

# A License to Discriminate? The Market Response to *Masterpiece Cakeshop*

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*What are the consequences of religious exemptions of antidiscrimination laws? And what are the normative implications of these consequences? These questions are currently at the center of a heated debate balancing religious freedom and civil rights. Opponents of religious exemptions from antidiscrimination laws argue that granting exemptions would increase sexual orientation discrimination. Proponents of religious exemptions argue that religious objectors are a small minority and that their exemption would not meaningfully increase discrimination against same-sex couples.*

*The troubling aspect of this debate is that none of the parties rely on hard data. Particularly missing are data on the effects of exemptions granted in Supreme Court decisions, an issue that the Court has addressed repeatedly in recent years—and is set to do so once again this term, in *Fulton v. City of Philadelphia*.*

*This Article intervenes in the debate based on the results of a large-scale field experiment that measured the effect of *Masterpiece Cakeshop v. Colorado Civil Rights Commission* on the ability of same-sex couples to receive services in the wedding market, as compared to opposite-sex couples. The field experiment revealed that after *Masterpiece Cakeshop*, vendors were less willing to provide wedding services to same-sex couples than to opposite-sex couples. This trend was true even for vendors that provided services to same-sex couples prior to the *Masterpiece Cakeshop* decision. Following *Masterpiece Cakeshop*, the odds that same-sex couples would experience discrimination from wedding vendors are estimated to be between 61% and 85%.*

*These results have several implications for the debate on religious exemptions. First, they discredit the argument that the effects of religious exemptions are negligible, making clear that exemptions will promote further discrimination. Second, the results complicate the conventional portrait of religious objection as fixed (and therefore unyielding to change), showing instead that the demand for discrimination is elastic and shaped by social constructions, even without coercion or sanctions. These negative effects of *Masterpiece Cakeshop* bear on both litigation—showing that antidiscrimination laws are necessary to further states' compelling interest in securing equality—and in legislation—pro-*

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viding guidance for legislatures on whether and how to enact religious exemptions from antidiscrimination laws.

Finally, the troubling consequences of *Masterpiece Cakeshop* require the Supreme Court to proceed with great care as it sets out to decide *Fulton v. City of Philadelphia* and any other future cases raising ostensible conflicts between religion and anti-discrimination law. However the Court decides to resolve the constitutional issue at hand, it must take into account that even a deliberately narrow and case-specific exemption might have a significant negative impact on the market and its customers.

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## INTRODUCTION

The conflict between religious liberty and marriage equality is escalating. This term, the Supreme Court is set to decide *Fulton v. City of Philadelphia*,<sup>2</sup> a case which raises the constitutionality of an antidiscrimination rule that denies religious exemptions for state contractors who refuse to serve same-sex couples. Only two years ago, the Court addressed the conflict in the private market context, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, ruling for a baker who refused to create a wedding cake for a same-sex couple.<sup>3</sup> Shortly after the decision, the Court vacated and remanded two similar cases, one involving a florist who would not create flower arrangements for a same-sex wedding<sup>4</sup> and another case involving wedding cakes.<sup>5</sup> An impressive number of similar cases have been making their way through the courts in recent years, involving photographers and video artists,<sup>6</sup> a web-designer,<sup>7</sup> a t-shirt store,<sup>8</sup> a custom wedding invitation studio,<sup>9</sup> and a bed and breakfast<sup>10</sup>—all of whom object to serving same-sex couples and seek exemptions from antidiscrimination laws.

This state of affairs has caused anxiety and controversy among citizens, lawmakers, and legal scholars. All of these groups are concerned with potential on-the-ground consequences of religious exemptions from antidiscrimination laws. Opponents of religious exemptions warn that granting exemptions will escalate the number and significance of faith claims and could expand sexual orientation discrimination to all facets of public life.<sup>11</sup> Proponents of religious exemptions reject these concerns as factual nonsense, arguing that religious objectors are a negligible minority in a society growing ever more affirming of marriage equality, and that exempting religious objectors will not exacerbate discrimination against same-sex couples.<sup>12</sup>

The relationship between religious exemptions from antidiscrimination law and the actual consequences for same-sex couples and for religious objectors is thus a central question. Yet there is almost no evidence that could

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<sup>2</sup> *Fulton v. City of Philadelphia*, 922 F.3d 140, 146–47 (3rd Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (No. 19-123).

<sup>3</sup> *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1720 (2018).

<sup>4</sup> *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018), *remanded to State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1209 (Wash. 2019). A second petition for certiorari was filed in 2019, and was not decided by the time this article went to press. *See* Petition for Writ of Certiorari, *Arlene's Flowers, Inc. v. Washington*, No. 19-333 (U.S. Sept. 11, 2019).

<sup>5</sup> *Klein v. Or. Bureau of Lab. & Indus.*, 139 S. Ct. 2713 (2019).

<sup>6</sup> *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 747 (8th Cir. 2019).

<sup>7</sup> 303 Creative L.L.C. v. Elenis, 405 F. Supp. 3d 907, 912 (D. Colo. 2019), *appeal docketed*, No. 19-01413 (10th Cir. argued Nov. 16, 2020).

<sup>8</sup> *Lexington-Fayette Urban Cnty. Hum. Rts. Comm'n v. Hands On Originals*, 592 S.W.3d 291, 294 (Ky. 2019).

<sup>9</sup> *Brush & Nib Studio v. City of Phoenix*, 448 P.3d 890, 897 (Ariz. 2019).

<sup>10</sup> *Aloha Bed & Breakfast v. Cervelli*, 415 P.3d 919, 923 (Haw. Ct. App. 2018), *cert. denied*, 139 S. Ct. 1319 (2019).

<sup>11</sup> *See infra* notes 67–70.

<sup>12</sup> *See infra* notes 77–83.

help clarify which of the contradictory factual premises is actually true. Such evidence is required to inform legislators debating whether to enact religious exemptions, and courts deliberating whether to grant such exemptions. Underscoring the importance of the consequentialist consideration, Justice Kennedy asked the U.S. Solicitor General<sup>13</sup> during the *Masterpiece Cakeshop* oral arguments, “what would the government’s position be if . . . the baker prevails in this case, and then bakers all over the country received urgent requests: Please do not bake cakes for gay weddings. And more and more bakers began to comply. Would the government feel vindicated in its position that it now submits to us?”<sup>14</sup> The Solicitor General responded that this would make the case for antidiscrimination “much stronger” because states would be able to show “that the application of the law is narrowly tailored to the government’s interest in ensuring access [to public accommodations].”<sup>15</sup> Justice Kennedy was not alone on the bench in considering the consequences of religious exemptions as the key for the decision to grant them. From *Employment Division v. Smith*<sup>16</sup> to *Burwell v. Hobby Lobby Stores, Inc.*,<sup>17</sup> the Court has consistently cited consequentialist concerns (or lack thereof) in rejecting (or granting) requested religious exemptions.

This article contributes to the consequentialist debate on religious exemptions by studying, for the first time, the effects of religious exemptions on sexual orientation discrimination. Part I begins with surveying the relevant legal background on the tension between marriage equality and religious liberty. It addresses the evolution of the conflict and the legislative patchwork of protections across the nation, where some jurisdictions prohibit sexual orientation discrimination in public accommodations (dubbed here “AD Law” regimes, for convenience purposes) and others do not; where some jurisdictions facilitate religious exemptions via a Religious Freedom Restoration Act (“RFRA”) and others do not.<sup>18</sup> This varied setting provides the context for the debate about religious exemptions and for *Masterpiece Cakeshop* itself. Part I concludes with analyzing the opposing consequentialist arguments about religious exemptions, exposing their lack of evidentiary foundations, and the implications of these omissions.

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<sup>13</sup> The U.S. Solicitor General argued as amicus curiae supporting the baker in *Masterpiece Cakeshop*. See Transcript of Oral Argument at 2, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111).

<sup>14</sup> *Id.* at 45–46.

<sup>15</sup> *Id.* at 46.

<sup>16</sup> 494 U.S. 872, 879 (1990) (noting the concern that permitting an exemption is “in effect to permit every citizen to become a law unto himself”) (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)).

<sup>17</sup> 573 U.S. 682, 692–93 (2014) (“[O]ur holding is very specific. . . . [W]e certainly do not hold or suggest that ‘RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have’ . . . . The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero.”).

<sup>18</sup> These are broad distinctions. Additional nuances are discussed *infra* Part II.B.

Part II then describes the large-scale field experiment designed to elucidate and inform the consequentialist debate by measuring the impact of the *Masterpiece Cakeshop* decision on sexual orientation discrimination in the wedding vendor market. An extended analysis of the experiment is reported in a separate methodological paper.<sup>19</sup> Wedding vendors (bakers, photographers, and florists; N = 1,155) were sampled from the four types of regimes currently in existence (those with or without antidiscrimination laws; and those with or without religious freedom laws). Each business was contacted via email by four different couples: two shortly before and two shortly after the *Masterpiece Cakeshop* ruling; in each period, one of the test couples was a same-sex couple and the other was an opposite-sex couple. The total dataset includes four observations per business, allowing for both within- and across-businesses comparisons. The question of interest was whether businesses agreed to provide the requested service to the couples.

What were the results of the field experiment? In brief, the field experiment demonstrated that the Court's decision in *Masterpiece Cakeshop* significantly reduced the willingness of businesses to serve same-sex couples: while 63.6% were willing to serve same-sex couples before *Masterpiece Cakeshop*, only 49.2% were so willing after the decision was rendered (a 14.4 percentage-point gap, or ~23 percent decrease in favorable responses). Zooming in on businesses that, prior to *Masterpiece Cakeshop*, responded positively to same-sex couples, I find that many of these businesses discriminate between opposite-sex and same-sex couples after *Masterpiece Cakeshop*: previously "gay-friendly" businesses that were randomly contacted by opposite-sex or same-sex couples responded less favorably to same-sex couples than opposite-sex couples (75.5% vs. 66.3%, a 9 percentage-point gap, or 12 percent fewer favorable responses) after the decision was rendered. This effect is not an artifact of the experiment itself, as it is identically found in the "control" group of businesses that were contacted for the first time after *Masterpiece Cakeshop*. Probing into the differences between the four regime types, I find that the negative *Masterpiece Cakeshop* effect appears in all regimes, including regimes without AD laws and regimes without RFRAs, except for those that enacted *both* an AD law and a RFRA. The effect is robust, and remains so when including analyses that control for county-level conservativeness and analyses limited to businesses located in big cities (where, it is often argued, there is considerably less of a discrimination problem). However, the effect of *Masterpiece Cakeshop* is significantly more pronounced in religious environments, as proxied by the density of religious congregations in the county where the business is located.

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<sup>19</sup> Netta Barak-Corren, *Religious Exemptions Increase Discrimination Towards Same-Sex Couples: Evidence from Masterpiece Cakeshop*, J. LEGAL STUD. (forthcoming 2021). Parts of the current article have been adapted from there. The research was approved by the Hebrew University IRB.

A back-of-the-envelope calculation demonstrates the broader implications of these results. Provided that couples of all identities typically contract with about ten types of vendors in the process of organizing a wedding (reception venues, wedding planners, bakers, florists, photographers, videographers, bridal/groom salons, jewelers, DJs, and calligraphers—a partial list), that they often inquire with several vendors from each category, and that the average risk of experiencing discrimination per vendor post-*Masterpiece Cakeshop* is about 9%, I estimate the aggregate risk of experiencing at least one instance of discrimination ranges between 61% and 85% for same-sex couples. This means that across the observed differences between businesses, legal regimes, and religious environments, *Masterpiece Cakeshop* had the general effect of exposing same-sex couples to a substantial and heightened risk of discrimination while planning a wedding.

With this novel evidence, Part III returns to the normative debate and considers the implications of the law of religious exemptions. First, the results of the *Masterpiece Cakeshop* experiment discredit the argument that the effect of religious exemptions is negligible and that exemptions will not promote discrimination. Instead, what the *Masterpiece Cakeshop* experiment shows is that even an intentionally narrow and case-specific exemption can have a substantial impact on an industry and its customers. Second, the results complicate the conventional portrait of religious objection as fixed, showing instead that the demand for discrimination is elastic and shaped by social constructions, even without coercion or sanctions. Third, this evidence makes clear that states and localities have a compelling interest in passing and enforcing anti-discrimination laws, and that such laws are narrowly tailored to that interest. Antidiscrimination laws thus satisfy strict scrutiny (and lower thresholds of judicial review, where applicable).

At the same time, the documented variation between legal regimes tentatively suggests that there is still room for legislatures to explore ways to protect *both* marriage equality and religious freedom, without necessarily increasing discrimination. I suggest specific ways in which legislators could improve the regulation of religion-equality conflicts, by actively seeking to ground policy in data. In particular, I argue that new laws should be experimentally pre-tested to inform lawmakers as to the likely consequences. I demonstrate how such pre-testing could be performed and I explain its advantages.

As is true for any empirical work, this article does not purport to exhaust or conclude the debate about the consequences of religious exemptions. Indeed, this would be impossible. The article is a snapshot of reality at a specific point in time and place and is limited in what such a snapshot can reveal about society—particularly when it comes to complex phenomena such as the relationship between law and behavior. Notwithstanding these important limitations, the centrality of empirical assumptions to the resolution of the debates in constitutional law requires us to grapple with the empirical questions rather than treating them as axioms. The current debate

illustrates this need well. Opponents and proponents of religious exemptions rely on conflicting assumptions regarding the consequences of exemptions, largely talking past each other. While there is no assurance that the opposing camps will digest empirical evidence willingly and without bias, there is always hope that at least some will (indeed, this is the underlying premise of all scientific work). At the very least, disagreements about the relevance of the data could increase the sophistication of legal arguments and generate new questions for debate and empirical investigation. For now, the troubling effects of *Masterpiece Cakeshop* suggest that the Supreme Court should question empirical arguments that do not base themselves on relevant data and should carefully consider the probable consequences of its impending decision in *Fulton v. City of Philadelphia* and in any other religion-equality conflict that will come before the Court in the future.

## I. THE TENSION BETWEEN MARRIAGE EQUALITY AND RELIGIOUS LIBERTY

The tension between sexual orientation equality and religious liberty has been present from the inception of the movement for marriage equality. When Massachusetts became the first State to recognize same-sex marriage in 2004, the Supreme Judicial Court recognized the possibility of such a conflict when it asserted that its “decision [to uphold same-sex marriage laws] in no way limits the rights of individuals to refuse to marry persons of the same-sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage.”<sup>20</sup> Similarly, when the Iowa Supreme Court recognized same-sex marriage—the fourth high court to follow this route, after Massachusetts, California and Connecticut—it stated that “[r]eligious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views.”<sup>21</sup> In 2015, when the U.S. Supreme Court legalized same-sex marriage across the nation in *Obergefell v. Hodges*, it emphasized that “religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.”<sup>22</sup>

Other courts expressed reservations about the possibility of mitigating the tension between religion and sexual orientation equality. When the Connecticut Supreme Court recognized same-sex marriage in 2008, it dedicated a lengthy paragraph to describe the religious condemnation of homosexual-

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<sup>20</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 965 n.29 (Mass. 2003).

<sup>21</sup> *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009).

<sup>22</sup> 576 U.S. 644, 679 (2015). Notably, any reference to a potential tension between religious liberty and marriage equality was omitted from a previous marriage equality decision, *United States v. Windsor*, in which the Court struck down the Defense of Marriage Act, a federal law defining marriage as an act between a man and a woman. 570 U.S. 744, 745 (2013).

ity and to present it as one of the roots of discrimination towards gay people in society.<sup>23</sup> The court then observed that “[f]eelings and beliefs predicated on such profound religious and moral principles are likely to be enduring, and persons and groups adhering to those views undoubtedly will continue to exert influence over public policy makers.”<sup>24</sup> Several years later, Justice Alito dissented from the United States Supreme Court’s decision in *Obergefell* with the opposite prediction, expressing concern that “those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.”<sup>25</sup>

Whether mitigating this tension is possible or not remains to be seen. What is clearly evident, however, is that religion-equality conflicts are rapidly gaining legal momentum and public attention. As the primary origin of these conflicts has been state law, it is necessary to understand the variation between states to assess the background against which religious exemptions are debated.

#### A. *Antidiscrimination Laws and Claims for Religious Exemptions*

At present, federal law does not prohibit discrimination on the basis of sexual orientation in public accommodations. Title II of the Civil Rights Act does not prohibit discrimination on the basis of either sex or sexual orientation;<sup>26</sup> even if it did, it limits “public accommodation” to hotels, restaurants, gas stations, and places of exhibition or entertainment.<sup>27</sup> This definition does not include most of the businesses currently refusing service to same-sex couples, in particular most wedding vendors.<sup>28</sup>

Acting to fill the void, twenty-two states, the District of Columbia, and numerous local governments passed legislation prohibiting discrimination based on sexual orientation and/or gender identity in public accommodations (“AD states,” see Figure 1).<sup>29</sup> Most of these laws permit no religious exemp-

<sup>23</sup> Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 444–45 (Conn. 2008).

<sup>24</sup> *Id.* at 445.

<sup>25</sup> *Obergefell*, 576 U.S. at 741 (Alito, J., dissenting).

<sup>26</sup> 42 U.S.C. § 2000a(a). This omission is in contrast to the prohibition on discrimination on the basis of “sex” in employment in Title VII of the Civil Rights Act, a provision that has been interpreted as also covering sexual orientation discrimination. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

<sup>27</sup> 42 U.S.C. § 2000a(b).

