circuits leaves the judicial relief section with two grammatically imprecise alternatives. One reading suggests that "obtain relief" is meant to limit the scope of both claims and defenses. Under this view however, "obtain relief" would be linguistically nonsensical as a limit upon defenses since a litigant cannot obtain relief when merely asserting a defense. On an alternate view, "obtain relief" could be understood as applying inconsistently to the prior phrase, thus acting as a limit to "claims" but not similarly to "defenses." Under this reading, RFRA would provide a defense in citizen suits. It would not, however, allow litigants to go further and counterclaim in citizen suits because RFRA provides judicial relief for claims and counterclaims solely in government-party suits. There is no indication that Congress intended such a lopsided result, nor is there a clear policy justification for this inconsistent application of RFRA. As a result, courts that insist upon understanding "obtain relief" as a limiting phrase are left with two possible grammatical ambiguities in the judicial relief section.

111 Listecki v. Official Comm. of Unsecured Creditors, 780 F.3d 731, 737 (7th Cir. 2015).

112 Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 834 (9th Cir. 1999).

113 Lunsford, *supra* note 96, at 54-55 (citation omitted).

> vate party. RFRA does not apply to state law. Thus, disparate treatment of federal and state-law claims is assured . . . .[114]

As can been seen, the jury is still out on this one. One effect that these disparate interpretations could have is to expand protections for religious claimants in those Circuits in which RFRA is applicable to suits between private parties. This could leave an entire class of plaintiffs without the protection of anti-discrimination statutes, especially considering that, after *Hobby Lobby*, RFRA covers for-profit corporations. On the other hand, in Circuits in which RFRA is not applicable in suits between private plaintiffs, we could be seeing a potential chilling effect on the EEOC, since the same plaintiffs could be better off suing on their own instead of triggering the application of RFRA via government action (i.e., the EEOC filing on their behalf) and enabling its use as an affirmative defense.[115]

RFRA's purported ambiguity and the contrasting results it has caused at the courts of appeals have prompted a proposed amendment to the "judicial relief" section of the statute. The above mentioned *Do No Harm Act* also includes a section that to clarifies RFRA's applicability and precludes its application to litigation between private parties.[116] The proposed amendment reads:

> "(b) PRECLUSION - Section 3(c) of the Religious Freedom Restoration Act of 1993 is amended, in the first sentence, by striking 'judicial proceeding' and all that follows and inserting 'judicial proceeding to which the government is a party and obtain appropriate relief against that government.'"[117]

B. Religious freedom: At the mercy of the believer?

Imagine you are protected from discrimination on account of your religious beliefs. Now imagine that the same protection is denied to those affected by your religious beliefs. Yes, this is real and it is already happening. Consider *Francis v. Mineta*, a case for the Third Circuit.[118] Francis, an African-American male who wore his hair in dreadlocks as an expression of his sincerely held religious beliefs, filed suit for religious discrimination and alleged that he was "ordered . . . to sign a separation agreement, terminating his employment," when he failed to cut his

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114 Rweyemamu v. Cote, 520 F.3d 198, 203-04 n.2 (2d Cir. 2008) (citation omitted).

115 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 864 (E.D. Mich. 2016) ("[A]t least in the Sixth and Seventh Circuits, it appears that there cannot be a RFRA defense in a Title VII case brought by an employee against a private employer because that would be a case between private parties.")

116 To assert a RFRA claim or defense in a judicial proceeding, *the government must be a party to the proceeding.* Do No Harm Act, H.R. 5272, 114th Cong. (2016).

117 *Id.* § 4(b) (citation ommited).

118 Francis v. Mineta, 505 F.3d 266 (3d Cir. 2007).

dreadlocks.[119] In his complaint, the petitioner alleged that the Transportation Security Administration "fired him because he refused to comply with T.S.A.'s grooming policy. He also alleg[ed] that [the policy] as applied to him, violate[d] RFRA because it substantially burden[ed] his sincerely held religious beliefs without furthering any compelling governmental interest."[120] He further purported that "the plain text of RFRA 'clearly [gave him] and other federal employees a right to sue under the statute.'"[121] To this, the Court responded that Congress sought to "circumscribe [RFRA's] reach" by stating in its Senate Report for RFRA that "[n]othing in [the] act shall be construed as affecting religious accommodation under [T]itle VII of the Civil Rights Act of 1964."[122] Nonetheless, petitioner alleged that "RFRA subsume[d] the prohibition on employment discrimination . . . of Title VII."[123] The Court was not swayed, and held that ". . . Title VII provides the exclusive remedy for job-related claims of federal religious discrimination"[124] and it stressed that:

