License to Discriminate: How a Washington Florist is Making the Case for Applying Intermediate Scrutiny to Sexual Orientation

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I. INTRODUCTION

On March 1, 2013, a man walked into a floral shop in Richland, Washington, intending to purchase flowers for use at his wedding.[1] Though this particular shop normally provides this service, the owner refused on the basis that her religious beliefs would not allow her to participate in the man's wedding.[2] The conflict? The customer was marrying another man.[3]

Over the past few decades, the debate over sexual orientation has risen to the forefront of civil rights issues. Though the focus has generally been on the right to marriage, peripheral issues associated with the right to marriage—and with sexual orientation generally—have become more common in recent years. As the number of states permitting same-sex marriage—along with states prohibiting discrimination on the basis of sexual orientation—increases, so too does the conflict between providers of public accommodations and those seeking their services.[4] Never is this situation more problematic than when religious beliefs are cited as the basis for denying services to gay, lesbian, bisexual, or transgender individuals.

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1. Complaint for Injunctive & Other Relief Under the Consumer Protection Act at 2, State v. Arlene's Flowers, Inc., No. 13-2-00871-5 (Benton Cnty. Super. Ct. Apr. 9, 2013), *available at* http://www.atg.wa.gov/uploadedFiles/Home/About_the_Office/Cases/Arlenes/Complaint%202013-04-09.pdf [hereinafter State Complaint].

2. *Id.* at 3.

3. *Id.*

4. The definition of what constitutes a public accommodation varies among jurisdictions. For the federal definition, see 42 U.S.C. § 2000a(b) (2012). *See also* discussion *infra* Part III.A.1.

Many such cases have been addressed solely in the media or resolved privately between parties. In response to the Richland flower shop incident, however, the State of Washington took the unusual step of directly filing suit against a private company and the individual owner in order to enforce the state's antidiscrimination laws.[5] This is certainly not the first time a state has become involved in such a dispute. Hawaii,[6] New Mexico,[7] and Colorado[8] have all intervened in similar cases, and Oregon has been investigating another;[9] however, Washington is the first state to take such direct legal action.[10] Though the Washington case may never be resolved on its merits, it still raises a critical question not previously at issue: what happens when a state acts to suppress a right and a class fully protected by federal legislation and the Constitution (religion) in favor of a class that is only partially protected by federal law and is fully protected by only a handful of states (sexual orientation)? This question requires two answers: first, the likely outcome of the case if it reaches the United States Supreme Court; and second, a way to resolve the ensuing conflict between states offering varying levels of protection around sexual orientation. I conclude that the Supreme Court would likely resolve the current conflict in favor of the State. Furthermore, this conflict demonstrates the need for consistent nationwide protection of sexual orientation—any lesser protection, whether at the federal level or among individual states, is unworkable in a civil rights context.

Part II provides background on cases involving the three elements critical to this analysis: (1) discrimination on the basis of sexual orienta-

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5. State Complaint, *supra* note 1, at 3.

6. *See generally* Complaint for Injunctive Relief, Declaratory Relief, and Damages, Cervelli v. Aloha Bed & Breakfast, No. 11–1–3103–12 ECN (Haw. Cir. Ct. Dec. 19, 2011), *available at* http://www.lambdalegal.org/sites/default/files/cervelli_hi_20111219_complaint.pdf [hereinafter Cervelli Complaint].

7. *See generally* Elane Photography, LLC v. Willock, 284 P.3d 428 (N.M. Ct. App. 2012), *cert. granted,* 296 P.3d 491 (N.M. 2012), *aff'd,* 309 P.3d 53 (N.M. 2013), *and cert. denied,* 134 S. Ct. 1787 (2014).

8. *See Masterpiece Cakeshop*, AM. CIVIL LIBERTIES UNION OF COLO., http://aclu-co.org/court-cases/masterpiece-cakeshop/ (last visited Apr. 11, 2014).

9. *See* Maxine Bernstein, *Lesbian Couple Refused Wedding Cake Files State Discrimination Complaint*, Or. Live (Aug. 14, 2013, 5:30 AM), http://www.oregonlive.com/gresham/index.ssf/2013/08/lesbian_couple_refused_wedding.html.

10. Involvement by the state in both Hawaii and Colorado was through the states' respective civil rights agencies and in Oregon through its Department of Labor and Industries. Although Washington has a similar agency as Hawaii and Colorado tasked with the investigation and enforcement of the state's antidiscrimination laws, the Washington Attorney General has gone outside of this system to file suit directly without use of the administrative process. *See* Lornet Turnbull, *Richland Florist Asks Court to Dismiss Attorney General's Suit*, SEATTLE TIMES (Oct. 28, 2013, 5:32 PM), http://blogs.seattletimes.com/today/2013/10/richland-florist-asks-court-to-dismiss-attorney-generals-suit/.

tion in a public accommodation setting; (2) justification on the basis of religious beliefs; and (3) legal action by the state to enforce its antidiscrimination law. The first section of Part II provides a review of cases in Hawaii, New Mexico, and Colorado, and a brief overview of a recent investigation in Oregon. The second section of Part II provides a description of the case currently underway in Washington. Part III assesses the current status of federal and state antidiscrimination laws regarding sexual orientation and the free exercise of religion. Additionally, it analyzes the competition between the two and the likely outcome of the current Washington case should it reach the United States Supreme Court. Part IV addresses the potential conflict among states resulting from a Supreme Court ruling in favor of the State of Washington and the need for a consistent nationwide legal standard that both adequately addresses the conflict arising in public accommodation cases and provides increased protection for sexual orientation. Finally, Part V concludes.

