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Recognition of Same-Sex Marriage: Implications for Religious Objections

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Summary

The U.S. Supreme Court's landmark decision in *Obergefell v. Hodges* in June 2015 held that the Fourteenth Amendment of the U.S. Constitution required states to issue marriage licenses to same-sex couples and to recognize same-sex marriages formed in other states. The Court's decision in *Obergefell* does not directly address incidental claims related to religious freedom in the context of same-sex marriage. However, the case has generated a number of other questions regarding potential implications of the Court's decision, particularly with respect to the rights of individuals or entities with religious objections to same-sex marriage. Among the issues raised are the obligation of marriage officiants to perform or facilitate same-sex marriage ceremonies; civil rights protections for same-sex couples and religious objectors; potential protections for religious social service providers in federally funded programs; and the impact on tax-exempt status of religious entities that object to same-sex marriage.

Questions related to the solemnization of same-sex marriages involve whether individuals who serve as marriage officiants, either in religious or civil ceremonies, would be required to solemnize marriages to which they object. Although long-standing Supreme Court jurisprudence indicates that religious officiants would be protected under the First Amendment, the protections available to civil servants whose duties include issuing state marriage licenses or officiating at civil ceremonies are not as straightforward, and may depend on a number of other factors.

Expansion of constitutional protection to same-sex couples also may have implications under civil rights law and certain federally funded social service programs. Under federal and state civil rights provisions, questions have involved whether owners of public accommodations may be required to serve same-sex couples; whether health care providers may be required to provide medical treatment regardless of a patient's sexual orientation; and whether religious institutions must provide housing to same-sex couples. Generally, courts are finding that a business must provide the same services to same-sex couples as it provides to opposite-sex couples, or that the business must not offer services that it would object to offering to same-sex couples. In the context of social service programs, some religious organizations receive federal funding to provide certain social services (e.g., adoption). However, concerns have been raised regarding whether such organizations could decline to serve same-sex couples based on their religious objections to same-sex marriage.

Finally, the Court's decision may affect religious entities' tax-exempt status under Section 501(c)(3) of the Internal Revenue Code. One qualification for Section 501(c)(3) status is that an organization cannot engage in activities that are illegal or violate a fundamental public policy. This is referred to as the "illegality doctrine." A question that has been raised in light of the *Obergefell* decision is whether religious entities that act in opposition to same-sex marriage could be in violation of the doctrine. In testimony before Congress in July 2015, the Internal Revenue Service (IRS) Commissioner stated that the IRS would not currently apply the doctrine to religious entities acting in opposition to same-sex marriage, but left open the possibility that the agency could change its position in response to future legal and policy developments. If the doctrine were to apply, one question that might arise is whether a religious entity's First Amendment rights would be violated if its tax-exempt status were revoked due to actions based on sincerely held religious beliefs. The Supreme Court has held in another context that denial of tax-exempt status of religious schools under the illegality doctrine may be permissible under the First Amendment, so long as the law or policy requiring the denial advances a compelling governmental interest that could not be served by less restrictive means and is based on neutral, secular criteria. Notably, the Court's holding did not address the doctrine's application to houses of worship, thus leaving open the possibility that they may be afforded greater protections.

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The U.S. Supreme Court's highly anticipated decision in *Obergefell v. Hodges* recognized federal constitutional protection for same-sex marriage.¹ Although on its face the case addressed only whether states must issue marriage licenses to same-sex couples and recognize marriages legally formed in other states, *Obergefell* has implicated a number of other legal rights, particularly those related to religious exercise and civil rights. Some religious doctrines include objections to same-sex marriage, leading to questions about the extent to which individuals, businesses, or religious institutions that share such objections must recognize or accommodate couples in same-sex marriages. Because federal law includes both constitutional and statutory protections for religious beliefs that may involve such conflicts, the manner in which these protections may intersect with constitutional protection of same-sex marriage can become complicated.

This report will analyze a range of legal issues for which *Obergefell* has implications. Since states initially began recognizing same-sex marriage, one of the primary questions has been whether recognition of same-sex marriage requires individuals, who officiate at weddings or issue marriage licenses but object to same-sex marriage on religious grounds, to provide those services to same-sex couples. Another conflict has arisen over whether businesses, which are owned by individuals with religious objections to same-sex marriage, would be subject to civil rights laws that prohibit discrimination against same-sex couples. Likewise, it is unclear whether religiously affiliated social service providers who object to same-sex marriage may participate in certain federally funded programs (e.g., adoption services grants). Finally, another potential legal issue that has been raised in light of *Obergefell* is whether churches and other religious entities could be denied federal tax-exempt status if they act in opposition to same-sex marriage.

Obergefell v. Hodges: Federal Constitutional Recognition of Same-Sex Marriage

In its landmark decision, *Obergefell v. Hodges*, the U.S. Supreme Court struck down state bans on same-sex marriage as unconstitutional under the Fourteenth Amendment of the U.S. Constitution.² The issues presented to the Court included whether states were required to permit same-sex couples to marry in their states and whether states were required to recognize same-sex marriages formed in other states, but did not include any issue directly affecting the manner in which such marriages were formed or what legal rights such couples may have beyond the ability to marry itself. Ultimately, the Court ruled that “the State laws challenged ... in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”³

The Court characterized the protection of the Due Process Clause of the Fourteenth Amendment as one that “extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”⁴ Examining the evolving history of the institution of marriage, the Court noted a shift in societal perceptions of same-sex

¹ *Obergefell v. Hodges*, No. 14-556 (U.S. June 26, 2015), available at http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf.

² *Id.* A comprehensive analysis of the Court's decision in *Obergefell* is beyond the scope of this report. For more information on the legal issues related to same-sex marriage generally, see CRS Report R44143, *Obergefell v. Hodges: Same-Sex Marriage Legalized*; CRS Report R43886, *Same-Sex Marriage: A Legal Overview*.

³ *Obergefell*, slip op. at 23.

⁴ *Id.* at 10.

relationships over the past century.⁵ In particular, the Court acknowledged that it “has long held the right to marry is protected by the Constitution,”⁶ and cited four principles supporting governmental recognition of marriage rights: individual autonomy; the unique nature of the institution of marriage; the safeguards that legal marriage provides for children and families; and the “keystone” role marriage plays in the nation’s social order.⁷ Examination of these principles led a majority of the Court to conclude that the reasons for which marriage is a fundamental right apply equally to same-sex couples as they have to opposite-sex couples, and thus same-sex marriages must be afforded the same constitutional protection.⁸

Obergefell was decided by a 5-4 vote, with the dissenting justices expressing strong objections to the majority opinion, in part raising arguments regarding religious freedom.⁹ Even Justice Kennedy, writing for the majority, acknowledged that recognition of same-sex marriage would not be universally accepted, specifically citing religious objectors:

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.¹⁰

The Court emphasized the continued First Amendment right of individuals and religious entities to engage in debate regarding expansion of the scope of couples eligible to marry, while distinguishing that the Fourteenth Amendment precluded the government from engaging in unequal treatment of these couples.¹¹

Background: Current Religious Freedom Protections Generally

The First Amendment states that “Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof ...” in what are known respectively as the Establishment and Free Exercise Clauses.¹² Establishment Clause protections apply in circumstances in which a government action may be considered as sanctioning a particular religious practice or point of view. Free Exercise Clause protections generally apply if a government action is directed at interfering with voluntary religious practices of private parties.

The Establishment Clause prohibits the government from taking actions that would create an official position related to a religious practice or point of view. The Supreme Court has applied a range of different tests to identify whether a particular government action would violate the Establishment Clause. Under the traditional tripartite *Lemon* test, a challenged government action would be upheld if it (1) has a secular purpose; (2) has a primary effect that neither advances nor

⁵ *Id.* at 7-9.

⁶ *Id.* at 11.

⁷ *Id.* at 12-16.

⁸ *Id.* at 12.

⁹ *See id.* at 27-28 (Roberts, C.J., dissenting); *id.* at 14-16 (Thomas, J., dissenting).

¹⁰ *Id.* at 19.

¹¹ *Id.* at 27.

¹² U.S. CONST. amend. I.

inhibits religion; and (3) does not foster excessive entanglement with religion.¹³ When applying that test, the Court has required that laws cannot create a relationship between government and religious entities that would cause one to interfere with the internal affairs of the other.¹⁴ Other tests consider whether the government action may endorse or disapprove a particular religion,¹⁵ or whether the law is neutral between religions and between religion and nonreligion.¹⁶

Under the Free Exercise Clause, the First Amendment also provides protection against the government's interference with voluntary religious exercise. The Court historically had applied heightened scrutiny to government actions that would infringe on religious exercise, requiring the government to show a compelling interest to do so.¹⁷ However, in the 1990 decision *Employment Division, Department of Human Resources in Oregon v. Smith*, it lowered the constitutional standard to require only that the government not intentionally infringe upon religious exercise.¹⁸ Under the current interpretation, the Court explained that the Free Exercise Clause never "relieve[s] an individual of the obligation to comply with a valid and neutral law of general applicability."¹⁹ However, the Court has emphasized that Congress remains free to consider whether heightened protection would be appropriate through the legislative process.²⁰

Shortly after the Court adopted the new standard, Congress responded by enacting the Religious Freedom Restoration Act (RFRA), which applies heightened scrutiny to federal government actions that may affect religious exercise.²¹ RFRA states that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except" when the burden furthers a compelling governmental interest and uses the least restrictive means to achieve that interest.²²

Since its enactment, RFRA traditionally has been applied in cases involving alleged burdens on the religious exercise of individuals and nonprofit religious organizations. Although litigation involving RFRA has been extensive in lower courts, the Supreme Court has heard only a few cases requiring it to interpret the substantive provisions of RFRA.²³ In the landmark 2014 case, *Burwell v. Hobby Lobby Stores, Inc.*, the Court interpreted the scope of applicability of RFRA's protections to include some corporations.²⁴ In *Hobby Lobby*, the owners of closely held for-profit corporations challenged a provision of the Affordable Care Act that required employers to provide insurance coverage for certain contraceptives as a burden on their religious exercise under RFRA. The Supreme Court held that RFRA requires the government to accommodate the

¹³ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

¹⁴ *Id.* at 621-22.

¹⁵ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

¹⁶ *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

¹⁷ *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁸ 494 U.S. 872 (1990).

¹⁹ *Id.* at 879 (internal quotes omitted).

²⁰ *Id.* at 890.

²¹ P.L. 103-141, codified at 42 U.S.C. §2000bb et seq. RFRA originally provided protection to federal, state, and local government actions, but the Supreme Court ruled in 1997 that its application to state and local governments was unconstitutional on federalism grounds under the Fourteenth Amendment. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

²² 42 U.S.C. §2000bb-1.

²³ In a 2006 case, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, the Court held that the government must provide a compelling interest if it offers an exemption to one group but refuses to provide an exemption to another group from the same legal requirement. 546 U.S. 418 (2006).

²⁴ 134 S.Ct. 2751 (2014).

beliefs of such entities, meaning that RFRA now may be understood to protect individuals, nonprofit religious organizations, and closely held for-profit businesses, that is, those “owned and controlled by members of a single family.”²⁵ Notably, the Court acknowledged, but declined to resolve, the remaining question of whether other businesses (e.g., publicly traded companies) also may be protected.²⁶

The closely divided *Hobby Lobby* decision sparked a vigorous debate over the future implications of neutral laws of general applicability that may affect the ability of various entities to exercise their religious beliefs. In a highly critical dissenting opinion, Justice Ginsburg questioned, for example, the extent to which the decision could be read to permit employers with religious objections to various government mandates to avoid compliance.²⁷ The majority opinion addressed this concern, explaining that it was unfounded because the *Hobby Lobby* decision reached only the contraceptive coverage requirement at issue in the case.²⁸ According to the majority, other legal mandates would be subject to a different set of interests and different arguments regarding methods of meeting those interests.²⁹ However, the majority did not state definitively that other requirements would be beyond the reach of a future RFRA challenge. This response implied that other legal mandates that may be challenged under future RFRA cases would have to be assessed on a case-by-case basis, a point that has generated much debate since the decision was issued.

