Religious Freedom Legislation in Texas Takes Aim at Same-Sex Marriage

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INTRODUCTION

The Religious Freedom Restoration Act (RFRA) requires that the government reach a high standard in order to burden an individual's free exercise of religion. Texas has its own RFRA, and since its inception, most RFRA-related bills in Texas have provided exemptions for individuals with sincerely held religious beliefs. The legalization of same-sex marriage in the United States in *Obergefell v. Hodges* changed the nature of RFRA-related legislation in Texas.[1] Many bills from the 2017 Texas

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legislative session now address same-sex marriage and create exemptions for individuals who oppose same-sex marriage based on religious beliefs.[2] The number of RFRA-related bills introduced during the 2017 legislative session also increased. This increase is due to the addition of same-sex marriage RFRA bills to the usual RFRA bills and because the success of the original plaintiff in *Burwell v. Hobby Lobby* has bolstered the strength of the RFRA doctrine and sparked more RFRA-related legislation. Recent Texas RFRA-related legislation includes the Pastor Protection Act and the Adoption Bill, the latter of which has created significant controversy and is potentially vulnerable to constitutional and other legal challenges.[3] Barring a change in state leadership, Texans can expect to see more RFRA-related bills addressing same-sex marriage in the future.

I. THE ROAD TO TEXAS'S RFRA

The Religious Freedom Restoration Act (RFRA) doctrine has found a comfortable home in the state of Texas. But the RFRA doctrine took a winding path before coming to rest in Texas in its current form. RFRA began as a national response to the unpopular holding in *Employment Division v. Smith* in 1990.[4] The Supreme Court held in *Smith* that the state of Oregon could deny unemployment benefits to a Native American fired for using peyote (an illegal, hallucinogenic plant) during a tribal ritual, and that the plaintiff was not exempt from a neutral law of general applicability even if it conflicted with his religious beliefs.[5] *Smith* sent shockwaves around the nation, with many people feeling that the ruling had impermissibly imposed on the rights guaranteed by the Free Exercise Clause of the First Amendment.[6] Religious groups and civil rights organizations became unlikely bedfellows and lobbied Congress to pass RFRA to restore the religious liberties that many feared were lost in *Smith*.[7] The U.S. Senate voted astoundingly 97–3 in favor of RFRA, and the Act was

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who encouraged my interest in Texas RFRA legislation and helped guide my research and writing. Many thanks to the editors TJCLCR for their feedback and diligent editing.

1 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

2 Because of the high number of RFRA-related bills that are introduced in the Texas legislature and in order to create a more in-depth analysis of the enacted bills, this paper will focus primarily on the Texas, RFRA-related legislation that successfully became law.

3 S.B. 2065, 84th Leg., Reg. Sess. (Tx. 2015) (codified at TEX. FAM. CODE § 2.601; 2.602) (known as "The Pastor Protection Act"); H.B. 3859, 85th Leg., Reg. Sess. (Tx. 2017) (codified at TEX. HUM. RES. CODE § 45.004(1-2); 45.005) (hereinafter the "Adoption Bill").

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

5 *Id.* at 890.

6 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .").

7 CHRISTOPHER EISGRUBER & LAWRENCE SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).

signed into law by President Bill Clinton in 1993.[8]

The Act states that its purpose is "to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . ."[9] *Sherbert* and *Yoder* constitute some of the country's most protective holdings on religious liberties.[10] The strict scrutiny standard, as applied in *Sherbert* and *Yoder*, requires that the state have a compelling governmental interest in order to burden an individual's religious convictions.[11] The 1993 federal RFRA marked the reintroduction of the strict scrutiny test.[12] RFRA adopts the same language as in *Sherbert* and *Yoder*—prohibiting the government from substantially burdening a person's free exercise of religion, unless 1) the agency demonstrates that this is in furtherance of a compelling state interest test, and 2) is it the least restrictive means of furthering that interest.[13]

Despite the Act's broad language, many were uncertain of its practical application. The statute was tested in *City of Boerne v. Flores*, when the Archbishop of San Antonio alleged that the denial of a permit to enlarge a church violated RFRA by imposing a substantial burden on the exercise of his religion without a compelling state interest.[14] The Supreme Court in *City of Boerne* struck down RFRA as it applied to the states as an unconstitutional use of the enforcement power of the Fourteenth Amendment.[15] The Court clarified that although Congress may enact legislation by virtue of Section Five of the Fourteenth Amendment to enforce constitutional rights (here, the First Amendment's Free Exercise Clause), in this case, Congress had exceeded its enforcement power by prescribing what constitutes a constitutional violation.[16] Although RFRA as it applies to states was invalidated in *Smith,* the federal RFRA was held constitutional in *Gonzales v. O Centro Espirita* and remains intact today.[17]

After the Supreme Court invalidated RFRA as it applied to the states in *City of Boerne*, many states hastened to draft state RFRAs (termed "little RFRAs") of their own.[18] Texas enacted its state RFRA in 1999

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[8] *See* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[9] 42 U.S.C. § 2000bb(b)(1) (1993) (referencing Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972)).

[10] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2791 (2014).

[11] *Sherbert*, 374 U.S. at 398; *Yoder*, 406 U.S. at 205.

[12] 42 U.S.C. § 2000bb-1.

[13] *Id.*; *Sherbert*, 374 U.S. at 398; *Yoder*, 406 U.S. at 205.

[14] City of Boerne v. Flores, 521 U.S. 507, 512 (1997).

[15] *Id.* at 508 ("Legislation which alters the Free Exercise Clause's meaning cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.").

[16] *Id.*

[17] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006).