II. STATE CASES

A. Hawaii, New Mexico, Colorado, and Oregon

The denial of service in a commercial setting on the basis of sexual orientation, though not necessarily common, is by no means limited to Washington State. Some of the oldest services involving public accommodation discrimination on the basis of sexual orientation were places of lodging, such as hotels and inns.[11] Such services were the basis for a Hawaii case involving sexual orientation discrimination, religious beliefs, and state action.[12] In 2007, a California couple sought accommodations at a Hawaii bed and breakfast, but they were refused when the owner discovered that the prospective customers were both women.[13] The owner refused these services on the basis of his personal religious views.[14] Pursuant to Hawaii state law, the two women filed complaints with the Hawaii Civil Rights Commission—the state agency responsible for the enforcement of Hawaii's antidiscrimination laws.[15] Following a lengthy investigation, the Hawaii Civil Rights Commission found support for the couple's discrimination claim and gave the couple permis-

11. For a more complete analysis specific to places of lodging, see David M. Forman, *A Room for "Adam and Steve" at Mrs. Murphy's Bed and Breakfast: Avoiding the Sin of Inhospitality in Places of Public Accommodation*, 23 COLUM. J. GENDER & L. 326 (2012).

12. Cervelli Complaint, *supra* note 6.

13. *Id.* at 6.

14. *Id.*

15. *Id.* at 8.

sion to initiate a lawsuit.[16] The couple filed a private suit on December 19, 2011, and the Hawaii Civil Rights Commission successfully moved to participate in the case as plaintiff-intervenor.[17] The Commission, along with the plaintiffs, filed a joint summary judgment motion, and the court ruled in favor of the couple.[18]

As more states allow same-sex marriages, however, the conflict between religion and sexual orientation is moving beyond places of lodging and into businesses that provide generic goods and services. This conflict became evident in 2006 after a New Mexico photographer refused to provide services for a same-sex wedding ceremony.[19] After the New Mexico Human Rights Commission determined that the business had engaged in unlawful discrimination, the business filed a series of appeals, arguing at each stage that New Mexico's antidiscrimination law violated the First Amendment by compelling speech and by limiting the free exercise of religion, which was also a violation of state law protecting religion.[20] These appeals were unsuccessful, and the business eventually exhausted its options for relief in the State of New Mexico.[21] On November 8, 2013, the business filed a petition for a writ of certiorari with the United States Supreme Court.[22] Though the case appeared to be the first of its kind in the Court—placing sexual orientation and religion in direct conflict through public accommodation law—the business dropped all claims pertaining to the free exercise of religion and only presented a compelled speech issue.[23] On April 7, 2014, the Supreme Court denied the petition.[24]

As the New Mexico photography case progressed, wedding cakes became a new source of conflict, as demonstrated in 2012 after a Colorado cake shop declined to provide a wedding cake for a same-sex cou-

16. *Id.* at 8–9.

17. *Cervelli v. Aloha Bed & Breakfast*, LAMBDA LEGAL, http://www.lambdalegal.org/in-court/cases/cervelli-v-aloha-bed-and-breakfast (last visited Apr. 11, 2014).

18. Order Granting Plaintiffs' and Plaintiff-Intervenor's Motion for Partial Summary Judgment for Declaratory and Injunctive Relief and Denying Defendant's Motion for Summary Judgment, Cervelli v. Aloha Bed & Breakfast, No. 11–1–3103–12 ECN (Haw. Cir. Ct. Apr. 15, 2013), *available at* http://www.lambdalegal.org/sites/default/files/2013-04-15_-_cervelli_order.pdf.

19. Elane Photography, LLC v. Willock, 284 P.3d 428 (N.M. Ct. App. 2012), *cert. granted,* 296 P.3d 491 (N.M. 2012), *aff'd,* 309 P.3d 53 (N.M. 2013), *and cert. denied,* 134 S. Ct. 1787 (2014).

20. *Elane Photography, LLC*, 309 P.3d at 59.

21. *Id.*

22. Petition for Writ of Certiorari, Elane Photography, LLC v. Willock, No. 13-585 (U.S. Nov. 8, 2013), 2013 WL 6002201 [hereinafter Elane Photography Petition for Certiorari], *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2013/12/ElanePhotoCertPetition.pdf.

23. *Id.* at § i.

24. Elane Photography, LLC v. Willock, 134 S. Ct. 1787 (2014).

ple.[25] According to the owner, it was store policy to deny wedding-related services to same-sex couples.[26] It became clear that this was an established policy after the couple's complaint led to an investigation by the Colorado Civil Rights Division.[27] When the agency released a probable cause determination finding that discrimination had occurred, it cited not only the incident described in the initial case, but also three other instances of alleged discrimination at the same shop—two in 2012 and one as far back as 2005.[28] Efforts to settle the case were unsuccessful, and the dispute moved to an administrative hearing before the Colorado Civil Rights Commission which affirmed prior discrimination findings and ordered the shop to provide services regardless of sexual orientation.[29] There are indications that the Colorado Office of the Attorney General has been involved, but not as a direct plaintiff against the cake shop or its owner.[30]

A similar scenario is currently playing out in Oregon, where sexual orientation is one of eight classes protected from discrimination in places of public accommodation.[31] In January 2013, an Oregon baker declined to make a wedding cake for a same-sex couple on the basis of his religious beliefs—describing the situation as a religious opinion rather than discrimination.[32] In August 2013, the would-be customer filed a complaint with the Oregon Civil Rights Division—the state agency responsible for investigating discrimination allegations.[33] At the time, the complaint was the tenth of its kind filed in Oregon, though a case has yet to

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25. Charge of Discrimination, Craig v. Masterpiece Cakeshop, No. P2013008X (Colo. Civil Rights Div. Sept. 5, 2012), *available at* http://aclu-co.org/sites/default/files/Charge%20of%20Discrimination%20%282%29.pdf.