> He is suing because that policy failed to accommodate his religiously-based conduct. *But that is an attempt to use RFRA to force the T.S.A. to accommodate wearing dreadlocks because they have religious significance*. . . . *Congress did not intend RFRA* to create a vehicle for allowing religious accommodation claims in the context of federal employment to *do an end run around the legislative scheme of Title VII*.[125]

As it turns out, federal employees who allege religious discrimination are precluded from asserting a RFRA claim because Title VII is the "exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination."[126] *But still, Title VII's broad protection against religious discrimination in the workplace is available to them*. And yet, when it comes to protecting employees from being discriminated because of their employer's reli-

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119 During their training, the Federal Security Director told the transportation security screeners (including Francis) that they would have to conform to a mandatory grooming policy and that those who had a problem with it should not take the oath of employment. But he did. *Id.* at 268.

120 *Id.* at 269.

121 *Id.*

122 *Id.* at 270 (citation omitted).

123 *Id.*

124 *Id.* at 272. The Court relied on *Brown v. GSA*, which held that "[section] 717 [of Title VII] of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment." Brown v. GSA, 425 U.S. 820, 835 (1976).

125 *Francis*, 505 F.3d at 271 (emphasis added).

126 *Brown*, 425 U.S. at 829. The Courts of Appeals for the Third and Eight Circuits have addressed the issue in *Francis* and in *Harrell v. Donahue*, respectively. *Harrell* held that: "RFRA was not intended to broaden the remedies for federal employment discrimination beyond those that already existed under Title VII. As a result, Harrell's claims under RFRA are barred because Title VII provides the exclusive remedy for his claims of religious discrimination." Harrell v. Donahue, 638 F.3d 975, 984 (8th Cir. 2011).

gious beliefs, RFRA seems to do "an end run around the legislative scheme of Title VII," by "forc[ing] . . . to accommodate," the employer's religious beliefs.[127] Thus, as argued below, the person who asserts a sincerely held religious belief under RFRA can now deprive others of Title VII's protection against discrimination in the workplace.

III. *EEOC v. R.G. & G.R. HARRIS FUNERAL HOMES*: HOW *HOBBY LOBBY'S* READING OF RFRA EVISCERATES PROTECTIONS UNDER TITLE VII FOR LGBT WORKERS DUE TO EMPLOYERS "SINCERELY HELD RELIGIOUS BELIEFS"

> It takes no great imagination to envision a case in which a corporation with devout Christian owners, like Hobby Lobby, challenges a federal antidiscrimination law . . . —such as . . . a re-interpreted Title VII— as substantially burdening their religious beliefs by forcing them to give equal treatment to LGBT workers.[128]

Amiee Australia Stephens, a transgender woman, had worked since 2007 as a funeral director and embalmer at Harris Funeral Homes. Back then, she still presented herself and dressed in accordance with the gender she was assigned at birth, male.[129] After informing her plan to transition through a letter addressed to her employer and co-workers, Amiee was told by the Funeral Home's owner, Mr. Rost, "that what she was 'proposing to do' was unacceptable" and terminated her employment.[130] The EEOC filed the action on behalf of Ms. Stephens and:

> Assert[ed] that the Funeral Home violated Title VII by terminating Stephens because of sex. . . . Specifically, [the Funeral Home] fired Stephens because Stephens is transgender, because of Stephens's transition from male to female, and/or because Stephens did not conform to [the Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes.[131]

Against the wrongful termination claim, the Funeral Home asserted that it was entitled to an exemption from the application of Title VII under RFRA[132] The Court found that " . . . the Funeral Home [had] met its initial burden of showing that enforcement of Title VII, and the body of sex-stereotyping case law that has developed under it, would impose a substantial burden on [its] ability . . . to

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127 *Francis*, 505 F.3d at 267, 271.

128 LISA J. BANKS AND SAM KRAMER, ADVANCED EMPLOYMENT LAW AND LITIGATION 2016: EMERGING ISSUES IN ANTI-DISCRIMINATION LAW (2016), http://www.kmblegal.com/sites/default/files/ALI-Anti-Discrimination-Law-Emerging-Issues-Lisa-Banks.pdf (emphasis added).

