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**THE RIGHT TO REFUSE: THE LEGAL COUNTERBALANCE FOR
RELIGIOUS BUSINESSES AND SAME-SEX MARRIAGE PROMOTION
TO CURTAIL THE RIPPLING WAVE OF TENSION ERUPTING ACROSS
THE NATION AND FLORIDA**

*Ta'lor McFarland**

I. INTRODUCTION

Picture yourself as the owner of a private business that offers personal, creative services to your clients. Although you gain clients by word of mouth, you also advertise your services in local ad papers. You are very religious and believe that your faith guides every aspect of your life, including your professional life. Imagine that because of your faith—which is grounded in historical and religious principles—there are certain aspects of the current culture that you do not believe to be true, or that you support. Now imagine that the federal government, and the state you reside in, have recognized certain behavior that conflicts with your beliefs. Not only have they recognized it, but now the government is forcing you to support and promote those ideas even though promoting them would undermine your faith. Now you are at a crossroad. Do you follow your grounded faith and beliefs and suffer potential law suits and/or civil penalties, or do you deny your faith and offer services that promote the very behavior you do not agree with or support? This is the crossroad that many religious, private business owners are facing or will soon face in grave force across the country and in the State of Florida.

The rise of states allowing same-sex couples to marry and promoting the lifestyle of homosexuals has caused many religious business owners to call attention to a need for balancing civil liberties.¹ There is no doubt that the main religion being subjected to the criticism is Christianity.² The problem that arises with many, including Christians, is that their belief and value system is more than just a meeting on Sunday mornings; it has become a system of beliefs incorporated into a daily lifestyle that emanates into their professional lives.

This article addresses the tension between the right to freely exercise one's religion and the rise of same-sex marriage acceptance; discusses the limitations being placed on religious exercise; and offers a solution to this problem as Florida, and

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1. Richard Fausset & Alan Blinder, *States Weigh Legislation to Let Businesses Refuse to Serve Gay Couples*, N.Y. TIMES, Mar. 6, 2015, at A20, available at http://www.nytimes.com/2015/03/06/us/anticipating-nationwide-right-to-same-sex-marriage-states-weigh-religious-exemption-bills.html?_r=0.

2. Jack M. Battaglia, *Religion, Sexual Orientation, and Self Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 203–04 (1999) (noting the religious stance on same-sex marriage and the breakdown of different Christian denominations).

now the Supreme Court of the United States, have recognized same-sex marriage.³ In light of this, Florida has not reformed its religious reformation bill since 1998.⁴ This article is not written or meant for the purpose of promoting the idea that same-sex couples should not have the right to marry, nor does it promote legalized discrimination. Rather, this article recognizes the growing tension between the supporters of same-sex marriage and the religious freedom guaranteed to all—including small business owners—established by the First Amendment. As Florida has formally recognized same-sex marriage,⁵ this article offers a solution to keep Florida ahead of the tumultuous tension erupting amongst small religious business owners and same-sex marriage promoters. The proposed solution calls upon Florida legislators to pass a religious freedom restoration act that allows for a religious exemption in certain aspects.

II. RISE AND RECOGNITION OF SAME-SEX MARRIAGE

The conflict and debate over issues surrounding same-sex marriage and the many viewpoints associated with its recognition have grown into an intense legal battle over the past ten years.⁶ Until recently, the Supreme Court has been reluctant to take on the issue of whether the marriage between those of the same sex is considered a fundamental right for purposes of constitutional protection.⁷ Previously, the Supreme Court ruled that the federal government should not be the one to define what constitutes a legal marriage.⁸ Some other courts also agree that the realm of marriage is something that should be left to the individual states, as marriage has traditionally been viewed as a state matter.⁹ States have the power to place limitations on marriage, such as age requirements; therefore, some believe that the states should be the ones to define marriage.¹⁰

In 1997, the Florida Legislature signed into law a statute that defined what the Legislature recognized as the legal definition of marriage.¹¹ This statute made it very clear Florida was taking a stand in opposition to same-sex marriage.¹² The first

3. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (The Supreme Court of the United States has issued an opinion that recognizes marriage as a fundamental right and prohibits states from denying the right to marry to same-sex couples.).

4. See FLA. STAT. § 761.03 (1998).

5. See *Brenner v. Scott*, No. 4:14CV107, 2015 WL 44260 (N.D. Fla. Jan. 1, 2015).

6. See *Obergefell*, 135 S. Ct. at 2595–97 (noting the legal debate concerning same-sex marriage over American History included issues based on religion).

7. See Adam Liptak, *Supreme Court to Decide Marriage Rights for Gay Couples Nationwide*, N.Y. TIMES, Jan. 17, 2015, at A1, available at <http://www.nytimes.com/2015/01/17/us/supreme-court-to-decide-whether-gays-nationwide-can-marry.html>. But see *Obergefell*, 135 S. Ct. at 2598 (“The right to marry is protected by the Constitution.”).

8. *United States v. Windsor*, 133 S. Ct. 2675, 2691–92 (2013).

9. *Id.*; see also *Williams v. North Carolina*, 317 U.S. 287, 298 (1942).

10. *Windsor*, 133 S. Ct. 2675 at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (“‘Regulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States.’”)).