26. *Id.*; Kiela Parks & John Krieger, *A Wedding Cake for Fido & Fluffy but not for Dave & Charlie?*, ACLU BLOG OF RIGHTS (June 4, 2013, 12:03 PM), https://www.aclu.org/blog/religion-belief-lgbt-rights/wedding-cake-fido-fluffy-not-dave-charlie.

27. Parks & Krieger, *supra* note 26.

28. Probable Cause Determination at 2–3, Craig v. Masterpiece Cakeshop, No. P2013008X (Colo. Civil Rights Div. March 5, 2013), *available at* http://aclu-co.org/sites/default/files/Probable%20Cause%20Determination%20%282%29.pdf.

29. Notice of Hearing and Formal Complaint, Craig v. Masterpiece Cakeshop, No. P2013008X (Colo. Office of Admin. Ct. May 31, 2013), *available at* http://aclu-co.org/sites/default/files/2013-05-31%20Notice%20of%20Charges%20%28Craig%29.pdf; Final Agency Order, No. CR 2013-0008 (Colo. Civil Rights Comm'n May 30, 2014), *available at* https://www.aclu.org/sites/default/files/assets/masterpiece_--_commissions_final_order.pdf.

30. *See* Parks & Krieger, *supra* note 26.

31. OR. REV. STAT. ANN. § 659A.403 (West 2013).

32. Bernstein, *supra* note 9.

33. *Id*. Though this is technically a division of the Oregon Bureau of Labor and Industries, the organization functions in essentially the same way as those in Hawaii, Colorado, and Washington. OREGON'S CIVIL RIGHTS DIVISION, http://www.oregon.gov/boli/CRD/pages/index.aspx (last visited Apr. 11, 2014).

go before an administrative law judge as each complaint was settled or dismissed.[34] The customer's partner filed a second complaint, and the Oregon Bureau of Labor and Industries ultimately determined that discrimination had occurred; [35] private actions have not been initiated. Yet, this is not the only instance of such a refusal in Oregon. In May 2013, another couple was refused services by a baker in Hood River, Oregon, on the same basis—their same-sex marriage went against the religious beliefs of the baker.[36] Where discrimination is found, the Oregon process calls for administrative proceedings similar to those used in Hawaii, New Mexico, and Colorado prior to any private litigation.[37]

B. Washington

On March 1, 2013, Robert Ingersoll entered Arlene's Flowers in Richland, Washington, intending to purchase flowers for use at his wedding.[38] Mr. Ingersoll and his partner, Curt Freed, had been customers of the shop for many years, and the owner, Baronelle Stuzman, was aware of their sexual orientation and relationship.[39] Citing her religious beliefs, Ms. Stuzman refused to provide the requested flowers.[40] After learning of the incident, the State of Washington, through its Attorney General, filed suit against the store and its owner on April 9, 2013.[41] The State's complaint alleged that the refusal of services violated the Washington State Consumer Protection Act by way of the Washington State Civil Rights Act, which includes sexual orientation as a class protected from discrimination in places of public accommodation.[42] A private suit fol-

34. Bernstein, *supra* note 9.

35. *State Says 'Sweet Cakes' Discriminated Against Same-Sex Couple*, KATU.COM (Jan. 17, 2014, 5:16 AM), http://www.katu.com/news/local/State-labor-dept-says-Sweet-Cakes-discriminated-against-same-sex-couple-240931461.html; *Sweet Cakes by Melissa Faces Another Complaint*, KATU.COM (Nov. 12, 2013, 8:55 AM), http://www.katu.com/communities/gresham/Sweet-Cakes-by-Melissa-faces-another-complaint-lesbian-wedding-cake-231581741.html.

36. Dan Cassuto, *Another Gay Wedding, Another Cake Denied*, KOMO NEWS (May 15, 2013, 6:42 AM), http://www.komonews.com/news/local/Another-gay-wedding-another-cake-denied-207495751.html.

37. *BOLI's CRD Response Process*, OR. CIVIL RIGHTS DIV., http://www.oregon.gov/boli/CRD/Pages/C_CResponse.aspx (last visited Apr. 11, 2014).

38. State Complaint, *supra* note 1, at 2.

39. *Id.*; Complaint at 3, Ingersoll v. Arlene's Flowers, Inc., No. 13-2-00953-3 (Benton Cnty. Super. Ct. Apr. 18, 2014), *available at* http://aclu-wa.org/sites/default/files/attachments/Complaint%20-%20Intersoll%20v%20Arlene%27s%20Flowers%20%282%29.pdf [hereinafter Ingersoll Complaint].

40. State Complaint, *supra* note 1, at 3.

41. *See generally* State Complaint, *supra* note 1.

42. *Id.* at 3–4; WASH. REV. CODE § 49.60.030 (2009).

lowed on April 18, 2013, alleging the same violations of the Washington State Civil Rights Act.[43]

The case quickly garnered national attention due to the unprecedented action taken by the State. Like Hawaii, New Mexico, Colorado, and Oregon, Washington has an independent organization—the Washington Human Rights Commission—responsible for the investigation and initial enforcement of the state's antidiscrimination laws.[44] Following an investigation, Commission cases enter alternative dispute resolution prior to involvement by the Office of the Attorney General.[45] If the Attorney General becomes involved after unsuccessful conciliation by the Commission, the Attorney General must make further attempts at settlement prior to a hearing before the Office of Administrative Hearings.[46] Overall, the process in Washington, like in other states, is one of administrative law—not a matter for state courts.