[18] *State Religious Freedom Restoration Acts*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/S7ZH-TEJY].

and is one of twenty-one states to do so.[19] Most state RFRAs, including Texas's, track the same language as the federal RFRA and impose the same strict scrutiny standard.[20]

II. RELIGIOUS FREEDOM LEGISLATION IN TEXAS

After Texas's RFRA was passed in 1999, relatively few RFRA bills were introduced in Texas in the early years and an even smaller number of these bills became law.[21] The few early RFRA-related bills passed without much incident and were largely devoid of controversy. For example, Texas used RFRA language to amend the Education Code to provide additional leeway for students to receive excused absences for religious holidays.[22] Additional Texas RFRA legislation included an amendment to the property code that prohibits a property owner's association from adopting covenants prohibiting residents from displaying religiously motivated displays.[23] The legislature also protected the religious beliefs of non-Christians in creating criminal penalties for the intentional mislabeling of halal food, which is food prepared in accordance with Islamic religious requirements.[24] This law is not technically RFRA legislation since no government action burdened the individual's free exercise, except perhaps the lack of regulation. Nonetheless, it did protect the free exercise of religion, which was the underlying purpose of RFRA. The period following the establishment of the Texas RFRA was a time of expanding religious liberties, and these unoffending RFRA bills passed without much opposition.

A 2009 Texas RFRA-related law created an exemption from the required meningitis vaccine for students with sincerely held religious beliefs in public institutions of higher education.[25] The vaccine exemption bills caused some controversy—after all, unvaccinated students can increase the spread of meningitis, becoming a public health issue.[26] Recall

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[19] TEX. CIV. PRAC. & REM. CODE § 110.001 *et seq.* (2017); *State Public Accommodation Laws,* NATIONAL CONFERENCE OF STATE LEGISLATURES (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx [https://perma.cc/SL62-GXS5].

[20] CIV. PRAC. & REM. § 110.006.

[21] CIV. PRAC. & REM. § 110.001. *See Bill Search,* TEXAS LEGISLATURE ONLINE, http://www.capitol.state.tx.us/Search/BillSearch.aspx.

[22] *See* H.B. 217, 76th Leg., Reg. Sess. (Tex. 1999); H.B. 256, 78th Leg., Reg. Sess. (Tex. 2003).

[23] H.B. 1278, 82d Leg., Reg. Sess. (Tex. 2011) (amending the property code to provide for display motivated by sincere religious beliefs to be subject to limitations on offensive language and size).

[24] H.B. 470, 78th Leg., Reg. Sess. (Tex. 2003).

[25] H.B. 4189, 81st Leg., Reg. Sess. (Tex. 2009) (meningitis vaccine exemption); H.B. 62, 83d Leg., Reg. Sess. (Tex. 2013) (amending meningitis vaccine exemption).

[26] *See* Elizabeth Hatch, *To Vaccinate or Not to Vaccinate?: The Challenges and Benefits of the Implementation of the Jamie Schanbaum Act,* 15 TEX. TECH ADMIN. L.J. 187, 200 (2013); *see also* Reeve Hamilton, *Meningitis Vaccine Mandate Could Get Tweaked in 2013,* THE TEX. TRIB. (Aug.

the Texas RFRA strict scrutiny standard—prohibiting the government from substantially burdening a person's free exercise of religion unless 1) the government demonstrates that its action is in furtherance of a compelling state interest and 2) it is the least restrictive means of furthering that interest.[27] It can be assumed with most RFRA-related bills that a citizen's religious beliefs are or will be burdened by governmental action, and that burden prompts RFRA legislation seeking an exemption for those with sincerely held religious beliefs. To require all students to receive the meningitis vaccine regardless of religious beliefs would burden some individuals' free exercise of religion. The government can only substantially burden a person's free exercise of religion if it first shows that the government has a compelling state interest in requiring meningitis vaccinations.[28] The first prong is easily proven—the government has an incontrovertible interest in preventing the spread of meningitis by requiring the meningitis vaccine.

The second prong requires the state to prove that requiring mandatory meningitis vaccines without religious exceptions is the least restrictive means of furthering that interest.[29] This prong includes fact-specific inquiries such as the necessity of the law and the method that must be imposed to achieve that interest. In considering the effectiveness of the vaccine, the state would reasonably consider the "herd immunity phenomenon," in which most students getting vaccinated protects the small number in the population who are not or cannot be vaccinated.[30] In application, if relatively few students claim a religious belief exemption, the overwhelming majority that are vaccinated would theoretically protect the few unvaccinated from contracting meningitis.[31] Many states allow for non-medical vaccine exemptions, including exemptions based on religious beliefs, but this does reduce the effectiveness of the "herd immunity," particularly if a large number of students claim an exemption.[32] By providing for this exemption based on religious beliefs, Texas has concluded that the state can satisfy its indisputable interest in preventing the spread of meningitis through less restrictive means than refusing exemptions for religious beliefs. Should Texas have concluded that requiring meningitis vaccines without religious exemptions was the least restrictive means of preventing the spread of meningitis, this would have satisfied the RFRA strict scrutiny standard required to burden an individual's free exercise of religion.

10, 2012), http://www.texastribune.org/2012/08/10/meningitis-vaccine-mandate-could-get-tweaked-2013/ [https://perma.cc/EE89-7WNJ].

[27] CIV. PRAC. & REM. § 110.003.

[28] *Id.*

[29] *Id.*

[30] *See* Hatch, *supra* note 26.

[31] *Id.*

[32] *See, e.g.*, Majorie A. Shields, *Power of Court or Other Public Agency to Order Vaccination over Parental Religious Objection*, 94 A.L.R. 5th 613 (2001).

A. *Hobby Lobby*'s Effects on RFRA Legislation in Texas

The success of Hobby Lobby in *Burwell v. Hobby Lobby* bolstered the power of the RFRA doctrine, and has, in turn, encouraged more RFRA-related legislation.[33] In 2014, the religiously founded Hobby Lobby corporation challenged the 2010 Patient Protection and Affordable Care Act's preventative health services, covered under the "employer mandate," as a violation of RFRA, arguing that it would violate Hobby Lobby's religious beliefs to facilitate access to certain contraceptive drugs.[34] The Supreme Court ultimately held that RFRA granted an exemption for closely held, for-profit corporations if the corporation raised religious objections.[35]

In making its case against Hobby Lobby's RFRA claims, the government argued that the mandate served a compelling interest in ensuring that all women have access to FDA-approved contraceptives.[36] The Supreme Court agreed with this compelling state interest, but held that the government did not meet the requisite high standard of the least restrictive means prong.[37] The federal government failed to prove the second prong and therefore did not meet the RFRA threshold required to burden an individual's free exercise of religion.[38]

This case was instrumental in several ways. By ruling that closely-held corporations are entitled to RFRA protections, the Supreme Court significantly expanded the RFRA doctrine beyond free exercise protections to individual persons.[39] Justice Ginsburg in her dissent admonished this expanded reach of First Amendment protections of free exercise to corporations or "legal entities."[40] *Hobby Lobby*'s RFRA expansion is limited to closely held, for-profit corporations, but its expansion nonetheless makes RFRA an increasingly attractive law, both at the national level and in states with state RFRAs.[41] This expanded power helps explain the spike in religious freedom legislation in Texas following *Hobby Lobby*. During the 2017 regular legislative session alone, thirty-three bills were introduced in Texas that relate to religious freedom.[42] This is more than double the number of religious freedom-related bills that were

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[33] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2755 (2014).