<sup>28</sup> *See, e.g., State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1209 (Wash. 2019); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 747 (8th Cir. 2019); *303 Creative L.L.C. v. Elenis*, 405 F. Supp. 3d 907, 912 (D. Colo. 2019), *appeal docketed*, No. 19-01413 (10th Cir. argued Nov. 16, 2020).

<sup>29</sup> HUM. RTS. CAMPAIGN FOUND., 2020 STATE EQUALITY INDEX 14 (2020), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/HRC-SEI20-report-Update-022321-FInal.pdf?mtime=20210322114741&focal=none>, archived at <https://perma.cc/YG5Y-35Q2>. Note that Figure 1 presents the state of the law at the time of the study in 2018, before Virginia prohibited discrimination on the basis of sexual orientation in public accommodations.



tions,<sup>30</sup> and their definitions of “public accommodations” are generally much broader than that of federal law,<sup>31</sup> covering any business open to the public. These laws are the underpinnings of the lawsuits against wedding vendors that refused to provide service to same-sex commitment ceremonies and weddings, citing religious reasons.<sup>32</sup> Concomitantly, and particularly after the recognition of marriage equality in *Obergefell*, conservative faith groups began calling for religious exemptions from AD laws.<sup>33</sup> On the legislative front, some states took steps to advance these calls.<sup>34</sup> In courts, most wedding-vendor cases ended in defeat for the vendors.<sup>35</sup>

*Masterpiece Cakeshop* was the first case in which the Supreme Court granted a petition for certiorari on the question of whether laws forbidding discrimination on the basis of sexuality violate religious freedom.<sup>36</sup> Arising under Colorado’s AD law, the case presented a conflict between Jack Phillips—the owner of Masterpiece Cakeshop—and Charlie Craig and David Mullins, a same-sex couple who attempted to purchase a cake from Phillips, unaware of Phillips’ beliefs. Phillips declined to make the cake, citing his objection to same-sex marriages. The parties dispute whether Phillips of-

<sup>30</sup> Many states provide exemptions for churches and affiliated religious organizations, but these exemptions mostly do not extend to private for-profit businesses. See Lucien J. Dhooge, *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?*, 21 WM. & MARY J. WOMEN & L. 319, 344 (2015).

<sup>31</sup> For example, IOWA CODE § 216.2.13(a) defines “public accommodation” as “each and every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods for a fee or charge to nonmembers of any organization or association utilizing the place, establishment, or facility.”

<sup>32</sup> Such lawsuits against wedding vendors have been brought in various states. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) (in Colorado); *Arlene’s Flowers*, 441 P.3d at 1209 (in Washington); *Telescope Media Grp.*, 936 F.3d at 740 (in Minnesota); *Brush & Nib Studio v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019) (in Arizona); *Cervelli v. Aloha Bed & Breakfast*, 415 P.3d 919 (Haw. Ct. App. 2018), *cert. denied*, 139 S. Ct. 1319 (2019) (in Hawaii); *Klein v. Or. Bureau of Lab. & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017) (in Oregon); *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53 (N.M. 2013) (in New Mexico).

<sup>33</sup> Erik Eckholm, *Conservative Lawmakers and Faith Groups Seek Exemptions After Same-Sex Ruling*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/27/us/conservative-lawmakers-and-faith-groups-seek-exemptions-after-same-sex-ruling.html>, archived at <https://perma.cc/N48H-G6WN>; *Religious groups react to Supreme Court ruling on same-sex marriage*, TAMPA BAY TIMES (June 26, 2015), <https://www.tampabay.com/news/courts/religious-groups-react-to-supreme-court-ruling-on-same-sex-marriage/2235233/>, archived at <https://perma.cc/5X7P-X27S>.

<sup>34</sup> See *infra* Part I.C.

<sup>35</sup> See, e.g., *Arlene’s Flowers*, 441 P.3d at 1237; *Aloha Bed & Breakfast*, 415 P.3d at 923; *Elane Photography*, 309 P.3d at 59; 303 *Creative L.L.C. v. Elenis*, 405 F. Supp. 3d 907, 912 (D. Colo. 2019). *Contra Brush & Nib Studio*, 448 P.3d at 926 (holding that Phoenix’s public accommodations ordinance unconstitutionally compels speech and violates the vendor’s free exercise of religion).

<sup>36</sup> Before *Masterpiece Cakeshop*, the Supreme Court denied certiorari in *Elane Photography, L.L.C. v. Willock*, 572 U.S. 1046 (2014). After *Masterpiece Cakeshop*, the Supreme Court granted certiorari in *Arlene’s Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018), and *Klein v. Or. Bureau of Lab. & Indus.*, 139 S. Ct. 2713 (2019), vacating and remanding both cases for further consideration in light of *Masterpiece Cakeshop*. *Arlene’s Flowers*, 138 S. Ct. at 2671; *Klein*, 139 S. Ct. at 2713.

ferred to sell other products at his store to the couple: Phillips argues that he “offered to make any other cake for them,”<sup>37</sup> but the couple argues that Phillips said that “while the bakery would sell baked goods to gay and lesbian customers for other purposes, it would not sell them baked goods for weddings”<sup>38</sup> and that “the bakery has repeatedly refused to provide any baked goods . . . for wedding receptions or commitment ceremonies of same-sex couples.”<sup>39</sup>

## AD states



Source: Human Rights Campaign

**Figure 1.** States prohibiting sexual orientation and gender identity discrimination in public accommodations as of 2018.<sup>40</sup>

The Colorado Civil Rights Commission, the administrative body that adjudicates claims under the Colorado Anti-Discrimination Act, found that Phillips discriminated against the couple based on their sexual orientation. During the proceedings, a member of the Commission stated that “to me it is one of the most despicable pieces of rhetoric that people can use to—to use

<sup>37</sup> Petition for Writ of Certiorari at 6, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

<sup>38</sup> Brief for Respondents Charlie Craig & David Mullins at 4, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

<sup>39</sup> *Id.* at 1, 4–5.

<sup>40</sup> HUM. RTS. CAMPAIGN FOUND., *supra* note 29, at 14. Wisconsin prohibits only sexual orientation discrimination. *Id.* The map does not include local governments that prohibit discrimination within their boundaries. Note that Figure 1 presents the state of the law at the time of the study in 2018, before Virginia prohibited discrimination on the basis of sexual orientation in public accommodations.

their religion to hurt others.”<sup>41</sup> Ultimately, these and related comments were among the primary reasons cited by the Supreme Court when it reversed and invalidated the Commission’s decision. The Court noted that the Commission failed to treat Phillips neutrally and fairly and instead showed unconstitutional religious hostility towards his beliefs.<sup>42</sup> In a concurrence joined by Justice Gorsuch, Justice Thomas opined that Phillips should have also prevailed on free speech grounds, stating that creating and designing custom wedding cakes is a form of expressive conduct.<sup>43</sup>

While Phillips won the case on free exercise grounds, the decision also affirmed the need for AD laws to protect against sexual orientation discrimination in the marketplace. The majority acknowledged that “if [religious] exception[s] were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws.”<sup>44</sup> For this reason, the Court did not rule out the possibility that Colorado could eventually rule against Phillips and similarly situated vendors on the basis of its AD law if the state guaranteed a neutral and respectful process to all parties. More generally, the majority’s opinion did not expressly resolve the bigger issue of the relationship between religious liberty and sexual orientation equality.

### *B. Religious Freedom Laws and Claims for Religious Exemptions*

Thus far, I have surveyed the tension between marriage equality and religious liberty from the standpoint of AD legislation. Another type of legislation that bears on the legal status of religion-equality conflicts are Religious Freedom Restoration Acts (“RFRA”).

Congress enacted the first national RFRA in response to *Employment Division v. Smith*, which held that neutral laws of general applicability (i.e., those that do not intentionally target religion) are constitutional even if they substantially burden the free exercise of religion.<sup>45</sup> Before *Smith*, one of the tests used by the Court to review substantial burdens on religious freedom required that such burdens be the least restrictive means of serving a compelling government interest (a test known as “strict scrutiny”).<sup>46</sup> Congress

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<sup>41</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

<sup>42</sup> *Id.* at 1723. The Court also found another indication of hostility in “the difference in treatment between Phillips’ case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.” *Id.* at 1730. These other bakers refused to create cakes with images that conveyed disapproval of same-sex marriage, and the Commission found their refusal legal because the bakers deemed the messages offensive. *Id.* The Court criticized this differential treatment as a showing of hostility towards Phillips’ faith. *See id.*

<sup>43</sup> *Id.* at 1742 (Thomas, J., concurring).

<sup>44</sup> *Id.* at 1727.

<sup>45</sup> 494 U.S. 872, 879 (1990).

<sup>46</sup> *See* *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972). Strict scrutiny, however, was not evenly or consistently applied before *Smith*, and

sought to enact that standard through the national RFRA, which provided that the “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the burden serves “a compelling government interest” and is “the least restrictive means” to further that interest.<sup>47</sup> But the Supreme Court limited the national RFRA’s scope to the federal government and invalidated it as applied to the states.<sup>48</sup> Twenty-one states responded by enacting state-level RFRAs to ensure that their governments are subject to the same high level of scrutiny as the federal government (see Figure 2).<sup>49</sup> In ten additional states, courts have interpreted their constitutions to require strict scrutiny.<sup>50</sup>

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the Court sidestepped it in a series of cases. See *O’Lone v. Est. of Shabazz*, 482 U.S. 342, 349 (1987) (declining to apply strict scrutiny to prison policy); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (declining to apply strict scrutiny to military policy); *United States v. Lee*, 455 U.S. 252, 261 (1982) (declining to exempt Amish employers from social security policy); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (declining to reverse the denial of tax benefits of a university, stating that government’s interest in eradicating racial discrimination outweighs the burden on the university’s religious exercise). See generally Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 51–53 (2015) (exploring the court’s treatment of free exercise claims pre-*Smith*).

<sup>47</sup> 42 U.S.C. § 2000bb to 2000bb-4 (1993), *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (finding RFRA unconstitutional as applied to the states).

<sup>48</sup> *City of Boerne*, 521 U.S. at 532. Congress amended RFRA to reflect the holding and removed the words “a State, or a subdivision of a State” from the definition of “government” in the law. See 42 U.S.C. § 2000bb-2.

<sup>49</sup> *State Religious Freedom Restoration Acts*, NAT’L CONF. STATE LEGISLATURES (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>, archived at <https://perma.cc/QV3E-F67V> [hereinafter NCSL] (providing an up-to-date survey of all RFRAs).

<sup>50</sup> Eugene Volokh, *JA. What Is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY (Dec. 2, 2013), <http://volokh.com/2013/12/02/1a-religious-freedom-restoration-act/>, archived at <https://perma.cc/DXZ6-9PLN> (surveying state RFRAs and state interpretations of their constitutions to require strict scrutiny; since then, Arkansas, Indiana, and Mississippi also enacted RFRAs).

## RFRA states



Source: National Conference of State Legislatures

[www.guttmacher.org](http://www.guttmacher.org)

**Figure 2.** States that have enacted Religious Freedom Restoration Acts as of 2018. The map does not include states that interpret their constitutions to require a RFRA-like protection of religious freedom: Alaska, Massachusetts, Maine, Michigan, Minnesota, Montana, North Carolina, Ohio, Washington, and Wisconsin.<sup>51</sup>

While RFRA does not provide absolute guarantees of religious exemptions, conservative legislators in RFRA-less states began pushing for the enactment of RFRA as a shield (or in some cases, a sword) against potential duties to recognize the validity of same-sex marriage. Mississippi passed a RFRA in 2014; Indiana and Arkansas in 2015.<sup>52</sup> Yet in other states, such as Iowa and Georgia, RFRA bills failed due to public concerns about their implications for LGBTQ rights and fears of commercial boycotts.<sup>53</sup> In the process, RFRA came to be viewed as the legislative opposite of AD laws.<sup>54</sup>

<sup>51</sup> *Id.*

<sup>52</sup> NCSL, *supra* note 49.

<sup>53</sup> Kathleen Foody, *Ga. lawmakers leave without vote on religious freedom bill*, WASH. TIMES (Apr. 3, 2015), <https://www.washingtontimes.com/news/2015/apr/3/religious-freedom-measure-focus-of-ga-lawmakers-lal/>, archived at <https://perma.cc/77XQ-AUDA>.

<sup>54</sup> See, e.g., David Ferguson, *LGBT rights amendment proves to be 'poison pill' for Georgia's 'religious freedom' bill*, RAWSTORY (Mar. 27, 2015), <https://www.rawstory.com/2015/03/lgbt-rights-amendment-proves-to-be-poison-pill-for-georgias-religious-freedom-bill/>, archived at <https://perma.cc/39CX-J8J6> (reporting how the passage of an amendment preventing the bill from affecting the state's civil rights laws collapsed support of the bill).

C. *The Implications of the “Legislative Mismatch”*

Figures 1 and 2 show that the distribution of AD laws and RFRAs across states is what Professor Lupu has termed a “legislative mismatch” with a relatively narrow overlap. As Professor Lupu notes, the overlap consists of four states that enacted both laws (Connecticut, Illinois, New Mexico, and Rhode Island), a maximum of seven states that have both AD laws and extended protections on religious freedom in their constitutions but no RFRA (Maine, Massachusetts, Minnesota, New York, Vermont, Washington, and Wisconsin),<sup>55</sup> and a considerable number of local governments in RFRA states that enacted municipal AD laws. This last category includes a number of major cities in conservative states, such as Dallas, Texas, Indianapolis, Indiana, Phoenix, Arizona, and Atlanta, Georgia.<sup>56</sup>

The legal variation that results from the “legislative mismatch” potentially entails very different outcomes for otherwise identical cases. Imagine a photographer refusing to take the engagement photos of a same-sex couple. In solely AD states, a discrimination claim will likely result in victory for the couple.<sup>57</sup> In solely RFRA states, such claim will likely fail. In states that enacted neither type of law (e.g., North Carolina), the claim’s fate will likely be similar to RFRA states, if only because there is no vehicle to bring an antidiscrimination claim forward. And in the overlap category, where both sexual orientation and religious freedom are afforded legislative protections, the claim’s fate would depend on how courts interpret the relationship between the two laws, including their potential application of strict scrutiny to the state’s AD law.

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<sup>55</sup> Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. 1, 45–46 (2015) (classifying states into categories, and since which, no new laws have been enacted to change this classification). Some uncertainty exists as to which states have interpreted their constitutions to require a RFRA-like standard of review. Volokh, *supra* note 50, classifies Hawaii and Vermont as states where courts have explicitly noted uncertainty about whether their constitution entails such a standard, and declined to resolve it, and New York as a state with weak intermediate review. In Hawaii, that uncertainty was recently noted in a case of a wedding service refusal. *Cervelli v. Aloha Bed & Breakfast*, 415 P.3d 919, 934 (Haw. Ct. App. 2018) (“We need not decide whether a higher level of scrutiny should be applied to a free exercise claim under the Hawai’i constitution . . . because we conclude that [Hawaii AD law] satisfies even strict scrutiny as applied to Aloha B&B’s free exercise claim.”).

<sup>56</sup> Lupu, *supra* note 55, at 46; *Texas’ Equality Profile*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality\\_maps/profile\\_state/TX](https://www.lgbtmap.org/equality_maps/profile_state/TX), archived at <https://perma.cc/BC78-VFGU> (last visited Apr. 3, 2021); *Indiana’s Equality Profile*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality\\_maps/profile\\_state/IN](https://www.lgbtmap.org/equality_maps/profile_state/IN), archived at <https://perma.cc/A77G-U2A9> (last visited Apr. 3, 2021). No local government in an AD state has enacted a municipal RFRA thus far. Local laws are typically enforceable by complaint to a city agency.

<sup>57</sup> The analysis in this paragraph assumes the state of the law at the time when the study at the heart of this Article was designed, under which there is no constitutional requirement to exempt religious vendors from generally applicable AD laws. That fact did not change following *Masterpiece Cakeshop*, because the Court found for Phillips on the basis of governmental hostility and did not reach the question of whether Phillips had a right to an exemption from AD laws. 138 S. Ct. 1719, 1723–24, 1732 (2018).

Although one may assume that the conflict is strongest in the overlap states, it is not necessarily the case. For example, the four states with both AD laws and RFRAs construed their RFRAs to apply only to government agencies, excluding legislatures and courts, or limited relief to be only against the government, excluding private parties.<sup>58</sup> This structure led the New Mexico Supreme Court to reject the claim that the state's RFA prevents the application of the state's AD law to a photographer declining service to a same-sex couple.<sup>59</sup> Courts in Washington<sup>60</sup> and Hawai'i<sup>61</sup>—states that Lupu classifies as hybrid because of RFA-like constitutional norms<sup>62</sup>—reached a similar result, each ruling that the state's AD law survives strict scrutiny. Overall, a large part of this overlap category appears to be more similar to the AD-only category when it comes to religion-equality conflicts.

The potentially more conflicted overlaps are where RFRAs are construed to apply to state laws (not only executive agencies), without excluding relief against private parties. Such are the Texas and Indiana RFRAs,<sup>63</sup> and new RFA bills have followed this model.<sup>64</sup> Both the Texas and Indiana RFRAs include language stating that the Act does not authorize or establish a defense for discrimination or breach of civil rights laws for any individual or organization other than religious non-profits.<sup>65</sup> But, as neither state has AD laws that prohibit discrimination on the basis of sexual orientation, these reservations appear to be relevant only in municipalities within these states

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<sup>58</sup> Rhode Island defines “government” to exclude the legislature and the courts and sets the remedies to be “injunctive and declaratory relief against any governmental authority which commits or proposes to commit a violation of this chapter.” R.I. GEN. LAWS § 42-80.1 (2010). Connecticut defines “state or any political subdivision of the state” to exclude the legislature and the courts and sets the right to relief only against the state. CONN. GEN. STAT. § 52-571b (1993). New Mexico is very similar to both, as explained below. N.M. STAT. ANN. § 28-22 (2000). Illinois defines “government” to include “a branch” but sets the right to appropriate relief in section 20 only “against a government.” 775 ILL. COMP. STAT. 35 (1998).