The extent to which individuals and businesses are able to avoid compliance with various legal mandates related to same-sex marriage as a result of RFRA and *Hobby Lobby* is unclear. Although *Hobby Lobby* clearly broadened the applicability of RFRA’s protections, the decision did not clearly delineate the parameters of how that protection might be used. One outstanding question that appears to be critical to the analysis of balancing legal rights in the context of religious objections to same-sex marriage is what constitutes a *substantial burden* under RFRA, a term that was not defined by Congress in the statute itself.

It is important to note that RFRA applies only to federal government actions that may burden religious exercise. Protection against burdens imposed by state or local governments depends on state law. After the Supreme Court held that the federal RFRA did not constrain the states, many states enacted their own versions of RFRA to prevent burdens on religious exercise at the state and local level.³⁰ Almost half of the states have enacted a version of RFRA, many of which follow the federal model.³¹ Some states have proposed broader protections than are available in the federal RFRA, with mixed results. In one example of broader protection enacted by a state, Indiana’s RFRA explicitly applies to individuals, organizations, and a broad range of businesses (not only closely held corporations), and can be invoked not only when religious exercise has

²⁵ *Id.* at 2774. The Court’s definition was limited to the scope of the cases being considered. Since the decision, federal agencies have issued regulations that clarify the definition of closely held corporations for purposes of the contraceptive coverage mandate to mean generally those with no publicly traded ownership interests and having five or less individuals who own over 50% of its ownership interests. *Coverage of Certain Preventive Health Services Under the Affordable Care Act*, 80 Fed. Reg. 41,318 (July 14, 2015).

²⁶ *Hobby Lobby*, 134 S.Ct. at 2774.

²⁷ *Id.* at 2802-05 (Ginsburg, J., dissenting).

²⁸ *Id.* at 2783.

²⁹ *Id.*

³⁰ *City of Boerne*, 521 U.S. 507.

³¹ National Conference of State Legislatures, *State Religious Freedom Restoration Acts* (June 5, 2015), available at <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

been substantially burdened but also when it “is likely to be substantially burdened.”³² It also permits eligible persons to assert a violation of the protection provided “as a claim or defense in a judicial or administrative proceeding, regardless of whether the state or any other governmental entity is a party to the proceeding.”³³ Notably, states that have not enacted heightened statutory protections may have constitutional provisions that the state has interpreted to provide heightened protection without additional legislation.³⁴

Legal Protections for Marriage Officiants

One of the ongoing debates related to same-sex marriage as it intersects with religious freedom is whether the government’s recognition of marriage should be intertwined with a religious solemnization of marriage in any way. As states began recognizing same-sex marriages, questions arose related to the impact of such recognition on marriage officiants. State marriage laws generally allow religious ministers to act on behalf of the state in officiating civil marriage requirements as well as the religious ceremonial requirements. This dual role of religious officiants has raised concerns that ministers, because of their concurrent role for civil requirements, may be forced to solemnize marriages to which they object. Notably, the Court’s decision in *Obergefell* specifically addresses the right of same-sex couples to enter “civil marriage[s] on the same terms and conditions as opposite-sex couples,” and does not require or suggest that religious marriages must include all couples.³⁵

Some argue that establishing distinct institutions of civil and religious marriage may resolve some of the controversy regarding the scope of marriages to be recognized.³⁶ Under that model, any couple wishing to marry and qualify for associated government benefits would have a civil ceremony, and couples wishing to be married in accordance with their chosen religious faith would also have a religious ceremony. This scenario arguably would eliminate the perception that religious officiants could be forced to solemnize marriages recognized by the state that conflict with their religious beliefs. However, religious ministers may not be the only officiants with religious objections to same-sex marriages. Questions also arise regarding whether an individual working for the government and having job duties related to officiating or facilitating civil marriages could be required to do so for same-sex couples.³⁷ Such individuals would not have the same constitutional protections as religious officiants, but arguably may seek other legal protection.

³² Indiana Senate Enrolled Act No. 101, 119th Gen. Assembly, First Regular Sess. (2015).

³³ *Id.*

³⁴ See, e.g., Wash. CONST. art. I, §11; *City of Woodinville v. Northshore United Church of Christ*, 166 Wn. 2d 633 (2009) (explaining that Washington’s constitution provides greater protection than the federal Constitution). See also Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, WASHINGTON POST (March 1, 2014), available at <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/>.

³⁵ *Obergefell*, slip op. at 23 (emphasis added).

³⁶ See Mark Oppenheimer, *Gay Marriage Prompts Call for Clergy to Shun Civil Ceremonies*, N.Y. TIMES (January 2, 2015), available at http://www.nytimes.com/2015/01/03/us/gay-marriage-prompts-a-call-for-clergy-to-shun-civil-ceremonies.html?_r=0.

³⁷ These issues have been illustrated by events in Rowan County, Kentucky, where a county court clerk refused, based on religious objections, to issue marriage licenses after the Court’s decision in *Obergefell*. This example is discussed in further detail later in this section of the report.

Religious Ceremonies

One of the initial questions arising in the context of religious freedom and same-sex marriage was whether legal recognition of same-sex marriage would require ministers and other faith leaders to officiate marriage ceremonies that would conflict with their religious beliefs.³⁸ A number of states responded to these concerns by enacting explicit protections to protect religious officials and the independence of religious institutions to determine who was eligible to marry under their doctrinal rules.³⁹ Explicit statutory protection may not be necessary, though, because as a matter of federal constitutional law, religious institutions are protected from government interference in their internal matters, including religious doctrine, authority, and ministerial employment.⁴⁰ Under long-standing First Amendment jurisprudence, courts have avoided deciding matters of religious doctrine, which almost certainly would include which marriages the religious authority would recognize and therefore solemnize.

The Supreme Court has maintained an understanding that “courts should refrain from trolling through a person’s or institution’s religious beliefs.”⁴¹ Furthermore, it has recognized that churches and other religious institutions have a right under the Free Exercise Clause to address their internal matters independently and without interference from government institutions.⁴² Such action by courts would entangle the legal system in an inquiry of religious authority and doctrine, suggesting the type of probing interference contemplated by the entanglement prong of the traditional *Lemon* test.⁴³ Accordingly, the Court has barred interference in religious practices through decisions prohibiting the government from deciding disputes concerning religious authority or policies.

In 1872, the Court recognized in *Watson v. Jones* that matters of religious doctrine should be determined within the authority of the particular church and should be separate from any secular legal interpretation.⁴⁴ The Court’s decision arose from a dispute regarding who were the proper

³⁸ A threshold question might be whether religious officiants, because they are both performing the religious ceremony and completing civil licensing requirements, are acting as agents of the state and are thus subject to Fourteenth Amendment requirements. See John Dorsett Niles, Lauren E. Tribble, and Jennifer N. Wimsatt, *Making Sense of State Action*, 51 SANTA CLARA L. REV. 885, 907 (2011) (arguing that when a state delegates some civil function to a private party, that party must comport with the Fourteenth Amendment). A number of interpretations may exist regarding the potential recognition of religious officiants as state actors. A comprehensive discussion of the limits of recognition of state actors in this context, however, is beyond the scope of this report.

³⁹ See, e.g., N.H. Rev. Stat. Ann. §457:37.

⁴⁰ U.S. CONST. amend I. See *Watson v. Jones*, 80 U.S. 679 (1872); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94 (1952); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1968); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694 (2012).

⁴¹ See *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

⁴² *Kedroff*, 344 U.S. 94.

⁴³ Recognizing that the authors of the First Amendment understood that “establishment of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity,” the Court has interpreted the Establishment Clause to prohibit governmental action that creates “excessive entanglement” between government and religion. *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 668, 674 (1970). The Court has explained the bar on entanglement as an inquiry of whether the disputed government action would “establish or interfere with religious beliefs and practices or have the effect of doing so,” or would create “the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.” *Id.* at 669-70. See also *Lemon*, 403 U.S. 602.

⁴⁴ *Watson*, 80 U.S. at 728-29. See also *Gonzalez v. Archbishop*, 280 U.S. 1 (1929) (“In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by (continued...)”).

leaders of a local Presbyterian church and consequently had control over that church's property.⁴⁵ The dispute was litigated between competing leaders of the church, some pro-slavery and others anti-slavery, in the years following the Civil War during the ratification process of the Fourteenth Amendment, which granted equal protection to all U.S. citizens, including former slaves.⁴⁶ The dispute within the local church reflected disagreement among the subdivisions of the Presbyterian Church of the United States regarding the issue of slavery after the war and internal divisions among a local church's leadership with respect to that doctrine.⁴⁷ Although the case was taken to civil courts, the Court ultimately noted that the case involved a "schism in the church," seeking resolution "of which of two bodies shall be recognized as the Third or Walnut Street Presbyterian Church."⁴⁸ Accordingly, the Court held, regarding "relations of church and state under our system of laws," that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."⁴⁹

The Court effectively preserved the authority of the church to recognize its proper leaders in the context of its doctrine and practice.

The Court recognized in *Watson* that certain disputes that may involve a church or its members are not necessarily beyond the reach of civil courts, that is, criminal activity or personal disputes. However, it explained that matters comprising the church's religious practice are not subject to judicial review. The Court stated:

[I]t is a very different thing where a subject-matter of a dispute, strictly and purely ecclesiastical in its character,—a matter over which the civil courts exercise no jurisdiction,—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them....⁵⁰

The *Watson* decision, a seminal case on the independence of churches to identify their governing authority and internal doctrinal policies, explicitly departed from English precedent, which allowed courts to examine and make decisions regarding religious matters, including "the true standard of faith in the church organization."⁵¹ The Court distinguished its decision from that of the English legal system, which lacked the "full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of [American] political principles."⁵² Thus, the Court established the principle that determinations of church doctrine and practice were to be free of government control well before it had even developed other aspects of its First Amendment jurisprudence.

(...continued)

contract or otherwise.").

⁴⁵ *Watson*, 80 U.S. 679.

⁴⁶ U.S. CONST. amend. XIV.

⁴⁷ *Watson v. Jones*, 1871 U.S. LEXIS 1383, 18-22 (U.S. 1879).

⁴⁸ *Watson*, 80 U.S. at 717.

⁴⁹ *Id.* at 727.

⁵⁰ *Id.* at 733.

⁵¹ *Id.* at 727.

⁵² *Id.* at 728.

In 1952, noting its historic recognition of a prohibition on government interference in matters of religion, the Court reiterated its earlier understanding of “a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”⁵³ The Court accordingly granted federal constitutional protection for the independent choice of churches for self-governance “as a part of the free exercise of religion against state interference” when it held that a legislature was constitutionally barred from determining the proper religious authority of the Russian Orthodox Church.⁵⁴

On a number of occasions, the Court has reiterated the limits of the First Amendment on government authority to decide the legitimacy of matters of church internal practices. Just as it prohibited the legislature from doing so, it has also limited courts from overstepping their constitutional authority in making civil determinations of the propriety of church actions or the validity of church beliefs.⁵⁵ The Court has held that “because of the religious nature of [disputes related to control of church property, doctrine, and practice], civil courts should decide them according to the principles that do not interfere with the free exercise of religion in accordance with church polity and doctrine.”⁵⁶

Most recently, the Court has affirmed the constitutional right of the independence of religious institutions in matters of church doctrine, considering the extent to which religious institutions must abide by nondiscrimination laws. In 2012, it recognized that a church’s constitutional right to select its ministers exempts it from compliance with statutory employment nondiscrimination laws, at least with respect to “ministerial employees.”⁵⁷ The Court noted that both the Establishment Clause and the Free Exercise Clause “bar the government from interfering with the decision of a religious group to fire one of its ministers.”⁵⁸ It explained that “[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”⁵⁹ This protection “is not limited to the head of a religious congregation,” and includes any ministerial position, though the Court has not defined the parameters of that term.⁶⁰

Together, these cases indicate that the Constitution prevents the government from exerting control over the duties, authority, and doctrinal positions of the leadership of religious institutions. Thus, in the context of same-sex marriage, the government would not be able to require a religious

⁵³ *Kedroff*, 344 U.S. at 116.