129 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837 (E.D. Mich. 2016).

130 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d 594, 596 (E.D. Mich. 2015).

131 *R.G & G.R. Harris Funeral Homes*, 201 F. Supp. 3d at 842.

132 *Id.* The EEOC asserted a second claim regarding discrimination in clothing allowance, which is not going to be discussed in this article.

conduct business in accordance with its sincerely-held religious beliefs."[133] Accordingly, the burden of proof shifted to the EEOC to prove that "[the] application of the burden 'to the person:' 1) [was] in furtherance of a compelling governmental interest; and 2) [was] the least restrictive means of furthering that compelling governmental interest."[134] This Court, as well as the Supreme Court in *Hobby Lobby,* assumed without deciding the first prong of the compelling interest test, "that protecting employees from gender stereotyping in the workplace is a compelling governmental interest."[135] Nonetheless, the Court concluded that the EEOC —under the facts presented in this case— "failed to show that [the] application of the burden on the Funeral Home . . . [was] the least restrictive means of protecting employees from gender stereotyping."[136] According to the judge who wrote the Opinion, the EEOC took the position " . . . that Stephens has a Title VII right to 'dress as a woman' (*i.e.*, dress in a stereotypical feminine manner) . . . "[137] but failed to provide a less restrictive alternative in the form of a "gender-neutral dress code as a reasonable accommodation . . . ."[138] Still, I submit, that even if the EEOC had proposed a gender-neutral dress code and the Funeral Home had abided by it, the *accommodation* would have had a discriminatory effect as applied to Amiee, since every other woman at the Funeral Home except Amiee would have had the liberty of choosing between dressing in skirts or pants. The same would happen in the case of a transgender man. The only people to which a gender-neutral dress policy such as the one suggested by the Court would not be discriminatorily applied to are cisgender people.[139] During his deposition, Mr. Rost was asked if he had fired Aimee for being transgender, to which he answered in the negative:

> Q. . . . *Is it —the reason you fired him*, was it because he claimed that he was really a woman; is that why you fired him or was it because he claimed— or that he would no longer dress as a man? A. *That he would no longer dress as a man*.[140]

Notice that the *alleged* reason Amiee was fired was because she intended to dress in "appropriate business attire,"[141] to which the defendant objected. The record also shows that according to Mr. Rost, he would not have had any problem if Amiee were to accommodate him by continuing to present as a man at

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133 *Id.* at 857.

134 *Id.* (*quoting* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761).

135 *Id.* at 841.

136 *Id.* at 842.

137 *Id.* at 841.

138 *Id.*

139 "Definition of cisgender: of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth." *Definition of Cisgender* MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/cisgender (last visited June, 24, 2017).

140 *R.G & G.R. Harris Funeral Homes*, 201 F. Supp. 3d at 850.

141 *Id.* at 845.

work and dressing whichever way she liked while off work.[142] But, hypothetically, what would have happened if Amiee continued to work at the Funeral Home still presenting as a man *while* undergoing her gender transition? One could wonder the extent to which she would be required to conceal her identity in order to accommodate Rost's sincerely held religious beliefs. For instance, she most certainly would not be allowed to wear makeup or jewelry. But, what would have happened if she started showing a more feminized appearance or if she developed breasts due to hormones, breast implants or both? Would she have been required then to conceal her breasts to look more masculine? After all, if the defendant's religious objections are regarding the immutability of one's sex,[143] I submit clothing has nothing to do with it:

> Rost believes that he "would be violating God's commands if [he] were to permit one of the [Funeral Home's] funeral directors to deny their sex while acting as a representative of the [Funeral Home]. This would violate God's commands because, among other reasons [he] would be directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift . . . ."[144]

Would allowing Amiee to continue working as a transgender female, regardless of her clothing, also violate Mr. Rost's sincerely held religious beliefs? I believe that it would, for if "Rost believes that 'the Bible teaches that it is wrong for a biological male to deny his sex by dressing as a woman,'"[145] he would most likely also consider it wrong to "deny [one's] sex" by transitioning to the opposite gender. Nonetheless, Mr. Rost asserted that he did not fire Amiee because of her transgender status. But, this exercise may very well be moot since "[i]n order to be protected, the claimant's beliefs must be 'sincere,' but they need not necessarily be consistent, coherent, clearly articulated, or congruent . . . ."[146]