11. FLA. STAT. § 741.212 (1997).

12. *Id.* The relevant language of the statute:

Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or

section of the statute states same-sex marriages, which are recognized as legal unions in other states, are not recognized by the State of Florida.¹³ The statute further defined marriage as the “legal union between one man and one woman as husband and wife, and the term ‘spouse’ applies only to a member of such a union.”¹⁴ This language reflected the same language in Section 3 of the 1996 Defense of Marriage Act (DOMA).¹⁵ However, in 2014, the Supreme Court of the United States examined the constitutionality of this section and found that it violated the Fifth Amendment’s Equal Protection Clause.¹⁶ This was the first time the Supreme Court provided any discussion on the controversial definition of marriage that many states had adopted as part of their state constitutions. Although the State of Florida placed a ban on same-sex marriage recognition in the statute, in 2014 the constitutionality of the statute was challenged.¹⁷

In August of 2014, the United States District Court for the Northern District of Florida considered the constitutionality of this statute in *Brenner v. Scott*.¹⁸ This case set the stage for the battle over the legalization of same-sex marriage in Florida. The Northern District of Florida determined that the ban on same-sex marriage was unconstitutional, placed a preliminary injunction on enforcement of the ban, and ordered a stay on same-sex marriage until ninety-one days from the date of the order, which was August 21, 2014.¹⁹ Unless the Florida Legislature could come up with a valid reason for prohibiting such marriage, the stay would be terminated January 8, 2014.²⁰ As a result, the Florida Legislature did not address this issue and same-sex marriage is now recognized in the State of Florida.²¹ The recognition of same-sex marriage has now been solidified with the recent landmark decision, *Obergefell v. Hodges*, which recognizes marriage as a fundamental right and prohibits states from denying the right to marry to same-sex couples.²² There is no doubt that same-sex couples deserve the opportunity to enjoy their right to marry; however, there is still mounting tension between recognizing such a right and the right of each citizen to enjoy religious freedom. Florida can respond to the tension that is boiling throughout this country by standing with the other states that have adopted legislation and amending its outdated religious reformation acts to account for certain business

foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state.

Id.

13. *Id.* § 741.212(1).
14. *Id.* § 741.212(3).
15. See Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419.
16. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).
17. See *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014).
18. *Id.*
19. *Id.* at 1293–94; see also *Brenner v. Scott*, No. 4:14CV107, 2015 WL 44260 (N.D. Fla. Jan. 1, 2015).
20. *Brenner*, 999 F. Supp. at 1293.
21. See *Brenner*, No. 4:14CV107, 2015 WL 44260 (N.D. Fla. Jan. 1, 2015).
22. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595–97 (2015).

owners that will be able to refuse but refer services that are in direct conflict with, and substantially burden, their free exercise of religion.²³

III. THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT GUARANTEES PROTECTION TO CITIZENS AND IS APPLICABLE AGAINST THE STATES

Recently there has been a resurrection of the focus on religious freedom and the Establishment Clause of the First Amendment. The First Amendment of the United States Constitution provides that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”²⁴ This language guarantees every citizen the right to freely exercise his or her religion without government proscription.²⁵ Although the First Amendment relates to the federal government, it also applies to the individual states through incorporation under the Fourteenth Amendment.²⁶ However, before looking to its applicability to the states, some background on the countless debates over what that phrase actually entails is important.

The Supreme Court stated that the Free Exercise Clause encompasses “the right to believe and profess whatever religious doctrine one desires.”²⁷ It further prohibits the government from regulating religious beliefs, *compelling affirmation of a certain religious belief*, and from punishing the expression of religious doctrines.²⁸ These beliefs have included not only being able to profess what you believe but also the right to refrain from certain governmental mandates that conflict with sincere religious beliefs.²⁹ Furthermore, the Free Exercise Clause does not separate religious conduct from beliefs when the conduct is motivated by genuine beliefs.³⁰

In *Employment Division v. Smith*,³¹ the Supreme Court examined an Oregon law that made a certain substance, peyote, illegal to consume.³² The petitioners in *Smith* were fired from their jobs and attempted to obtain unemployment benefits.³³ They were denied unemployment benefits because it was deemed that they were fired for work misconduct—consuming peyote, which was illegal under the Oregon statute.³⁴ Upon appealing the Employment Division’s decision, the petitioners tried to establish an exemption to the law because their religious practices involved the

23. Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. In Brief 1, 5 (2013) (Hawaii, Illinois, and Rhode Island have religious liberty protections in place coupled with their same sex marriage bills); *see also infra* Part V.

24. U.S. CONST. amend. I.

25. *Id.*

26. *See* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 215 (1963).

27. *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990).

28. *Id.*

29. *Id.* at 893 (O’Connor, J., concurring).

30. *Id.* (Justice O’Connor specified that “the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief . . . must be at least presumptively protected by the Free Exercise Clause.”).

31. *Id.* at 874.

32. *Id.*

33. *Smith*, 494 U.S. at 874.

34. *Id.*

consumption of peyote.³⁵ The petitioners claimed that the Oregon law violated the Free Exercise Clause because it substantially burdened their exercise of religion.³⁶ If governmental action substantially burdens a religious exercise, the government must establish a compelling interest.³⁷ However, the Supreme Court found that the law was not targeting religion but was a law of “general applicability” and thus did not frustrate the Free Exercise Clause of the First Amendment.³⁸ Therefore, the Supreme Court ruled that there was no need to apply the compelling interest test.³⁹ Because of the Supreme Court’s decision in *Smith*, Congress attempted to provide protection to the Free Exercise Clause by enacting the Religious Freedom Restoration Act (RFRA) in 1993.⁴⁰

In passing RFRA, Congress wanted to preserve the constitutional right expressed in the First Amendment. RFRA states that:

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes. The purposes of this Act are--

(1) to restore . . . and **(2)** to provide a claim or defense to persons whose religious exercise is substantially burdened by government.⁴¹

35. *Id.* at 875.

36. *Id.* at 877.

37. *Id.* at 883 (citing *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963)).

38. *Id.* at 878.

39. *Smith*, 494 U.S. at 883. (citing *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963) (“[G]overnmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.”)).

40. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014).

41. 42 U.S.C. § 2000bb (1993).

One of the Act's purported purposes was to provide claims or defenses to people whose exercise of religion is "substantially burdened" by the government.⁴² In *Smith*, the Supreme Court asserted the general rule that laws of general applicability do not burden the free exercise of religion, thus there was no need for laws of general applicability to meet strict scrutiny.⁴³ However, RFRA subjects any law that substantially burdens the free exercise of religion to strict scrutiny, meaning the government must establish a compelling interest and that the law in question is the least restrictive means in meeting that interest.⁴⁴

The constitutionality of RFRA was considered by the Supreme Court in *City of Borne v. Flores*.⁴⁵ The Court ruled that RFRA could not constitutionally apply to the states because Congress exceeded its powers under section five of the Fourteenth Amendment.⁴⁶ The Court found that RFRA was not remedial in nature because Congress in essence changed the actual right that is expressed in the First Amendment.⁴⁷ However, the Court found that RFRA was a valid exercise of Congress' powers under the Commerce Clause so RFRA was applicable to the federal government.⁴⁸ Even still, the First Amendment, which guarantees citizens the right to "freely exercise" one's religion, has been incorporated to apply to the states through the Fourteenth Amendment; therefore, all states are bound by this same principle.⁴⁹ Many states began to adopt their own "mini RFRAs" as they recognized the need for religious protection.

IV. CIVIL LAWSUITS BETWEEN RELIGIOUS BUSINESS OWNERS AND SAME-SEX COUPLES AND PUBLIC POLICY GROUPS DRAW AWARENESS

The civil lawsuits between religious business owners and same-sex couples are further evidence of this growing tension that needs to be addressed directly. In *Elane Photography, LLC v. Willock*,⁵⁰ the New Mexico Supreme Court was the first to consider the conflict with religious business owners and the same-sex marriage debate.⁵¹ Elaine was a photographer that specialized in wedding photos.⁵² She was a very religious person whose faith transferred into her work.⁵³ The defendants, a lesbian couple, contacted Elane Photography to be the photographer for their wedding ceremony.⁵⁴ Elaine declined and informed the defendants that she could not be the photographer of the marriage ceremony because the promotion of same-sex

42. *Id.* § 2000bb(b)(2).

43. *See Smith*, 494 U.S. at 883–86.

44. *See* 42 U.S.C. § 2000bb(a)(5).

45. *See City of Borne v. Flores*, 521 U.S. 507 (1997).

46. *Id.* at 530–36.

47. *Id.*

48. *Id.*

49. *See* U.S. CONST. amend. I.

50. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2013).

51. *Id.*

52. *Id.* at 58–59.

53. *Id.*

54. *Id.* at 59–60.

marriage was in direct conflict with her sincere, religious beliefs.⁵⁵ Elane's Photography said it would be glad to photograph each of them separately but the defendants were not willing to accept that service and filed a lawsuit.⁵⁶

Recently in New Mexico, the Legislature enacted the New Mexico Human Rights Act, (NMHRA), which prohibited “discriminatory practices against certain defined classes of people.”⁵⁷ This included sexual orientation as a protected class from discriminatory treatment.⁵⁸ Furthermore, the court found that the photography business was classified as a public accommodation for purposes of the statute.⁵⁹ The NMHRA specifically prohibited “any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services [facilities, accommodations or goods to any person] because of [race, religion, color, national origin, ancestry, sex,] *sexual orientation* [gender identity, spousal affiliation, or physical or mental handicap.]”⁶⁰ The petitioner in that case argued that the NMHRA unconstitutionally compelled her to “create and engage in expression” that would send a positive message tending to show that the petitioner shared the same views.⁶¹

The petitioner also challenged that the enforcement of the NMHRA violated the New Mexico Religious Freedom Restoration Act (NMRFRA).⁶² The NMRFRA required that if a law substantially burdens the free exercise of religion, the government must establish a “compelling governmental interest,” and the law must be “the least restrictive means of furthering that compelling governmental interest.”⁶³ It further defined the exercise of religion to include “an act or a refusal to act that is substantially motivated by religious belief.”⁶⁴ The court found that the NMRFRA was not applicable in that case because the NMRFRA only applied when the government was a party, not between private citizens.⁶⁵ The court ultimately found that the NMHRA was constitutional and that Elane Photography fell under the classification of a public accommodation; therefore, the business could not justifiably decide not to serve the defendants as it related to the photography of their lesbian wedding.⁶⁶ The fact that the religious freedom bill only covered governmental actors was the crucial deciding factor on whether the petitioners were entitled to exemption and protection.⁶⁷

55. *Id.*

56. *Elane Photography*, 309 P.3d at 61.

57. *See id.* at 59; *see also* N.M. STAT. ANN. § 28-1-7 (West 2015).

58. *See Elane Photography*, 309 P.3d at 59.

59. *Id.* at 61.

60. *See id.* (quoting N.M. STAT. ANN. § 28-1-7(f) (West 2015)) (alteration in original) (emphasis added).

61. *Id.* at 63.

62. *Id.* at 76.

63. *Id.* (citing N.M. STAT. ANN. § 28-22-3 (West 2015)).

64. *Elane Photography*, 309 P.3d at 76 (citing N.M. STAT. ANN. § 28-22-2(a) (West 2015)).

65. *Id.* at 77.

66. *Id.*

67. *Id.* at 76–77.