⁵⁴ *Id.* The constitutional right to select clergy under the Free Exercise Clause is often referred to as the “ministerial exception” in some civil rights cases. The Supreme Court affirmed the constitutional ministerial exception in these cases in 2012. *See Hosanna-Tabor*, 132 S.Ct. 694.

⁵⁵ *See, e.g., Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960) (courts may not transfer control of church from general body of the Russian Orthodox Church); *United States v. Ballard*, 322 U.S. 78 (1944) (holding that the First Amendment precludes civil bodies from determining the verity of religious doctrines or beliefs).

⁵⁶ *Jones v. Wolf*, 443 U.S. 595, 616 (1979). *See also Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church*, 393 U.S. 440.

⁵⁷ *Hosanna-Tabor*, 132 S.Ct. 694.

⁵⁸ *Id.* at 702.

⁵⁹ *Id.* at 703.

⁶⁰ *Id.* at 707. Limiting its identification of ministerial employee qualifications to only the case before it, the Court considered factors such as the church’s designation of the employee as a minister, including religious training; availability of ministerial privileges; and the employee’s role in conveying the church’s doctrine. *Id.* at 707-08.

institution or its ministers to accept members or perform ceremonies that are inconsistent with its faith doctrine without running afoul of the First Amendment.⁶¹

Civil Ceremonies

Civil officials who facilitate or perform civil marriage ceremonies (e.g., justices of the peace, court clerks who issue marriage licenses) would not appear to be subject to the same protections as clergy performing religious ceremonies.⁶² Civil servants, whose professional duties relate to the state recognition of marriages, may object to same-sex marriage based on their personal religious beliefs, but legal protection of their ability to refuse to perform tasks that conflict with their sincerely held religious beliefs is unclear. As government actors, civil servants are bound by the Establishment Clause's prohibition on showing preference of one religious belief over another.⁶³ However, serving as a government official does not preclude government employees from protection of individual constitutional protections.⁶⁴ Civil servants' religious objections may be protected by federal or state employment nondiscrimination provisions.⁶⁵ Alternatively, protection may be available through specific exemptions related to their positions or to the particular job duty to which they object.⁶⁶

Objections to Issuing Same-Sex Marriage Licenses by State Officials

Following legal recognition of same-sex marriage, first by states and later by the Supreme Court, a number of public officials objected to their role in same-sex marriages.⁶⁷ Refusal of some clerks in Florida to issue marriage licenses to same-sex couples drew significant attention at the end of 2014 and the beginning of 2015.⁶⁸ In August 2014, a federal judge found Florida's marriage laws, which prohibited recognition of same-sex marriages, unconstitutional under the Fourteenth Amendment.⁶⁹ A county clerk of the court requested clarification on the scope of the decision,

⁶¹ Although such action cannot be directly compelled, the government might be able to condition benefits available to religious entities as an indirect method of pursuing its public policy goals, for example, tax status, which will be discussed in detail later in this report.

⁶² The Court's jurisprudence analyzed in preceding section applies only to religious institutions and ministers. It has not been applied to civil service positions, but instead the Court has focused on the status of the protected entity as a religious institution. *See* *Watson v. Jones*, 80 U.S. 679 (1872); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94 (1952); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1968); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694 (2012).

⁶³ U.S. Const. amend. I.

⁶⁴ The U.S. Supreme Court has held that public employees maintain their First Amendment rights. *See* *Pickering v. Board of Education*, 391 U.S. 563 (1968). Although *Pickering* was decided under the Free Speech Clause, federal appellate courts have held that the First Amendment protects public employees' religious exercise rights to a certain extent. *See, e.g.,* *Brown v. Polk County*, 61 F.3d 650, 654 (8th Cir. 1995).

⁶⁵ *See, e.g.,* Title VII of the Civil Rights Act of 1964, P.L. 88-352, codified at 42 U.S.C. § 2000e et seq.

⁶⁶ *See, e.g.,* North Carolina Senate Bill 2/S.L. 2015-75, *Magistrates Recusal for Civil Ceremonies*, available at <http://www.ncga.state.nc.us/Sessions/2015/Bills/Senate/PDF/S2v3.pdf>.

⁶⁷ *See, e.g.,* *Some Clerks Raise Objections to Granting Same-Sex Marriage Licenses*, GREAT FALLS TRIBUNE (November 22, 2014), available at <http://www.greatfallstribune.com/story/news/local/2014/11/22/clerks-raise-objections-granting-sex-marriage-licenses/19408291/>.

⁶⁸ Tony Marrero, *Bay Area Court Clerks Will Not Issue Same-Sex Marriage Licenses Jan. 6*, TAMPA BAY TIMES (December 22, 2014), available at <http://www.tampabay.com/news/politics/stateroundup/florida-gay-rights-groups-vow-legal-fights-if-clerks-deny-marriage-licenses/2211147>.

⁶⁹ *Brenner v. Scott*, 999 F.Supp. 2d 1278 (N.D. Fla. 2014).

asking whether, as clerk, she must issue licenses to all qualified same-sex applicants.⁷⁰ The court's answer made clear that clerks are obligated to issue marriage licenses to any qualified couple who have a constitutional right to marry, noting that public officials must follow the law, regardless of whether or not they agree with it.⁷¹

Also in early 2015, controversy arose when the Chief Justice of the Alabama Supreme Court ordered state probate judges not to issue or recognize same-sex marriage licenses.⁷² A federal district court had struck down the state's same-sex marriage ban and effectively validated same-sex marriage in Alabama.⁷³ The Chief Justice's order asserted the state's right to defy lower federal court orders that conflict with the state constitution.⁷⁴ The court's actions raised a number of legal questions related to federalism and states' rights that are beyond the scope of this report, but ultimately, the federal court issued an injunctive order barring state officials from refusing to issue marriage licenses to same-sex couples.⁷⁵ Following the Supreme Court's decision in *Obergefell*, the Alabama Supreme Court's legal reasoning appears moot, as it claimed that decisions of lower federal courts that conflicted with state law would not be binding. As a matter of federal supremacy, states must comply with decisions of the U.S. Supreme Court.⁷⁶

Protection of Civil Employees' Religious Beliefs

While general legal objections have not succeeded in court, some clerks have asserted their religious objections to facilitating same-sex marriage, resulting in several lawsuits pending in federal courts. Following the *Obergefell* decision, a county clerk in Kentucky, citing religious objections to same-sex marriages, adopted a policy refusing to issue marriage licenses to any couple.⁷⁷ Subsequent lawsuits were filed challenging the clerk's interference with same-sex and opposite-sex couples' constitutional rights.⁷⁸ In response, the clerk filed a related challenge, alleging that the governor had interfered with her religious exercise "by insisting that [she] issue marriage licenses to same-sex couples contrary to her conscience."⁷⁹ After the clerk failed to comply with a federal district court's order to issue licenses, a federal judge held the clerk in contempt of court and ordered her incarceration until her deputies were able to begin reissuing

⁷⁰ Brenner v. Scott, 2015 U.S. Dist. LEXIS 2146 (N.D. Fla. January 1, 2015).

⁷¹ *Id.* at *4-*5.

⁷² Administrative Order of the Chief Justice of the Supreme Court, State of Alabama—Judicial System (February 8, 2015), available at https://www.liberty.edu/media/9980/attachments/2015/020915_CJ_Moore_Order_to_Ala_Probate_Judges.pdf.

⁷³ Searcy v. Strange, 2015 U.S. Dist. LEXIS 7776 (S.D. Ala. January 23, 2015).

⁷⁴ Administrative Order of the Chief Justice of the Supreme Court, State of Alabama—Judicial System (February 8, 2015).

⁷⁵ See Strawser v. Strange, 44 F.Supp.3d 1206 (S.D. Ala. February 12, 2015).

⁷⁶ U.S. CONST. art. VI, cl. 2.

⁷⁷ *Clerk Not Issuing Marriage Licenses*, THE MOREHEAD NEWS (June 29, 2015), available at http://www.themoreheadnews.com/news/clerk-not-issuing-marriage-licenses/article_c5a949f4-1e84-11e5-a671-ef4ed3b4224c.html.

⁷⁸ See Miller v. Davis, Complaint, No. 0:15-cv-00044-HRW (E.D. Ky. filed July 2, 2015), available at <http://www.aclu-ky.org/wp-content/uploads/2015/07/Rowan-complaint.pdf>; Ermold v. Davis, Complaint, No. 0:15-cv-00046-HRW (E.D. Ky., filed July 10, 2015), available at <http://www.scribd.com/doc/271509579/Ermold-v-Kim-Davis-Rowan-County-Clerk>.

⁷⁹ Miller v. Davis, Verified Third-Party Complaint of Defendant Kim Davis, No. 0:15-cv-00044-DLB (E.D. Ky. filed August 4, 2015), available at https://www.liberty.edu/media/9980/attachments/2015/080515_Complaint_-_Davis_Third_Party_Complaint_against_Gov_Beshear_FINAL.pdf.

marriage licenses to eligible couples.⁸⁰ The litigation has illustrated the complexities that can be involved in the assertion of religious freedom rights among government employees.

While the Kentucky example illustrates legal challenges facing government officials who attempt to implement office policies consistent with their religious objections, individual employees may have other grounds for asserting their religious objections in offices that are issuing licenses. Specifically, Title VII of the Civil Rights Act of 1964 provides federal statutory protection for employees who have religious objections to their job duties.⁸¹ Title VII prohibits employers, including both governmental and certain private entities, from basing employment decisions (e.g., hiring and firing) on an employee's religion.⁸² Under Title VII, religion includes "all aspects of religious observance and practice, as well as belief."⁸³ The employer, in this case the government, must make reasonable accommodations for an employee's religious observance or practice unless it would pose an undue hardship on the employer's operations.⁸⁴ Religious practices and observances generally are considered "to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."⁸⁵

The U.S. Supreme Court has held that Title VII's protection of religion does not require an accommodation that would cause more than minimal hardship to the employer or other employees.⁸⁶ The Court has also held that Title VII requires employers to work with employees to find a reasonable alternative that would accommodate the employee's objection.⁸⁷ However, Title VII does not require "an employer to choose any particular reasonable accommodation."⁸⁸ That is, the accommodation offered to the employee need not be the most reasonable one, the one requested by the employee, or the one that imposes the least burden on the employee.⁸⁹ Evaluation of reasonable accommodations and undue burden are generally made on a case-by-case basis, depending on the specific circumstances of each claim.⁹⁰

⁸⁰ For more information, see CRS Legal Sidebar WSLG1371, *Supreme Court Acts Again on Same-Sex Marriage: Kentucky Clerk Must Issue Same-Sex Licenses While Appeal Is Pending*.

⁸¹ 42 U.S.C. §2000e et seq. For an overview of Title VII as it pertains to religious discrimination, see CRS Report RS22745, *Religious Discrimination in Employment Under Title VII of the Civil Rights Act of 1964*.

⁸² 42 U.S.C. §2000e-2(a)(1).

⁸³ 42 U.S.C. §2000e(j).

⁸⁴ 42 U.S.C. §2000e(j). Reasonable accommodations include "any adjustment to the work environment that will allow the employee to comply with his or her religious beliefs." EEOC Compliance Manual, §12, Religious Discrimination at 12-IV(A), available at http://www.eeoc.gov/policy/docs/religion.html#_Toc203359522. Undue hardships "impose more than *de minimis* cost on the operation of the employer's business." *Id.* at 12-IV(B) (internal quotations omitted). The determination of whether an accommodation exceeds a *de minimis* cost depends on the cost incurred to the employer and the number of employees that will need the accommodation. 29 C.F.R. §1605.2(e)(1) (internal quotations omitted).

⁸⁵ 29 C.F.R. §1605.1.

⁸⁶ See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977); *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67-69 (1986).

⁸⁷ See *Ansonia Board of Education*, 479 U.S. at 68-69 (internal citation omitted).

⁸⁸ *Id.* at 68.