Without using the Commission's administrative process, however, the State of Washington independently filed suit in superior court under the Washington State Consumer Protection Act, which incorporates violations of the Washington State Civil Rights Act.[47] This action, which circumvents the administrative process, is unprecedented in such litigation. Though states have acted to investigate and assist in similar cases, before Washington, no state has taken direct action against an individual and his or her religious beliefs in defense of sexual orientation. This action prompted the defendant to file a third-party complaint on May 16, 2013.[48] Like *Elane Photography*, the defendant argued that Washington's enforcement of its antidiscrimination law restricted the free exercise of religion in violation of both state law and the United States Constitution.[49] The State's unusual action has placed the free exercise of reli-

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43. Ingersoll Complaint, *supra* note 39, at 4–5.

44. *Investigative Process,* WASH. STATE HUMAN RIGHTS COMM'N, http://www.hum.wa.gov/ComplaintProcess/InvestigativeProcess.html (last visited Jun. 28, 2014).

45. *Id.*

46. *Id.*

47. *See generally* State Complaint, *supra* note 1; WASH. REV. CODE § 49.60.030(3) (2009); WASH. REV. CODE § 19.86.020 (1961).

48. Answer, Affirmative Defenses, and Third-Party Complaint, State v. Arlene's Flowers, Inc., No. 13-2-00871-5 (Benton Cnty. Super. Ct. Apr. 9, 2013) [hereinafter Arlene's Flowers Complaint], *available at* http://www.adfmedia.org/files/ArlenesFlowersCountersuit.pdf.

49. *Id.* at 16–17. Although both cases contain additional First Amendment claims related to free exercise of religion, namely that state enforcement of antidiscrimination law improperly compels speech and association that is contrary to the individual's religious beliefs, such claims are not addressed in this Comment. However, it should be noted that, as previously mentioned, the compelled speech claim was the sole issue raised in the *Elane Photography* petition for certiorari. The Supreme Court's denial of the petition indicates a disinclination to disturb the ruling of the New Mexico Supreme Court, which limited the application of both *Hurley v. Irish-Am. Gay, Lesbian &*

gion—a right fully protected by the United States Constitution and by federal legislation—directly in conflict with sexual orientation, a class that currently has limited federal protection and is fully protected by only a handful of states.

III. CLASS PROTECTION OF RELIGION AND SEXUAL ORIENTATION, AND THE CONFLICT BETWEEN THE TWO

If it eventually receives consideration from the Supreme Court, *Arlene's Flowers*, or a case like it, begs a novel question: How do we solve a public accommodation conflict between two distinct classes on considerably unequal footing? The answer lies in a convoluted history of cases and, in the end, does not rely on an imaginary battle pitting one class against another. It is, however, necessary to understand each class and how each is protected in order to understand the nature of the conflict and its resolution. Such protection can occur at both the state and federal levels, and protection at each level can come from a variety of sources including constitutions, legislative acts, and judicial decisions. Within judicial decisions, the level of protection is determined by which of the three tiers of scrutiny common to class discrimination claims is applied: strict scrutiny,[50] intermediate scrutiny,[51] or rational-basis review.[52] How these tiers of scrutiny and other forms of protection apply in a case such as *Arlene's Flowers* requires consideration not only of religion and sexu-

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Bisexual Grp. of Boston, 515 U.S. 557 (1995), and *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000)—the two leading cases for limitations on compelled speech in a private organization. Elane Photography, LLC v. Willock, 309 P.3d 53, *cert. denied,* 134 S. Ct. 1787 (2014). As a result, it would appear that at this time, the protection afforded by *Hurley* and *Dale* does not necessarily apply to compelled speech or association claims made by "an ordinary public accommodation . . . that sells goods and services to the public." *Id.* at 66.

50. "Strict scrutiny" requires a compelling government interest and a law that is narrowly tailored to meet that interest. BLACK'S LAW DICTIONARY (9th ed. 2009).

51. "Intermediate scrutiny" requires an important government interest and a law that is substantially related to that interest. BLACK'S LAW DICTIONARY (9th ed. 2009).

52. "Rational-basis review" requires a legitimate government interest and a law that is reasonably related to that interest. BLACK'S LAW DICTIONARY (9th ed. 2009). Arguments have been made that a fourth tier may exist, commonly referred to as '"rational-basis with bite." Kevin H. Lewis, *Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 180 (1997). This tier theoretically falls somewhere between rational-basis review and intermediate scrutiny and has occurred in cases where the Supreme Court applied rational-basis review, but inquired into the government interest in a way that looked more like intermediate level scrutiny. *Id.* As of now, this more searching review has appeared in cases regarding sexual orientation and disability. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting); *Id.* at 2716–17 (Alito, J., dissenting); Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Conner, J., concurring); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 459–60 (1985) (Marshall, J., dissenting).

al orientation as discrete classes, but of public accommodation law as well.

A. Public Accommodation Law and the Protection of Classes

1. Public Accommodation Law

Generally, Title II of the Civil Rights Act governs federal public accommodation antidiscrimination law.[53] Title II currently provides full protection against public accommodation discrimination on the basis of race, ethnicity, religion, and national origin.[54] Additionally, the Americans with Disabilities Act, passed in 1990, includes disability as a protected class in public accommodation antidiscrimination law.[55] Though additional federal legislation has provided protection for other classes, these efforts have been largely directed at preventing employment discrimination, and none have extended public accommodation protections to other classes.

2. Class Protection for Religious Beliefs

Individual religious beliefs have long been protected by the First Amendment, which bars the federal government from prohibiting the free exercise of religion.[56] In 1940, this protection was incorporated through the Due Process Clause of the Fourteenth Amendment, thereby applying the same prohibition to the states.[57] Furthermore, religion is one of the classes protected by the Civil Rights Act of 1964.[58] This right, however, is not unlimited, especially when religious belief becomes religious conduct.[59] Perhaps the clearest line the Court drew on this matter occurred in *Employment Division v. Smith*, where the Court held that generally applicable laws were not unconstitutional even though they may impact religious conduct.[60] The Court reasoned that the govern-

53. 42 U.S.C. § 2000a (2012).