<sup>59</sup> *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53, 59, 76 (N.M. 2013) (holding that because the NMRFA does not apply to the legislator and the courts, and sets remedies only against government agencies, it does not insulate businesses from the legislature's prohibition on discrimination and does not shield them from discrimination lawsuits by private parties, including same-sex couples).

<sup>60</sup> *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1234 (Wash. 2019) (holding that Washington's AD law survives strict scrutiny).

<sup>61</sup> *Cervelli v. Aloha Bed & Breakfast*, 415 P.3d 919, 934 (Haw. Ct. App. 2018) (holding that, even if the Hawai'i constitution requires strict scrutiny, the Hawai'i AD law survives it).

<sup>62</sup> Lupu, *supra* note 55, at 45–46.

<sup>63</sup> TEX. CIV. PRAC. & REM. CODE ANN § 110.014 (1999) (“A person whose free exercise of religion has been substantially burdened . . . may assert that violation . . . without regard to whether the proceeding is brought in the name of the state or by any other person.”); IND. CODE § 34-13-9-7 (2015) (“regardless of whether the state or any other governmental entity is a party to the proceeding”).

<sup>64</sup> In addition to the newly enacted Indiana and Mississippi RFRAs, MISS. CODE § 11-61-1 (2014), many recent RFA bills followed the same structure, including SB 898 in Oklahoma, HB 55 in New Mexico, SB 180 in Kentucky, SB 1062 in Arizona, etc.

<sup>65</sup> TEX. CIV. PRAC. & REM. CODE ANN § 110.014 (1999); IND. CODE § 34-13-9-7 (2015).

that enacted local AD protections.<sup>66</sup> These clauses are yet to be interpreted by courts as to whether they resolve the tension or not. More generally, RFRAs do not provide a flat guarantee of exemption, only the possibility of securing an exemption subject to certain legal conditions. Therefore, even expansive RFRA regimes do not guarantee religious vendors a right to refuse to serve same-sex couples, although they increase the likelihood that such right is granted.

In summary, the contemporary regulation of the tension between sexual orientation equality and religious liberty encompasses four legal categories: (1) regimes (state or local) with both AD laws and RFRAs; (2) regimes that only have AD laws; (3) regimes that only have RFRAs; and (4) regimes that have none. This patchwork is the background against which *Masterpiece Cakeshop* was decided, and against which the debate on religious exemptions is raging.

#### D. *Opposing Arguments About the Consequences of Religious Exemptions*

The legislative mismatch and the inconsistent patchwork of protections for same-sex couples and religious objectors across the nation yielded two forceful and opposite responses to religious exemption laws.

In one camp are advocates and scholars that emphatically object to the legislation of new RFRAs and to most types of religious exemptions from AD laws. Much of the concern voiced by this group is about harm and consequences, perhaps most strongly articulated in Mark Stern's argument that if there is any religious accommodation, "inevitably, it will soon stretch to restaurants, hotels, movie theaters—in short, to all facets of public life. A religious right to discriminate against gay people will lead directly to anti-gay segregation."<sup>67</sup> Professors Douglas NeJaime and Reva Siegel take the view that claims for religious exemptions reflect the same effort to preserve traditional gender norms that characterized the religious objection to enacting these laws in the first place, what they call "preservation through trans-

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<sup>66</sup> It seems that this is also how these RFRA provisions have been understood in the public media. David S. Cohen & Leonore Carpenter, *The "Fix" to Indiana's Law Still Doesn't Protect Hoosiers From Anti-Gay Discrimination*, SLATE (Apr. 2, 2015), <https://slate.com/human-interest/2015/04/indiana-religious-freedom-law-the-fix-still-doesnt-protect-gay-hoosiers-from-discrimination.html>, archived at <https://perma.cc/2LSV-G5ZX> (arguing that a suggested fix in Indiana's RFRA is relevant only to the few cities that passed AD bills); Robbie Owens, *Texas Has Its Own Religious Freedom Law*, CBS DFW (Mar. 31, 2015), <https://dfw.cbslocal.com/2015/03/31/fifteen-year-old-texas-law-similar-to-new-indiana-law/>, archived at <https://perma.cc/6FAK-U52N> (claiming the Texas RFRA "can't be misused to disregard civil rights protections.").

<sup>67</sup> Mark Joseph Stern, *Anti-Gay Segregation May Soon Be Coming to Oregon*, SLATE (Feb. 4, 2014), <https://slate.com/human-interest/2014/02/oregon-anti-gay-referendum-the-initiative-is-homophobic-segregation.html>, archived at <https://perma.cc/SYG8-6PUD>.



formation.”<sup>68</sup> Hence, they argue that religious accommodations “may continue democratic conflict in new forms,”<sup>69</sup> and faith claims would escalate in number and significance.<sup>70</sup> Law professors also expressed these concerns to legislatures deliberating new RFRA, urging them to reconsider the bills.<sup>71</sup>

In the opposing camp are advocates and scholars—including some supporters of same-sex marriage<sup>72</sup>—who support religious exemptions. This group, which has also been active in communicating with legislators and pushing forward draft proposals for religious exemptions,<sup>73</sup> rejects the consequential concerns as detached from reality. Professor Andrew Koppelman cites data from polls indicating that a majority of Americans and the vast majority of young Americans now support same-sex marriages.<sup>74</sup> Reflecting on the volume of court cases, he then claims that instances of individuals invoking religious exemptions from antidiscrimination laws are extremely rare, “a handful in a country of 300 million people.”<sup>75</sup> The economic purposes of antidiscrimination law, Koppelman writes, “are a response to pervasive discrimination, and therefore “they are not frustrated by discrimination which is unusual.” Based on the assumption that discrimination against same-sex couples is unusual, he argues that “[i]f gay people are generally protected against discrimination, then a few outliers won’t make any difference.”<sup>76</sup> Similarly, Professors Thomas Berg and Douglas Laycock argue that states do not have a compelling interest in enforcing their antidis-

<sup>68</sup> Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2552–54 (2015).

<sup>69</sup> *Id.* at 2521.

<sup>70</sup> *Id.* at 2520; see also Douglas NeJaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, in THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 187 (Susanna Mancini & Michel Rosenfeld eds., 2018).

<sup>71</sup> Letter from Katherine Franke, Isidor & Seville Sulzbacher Prof. of Law, Columbia University, et al., to Ed DeLaney, Rep. of Indiana (Feb. 27, 2015), [https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/law\\_professors\\_letter\\_on\\_indiana\\_rfra.pdf](https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/law_professors_letter_on_indiana_rfra.pdf), archived at <https://perma.cc/P5AN-YMX4> (criticizing the original Indiana RFRA); letter from Ira C. Lupu, F. Elwood & Eleanor Davis Prof. of Law Emeritus, George Washington University, et al., to Gov. Nathan Deal (Jan. 21, 2015), <https://georgiainites.org/wp-content/uploads/2015/01/Georgia-Religious-Freedom-Letter.pdf>, archived at <https://perma.cc/2HB4-LEMP> (criticizing the Georgia RFRA proposal).

<sup>72</sup> See, e.g., Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 620, 643–44 (2014); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 877–80 (2014).

<sup>73</sup> For a collection of letters to state legislators making these and similar proposals, see Thomas Berg, *ARCHIVE: Memos/Letters on Religious Liberty and Same-Sex Marriage*, MIRROR OF JUSTICE (Aug. 2, 2009), <https://mirrorofjustice.blogs.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html>, archived at <https://perma.cc/A6MN-M2SW>. For the model exemption law advanced by this group, see Letter from Edward McGlynn Gaffney, Jr., Prof. of Law, Valparaiso Univ. Sch. of Law, et al., to Rosalyn H. Baker, State Sen., Haw. (Oct. 17, 2013), <https://mirrorofjustice.blogs.com/files/hawaii-special-session-letter-10-17-13-1.pdf>, archived at <https://perma.cc/FUK6-H6KS>.

<sup>74</sup> Koppelman, *supra* note 72, at 624.

<sup>75</sup> *Id.* at 643.

<sup>76</sup> *Id.* at 627.

crimination laws against religious objectors where “ample alternative providers exist (as they nearly always do).”<sup>77</sup> *Masterpiece Cakeshop*, in their view, is precisely one such case because other bakers were readily available to provide the service.<sup>78</sup> Yet, the premise that exemptions should be allowed where market alternatives exist is under-developed in these arguments. How many other bakers would need to be available to justify an exemption? And if a large number of bakers ultimately refused service, would it invalidate an otherwise justified exemption?

The question of what quantity of refusing vendors begins to erode the position of proponents of religious exemptions is left unanswered. Koppelman concedes that, in some areas of the country, many businesses might invoke an exemption; but he immediately dismisses this concern, assuming that these areas do not have antidiscrimination protections in the first place.<sup>79</sup> With respect to *Masterpiece Cakeshop*, Berg and Laycock simply note that the couple accepted an offer of a free wedding cake after being refused by Phillips.<sup>80</sup> They do not consider other potential scenarios—for example that a couple would encounter repeated refusals until finally securing a cake—or considerations—for example, that the risk of refusal might be multiplied by the number of vendors a couple typically contracts with for their wedding. Finally, proponents of religious exemptions do not consider the question of how religious exemptions might *themselves* shape market alternatives. If religious exemptions encourage more refusals, or expand to other facets of public life, as Seigel, NeJaime, and others worry, then the premise of market alternatives could erode further.<sup>81</sup>

It is possible that the proponents of exemptions are not worried about the potential expansion of faith-based claims because they assume that no religious objector would shy away from expressing their objection under current legal prohibitions, and thus, the only live question is how the authorities choose to treat these inevitable objections. This type of thinking is implicit in Berg and Laycock’s description of religious objectors:

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<sup>77</sup> Douglas Laycock & Thomas C. Berg, *Here’s what you missed in the Supreme Court ruling in same-sex wedding cake case*, DALL. NEWS (June 14, 2018), <https://www.dallasnews.com/opinion/commentary/2018/06/14/missed-supreme-court-ruling-sex-wedding-cake-case>, archived as <https://perma.cc/QK9T-FYPH>.

<sup>78</sup> Thomas C. Berg & Douglas Laycock, *Masterpiece Cakeshop and Reading Smith Carefully: A Reply to Jim Oleske*, TAKE CARE (Oct. 30, 2017), <https://takecareblog.com/blog/masterpiece-cakeshop-and-reading-smith-carefully-a-reply-to-jim-oleske>, archived at <https://perma.cc/59PP-DKYT> (“The case would be different . . . if no other baker were readily available.”).

<sup>79</sup> Koppelman, *supra* note 72, at 644.

<sup>80</sup> Brief for Christian Legal Society et al. as Amici Curiae Supporting Petitioners at 30, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111) [hereinafter Berg & Laycock’s Brief].

<sup>81</sup> NeJaime & Siegel, *supra* note 68, at 2566–74. Koppelman is aware of this concern, but he dismisses such a “cascade” as unlikely given what he considers to be the irreversible trend in social attitudes towards gay couples. Koppelman, *supra* note 72, at 644.

Those bakers willing to turn away good business for religious reasons believe that they are being asked to defy God's will, disrupting the most important relationship in their lives, a relationship with an omnipotent being who controls their fates. They believe that they are being asked to do serious wrong that will torment their conscience for a long time after. Petitioner said he would be "dishonoring" and "displeasing" "the sovereign God of the universe."<sup>82</sup>

Berg and Laycock further write that "[t]he harm of regulation on the religious side is permanent loss of identity or permanent loss of occupation."<sup>83</sup> But is the assumption, that religious objection (where there is one) is an inevitable and fixed position, necessarily true? Or might different legal arrangements influence believers to either tolerate or object to same-sex marriage? This, again, is an open empirical question. If religious objection fluctuates in response to the availability of religious exemptions, and individuals who were willing to provide services to same-sex weddings become unwilling to do so once an exemption is announced, it is unclear that the vigor of Berg and Laycock's argument regarding the harm to religious objectors remains intact. In such case, more nuanced questions would need to be explored: What, really, is the magnitude of harm from not being able to refuse service to same-sex weddings? To what extent is refusal the only available religious response? And is it justified to exempt objectors for whom serving same-sex couples would truly disrupt the most important relationship in their lives, if such exemption also causes many other vendors to refuse service that they would have otherwise provided willingly?<sup>84</sup>

## II. THE *MASTERPIECE CAKESHOP* EXPERIMENT

### A. *The Motivation and Setting for the Experiment*

The primary purpose of the present experiment was to examine the contradicting empirical assumptions regarding the effects of religious exemptions on discrimination towards same-sex couples. These assumptions lie at the heart of the debate on religious exemptions, particularly in the context of weddings, yet neither side has actual data on the consequences of religious exemptions in this market or elsewhere. Even data on the more basic question—the scope of discrimination towards same-sex couples in the wedding industry or any business market—is lacking. These omissions have made it

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<sup>82</sup> Berg & Laycock's Brief, *supra* note 80, at 31.

<sup>83</sup> *Id.* at 32.

<sup>84</sup> This is not an exhaustive list of intriguing empirical questions. One question that I do not address in this Article is that of religious same-sex couples, and how harm to religious interests should be weighed when religion is on both sides of the conflict—the vendor *and* the couple. This could be addressed in future articles.

impossible to assess the merits of the opposing positions and have left the debate hanging in the air.

*Masterpiece Cakeshop* created an opportunity to evaluate these arguments in their most pressing setting. Based on the oral arguments, I anticipated that the Court would grant an exemption, in one format or another.<sup>85</sup> As “one of the most anticipated decisions of the term,”<sup>86</sup> the decision was also likely to draw extensive coverage and discussion in the public media (as it did), and thus potentially have an impact on public attitudes and conduct.<sup>87</sup>

When the decision was finally rendered on June 4, 2018, it received broad coverage and mixed responses. National, state, and local news outlets covered the decision and sought comment from local advocacy groups and politicians.<sup>88</sup> All mainstream outlets, including the New York Times, NBC News, and CNN, titled the decision a victory for the baker; they also called the decision “narrow,” explaining that it did not resolve the big constitutional questions at issue.<sup>89</sup> At the same time, many conservative leaders and religious liberty advocates hailed the decision as a victory, expressing signif-

<sup>85</sup> This expectation was formed based on the comments of Justice Anthony Kennedy, the Court’s swing seat, who hinted that the Court thought that there was “a significant aspect of hostility to a religion in this case.” Transcript of Oral Argument, *supra* note 13, at 54. This became a dominant line of questioning from the conservative judges on the bench. *Id.* at 54–59. Justice Kennedy also said unequivocally, “Counselor, tolerance is essential in a free society. . . . It seems to me that the state in its position here has been neither tolerant nor respectful of Mr. Phillips’ religious beliefs.” *Id.* at 64.

<sup>86</sup> Amy Howe, *Opinion Analysis: Court Rules (Narrowly) for Baker in Same-Sex-Wedding-Cake Case [Updated]*, SCOTUSBLOG (June 4, 2018), <https://www.scotusblog.com/2018/06/opinion-analysis-court-rules-narrowly-for-baker-in-same-sex-wedding-cake-case/>, archived at <https://perma.cc/S7LZ-BVZ2>.

<sup>87</sup> Katerina Linos & Kimberly Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods*, 45 J. LEGAL STUD. 223, 247 (2016).

<sup>88</sup> *See, e.g.*, Lauren McGaughy, *Supreme Court Sides With Baker Who Refused To Make Wedding Cake For Gay Couple*, DALL. NEWS (June 4, 2018), <https://www.dallasnews.com/news/lgbt/2018/06/04/supreme-court-sides-baker-refused-make-wedding-cake-gay-couple>, archived at <https://perma.cc/T68K-5XXG>; Emma Platoff, *What the U.S. Supreme Court’s Masterpiece Cakeshop decision means for religious refusal laws in Texas*, TEX. TRIB. (June 5, 2018), <https://www.texastribune.org/2018/06/05/us-supreme-court-masterpiece-cakeshop-gay-ruling-religious-freedom-tex/>, archived at <https://perma.cc/BW9D-46TF>; Katie Simpson, *New Supreme Court Ruling May Affect Indiana Religious Freedom Lawsuit*, WFYI INDIANAPOLIS (June 4, 2018), <https://www.wfyi.org/news/articles/new-supreme-court-ruling-may-affect-indiana-religious-freedom-lawsuit>, archived at <https://perma.cc/D6YY-DTR5> (describing *Masterpiece* as a victory for religious exemptions which may assist conservative groups to challenge Indiana’s “weakening religious freedom protections”).