⁸⁹ *Id.* at 68-69 (noting that the lower court interpreted Equal Employment Opportunity Commission (EEOC) guidelines to require a certain accommodation). The Court stated that "though superficially consistent with the burden imposed by the Court of Appeals, this guideline, by requiring the employer to choose the option that least disadvantages an individual's *employment opportunities*, contains a significant limitation not found in the court's standard. To the extent that the guideline ... requires the employer to accept any alternative favored by the employee short of undue hardship, we find the guideline simply inconsistent with the plain meaning of the statute." *Id.* at n.6.

⁹⁰ EEOC Compliance Manual, §12 at 12-IV.

Several lawsuits have been filed asserting protection under Title VII for religious objections to job duties relating to same-sex couples.⁹¹ These cases suggest that the traditional reasonable accommodation analysis would apply to pending decisions involving civil employees who object to job duties involving the certification of same-sex marriages. In one case that is still pending, an employee in an Indiana county clerk's office cited religious objections to condoning same-sex marriages when requesting a religious accommodation to be excused from processing related paperwork.⁹² According to the complaint in the case, two other employees in the office had offered to process the same-sex couples' applications instead under the proposed accommodation, but the requesting employee was terminated from the position.⁹³

Prior to the recognition of federal constitutional protection for same-sex couples to marry, similar objections were litigated under Title VII in the context of state recognition of same-sex relationships. For example, in one case, following state enactment of legislation recognizing domestic partnerships between same-sex couples, an employee of the county clerk's office requested an accommodation under Title VII due to religious objections to work related to registration of domestic partnerships.⁹⁴ Although the county offered to assist the employee in finding another position outside the office, it denied her request and terminated her employment.⁹⁵ The court found that the county did not make sufficient efforts to accommodate the employee, noting that her supervisor initially permitted the employee to be excused if another employee was available to process the registrations, and later rescinded that alternative.⁹⁶ Noting that the employee had offered to assume additional duties related to other tasks and that the office had not investigated potential alternatives for accommodation, the court rejected the county's argument that it had no option other than termination. The court's decision built on previous cases in which employees with religious objections were accommodated if they referred customers to nonobjecting employees.⁹⁷ The clerk's office had not demonstrated the necessary burden, with the court noting that the office's distribution of work related to the registrations at issue was unevenly distributed, and that the office continued to process all applications even after the objecting employee's termination.⁹⁸ The court reasoned that if the office could continue functioning without the employee, it could not be unduly burdened by that employee being excused from a relatively narrow portion of her duties.⁹⁹

Statutory Exemption Available to Employees with Religious Objections to Same-Sex Marriage

One potential method to address the conflict facing state officials with religious objections to same-sex marriage would be to adopt conscience protections that specifically would permit such officials to opt out of duties related to marriage. This avenue has been illustrated by state actions

⁹¹ See, e.g., *Summers v. Whitis*, Complaint, No. 4:15-cv-93 (S.D. Ind. filed July 17, 2015); *Slater v. Douglas County*, 743 F.Supp.2d 1188 (D. Or. 2010).

⁹² *Summers v. Whitis*, Complaint, No. 4:15-cv-93 (S.D. Ind. filed July 17, 2015).

⁹³ *Id.*

⁹⁴ *Slater v. Douglas County*, 743 F.Supp.2d 1188 (D. Or. 2010).

⁹⁵ *Id.* at 1190.

⁹⁶ *Id.* at 1192.

⁹⁷ *Id.* at 1193-94 (citing *Noesen v. Medical Staffing Networks*, 232 Fed. Appx. 581 (7th Cir. 2007) and *Brady v. Dean*, 790 A.2d 428 (Vt. 2001)).

⁹⁸ *Id.* at 1194.

⁹⁹ *Id.*

in Texas and North Carolina. Following the Court's decision in *Obergefell*, the Texas attorney general clarified that state officials, including county clerks, their employees, justices of the peace, and judges, retain legal rights to object to duties that involve performing or facilitating same-sex marriages.¹⁰⁰ Emphasizing that any objection and potential accommodation must be evaluated on a case-by-case basis, the opinion cited the availability of federal and state employment nondiscrimination laws (discussed above) and RFRA as generally applicable provisions that would permit employees to assert their need for religious accommodations.¹⁰¹

Shortly before the Court issued its decision in *Obergefell*, North Carolina passed legislation that provided a specific statutory exemption for individuals with religious objections to same-sex marriage. Overriding a gubernatorial veto,¹⁰² the state authorized public officials with religious objections to recuse themselves from performing or facilitating "all lawful marriages" by providing written notification.¹⁰³ Recusals are effective for at least six months, for which time the official may not perform or facilitate any marriage, whether for a same-sex or heterosexual couple.¹⁰⁴ If all officials in a jurisdiction recuse themselves from performing marriages, the law provides that the state will make another official available to perform those duties.¹⁰⁵ This approach follows those used in other scenarios involving religious objections to job duties and provides accommodations where the objecting party's refusal to participate does not preclude third parties from exercising their legal rights.¹⁰⁶

Potential Conscience Protections in Programs Receiving Federal Funds

Because marriage is an institution governed by the states, Congress likely would be unable to regulate the duties of state officials directly regarding marriage procedures. However, Congress nonetheless has been able to effect protection of conscientious objections in other legal matters governed by the states, and may be able to do so in the context of same-sex marriage as well.¹⁰⁷ For instance, the federal government has enacted conscience protections related to abortion, linking the protection to federal funding.¹⁰⁸ Under these federal conscience clauses, employees

¹⁰⁰ Attorney General of Texas, Opinion No. KP-0025, Rights of Government Officials Involved with Issuing Same-Sex Marriage Licenses and Conducting Same-Sex Wedding Ceremonies (June 28, 2015), available at <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2015/kp0025.pdf>.

¹⁰¹ *Id.*

¹⁰² See also Press Release, Governor Rory McCrory, *Governor McCrory Defends Constitution* (May 28, 2015), available at <http://governor.nc.gov/press-release/governor-mccrory-defends-constitution>.

¹⁰³ North Carolina Senate Bill 2/S.L. 2015-75, Magistrates Recusal for Civil Ceremonies, available at <http://www.ncga.state.nc.us/Sessions/2015/Bills/Senate/PDF/S2v3.pdf>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ This type of accommodation has been used in the context of pharmacists with objections to dispensing contraceptives prescribed by doctors to third-party customers. Generally speaking, pharmacists with objections have been permitted to decline to fill such prescriptions if they can refer customers to someone who can fill the prescriptions. According to EEOC regulations and guidance, "the employer is not required to accommodate [a pharmacist's] request to remain in [the position] yet avoid all situations where he might even briefly interact with customers who have requested contraceptives, or to accommodate a disruption of business operations. The employer may discipline or terminate [the pharmacist] for not meeting legitimate expectations." EEOC Compliance Manual at §12-14.C.3 (Examples 43 and 44). See also *Shelton v. Univ. of Medicine and Dentistry of New Jersey*, 223 F.3d 220 (3rd Cir. 2000) (upholding the accommodation offered as reasonable and subsequent termination of a nurse who refused to assist in emergency procedures to terminate pregnancies).

¹⁰⁷ See CRS Report RL34703, *The History and Effect of Abortion Conscience Clause Laws*.

¹⁰⁸ See CRS Report R40722, *Health Care Providers' Religious Objections to Medical Treatment: Legal Issues Related to Religious Discrimination in Employment and Conscience Clause Provisions*; CRS Report RL34703, *The History and* (continued...)

must be allowed to refuse to participate in certain reproductive procedures as a condition of the employer's receipt of certain federal funds.¹⁰⁹ Thus, the conscience clauses do not provide a right of action for the employee, but instead compel the employer to accommodate the employee as a means of continuing to receive federal funding through the applicable grant program.

Federal conscience clauses related to abortion have been linked to a number of potential funding programs. In one example, under the so-called Church Amendment, recipients of HHS grants for biomedical or behavioral research are prohibited from discriminating in employment or staff privileges based on the refusal of an employee to perform or assist "any lawful health service or research activity" on religious or moral grounds.¹¹⁰ Another example, known as the Weldon Amendment, prohibits federal agencies, states, and local governments that receive certain appropriated funds from discriminating among institutional or individual health care entities on the basis of a health care entity's refusal to provide, pay for, provide coverage of, or refer for abortions.¹¹¹

Federal legislation applying similar restrictions on funding provisions that provide appropriated funds to state and local governments may be an option to ensure that those governments accommodate the potential religious objections to same-sex marriage. Notably, however, this type of protection differs from the accommodations discussed in the context of Title VII and RFRA. While Title VII specifically requires a case-by-case examination of whether an accommodation of one party would be an undue burden to another, existing conscience clauses do not require balancing of the interests of the parties in conflict.¹¹² Existing examples may not be the only method of conditioning funds, though. In theory, at least, even if difficult to administer in practice, a conscience clause may be crafted to establish some degree of balancing or accommodation that is not absolute. If the existing model is followed, however, these types of protection would apply absolutely, and conceivably could mean that a civil employee's religious objections might preclude a same-sex couple's ability to exercise the constitutional right to marry, leading to separate legal challenges, as illustrated in the discussion of the Kentucky court clerk case earlier in this report.

Civil Rights Concerns of Same-Sex Couples and Entities with Religious Objections

As a result of the *Obergefell* decision, federal, state, and local governments may not discriminate against same-sex couples seeking to marry.¹¹³ The decision did not recognize general Fourteenth Amendment protection based on sexual orientation, nor does it dictate the behavior of private parties. However, through civil rights legislation, federal, state or local governments may regulate the behavior of private entities that operate public accommodations (i.e., entities that provide

(...continued)

Effect of Abortion Conscience Clause Laws.

¹⁰⁹ *Id.*

¹¹⁰ 42 U.S.C. §300a-7(c)(2).

¹¹¹ *See, e.g.,* P.L. 111-8, div. F, §508(d)(1).

¹¹² For a discussion of this distinction between protections available under Title VII and federal conscience protections, see CRS Report R40722, *Health Care Providers' Religious Objections to Medical Treatment: Legal Issues Related to Religious Discrimination in Employment and Conscience Clause Provisions.*

¹¹³ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015); CRS Report R44143, *Obergefell v. Hodges: Same-Sex Marriage Legalized.*

goods and services to the general public); that provide housing, employment, or credit; or those which receive public funds.¹¹⁴ Although existing federal civil rights law does not provide express protection in these contexts based on sexual orientation, some states and local governments have enacted such protection, leading to legal challenges from individuals, organizations, and businesses with religious objections to serving same-sex couples.¹¹⁵

Entities with religious objections may seek legal protection under state religious freedom laws, whether a state RFRA or a state constitutional provision that applies the same protection, claiming that the nondiscrimination laws are a substantial burden subject to the limitations of RFRA. As discussed earlier, a number of states have enacted legislation that is substantially similar to the federal RFRA. Although some more recently enacted state RFRA laws have attempted to address these types of claims more explicitly,¹¹⁶ it is unclear how RFRA and various civil rights provisions may be reconciled. Because of the absence of civil rights protections based on sexual orientation at the federal level, these issues have been explored as a matter of state laws.

Balancing the First Amendment with Nondiscrimination Laws Under Supreme Court Jurisprudence

A number of Supreme Court decisions have indicated that First Amendment rights are not absolute when weighed against nondiscrimination requirements.¹¹⁷ The Court considered the balance between freedom of religion under the First Amendment and racial nondiscrimination provisions in *Bob Jones University v. United States*.¹¹⁸ Bob Jones University—which operates according to “fundamentalist Christian religious beliefs,” including a prohibition on interracial dating and marriage—had originally excluded black students and eventually developed a policy for admission of black students, but proscribed interracial dating and marriage.¹¹⁹ The lawsuit challenged the revocation of the school’s tax-exempt status based on these rules (discussed in detail in a later section of this report), but the Court also considered the role of the school’s First Amendment right to practice its religion freely. Acknowledging that eliminating racial discrimination in education was a fundamental public policy, the Court rejected the school’s defense that its First Amendment rights permitted it to consider race regardless of statutory nondiscrimination requirements.¹²⁰ Even though the case was decided while the Court still applied heightened protection to First Amendment religious exercise claims, it nonetheless held that the government’s interest in eliminating racial discrimination outweighed the infringement on the school’s religious exercise, stating: “[Not] all burdens on religion are unconstitutional.... The

¹¹⁴ See CRS Report RL33386, *Federal Civil Rights Statutes: A Primer*.