Even though the Court recognized that there appeared to be direct evidence of employment discrimination, the Funeral Home asserted that "RFRA prohibit[ed] the EEOC from applying Title VII to force the Funeral Home to violate its sincerely held religious beliefs," and the Court agreed.[147]

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142 During his deposition, Mr. Rost was also asked: "Q. So hypothetically speaking, if Stephens had told you that he believed that he was a woman, but would only present as a woman outside of work, would you have terminated him? A. No." *Id.* at 847. He submitted an affidavit to this effect.

143 "Rost sincerely believes that the 'Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex.'" *Id.* at 848.

144 *Id.* at 848 (citation omitted).

145 *Id.* (citation omitted).

146 McConnell, *supra* note 24, at 1417.

147 *R.G & G.R. Harris Funeral Homes,* 201 F. Supp. 3d at 851.

A. Consequences

Religious believers acting on their faith are not suspicious characters seeking unprincipled special treatment. They are exercising a fundamental human right, and the American commitment is to let them exercise it unless there is an extraordinary reason to interfere, . . . a compelling reason. What is suspicious is not the believer practicing his faith, but the government seeking to stop him.[148]

The application of the federal RFRA to this case gives us a preview of what the courts are dealing with in the wake of *Hobby Lobby* and its expansion of RFRA protections to for-profit corporations. Just as Justice Ginsburg had warned, RFRA is being used as a defense against the application of anti-discrimination statutes. In *R.G & G.R. Harris Funeral Homes*, there seems to be an even more relaxed application of RFRA than in *Hobby Lobby,* especially considering what is missing from the Court's opinion. As discussed in Part I, Hobby Lobby had a board-adopted statement on the sanctity of life and the company's mission, vision and values statement reflected the Hahn's religious beliefs.[149] In similar fashion, the Greens made each family member sign a pledge,[150] closed their stores on Sundays (losing a considerable amount of profit), and contributed to ministries and missions, to name a few. These factors (board adopted statements, pledges on the part of members of the corporation, and so on) are wholly absent from *R.G & G.R. Harris Funeral Homes*. We also have to remember that the Funeral Home "is not affiliated with or part of any church and its articles of incorporation do not avow any religious purpose."[151] What the the Funeral Home does have is its mission statement published on its website:

> R.G. & G.R. Harris Funeral Homes recognize that its highest priority is to honor God in all that we do as a company and as individuals. With respect, dignity, and personal attention, our team of caring professionals strive to exceed expectations, offering options and assistance designed to facilitate healing and wholeness in serving the personal needs of family and friends as they experience a loss of life.[152]

It also contains one Bible verse "at the bottom of the mission statement page."[153] The Court's mention of Rost's predilection for putting Christian devotional booklets or cards with Bible verses throughout his businesses is of little weight, considering that this could be a standard practice in funeral homes, especially those of the Christian kind, it is most likely not a unique characteristic. The Court goes on to explain that Mr. Rost "has been a Christian for over sixty-

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148 Laycock & Thomas, *supra* note 23, at 244-45.

149 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

150 *Id.*

151 *R.G. & G.R. Harris Funeral Homes*, 201 F. Supp. 3d at 843.

152 *Id.* at 847.

153 *Id.*

five years" and lists the activities in which he was involved as a member of his church.[154] And while "operat[ing] the Funeral Home 'as a ministry to serve grieving families while they endure some of the most difficult and trying times in their lives'" is noble, all that it took to substantiate Rost's claims to that effect was his own affidavit. [155]

This is worrisome and it could open the door for other corporations with even less substantial ties to religion —in this case, the Funeral Home's link to religion comes almost entirely from its owner— to assert sincerely held religious beliefs with only the support of his or her own affirmations. How are the courts going to sort out which corporations can legitimately exercise religion when the businesses relationship to religion is so diluted and attenuated? Is this even a question that courts should be delving into? I submit that entirely secular corporations could benefit from such a relaxed standard to the detriment of LGBT employees if it so happens that its owner has religious or moral objections to LGBT people.