[34] *Id.* at 2759. *See also* 42 U.S.C. § 300gg-13(a)(4) (requiring employers providing health insurance to their employees to provide "additional preventive care" for women).

[35] *Burwell*, 134 S. Ct. at 2759.

[36] *Id.* at 2779.

[37] *Id.* at 2780.

[38] *Id.*

[39] *Id.* at 2774.

[40] *Id.* at 2794 (Ginsburg, J., dissenting).

[41] Gregory P. Magarian, Hobby Lobby *in Constitutional Waters: Two Life Rings and an Anchor*, 67 VAND. L. REV. EN BANC 67, 76 (2014).

[42] *Bill Search*, TEXAS LEGISLATURE ONLINE, http://www.capitol.state.tx.us/Search/BillSearch.aspx [https://perma.cc/RXY8-9JUG] (reflecting selections of "Religion (I0646)" under "Subject" and "85(R) - 2017" under "Legislature").

introduced in 2011, and a significant increase from the twenty-two introduced in both 2013 and 2015.[43] If the trend continues, Texans can expect even more RFRA-related bills introduced in Texas's 2019 legislative session.

B. Public Accommodation Protections

RFRA-related bills that offer exclusions for those with sincerely held religious beliefs are particularly susceptible to running afoul of Title II of the Civil Rights Act of 1964, or the additional public accommodation laws implemented on a state-by-state basis.[44] This is particularly true of post-*Obergefell* laws, many of which provide exemptions for those whose sincerely held religious beliefs conflict with same-sex marriage.[45] The Civil Rights Act of 1964, passed during the segregationist era, includes Title II, which prohibits discrimination of protected classes in places of public accommodation such as restaurants or hotels.[46] Title II provides that all persons "shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations [sic] without discrimination on the ground of race, color, religion, or national origin."[47] The Civil Rights Act has been an instrumental tool in reducing discrimination, particularly racial discrimination against African-Americans in the public sector. Private clubs and other establishments are exempt from these provisions because they are not open to the public and therefore are not places of public accommodation.[48]

Sexual orientation and gender identification are not included in this list of protected classes of people in the Civil Rights Act.[49] This is a vestige of the time, since LGBT discrimination concerns and certainly marriage equality would not take center-stage for several decades after the passage of the Civil Rights Act. Since the Civil Rights Act, forty-five of the fifty states have enacted public accommodation laws that prohibit discrimination against groups not covered by the Act, including marital status, sexual orientation, gender identity, and age.[50] Of the forty-five states with such public accommodation laws, twenty-two states prohibit

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[43] *Bill Search*, TEXAS LEGISLATURE ONLINE, http://www.capitol.state.tx.us/Search/BillSearch.aspx [https://perma.cc/4G3Q-KJ9N] (reflecting selections of "Religion (I0646)" under "Subject" and "82(R) - 2011" under "Legislature"). The same search may be performed for the 83rd (2013) and 84th (2015) regular legislative sessions.

[44] *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2564 (2015).

[45] *See id; see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

[46] Civil Rights Act of 1964, 42 U.S.C. § 2000a (2012).

[47] *Id.* § 2000a(a).

[48] *Id.* § 2000a(e).

[49] *Id.* § 2000a(a).

[50] NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 18.

discrimination based on sexual orientation, and nineteen prohibit discrimination based on gender identity.[51] Five states—Alabama, Georgia, Mississippi, North Carolina, and Texas—do not have public accommodation laws, besides those for persons with disabilities.[52] Nonetheless, the Civil Rights Act of 1964 applies to all states, meaning that places of public accommodation in Texas cannot discriminate against members of the Act's protected groups.[53] However, there is no protection in Texas for groups not listed in the Civil Rights Act.

As a state that does not legally prohibit discrimination based on sexual orientation, many Texas businesses are within their legal rights to refuse business to LGBT individuals based on their sexual orientation.[54] Several Texas cities have passed anti-discrimination ordinances covering sexual orientation, but the penalties are limited to a few hundred dollars, and they do not provide the strict protections that statewide anti-discrimination laws could.[55] Because sexual orientation is not a protected class in the Civil Rights Act or at the Texas state level, LGBT individuals in Texas are particularly vulnerable to being denied services or opportunities by those claiming religious opposition to same-sex marriage. Religious opposition to same-sex marriage has sparked RFRA legislation, as well as litigation, in Texas.

Masterpiece Cakeshop is a pending Supreme Court case that has garnered national attention and is a quintessential example of the intersection of discrimination claims by LGBT individuals and individuals claiming protections based on religious opposition to same-sex marriage.[56] *Masterpiece* involves a bakery owner in Colorado who refused to bake a cake for a same-sex couple's wedding because same-sex marriage conflicts with the baker's sincerely held religious beliefs.[57] Specifically, *Masterpiece* involves Colorado's public accommodations act protecting LGBT individuals from discrimination and the bakery's free exercise of religion and free speech defenses.[58] Although the defendant, Masterpiece Cakeshop, relies on constitutional defenses, it does not rely on RFRA protections.[59] This is because Colorado does not have a state

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[51] *Id.*

[52] *Id.*

[53] Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) (2012) (prohibiting discrimination on the grounds of "race, color, religion, or national origin.").

[54] Alexa Ura et al., *Comparing Nondiscrimination Protections in Texas Cities*, THE TEX. TRIB. (June 9, 2016), https://www.texastribune.org/2016/06/09/comparing-nondiscrimination-ordinances-texas [https://perma.cc/W9JA-SQNL].