¹¹⁵ Congress has proposed legislation that would expand protection based on sexual orientation and gender identity in a variety of contexts. See, e.g., H.R. 3185/S. 1858, 114th Cong., 1st Sess. (2015).

¹¹⁶ See, e.g., Indiana Sen. Bill 101, 2015 Sess. (March 26, 2015), available at <https://iga.in.gov/legislative/2015/bills/senate/101>; Indiana Sen. Bill 50, 2015 Sess. (April 2, 2015), available at <https://iga.in.gov/legislative/2015/bills/senate/50>.

¹¹⁷ See *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Boy Scouts of America and Monmouth Council v. Dale*, 530 U.S. 640 (2000).

¹¹⁸ *Bob Jones University*, 461 U.S. 574.

¹¹⁹ *Id.* at 580-81.

¹²⁰ *Id.* at 592-93.

state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”¹²¹

The Court thus found the government’s interest to be compelling, which satisfied the pre-*Smith* constitutional standard, and permitted enforcement of nondiscrimination protections even if they conflicted with religious exercise rights.

In some cases, the Court has considered whether certain civic organizations, such as the Jaycees or Boy Scouts, could be compelled to admit members under nondiscrimination laws who they would otherwise exclude, or whether the organizations could claim First Amendment freedom of association protection. Finding that the Jaycees operated as “large and basically unselective groups,” the Court upheld the application of a state public accommodations statute requiring the group to accept female members.¹²² The Court noted that the right to associate is not absolute, and must be weighed against the government’s interest in regulation of discriminatory practices.¹²³ Applying strict scrutiny, the Court explained that the local chapters of the Jaycees are places of public accommodations because they provide goods and services to members through their programs.¹²⁴ The Court ultimately determined that the government had a compelling interest to offer equal access to those services, and that it had “advanced those interests through the least restrictive means.”¹²⁵

The Court reached a different outcome in a challenge to the Boy Scouts’ membership policy that excluded members based on sexual orientation.¹²⁶ The Court held that applying nondiscrimination provisions of the state public accommodations law to the Boy Scouts violated the group’s First Amendment right to free association.¹²⁷ Noting some controversy regarding whether or not the group should be subject to public accommodations provisions, the Court appeared to recognize that the Boy Scouts’ policy opposing extension of membership regardless of sexual orientation was fundamental to the identity of the organization.¹²⁸ Accordingly, the Boy Scouts’ constitutional right outweighed the government’s interest in compelling its compliance with nondiscrimination law.

Religious Objections to Civil Rights of Same-Sex Couples

As states began legally recognizing same-sex relationships—whether as marriages, civil unions, or domestic partnerships—individuals and organizations with religious objections filed legal challenges asserting their religious freedom rights as a defense from complying with various nondiscrimination requirements that might require serving such couples.¹²⁹ The Supreme Court has recognized the authority of the government to impose requirements on business owners with religious objections to a particular statutory mandate historically, stating the following:

¹²¹ *Id.* at 603 (quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982)).

¹²² *Roberts*, 468 U.S. at 621.

¹²³ *Id.* at 623.

¹²⁴ *Id.* at 626.

¹²⁵ *Id.*

¹²⁶ *Boy Scouts of America*, 530 U.S. 640.

¹²⁷ *Id.*

¹²⁸ *See id.* at 656-57.

¹²⁹ *See, e.g., North Coast Women’s Care Medical Group, Inc. v. Superior Court of San Diego County*, 44 Cal. 4th 1145 (Cal. 2008).

[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption ... to an employer operates to impose the employer's religious faith on the employees.¹³⁰

However, *Hobby Lobby* has illustrated that business owners do not forfeit all legal rights related to their religious exercise simply by engaging in commercial business.¹³¹

Cases alleging discrimination based on a couple's same-sex orientation historically have arisen in a variety of contexts, including facilities that are considered public accommodations under applicable law, as well as housing opportunities and employment benefits for same-sex couples.¹³² For example, in a 2008 case, the California Supreme Court ruled that physicians with religious objections to same-sex couples could not claim constitutional religious exemption from the state's civil rights law, which had been interpreted to prohibit sexual orientation discrimination.¹³³ A same-sex couple sought assistance for fertility treatment from a medical office that employed several doctors who had religious objections to one of the procedures that might be considered for artificial insemination.¹³⁴ The initial physician advised the couple of her objections to certain steps in the planned course of treatment, but informed them that other doctors in the practice did not share those objections and could be available to provide treatment as necessary.¹³⁵ Because of complications during the fertility process, the course of the treatment changed and the only two doctors who ultimately would be able to assist the couple objected to serving unmarried or same-sex couples.¹³⁶ Under state law, a business establishment and its employees are subject to liability if a person is denied "full and equal accommodations, advantages, facilities, privileges, or services."¹³⁷ The court reasoned that the civil rights provision was a valid and neutral law of general applicability under *Smith*, and therefore declined to recognize an exemption under the First Amendment.¹³⁸ The court noted that the physicians could avoid conflict with the law's requirements by limiting their practice to offer only procedures that doctors would perform for any patient, or by ensuring that a physician who did not object was available to patients seeking any given treatment.¹³⁹ In this case, only one doctor was licensed to provide the necessary treatment and that doctor claimed religious objections to treating this particular patient.¹⁴⁰ Additionally, the court concluded that even a heightened standard of review, which may be available under the state constitution, would not protect the physicians' religious

¹³⁰ *United States v. Lee*, 455 U.S. 252, 261 (1982) (involving a challenge by an Amish employer to participation in Social Security tax system).

¹³¹ *See Hobby Lobby*, 134 S.Ct. 2751.

¹³² *See, e.g., Levin v. Yeshiva University*, 96 N.Y.2d 484 (N.Y. 2001) (unmarried lesbian student's challenge to university housing policy giving priority for married couples); *Bedford v. New Hampshire Community Technical College System*, 98 Fair Empl. Prac. Cas. (BNA) 663 (2006) (lesbian employees' challenge to denial of employment benefits for same-sex partners).

¹³³ *North Coast Women's Care Medical Group, Inc. v. Superior Court of San Diego County*, 44 Cal. 4th 1145, 1153 (Cal. 2008).

¹³⁴ *Id.*

¹³⁵ *Id.* at 1150-51.

¹³⁶ *Id.* at 1151-53.

¹³⁷ *See* Cal. Civ. Code §51(b).

¹³⁸ *North Coast Women's Care Medical Group*, 44 Cal. 4th at 1156.

¹³⁹ *Id.* at 1159.

¹⁴⁰ *Id.* at 1152.

objections because the state had a compelling interest in providing access to medical care, regardless of sexual orientation, and had no less restrictive means available to do so.¹⁴¹

Some of the most prominent challenges have been made in the context of business owners' religious objections to serving same-sex couples related to goods and services available for wedding celebrations. For example, in one case that received significant attention on this issue, a religious association that operated a boardwalk pavilion denied access to the facility for a same-sex civil union ceremony, although it permitted the facility to be used for other public events, including other couples' marriage ceremonies.¹⁴² The New Jersey Division on Civil Rights upheld an administrative ruling that the association had violated state nondiscrimination laws (which included protection based on sexual orientation) because, as a place of public accommodation, the pavilion must be made available on an equal basis to couples, regardless of sexual orientation.¹⁴³

Challenges in other states have had similar results.¹⁴⁴ A Washington court rejected religious freedom claims of a florist who declined to serve a gay couple's request for wedding arrangements.¹⁴⁵ Applying heightened scrutiny under the state constitution, it recognized a compelling interest in eradicating discrimination, and held that allowing objecting businesses to refer customers to alternative businesses would undermine that purpose.¹⁴⁶ A Colorado court held that a bakery could not claim exemption from the state's nondiscrimination law based on its religious objections to serving same-sex couples.¹⁴⁷ Examining both federal and state constitutional protections, the court noted that the law was a neutral law of general applicability, thus satisfying the federal standard, and that state law did not require the court to apply a heightened standard of protection.¹⁴⁸

While challenges applying the *Smith* standard typically have been decided in favor of the same-sex couple, some businesses have invoked RFRA in defense of their objections. In a case that has been cited as a likely motivating factor for some states drafting new or broader religious freedom laws, the Supreme Court of New Mexico held that a wedding photography business violated state public accommodations provisions after refusing to serve a same-sex couple, and that the business could not assert protection under the state RFRA.¹⁴⁹ The business argued that it would not discriminate against individuals based on their sexual orientation, but that its religious objections should protect it from being compelled to serve individuals in contexts that would demonstrate their orientation, that is, as couples or at weddings.¹⁵⁰ The Court rejected that

¹⁴¹ *Id.*

¹⁴² *Bernstein v. Ocean Grove Camp Meeting Association*, Agency Dkt. No. PN34XB-03008 (Initial Decision, January 12, 2012), available at <http://www.adfmedia.org/files/OGCMA-BernsteinRuling.pdf>; *Bernstein v. Ocean Grove Camp Meeting Association*, Finding of Probable Cause, DCR Dkt No. PN34XB-03008 (December 29, 2008), available at <http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf>.

¹⁴³ *See id.*

¹⁴⁴ *See also McCarthy v. Liberty Ridge Farm, L.L.C.*, Nos. 10157952 and 10157963, Notice and Final Order (New York State Division of Human Rights, July 2, 2014).

¹⁴⁵ *State of Washington v. Arlene's Flowers, Inc.*, No. 13-2-00871-5 (Superior Court of Washington filed February 18, 2015).

¹⁴⁶ *Id.*

¹⁴⁷ *Craig v. Masterpiece Cakeshop, Inc.*, 2015 Colo. App. LEXIS 1217 (Colo. Ct. App. August 13, 2015).

¹⁴⁸ *Id.* Colorado has not enacted a state version of RFRA that would require heightened scrutiny. The Court found that the state constitution did not require it to apply heightened scrutiny in this case. *Id.*

¹⁴⁹ *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013).

¹⁵⁰ *Id.* at 62-63.

argument, and further held that the company's First Amendment rights were not infringed.¹⁵¹ Among the issues the state supreme court considered were whether the business would qualify for protection as a "person" with free exercise rights and whether the law was neutral and generally applicable.¹⁵² Assuming the business could claim protection, the court held that a free exercise claim could not survive because the public accommodations law that allegedly infringed was a neutral law of general applicability.¹⁵³ The court declined to apply the state RFRA, explaining that the statute could be violated only by actions of a government agency, which it interpreted to not include the legislature or courts.¹⁵⁴ Furthermore, according to the court, the statute was applicable only to provide relief in cases in which the government was a party.¹⁵⁵

Implications of *Hobby Lobby* and the Applicability of RFRA Protection for Businesses with Religious Objections

Prior to the Court's decision in *Hobby Lobby*, it may have seemed unlikely that business owners could claim protection for their religious beliefs. However, the *Hobby Lobby* decision made clear that owners of secular, for-profit businesses may assert religious freedom protections under the federal RFRA. As mentioned earlier in this report, many states have enacted RFRA similar to the federal statute, and therefore likely could also be invoked to protect such entities. Recently proposed and enacted state versions of RFRA have attempted to address concerns about potential limits to the applicability of statutory protections for religious freedom, as illustrated in the New Mexico photography case. For example, Arizona's legislature passed amendments to its RFRA to clarify that the government would not be required to be a party to a lawsuit invoking RFRA as a defense.¹⁵⁶ The bill was vetoed, however, by the governor, who cited potential unintended consequences and broad opposition to the bill from the business community.¹⁵⁷ Likewise, states that proposed broader language when considering enacting state RFRA legislation faced significant controversy in early 2015 because of opposition from businesses and the unclear consequences that the broader language may have.¹⁵⁸

Additionally, the Court's decision in *Hobby Lobby* raised a number of questions regarding the extent to which RFRA protections could be used to exempt businesses from statutory nondiscrimination mandates. As mentioned in an earlier section of this report, the majority and dissenting opinions debated the potential scope of the decision's effect, with the dissent expressing concern that the decision may protect businesses that engage in discriminatory

¹⁵¹ *Id.* at 63-76.