54. *Id*.

55. 42 U.S.C. § 12182 (2012).

56. U.S. CONST. amend. I.

57. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

58. 42 U.S.C. § 2000a (2012).

59. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

60. Emp't Div. v. Smith, 494 U.S. 872, 879 (1990). "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

ment's ability to prohibit conduct that is harmful to society cannot depend on the "spiritual development" of an individual.[61]

> To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself,"—contradicts both constitutional tradition and common sense.[62]

In doing so, the Court pulled away from the strict scrutiny standard it had previously applied to the free exercise of religion as a fundamental right and instituted a standard that was essentially rational-basis.[63]

The Court's analysis of such "generally applicable" laws was, however, short-lived. In direct response to the Court's decision in *Employment Division v. Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).[64] The law reinstated the requirement of a "compelling government interest," even for generally applicable laws, when an individual's exercise of religion is substantially burdened.[65] Though it was initially written to cover both federal and state laws burdening religion, it is important to note that the RFRA no longer applies to the states. The Supreme Court declared such application unconstitutional in *City of Boerne v. Flores* in 1997,[66] and the RFRA was amended to remove the language applying the Act to state laws in 2000.[67] In its *City of Boerne* analysis, the Court adhered to the *Employment Division v. Smith* rationale for analyzing state laws that impact the free exercise of religion: laws that are neutral and generally applicable are not unconstitutional unless another constitutional protection is implicated.[68]

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61. *Smith*, 494 U.S. at 885 (citing Lyng v. Nw. Indian Cemetery Protective Ass'n., 485 U.S. 439, 451 (1988)).

62. *Id*. (citation omitted).

63. *Id.*

64. 42 U.S.C. § 2000bb (2000).

65. 42 U.S.C. § 2000bb-1(a)-(b) (2000).

66. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

67. 42 U.S.C. § 2000bb-2 (2000), *as recognized in* Olsen v. Mukasey, 541 F.3d 827, 830 (8th Cir. 2008), *cert. denied sub nom* Olsen v. Holder, 556 U.S. 1221 (2009). It is for this reason that a decision such as *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), addressing the federal Patient Protection and Affordable Care Act, has no impact on the analysis herein.

68. *See* City of Boerne, 521 U.S. 507 (1997). *See also Smith*, 494 U.S. at 881–82. Freedom of speech and of association are two such protections that will be afforded strict scrutiny analysis in the face of a neutral and generally applicable law that incidentally burdens the free exercise of religion. *Id.* Such cases are frequently referred to as "hybrid" claims. *Id.*

At the state level, nineteen states have passed their own versions of the RFRA, most of which closely mirror the federal version.[69] That is not to say, however, that states without an RFRA leave religion with a lower level of protection. Washington, for example, does not have an RFRA to provide statutory protection, but it has a longstanding judicial requirement of a "compelling government interest."[70] Therefore, *Arlene's Flowers* would face a future of complex appellate litigation where alleged violations of the state constitution would be governed by the strict scrutiny standard, requiring a compelling state interest. However, alleged violations of the Constitution would depend on the issues raised by the appealing party: a singular claim regarding the free exercise of religion would face rational-basis review, while a hybrid claim would face strict scrutiny.

3. Class Protection for Sexual Orientation Discrimination

At this time, sexual orientation as a characteristic or class receives almost no protection at the federal level, either by congressional act or judicial standard of scrutiny, for any reason.[71] Only recently was an executive order signed providing protection from employment discrimination.[72] At the state level, twenty-one states and the District of Columbia currently provide public accommodation protection for sexual orientation.[73] Seventeen of these jurisdictions protect both sexual orientation and gender identity, while five protect sexual orientation only.[74] An additional nine states provide protection for gender identity, sexual orientation, or both in public employment, but do not extend this protection to public accommodations.[75] The remaining states provide no protection for

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69. Sarah Torre, *Religious Freedom Wins in Mississippi*, DAILY SIGNAL (Apr. 9, 2014), http://dailysignal.com/2014/04/09/religious-freedom-wins-mississippi/.

70. First United Methodist Church of Seattle v. Hearing Exam'r for Seattle Landmarks Pres. Bd., 916 P.2d 374 (1996). Under the Washington State Constitution protection of religion, "the complaining party must first prove the government action has a coercive effect on the practice of religion. Once a coercive effect is established, the burden of proof shifts to the government to show the restrictions serve a compelling state interest and are the least restrictive means for achieving the government objective. If no compelling state interest exists, the restrictions are unconstitutional." *Id.* (citing First Covenant Church of Seattle v. City of Seattle, 787 P.2d 1352, 1357 (1992)).

71. *See generally* United States v. Windsor, 133 S. Ct. 2675 (2013).

72. *See* Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

73. *Non-Discrimination Laws: State by State Information—Map*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map (last visited Apr. 11, 2014). While gender identity is not technically at issue in this Comment, the distinction illustrates the extent of the existing discrepancy among states even when there is some level of protection. *Id*.

74. *Id.*

75. *Id.*

sexual orientation.[76] Thus, as it stands, there is a considerable difference in how sexual orientation discrimination is treated from one state to the next.