[55] *Id.*; John Wright, *About Those Nondiscrimination Ordinances. . .*, THE TEX. OBSERVER (Aug. 26, 2015), https://www.texasobserver.org/about-those-nondiscrimination-ordinances [https://perma.cc/E6PX-ZRAW].

[56] Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Col. App. 2015), *cert. denied sub nom.* Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

[57] *Id.* at 276–77.

[58] *Id.* at 277; *see* Colorado Anti-Discrimination Act (CADA), Colo. Rev. Stat. § 24-34-301 (2016).

[59] *Masterpiece Cakeshop, Inc.*, 370 P.3d at 277.

RFRA, and the federal RFRA as it applied to the states was struck down in *City of Boerne v. Flores*.[60] The State of Colorado thus represents the inverse of Texas's legal protections—Colorado, with its expansive public accommodation laws for LGBT individuals and no state RFRA, and Texas, with no public accommodation laws but a fiercely protected state RFRA.[61] Despite these differences, *Masterpiece* helps outline the complexities of these competing interests—protecting religious beliefs and prohibiting discrimination. This frequent collision of competing interests has occurred in both federal and state courts, including in Texas. The Supreme Court's holding in *Masterpiece* will help indicate the prioritization of these two interests and will in turn shape lower federal courts' and state courts' future holdings.

C. Texas's Initial Legislative Response to *Obergefell*

Since Texas RFRA's inception, most RFRA bills in Texas have carved out exceptions for those with sincerely held religious beliefs. Senate Bill 2065, introduced in 2015, was the first *Obergefell*-related bill in Texas, marking the shift to RFRA legislation addressing religious opposition to same-sex marriage.[62] Senate Bill 2065, known as the "Texas Pastor Protection Act," prohibits the state from requiring clergy or any staff member of a religious institution to provide services, including facilities and goods, to a marriage if that action violates the organization's or individual's sincerely held religious belief.[63] The Pastor Protection Act was introduced in April 2015, the same day the Supreme Court heard oral arguments in *Obergefell*.[64] The overlapping timeframe of these two legal processes is arguably not a coincidence; the Texas legislature plausibly wanted to create a legal safety net for religious congregations should same-sex marriage become the law of the land. The Texas Legislature passed the bill, and Senate Bill 2065 become effective immediately in June 2015.[65]

The bill was viewed by many as an essential piece of legislation needed to protect pastors' rights of conscience.[66] Texas Governor Greg Abbott signed the bill to much fanfare saying, "Religious leaders in the state of Texas must be absolutely secure in the knowledge that religious

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[60] City of Boerne v. Flores, 521 U.S. 507 (1997).

[61] Colo. Rev. Stat. § 24-34-601.

[62] Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

[63] S.B. 2065, 84th Leg., Reg. Sess. (Tex. 2015).

[64] Mary Tuma, *Bill of the Week: Senate Bill 2065*, THE AUSTIN CHRONICLE (May 8, 2015), https://www.austinchronicle.com/news/2015-05-08/anti-lgbt-religious-freedom-laws-piling-up-at-the-lege [https://perma.cc/65B3-HAQM].

[65] S.B. 2065, 84th Leg. Reg. Sess. (Tex. 2015).

[66] Liz Crampton, *Abbott Signs "Pastor Protection Act" Into Law*, THE TEX. TRIB. (June 11, 2015), https://www.texastribune.org/2015/06/11/gov-abbott-signs-pastor-protection-act [https://perma.cc/GQQ7-7SWJ].

freedom is beyond the reach of government or coercion by the courts."[67] The bill did not garner much criticism from civil rights organizations, who generally agreed that pastors should be exempt as religious leaders.[68] Gay rights organizations and civil rights groups unsuccessfully advocated for an amendment to the Act that would have limited the protection to pastors or clerics "acting in that capacity [as a pastor or cleric]".[69] It is unclear whether the exclusion of this "capacity" limitation has had any significant effects, however.

Looking at the Pastor Protection Act as a whole, it is unclear how much protection the bill actually provides. A pastor's right of refusal is already protected by the First Amendment, namely by the Free Exercise and Free Speech Clauses. But Texas Governor Abbott said that "pastors now have the freedom to exercise their First Amendment rights."[70] Is the First Amendment insufficient, in itself, to protect pastors who refuse to officiate a same-sex wedding? What additional protection is offered by Senate Bill 2065?

A pastor's free speech and free exercise rights are guaranteed by the First Amendment, and a pastor's actions cannot be subject to discrimination claims because his or her actions do not fall under the purview of public accommodation laws.[71] Texas does not have a public accommodation law, except for individuals with disabilities, and the Civil Rights Act of 1964 does not include sexual orientation as a protected class.[72] Yet, even if Texas had a public accommodation law protecting sexual orientation, religious and private organizations are exempt from nearly all federal and state public accommodation laws.[73] In states with public accommodation laws that prohibit discrimination based on sexual orientation, like Colorado or Connecticut, a law like the Pastor Protection Act would be unnecessary because pastors and religious institutions are not places of public accommodation and, therefore, cannot fall under the purview of public accommodation laws.[74] Because there are no federal protections for sexual orientation and because religious institutions are not subject to state-enacted LGBT anti-discrimination laws, same-sex couples denied

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67 *Id.*

68 Tuma, *supra* note 64.

69 *Id.*

70 Crampton, *supra* note 66.

71 *See infra* note 76.

72 Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) (2012).

73 *Id.* ("The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment."); Colo. Rev. Stat. § 24-34-601 (2016) ("'Place of public accommodation' shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes."); Conn. Gen. Stat. § 46a-81p (1991) (prohibitions on sexual orientation discrimination ". . . shall not apply to a religious corporation, entity, association, educational institution or society with respect to the employment of individuals to perform work connected with the carrying on by such corporation, entity, association, educational institution or society of its activities, or with respect to matters of discipline, faith, internal organization or ecclesiastical rule, custom or law which are established by such corporation, entity, association, educational institution or society.").

74 *Id.*

services by these religious institutions do not have a cause of action against religious institutions.