<sup>89</sup> Mark Goldfeder, *How the Supreme Court (respectfully) kicked the cake down the road*, CNN (June 6, 2018), <https://edition.cnn.com/2018/06/04/opinions/supreme-court-masterpiece-cakeshop-goldfeder/index.html>, archived at <https://perma.cc/HAG8-UEGC> (“Initial reviews . . . mostly imply that it was a very narrow ruling and is therefore somewhat unremarkable.”); Adam Liptak, *In Narrow Decision the Supreme Court Sides with Baker Who Turned Away Gay Couple*, N.Y. TIMES (June 4, 2018), <https://www.nytimes.com/2018/06/04/us/politics/supreme-court-sides-with-baker-who-turned-away-gay-couple.html>, archived at <https://perma.cc/655G-72YQ> (“The court’s decision was narrow . . . . The court passed on an opportunity to either bolster the right to same-sex marriage or explain how far the government can go in regulating businesses run on religious principles.”); Pete Williams, *In narrow ruling, Supreme Court gives victory to Baker Who Refused To Make Cake For Gay Wedding*, NBC NEWS (June 4, 2018), <https://www.nbcnews.com/politics/supreme-court/narrow-ruling-supreme-court-gives->

icantly less reservations about its scope.<sup>90</sup> Fox News held a supportive interview with Phillips, who defined the decision as a “big win.”<sup>91</sup> Leaders of the U.S. Conference of Catholic Bishops released a joint statement applauding the decision, saying that it “confirms that people of faith should not suffer discrimination on account of their deeply held religious beliefs, but instead should be respected by government officials,” emphasizing the decision’s expression of pluralism and tolerance.<sup>92</sup> The Family Research Council released a statement that the decision “made clear that the government has no authority to discriminate against Jack Phillips because of his religious beliefs” and that the “ruling means Jack will remain free to live according to his beliefs whether he is at work, at home, or in his place of worship.”<sup>93</sup> These statements do not betray any doubt about the scope of the decision or mention its recognition of the important role of AD laws in protecting against sexual orientation discrimination.

Some progressive commentators observed these enthusiastic responses and voiced concerns that *Masterpiece Cakeshop* will grant objectors a li-

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victory-baker-who-refused-make-n872946, archived at <https://perma.cc/KXG3-74PY> (“[T]he opinion was a narrow one, applying to the specific facts of this case only.”).

<sup>90</sup> Emilie Kao, *Why the Supreme Court’s Ruling for a Christian Baker Was Not ‘Narrow’*, DAILY SIGNAL (June 12, 2018), <https://www.dailysignal.com/2018/06/12/why-the-supreme-courts-ruling-for-a-christian-baker-was-not-narrow/>, archived at <https://perma.cc/ECS6-7D72> (“the decision . . . expos[ed] a huge fallacy in the ACLU’s main argument in the case . . . The court’s clear rejection of the discrimination argument has implications for many of the other conflicts currently brewing between religious freedom and sexual orientation.”); *Victory for Colorado Cake Case*, LIBERTY COUNS. (June 4, 2018), <https://www.lc.org/newsroom/details/060418-victory-for-colorado-cake-case>, archived at <https://perma.cc/9M8L-QZ23> (“Though the Court focused on the explicit hostility exhibited by the Colorado Civil Rights Commission in this specific instance, this significant decision will have a wide impact regarding the clash between free speech and the LGBT agenda, including laws that add ‘sexual orientation’ and ‘gender identity.’”).

<sup>91</sup> *Colorado Baker Reacts to ‘Big Win’ in Same-Sex Wedding Cake Case*, FOX NEWS INSIDER (June 5, 2018), <https://insider.foxnews.com/2018/06/05/same-sex-wedding-cake-case-colorado-baker-jack-phillips-supreme-court-ruling-was-big-win>, archived at <https://perma.cc/3Z2C-PDRP>; see also Todd Starnes, *A win for Masterpiece Cakeshop but it ain’t over yet*, FOX NEWS (June 4, 2018), <https://www.foxnews.com/opinion/todd-starnes-a-win-for-masterpiece-cakeshop-but-it-aint-over-yet>, archived at <https://perma.cc/8STY-5Q5Z> (“Monday’s ruling should give some comfort to Christian business owners who primarily service the wedding industry – gay rights do not necessarily trump everyone else’s rights.”). Other coverage by Fox News was more careful in discussing the limitations of the decision. See, e.g., Bill Mears & Judson Berger, *Supreme Court sides with Colorado baker who refused to make wedding cake for same-sex couple*, FOX NEWS LIVE (June 4, 2018), <https://www.foxnews.com/politics/supreme-court-sides-with-colorado-baker-who-refused-to-make-wedding-cake-for-same-sex-couple>, archived at <https://perma.cc/6YHF-XMS9> (“The narrow ruling here focused on what the court described as anti-religious bias on the Colorado Civil Rights Commission when it ruled against baker Jack Phillips.”).

<sup>92</sup> *Religious freedom groups praise Supreme Court’s Masterpiece ruling*, CATH. NEWS AGENCY (June 4, 2018), <https://www.catholicnewsagency.com/news/religious-freedom-groups-praise-supreme-courts-masterpiece-ruling-57089>, archived at <https://perma.cc/NV9W-38UR>.

<sup>93</sup> *Supreme Court Ruling a Victory for Freedom of Colorado Baker to Live by his Faith, says Family Research Council*, FAM. RSCH. COUNCIL (June 4, 2018), <https://www.frc.org/newsroom/supreme-court-ruling-a-victory-for-freedom-of-colorado-baker-to-live-by-his-faith-says-family-research-council>, archived at <https://perma.cc/4Q7L-Q5FX>.

cense to discriminate. Gay and Lesbian Alliance Against Defamation (“GLAAD”) President and CEO, Sarah Kate Ellis, said that it “leaves the door wide open for religious exemptions to be used against LGBTQ people.”<sup>94</sup> Annise Parker, the President of the LGBTQ Victory Institute, further warned that, “[h]omophobic forces will purposefully over-interpret the ruling and challenge existing non-discrimination laws by refusing service to LGBTQ people in even more situations.”<sup>95</sup> NBC News columnist, Scott Lemieux, wrote that the decision “presents a serious risk of undermining civil rights law in the name of religious freedom, especially given that it invites yet further suits for the court to consider.”<sup>96</sup>

This combination of factors—a highly anticipated decision, a court that appeared positioned to exempt the religious objector, and the massive coverage that followed the decision and communicated the above messages—created a favorable setting for the empirical test of the effects (or lack thereof) of religious exemptions on sexual orientation discrimination. In a previous study, Professors Katerina Linos and Kimberly Twist found that Supreme Court decisions can increase support for controversial policies that were vindicated by the Court (e.g., the Affordable Care Act), even when the court was divided and the decision was nuanced.<sup>97</sup> Similarly, three recent studies, measuring the effect of the legalization of same-sex marriage on public attitudes, documented an increase in perceptions that social norms support same-sex marriage<sup>98</sup> and an increase in personal support for same-sex marriages<sup>99</sup> post-*Obergefell*, as well as a sharper decrease in antigay bias in states that legalized same-sex marriage compared with those that did not.<sup>100</sup> All of these studies were based on attitudinal surveys conducted shortly before and after the decisions or acts of legislation, sometimes with an additional experimental component that randomized the framing of the decision or the information provided on the decision. Yet none of these studies examined the implications of Supreme Court decisions on the behavior of decision-makers pertinent to the subject matter of the decision (in the present

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<sup>94</sup> Nico Lang, *Hate Groups Want to Exploit Masterpiece Cakeshop Ruling as a License to Discriminate*, INTO (June 4, 2018), <https://www.intomore.com/impact/hate-groups-want-to-exploit-masterpiece-cakeshop-ruling-as-a-license-to-discriminate/>, archived at <https://perma.cc/7DLD-67AR>.

<sup>95</sup> *Id.*

<sup>96</sup> Scott Lemieux, *How the ‘Narrow’ Ruling in Masterpiece Cakeshop Could Undermine Future Civil Rights Cases*, NBC NEWS (June 5, 2018), <https://www.nbcnews.com/think/opinion/how-narrow-ruling-masterpiece-cakeshop-could-undermine-future-civil-rights-ncna879976>, archived at <https://perma.cc/YM2M-9EZ6>.

<sup>97</sup> Linos & Twist, *supra* note 87, at 247.

<sup>98</sup> Margaret E. Tankard & Elizabeth Levy Paluck, *The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitudes*, 28 PSYCH. SCI. 1334, 1339 (2017).

<sup>99</sup> Emily Kazyak & Mathew Stange, *Backlash or a Positive Response?: Public Opinion of LGB Issues After Obergefell v. Hodges*, 65 J. HOMOSEXUALITY 2028, 2040 (2018).

<sup>100</sup> Eugene K. Ofose et al., *Same-Sex Marriage Legalization Associated With Reduced Implicit And Explicit Antigay Bias*, 116 PROC. NAT’L ACAD. SCI. U.S. 8846, 8849–51 (2019).

case, how wedding vendors are influenced from a decision pertinent to the wedding industry).

In addition, previous studies did not investigate whether effects of Supreme Court decisions vary between socio-legal regimes. As Part II explained, the variation in how states regulate sexual orientation discrimination and religious freedom is potentially important in the present case, as these background regimes yield different expectations about the legal outcomes of otherwise identical cases. These expectations could have directed wedding vendors towards different behaviors and could have differentiated their response to the *Masterpiece Cakeshop* decision. For example, business in regimes that resemble Colorado—with AD laws and without RFRA—might refuse service to same-sex couples to a greater extent post-*Masterpiece Cakeshop* if they believe that *Masterpiece Cakeshop* relaxed their AD obligations. One may also expect this change to be more pronounced in overlap regimes, because the existence of a RFRA could strengthen the impression that businesses are likely to secure an exemption post-*Masterpiece Cakeshop*. In contrast, businesses in regimes that have never enacted AD laws have no legal basis to change their behavior. For these businesses, the law has not changed: they are as free to discriminate after *Masterpiece Cakeshop* as they were before the ruling. All these hypotheses should be couched in the general caveat that businesses are not necessarily well versed in the law. Therefore, it is also possible that businesses in different legal regimes would not respond differently to *Masterpiece Cakeshop*. But then again, laws are not enacted at random, but are the product of certain social and political conditions. These conditions could in turn influence the acceptance and interpretation of the decision, even if businesses are not directly aware of their rights and obligations under the law. In short, investigating differences between socio-legal regimes is vital to understand whether the effect of a national Supreme Court decision is general or varies from one regime to another.

In sum, *Masterpiece Cakeshop* provided a unique opportunity to study the behavioral effect of providing a religious exemption from antidiscrimination laws, a question of which no empirical data exist to date, and which bears heavily on contemporary legal debates. In addition, the present study goes deeper than previous studies in probing the relationship between the national Supreme Court “shock” and the preexisting sub-national legal structures that could vary the effect of the decision between otherwise similar regimes.

### B. Research Design

To assess whether *Masterpiece Cakeshop* had an effect on sexual orientation discrimination in the wedding industry, I combined methods from natural (pseudo) experiments and field experiments. As in such experiments, I examined the behavior of wedding businesses in two periods: before (May

8–15, 2018) and after (June 13–20, 2018) the decision (June 4, 2018). As in field experiments, the methods aimed to control for both the setting of the examination and the allocation of sexual orientation treatment between businesses, to allow for causal inference.

Sample construction began with a preliminary comparison of all states, to find those that were most comparable in their overall characteristics yet differed in legal regime. Four states were selected: Indiana, Texas, Iowa, and North Carolina. Table 1 shows that these states have roughly the same attitudinal and economic characteristics yet vary in how they regulate religious freedom and public accommodations. North Carolina has no RFRA and no AD law at any level of government (-RFRA, -AD). Iowa has no RFRA (at any level of government), but has a state AD law (-RFRA, +AD).<sup>101</sup> Indiana and Texas model together the two final categories: both have state RFRA<sup>102</sup> and no state AD laws, yet some jurisdictions within these states have local AD laws.<sup>103</sup> Texas and Indiana jurisdictions with AD laws model the +RFRA, +AD category, whereas Texas and Indiana jurisdictions without such laws model the +RFRA, -AD category.

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<sup>101</sup> IOWA CODE § 216.7 (2017). Notably, the Iowa Supreme Court has been a trailblazer for gay rights, striking down Iowa’s anti-sodomy law twenty-seven years before the U.S. Supreme Court did the same in *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003). *State v. Pilcher*, 242 N.W.2d 348, 359–60 (Iowa 1976) (en banc) (holding Iowa’s criminal anti-sodomy law unconstitutional under the Fourteenth Amendment as applied to “adult persons of the opposite sex”). Iowa also became the third state in the nation to allow same-sex couples to marry when the Iowa Supreme Court legalized same-sex marriage in *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009). See also *Iowa Supreme Court legalizes gay marriage*, NBC NEWS (Apr. 3, 2009), <https://www.nbcnews.com/id/wbna30027685>, archived at <https://perma.cc/Q6BH-2LUD>. RFRA has been repeatedly proposed and rejected in the state legislature. Barbara Rodriguez, *Controversial ‘religious freedom’ bill gets another look at Iowa Capitol*, DES MOINES REG. (Feb. 18, 2019), <https://www.desmoinesregister.com/story/news/politics/2019/02/18/iowa-republicans-religious-freedom-restoration-act-capitol-rfra-discrimination-bill/2909230002/>, archived at <https://perma.cc/CT95-6RPZ>.

<sup>102</sup> IND. CODE § 34-13-9 (2015); TEX. CIV. PRAC. & REM. CODE ANN § 110.011 (1999).

<sup>103</sup> Jurisdictions in Indiana with AD laws include Indianapolis, Fort Wayne, Evansville, Bloomington, Muncie, South Bend, and Terre Haute. *Indiana’s Equality Profile*, *supra* note 56. Jurisdictions in Indiana without AD laws include West Lafayette. *Id.* Jurisdictions in Texas with AD laws include Dallas, San Antonio, Austin, El Paso, Plano, and Fort Worth. *Texas’ Equality Profile*, *supra* note 56. Jurisdictions in Texas without AD laws include Houston, Irving, Arlington, Corpus Christi, Lubbock, Garland, Amarillo, Grand Prairie, Brownsville, McKinney, Killeen, McAllen, Waco, Denton, Round Rock, and College Station. *Id.*



TABLE 1 – CHARACTERISTICS OF SAMPLED REGIMES

Criterion	Definition	IA <sup>104</sup>	NC <sup>105</sup>	IN <sup>106</sup>	TX <sup>107</sup>	Dallas Metro, TX <sup>108</sup>	Houston Metro, TX <sup>109</sup>
GDP (\$) <sup>110</sup>		59,978	54,442	55,173	61,168	--	--
Importance of Religion	Religion is Somewhat/ Very Important (National average: 77%)	79%	84%	78%	86%	85%	83%
% Conservatives	(National average: 36%)	41%	40%	41%	39%	41%	38%
% Evangelicals	(National average: 25%)	28%	35%	31%	31%	38%	30%
Attitudes Towards Homosexuals	“Homosexuality should be discouraged” (National average: 31%)	36%	36%	37%	36%	35%	39%
Attitudes Towards Same-Sex Marriage	Opposing/Strongly Opposing Same-Sex Marriage (National average: 39%)	41%	45%	45%	46%	44%	51%
State RFRA <sup>111</sup>		No	No	Yes	Yes	Yes	Yes
State/Local AD law <sup>112</sup>		Yes	No	Some	Some	Yes	No

Two reasons were responsible for the choice of Texas and Indiana as models of the overlap category (+RFRA, +AD) and the +RFRA, -AD category. As Part II describes, there are three versions of the overlap between RFRA and AD laws: (1) states that enacted both laws; (2) states that enacted an AD law and whose courts interpret the constitution to provide a

<sup>104</sup> PEW RSCH. CTR., RELIGIOUS LANDSCAPE STUDY: ADULTS IN IOWA (2015), <https://www.pewforum.org/religious-landscape-study/state/iowa/>, archived at <https://perma.cc/2X9G-YX76>.

<sup>105</sup> PEW RSCH. CTR., RELIGIOUS LANDSCAPE STUDY: ADULTS IN NORTH CAROLINA (2015), <https://www.pewforum.org/religious-landscape-study/state/north-carolina/>, archived at <https://perma.cc/3NGA-EPKU>.

<sup>106</sup> PEW RSCH. CTR., RELIGIOUS LANDSCAPE STUDY: ADULTS IN INDIANA (2015), <https://www.pewforum.org/religious-landscape-study/state/indiana/>, archived at <https://perma.cc/TGF4-5LQ5>.

<sup>107</sup> PEW RSCH. CTR., RELIGIOUS LANDSCAPE STUDY: ADULTS IN TEXAS (2015), <https://www.pewforum.org/religious-landscape-study/state/texas/>, archived at <https://perma.cc/DNF2-4PPF>.

<sup>108</sup> PEW RSCH. CTR., RELIGIOUS LANDSCAPE STUDY: ADULTS IN THE DALLAS METRO AREA (2015), <https://www.pewforum.org/religious-landscape-study/metro-area/dallasfort-worth-metro-area/>, archived at <https://perma.cc/9XQ4-79JH>.

<sup>109</sup> PEW RSCH. CTR., RELIGIOUS LANDSCAPE STUDY: ADULTS IN THE HOUSTON METRO AREA (2015), <https://www.pewforum.org/religious-landscape-study/metro-area/houston-metro-area/>, archived at <https://perma.cc/5F7L-Y3ZS>.

<sup>110</sup> GDP per capita was calculated based on data from the second quarter of 2018. BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COM., GROSS DOMESTIC PRODUCT BY STATE: SECOND QUARTER 2018 (2018).

<sup>111</sup> IND. CODE § 34-13-9 (2015); TEX. CIV. PRAC. & REM. CODE ANN § 110.011 (1999).

<sup>112</sup> This refers to public accommodation laws that apply to private businesses and are enacted at the state or city level.

RFRA-like standard; and (3) local AD laws within RFRA states. The primary reason for choosing the third version to model the overlap category was that the demographic and attitudinal characteristics of the four states that enacted both laws (Rhode Island, Connecticut, New Mexico, Illinois) and the states that had a RFRA without an AD law differed widely from states in the three other categories. Second, as Part II discusses, the particular RFRA design in the first overlap category was not conducive for the examination of the tension between RFRA and AD laws, while the second overlap category raised considerable uncertainty regarding the existence of the same tension. Texas and Indiana provided an adequate demographic and attitudinal comparison to the other legal categories, as well as clarity regarding the classification of their legal regimes.