Another case showing the tension between private business owners and the rise in same-sex marriage promotion stemmed from an incident in 2012.⁶⁸ A baker, of “Masterpiece Cakeshop” in Colorado, was contacted to make a wedding cake for a same-sex couple.⁶⁹ The baker refused to make a wedding cake citing his sincere religious beliefs.⁷⁰ The American Civil Liberties Union (ACLU) filed suit against the baker on the couple’s behalf in the Colorado Civil Rights Commission.⁷¹ Although the baker initially refused to make the wedding cake, he did offer to make the couple any other cake in his bakery as long as it was not a wedding cake.⁷² The Colorado Civil Rights Commission found that a private business owner may not refuse to serve a person because of his sexual orientation.⁷³ The Commission further found that the baker must sell to everyone that comes seeking services and ordered the baker to submit reports of each person he turns away.⁷⁴ This suggests that states and municipalities are allowed to compel private business owners to perform in such a way that goes against the very core of their religious beliefs. The baker also faced fines if he did not comply with the Commission.⁷⁵ Essentially, the baker was in a position that required him to put his name and brand on something that directly conflicted with his sincere religious beliefs.

In New York, local farm owners were fined \$10,000.00 for not allowing a couple to perform a same-sex marriage on their residential farm.⁷⁶ The farm owners cited their personal religious beliefs for not wanting to promote the marriage ceremony between the same-sex couple; however, the farm owners offered the couple an option to have the reception at the farm.⁷⁷ The couple refused and filed suit against the farm owners despite their efforts in offering an alternative service.⁷⁸ State and federal courts have dealt with cases involving the conflict and tension between religion and same-sex marriage over the past decade in many aspects.⁷⁹

In order for supporters of same-sex marriage and those with religious oppositions to coexist, there needs to be a balance of statutory protection through allowing limited exceptions. For example, homosexual couples and supporters of same-sex marriage have pressed for constitutional and governmental declarations to

68. See Ivan Moreno, *Court Hears Discrimination Case Over Wedding Cake*, DENVER POST (Dec. 4, 2013), http://www.denverpost.com/news/ci_24652421/court-hears-discrimination-case-over-wedding-cake?source=pkg.

69. *Id.*

70. *Id.*

71. See Liz Fields, *Judge Orders Colorado Bakery to Cater for Same-Sex Weddings*, ABC NEWS (Dec. 7, 2013), <http://abcnews.go.com/US/judge-orders-colorado-bakery-cater-sex-weddings/story?id=21136505>.

72. *Id.*

73. *Id.*

74. See *Charlie Craig and David Mullins v. Masterpiece Cakeshop*, AM. CIV. LIBERTIES UNION (Aug. 13, 2015), <https://www.aclu.org/cases/charlie-craig-and-david-mullins-v-masterpiece-cakeshop>.

75. See Fields, *supra* note 72.

76. See Sarah Pulliam Bailey, *Farm Owners Fined for Saying No to Lesbian Wedding*, WASH. POST (Aug. 19, 2014), https://www.washingtonpost.com/national/religion/farm-owners-fined-for-saying-no-to-lesbian-wedding/2014/08/19/1cfe5ca2-27dd-11e4-8b10-7db129976abb_story.html.

77. *Id.*

78. *Id.*

79. See, e.g., *N. Coast Women’s Care Med. Grp., Inc. v. Super. Ct. of San Diego Cnty.*, 40 Cal. Rptr. 3d 636, 639 (Cal. Ct. App. 2006) (doctor refusing to inseminate a lesbian because of religious beliefs); *State ex rel. v. City of Madison*, 555 N.W.2d 409 (Wis. Ct. App. 1996) (private landowner refusing to rent to homosexual couple).

the established right to marry.⁸⁰ On the other hand, despite *Obergefell*, there is pressure on congressmen from religious groups and leaders to preserve the constitutional right to religious freedom.⁸¹

Many groups have banded together to establish public policy organizations to make sure that certain values are preserved by lobbying congressmen.⁸² CitizenLink is a public policy organization that seeks to protect life, marriage, and religious beliefs.⁸³ CitizenLink helps organizations take action and enforces the importance of voting for legislative change.⁸⁴ Florida has a state group, Florida Family Policy Council, which is associated with CitizenLink and encourages and educates its members on “good” versus “bad” bills and the effects they may have on the State of Florida.⁸⁵ Florida Family Policy Council’s main goal is advocacy and to spread the word about different cases that may impact the foundation that the policy group is founded upon.⁸⁶ Florida is also a part of the Religious Freedom Caucus.⁸⁷ The caucus seeks to promote religious freedom for citizens of all faiths.⁸⁸ This is more of an educational or informational forum to get materials out to those interested in preserving religious freedoms for all faiths. These political action groups’ main purpose is to bring awareness, to spark debate, and to provide ways for individuals to effect change in society. These policy groups represent more than just advocacy and information; they are evidence of the mounting tension between religious freedom and same-sex marriage rights.

Courts have cited that there must be a compromise for those private business owners that offer services to the public when religious exemptions conflict with the rights of others.⁸⁹ While it is true that public accommodation laws prohibit businesses that offer services to the public from discriminating based on certain characteristics,⁹⁰ the question has now become: Can there be a limited exception to allow for true religious freedom? But where is the compromise? The only thing that

80. See, e.g., Mike Wynn & Andrew Wolfson, *Gay Couples Ask Judge to Punish Defiant Clerk*, USA TODAY (Sept. 1, 2015), <http://www.usatoday.com/story/news/nation/2015/09/01/ky-clerk-defies-court-refuses-issue-marriage-license-gays/71505008/> (after clerk denied a marriage licenses to gay couples, American Civil Liberties Union filed a suit to compel the clerk to issue marriage license or else be in contempt of court).

81. See generally, *About Us*, CITIZENLINK, <http://www.citizenlink.com/about-us/> (Last visited Feb. 28, 2016) (advancing Christian views through legislators who advance pro-family legislation and are the voice of Biblical citizens).