Should a new state law somehow provide legal grounds for a plaintiff to challenge a pastor's right to refuse to officiate a same-sex wedding ceremony, the pastor would likely claim both Free Exercise and Freedom of Speech protections. In refusing to officiate the wedding, the pastor is both withholding his or her speech, which is protected under the First Amendment, and is exercising freedom of religion by refusing to officiate the wedding, which is also protected under the First Amendment.[75] Ultimately, there is no law under which to challenge the pastor's action and should there be, First Amendment constitutional protections would kick in and prevent such a suit's success. Since there are already safety nets in place to protect a pastor who refuses to officiate a same-sex wedding, the benefit of the Pastor Protection Act is questionable. Arguably, the primary benefit of the Act is a concrete, albeit redundant, reinforcement to existing legal and constitutional protections with the intent to shore up any doubt of this right of refusal.

III. WHERE WE ARE NOW: THE ADOPTION BILL

Prior to *Obergefell,* nearly all Texas RFRA-related bills provided exemptions for those with sincerely held religious beliefs, and now, many Texas RFRA bills relate specifically to exemptions for those with religious objections to same-sex marriage.[76] The reverberations of *Hobby Lobby* and *Obergefell* were felt during Texas's most recent regular legislative session, with a distinct change in both the volume and type of RFRA-related bills.[77] Bolstered by Hobby Lobby's success in 2014, RFRA never looked so powerful and became an obvious defense for those concerned with the effects of *Obergefell.*[78] More than a third of the thirty-three RFRA-related bills involved exemptions or protections for those with sincerely held religious objections to same-sex marriage.[79]

Of the thirty-three religious freedom bills that were introduced during the 2017 legislative session, only three became law.[80] One of these

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[75] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881 (1990) ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . ." These claims are known as "'hybrid' decisions"); *see also* Cantwell v. Connecticut, 310 U.S. 296 (1940); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[76] *See* TEXAS LEGISLATURE ONLINE, *supra* note 42.

[77] *Id.*

[78] Magarian, *supra* note 41.

[79] *Id.*

[80] *See* H.B. 3859, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 897, 85th Leg., Reg. Sess. (Tex. 2017); S.B. 24, 85th Leg., Reg. Sess. (Tex. 2017). *See also Legislative Statistics,* TEXAS

RFRA bills was House Bill 897, which amended the tax code to exempt churches, religious organizations, and private schools from taxes and fees imposed on the sale of vehicles owned by the organizations and also exempted such organizations from annual vehicle registration fees.[81] The other, Senate Bill 24, amended a chapter on discovery to exempt religious leaders from disclosing evidence from a sermon in a civil or administrative proceeding where the government is a party.[82]

The third RFRA bill that successfully became law during the 2017 legislative session, House Bill 3859, was one of the most highly contested bills of the session and garnered nationwide media attention.[83] House Bill 3859 (the "Adoption Bill") protects child welfare agencies from adverse action if a provider declines to place a child with, or in the guardianship and care of, a child welfare service, if it "conflict[s] with [sic] the provider's sincerely held religious beliefs."[84] The Adoption Bill also protects adoption and foster agencies who may decline to provide or refer a person in their care to abortion or contraception services if doing so would conflict with the agencies' sincerely held religious beliefs.[85] The Adoption Bill's effects on religious freedom cut both ways; the bill gives greater deference to religious foster and adoption agencies to choose where to place the children in their care, but also disadvantages others who may be turned away by these religious agencies because of their lifestyles or religious beliefs.

Proponents of the Adoption Bill say that this bill allows religious adoption agencies to comply with their sincerely held religious beliefs and thus expands religious freedom. Jonathan Saenz, President of Texas Values, praised the bill in saying, "the Freedom to Serve Children Act (HB 3859) is a major victory for children and for religious liberty in Texas. Faith-based providers across Texas are now free to recruit foster families and place children with loving families."[86] Under the law, agencies who deny service based on religious beliefs are required to refer the prospective parents to another service provider.[87] Proponents say that this

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LEGISLATURE ONLINE (May 8, 2018), http://www.capitol.state.tx.us/Reports/Report.aspx?ID=legislativestatistics [https://perma.cc/N7V5-SN9T]. This passage rate of religious liberty bills is on par with the overall number of bills introduced and those that became law.

[81] H.B. 897, 85th Leg., Reg. Sess. (Tex. 2017).

[82] S.B. 24, 85th Leg., Reg. Sess. (Tex. 2017).

[83] Lindsey Bever, *Texas bill allows child agencies to deny services based on religion. Some say it targets LGBT families.*, THE WASH. POST (May 22, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/05/22%20/texas-bill-allows-child-agencies-to-deny-services-based-on-religion-some-say-it-targets-lgbt-families [https://perma.cc/SE2Y-G9Q6].

[84] H.B. 3859, 85th Leg., Reg. Sess. (Tex. 2017) (codified at TEX. HUM. RES. CODE §§ 45.004(1)-(2), 45.005) (referred to as the "Adoption Bill") This bill's predecessors were two 2015 bills, also entitled "Protection of Rights of Conscience for Child Welfare Services Providers," containing nearly identical wording but which never made it to a vote. *See* H.B. 3864, 84th Leg., Reg. Sess. (Tex. 2015); S.B. 1935, 84th Leg., Reg. Sess. (Tex. 2015).

[85] H.B. 3859, 85th Leg., Reg. Sess. (Tex. 2017).

[86] *Victory! Gov. Abbott Signs Religious Liberty Bill, Freedom to Serve Children Act*, TEX. VALUES (June 15, 2017), https://txvalues.org/2017/06/15/victory-gov-abbott-signs-religious-liberty-bill-freedom-to-serve-children-act [https://perma.cc/X7H2-6EQA].