To be sure, I do not argue that the design is capable of identifying a *causal relationship* between specific regimes and behavioral outcomes (as I will show next, other features of the design allow for the identification of a causal relationship in the entire sample, *across* legal regimes). First, background laws—unlike the experimental treatment—are not randomly assigned. They cannot be easily separated from the underlying political and social climate that produced them.<sup>113</sup> In addition, unlike the *Masterpiece Cakeshop* decision, they are not new, so their effect cannot be studied as a pseudo, natural experiment. Second, as discussed above, while different laws provide different behavioral guidance, businesses may not be fully aware of laws' dictates. Nevertheless, it is important to study the variation between legal regimes—if not for the direct impact of law, then for the potential impact of the underlying socio-political structures that the law reflects. Had I only sampled from one regime, important real-world variation would have been masked. Exploring how businesses in different regimes respond to *Masterpiece Cakeshop* is necessary, even if the results are only suggestive and causal inference is limited.

The sample was built by collecting information on photographers, bakers, and florists in each legal regime through a Google search, aiming to include 250 vendors per regime.<sup>114</sup> Only vendors who published an email address were sampled.<sup>115</sup> Vendors were contacted by email, a highly common method for communication in the wedding market. There is ample gui-

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<sup>113</sup> In addition, the law is determined not only based on acts of the legislature but also based on judicial decisions and administrative directives that interpret the enacted rule. I attempted to account for those—for example, by not sampling from overlap states where courts interpreted RFRAs as providing no protection against AD claims—but it is very difficult to account for all interactions between judge-made law and legislated law.

<sup>114</sup> For an extended discussion of the sample, see Barak-Corren, *supra* note 19, at 12–17. The choice of vendors was influenced by recent cases in which businesses refused service to same-sex couples. *See, e.g.*, *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019) (florists); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (bakers); *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53 (N.M. 2013) (photographers).

<sup>115</sup> Vendors that did not publish an email address typically had an online application form on their website, reducing the potential concern that the sample is biased towards technology-oriented vendors.

dance online on how to write an email to potential vendors, and multiple websites assume that email is the default or best form of communication with vendors.<sup>116</sup>

Next, sixteen fictitious email profiles were created to facilitate the experiment. In order to assess the baseline discrimination pattern, each business received two emails prior to *Masterpiece Cakeshop* from two different “couples”: a same-sex couple (first wave) and a different-sex couple (second wave). The couples’ sexual orientation was made evident by their names. The name of the sender, appearing in the profile information and the signature, was a generic American male name (John, Robert, Dylan, Scott). The name of the prospective spouse appeared inside the body of the email and was a generic name for an American male or female, depending on the couple’s identity (Adam, Paul, Harry; Ashley, Rebecca, Jessica).<sup>117</sup> The emails had similar properties, including similar information about the fictitious couple and the service requested from the vendor; they were written in the same level of cordiality. Small, meaningless changes were inserted to diminish suspicion (including variations in font size, font color, signature style, and profile pictures).<sup>118</sup> The emails were sent one week apart, about the same time during the week and day, with an intentional hour lag to reduce suspicion.<sup>119</sup>

A week after *Masterpiece Cakeshop*, on June 13, all businesses were randomized to receive an email from a same-sex or a different-sex couple (third wave); and on the following week, each business received an email from the opposite-orientation couple (fourth wave). In each third and fourth

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<sup>116</sup> See, e.g., Kelsey Malie, *How to Successfully Communicate With Your Wedding Vendors*, (Mar. 29, 2018), <http://www.kelseymaliecalligraphy.com/blog/2018/3/29/how-to-successfully-communicate-with-your-wedding-vendors>, archived at <https://perma.cc/JD6V-M3KY> (“An email is usually the preferred method for inquiries as it allows the vendor to keep track of your conversation, respond in length and from a desktop, and allows them to easily attach files, reference links, and more.”); Kim Forrest, *7 Ways to Effectively Communicate With Wedding Vendors*, WEDDINGWIRE (Feb. 13, 2017), <https://www.weddingwire.com/wedding-ideas/7-ways-to-effectively-communicate-with-wedding-vendors>, archived at <https://perma.cc/RNK2-U55G> (assuming at least some communication is done via email); Adair Currie, *How to Email Potential Wedding Vendors*, EVERY LAST DETAIL (Feb. 3, 2015), <https://theeverylastdetail.com/email-potential-wedding-vendors/>, archived at <https://perma.cc/32UF-38KE> (providing guidance on how to write emails to potential wedding vendors).

<sup>117</sup> These are highly popular names of men and women respectively (and not of the other gender), for people born in the U.S. in the 1980s and 1990s. See, e.g., Soc. SEC. ADMIN., TOP NAMES OF THE 1990s, <https://www.ssa.gov/oact/babynames/decades/names1990s.html>, archived at <https://perma.cc/JT2B-XJTW>. Those years are the relevant age cohorts for marriage in 2018, when the experiment was conducted. In 2018, the median age for marriage in the U.S. was 30 for men and 28 for women. See A.W. Geiger & Gretchen Livingston, *8 Facts About Love and Marriage in America*, PEW RSCH. CTR. (Feb. 13, 2019), <https://www.pewresearch.org/fact-tank/2019/02/13/8-facts-about-love-and-marriage/>, archived at <https://perma.cc/UL9E-FKVE>.

<sup>118</sup> See Barak-Corren, *supra* note 19, online app. § OA1, at 1–10, <https://harvardcrcl.org/wp-content/uploads/sites/10/2021/05/Online-Appendix-final.pdf>, archived at <https://perma.cc/GF73-AHXU>. All email versions are included in this section of the appendix. *Id.*

<sup>119</sup> Barak-Corren, *supra* note 19, at 18. A small group of subjects received each email 24 or 48 hours after the main group, due to logistical issues. *Id.* at 18 n.22.

wave, the two emails had similar properties and were different from the two pre-*Masterpiece Cakeshop* emails. Each email was always sent from a profile that has not contacted that business before. Altogether, each business received four different emails from four different profiles. Following the same procedure and schedule, a “control” group of businesses were contacted in the third and fourth waves.<sup>120</sup> These businesses were contacted for the first time after the decision, to evaluate the possibility that the repeated measurement of the experimental procedure had an independent effect on business behavior.<sup>121</sup>

### C. *Strengths and Weaknesses of the Experiment*

The experimental design has multiple methodological strengths. First, it combines two of the most powerful methods for causal inference—pseudo-experiments and field experiments—to enable the study of an actual, concrete event—the *Masterpiece Cakeshop* decision—in a controlled setting. Second, sending carefully designed materials of fictitious individuals instead of real auditors creates a controlled setting for the study and removes inadvertent auditor biases.<sup>122</sup> The emails enable controlling the couple’s identities, how they represent themselves to businesses, the exact content of the inquiry, and the timing of the inquiry. All of these are very difficult to achieve in studies that employ real testers (audit studies). Although testers can be trained to behave similarly, it is impossible to erase the numerous differences between real people, or control for nuances in tone and facial expressions that can disclose the auditors’ attitudes or that their search for a job/service is ingenuine.<sup>123</sup> In addition, while email inquiries do not capture the entire variation in how couples interact with vendors, emails are one of the most common methods of communication between couples and vendors, especially in the inquiry phase.<sup>124</sup> To the extent that the process of negotiating with vendors has even moderate friction, one would expect that reduced positive responses to emails would ultimately translate into less market opportunities for same-sex couples. Third, the outcome measure—agreement to provide services to the couple—is less crude than, for example, callbacks in employment experiments that were used in previous prominent studies.<sup>125</sup> This is because the conflict about discrimination in wedding services focuses

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<sup>120</sup> *Id.* at 17. There were 251 vendors. *Id.* Additional details on the composition of the control group can be found at this source. *Id.*

<sup>121</sup> *Id.* at 17–20. Further details on the procedure and treatment of the data can be found at this source. *Id.*

<sup>122</sup> Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 993–94 (2004).

<sup>123</sup> *Id.*

<sup>124</sup> See, e.g., sources cited *supra* note 116.

<sup>125</sup> Bertrand & Mullainathan, *supra* note 122, at 997.

on the specific stage of the transaction that is studied here: the initial inquiry about the service.<sup>126</sup>

Alongside these strengths, the experiment also has limitations. First, similar to other studies of discrimination in the field, I study asynchronous communication rather than face to face or phone communication.<sup>127</sup> As noted, there are good reasons for that. However, how the results translate to additional methods of communication remains an open question and a topic for a future study. In addition, the experiment examines willingness to provide service to male couples and does not examine impacts on lesbian or non-binary couples or couples with distinctively Black or non-white names, nor does it explore the intersectionality of gender and race. This, too, could be a topic for a future study.<sup>128</sup>

An additional limitation, resulting from the pseudo- and controlled experiment design, is that I examine the effect of *Masterpiece Cakeshop* in a relatively short time span: several weeks after the ruling. While collecting more observations would have been desirable, it was not possible to continue isolating the effect of the decision from intervening political developments beyond that period. I explain this in more length in the discussion.

TABLE 2: OVERALL RESPONSE RATES IN EACH WAVE

Wave	Overall Response Rate
W1	70.8
W2	58.7
W3	63.4
W4	61.9

Finally, I encountered a large attrition of businesses in the second wave of inquiries before *Masterpiece Cakeshop* (see Table 2)—an issue that pervades studies that repeatedly measure the same respondents over time.<sup>129</sup>

<sup>126</sup> See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1724 (2018) (inquiry about purchasing a cake); *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1211 (Wash. 2019) (inquiry about floral arrangements); *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53, 59–60 (N.M. 2013) (inquiry about wedding photos).

<sup>127</sup> Bertrand & Mullainathan, *supra* note 122, at 991–93.

<sup>128</sup> See, e.g., Kathryn M. Kroeper et al., *Marriage Equality: On the Books and on the Ground? An Experimental Audit Study of Beliefs and Behavior towards Same-Sex and Interracial Couples in the Wedding Industry*, 19 ANALYSES OF SOC. ISSUES & PUB. POL'Y 50 (2019). Kroeper's study was conducted before *Masterpiece*, finding that communications from same-sex couples were ignored more than communications from heterosexual and interracial couples. *Id.* at 66–67. The study did not find meaningful differences between gay and lesbian couples. See Kroeper et al.'s online supplement at 3. The comparisons and intersections explored in the study should be revisited, both because the sample size of each couple type was quite small, and because social norms may change, for example, because of decisions such as *Masterpiece Cakeshop*.

<sup>129</sup> See, e.g., Graham Kalton, *Designs for Surveys Over Time*, in SAMPLE SURVEYS: INFERENCE AND ANALYSIS 89, 101–03 (C. R. Rao & D. Pfeffermann eds., 2009); ALAN S. GERBER &

This pattern hindered the ability to detect discrimination in the pre-*Masterpiece Cakeshop* period, as the first wave of emails was from same-sex couples and the second wave of emails was from opposite-sex couples. While the causes for this attrition are not entirely clear (this is common to studies that encounter attrition),<sup>130</sup> a random phone survey suggested that businesses that provided no response to the second wave of emails were generally less responsive than other businesses (also over the phone), rather than suspicious or email fatigued.<sup>131</sup> To minimize the impact of attrition on the robustness of the design, I randomized couples' identity within each following wave. In addition, the following waves were designed to increase responsiveness by altering the style and formatting of the emails and the couples' profiles. This effort succeeded in increasing responsiveness to wave three and in reducing attrition between waves three and four. Nevertheless, I concede that the attrition of businesses from wave two prevents the evaluation of the existence and extent of sexual orientation discrimination before *Masterpiece Cakeshop*.<sup>132</sup> To overcome this pitfall and evaluate the effect of *Masterpiece Cakeshop* on the existence and extent of discrimination *after* the decision, I developed several strategies of analysis which I present next.

#### D. Findings

In this section, I present the core results of the *Masterpiece Cakeshop* field experiment.<sup>133</sup> The analysis begins by focusing on businesses that agreed to serve same-sex couples before *Masterpiece Cakeshop* and examining their behavior post-*Masterpiece Cakeshop*. The second analysis examines within-business changes of behavior across all businesses over time. I then move to examining differences between legal jurisdictions and between religious environments.

##### 1. Did *Masterpiece Cakeshop* Increase Discrimination Towards Same-Sex Couples?

To answer this question, I evaluate the impact of *Masterpiece Cakeshop* on the 576 businesses that agreed to serve same-sex couples before the deci-

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DONALD P. GREEN, FIELD EXPERIMENTS: DESIGN, ANALYSIS, AND INTERPRETATION 236–40 (Ann Shin ed., 1st ed. 2012).

<sup>130</sup> John Fitzgerald et al., *An Analysis of Sample Attrition in Panel Data: The Michigan Panel Study of Income Dynamics*, 33 J. HUM. RES. 251, 252 (1998).

<sup>131</sup> See Barak-Corren, *supra* note 19, online app. § OA3, at 11–14, <https://harvardcrcl.org/wp-content/uploads/sites/10/2021/05/Online-Appendix-final.pdf>, archived at <https://perma.cc/GF73-AHXU>.

<sup>132</sup> See *id.* § OA4.1, at 15–20. It is possible to infer that, prior to *Masterpiece Cakeshop*, opposite-sex couples were disfavored relative to same-sex couples (reverse discrimination), but this inference seems tenuous. To the extent it is true, the magnitude of the *Masterpiece Cakeshop* effect is much larger than estimated below.

<sup>133</sup> For elaborations, robustness checks, and follow up studies, see Barak-Corren, *supra* note 19.

sion. Examining their behavior after the decision can provide an answer as to whether *Masterpiece Cakeshop* had a negative effect on the willingness of businesses to provide services to same-sex couples. As all businesses, these previously “gay-friendly” businesses were randomized post-*Masterpiece Cakeshop* to receive an inquiry either from a same-sex or an opposite-sex couple (and then vice versa in the following wave, such that each business was contacted by both couples post-*Masterpiece Cakeshop*). This design allowed me to estimate the effect of *Masterpiece Cakeshop* precisely, using both within and between businesses data.

Overall, post-*Masterpiece Cakeshop* inquiries from a same-sex couple had a 66.3% chance of receiving a positive response. Equivalent inquiries from an opposite-sex couple have a 75.5% chance of being answered positively. This represents a difference of 9.2 percentage points, a 14% change, that can be solely attributed to the identity of the couple;<sup>134</sup> these results were stable and significant in both waves following *Masterpiece Cakeshop*.

How do businesses communicate negative responses to couples? The most common form of declining service is simply no response. This result is anticipated, as writing a negative response is both time-intensive and awkward, and the easiest way for a business to proceed is to ignore the inquiry.<sup>135</sup> While some non-responses may have had other causes—for example, non-receipt of the initial email or simple forgetfulness—we would expect such errors to distribute randomly and therefore equally across couple types. This is not the case. Opposite-sex couples had a 19.6% chance of not receiving a response to their inquiry, while same-sex couples had a 27.8% chance of not receiving a response. That is, the chance of same-sex couples to not receive a response was 42% higher.<sup>136</sup> In addition, while explicitly negative responses were less common, the increase in such responses for same-sex couples from before to after *Masterpiece Cakeshop* was 177% the increase of such responses for opposite-sex couples.<sup>137</sup>

The negative effect of *Masterpiece Cakeshop* on the willingness to provide services to same-sex couples was consistent across additional analyses. I find the effect in the entire sample of businesses in the experiment (N=906): comparing the rate of positive responses to same-sex couples before and after *Masterpiece Cakeshop* yields a drop of 14.4 percentage points, or about 23% change. I find the negative effect also in the control group, where the gap between couple types after *Masterpiece Cakeshop* was 9.5 percentage points, or about 14% change. I also find this effect among the particularly keen group of businesses that responded positively to both

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<sup>134</sup>  $p = .0006$ . *Id.* at 24 tbl.5.

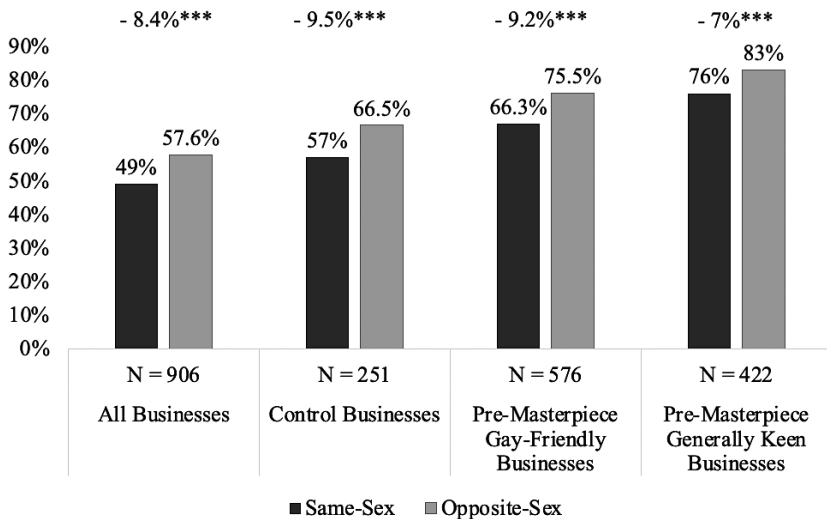
<sup>135</sup> See John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 *ADVANCES IN EXPERIMENTAL SOC. PSYCH.* 1, 10 (2004); cf. Bertrand & Mullainathan, *supra* note 122, at 1006.