¹⁵² *Id.* at 72-76. The court also noted a rarely applied theory of free exercise jurisprudence known as hybrid rights claims, but concluded that such a theory had not been adequately supported in this case. *Id.* at 75.

¹⁵³ *Id.* at 73-75.

¹⁵⁴ *Id.* at 76.

¹⁵⁵ *Id.*

¹⁵⁶ See Ariz. Sen. Bill 1062, 51st Leg., 2nd Reg. Sess. (2014), available at <http://www.azleg.gov/legtext/51leg/2r/bills/sb1062s.pdf>.

¹⁵⁷ See Veto Letter, Re: Senate Bill 1062 (exercise of religion; state action), Governor Janice K. Brewer, State of Arizona (February 26, 2014), available at http://tucson.com/gov-brewer-s-veto-letter/pdf_b7679d6e-9f4b-11e3-8cb0-001a4bcf887a.html.

¹⁵⁸ See, e.g., Indiana Sen. Bill 101, 2015 Sess. (March 26, 2015), available at <https://iga.in.gov/legislative/2015/bills/senate/101>; Indiana Sen. Bill 50, 2015 Sess. (April 2, 2015), available at <https://iga.in.gov/legislative/2015/bills/senate/50>; Arkansas Sen. Bill 975, 90th Gen. Assembly, Reg. Session (April 2, 2015), available at <http://www.arkleg.state.ar.us/assembly/2015/2015R/Pages/BillInformation.aspx?measureno=SB975>.

practices.¹⁵⁹ However, the majority specifically responded to the concern that RFRA might permit a business to engage in racially discriminatory hiring practices, writing that the “decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”¹⁶⁰ It may be noted that the Court’s statement did not address sexual orientation discrimination specifically, and that the decision emphasized the case-by-case basis of evaluating application of the heightened protection provided by RFRA. Thus, although the decision implies that RFRA protections would not supersede at least some civil rights protections (e.g., employment rights), it is not clear how the issue would be decided on the merits of a particular legal challenge.

Religiously Affiliated Social Service Providers’ Participation in Publicly Funded Programs

Concerns about religious objections to same-sex marriage have also manifested in the context of government funding programs that provide financial assistance to private entities, including organizations with religious objections to same-sex marriage. The provision of public funds to religious entities raises a number of constitutional questions, which are beyond the scope of this report, but generally such funding has been permitted under certain circumstances.¹⁶¹ Questions about the implications of *Obergefell* for religious service providers who object to same-sex marriages have arisen most often in the realm of adoption services, but religious social service providers receiving federal funds may have objections in other contexts as well.¹⁶² The crux of the question is whether entities that receive public funds to administer a particular program may refuse to serve same-sex couples who would be potential beneficiaries of that program. For the purposes of this report, the term beneficiaries, in the context of adoption programs, generally refers to parents who seek assistance to adopt a child from an adoption services provider. It is noted that the children being adopted also may be considered beneficiaries of the program.

Role of Religious Providers and Federal Funding in Adoption and Foster Care Services

Obergefell requires states to recognize same-sex marriages, but the Court’s decision did not address whether states must recognize same-sex couples as potential foster or adoptive parents.¹⁶³

¹⁵⁹ *Hobby Lobby Stores*, 134 S.Ct. at 2804-05 (Ginsburg, J., dissenting).

¹⁶⁰ *Id.* at 2783.

¹⁶¹ See, e.g., CRS Report R42974, *Federal Aid for Reconstruction of Houses of Worship: A Legal Analysis*; CRS Report R41099, *Faith-Based Funding: Legal Issues Associated with Religious Organizations That Receive Public Funds*; CRS Report R40195, *The Law of Church and State: Public Aid to Sectarian Schools*.

¹⁶² For example, in early 2015, Congress considered amendments to the Runaway and Homeless Youth Act (42 U.S.C. §5701 et seq.). See S.Amdt. 290, 114th Cong. Senate Amendment 290 would have applied nondiscrimination protections based on a number of categories, including sexual orientation, to certain programs and activities under the Juvenile Justice and Delinquency Prevention Act. Congressional debate addressed concerns that the amendment would require some faith-based service providers with objections to sexual orientation to act in conflict with their religious beliefs. See, e.g., *Congressional Record*, April 22, 2015, pp. S2327-S2331.

¹⁶³ As noted earlier in the report, the *Obergefell* decision identified a number of principles to support its finding that marriage was a fundamental right for same-sex couples, including a discussion of the safeguards that marriage provides for children and families, noting the potential significance of marriage in the adoption context. *Obergefell*, slip op. at 14. The Court noted that state laws vary with regard to the ability of same-sex parents to adopt; however, it did not (continued...)

States have adopted a range of laws regulating adoption of children, including limitations based on the potential parents' sexual orientation or marital status.¹⁶⁴ As states began the process of recognizing same-sex marriages in recent decades and enacting protections against discrimination based on sexual orientation, religious entities have raised objections—based on religious beliefs that do not condone same-sex relationships—regarding state requirements to consider placing children with same-sex parents.¹⁶⁵

Although eligibility to adopt remains a matter of state law, the federal law or policies may impact the adoption process, particularly through Congress's authority to condition the use of federal funds. The federal government provides funds to state child welfare agencies for their use in recruitment of foster and adoptive parents, promotion of adoption and related support services, and provision of assistance for children in foster care or adopted from foster care.¹⁶⁶ Although restrictions on federal assistance currently include prohibitions on state or local recipients related to the consideration of race, color, or national origin of the potential foster or adoptive parent or child, there appears to be no federal prohibition on the consideration of sexual orientation in the placement process.¹⁶⁷ Following *Obergefell*, questions have been raised whether the recognition of a constitutional right to marry for same-sex couples consequently would require adoption services providers to consider placing children with same-sex couples who are otherwise eligible to be adoptive or foster parents. Because *Obergefell* did not establish a right of same-sex couples to adopt, and because federal law currently does not include any conditions requiring nondiscrimination based on sexual orientation for adoption services funding, it appears unlikely that religious entities would be required to place children with same-sex couples as a matter of federal law. However, state nondiscrimination laws or related conditions on state funds may impose such requirements.

Considerations for Potential Conditions on Funding That Involves Same-Sex Couples

Although federal law currently does not address concerns about potential discrimination against same-sex couples seeking to adopt a child or about potential burdens imposed on religious service providers, Congress may consider legislation that would respond to either or both of those issues.¹⁶⁸ Congress previously has enacted legislation that addressed both of these concerns in the context of its so-called faith-based funding rules (also commonly known as charitable choice

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confer any associated rights to same-sex couples as adoptive parents beyond the right to marry. *Id.* at 15.

¹⁶⁴ For more information, see CRS Report RS21191, *Same-Sex Adoptions*. See also Rebecca Beitsch, *Despite Same-Sex Marriage Ruling, Gay Adoption Rights Uncertain in Some States*, Stateline, Pew Charitable Trusts (August 19, 2015), available at <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/08/19/despite-same-sex-marriage-ruling-gay-adoption-rights-uncertain-in-some-states>.

¹⁶⁵ Some religious service organizations ended their adoption services programs due to requirements that would not recognize their objections to placing children with same-sex parents. See Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE (March 11, 2006); Manya A. Brachear, *Catholic Charities of Rockford Ends Foster Care, Adoption Services*, CHICAGO TRIBUNE (May 26, 2011).

¹⁶⁶ See CRS Report R43458, *Child Welfare: An Overview of Federal Programs and Their Current Funding*.

¹⁶⁷ See 42 U.S.C. §671(a)(18).

¹⁶⁸ Several bills have been introduced, predating the *Obergefell* decision, that address potential approaches regarding the rights of religious service providers and same-sex parents. See, e.g., Child Welfare Provider Inclusion Act, H.R. 1299/S. 667, 114th Cong., 1st Sess. (2015); Every Child Deserves a Family Act, H.R. 2449/1382, 114th Cong., 1st Sess. (2015). However, a discussion of these bills is beyond the scope of this report.

rules). It may also rely on the conscience clause model that has been used to protect entities with religious objections to abortion that receive federal funds under certain health care programs.

Adopting Faith-Based Funding Rules Related to Adoption and Foster Services Funding

A significant issue related to faith-based funding that is particularly relevant to same-sex adoptions has been the balancing of rights of the religious organization and the rights of beneficiaries of the program. Over the past two decades, Congress has enacted protections for religious service providers that participate in publicly funded programs, and concurrent restrictions on discrimination against beneficiaries in publicly funded programs.¹⁶⁹ In these examples of programs involving religious service providers, federal law provides both protections for the providers' religious identity and protections for the rights of the program beneficiaries who may seek services from those providers (in this case, same-sex parents seeking to adopt a child).

As a general matter, faith-based providers' participation in these programs has been controversial, but the legislation authorizing participation includes a number of provisions to address potential constitutional issues.¹⁷⁰ So-called faith-based funding or charitable choice legislation includes provisions that allow a religious organization receiving federal funds to "retain its independence" regarding its control over its religious exercise and beliefs.¹⁷¹ Such an organization cannot be required to change its form of internal governance or remove religious symbols from its facilities.¹⁷² Although the Supreme Court has not considered challenges to these provisions, the Court has permitted religious entities to receive federal funds directed for secular purposes with certain conditions in a number of other cases.¹⁷³

Some programs include explicit protections for beneficiaries who object to the religious character of a recipient organization.¹⁷⁴ The state must notify the beneficiary of an alternative provider that would be accessible to the beneficiary.¹⁷⁵ Religious service providers are prohibited from discriminating against beneficiaries "on the basis of religion, a religious belief, or refusal to actively participate in a religious practice."¹⁷⁶ Thus, current provisions in existing statutory programs protect both the religious identity of the organization and the religious freedom of

¹⁶⁹ Beginning in 1996, Congress enacted several laws that included so-called charitable choice rules to ensure faith-based organizations could participate in federally funded social service programs like other nongovernmental providers. *See, e.g.*, P.L. 104-193, Title I, §104 (August 22, 1996), 110 Stat. 2161, codified at 42 U.S.C. §604a; P.L. 105-33, Title V, Subtitle A (August 5, 1997), 111 Stat. 251, 577; P.L. 105-285, Title II, §201 (October 27, 1998), 112 Stat. 2749, codified at 42 U.S.C. §9920; P.L. 106-310, Title XXXIII, §3305 (October 17, 2000), codified at 42 U.S.C. §300x-65; P.L. 106-554, §1 (December 21, 2000), 114 Stat. 2763, codified at 42 U.S.C. §290kk.

¹⁷⁰ For more information on legal issues associated with faith-based organizations' participation in social service programs, *see* CRS Report R41099, *Faith-Based Funding: Legal Issues Associated with Religious Organizations That Receive Public Funds*.

¹⁷¹ *See, e.g.*, 42 U.S.C. §604a(d)(1).

¹⁷² *See, e.g.*, 42 U.S.C. §604a(d)(2).

¹⁷³ *See, e.g.*, *Tilton v. Richardson*, 403 U.S. 672 (1971); *Agostini v. Felton*, 521 U.S. 203 (1997).

¹⁷⁴ A number of federal agencies have issued notice of proposed rulemaking to clarify these rules in response to recommendations by the Advisory Council for Faith-Based and Neighborhood Partnerships. *See* Melissa Rogers, Promoting Common-Ground Reforms of Social Service Partnerships, August 5, 2015, *available at* <https://www.whitehouse.gov/blog/2015/08/05/promoting-common-ground-reforms-social-service-partnerships>.

¹⁷⁵ *See, e.g.*, 42 U.S.C. §604a(e)(1).

¹⁷⁶ *See, e.g.*, 42 U.S.C. §604a(g).

beneficiaries. These rules apply only to the programs under which they were enacted, and do not apply to all federal funds that might be distributed to religious entities under other programs.