Furthermore, it seems that a decision such as this has the effect of applying yet another exception to Title VII, and a loosely crafted one at that. Title VII already has three distinct "exemptions to the ban on religious employment discrimination: a bona fide occupational qualification, often referred to as the 'ministerial exemption,' a curriculum exemption, and the 'religious organization' exemption. . . ."[156] If this decision where to prevail on appeal,[157] we could potentially see the use of RFRA to exempt corporations that are purely secular in function but which have some sort of connection, albeit vague, to religion.

IV. RFRA AND PUERTO RICO: WHAT ABOUT ACT 22-2013?

A. RFRA's applicability to Puerto Rico

From its enactment in 1993 up to 1997, when *City of Boerne v. Flores* was decided,[158] RFRA applied to all federal as well as state law. But in *City of Boerne*, the court held that RFRA exceeded Congress' power under Section 5 of the Fourteenth Amendment to enact laws enforcing the First Amendment's Free Exercise

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154 *Id.* He attends two churches, was on the *deacon board* in one of those churches for a time, was on the board of the Salvation Army, and was the former Chair of its advisory board.

155 *Id.* at 848.

156 Erik S. Thompson, *Compromising Equality: An Analysis of the Religious Exemption in the Employment Non-Discrimination Act and its Impact on LGBT Workers*, 35 B. C. J. L. & SOC. JUST. 285, 305 (2015).

157 An appeal to the United States Court of Appeals for the Sixth Circuit was filed by the EEOC on October 13, 2016. Briefs for appellant were due on January 26, 2017, but on that same date, the EEOC filed for a 30-day extension. The motion succinctly states that "[t]he EEOC requests the extension because of Administration-related changes at the Commission." Motion of the EEOC as Appellant for Extension of Time, EEOC v. R.G. &. G.R. Harris Funeral (Jan. 26, 2017).

158 City of Boerne v. Flores, 521 U.S. 507 (1997).

Clause.[159] Nonetheless, RFRA is still considered constitutional as applied to federal laws burdening religion. Even though RFRA is unconstitutional as applied to the states, this is not the case for Puerto Rico, as the statute explicitly provides that:

> (1) [T]he term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;
>
> (2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States. . .[160]

Thus, there is no doubt that RFRA applies to Puerto Rico.[161]

Enter *Guam v. Guerrero.*[162] Although this case is for the Ninth Circuit, it is an example of RFRA's application to a territory or possession of the United States. Guerrero was indicted under the laws of Guam when he was caught in its international airport carrying marijuana and marijuana seeds on his person. The accused moved to dismiss on the grounds that the statutes criminalizing the importation of the controlled substance violated his free exercise of religion, Rastafarianism, under RFRA[163] Thus, the Ninth Circuit set out to answer "whether RFRA . . . [was] constitutional as applied to Guam, a federal instrumentality."[164] The Court emphasized that "Guam remain[ed] an *unincorporated territory* of the United States . . . *subject to the plenary power of Congress*" and that as such, "[w]ith the exception of certain 'fundamental rights,' federal constitutional rights do not automatically apply to unincorporated territories."[165] Having found RFRA

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159 Congress' relied on its Section 5 power to enact RFRA, but this power is "remedial and preventive in nature" *Id.* at 524. The Court found that RFRA could not be considered remedial or preventive, but instead, it appeared to "attempt a substantive change in constitutional protections." *Id.* at 532. Furthermore, the reach of RFRA in each level of government was deemed excessive: "The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." *Id.* at 533.

160 Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-2 (2012).

161 If there were any doubt, we have to acknowledge that any notion of sovereignty that we may have had as a Commonwealth with more or less *independent* powers has been consistently eroded and that there is now more consensus than ever in that "[t]he power over the territories is vested in Congress without limitation, and that this power has been considered the foundation upon which the territorial governments rest." Downes v. Bidwell, 182 U.S. 244, 267-68, (1901); *See* Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (2016). Congress's plenary powers over Puerto Rico cannot be denied. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . . " U.S. CONST. art. IV, § 3, cl. 2.

162 Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002).

163 *Id.* at 1212.

164 *Id.* at 1218.