<sup>136</sup>  $Z = 3.26$ ,  $p = .001$ . Barak-Corren, *supra* note 19, at 26.

<sup>137</sup>  $Z = 2.14$ ,  $p = .03$ . Barak-Corren, *supra* note 19, online app. § OA4, at 19, <https://harvardcrcl.org/wp-content/uploads/sites/10/2021/05/Online-Appendix-final.pdf>, archived at <https://perma.cc/GF73-AHXU>.

couples before *Masterpiece Cakeshop*. While these businesses remain more responsive than any other group of businesses, they too differentiate significantly between same-sex and opposite-sex couples after *Masterpiece Cakeshop* (~7 percentage point difference, or about 8% change). The summary of these results is presented in Figure 3, which shows that all business cohorts respond to *Masterpiece Cakeshop* with unfavorable treatment of same-sex couples, notwithstanding different baselines of positive response rates that characterize each cohort separately. In all of these analyses, the *Masterpiece Cakeshop* effect is robust to the inclusion of all experimental covariates, such as the type of business, the legal regime, and so on. The effect is equally strong in urban areas, which are often assumed to be particularly inclusive of same-sex couples, and does not vary with political conservativeness. However, as I report in the next sub-section, the effect varies with religiosity of the business environment, such that businesses in areas dense with religious congregations are more likely to show substantial discrimination towards same-sex couples post-*Masterpiece Cakeshop*.



Agreement to Serve Same-Sex and Opposite-Sex Couples After *Masterpiece Cakeshop*

**Figure 3.**<sup>138</sup> *The average positive response rate to same-sex and opposite-sex couples after the Masterpiece Cakeshop decision, by four groups of businesses: all businesses; businesses that were sampled for the first time after Masterpiece Cakeshop (control businesses); businesses that, prior to Masterpiece Cakeshop, were willing to serve same-sex couples (pre-Masterpiece Cakeshop gay-friendly businesses); and businesses that, prior to Masterpiece Cakeshop, were generally keen to serve all couples (pre-Masterpiece Cakeshop generally keen businesses). Gaps in percentage points are noted. \*\*\*  $p < .01$ .*

## 2. What is the Magnitude of the Masterpiece Cakeshop Effect?

How substantial are these effects? Take the average 9% gap in willingness to serve same-sex and opposite-sex couples that was documented in the main analysis, as well as most additional analyses reported above. Now consider the typical couple that contracts with about ten vendors in the process of planning their wedding, including photographers, bakers, florists, videographers, venues, DJs, bridal/groom salons, calligraphers, jewelers, wedding planners, and more.<sup>139</sup> A conservative estimate of the number of inquiries would be one per each business category, amounting to ten in total. A more liberal (some might say more representative) estimate assumes that each couple inquires with one or two potential vendors in each category, maybe more, amounting to at least 15–20 encounters. As each vendor-

<sup>138</sup> *Id.* at 28.

<sup>139</sup> Photographers were generally less responsive (to all couples) than other businesses, but the negative effect of sexual orientation was robust across business types.

couple interaction presents an independent risk of incurring discrimination,<sup>140</sup> the aggregate risk that same-sex couples would encounter discrimination at least once in their interactions post-*Masterpiece Cakeshop* is a function of the average risk posed by each vendor and the overall number of interactions. This risk ranges from 61% for ten interactions to 85% for twenty interactions,<sup>141</sup> and can go higher (or lower) the more (or fewer) vendors a couple encounters.

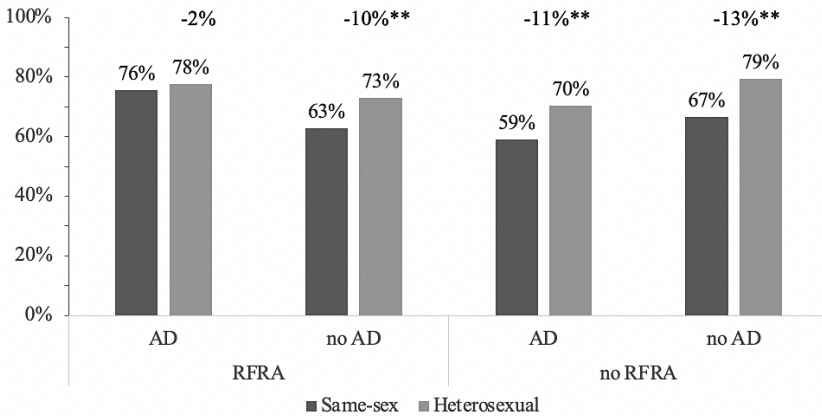
### 3. *Does the Effect of Masterpiece Cakeshop Vary Between Legal Regimes?*

The results demonstrate a substantial reduction in businesses' willingness to provide services to same-sex couples, as compared with opposite-sex couples, after the *Masterpiece Cakeshop* decision. Next, this section asks how this effect displays in different socio-legal regimes. Because of space limitations, the results are summarized in Figure 4. Briefly, I find that *Masterpiece Cakeshop* had a highly statistically significant negative effect in all regimes, *except* for regimes that enacted both an AD law and a religious freedom law.

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<sup>140</sup> Clearly, independent vendors in one area could be different than independent vendors in another area, as areas differ in their levels of discrimination. In that sense, the risk posed by each vendor is not entirely independent from the risks posed by neighboring vendors. The *Masterpiece Cakeshop* effect was robust to county-level conservativeness and city size but varied with county-level religious density. On some aspects, then, the assumption of independence holds on average, and on other aspects the risk may vary with the environment. In any event, cases of revealed non-independence were rare and were removed from the sample. See Barak-Corren, *supra* note 19, online app. § OA2, at 10–11, <https://harvardcrcl.org/wp-content/uploads/sites/10/2021/05/Online-Appendix-final.pdf>, archived at <https://perma.cc/GF73-AHXU>.

<sup>141</sup> In probabilistic terms, the question is: what is the probability that at least one of the vendors will discriminate against the couple, given  $X$  vendors and that the average vendor poses a 9% discrimination risk? To answer the question, one needs to calculate the odds that all  $X$  vendors do *not* discriminate (91% per vendor) and subtract that from 1.  $P(\text{at least one vendor discriminates}) = 1 - 0.91^X$ . This probability is 0.61 for  $X=10$  vendors, 0.76 for  $X = 15$  vendors, 0.85 for  $X = 20$  vendors, and so on.

Impact of *Masterpiece Cakeshop* on Previously Gay-Friendly Businesses, by Legal Regime

Businesses = 576, Observations = 1,152

**Figure 4.** This figure presents the effect of *Masterpiece Cakeshop* on businesses operating in different legal regimes that prior to the decision agreed to provide services to same-sex couples. +RFRA, +AD regimes are counties in Indiana and Texas that are subject to state RFRAs and have enacted local AD laws; +RFRA, -AD regimes are counties in Indiana and Texas that are subject to state RFRAs and have *not* enacted local AD laws; the -RFRA, +AD regime comprises all counties in Iowa, a state that has enacted an AD law and no RFRA; the -RFRA, -AD regime comprises all counties in North Carolina, a state that has not enacted a RFRA and has not enacted an AD law, and had no county with such laws at the time of the experiment. See Table 1 for a socio-demographic comparison of the four regimes. \*\*  $p < .05$ ; \*\*\*  $p < .01$ .

#### 4. Is the Effect of *Masterpiece Cakeshop* Shaped by Religiosity?

Finally, what role does religion play in business behavior? Given that the decision involves a religious exemption and received considerable attention in religious media, one may expect that businesses operating in more religious environments will be more sensitive to *Masterpiece Cakeshop*, and as a result, the effect will be more pronounced in these environments. This hypothesis is particularly plausible with respect to Evangelical-dominant areas, as Evangelical Christians have been involved in a large number of wedding conflicts and are the denomination with the lowest rates of support for same-sex marriage.<sup>142</sup> Although individual-level evidence on the religiosity

<sup>142</sup> PEW RSCH. CTR., U.S. PUBLIC BECOMING LESS RELIGIOUS 108–09 (2015), [https://www.pewforum.org/wp-content/uploads/sites/7/2015/11/201.11.03\\_RLS\\_II\\_full\\_report.pdf](https://www.pewforum.org/wp-content/uploads/sites/7/2015/11/201.11.03_RLS_II_full_report.pdf), archived at <https://perma.cc/NW2E-998M>.

of the businesses is unavailable in this study, I can examine the impact of the surrounding religious environment by observing the density of Evangelical congregations in the county where the businesses are located.

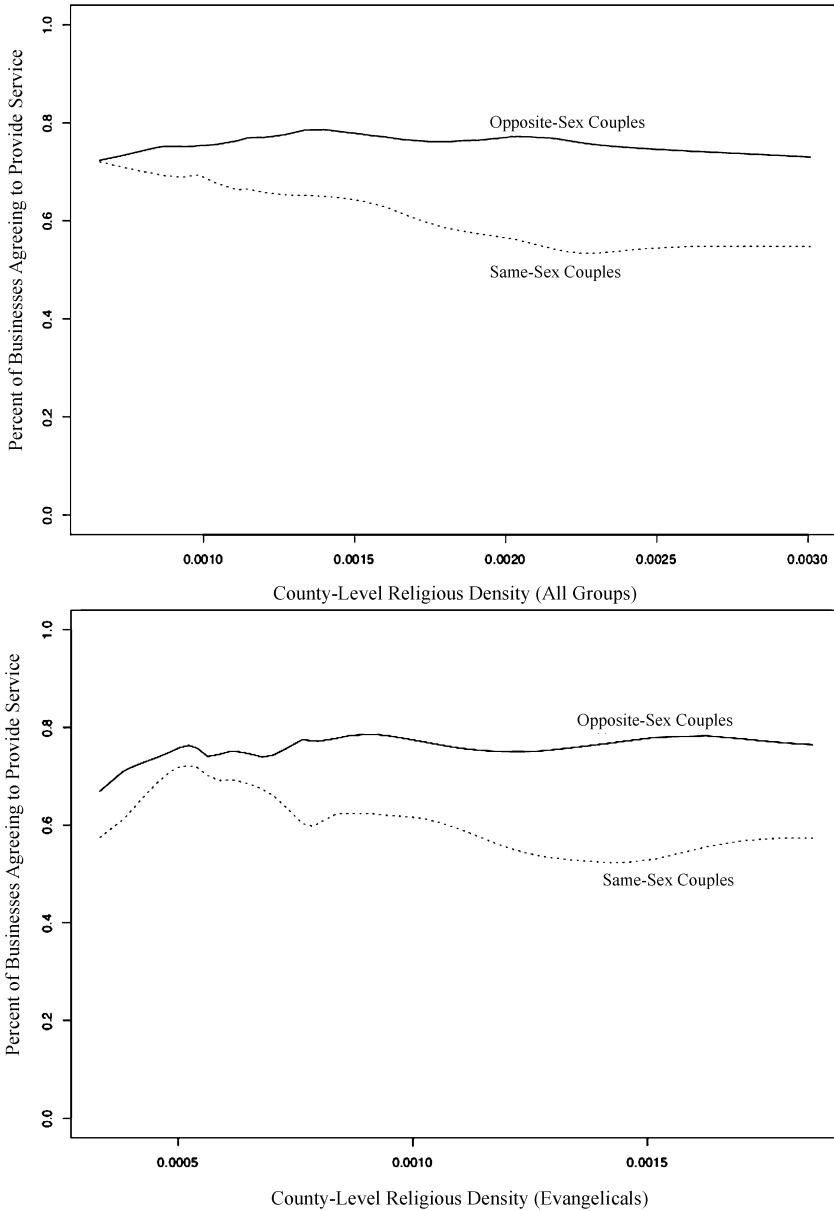
I explored this hypothesis using public data on county-level density of religious and particularly Evangelical congregations from the U.S. Religion Census.<sup>143</sup> These data help me examine whether religious environment influences previously gay-friendly businesses after *Masterpiece Cakeshop*.

Figure 5 plots the results. The top panel shows that the gap in agreement to serve same-sex and opposite-sex couples varied with the religiosity of the environment of the businesses. All of the businesses in this analysis agreed to serve same-sex couples before *Masterpiece Cakeshop*. After *Masterpiece Cakeshop*, however, businesses in religiously dense areas showed a large gap between same- and opposite-sex couples. In contrast, businesses in areas with few congregations do not significantly distinguish between same-sex and opposite-sex couples. Plotting the results against the density of Evangelical congregations provides very similar results, as the bottom panel of Figure 5 shows. The data for areas with very few congregations is somewhat noisy (only 32 businesses are located in counties where Evangelical density is 0.0004 or below), yet the general trend is the same: the sexual orientation service gap widens with Evangelical density. Notably, the percentage of businesses agreeing to provide services for opposite-sex couples is fairly stable across high- and low-religious/Evangelical density areas. The fluctuation occurs mostly with respect to same-sex couples.<sup>144</sup>

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<sup>143</sup> See generally CLIFFORD GRAMMICH ET AL., 2010 U.S. RELIGION CENSUS: RELIGIOUS CONGREGATIONS AND MEMBERSHIP STUDY (2012).

<sup>144</sup> For the results of the regression analyses that account for religious and Evangelical density, see Barak-Corren, *supra* note 19, online app. § OA4.6, at 30–32 tbl.OA4.8, <https://harvardcrcl.org/wp-content/uploads/sites/10/2021/05/Online-Appendix-final.pdf>, archived at <https://perma.cc/GF73-AHXU>.



**Figure 5.** *The agreement to serve same-sex and opposite-sex couples post-Masterpiece Cakeshop by businesses that provided positive responses to same-sex couples prior to Masterpiece Cakeshop, as a function of the religious environment. The top panel illustrates the results as a function of congregations density from all religious groups in the county where the business is located. The bottom panel illustrates the results as a function of the density of Evangelical congregations in the county.*

These data demonstrate that the negative effect of *Masterpiece Cakeshop* is significantly concentrated in more religious environments. To get a concrete appreciation of the magnitude of this result, I compared businesses in high versus low Evangelical density environments (top 25% versus bottom 25%). In highly Evangelical environments, previously gay-friendly businesses developed a 20.5 percentage point gap between couples (78 percentage points versus 57.5 percentage points),<sup>145</sup> whereas in slightly Evangelical environments, the gap is 2.7 percentage points (70.6 percentage points versus 67.9 percentage points, and non-statistically significant). The same disparity between high and low religiosity areas is true for general religiosity as well.<sup>146</sup> These results are illustrative, yet it is important to note that the effect is not a binary but a continuum. Not only heavily religious (Evangelical) communities show the effect, but also intermediately religious communities, as Figure 5 demonstrates. These results indicate that businesses in more religious areas updated their behavior after *Masterpiece Cakeshop* significantly more than businesses in less religious areas.

### III. THE *MASTERPIECE CAKESHOP* EFFECT: EXPLANATIONS AND IMPLICATIONS

The field experiment findings exposed the highly consequential effect of law and the Supreme Court in particular on the behavior of the public. A methodological strength of the field experiment is that it tests the effect of *Masterpiece Cakeshop* directly before and after the decision was rendered, while controlling the setting of the study and employing randomization and is therefore able to isolate the decision's causal effect. It would have been desirable to continue examining *Masterpiece Cakeshop*'s effect later in time, but subsequent legal and political developments have severed the causal link between *Masterpiece Cakeshop* and the market, making such examination impossible. Shortly after the decision, legislatures in several states have proposed or revived new religious liberty bills<sup>147</sup> and two states surveyed in the experiment—Texas and North Carolina—passed legislation related to religious liberty or LGBTQ rights.<sup>148</sup> Given the constantly dynamic legal and political landscape on these issues, whatever has been the conduct of busi-

<sup>145</sup>  $Z = 3.69, p = .0002$ . Barak-Corren, *supra* note 19, at 36.

<sup>146</sup> A 17.2 percentage point vs. 3.6 percentage point gap, respectively,  $Z = 3.133, p = .0017$ . *Id.*

<sup>147</sup> This includes Iowa and Texas. See Rodriguez, *supra* note 101; Emma Platoff, *Texas Senate approves occupational licensing bill LGBTQ advocates call a "license to discriminate"*, TEX. TRIB. (Apr. 2, 2019), <https://www.texastribune.org/2019/04/02/texas-senate-religious-refusal-LGBTQ-occupational-licensing/>, archived at <https://perma.cc/J2EQ-GF5H> (reporting on S.B. 17, which would allow occupational license holders to cite sincerely held religious beliefs as a defense for license-threatening conduct or speech).

<sup>148</sup> Emma Platoff, *Texas House passes religious liberty bill amid LGBTQ Caucus' objections*, TEX. TRIB. (May 20, 2019), <https://www.texastribune.org/2019/05/20/texas-religious-liberty-bill-passes-lgbtq-caucus-fear-hateful-rhetoric/>, archived at <https://perma.cc/5LJF-K2J2>; Tim Fitzsimons, *N. Carolina is first in South to ban state funding for conversion therapy*, NBC

nesses during the intervening period, it can no longer be linked to *Masterpiece Cakeshop*. The *Masterpiece Cakeshop* field experiment therefore provides the cleanest test of the decision's impact and speaks for the consequences directly stemming from the decision itself.