82. See *id.*; see also *Making Marriage Something It’s Not*. ALLIANCE DEFENDING FREEDOM, <http://www.adflegal.org/issues/marriage/redefining-marriage/key-issues/laws-affirming-marriage> (last visited Jan. 20, 2016) (organization remains loyal to a marriage only between a man and a woman).

83. See *About Us*, *supra* note 82.

84. *Id.*

85. See *Allied State Groups*, CITIZENLINK, <http://www.citizenlink.com/state-groups/> (last visited Feb. 28, 2016); see also FLORIDA FAMILY ACTION, <http://www.flfamily.org> (last visited Jan. 13, 2015) (Florida Family Action is part of the Florida’s Pro-Family Team, which is directly associated with CitizenLink.).

86. See *Who We Are*, FLORIDA FAMILY POLICY COUNCIL, <http://flfamily.org/who-we-are/> (last visited Feb. 28, 2016).

87. See generally Michelle Bauman, *First Religious Freedom Caucuses Launch in Nine States*, CATHOLIC NEWS AGENCY (Oct. 10, 2012), <http://www.catholicnewsagency.com/news/first-religious-freedom-caucuses-launched-in-nine-states/> (caucus defends threats to religious liberty).

88. See *id.*

89. *Elane Photography*, 309 P.3d at 79–80 (Bosson, J., concurring).

90. See *id.*; see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (held Congress acted within its Constitutional powers by prohibiting a motel to refuse accommodations based on race).

seems to be compromised is the sincere religious beliefs of the individual business owners.⁹¹ Refusing to recognize such a legal exemption means that those business owners will be “compelled by law to compromise the very religious beliefs that inspire their lives.”⁹² Furthermore, private business owners, being compelled by law to forego their religious beliefs, will leave a “tangible mark” on those business owners.⁹³ Many of these business owners are not trying to take any “rights” away from same-sex couples. Instead, they do not want to be compelled to give up their religious beliefs when the rights of the same-sex couples are not being compromised. As Florida has now recognized same-sex marriage, the State of Florida must pass legislation that offers protection to all citizens and all constitutionally recognized rights.

V. STATES THAT HAVE PASSED RELIGIOUS REFORMATION LAWS THAT OFFER EXEMPTIONS FOR RELIGIOUS BUSINESS UNDER ANTI-DISCRIMINATION LAWS

The Supreme Court of the United States set the stage for many anti-discrimination laws concerning same-sex conduct when it analyzed “Amendment 2,” a Colorado ordinance that repealed any law that offered protection based on sexual discrimination.⁹⁴ The Court ruled that denying protection to a certain class, same-sex couples, changed the legal status of that class and violated the Equal Protection Clause.⁹⁵ Many states have enacted laws prohibiting discrimination based on sexual orientation under public accommodation laws.⁹⁶ California has enacted the Unruh Civil Rights Act which states, “All persons within the jurisdiction of this state are free and equal, and no matter what their . . . sexual orientation . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”⁹⁷ Although same-sex couples should be protected from discrimination, some states have recognized the fine line between discrimination and compelling individuals to give up certain constitutional rights; thus, states have begun to enact “mini RFRA” to help protect the balance of rights.

Arizona was the first state to attempt to adopt a law that provided security to private, religious business owners while trying to strike a balance with the newly emerging recognition of controversial issues.⁹⁸ In 2014, the Arizona Legislature

91. *Elane Photography*, 309 P.3d at 79 (Bosson, J., concurring) (“[The business owners] are compelled by law to compromise the very religious beliefs that inspire their lives. Though the rule of law requires it, the result is sobering. It will no doubt leave a tangible mark on the [the business owners] and others of similar views.”).

92. *Id.*

93. *Id.*

94. *Romer v. Evans*, 517 U.S. 620, 624 (1996).

95. *See id.* at 635.

96. *See* Elizabeth R. Cayton, *Equal Access to Health Care: Sexual Orientation and State Public Accommodation Antidiscrimination Statutes*, 19 LAW & SEXUALITY 193, 195 (2010) (citing states with antidiscrimination laws for public accommodations and sexual orientation).

97. CAL. CIV. CODE § 51(b) (West 2016).

98. *See Arizona House Passes Controversial “Religious Freedom” Bill*, AL JAZEERA AMERICA (Feb. 21, 2014), <http://america.aljazeera.com/articles/2014/2/21/arizona-house-passescontroversialreligiousfreedombill.html>.

passed a bill that allowed private business owners to refuse service to customers if it conflicted with their religious beliefs.⁹⁹ Many of the constituents were fearful because of the rise of cases where private business owners were being sued for refusing service.¹⁰⁰ Many private business owners wanted to exercise their religious beliefs in the course of business.¹⁰¹ The law passed both houses of the Legislature.¹⁰² However, the ACLU joined forces with some constituents to ensure that the bill would not become law, citing that the law allowed for private business owners to discriminate based on sexual orientation.¹⁰³ The governor eventually vetoed the bill blocking it from becoming the law of the state.¹⁰⁴ Instead of looking at the bill under the perspective that it offered additional protection to an already recognized constitutional right, critics only looked at it as a pure discriminatory measure.¹⁰⁵

Kansas and Idaho have begun to write legislation similar to what Arizona attempted to pass.¹⁰⁶ Kansas' House Bill, a "mini RFRA," was also signed into law by the governor and became effective July 1, 2013.¹⁰⁷ This bill includes "the right to act or refuse to act" based on sincere religious beliefs.¹⁰⁸ This particular law does not offer the same protections to private business owners that Arizona's included, but it is in the process of being amended to afford more protections.¹⁰⁹ However, new legislation exists to expand the protection of religious exercise when the state or local government substantially burden the constitutional right established under the First Amendment.¹¹⁰