If Congress adopted statutory nondiscrimination requirements for adoption services funding, the balance of the rights of participating religious providers and potential same-sex parents as program beneficiaries likely would be a matter of congressional discretion. It may be noted that the parameters of the ban on discrimination against beneficiaries based on religion are unclear. In other words, would such a prohibition mean that service providers cannot *only* serve beneficiaries who are co-religionists? Alternatively, the prohibition arguably could be interpreted more broadly to mean that service providers cannot base their decision on other factors that do not involve religious affiliation but rather other characteristics to which the provider's religious doctrine objects (i.e., sexual orientation). In other contexts, for example, under employment nondiscrimination statutes, courts have indicated that discrimination *based on religion* may include other forms of discrimination as long as the action relates to a religious tenet.¹⁷⁷ Under this theory of interpretation, a religious organization that receives public funds may argue that extending its services to same-sex beneficiaries would infringe on its religious identity in violation of statutory religious freedom protections. In other words, the religious organization's preference for opposite-sex parents may be considered a matter of its religious doctrine which arguably could not be infringed unless the standards of protection available under RFRA were met. It is noted that this is a fairly novel and very complicated issue because it arises in the context of funding conditions, rather than direct regulation, and therefore may not be subject to the same analysis. Such a case likely would raise a similar set of issues as those discussed earlier regarding how to balance the rights of a religious organization with the civil rights of other individuals, as was litigated in *Bob Jones University*.

Conscience Clause Protections Related to Adoption and Foster Care

Congress may choose to consider a federal conscience clause (similar to that discussed in the context of civil officiants earlier in this report) to protect religiously affiliated agencies' objections to placing children with same-sex couples. Federal conscience clauses arguably could protect the right of religious objectors by conditioning federal funding (e.g., adoption services grants to state agencies) on nondiscrimination based on religion. This approach would ensure that funds may only be distributed to recipients (i.e., the state agencies) if the religious objections of participating service providers are accommodated. In other words, a state that forced a religious adoption agency to place children in homes with same-sex couples would consequently lose federal funds under the program. A conscience clause would incentivize inclusion of religiously affiliated adoption agencies because of the benefits of federal funding for the program. Congress may seek to balance the interest of such agencies with the interests of same-sex adoptive parents by including a requirement that agencies with objections provide alternative options for couples whom the agency cannot serve.¹⁷⁸ It is important to remember that existing models of federal

¹⁷⁷ For instance, religious employers are permitted to discriminate in employment decisions based on religion, but not on race, color, sex, or national origin. See *EEOC v. Pacific Press Publ'g Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982); EEOC Notice, N-915, September 23, 1987. If a religious school terminated a teacher's employment because she was pregnant, it likely would be deemed in violation of federal law because its decision was based on the teacher's sex. See *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410 (6th Cir. 1996). However, if the decision to terminate the pregnant teacher's employment was because she was not married at the time she became pregnant and the school's religious doctrine forbade sex outside of marriage, the school's decision likely would be characterized discrimination based on religion. *Id.*

¹⁷⁸ As discussed briefly earlier in this report, some states have enacted conscience clauses to protect pharmacists who object to dispensing contraceptives. In some cases, the pharmacist nonetheless is required to provide alternative means (continued...)

conscience clauses do not include a right of action for the individual, but Congress is not precluded from including one in the future.

Availability of Alternative Service Providers

In existing examples of faith-based funding rules and conscience clauses, entities with religious objections generally have been required to notify beneficiaries or customers of an alternative provider who would not object to serving that individual.¹⁷⁹ However, when considering specific rules to allow religiously affiliated adoption agencies to participate in federally funded programs, Congress may seek to ensure the availability of alternative service providers for beneficiaries that certain religiously affiliated agencies would object to serving. For example, if Congress enacts protections allowing religious providers to refuse to place children with certain couples, there may be notable impacts on the availability of services for those couples, depending on the range of alternative providers. If there are few alternatives available, exempting religiously affiliated providers may mean that some beneficiaries effectively cannot otherwise participate in the program. Given the proportion of religiously affiliated adoption agencies in a particular jurisdiction, a decision to require such agencies to make placements to which they have religious objections may have repercussions for the program as a whole. For example, Catholic Charities handles 20% of adoption and foster care services in Illinois.¹⁸⁰ If Catholic Charities withdrew from providing these services because of its religious objections, the withdrawal would likely increase the workload of other agencies providing adoption and foster care services.

Potential Effects for Tax-Exempt Status

Another potential issue, which was raised at oral argument in *Obergefell* and recently addressed by Internal Revenue Service (IRS) Commissioner Koskinen in testimony before Congress,¹⁸¹ is whether churches and other religious entities could be denied federal tax-exempt status if they act in opposition to same-sex marriage (e.g., a church that does not perform same-sex marriages or a religious school that refuses to provide same-sex couples with married student housing).

Churches and other religious organizations, such as religious schools and religiously affiliated charities, are among the entities that qualify for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code (IRC).¹⁸² Section 501(c)(3) entities are broadly referred to as charitable

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of access for the patient, for example, referring the prescription to a different pharmacy. See *Pharmacist Conscience Clauses: Laws and Information*, National Conference of State Legislatures (May 2012), available at <http://www.ncsl.org/issues-research/health/pharmacist-conscience-clauses-laws-and-information.aspx>.

¹⁷⁹ See, e.g., 42 U.S.C. §604a(e)(1); EEOC Compliance Manual at §12-14.C.3 (Examples 43 and 44).

¹⁸⁰ Stephen DiBenedetto, *Catholic Adoption Groups Want to Be Able to Refuse Gay and Lesbian Parents*, CHICAGO SUN-TIMES (August 4, 2011), available at <http://www.suntimes.com/news/metro/5190728-417/catholic-adoption-groups-want-to-be-able-to-refuse-gay-and-lesbian-parents.html>.

¹⁸¹ See Transcript of Oral Argument at 38, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14556); CQ Transcriptions, *Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options Before the Subcomm. on Oversight, Agency Action, Federal Rights and Federal Courts of the S. Comm. on the Judiciary* (July 29, 2015) (statement of IRS Commissioner Koskinen) (hereinafter *Koskinen testimony*), available through Lexis.com.

¹⁸² 26 U.S.C. §501(c)(3) (describing entities “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition ... or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation ... and which does not participate in, or intervene in ... any political (continued...)”).

organizations. In addition to being exempt from federal income and unemployment taxes,¹⁸³ they are eligible to receive tax-deductible charitable contributions under IRC Section 170.¹⁸⁴

One qualification for Section 501(c)(3) status and Section 170 eligibility is that an organization cannot engage in activities that are illegal or violate a well-established, fundamental public policy.¹⁸⁵ This is referred to as the “illegality doctrine.” The doctrine is not found in the statutory language of either section. Rather, the Supreme Court has held that it is an implicit condition under both sections, stemming from the common law of charitable trusts.¹⁸⁶

The possibility that the illegality doctrine could be applied to churches and other religious institutions that act in opposition to same-sex marriage is controversial. This report analyzes two legal questions that would be raised by the doctrine’s application in this context. The first is whether a religious organization’s First Amendment rights would be violated if it were denied Section 501(c)(3) status due to actions based on sincerely held religious beliefs. If yes, then that is the end of the matter, and the denial could not occur. If, however, the denial of tax-exempt status would not run afoul of the First Amendment, then the second question is whether such denial would be appropriate under the illegality doctrine. Answering this question requires determining whether a law or public policy exists in the same-sex marriage context that would trigger the doctrine’s application and, if so, whether an organization’s specific actions justify revocation under the doctrine. These questions are discussed below.

First Amendment’s Religious Clauses

The first question is whether a religious entity’s First Amendment rights would be violated if it were denied Section 501(c)(3) status due to actions that were based on sincerely held religious beliefs. In the seminal 1983 case *Bob Jones University v. United States*,¹⁸⁷ the Supreme Court held that such denial is permissible under certain circumstances.

In *Bob Jones*, the Court upheld the IRS’s determination that a private religious school could have its Section 501(c)(3) status revoked under the illegality doctrine for engaging in racially discriminatory practices.¹⁸⁸ In so doing, the Court held that the revocation did not run afoul of the First Amendment’s religious clauses, even assuming the school’s racially discriminatory policies were based on sincerely held religious beliefs.¹⁸⁹ With respect to the Free Exercise Clause, the Court explained that the government can justify a burden on religion by showing it is necessary to accomplish a compelling governmental interest that cannot be achieved by less restrictive means.¹⁹⁰ The Court determined that the burden on religion in the form of revoked tax benefits

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campaign on behalf of (or in opposition to) any candidate for public office.”).

¹⁸³ 26 U.S.C. §§501(a), 3306(c)(B)(8).

¹⁸⁴ 26 U.S.C. §170(c)(2)(B) (defining “charitable contribution” to include contributions to or for the use of entities “organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes ...”).

¹⁸⁵ See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). See also IRS, *Illegality and Public Policy Considerations*, 1994 EO CPE TEXT, available at <http://www.irs.gov/pub/irs-tege/eotopic194.pdf> (hereinafter *IRS EO CPE Text*) (discussing application of the doctrine’s principles to charitable and noncharitable tax-exempt entities, including Section 501(c)(4) social welfare organizations and Section 501(c)(6) business leagues).

¹⁸⁶ See *Bob Jones*, 461 U.S. at 591.

¹⁸⁷ See *id.* at 603-605.

¹⁸⁸ See *id.* at 595-96.

¹⁸⁹ See *id.* at 603-605.

¹⁹⁰ See *id.* at 604.

was justified in light of the government’s compelling interest in eradicating racial discrimination in education, and that no less restrictive means existed.¹⁹¹ The Court also rejected the school’s argument that the revocation policy violated its rights under the Establishment Clause by favoring religions that did not have such racial beliefs, with the Court concluding that the policy was permissible because it was based on neutral, secular criteria.¹⁹²

Notably, the extent to which the First Amendment analysis in *Bob Jones* applies in the context of churches and other houses of worship is not clear. The Court, in holding that the school’s First Amendment rights were not violated, expressly stated that it was not addressing churches and other “purely religious institutions,” and emphasized that the governmental interest supporting revocation was denying public support to racial discrimination in education.¹⁹³ Thus, the Court did not address the circumstances under which the application of the illegality doctrine to a church acting on sincerely held religious beliefs would be constitutionally permissible. It does not appear that any cases since *Bob Jones* have clarified this issue.¹⁹⁴ As such, it is not clear whether the *Bob Jones* analysis would support the denial of tax-exempt status under the illegality doctrine for churches and other houses of worship acting on sincerely held religious beliefs, particularly in light of the constitutional protection of noninterference in internal matters of religious institutions discussed above.

Illegality Doctrine

In those instances in which the denial of Section 501(c)(3) status to a religious entity is permissible under the First Amendment, the next question is whether the illegality doctrine would support such denial for religious entities acting in opposition to same-sex marriage. This raises two fundamental issues: (1) whether a Section 501(c)(3) organization that acts in opposition to same-sex marriage would be in violation of a law or public policy and thus trigger the doctrine’s application; and (2) if so, whether the organization’s specific actions would justify the denial of tax-exempt status under the doctrine.

Illegality Doctrine’s Application in the Context of Same-Sex Marriage

The first issue is whether a Section 501(c)(3) organization’s action in opposition to same-sex marriage would be in violation of a law or public policy and thus trigger the application of the illegality doctrine. If the entity’s actions were illegal, then the doctrine would apply (although denial might not be justified in light of the organization’s other activities, as discussed below). In those situations in which a law is not violated (which would appear to generally be the case in the same-sex marriage context), the Supreme Court has clearly stated that the doctrine applies only if there is “no doubt” the organization’s activity “is contrary to a fundamental public policy.”¹⁹⁵ This raises the critical question of how to determine whether such a public policy exists.

¹⁹¹ *See id.*

¹⁹² *See id.* at 604 n.30.

¹⁹³ *See id.* at 604 n.29.