#### A. *Explaining the Masterpiece Cakeshop Discriminatory Effect*

What explains the general effect of the *Masterpiece Cakeshop* decision on wedding vendors? Why do they change their behavior after the decision is rendered? Elsewhere, I considered two types of mechanisms that could explain the effect: *cognitive* and *social*.<sup>149</sup>

There are two primary cognitive explanations for the results: a law-and-economics-type explanation and an expressive-law-type explanation. The law-and-economics explanation is that *Masterpiece Cakeshop* was interpreted by vendors as a relief of previously-anticipated penalties for discrimination, or as a signal that the Court has little intention to enforce AD laws. In economic terms, *Masterpiece Cakeshop* may have influenced perceptions regarding the probability of sanction and/or the likelihood of enforcement. The problem with this explanation is that it is less plausible in light of the design of the experiment and its findings. First, for *Masterpiece Cakeshop* to relieve the risk of incurring a penalty, such risk should be present to begin with. Yet, the experiment, by design, eliminated the risk of getting caught (by the couple, by society, and by state officials), as emails allow vendors to entirely avoid the detection of discrimination (whereas in face to face communication, the synchronous nature of communication makes it more difficult). Namely, even before *Masterpiece Cakeshop*, vendors could have opted to ignore emails from same-sex couples or provide excuses; they were under no threat of detection, enforcement, or penalty, and *Masterpiece Cakeshop* did not change that. The reputational risk of being labelled a discriminator (and the potential penalty of losing clients) was also absent, for the same reasons. Hence, the decreased willingness to provide services to same-sex couples cannot be attributed to a relief of risk of penalty.

Furthermore, the negative effect of *Masterpiece Cakeshop* is found even in regimes that have not enacted *any* prohibition on the discrimination of same-sex couples (no-AD law regimes). Businesses in Texas, Indiana, and North Carolina, operating under no obligation to serve same-sex couples, and therefore under no threat of sanction, still adapted their behavior post-*Masterpiece Cakeshop*. Hence, it is unlikely that the negative *Masterpiece Cakeshop* effect is explained by the decision's influence on the legal costs of discrimination, even if these costs indeed dropped. Indeed, by no means do I argue that legal or social penalties are inexistent or uninfluential. Both legal

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NEWS (Aug. 3, 2019), <https://www.nbcnews.com/feature/nbc-out/n-carolina-first-south-ban-state-funding-conversion-therapy-n1038846>, archived at <https://perma.cc/2Y27-4SB3>.

<sup>149</sup> Barak-Corren, *supra* note 19, at 36–39.

penalties and reputational costs can be very influential. However, their absence from the present setting—a common real-life setting where communication is asynchronous and decisions can be easily masked and remain unknown to the public—makes penalties an unlikely explanation for the effect documented in the present study.

An alternative cognitive explanation is that *Masterpiece Cakeshop* had an expressive effect on wedding vendors, changing their perceptions of the social norm regarding service refusal. The expressive theory of law argues that law can foster change not only or merely by the imposition of costs or benefits, but also by conveying that a certain norm has received a consensual status.<sup>150</sup> The *Masterpiece Cakeshop* decision was a lopsided 7–2 ruling that crossed partisan lines and was infused with normative messages. The majority opinion particularly emphasized the importance of tolerance in a free society, the need for pluralism, and respect for the views of religious objectors. These parts of the decision were frequently cited by conservative and religious commentators on the decision.<sup>151</sup> Changes in social norm perceptions and/or personal support of same-sex marriage following the decision could explain why the decision strengthened the impetus of discrimination even if the probability of detection had not changed.<sup>152</sup> Another possibility is that personal preferences did not change, but were emboldened by the expressive message of the decision, making decision-makers more likely to act on them.

Moving from cognitive to social mechanisms, the environment in which vendors operate could have also influenced their decisions. I examined several types of environmental factors: urbanism; conservativeness; and religious density (I also examine different legal regimes, but I discuss this separately). All other things being equal, I did not find that the *Masterpiece Cakeshop* effect weakened in more urban environments, nor strengthened in more conservative environments. But I did find an indication of a more specific social mechanism: the religiosity of the surrounding environment. Businesses in religiously-dense areas discriminated against same-sex couples after *Masterpiece Cakeshop* significantly more than businesses in less religious areas.

Before interpreting these results, it is important to note that the religiosity of the environment is a crude proxy for the role of religion in the decision-making process, a proxy that could interact with additional factors in ways that are not controlled for in the study. Therefore, the findings from

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<sup>150</sup> See generally Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 339–40 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996).

<sup>151</sup> See *supra* notes 90–93.

<sup>152</sup> This explanation is also supported by the evidence on the impact of the Supreme Court on social norms and support of same-sex marriage in *Obergefell v. Hodges*, 576 U.S. 644 (2015). See Tankard & Paluck, *supra* note 98, at 1339; Kazyak & Stange, *supra* note 99, at 2044–45.



this analysis should be viewed as suggestive rather than conclusive. With this in mind, one straightforward interpretation of the results is that areas with more religious congregations have more religious businessowners, and that religious owners are adapting their behavior after *Masterpiece Cakeshop* (likely due to a perceived change in the social norm). Another possibility is that *Masterpiece Cakeshop* received greater exposure and favorable attention in religious environments, such that news of the decision (framed by religious and conservative outlets) spread widely and influenced *all* businesses—religious or not. This hypothesis is supported by the work of Linos and Twist, who found that Supreme Court decisions mostly influence attitudes through one-sided media frames, and that these frames have similar influence on people who regularly consume the relevant media versus those who are randomly exposed to them.<sup>153</sup> Either way, a religious environment appears to play a major role in translating *Masterpiece Cakeshop* into negative consequences for same-sex couples. The precise mechanism by which this translation occurs should be addressed in future studies, including survey experiments to measure individuals' religiosity. Such studies could also broaden the investigation to additional mechanisms and legal measures, such as statutory exemptions.

### B. Implications for Legislators

The “legislative mismatch” between the protections of sexual-orientation equality and religious freedom across the country should be a cause for concern on both ends of the political spectrum. The two most common regulatory vehicles to afford such protections—AD laws and RFRA—have been mostly stalled in recent years due to heightened anxiety about the consequences of AD laws for religious objectors and of RFRA for LGBTQ people. In May 2019, during a heated debate on the floor of the Texas House about an amendment to the state's RFRA, members of the LGBTQ caucus questioned the bill's sponsors extensively about how the bill might spark discrimination and warned that the bill “perpetuates the rhetoric that leads to discrimination, to hate and ultimately bullying that leads to the consequence of people dying.”<sup>154</sup> The last states to enact new RFRA until recently were Arkansas and Indiana in 2015;<sup>155</sup> the resulting commercial and public backlash might have deterred other states from following that route.<sup>156</sup>

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<sup>153</sup> Linos & Twist, *supra* note 87, at 223.

<sup>154</sup> Platoff, *supra* note 148.

<sup>155</sup> NCSL, *supra* note 49. In March 2021, right before this Article went to press, South Dakota became the first state in six years to enact a RFRA. S.B. 124, 2021 Leg., 96th Sess. (S.D. 2021).

<sup>156</sup> See, e.g., James Briggs, *RFRA 'Fix' Was Enough to Keep Tourists Coming to Indianapolis*, DES MOINES REG. (Feb. 3, 2017), <https://www.desmoinesregister.com/story/money/2017/02/03/briggs-rfra-fix-enough-keep-tourists-coming-indianapolis/97146094/>, archived at <https://perma.cc/XAS9-QYPT> (describing the backlash in Indiana). In Georgia, Gov. Deal vetoed the state's RFRA bill in response to widespread criticism from LGBTQ groups and supporters,

The situation is similar with respect to AD laws. On April 2020, Virginia expanded its public accommodations law to protect against discrimination based on gender identity and sexual orientation.<sup>157</sup> But prior to that, the last state to enact an AD law prohibiting sexual orientation discrimination in public accommodations was Delaware in 2009.<sup>158</sup> Twenty-seven states have not yet enacted such laws.<sup>159</sup>

The *Masterpiece Cakeshop* field experiment conducted a first-of-its-kind examination of the implications of the AD/RFRA mismatch by testing the behavior of wedding vendors from states that are highly similar in terms of their economic, social, and political climates, yet model four different legal regimes: with or without a RFRA, and with or without an AD law. The findings revealed that the introduction of a (perceived) federal religious exemption—in the form of *Masterpiece Cakeshop*—had the same negative impact on same-sex couples in three of the four regimes, but not in regimes that are regulated by both a RFRA and an AD law. Intriguingly, the differential effect of *Masterpiece Cakeshop* was partially observed between cities within the same RFRA state that differed on whether they had an AD law or not (e.g., Dallas versus Houston); these differences were associated with significant consequences for discrimination.

Before discussing the potential implications of these results, several caveats are due. To be sure, no causal inferences can be drawn from the legal regime results, as discussed earlier, because legal regimes are not randomly allocated and were impossible to examine in a natural experiment setting in the present context. Therefore, I am not arguing that the (in)existence of one law or the other is the cause for the *Masterpiece Cakeshop* effect. In addition, legal regimes are considerably richer and more nuanced than the letter of the law can reveal; and they are influenced, among other factors, by administrative policies and judicial decisions not captured in this analysis. Furthermore, legal differences between otherwise similar political units could

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including threats of commercial boycott. Greg Bluestein, *BREAKING: Nathan Deal vetoes Georgia's 'religious liberty' bill*, ATLANTA J.-CONST. (Mar. 28, 2016), <https://www.ajc.com/blog/politics/breaking-nathan-deal-vetoes-georgia-religious-liberty-bill/yVAFF868i7ilsrwT9zpH3L/>, archived at <https://perma.cc/4C4T-Q59N>. The Human Rights Campaign have also made the backlash a salient part of its appeal to states to refrain from enacting RFRAs, for example in its criticism of the recent South Dakota legislation. Wyatt Ronan, *South Dakota Gov. Kristi Noem Signs Religious Refusal Bill, Creating First Major RFRA Law in Six Years*, HUM. RTS. CAMPAIGN (Mar. 13, 2021), <https://www.hrc.org/press-releases/south-dakota-gov-kristi-noem-signs-religious-refusal-bill-creating-first-major-rfra-law-in-six-years>, archived at <https://perma.cc/PF4H-SPT6>.

<sup>157</sup> VA. CODE ANN. § 2.2-3900 (2020).

<sup>158</sup> 77 Del. Laws 90 (2009) (amending 28 sections in the Delaware Code to include sexual orientation).

<sup>159</sup> Out of which, five states—Florida, Kansas, Michigan, North Dakota, and Pennsylvania—recently interpreted the prohibition on “sex” discrimination in their law as including sexual orientation and gender identity. See *State Public Accommodations Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT (Dec. 10, 2020), <https://www.lgbtmap.org/img/maps/citations-nondisc-public-accom.pdf>, archived at <https://perma.cc/PX77-2RZB>.

be the result of unobservable variables that could be the actual causes of differences in discrimination. For example, the social and political climate that produced certain legislation might *also* shape the conduct of local businesses; such an explanation is probably more likely than the assumption that wedding businesses are fully familiar with the laws of their political units.

The underlying causes of the findings aside, the results carefully suggest two observations about the implications of the legislative mismatch. First, AD laws do not necessarily safeguard sexual orientation equality or protect against an increase in discrimination. Second, RFRA are not necessarily themselves detrimental to the operation of equality on the ground.

1. *The Push for Federal and State AD Laws Should Not Forsake Local AD Laws*

That AD laws do not necessarily ensure equality is not, on its own, novel. Extensive empirical research has repeatedly exposed and documented the failures of AD laws to prevent and remedy discrimination in practice.<sup>160</sup> Yet it is interesting to observe that regimes that enacted an AD law, but no RFRA, fare *worse* than comparable regimes that enacted both laws. Iowa, for example, has a long tradition of protection and advancement of sexual orientation equality. Iowa led the way for other states in invalidating its sodomy law already in 1976 and being one of the first states to recognize same-sex marriage.<sup>161</sup> The state enacted a state-wide ban on sexual orientation discrimination, and efforts to enact a RFRA in Iowa failed several times due to concerns about the potentially detrimental effects of such act on sexual orientation discrimination.<sup>162</sup> Against this background, one could expect that the social and political climate that produced Iowa's legal regime would be the most favorable to same-sex couples of all four regimes. Instead, business behavior in Iowa is found to be indistinguishable from regimes that have neither an AD law nor a RFRA (North Carolina), or even from regimes that have no AD law, but do have a RFRA (certain localities in Texas and Indiana). In contrast, regimes that have both an AD and a RFRA (other localities in Texas and Indiana) did not show the negative *Masterpiece Cakeshop* effect.

This pattern raises the question of whether AD laws vary in their effectiveness based on the level of their enactment—namely, whether municipal AD laws are more effective than state variations. This possibility runs counter to the intuition of LGBTQ advocacy groups in many AD-less states.

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<sup>160</sup> For a review based on comprehensive data, see ELLEN BERREY ET AL., RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 54–73 (2017).

<sup>161</sup> See sources cited *supra* note 101 and accompanying text.

<sup>162</sup> See *Iowa Religious Freedom Restoration Act (HF 258)*, REWIRE NEWS GROUP (Feb. 19, 2019), <https://rewire.news/legislative-tracker/law/iowa-religious-freedom-restoration-act-hf-258/>, archived at <https://perma.cc/22MK-GG7M> (documenting the failure of several bills in 2016 and 2018 and the stalling of a 2019 bill).

Some of these groups intensified their struggle for state-level AD legislation following *Masterpiece Cakeshop*, claiming that municipal legislative acts are insufficient and “do not carry the force that a state law would.”<sup>163</sup> Clearly, enacting a series of municipal ordinances is less efficient than enacting one law that covers all municipalities and provides legal recourse for the entire state population. Yet there are two potential reasons for why local AD legislation may fare better in reducing discrimination than state-level legislation. First, legislation at the local level may better represent the preferences and behavioral intentions of the political community.<sup>164</sup> Therefore, the enactment of a municipal AD law by a certain community likely provides a more reliable commitment to equality and nondiscrimination than the enactment of a state AD law. Second, and relatedly, because municipal legislation is closer to home, it could be more successful in persuading residents that have not yet bought into the norm. According to the expressive theory of law, “[a]s long as legislation is positively correlated with popular attitudes or opinions, then it will cause individuals to revise their beliefs about the expected approval or disapproval and to act accordingly.”<sup>165</sup> If this proposition holds in the present case, the fact that a municipal AD law represents the norm of the immediate community increases its ability to persuade individuals from that community to conform. This ability could be compromised the higher a certain legislation “climbs” (namely, a state law might succeed less in revising behavior than municipal law, and federal law might have even less success). This decrease in effectiveness is especially likely in diverse states, where communities that adhere to different norms could respond to AD laws very differently.<sup>166</sup>

Given that the findings with respect to state differences are correlational and may therefore reflect a variety of additional factors, these conclusions are tentative and should be further examined in future studies.

One implication for the interim period is not to abandon local initiatives to enact AD laws or prioritize them as less urgent or less important than state-level initiatives. Assuming that equality movements care not only about the law on the books, but also (and perhaps more so) about the law on the ground, including the prevention of actual discrimination and the improvement of people’s lives and opportunities, local AD laws appear to contribute greatly to achieving these goals.

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<sup>163</sup> See Platoff, *supra* note 88.

<sup>164</sup> For a discussion of how cities promote democratic self-governance and representation better than states, see Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 389–96 (2019).

<sup>165</sup> McAdams, *supra* note 150, at 343; see also Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 595 (1998) (hypothesizing that enacting a norm can increase the number of people who follow it).

<sup>166</sup> In such cases opposing communities could react against the law. See Netta Barak-Corren et al., *The Provocative Effect of Law: Majority Nationalism and Minority Discrimination*, 15 J. EMPIRICAL LEGAL STUD. 951, 956 (2018).

2. *RFRAs Are Not Necessarily Recipes for Discrimination and Should Be Pre-Tested to That Effect*

The second important finding that emerges from the comparison of legal regimes is that RFRAs are not necessarily detrimental to the operation of sexual orientation equality. This finding is arguably more surprising and potentially of broad relevance. The enactment of RFRAs and other protections of religious liberty has been the focus of intensive debate in recent years: one of the major concerns being that such laws would encourage greater discrimination against sexual minorities. I already alluded to the levels of anxiety and controversy that characterize this issue. States that enacted or considered enacting RFRAs were threatened with high-impact boycotts. Indiana itself was the subject of such a boycott after passing its RFRA in 2015, losing twelve conventions and \$60 million in revenue.<sup>167</sup> The Indiana legislature quickly passed a “fix” that clarified that the new Act does not trump local AD laws,<sup>168</sup> a provision very similar to the one included in Texas’ RFRA from its inception.<sup>169</sup>

The results from the *Masterpiece Cakeshop* field experiment indicate that the combination of religious liberty protections of the Texas-Indiana type with AD laws at the local level was resistant to the negative effect of *Masterpiece Cakeshop* on discrimination towards same-sex couples. One potential explanation is that the tension built into these hybrid regimes led businesses to reflect and contemplate their positions in advance—prior to *Masterpiece Cakeshop*—more, perhaps, than businesses in regimes where the tension was less salient. Having already formed a position, businesses in hybrid regimes were possibly more resistant to the influence of *Masterpiece Cakeshop*.<sup>170</sup> Notably, these businesses were not merely more consistent in their behavior; they were also the least discriminatory of same-sex couples post-*Masterpiece Cakeshop* (see Figure 5). Seventy-six percent of businesses in hybrid regimes agreed to provide services to same-sex couples, compared to 59–67% of businesses in other regimes.

As with the findings regarding AD regimes, the relationship between hybrid regimes and sexual orientation discrimination should be further examined. In particular, RFRAs come in many shapes and forms—e.g., with or without recourse against local governments, private lawsuits, and civil rights law.<sup>171</sup> Different RFRA designs could have different impacts on discrimination, especially as these designs interact with existing or inexistent AD laws. To be sure, businesses in RFRA regimes without AD laws strongly showed

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<sup>167</sup> Briggs, *supra* note 156.