Mississippi is the first state to formally allow for religious exemptions and the right to refuse service. Mississippi's Religious Freedom Reformation Bill has become the model to encourage new reform in religious freedom bills introduced by the individual states.¹¹¹ Mississippi's S.B. 2681 states that:

[T]o provide that state action or an action by any person based on state action shall not burden a person's right to the exercise of religion; . . . and for related purposes Burden means: any action that directly or indirectly constrains, inhibits, curtails or denies the

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.*

103. *See* Catherine E. Shoichet & Halimah Abdullah, *Arizona Gov. Jan Brewer Vetoes Controversial Anti-Gay Bill, SB 1062*, CNN (Feb. 26, 2014), <http://www.cnn.com/2014/02/26/politics/arizona-brewer-bill/> (reporting that the Governor was concerned about religious freedom but also the economic and discriminatory potential damage the bill could do).

104. *See id.*

105. *See id.*

106. *See* Sarah Posner, *Wave of New State Bills: Religious Freedom or License to Discriminate?*, AL JAZEERA AMERICA (Feb. 7, 2014), <http://america.aljazeera.com/articles/2014/2/7/wave-of-new-statebillsreligiousfreedomorlicensetodiscriminate.html#>.

107. Kan. H.B. 2203, 2013 Leg., Reg. Sess. (Kan. 2013).

108. *Id.*

109. *See* Bryan Lowry, *Kansas Senate Leaders Won't Pass Religious Freedom Legislation This Year*, THE WICHITA EAGLE (Mar. 6, 2014), <http://www.kansas.com/news/politics-government/article1136376.html>.

110. *See* Kan. H.B. 2453, 2014 Leg., Reg. Sess. (Kan. 2014).

111. Mississippi Religious Freedom Restoration Act, Miss. S.B. 2681, 2014 Leg., Reg. Sess. (Miss. 2014).

exercise of religion by any person or compels any action contrary to a person's exercise of religion.¹¹²

"Burden" can include such things as withholding benefits; assessing criminal, civil or administrative penalties; exclusion from programs; or access to governmental facilities.¹¹³ The important aspect of this state's religious bill, is what the State Legislature has defined as the "exercise of religion."¹¹⁴ The definition written into the law states that it includes, but is not limited to: "the ability to act or the refusal to act in a manner that is substantially motivated by one's sincerely held religious belief" ¹¹⁵ This is the portion that allows for private business owners to refuse service if it conflicts with their "sincerely held belief."¹¹⁶ Another important aspect of Mississippi's Bill is the language that a person whose exercise of religion is in fact burdened, the party can bring it as a claim or defense in civil proceedings *even if* the state or municipality is *not* a party to the suit.¹¹⁷ This is a profound change from many state RFRAs that limit a party's ability to assert a RFR claim only if the state or municipality is a party to the transaction.¹¹⁸ Had this language been included in the NMRFA, Elane Photography would have been able to assert her free exercise claim as a defense for her actions.¹¹⁹ Indiana has also followed this premise and adopted similar language in its Religious Freedom Restoration Act.¹²⁰

Some have criticized the state's new bill as a form of "legal discrimination."¹²¹ Additionally, critics have cited the new religious reformation acts as going back to the Jim Crow Era.¹²² The critics assert the same argument that was asserted in *Loving v. Virginia*.¹²³ In *Loving*, the Supreme Court of the United States invalidated a Virginia law that made it a crime to allow a caucasian to marry a person of color.¹²⁴ The Supreme Court found that under the Due Process Clause of the Fourteenth Amendment, and the Privileges and Immunities Clause, Virginia could not criminalize the union of marriage because it was found to be a fundamental right under the umbrella of privacy that the government cannot intrude.¹²⁵ However, what

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*; see also Mark Reinzi, *God and the Profits: Is there Religious Freedom for Moneymakers?*, 21 GEO. MASON L. REV. 59, 64–69 (2013) (analyzing whether private business can assert a religious exercise defense). *But see* Joshua Bauers, *The Price of Citizenship: An Analysis of Anti-Discrimination Laws and Religious Freedoms in Elane Photography, LLC v. Willock*, 15 RUTGERS J. L. & RELIGION 588, 609–10 (2014).

117. *Id.*

118. See *Elane Photography*, 309 P.3d at 76–77. (The NMRFA "statute is violated only if a 'government agency' restricts a person's free exercise of religion.")

119. *Id.* at 77.

120. See S.B. 568, 119th Gen. Assemb., Reg. Sess. (Ind. 2015).

121. See generally Kirsten Powers, *Jim Crow Laws for Gays and Lesbians?*, USA TODAY (Feb. 19, 2014, 1:17 PM), <http://www.usatoday.com/story/opinion/2014/02/18/gays-lesbians-kansas-bill-religious-freedom-christians-column/5588643/>.

122. *Id.*

123. See generally *Loving v. Virginia*, 388 U.S. 1, 2 (1963) (Supreme Court case analyzing Virginia's criminalization of interracial marriages and holding such criminalization unconstitutional).

124. *Id.*

125. *Id.* at 12.

Mississippi and other states are doing is not like what took place in *Loving*. None of the states are banning same-sex marriage, in fact many have recognized it as a legal union.¹²⁶ What the states have created, to those with sincere religious beliefs, is comfort in knowing that they are allowed to freely exercise their religion without the government forcing them to adopt and carry out their business in a way that this contrary to their way of life.