B. Resolving the Conflict Between Religion and Sexual Orientation

Should *Arlene's Flowers*, or a case like it, reach the Supreme Court, resolving the conflict between the free exercise of religion and the protection of sexual orientation will be nearly impossible to avoid, as the case will necessarily involve religion on some level.[77] Though the conflict playing out in *Arlene's Flowers* appears, on its face, to be a conflict between religion, sexual orientation, and the class protection afforded to each, such a characterization ignores the legal analysis at play. A portrayal of the conflict as one between two distinct classes of individuals, one highly protected and the other generally unprotected, would appear to lend itself to the conclusion that the highly protected class must prevail. This is inconsistent, however, with the way that American jurisprudence approaches state efforts to protect its citizens from discrimination.[78] In reality, the conflict is between religion and the enforcement of the state's antidiscrimination laws, under which sexual orientation is a protected class.[79] This is a subtle, yet key, distinction. Although this shift in analysis does not change the way in which religion is protected, it does alter the way in which the courts view sexual orientation: sexual orientation is one among a number of characteristics that the state has declared to be collectively protected through its antidiscrimination law, rather than a discrete characteristic or class. It is this government interest—the elimination of discrimination—which the Supreme Court would weigh against the free exercise of religion.

From the beginning of the civil rights era and through the expansion of equal rights, the Supreme Court has continually upheld the interest states have in eliminating discrimination, especially in the public ac-

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76. *Id.*

77. *Elane Photography* demonstrated the impossibility of removing the religion element from any speech or association claim, even if free exercise of religion was not technically at issue. *See generally* Elane Photography Petition for Certiorari, *supra* note 22. This is due to the fact that speech and association are only compelled because they conflict with a religious belief, thus there is no way to completely separate religion from the analysis. The same issue would occur in *Arlene's Flowers*, where a petition to the Supreme Court could only realistically consist of free exercise of a religion claim alone or a hybrid claim.

78. *See generally* Roberts v. U.S. Jaycees, 468 U.S. 609 (1984); Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1 (D.C. 1987).

79. *See generally Roberts*, 468 U.S. 609; *Bob Jones Univ.*, 461 U.S. 574; *Gay Rights Coal. of Georgetown Univ. Law Ctr.*, 536 A.2d 1.

commodation context. Speaking broadly, the Supreme Court has stated that a state's "commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order."[80] The substantial deference given to such laws trumps even the most protected constitutional interests, such as the freedoms of speech and association, because "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit."[81] This standard has generally held true even when the state interest is in conflict with the free exercise of religion by an individual or organization.[82] If *Arlene's Flowers* is brought to the Supreme Court as a free exercise claim alone, the rational-basis standard articulated in *Employment Division v. Smith* would apply, and the state's compelling interest in enforcing its antidiscrimination law ought to prevail.

The Court's application of this deferential standard is less certain in hybrid cases involving both the free exercise of religion and freedom of speech.[83] Such cases pose a unique problem: individuals who object to providing services on religious grounds perceive a risk that any action compelled by antidiscrimination laws will be publicly interpreted as an endorsement of a message that the individual considers undesirable.[84] However, the Supreme Court has drawn a distinction between the freedom to hold certain religious beliefs and opinions and the freedom to act on those beliefs.[85] Though the former is considered an absolute right, "[c]onduct remains subject to regulation for the protection of society,"[86] and legislation "may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even

80. *Roberts*, 468 U.S. at 624.

81. *Id*. at 628.

82. *See generally Bob Jones Univ.,* 461 U.S. 574 (Christian university could not base racially discriminatory policies on religious beliefs); *Gay Rights Coal. of Georgetown Univ. Law Ctr.*, 536 A.2d 1 (Catholic university could not base denial of benefits to "gay student organizations" on religious beliefs); McCready v. Hoffius, 459 Mich. 131 (1998), *vacated in part by* McCready v. Hoffius, 459 Mich. 1235 (1999) (landlord could not base refusal to rent to an unmarried couple on religious beliefs). *But see* State v. French, 460 N.W.2d 2 (Minn. 1990) (holding that refusal to rent to an unmarried couple on religious basis was not a violation of Minnesota antidiscrimination law because protection of "marital status" did not include unmarried couples based on statutory interpretation).

83. *See* Emp't Div. v. Smith, 494 U.S. 872, 881–82 (1990).

84. *See Gay Rights Coal. of Georgetown Univ. Law Ctr.*, 536 A.2d at 11–13. *See also* Arlene's Flowers Complaint, *supra* note 48, at 12.

85. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

86. *Id*.

when the actions are demanded by one's religion."[87] It is in this distinction that claims such as those made in *Arlene's Flowers* must necessarily fail. Though a business owner may consider same-sex marriage to be offensive to their religious beliefs, and any assistance to such a marriage specifically proscribed, any action on those beliefs that results in the unequal treatment of others, based solely on their sexual orientation, would necessarily violate the important social duty and good order upon which antidiscrimination laws are based. As a result, even if *Arlene's Flowers* is brought to the Supreme Court as a hybrid claim and strict scrutiny is applied, the state's interest in enforcing its antidiscrimination law would likely prevail.[88]

Considering Supreme Court precedent and the current state of the free exercise of religion in the public accommodation law context, the resolution of *Arlene's Flowers* would presumably favor the State of Washington. As a direct result, Arlene's Flowers, and other businesses like it in Washington, would be prohibited from refusing service to same-sex couples on the basis of religious beliefs. The broader result would be that states incorporating sexual orientation as a protected class in their public accommodation laws would be permitted to enforce such laws in spite of the religiously motivated objections of businesses. While this solves the immediate conflict for Washington and similar states, it creates a larger problem on the national level—the unequal application of antidiscrimination laws due to the differing standards among states.