<sup>168</sup> See *supra* notes 65–66.

<sup>169</sup> *Id.*

<sup>170</sup> I thank Stephanie Barclay for proposing this point.

<sup>171</sup> See *supra* notes 58–65 and accompanying text.

the negative *Masterpiece Cakeshop* effect. Caveat is required before enacting a new RFRA or amending an existing act.

Alongside this caveat, the findings regarding hybrid regimes provide tentative hope for scholarly and political efforts—most notably, Professor Robin Fretwell Wilson’s work—that marriage equality and religious liberty could be reconciled in legislation somehow, without necessarily exacerbating discrimination.<sup>172</sup> How might this goal be achieved?

An important implication of the *Masterpiece Cakeshop* experiment is that such efforts should rely on reliable and robust empirical evidence regarding the likely consequences of the proposal on sexual orientation discrimination. To do that, I propose pre-testing RFRAAs (and any other similar mechanism). Lawmakers and law professors must not speculate on the outcomes of their proposals or treat them as self-evident. As the findings of the field experiment teach us, speculations and assumptions that do not rely on directly relevant data are no good. The discipline of empirical legal studies has advanced to offer a variety of methods—including experimental surveys and qualitative in-depth interviews—that could facilitate testing the likely effects of proposed policies before formal implementation.<sup>173</sup>

For example, a state legislature could collect a representative sample of the state population, randomly expose different groups to alternative bills, and examine whether exposure to one bill (compared to the others, or no bill) generates more or less anti-gay bias in the population, or produces a more or less accurate understanding of appropriate behavior. Lawmakers could either devise their own decision-making dilemmas to probe citizens’ understanding of the proposed law, or they could rely on one of the many measures established in psychological research to capture bias and social norm perceptions.<sup>174</sup>

Clearly, pre-testing laws requires collaboration between lawmakers and empirical legal scholars, or even the establishment of an in-house research department to execute empirical studies for legislatures. Yet the benefits of such approach greatly exceed its costs. First, basing legislation on data, rather than on speculations, is a positive good which improves the quality of the legislative process. Second, the fears and anxiety that accompany the religion-equality conflict prevent the advancement of both AD laws and RFRAAs all around the nation and exacerbate cultural divides and political polarization. Were the opposing parties to suspend their assumptions about

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<sup>172</sup> See, e.g., Robin Fretwell Wilson & Anthony Michael Kreis, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 *GEO. J. GENDER & L.* 485, 488–89 (2014). Notably, Wilson and her colleague do not promote new RFRAAs, but instead specific and clear exemptions for wedding vendors from the duty to provide service to same-sex couples (but not other suspect categories). *Id.*

<sup>173</sup> In general, the field of evidence-based lawmaking has developed both theoretically and practically in recent years. See Ittai Bar-Siman-Tov, *The Dual Meaning of Evidence-based Judicial Review of Legislation*, 4 *THEORY PRAC. & LEGIS.* 107, 108–11 (2016).

<sup>174</sup> See, e.g., Ofosu et al., *supra* note 100, at 8847–48; Tankard & Paluck, *supra* note 98, at 1336–39.

the consequences of proposed policies and subject them to a rigorous empirical test, they might have been able to approach proposals more openly. In addition, the interim phase of subjecting bills to an a-priori empirical test, before legislating them, will facilitate bipartisan collaboration in research design. Pro-religion and pro-equality legislators will have to sit down and decide what bills they want to test and what measures are needed to capture the consequences they fear or favor, if real. For example, they will need to jointly draft the vignettes (or scenarios) they are interested in probing citizens' reactions to. This deliberation could clarify the stakes for both parties, encourage more reflection about their goals and concerns, and concretize the debate going forward. The results would hopefully resolve the debate in one direction or the other and provide informed ground to base any decision regarding the legislation.

### C. *Implications for Courts*

The findings of the *Masterpiece Cakeshop* field experiment answer several legal questions currently preoccupying the courts.

First, courts are the arbitrators of the debate on the consequences of religious exemptions. Complainants of discrimination and supporting amici frequently warn of increased discrimination towards same-sex couples if religious exemptions are granted. Religious objectors and supporting amici consistently argue that this concern should be dismissed because “ample alternative providers exist.”<sup>175</sup> As a result, courts ask what the consequences of their decisions are likely to be—as did Justice Kennedy, who penned the majority opinion in *Masterpiece Cakeshop*.<sup>176</sup> But, until now, courts have had no relevant data to answer this question.

The *Masterpiece Cakeshop* field experiment provides these data for the first time, documenting the scope of refusals to same-sex couples, as compared with opposite-sex couples, in response to the *Masterpiece Cakeshop* decision. Courts now have concrete evidence from different legal regimes in the U.S., data that were thus far the object of concerns and speculation. Importantly, these data are not drawn from liberal strongholds, but from states that are either at the national average or more conservative. The data show courts that market alternatives *do* exist—there are vendors who will provide services to same-sex couples—and that granting a religious exemption encourages discrimination towards same-sex couples nevertheless, across a wide range of social and legal categories. Indeed, the *Masterpiece Cakeshop* decision generally exposed same-sex couples to a high risk of experiencing discrimination—estimated to be between 65% and 81%, as a function of the

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<sup>175</sup> Laycock & Berg, *supra* note 77; see also Transcript of Oral Argument, *supra* note 13, at 46 (U.S. Attorney General arguing in support of the baker that “products are widely available from many different sources”).

<sup>176</sup> *Id.* at 44–45.

number of market interactions in which couples engage. Justice Kennedy's concern that an exemption would encourage wedding vendors to refuse service to same-sex couples is unfortunately borne out by the data.

These troubling consequences provide the missing piece to the puzzle of applying a strict scrutiny analysis, or RFRA review, to AD laws. Under this doctrine,<sup>177</sup> the court first examines whether the law substantially burdens the free exercise of religion. To survive strict scrutiny, a law must be the least restrictive means by which to further a compelling governmental interest. This is a high threshold for the government, one "that takes a hard look at the facts and does not accept the 'government's bare say-so' about factual outcomes."<sup>178</sup> The first part of the justification—proving a compelling governmental interest—is typically uncontroversial when it comes to laws that aim to fight discrimination on the basis of sexual orientation. But the second part—the least restrictive means test—is thornier, especially in cases involving potential religious exemptions. Cannot the compelling governmental interest in eradicating discrimination be achieved through the less restrictive means of a law that permits religious exemptions? To determine whether religious exemptions would undermine a law's purpose, judges must engage in a factual examination of the consequences of religious exemptions. To know whether a universal enforcement of AD laws is the least restrictive means to ensure access to public accommodations, courts need to know whether religious exemptions detract from this compelling goal. The results of the *Masterpiece Cakeshop* field experiment establish that the decision substantially detracted from this goal in most regimes, by substantially expanding discrimination against same-sex couples. Unfortunately, this was the outcome even though the Court reiterated its commitment to protecting sexual minorities in the marketplace in general, and despite the fact that the exemption crafted for the baker was narrow and case specific. Taken together, these results vindicate states that currently insist on enforcing AD laws without providing exemptions. As I note earlier, it is possible that a different combination of legal means will generate different behavioral outcomes, and such combinations should be tested—or, where relevant, pre-tested—in the appropriate circumstances in the future.

The second implication for courts involves the specific reasoning of the *Masterpiece Cakeshop* decision. The majority Justices—particularly Justice Kennedy—clearly wished to avoid settling the larger tension between religious liberty and sexual orientation equality. Instead, the Justices sought to carve a narrow decision that would not grant wedding vendors a license to discriminate against same-sex couples. This strategy does not seem to have been successful. *Masterpiece Cakeshop* has ultimately increased discrimina-

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<sup>177</sup> In 29 states, the standard of scrutiny of governmental burdens on religion is currently lower, encompassing standards such as intermediate scrutiny or even rational basis review. See *supra* Part I.B.

<sup>178</sup> Stephanie Barclay, *An Economic Approach to Religious Exemptions*, 72 FLA. L. REV. 1211, 1262 (2020) (quoting *Yellowbear v. Lampert*, 741 F.3d 48, 59 (10th Cir. 2014)).



tion in the wedding industry and bolstered legislators and advocates in their attempts to expand religious protections and narrow the scope of antidiscrimination protections.<sup>179</sup> The two subsequent unreasoned decisions in *Arlene's Flowers*<sup>180</sup> and *Klein*<sup>181</sup> that vacated and remanded other wedding vendor cases, despite very different factual circumstances, might have strengthened the impression that *Masterpiece Cakeshop* was not so narrow after all. Assuming the Court did not intend to expand discrimination against same-sex couples, could other judicial strategies have fared better?

This question is of crucial importance considering the challenge facing the Court in its coming term, and likely future ones. This term, the Court will decide *Fulton v. City of Philadelphia*, which involves a social welfare agency that objects, on religious grounds, to a Philadelphia AD rule. That rule requires the agency to provide services to LGBTQ prospective foster parents, as part of its governmental contract. The agency argues that if the Court rules for the city, the agency will close its doors and children will be harmed. The city argues that same-sex couples should not be excluded solely on the basis of their sexual orientation, and that all children are better off if placement agencies refrain from considering factors other than the best interest of children.

The *Masterpiece Cakeshop* experiment offers two lessons for the *Fulton* Court—and for any court adjudicating religion-equality conflicts in the future. First, the Court should require the parties to present directly relevant data to found arguments about consequences. The findings from the *Masterpiece Cakeshop* field experiment teach us that contrasting arguments about the empirical world can thrive despite the absence of data, as each party to the debate is highly motivated to hold on to their own assumptions and to speculate about the facts. This is a dangerous state of affairs. In constitutional law, as elsewhere, arguments about outcomes should rest on actual data. Not only are data crucial to learn the truth value of consequentialist arguments, they can also nuance and refine legal analysis. In the *Masterpiece Cakeshop* context, the empirical work exposes issues that were not previously considered in the area of religious exemptions—such as the nature of the influence of law on behavior—and creates new and specific questions for lawyers and judges to answer—such as how to factor the aggregate risk of discrimination. It is therefore imperative that courts will develop a more critical approach to consequential arguments and will look for directly relevant data.

The second lesson for the *Fulton* Court flows directly from the poor outcomes resulting from the avoidance strategy used in *Masterpiece*

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<sup>179</sup> See Simpson, *supra* note 88 (quoting the head of the American Family Association of Indiana saying that he sees *Masterpiece Cakeshop* as a “signal” to push forward litigation against local AD laws in Indiana); Platoff, *supra* note 148 (describing bills in Texas expanding protections for religious professionals and corporations).

<sup>180</sup> *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671, 2671–72 (2018).

<sup>181</sup> *Klein v. Or. Bureau of Lab. & Indus.*, 139 S. Ct. 2713, 2713 (2019).

*Cakeshop*. By now, several different studies—including the present study—have shown that the Court has the power to shape public attitudes and public behavior, thereby producing either less or more bias and discrimination in society.<sup>182</sup> It is true that after a decision is handed down by the Court, it takes on a life of its own, and much of its effects depend on how it is communicated by mass media. But the Court is not a helpless statist in this process. A clearer and less ambiguous decision—for example, one that sets a clear rule that is easy to communicate, understand, and follow—is less open to aggrandization, misstatements, or misinterpretations. The *Fulton* Court should opt for a clear and bright-line decision that provides specific and unambiguous behavioral instructions, including for future cases. This is particularly true if the court decides to grant an exemption in *Fulton*. In such case, the Court should assume, based on the *Masterpiece Cakeshop* effect, that its decision will likely encourage discrimination against sexual minorities. It is the Court's responsibility to minimize this effect to the extent possible. The Justices should not mislead themselves to think that evading the big questions or making a case-specific decision, as in *Masterpiece Cakeshop*, will avoid undesirable outcomes. The Justices should also not mislead themselves to think that their decision will only expand the freedom of a negligible minority of extremely objecting individuals. Rather, exempting religious objectors will likely have a broad impact, including on decision-makers who were willing to provide services before the decision, but will refuse to do so afterwards. These consequences are particularly concerning given the number of wedding conflict cases that have recently resolved in favor of vendors.<sup>183</sup> This trend gives rise to the possibility that the *Masterpiece Cakeshop* effect will repeat and aggregate over time, the more such decisions are made and become known to the public.

Finally, the expansion of discrimination post-*Masterpiece Cakeshop* suggests that courts should develop a better account of the burden that AD laws place on religious objectors. The dominant theory of the relationship between religious exemptions and religious objection put forth in litigation is that religious exemptions relieve the harm that antidiscrimination rules inflict on religious individuals. Among other things, the theory assumes that the only effect of exemptions would be to relieve devout individuals of the societal harm, but that exemptions do not change behavior, because religious objectors would not have provided services to same-sex couples in any event.<sup>184</sup> Recently, Professor Barclay suggested to formalize this theory in

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<sup>182</sup> Cf. Ofosu et al., *supra* note 100, at 8849 (finding a sharper decrease in anti-gay bias in states that legalized same-sex marriage compared with those that did not); Tankard & Paluck, *supra* note 98, at 1341–42 (finding that the Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), shifted perceived social norms among non-LGBTQIA Americans in support of same-sex marriage).

<sup>183</sup> See *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 762 (8th Cir. 2019); *Brush & Nib Studio v. City of Phoenix*, 448 P.3d 890, 926–27 (Ariz. 2019); *Lexington-Fayette Urban Cnty. Hum. Rts. Comm'n v. Hands On Originals*, 592 S.W.3d 291, 298 (Ky. 2019).

<sup>184</sup> Berg & Laycock's Brief, *supra* note 80, at 32.

economic terms, arguing that the harms incurred by same-sex couples (as a result of discrimination) should be weighed against the harms incurred by religious objectors (as a result of the AD law), by examining the transaction costs for each party. Barclay argues that the costs to religious objectors are extremely high, because of the idiosyncratic and fixed nature of their beliefs. She reasons that compelling them to act against their faith will increase net societal harm, because religious objectors will either become martyrs, or will end up with a broken conscience.<sup>185</sup> Under this theory of Berg, Laycock, Barclay, and others, the availability of exemptions should not change the scope of religious objection (because they will not enter the transaction in any event), only its consequences for the objectors.

But the results of the *Masterpiece Cakeshop* experiment bely this theory. First, the seeming availability of a religious exemption post-*Masterpiece Cakeshop* changed the scope of refusal to same-sex couples. To the extent that this effect is due to *Masterpiece Cakeshop*'s encouragement of religiously motivated objection, the data unsettle the theory that religious objection is a result of permanent idiosyncratic features of the objectors' religious identity, features that are unyielding to external influence. Rather, it seems that religious objection is contingent on the seeming availability of an exemption. The demand for objection is not fixed, but elastic. Second, this effect is not related to the imposition or relief of any penalty or enforcement. While it is theoretically possible that prior to *Masterpiece Cakeshop*, some religious objectors in no-exemption regimes caved in to legal pressure because they could not afford the penalties,<sup>186</sup> the experiment shows that wedding vendors changed their behavior in the absence of any state penalty and absent any likelihood of enforcement. First, as discussed above, discrimination increased in regimes that do not prohibit discrimination at all. Second, the option to ignore an email from a same-sex couple was available to all vendors both before and after *Masterpiece Cakeshop*, without anyone ever knowing their reasons for doing so. Wedding vendors changed their behavior not because *Masterpiece Cakeshop* relieved them of a penalty associated with their behavior, but due to other reasons—more likely, the expressive effect of the decision.<sup>187</sup>

These findings suggest that transaction costs in religion-equality conflicts are in fact dynamic, and that the religious objection to AD laws can fluctuate as a result of the availability of exemptions in ways that defy the “martyr/broken conscience” dichotomy.<sup>188</sup> These findings require courts to probe deeper into the characteristics of religious objection and explore more

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<sup>185</sup> Barclay, *supra* note 178, at 27–28 (relying in part on Christopher Lund, *Martyrdom and Religious Freedom*, 50 CONN. L. REV. 959, 965–67 (2018)).

<sup>186</sup> Despite the conscientious harms they experienced. This is the “broken conscience” concern developed in the context of harms by Barclay, *supra* note 178, at 27–28.

<sup>187</sup> See *supra* Part III.A.

<sup>188</sup> Barclay, *supra* note 178, at 27–28.

carefully the assumptions regarding the magnitude of harm caused to religious objectors from the *unavailability* of exemptions.

Clearly, this is a highly sensitive issue, and posing the question by no means underestimates the possibility that such harm is real and grave for some religious objectors. At the same time, law in general and the Supreme Court, in particular, always navigate two different levels of generality: the specific case and the general rule. In specific cases involving specific objectors, the harm from not providing an exemption could be enormous. Yet, because each decision also contributes to the formation of a general rule, courts cannot ignore how specific decisions eventually create precedents that influence the availability of rights and remedies for everyone, including individuals who do not necessarily share the features of the specific objector. The *Masterpiece Cakeshop* effect indicates that there are wedding vendors in this broader category who are willing to provide services to same-sex weddings in the first instance but become unwilling to do so once an exemption is announced.

There is no doubt that the Court faces an acute dilemma. Both equality before the law and religious liberty are fundamental constitutional rights, and setting their respective boundaries is no simple task. However the Court decides to resolve the constitutional issues at hand, it ought to consider the harms that might result from its decision, and to avoid or mitigate these harms if possible. Courts are often motivated by a desire to provide justice in particular cases without creating inadvertent and unjust consequences across the board. An important first step towards this goal is to follow the general prescription offered in this Article: to rest constitutional analyses of consequentialist arguments directly on relevant empirical evidence.