165 *Id.* at 1214 (*citing* Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1922); Dorr v. United States, 195 U.S. 138, 147 (1904)) (emphasis added).

constitutional as applied to the federal sphere, it also found it constitutional as applied to Guam:

> That Congress originally defined the term "State" to include Guam, . . . does not change our analysis. Congress most likely drafted the provision to ensure that RFRA would cover territories before *Boerne* held RFRA inapplicable to the States. Post-*Boerne*, Congress amended RFRA by substituting the phrase "covered entity" for "State" to clarify its intent that RFRA remain in force as to federal instrumentalities. . . . [T]hat Congress chose to call Guam a "State" for purposes of RFRA does not change the fact that Guam is still a territory.[166]

The Supreme Court of Puerto Rico has not expressed itself on this matter, although it has acknowledged in a brief footnote the holding of *Boerne* as to RFRA's unconstitutionality in its application to state law.[167] Since then, however, the United States District Court for the District of Puerto Rico applied RFRA in a case involving the Municipality of San Juan and granted a summary judgment when the plaintiffs —a Committee involved in the organization of a popular Puerto Rican festival— showed "no evidence that the [Municipality of San Juan] limited the [Committee's] performance of . . . religious activities in a way that substantially burdened the [Committee's] exercise of religion."[168] Further, the Court noted that:

RFRA applies to actions by the Commonwealth of Puerto Rico as a covered entity of the United States, RFRA, and is not affected by the United States Supreme Court decision in *City of Boerne v. Flores* . . . which found application of RFRA to the states to be unconstitutional.[169]

B. Consequences for Puerto Rico's Act 22-2013

Act 22-2013 establishes a nondiscriminatory public policy and amends, amongst others, Act 100-1959, the general employment nondiscrimination statute in Puerto Rico, by adding sexual orientation and gender identity to the list of protected classes.[170] The drafters of the project found that, in Puerto Rico, a person who was discriminated against because of his or her sexual orientation in the workplace had very little protection. Various court decisions *closed the door*[171] to

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166 *Id.* at 1222 n.19.

167 Lozada Tirado v. Testigos de Jehová, 117 DPR 893, 915 n.10 (2010).

168 Comité Fiestas de la Calle San Sebastián, Inc. v. Cruz, 2016 WL 4761949, at 10 (D. P.R. 2016).

169 *Id.* at 9 n.8 (citation omitted).

170 Act 22 of May 29, 2013, 2013 LPR 151.

171 *See* Valentín Pérez v. Aguadilla Shoe Corp., KLCE980197 (TCA PR 22 de junio de 1998); Rodríguez Mercado v. Sistema Universitario Ana G. Méndez, KLAN2010018o, 2010 WL 6549509 (TCA PR 29 de octubre de 2010); Portugues Santa v. B. Fernández & Hnos., Inc., 438 F. Supp. 2d 33, 34–35 (D.P.R. 2006). See also, Ex Parte AAR, 187 DPR 835 (2013). This case, although unrelated to employment discrimination, affirmed that Puerto Rico's Constitution express prohibition on sex discrimination did not encompass sexual orientation discrimination.

gay and lesbian plaintiffs who suffered workplace discrimination due to their sexual orientation and were unable, under the facts of their cases, to prove discrimination under the gender stereotyping theory established in *Price Waterhouse*:

> Law 100 of June 30, 1959, Puerto Rico's general employment discrimination statute, bars discrimination only on the basis of age, race, color, sex, social and national origin, social condition, political affiliation, and political and religious ideology. Law 100 does not bar discrimination on the basis of sexual orientation.
>
> . . . .
>
> The Court declines to create a new cause of action for employment discrimination on the basis of being regarded as homosexual. . . . The fact that several states have statutes barring discrimination on the basis of sexual orientation only indicates that this is a matter for the legislatures and not for the courts.[172]

Article 12 of Act 22-2013 amends article 1 of Act 100-1959 to make it read as follows:

> Any employer who discharges, lays off or discriminates against an employee regarding his/her salary, wage, pay or remuneration, terms, rank, conditions or privileges of his/her job, or who fails or refuses to hire or rehire a person, or who limits or classifies his/her employees in any way which tends to deprive a person of employment opportunities, or that affects his/her employee status because of his/her . . . sexual orientation, gender identity . . . (a) Shall incur in civil liability . . . [173]

Unfortunately, the latest pronouncements of the United States District Court for the District of Puerto Rico suggest that the employment protections afforded to the LGBT community by virtue of Act 22-2013 are vulnerable to attacks under the RFRA. To make matters worse for the LGBT community, Puerto Rico's current Governor has made alliances with religiously conservative sectors and signed an agreement that essentially threatens to reverse the past administration's efforts to secure civil rights for the LGBT community. The document, *Agreement with the Third Sector and Faith Based Communities*, contains eight specific initiatives that the elected governor intends to make part of his agenda. Section one states:

> Religious Freedom - We are convinced that the current Administration of the Government of Puerto Rico has implemented public policies and practices that threaten and/or restrict the freedom to practice the citizen's preferred reli-

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172 Portugues Santa v. B. Fernández & Hnos., Inc., 438 F. Supp. 2d 33, 34-35 (D. P.R. 2006) (citation omitted).