¹⁹⁴ There appears to be one case addressing the illegality doctrine in the context of churches, but it has limited applicability here because of the specific issues presented (primarily dealing with the church’s for-profit, noncharitable activities). *See Church of Scientology v. Comm’r*, 83 T.C. 381 (1984), *affirmed on other grounds by* 823 F.2d 1310 (9th Cir. 1987).

¹⁹⁵ *Bob Jones*, 461 U.S. at 592 (noting that such determinations “are sensitive matters with serious implications for the institutions affected”).

In *Bob Jones*, the Supreme Court held that the school's racially discriminatory practices violated a well-established, fundamental national public policy against racial discrimination in education.¹⁹⁶ The Court determined that this public policy existed because all three branches of the federal government had taken clear, unmistakable action to end racial discrimination in education.¹⁹⁷ As evidence, the Court pointed to its unbroken stream of cases beginning with the landmark decision in 1954 of *Brown v. Board of Education*;¹⁹⁸ multiple laws passed by Congress, including the Civil Rights Act of 1964; and various executive orders and presidential pronouncements.¹⁹⁹

Here, it is arguably not clear that a well-established, fundamental public policy exists that would justify the denial of Section 501(c)(3) status to an organization acting in opposition to same-sex marriage. In contrast to *Bob Jones*, where the Court identified decades of congressional, judicial, and executive branch actions prohibiting racial discrimination in education, analogous governmental action in support of same-sex marriage is arguably minimal. For example, while the Supreme Court has issued two significant cases in the context of same-sex marriage—*Obergefell*, holding that states must recognize same-sex marriage, and *Windsor v. United States*,²⁰⁰ striking down Section 3 of the federal Defense of Marriage Act—these are recent cases, and their implications are not fully developed.²⁰¹ Similarly, it might be argued that Congress has not taken significant legislative action in the same-sex marriage context that would be analogous to the Civil Rights Act of 1964 and other laws prohibiting racial discrimination. Thus, at this time, it is not clear the illegality doctrine would apply to Section 501(c)(3) entities acting in opposition to same-sex marriage.

In July 2015, IRS Commissioner Koskinen took this position in testimony before Congress.²⁰² He stated that the IRS would not attempt to revoke the tax-exempt status of religious entities that engage in activity in opposition to same-sex marriage because public policy does not currently support revocation under the illegality doctrine.²⁰³

The Commissioner did, however, leave open the possibility that the IRS might revisit the issue in response to future legal and policy developments.²⁰⁴ This is consistent with the Supreme Court's decision in *Bob Jones*, where the Court noted that public policy can change over time, and behavior that once was considered acceptable can later run afoul of the illegality doctrine.²⁰⁵ The Commissioner indicated that any future action by the IRS would only be done after sufficient public notice and opportunity to comment, and that nothing would happen during the next several years.²⁰⁶

¹⁹⁶ See *id.* at 595-96.

¹⁹⁷ See *Bob Jones*, 461 U.S. at 592-95.

¹⁹⁸ 347 U.S. 483 (1954).

¹⁹⁹ See *Bob Jones*, 461 U.S. at 592-95.

²⁰⁰ 133 S.Ct. 2884 (2013).

²⁰¹ See, e.g., CRS Report R44143, *Obergefell v. Hodges: Same-Sex Marriage Legalized* (discussing the potential implications and limited scope of *Obergefell*).

²⁰² See *Koskinen testimony*, *supra* note 181.

²⁰³ See *id.* (stating “[a]t this time, there’s no basis for us to revisit tax-exempt status on that ground,” and “[i]t is our view right now in terms of the overall lay of the land there’s no basis for us at this point to make any different change in our—in our review policies, our exam policies”).

²⁰⁴ See *id.*

²⁰⁵ See *Bob Jones*, 461 U.S. at 593 n.20.

²⁰⁶ See *Koskinen testimony*, *supra* note 181.

As the Court explained in *Bob Jones* and the Commissioner discussed in his testimony, the IRS is not responsible for determining what constitutes public policy—that determination is left to Congress and the courts.²⁰⁷ Rather, the IRS is responsible, in its role of administering the tax laws, for determining whether a public policy exists so that denial of tax-exempt status would be appropriate under the illegality doctrine. If the agency were to find that a public policy exists sufficient to trigger the doctrine’s application, its determination would be subject to review by Congress, which could address the matter through legislation (see “Implications for Congress” below), and the courts, which could assess the validity of the agency’s action in any legal challenges brought by affected organizations.

In light of the possibility that the public policy prong of the illegality doctrine could become relevant in the same-sex marriage context at some later date, it might be asked what led the IRS to determine the doctrine was triggered for private schools engaging in racially discriminatory practices, which then led to the *Bob Jones* case. It seems a court case brought by black families in Mississippi challenging the provision of tax-exempt status to discriminatory private schools in that state played a pivotal role.²⁰⁸ Prior to 1970, the IRS had allowed private schools to qualify for Section 501(c)(3) status without considering their racial admissions policies. In January 1970, a three-judge panel for the D.C. Circuit issued a preliminary injunction in the Mississippi case, prohibiting the IRS from granting tax-exempt status to the schools.²⁰⁹ Six months later, the IRS issued a news release stating it could “no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination.”²¹⁰ In June 1971, the court permanently enjoined the IRS from granting tax-exempt status to any Mississippi school without a nondiscrimination policy,²¹¹ and the IRS responded shortly thereafter with a revenue ruling articulating a nationwide policy for denying tax-exempt status to private schools engaging in racial discrimination.²¹² To the extent that the IRS application of the public policy doctrine in this context was influenced by the Mississippi case, it might be difficult for an individual to bring a similar case in the same-sex marriage context under the Court’s current standing jurisprudence. Constitutional standing requires that a party establish personal injury by allegedly unlawful conduct fairly traceable to the defendant, and that the injury is redressable in court.²¹³ Beginning in 1976, the Court has applied this standard in a way that has significantly limited the ability of third parties to challenge the IRS’s administration of the laws providing tax-exempt status.²¹⁴ This

²⁰⁷ See *id.* at 599 n.23 (rejecting the dissent’s argument that the majority opinion suggested the IRS has the authority to determine whether a public policy is fundamental); *Koskinen testimony*, *supra* note 181 (“It’s not the IRS position to make public policy,” and “[w]e can’t predict over the next years what’s going to happen in terms of decisions that’ll be made about public policy, but those aren’t decisions we’re going to make.”); see also Rev. Rul. 80-278, 1980-2 C.B. 175 (holding that an organization bringing environmental lawsuits did not run afoul of the doctrine because its activities did not violate a law or well-established public policy, as evidenced by the fact that Congress had provided for private litigation in numerous environmental statutes).

²⁰⁸ See *Green v. Kennedy*, 309 F.Supp. 1127 (D.D.C. 1970), *appeal dismissed sub nom.* *Cannon v. Green*, 398 U.S. 956 (1970).

²⁰⁹ See *id.* at 1140.

²¹⁰ See IRS News Release (July 7, 1970).

²¹¹ See *Green v. Connally*, 330 F.Supp. 1150, *summarily affirmed sub nom.* *Coit v. Green*, 404 U.S. 997 (1971).

²¹² Rev. Rul. 71-447, 1971-2 C.B. 230.

²¹³ See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976).

²¹⁴ See *id.* at 39-46 (finding indigents and public interest groups representing them did not have standing to challenge an IRS revenue ruling that removed the requirement that Section 501(c)(3) hospitals provide charity care); *Allen v. Wright*, 468 U.S. 737 (1984) (dismissing a class action suit brought by parents of black school children that challenged an IRS ruling providing guidelines on implementing the policy that racially discriminatory schools could not qualify for Section 501(c)(3) status); *U.S. Catholic Conference v. Baker*, 885 F.2d 1020 (2nd Cir. 1989) (dismissing a challenge (continued...))

may make it difficult, although not impossible, to challenge an IRS policy administering (or failing to administer) the illegality doctrine.²¹⁵

Application to Specific Organizations: Substantiality Requirement

Even if a Section 501(c)(3) organization were found to be in violation of a law or public policy, this would not mean the organization would automatically lose its tax-exempt status under the illegality doctrine. Rather, the denial would have to be justified based on the entity's actions and their interaction with the law or public policy at issue. A key question would likely be whether the organization, despite its impermissible actions, should still be granted tax-exempt status because of its other charitable activities. While this issue was not addressed by the Court in *Bob Jones*,²¹⁶ the IRS subsequently explained that an organization with a charitable purpose will lose its tax-exempt status under the illegality doctrine only if it engages in "substantial" impermissible activities.²¹⁷ It is not clear what threshold is used for determining substantiality.

Implications for Congress

An important aspect of the illegality doctrine is that it is an implicit statutory condition for Section 501(c)(3) status and Section 170 eligibility.²¹⁸ Congress could therefore choose to affect the doctrine's applicability by amending the statutes. For example, Congress could, if it so chose, prohibit the application of the doctrine; limit its application to only illegal behavior (i.e., remove the doctrine's public policy component); or codify the doctrine as developed through case law and IRS rulings. Legislation could address the doctrine's application generally or only in the same-sex marriage context.

Any legislative changes would have to be consistent with the Constitution. Under current law, it does not appear that any Supreme Court case suggests an amendment to the IRC would run afoul of the Constitution; however, an issue could arise if same-sex couples or lesbian, gay, bisexual or transgender (LGBT) individuals were found to have constitutional protections that would be violated by providing tax-exempt status to discriminatory institutions. For example, in *Bob Jones*, the Court noted that some amicus briefs had argued that denial of Section 501(c)(3) status to racially discriminatory private schools was required by the Fifth Amendment's equal protection

(...continued)

brought by various parties to force the IRS to examine the Catholic Church's tax-exempt status, and concluding that it would be a rare case when a third party would have standing to bring such a suit).

²¹⁵ The Court in *Allen*, recognizing the similarities between it and the Mississippi case, emphasized that its summary affirmance of the latter had little precedential value on the standing issue, and, in any event, the fact patterns between the two were "sufficiently different" so that "the absence of standing here is unaffected by the possible propriety of standing there." *Allen*, 468 U.S. at 764. The Court appeared to indicate that the major difference between the two cases was that the Mississippi case was brought to challenge "a fundamental IRS policy decision" affecting "numerous identifiable schools" in Mississippi, while the *Allen* case was brought to "reform Executive Branch enforcement procedures." *See id.* at 765. To the extent this suggests that the Court thought the Mississippi plaintiffs had standing even after the 1976 *Simon* decision, this might indicate that plaintiffs challenging an IRS policy providing tax-exempt status to entities that discriminate against same-sex couples could have standing, depending on the injury alleged.

²¹⁶ *See Bob Jones*, 461 U.S. at 596 n.21.

²¹⁷ *See IRS EO CPE Text*, *supra* note 185 at 5-7 (note that if the entity has an illegal purpose, denial is justified, regardless of substantiality).

²¹⁸ *See Bob Jones*, 461 U.S. 595-96, 599-600 (determining that the doctrine's application was consistent with congressional intent behind the two statutes, and finding significance in the fact that Congress had not amended the statutes to prevent the doctrine's application to racially discriminatory schools even though Congress was aware of the IRS policy as evidenced by hearings, congressional reports, and related legislation).

guarantees provided to affected black students, but the Court did not address the argument due to its holding that the denial was required under the illegality doctrine.²¹⁹ Had the Court determined that the denial was required by the Fifth Amendment, then it appears Congress could not have amended the IRC to permit Section 501(c)(3) status to racially discriminatory schools because this would have violated the students' constitutional rights.

It should also be noted that legislation outside the context of tax-exempt status could affect the application of the illegality doctrine. For example, if Congress were to pass legislation expanding the legal protections afforded to same-sex couples or LGBT individuals generally,²²⁰ then this action might be evidence that a public policy exists sufficient to trigger the doctrine's application. On the other hand, if Congress were to take no action or pass legislation limiting the scope of their protections, then this approach might support the determination that such a public policy does not exist at this time.

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²¹⁹ See *Bob Jones*, 461 U.S. at 599 n.24.

²²⁰ See, e.g., CRS Legal Sidebar WSLG1379, *Omnibus Gay Rights Bill Introduced in Congress*.

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