[87] TEX. HUM. RES. CODE § 45.005(c)(1)-(3) (2017).

provision in the law addresses discrimination concerns since prospective adopters denied services will be referred to and served by non-religious providers.[88]

The bill also serves a pragmatic purpose. Texas has been working to expand its adoption and foster agencies amongst increased need, and faith-based adoption and foster agencies are seen by some as a potential solution.[89] Texas government officials have courted such agencies, and Lieutenant Governor Dan Patrick and Texas First Lady Cecilia Abbott have publicly urged religious groups to participate in foster and adoption programs.[90] The protections afforded by the Adoption Bill help bolster support from these religious agencies and give the agencies confidence that their religiously-based placements will not be legally challenged.[91] Similar legislation protecting religious foster and adoption agencies has been passed in Michigan, North Dakota, South Dakota, and Virginia.[92] However, only South Dakota's bill is as sweeping as Texas's in extending these protections to state-funded agencies.[93]

Not all states have created protections for religious adoption agencies. Places such as Massachusetts, Illinois, San Francisco, and Washington, D.C. have faced backlash for refusing to create protections for religious agencies that refuse to consider same-sex couples.[94] Rather than comply with the requirement to serve same-sex adopters, Catholic Charities, a nationwide child welfare agency, has closed its adoption services in those areas.[95] In passing this bill, Texas avoided offending religious agencies that provide adoption and foster care services and whose potential departure would be problematic to the state. The law's opponents ask: at what cost?

Opponents have criticized the bill, saying that it disadvantages prospective LGBT adoptive and foster parents.[96] The bill has far-reaching consequences, according to Rebecca Robertson of the Texas chapter of the American Civil Liberties Union. Robertson contends that the bill "permit[s] lesbian, gay and transgender parents to be turned away, but there's nothing in the bill that prevents agencies from turning away, for

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[88] Marissa Evans, *Abbott OKs religious refusal of adoptions in Texas*, THE TEX. TRIB. (June 15, 2017), https://www.texastribune.org/2017/06/15/abbott-signs-religious-protections-child-welfare-agencies [https://perma.cc/E8F7-T4CH].

[89] Marissa Evans, *Senate passes religious protections for child welfare agencies*, THE TEX. TRIB. (May 21, 2017), https://www.texastribune.org/2017/05/21/senate-passes-religious-protections-child-welfare-agencies [https://perma.cc/B6GD-DSD4].

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Meredith Hoffman, *Under Texas bill, adoption agencies would reject Jews, gays, Muslims*, PBS NEWS HOUR, (May 6, 2017), https://www.pbs.org/newshour/nation/texas-adoption-jews-gays-muslims [https://perma.cc/YN9J-ALX4].

[94] David Crary, *For Advocates of Gay Adoption, Progress but Also Obstacles*, U.S. NEWS & WORLD REPORT (June 17, 2017), https://www.usnews.com/news/best-states/illinois/articles/2017-06-17/for-advocates-of-gay-adoption-progress-but-also-obstacles.

[95] *Id.*

[96] Bever, *supra* note 85.

example, people who have been divorced, people who are single, or people who don't go to church enough."[97] Opponents of the Adoption Bill argue that the bill focuses on protecting the agency and is not sufficiently concerned with ensuring that the child finds a loving home.[98]

The Adoption Bill also has the propensity to disadvantage prospective adoptive and foster parents who are of a different faith than the religious agency. Although the bill prohibits agencies from denying service based on a person's race, ethnicity, or national origin, all of which are protected classes under Title II of the Civil Rights Act, the bill does not prohibit agencies from denying service based on a person's religion, also a protected class under Title II.[99] Since all forty-one religiously-affiliated foster care and adoption agencies in Texas are Christian organizations, this can foreseeably disadvantage prospective adopters with minority religious beliefs, such as Muslim or Hindu parents, because their religion differs from the religion of the adoption or foster care agency.[100] Such an effect appears antithetical to the stated purpose of the bill—to protect people's right to religious freedom—and places individuals of minority faiths at a disadvantage. Because roughly one-fourth of all foster and adoption agencies in Texas are religious, the potential consequences of the Adoption Bill are not insignificant.[101]

The Adoption Bill is unique in its potentially far-reaching consequences. It is capable of negatively affecting the public at large, particularly vulnerable groups, and in that way, differs from most Texas RFRAs whose effects are limited to providing exemptions for individuals with sincerely held religious beliefs.[102] Additionally, the Adoption Bill addresses same-sex marriage, which remains a hot-button topic even after its legalization more than two years ago. The Adoption Bill's controversial subject matter and potential to affect not only the religious groups it seeks to protect, but also negatively impact others, helps explain the large amount of criticism that the Adoption Bill has received.

A. Possible Constitutional and Legal Challenges to the Adoption Bill

By funding religious adoption and foster agencies who can refuse

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[97] *Id.*

[98] Evans, *supra* note 91.

[99] H.B. 3859, 85th Leg., Reg. Sess. (Tex. 2017).

[100] *See Private Adoption Agencies in Texas*, TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, https://www.dfps.state.tx.us/Adoption_and_Foster_Care/Adoption_Partners/private.asp [https://perma.cc/NS9Y-AJH9].

[101] Evans, *supra* note 91.

[102] By providing a beneficial RFRA exemption to those with sincerely held religious beliefs, those without such beliefs could be viewed as comparatively disadvantaged. This is a meaningful argument, but its scope exceeds the confines of this Note. For the purposes of this Note, the analysis is limited to Texas RFRA laws capable of direct, negative effects on the public.

service to a class of people, the state of Texas opens itself up to constitutional challenges. The Adoption Bill can foreseeably affect two primary groups of people: individuals whose sexual orientations do not comport with the agencies' religious beliefs, i.e. LGBT individuals, and individuals whose religious beliefs do not align with those of the adoption agency. As a state entity, Texas is bound to treat all people equally, and the Equal Protection Clause of the Fourteenth Amendment is a primary avenue to challenge Texas's support of potentially discriminatory agencies.[103] The Fourteenth Amendment's Equal Protection Clause is powerful and provides that the government "shall . . . not deny to any person within its jurisdiction the equal protection of the laws."[104] The Equal Protection Clause applies to states or those acting under state authority.[105] Conduct that is "'private' may become so entwined with governmental policies or so impregnated with a governmental character" that it becomes subject to constitutional limitations placed on state action.[106] To raise an Equal Protection claim concerning the Adoption Bill, an injured plaintiff must establish that the actions of the private adoption agencies are so intertwined with the state that their actions become state actions. As state actions, the agencies cannot deny equal protection of the laws to any person, which includes denying adoption services based on religious beliefs or sexual orientation.