IV. THE CASE FOR HEIGHTENED SCRUTINY

A. The Need for a National Standard

Much of what has been said to this point is hypothetical. *Arlene's Flowers* may be dismissed on procedural grounds, the parties may decline to pursue appellate remedies for federal constitutional claims, or the Supreme Court may decline to hear the case or may alter its rationale and allow business owners to not comply with state antidiscrimination laws on the basis of religious belief. But in the face of so much uncertainty, the existing litigation regarding sexual orientation—whether on a mar-

87. Braunfeld v. Brown, 366 U.S. 599, 603–04 (1961).

88. *See, e.g.*, Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909, 921, 929 (Cal. 1996), *cert. denied*, 117 S. Ct. 2531 (1997) (holding, in a public accommodation case where the existence of a hybrid right was argued, that the hybrid claim was irrelevant because the state antidiscrimination statute did not amount to a substantial burden, thus upholding the law and ending the analysis before the compelling interest test could be applied).

riage or public accommodation basis—makes one fact inescapable: cases like *Arlene's Flowers* will continue until a national legal standard exists.

The need for a national legal standard arises primarily from the implications of interstate commerce. This concern has a long history of support dating back to the Civil Rights Act of 1964 and *Heart of Atlanta Motel v. United States*.[89] There, the Supreme Court held that the purpose of the Civil Rights Act of 1964 "was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"[90] The discrimination present in that case (denying hotel accommodation) was shown to substantially impede interstate travel, which was within the power of Congress to regulate.[91] In recent years, same-sex couples have faced the exact same type of discrimination present in *Heart of Atlanta Motel*.[92] That alone is a sufficient basis for a national standard of protection, yet the imbalance among state anti-discrimination laws makes the case even clearer. Due to the varied support for same-sex marriage, many couples that are domiciled in states prohibiting same-sex marriage travel to permissive states for ceremonies while seeking goods and services along the way.[93] As a result, the discrimination directed at same-sex couples, such as that seen in *Arlene's Flowers* and other similar cases, directly impacts interstate commerce through same-sex couples who engage in interstate travel to marry, vacation, or do business. The substantial impediment to such travel, which results from inconsistent protection for sexual orientation, demonstrates the need for a consistent legal standard—one which will adequately address the conflict and the rights at issue. Therefore, only one question remains: Which standard is appropriate?

B. Sexual Orientation and the Current Standard of Review

The most recent word from the Supreme Court on this matter, perhaps more aptly classified as silence, came in 2013 in *United States v. Windsor*.[94] The case involved a challenge to the Defense of Marriage Act (DOMA), a section of which was eventually struck down as a violation of the Fifth Amendment.[95] Although the Court's analysis avoided an out-

89. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

90. *Id.* at 250.

91. *Id.* at 253, 255.

92. *See generally* Cervelli v. Aloha Bed & Breakfast, No. 11–1–3103–12 ECN (Haw. Cir. Ct. Dec. 19, 2011).

93. Marriage, however, is not a prerequisite to such discrimination. *See* Cervelli Complaint, *supra* note 6.

94. *See* United States v. Windsor, 133 S. Ct. 2675 (2013).

95. *Id*. at 2696.

right declaration of the applicable level of scrutiny for sexual orientation cases, the opinion is consistent with rational-basis review, a point the dissenting opinions were quick to point out.[96] Though this standard of review would appear to hinder any efforts to obtain protection for sexual orientation, the case appears to have largely had the opposite effect.[97] Ultimately, the protection determination will be up to the Supreme Court, but lower courts, both those in *United States v. Windsor* and those basing their decisions on its outcome, have weighed in on the matter.[98] Where an analysis of heightened scrutiny has been undertaken, courts heavily favor intermediate level scrutiny.[99]

C. Finding an Appropriate Standard

1. Revisiting the High and the Low: Strict Scrutiny and Rational-Basis Review

Strict scrutiny—perhaps desirable as the holy grail of judicial protection—is a difficult standard to justify for sexual orientation. First, sexual orientation is not considered a fundamental right, unlike many of the categories of cases in which strict scrutiny is applied. Second, while sexual orientation has little or no instrumental relevance to many potential government regulations, it is still conceivable that there could be some relevant regulations on the same grounds as gender, rather than the

96. *Id*. at 2706 (Scalia, J., dissenting); *Id.* at 2716–17 (Alito, J., dissenting).

97. Since the Supreme Court decision in *Windsor*, multiple federal courts have had the opportunity to address state bans on same-sex marriage. *See generally* De Leon v. Perry, 975 F. Supp. 2d 632, 650–52 (W.D. Tex. 2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013). Although the *Windsor* court focused on the liberty interest protected by the Fifth Amendment, it noted that this interest "contains within it the prohibition against denying to any person the equal protection of the laws." *Windsor*, 133 S. Ct. at 2695 (citing Adarand Constructors, Inc. v. Penã, 515 U.S. 200, 217–18 (1995); Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954)). The Court went on to note that Fifth Amendment protections are further defined and preserved by the Fourteenth Amendment equal protection guarantee. *Id.* This brief rationale, rather than the question of class protection, has served as the basis for many district court decisions. *See Kitchen*, 961 F. Supp. 2d at 1193–94; *see generally De Leon,* F. Supp. 2d at 650–52.

98. *See generally Windsor*, 699 F.3d 169; *De Leon,* F. Supp. 2d at 650–52. A number of recent cases, however, have declined to review the matter of heightened scrutiny because the marriage law in question was unable to pass rational-basis review. *See* DeBoer v. Snyder, 973 F. Supp. 2d 757, 769 (E.D. Mich. 2014); Tanco v. Haslam, No. 3:13–cv–01159, 2014 WL 997525, at *6 (M.D. Tenn. Mar. 14, 2014); Bostic v. Rainey, 970 F. Supp. 2d 456, 482 (E.D. Va. Feb. 13, 2014); Bourke v. Beshear, No. 3:13–CV–750–H, 2014 WL 556729, at *5, *8 (W.D. Ky. Feb. 12, 2014); Bishop v. United States, 962 F. Supp. 2d 1252, 1286–87, 1295 (N.D. Okla. 2014); *Kitchen*, 961 F. Supp. 2d at 1206.