173 2013 LPR 162, art. 12 (*codified at* 29 LPRA § 146 (2016)).

> gion. We therefore pledge to protect the constitutional right of religious freedom for every citizen and to promote legislation for such purposes.[174]

What this will mean for Puerto Rico's LGBT community and if in fact, their recently acquired workplace protections will cease to exist, remains to be seen.

CONCLUSION

The U.S. Supreme Court in *Hobby Lobby* decided that closely held corporations could exercise religion, which had the effect of imposing the employer's religious beliefs on third parties through the exemption that RFRA allowed. This did not go unnoticed and in *R.G & G.R Harris Funeral Homes,* RFRA was understood to exempt the believer from complying with Title VII's provisions and case law, effectively depriving a transgender plaintiff of its protections. The states of Michigan, Ohio, Kentucky and Tennessee, are home close to a million LGBT persons.[175] If the Sixth Circuit were to affirm the judge's opinion in *R.G & G.R. Harris Funeral Homes*, the floodgates would open even more to religious claimants looking for relief from non-discrimination statutes.[176] Since RFRA applies such a high standard of review, the probabilities of success increase for the person that alleges his or her religious exercise is being burdened. Furthermore, if the Circuit is not clear in its expressions, inconsistent results will arise when lower courts attempt to divine which for profit corporations are worthy of RFRAs protection when burdened by a federal law such as Title VII. As discussed above, the corporations at issue in *Hobby Lobby*, could provide concrete examples of their ties to religion, through board-adopted statements, pledges, and the like. However, *R.G & G.R. Harris Funeral Homes* doesn't seem to look too hard for those same ties to religion. This factor, when taken in conjunction with RFRA's broad definition of religious exercise, affords the believer extreme protection. Other questions linger. If *R.G & G.R. Harris Funeral Homes* succeeds at the Circuit, could it mean that the other categories protected by Title VII could face the same fate? On the other hand, if a similar case were to arise in Puerto Rico where RFRA is said to apply as if *City of Boerne* never happened, would protections for

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174 *Roselló reafirma su compromiso con las comunidades de fe*, EL VOCERO (March 10, 2016) (translation by autor), http://elvocero.com/rossello-reafirma-su-compromiso-con-las-comunidades-de-fe/ (last visited June 24, 2017).

175 *LGBT populations*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/lgbt_populations (last visited June 24, 2017).

176 On January 27, 2017, not only did the EEOC requested an extension to submit its briefs as appellant, but stated that it did so because of *administration-related changes at the Commission*. This could mean a number of things, and there is fear that the Commission could turn away from its previous LGBT protective interpretations of Title VII. At the same time, the ACLU filed a Motion to Intervene as Plaintiff-Appellant noting that "it is no longer assured that 'the EEOC would adequately represent [Stephens'] interests'." Mark Joseph Stern, *Due to "Administration-Related Changes," the EEOC may Withdraw from a Trans Rights Case*, SLATE (Jan. 27, 2017), http://www.slate.com/blogs/outward/2017/01/27/eeoc_is_withdrawing_from_a_transgender_rights_case.html (last visited June 24, 2017).

LGBT workers in Puerto Rico disappear? It is probably too early to tell. Although Sixth Circuit decisions are not binding on Puerto Rico, whichever way the Circuit decides could start a domino effect on sister circuits. If eventually the First Circuit finds itself with a similar controversy, a decision favoring an exemption for corporations with sincerely held religious beliefs from antidiscrimination statutes such as Title VII and Act 22 could be fatal to the LGBT community in Puerto Rico, as they would not be protected at the federal or local level against employers with religiously based objections to homosexuality or transgender persons. The LGBT community is in no need of more hoops to jump through in order to life and work with dignity in the United States and in Puerto Rico.