The Supreme Court has applied several tests over the years to determine whether private action constitutes state action because of the government's excessive involvement.[107] The Court has considered 1) whether the alleged deprivation of rights was created or imposed by the state and 2) whether the party of the alleged deprivation can be fairly said to be a state actor.[108] Because the protections of the Adoption Bill that permit agencies to deny services to certain groups are a direct action of the Texas Legislature, the state can reasonably be said to have created this deprivation of rights. This would likely satisfy the first prong of the Supreme Court's state action test. In considering the second prong—whether the adoption agencies can fairly be said to be a state actor—it is important to remember that the foster and adoption agencies are serving a state purpose in caring for wards of the state. In the absence of these agencies, the responsibility to care for these children would otherwise fall to the state. Because of the agencies' role in facilitating a function of the state, they can fairly be said to be state actors and therefore meet the second prong of the Supreme Court's state actor test. The analysis may ultimately boil down to a significant nexus test—whether there is a "sufficiently close nexus between the state and the challenged action" for the

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[103] 16B C.J.S. *Constitutional Law* § 1263 (2017).

[104] U.S. CONST. amend. XIV, § 1.

[105] 16B C.J.S. *Constitutional Law* § 1263 (2017).

[106] Gilmore v. City of Montgomery, 417 U.S. 556, 565 (1974) (*quoting* Evans v. Newton, 382 U.S. 296, 299 (1966)).

[107] Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1412 (2003).

[108] *Id.*

latter's action to be treated as the state itself.[109] The direct financial support of the religious adoption agencies by the state indicates a close nexus between the agencies and the State of Texas. South Dakota is the only other state whose adoption bill provides state funding to agencies with such protections.[110] Texas's close legislative, financial, and practical connections with these agencies make it likely, even under the several tests promulgated by the Supreme Court, that these private actions are sufficiently connected to the State of Texas to become state action.

The Equal Protection Clause is a powerful constitutional protection capable of doing some heavy lifting and was instrumental in legalizing same-sex marriage in *Obergefell*. The Supreme Court held that states' bans on gay marriage violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and under these constitutional protections, same-sex couples may not be deprived of the right to marry.[111] Critics of the Adoption Bill can draw a comparison between states that once banned marriage of same-sex couples and states that are now protecting adoption agencies that refuse to service same-sex couples. Both result in a denial of Equal Protection to same-sex couples and likely also constitute a Due Process violation. *Obergefell* is particularly useful in challenging the agencies' denial of services to same-sex adopters, but these Equal Protection and Due Process arguments are similarly applicable to those denied service based on their religion. The significant nexus of the state-funded adoption agencies to the State of Texas requires that the adoption agencies comply with the Fourteenth Amendment's Equal Protection Clause and in failing to do so, both groups—those denied because of their sexual orientation and those denied because of their religion—will likely have strong Equal Protection and Due Process claims against the state of Texas.

B. Possible Arguments Available to those Denied Service Based on Religious Beliefs

Individuals denied service because of their religious beliefs will likely have an additional claim under the Civil Rights Act. The Adoption Bill prohibits agencies from denying services based on race, ethnicity, or national origin, all of which are protected classes under Title II of the Civil Rights Act, but the Bill does not include "religion" as a protected class.[112] Although private organizations, such as these religious adoption agencies, are exempt from compliance with public accommodation laws under Title II, the government is bound by these provisions and cannot

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[109] *Id.*; Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52 (1999).

[110] Evans, *supra* note 91.

[111] *Id.*

[112] TEX. HUM. RES. CODE § 45.009(f) (2017).

discriminate against the protected classes under the Civil Rights Act.[113] In contracting with agencies capable of denying service to prospective adopters because they are of a different faith, the state is supporting discrimination based on religious beliefs and in doing so opens itself up to Title II challenges.[114] Because religion is a protected class in the Civil Rights Act, unlike sexual orientation, this additional claim is only available to adopters denied service by these adoption agencies because of their religious beliefs.[115]

There is also a potential Establishment Clause claim for those turned away by adoption agencies because of their religion.[116] The three-part test articulated by the Supreme Court in *Lemon v. Kurtzman* says that for a law to be permissible under the Establishment Clause, the law must 1) have a secular purpose; 2) neither advance nor inhibit religion in its principal or primary effect; and 3) not foster an excessive entanglement with religion.[117] The first prong of *Lemon* looks at whether the intent of the law was to advance or inhibit a religion and the second *Lemon* prong looks at the effect of that law—whether the law conveys endorsement or disapproval of a religion.[118] Although the Adoption Bill does not explicitly favor a specific religion, one can reasonably claim an Establishment Clause violation based on the second *Lemon* prong because the bill disproportionately advances Christianity by protecting Texas religious adoption agencies, all of which are Christian.[119] The bill arguably violates the flip side of the second *Lemon* prong by disadvantaging non-Christian, prospective adopters who are denied services by the adoption agencies because their religion.[120] According to the Supreme Court, a government's endorsement or disapproval of a religion sends a message to "nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[121] The Adoption Bill arguably sends the message that Christianity is a privileged religion in Texas and that it is permissible to deny adoption services to non-Christians. This would understandably make non-Christians feel like outsiders and like they are not full members of the political community.

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[113] 12 TEX. JUR. 3D *Civil Rights* § 15 (2018).

[114] *Id.*

[115] *Id.*

[116] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

[117] Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). *See also* Michael A. Rosenhouse, *Construction and Application of Establishment Clause of First Amendment—U.S. Supreme Court Cases*, 15 A.L.R. Fed. 2d 573 (2006).

[118] *Lemon*, 403 U.S. at 613; Lynch v. Donnelly, 465 U.S. 668, 688 (1984).

[119] *Lemon*, 403 U.S. at 612.

[120] TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, *supra* note 103; Laura Marie Thompson, *'Recipe for Discrimination': Legal Battle Brews Over New 'Religious Refusal' Child Welfare Law*, THE TEX. OBSERVER (June 5, 2017), https://www.texasobserver.org/recipe-discrimination-legal-battle-brews-new-religious-refusal-child-welfare-law/ [https://perma.cc/939F-WXB2].

[121] *Lynch*, 465 U.S. at 688.