Even before same-sex marriage was formally recognized, many more states had acknowledged the need to protect religious groups. In December 2014, Michigan's House Legislature passed the Michigan Religious Freedom Restoration Act (Michigan RFRA).¹²⁷ This bill, as proposed, recognized that even facially neutral laws burden the free exercise of religion and that the

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to that person's exercise of religion in that particular instance is both of the following: (a) [i]n furtherance of a compelling governmental interest [and] (b) the least restrictive means of furthering that compelling governmental interest.¹²⁸

Although the main portions of this Act are similar to the one passed in Mississippi, the Michigan RFRA cites language that compels that the bill be "construed in favor of broad protection of religious exercise."¹²⁹ The Michigan RFRA has been attacked as granting authorization to religious groups or business owners to freely discriminate.¹³⁰ The House Legislature made it clear that the Michigan RFRA was not offered to legally permit discrimination; rather, it was offered as protection of the established constitutional right to freely exercise one's religion without being forced by the government to violate deeply rooted beliefs.¹³¹

VI. FLORIDA'S RECOGNITION OF SAME-SEX MARRIAGE AND THE NEED TO PASS LEGISLATION THAT OFFERS PROTECTION UNDER THE FREE EXERCISE CLAUSE

Florida adopted a "mini RFRA" in 1998.¹³² The statute requires that if governmental laws—including those of general applicability—substantially burden the free exercise of religion, they must be justified by a "compelling government interest" and they must be the "least restrictive means" in furthering that interest.¹³³

^{126.} See, e.g., *Same-Sex Marriage Fast Facts*, CNN, <http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/> (last updated Sep. 26, 2015, 6:08 PM) (listing the states that have legalized marriage between same sex partners).

^{127.} Michigan Religious Freedom Restoration Act, H.B. 5958 (Mich. 2014).

^{128.} See *id.*

^{129.} Michigan Religious Freedom Restoration Act, H.B. 5958 § 6(2) (Mich. 2014).

^{130.} See generally *Get the Facts: Understanding Michigan RFRA*, MICH. HOUSE REPUBLICANS (Dec. 9, 2014), <http://gophouse.org/understanding-mirfra/>.

^{131.} *Id.*

^{132.} FLA. STAT. ANN. § 761.01 (West 1998).

^{133.} FLA. STAT. ANN. § 761.03 (West 1998).

The language is quite similar to the ones previously stated, however, there is no language to suggest that the defense of the statute can be brought in a case where the government is not a party.¹³⁴ The language also does not mention the broad protection of religious exercise like that of Michigan's RFRA.¹³⁵

Anti-discrimination laws in Florida do not specifically make reference to discrimination based on sexual orientation. However, due to Florida's recent acceptance of same-sex marriage, this is likely to change.¹³⁶ The government has already recognized an exception for religious-based exemptions to generally applicable rules. Doctors and hospitals are allowed to refuse and refer their patients to other doctors and hospitals as it relates to offering abortion services.¹³⁷ States have recognized that some doctors—though they offer services to the public—fight the same moral and professional dilemma that many religious business owners face.¹³⁸ In many of the cases that have been publicized, it is not that the business owners refuse services to gay and lesbian couples in daily business, but when it comes to the promotion of the same-sex couple's lifestyle, they should have the right to say no.¹³⁹ In the case regarding the New York farm, although the owners did not agree with the union of gays and lesbians, they offered the couple the option to have their reception there, just not the wedding.¹⁴⁰ How far are state and local governments going to push private local businesses when it involves a legally recognized right to refuse to act in a manner that more than substantially burdens their sincere religious beliefs?

The United States Court of Appeals for the Sixth Circuit, in *Ward v. Polite*,¹⁴¹ addressed how to deal with the clash between services provided by a university

(1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

(a) Is in furtherance of a compelling governmental interest; and

(b) Is the least restrictive means of furthering that compelling governmental interest.

(2) 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.

Id.

134. See, e.g., *Elane Photography*, 309 P.3d at 76. (The NMRFA "statute is violated only if a 'government agency' restricts a person's free exercise of religion.").

135. See, e.g., Michigan Religious Freedom Restoration Act, H.B. 5958 (Mich. 2014).

136. See *Brenner v. Scott*, No. 4:14CV107, 2015 WL 44260, at *1 (N.D. Fla. Jan. 8, 2015).

137. See Jason Green, *Refusal Clauses and the Weldon Amendment: Inherently Unconstitutional and a Dangerous Precedent*, 26 J. LEGAL MED. 401, 402 (2005) ("The law shields health care providers who refuse to provide abortion or contraception services. The legislation must be interpreted to balance the pharmacist's beliefs and patient's medical needs, while maintaining constitutional protections and limitations set forth by the United States Supreme Court.").

138. *Id.* at 401.

139. See Mark Kellner, *Here's Why Your State May be Expanding Religious Freedom Protections This Year*, DESERET NEWS NATIONAL (Jan. 16, 2015), <http://national.deseretnews.com/article/3269/Here7s-why-your-state-may-be-expanding-religious-freedom-protections-this-year.html#Fly7DVe3M18TTh3X.99>.