99. *See generally Windsor*, 699 F.3d 169; *De Leon,* F. Supp. 2d at 650–52.

complete lack of relevance found in classes such as race and national origin.[100] As a result, strict scrutiny makes for an ill-fitting standard.

On the other end of the scrutiny spectrum, rational-basis review and the theoretical "rational-basis with bite" make for equally ill-fitting standards. The latter is easily dismissed; "rational-basis with bite" has yet to be acknowledged as an independent standard and provides no additional class protection beyond that of rational-basis review.[101] However, *Arlene's Flowers*, in addition to the similar cases in Hawaii, New Mexico, Colorado, and Oregon, demonstrate the inadequacy of traditional rational-basis review. The continued application of this low standard in sexual orientation cases leaves an opening for such conflicts as well as for broad discrepancies in the way that states treat gay, lesbian, bisexual, or transgender individuals. Such discrepancies implicate interstate commerce and equal protection concerns that will remain at issue until a consistent legal standard is achieved, thereby providing a means by which to review sexual orientation cases for more than a mere "legitimate government interest."

2. The Appropriate Standard: Intermediate Scrutiny & Sexual Orientation

The search for a workable standard, therefore, leads us to analyze the appropriateness of intermediate level scrutiny. The Supreme Court has never set forth a definitive test for when it will apply intermediate level scrutiny; however, there are four distinct factors taken from decades of application that are generally considered in determining whether a class is deserving of such heightened scrutiny.[102] First, the Supreme Court has considered whether the class in question is one that has historically "been subjected to discrimination."[103] Second, whether the class is defined by a characteristic that "frequently bears no relation to ability to perform or contribute to society."[104] Third, whether the class members "exhibit obvious, immutable, or distinguishing characteristics that define

100. Though it is difficult to conceive of a circumstance in which sexual orientation would be instrumentally relevant to a government regulation, thus implicating the strict scrutiny standard, intermediate level scrutiny would seem to be the logical choice for sexual orientation to remain consistent with gender-based protection.

101. *See generally Windsor*, 133 S. Ct. 2675; Lawrence v. Texas, 539 U.S. 558 (2003); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). *See also* discussion *supra* note 50.

102. *See Windsor*, 699 F.3d at 181.

103. Lyng v. Castillo, 477 U.S. 635, 638 (1986).

104. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

them as a discrete group."[105] Finally, the Court considers whether it is "a minority or politically powerless" class.[106]

Various courts have undertaken the application of these factors to sexual orientation cases in recent years, primarily because of challenges to laws prohibiting same-sex marriage.[107] In such cases, courts have consistently found that all four factors favor application of the intermediate standard.[108] As to the first factor, historical discrimination, courts have typically focused on past criminalization of homosexual behavior, exclusion from federal employment and even the country as a whole, and presumptions of mental infirmity.[109] The second factor, performance in society, is largely dismissed as not being a matter of debate as there is nothing to suggest that sexual orientation has any impact on performance or aptitude.[110] The third factor, an immutable characteristic, is one that has generated much debate, yet the Supreme Court has previously acknowledged sexual orientation to be "fundamental to a person's identity."[111] Additionally, courts have noted that little scientific debate remains as to the immutability of sexual orientation as a characteristic.[112] Finally, as to the fourth factor, political power, courts have noted that homosexual individuals, despite increased political power in recent decades, continue to face difficulties in protecting themselves from discriminatory policies resulting from a "majoritarian political process."[113] Considering these four factors together, it is clear that sexual orientation, as a class, is deserving of intermediate level scrutiny, while the conflicting protection among states demonstrates the need to apply this protection at a consistent, national level.

V. CONCLUSION

Though the intent was surely never there, a little shop called Arlene's Flowers has made a strong case for the heightened protection of sexual orientation on a national level. This case is a prime example of the current, inevitable conflict between same-sex couples seeking services

105. *Lyng*, 477 U.S. at 638.

106. *Id*.

107. *See generally Windsor*, 699 F.3d 169; De Leon v. Perry, 975 F. Supp. 2d 632, 650–52 (W.D. Tex. 2014).

108. *See generally Windsor*, 699 F.3d 169; *De Leon*, 975 F. Supp. 2d at 650–52.

109. *Windsor*, 699 F.3d at 182; *De Leon*, 975 F. Supp. 2d at 650–52.

110. *Windsor*, 699 F.3d at 182–83; *De Leon*, 975 F. Supp. 2d at 650–52.

111. *De Leon*, 975 F. Supp. 2d at 650–52 (citing Lawrence v. Texas, 539 U.S. 558, 576–77 (2003)).

112. *Windsor*, 699 F.3d at 183–84; *De Leon*, 975 F. Supp. 2d at 650–52.

113. *Windsor*, 699 F.3d at 184. *See also De Leon*, 975 F. Supp. 2d at 650–52.

and proprietors who would withhold them on the basis of their religious beliefs. Due to the unprecedented direct involvement of the State of Washington, *Arlene's Flowers* is a likely candidate for federal review where others have been unsuccessful. Based on the current state of jurisprudence governing conflicts between the free exercise of religion and state antidiscrimination laws, the Supreme Court would likely uphold the state law, thereby allowing the enforcement of such laws despite the religious objections of businesses. The broader result of such a ruling would be to magnify the disparate protection of sexual orientation among the states, a conflict that can only be resolved by the application of a consistent national standard of protection. Precedent for such protection is easily traced to the civil rights era, where discrimination by private businesses was prohibited in precisely the same circumstances and for the same commercial reasons implicated by current sexual orientation discrimination. As a result, a national standard of intermediate level scrutiny for sexual orientation is necessary to resolve the discrepancy among state levels of protection, to address interstate commerce concerns, and to adequately protect the rights of all individuals regardless of sexual orientation.