Texas would likely counter a purported Establishment Clause violation by demonstrating compliance with *Lemon*'s purpose prong and asserting that the bill's intention was not to advance Christianity, only to give greater deference to religious adoption agencies.[122] Texas should also convey that state action is not responsible for the totality of Christian-affiliated adoption agencies in Texas and that these demographics should not prevent the state from enacting religious freedom protections.[123] Texas would likewise argue that it satisfies *Lemon*'s effect prong by disputing the bill's purported advantages and disadvantages on particular religions, perhaps pointing to the bill's mandatory referral of individuals who are denied service to other non-religious adoption agencies.[124] Relying on this provision, Texas could contend that individuals denied service by religious adoption agencies are not disadvantaged but merely redirected to a better suited agency.[125] Although courts are generally deferential to the bill's expressed non-preferential purpose, this does not preclude a judicial finding of an Establishment Clause violation.[126] If a court finds that the Adoption Bill effectually advances or inhibits a particular religion, the bill will be held unconstitutional as a violation of the Establishment Clause irrespective of a stated non-discriminatory purpose.[127] Those turned away by state-funded private adoption agencies have a strong Establishment Clause claim that should be included in any legal challenge to the bill.

C. Expectations Going Forward

In addition to addressing potential constitutional and legal challenges to current RFRA laws, it is also necessary to anticipate future RFRA legislation. Because of the propensity for reintroduction of failed bills from past legislative sessions, it is useful to look at previously introduced legislation to forecast future legislation. The Adoption Bill was first introduced in two companion bills during the 2015 legislative session, but neither made it to a vote.[128] The Adoption Bill ultimately became law after being reintroduced during the 2017 legislative session.[129] Failed RFRA legislation from the 2017 regular legislative session that

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[122] *Lemon*, 403 U.S. at 612.

[123] TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, *supra* note 103.

[124] TEX. HUM. RES. CODE § 45.005(c)(1–3) (2017); *Lemon*, 403 U.S. at 612.

[125] *Id.*

[126] Wallace v. Jaffree, 472 U.S. 38, 74–75 (1985).

[127] *See id.*

[128] Hum. Res. § 45.004(1)–(2). This bill's predecessors were two 2015 bills also entitled "Protection of Rights of Conscience for Child Welfare Services Providers" and contained nearly identical wording but never made it to a vote. *See* H.B. 3864, 84th Leg., Reg. Sess. (Tex. 2015); S.B. 1935, 84th Leg., Reg. Sess. (Tex. 2015).

[129] *Id.*

might make a reappearance in 2019 includes a bill to exempt psychologists from providing marriage and family counseling if doing so would violate their sincerely held religious beliefs.[130] This legislation was introduced via two bills in both the Texas House and Senate, but neither bill made it out of committee.[131] Such legislation would protect a psychologist who refuses to provide treatment to same-sex couples because of a conflict of religious beliefs.[132] Other unsuccessful RFRA bills from the 2017 legislative session include Senate Bill 522, which prohibits a county clerk from being required to certify or issue a marriage license if doing so would violate the clerk's sincerely held religious beliefs, and House Bill 2876, which protects wedding industry professionals from providing services if the wedding violates the professionals' sincerely held religious beliefs.[133] These RFRA-related bills involve protections for individuals that oppose same-sex marriage based on religious beliefs. Given the tendency for failed legislation to be reintroduced in later sessions, it is possible that these RFRA-related bills will make a reappearance in the 2019 Texas legislative session.

Texas should also look to the outcome of the *Masterpiece Cakeshop* case for how to address the clash of LGBT discrimination and religious freedom protections. Barring a change in direction in the Texas legislature or at the national level, Texans can expect more legislative efforts and RFRA-related bills meant to limit the reach of *Obergefell* by providing protections for individuals who oppose same-sex marriage based on their religious beliefs.

IV. CONCLUSION

The Religious Freedom Restoration Act started as a response to an unpopular Supreme Court holding and has evolved into a primary legal avenue to secure exemptions for those with sincerely held religious beliefs. Texas's RFRA adopts the same strict scrutiny standard as the federal RFRA and requires that the government meet a high standard in order to burden an individual's free exercise of religion. The legalization of same-sex marriage in the U.S. as a result of *Obergefell v. Hodges* changed the nature of RFRA-related bills in Texas. Many bills from the 2017 legislative session now address same-sex marriage and create exemptions for individuals who oppose same-sex marriage based on religious beliefs. The number of RFRA-related bills in the 2017 legislative session also increased from prior sessions. This increase is due to the addition of same-sex marriage-related RFRA bills to the usual RFRA

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[130] H.B. 3856, 85th Leg., Reg. Sess. (Tex. 2017); S.B. 2096, 85th Leg., Reg. Sess. (Tex. 2017).
[131] *Id.*
[132] *Id.*
[133] S.B. 522, 85th Leg., Reg. Sess. (Tex. 2017); H.B. 2876, 85th Leg., Reg. Sess. (Tex. 2017).

bills and because the expansion of RFRA protections to closely held, for-profit corporations in *Burwell v. Hobby Lobby* has bolstered the strength of the RFRA doctrine and sparked more RFRA-related legislation.

Recent Texas RFRA-related legislation includes the Pastor Protection Act from the 2015 legislative session, which protects pastors who refuse to officiate same-sex weddings if doing so is against his or her religious beliefs. Yet, the protections provided by the Act are already ensured by the First Amendment's Free Exercise and Free Speech clauses. The Pastor Protection Act's primary purpose is arguably to reassure Texans of these constitutional protections and to shore up any doubt of this right of refusal.

The Adoption Bill is one of Texas's most recent RFRA-related laws from the 2017 legislative session and has created significant controversy in providing protections for religious adoption agencies who may deny service to adopters, including LGBT adopters and adopters of different religions, based on an agency's sincerely held religious beliefs. The Adoption Bill is vulnerable to constitutional challenges, namely via the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Additionally, those denied service based on religious beliefs have an additional claim of discrimination under Title II of the Civil Rights Act and under the Establishment Clause of the First Amendment. Based on the current political climate at both state and federal levels, Texans can likely expect to see more RFRA-related legislation and, in particular, more RFRA legislation creating exemptions for individuals who oppose same-sex marriage based on religious beliefs. As demonstrated by this article, such legislation is particularly susceptible to running afoul of constitutional protections and anti-discrimination laws and should therefore be closely monitored and scrutinized.