140. Bailey, *supra* note 77.

141. *Ward v. Polite*, 667 F.3d 727, 730–32 (6th Cir. 2012).

counseling program and a student's sincere, religious beliefs.¹⁴² The university had a policy that prohibited discrimination based on sexual orientation.¹⁴³ In *Ward*, a counseling student was expelled from the clinical program because the student refused to counsel a gay client.¹⁴⁴ The student agreed to counsel a gay client, but due to her religious beliefs and convictions, she asked that the school refer the client to another student.¹⁴⁵ She also agreed to take the case, but if the counseling session turned more towards relationship advice, she asked that the school transfer the client to another student.¹⁴⁶ However, the school refused to accommodate the student's request.¹⁴⁷ The student brought suit under the Fourteenth Amendment.¹⁴⁸ The Sixth Circuit's analysis began with determining that although there was a code of ethics, the industry allows for licensed clinicians to refer clients to others.¹⁴⁹ The court reasoned that if regular clinicians can refer clients, the student should be able to do the same.¹⁵⁰ This idea of refuse but refer has not been recognized across the board.¹⁵¹

There has been a comparison between state RFRAs and racial discrimination and segregation.¹⁵² The "mini RFRAs" are used not to discriminate but to place extra protection on the constitutional right to religious freedom.¹⁵³ Racial discrimination and segregation were based on the idea that certain races should not be treated as ordinary citizens but rather as members of an inferior and subordinate group.¹⁵⁴ In the conflict between religious freedom and the right to marry granted to same-sex couples, same-sex couples are not treated as inferior or subordinate.¹⁵⁵ Jim Crow laws—separate but equal—are not the same as allowing a religious exemption to private businesses when forcing them to offer certain, specialized services goes against their sincere religious beliefs.¹⁵⁶ It is only a balance of rights—one of which is already recognized by the United States Constitution—between the right to *freely*

142. *Id.*

143. *Id.* at 729.

144. *Id.* at 731–32.

145. *Id.* at 730–32.

146. *Id.*

147. *Ward*, 667 F.3d at 730–32.

148. *Id.* ("Considerable evidence, as also shown, suggests that the ethics code *permits* values-based referrals According to . . . some of the writings of the university's expert . . . such referrals are not out of custom but have become de rigueur.")

149. *Id.* at 739.

150. *Id.*

151. *Id.* at 741–42.

152. See Peter Dolan, *An Uneasy Union: Same-Sex Marriage and Religious Exemption in Washington State*, 88 WASH. L. REV. 1119, 1147–48 (citing Robin F. Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* 77, 101 (Douglas Laycock et al. eds., 2008)) (It is not clear that "parallels between racial discrimination and discrimination on the basis of sexual orientation . . . are equivalent in this context. The religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination.")

153. *Id.*

154. *Id.* at 1148.

155. *Id.* ("In the context of same-sex marriage, there is a definite public benefit in balancing the rights of same-sex couples and the right to religious freedom for wedding service providers, as both rights are considered fundamental and deserve heightened protection.")

156. See *supra* Part IV (collecting cases dealing with specific, personal, and specialized services that relate to the *promotion* of same-sex marriage).

exercise one's religious beliefs and the rights of same-sex couples to marry.¹⁵⁷ Furthermore, the fight against segregation had to do with services dealing with actual public accommodations in restaurants, hotels, hospitals, and police brutality.¹⁵⁸ In this instance, the services are personal and creative, such as wedding planners, church banquet halls, and photography. The proposition is to limit the religious exemption only to allow certain private business owners the right to refuse "special" services in situations that compromise their religious beliefs.

Possible limitations might be limiting the exemption to only privately owned businesses that offer creative, personal services such as wedding services, as opposed to business that offer basic services to the public.¹⁵⁹ Further, the business owners must show that offering the service in question would actually *promote* something that is in direct conflict with a *sincere* religious belief. For example, a restaurant owner would not be able to refuse to serve food to a same-sex couple because providing a regular meal does not promote anything other than a good meal—regardless of any religious convictions.¹⁶⁰ Finally, another limitation would require the business owners that satisfy the previous limitations, if he or she refuses to offer a specific service, to refer the potential customer to someone who will provide the services and who is equally qualified. The language of the bill would have to be very specific to ensure that there is a balance of rights.

Does a business owner have the right to decide which jobs to take and which to turn down? It should be a matter of a personal business decision to decide which jobs to take and which jobs to pass on. Should the government be forcing small, private business owners to "speak the government's message" by forcing them to take any and all customers no matter the cost?¹⁶¹ Will small, private business owners be forced to mark their seal of approval and their brand on something that directly conflicts with their sincerely held religious beliefs? Would it be better if religious business owners refuse service by claiming to be unavailable in an effort to dodge potential lawsuits? Why must business owners be forced to suppress their religious beliefs and only reveal them at church on Sunday morning, in spite of the constitutional guarantee of religious freedom? These are all questions that are being raised across the nation. All of these questions can be answered if Florida adopts legislation such as Mississippi and Indiana, to provide adequate balance and protection to religious, private business owners.¹⁶²

VII. CONCLUSION

There is no doubt that same-sex couples deserve protection and should be free from the harshness of discrimination. However, the religious argument cannot be

157. See Laycock & Berg, *supra* note 24.

158. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 245–48 (1964).

159. Wedding services is only a limited example of a business that may fall under the exemption if allowed.

160. Similarly, a masseuse would not be able to refuse to offer massage services to a same-sex couple because the massage, without more, does not promote an idea that conflicts with a sincerely held religious belief.

161. See Elane Photography, LLC v. Willock, 309 P.3d 53, 79 (N.M. 2013).

162. See Mississippi Religious Freedom Restoration Act, *supra* note 112.

completely ignored. To do so would undermine the very thing the Framers of the Constitution sought to protect in the First Amendment to the Constitution. As same-sex marriage is formally recognized, and some local governments are beginning to institute public accommodation laws preventing discrimination based on sexual orientation, the Florida Legislature must begin to formulate a way to reconcile differences on both sides. “Mini RFRAs” can provide protection for those who hold sincere religious beliefs.¹⁶³ They can also serve as the legal counterbalance to the ever-growing evolution of society and the norms we accept. Adopting such legislation will help to ensure a balance of rights so that no one is forced or compelled by the government to promote something that substantially frustrates his or her core beliefs. This will keep Florida and other state legislatures ahead of this rippling wave of tension erupting across the nation.

163. *Id.*