

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION**

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**CHELSEY NELSON PHOTOGRAPHY  
LLC and CHELSEY NELSON,**

**Plaintiffs,**

**v.**

**LOUISVILLE/JEFFERSON COUNTY  
METRO GOVERNMENT, et al.,**

**Defendants.**

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**Case No. 3:19-cv-851-BJB-CHL**

**DEFENDANTS' MOTION TO LIMIT TESTIMONY BY  
PLAINTIFFS' REBUTTAL EXPERT, GEORGE YANCEY**

Defendants Louisville/Jefferson County Metro Government (“Louisville Metro”), Louisville Metro Human Relations Commission – Enforcement, Louisville Metro Human Relations Commission – Advocacy, Verná Goatley, in her official capacity as Executive Director of the HRC, Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Leslie Faust, William Sutter, Ibrahim Syed, and Leonard Thomas, in their official capacities as members of the Louisville Metro Human Relations Commission-Enforcement (collectively, “Defendants”), by counsel, hereby move for an order partially excluding or limiting expert testimony offered by George Yancey, Ph.D., an expert witness disclosed by Plaintiffs Chelsey Nelson Photography and Chelsey Nelson (collectively, “Chelsey” or “Plaintiffs”) as rebuttal to the opinion offered by Defendants’ expert, Professor Netta Barak-Corren.

**INTRODUCTION**

The second part of Professor Yancey’s report goes well beyond the permissible scope of rebuttal expert testimony, which is strictly limited to evidence “intended solely to contradict or

rebut evidence on the same subject matter” discussed by another party’s expert witness. Fed. R. Civ. P. 26(a)(2)(D)(ii). Professor Yancey’s opinions regarding individual attitudes for or against same-sex couples or conservative Christians are both irrelevant and unreliable. Professor Yancey’s assertions regarding the consequences of denying Chelsey Nelson a religious exemption are pure speculation, unsupported by anything in the record or even any academic articles or studies. The second part of Professor Yancey’s rebuttal report and any related testimony must be excluded under well-established law.

## **THE EXPERT REPORTS**

### **I. Professor Barak-Corren’s Expert Opinion**

On June 30, 2021, Defendants disclosed an expert report from Professor Netta Barak-Corren, an accomplished legal scholar and cognitive scientist focused on empirical and behavioral analysis of constitutional and public law. *See* Professor Barak-Corren’s Expert Report, attached hereto as Exhibit 1, ¶ 6. Professor Barak-Corren conducted a field experiment during the pendency of the U.S. Supreme Court’s decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n*, 138 S. Ct. 1719 (2018) which was designed to measure the impact of the Court’s decision on wedding vendors’ willingness to provide services to same-sex couples (the “*Masterpiece* experiment”). *Id.* at ¶ 13. Professor Barak-Corren found that the *Masterpiece* ruling, which was decided in favor of a baker that refused to create a wedding cake for a same-sex couple, significantly reduced the agreement to serve same-sex couples as compared with opposite-sex couples, even among previously willing vendors.<sup>1</sup> *Id.* at ¶ 14.

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<sup>1</sup> The results of the *Masterpiece* experiment are to be published in forthcoming editions of the Harvard Civil Rights-Civil Liberties Law Review and the Journal of Legal Studies. *See* Netta Barak-Corren, *A License to Discriminate? The Market Response to Masterpiece Cakeshop*, 56(2), Harvard Civil Rights-Civil Liberties Law Review (forthcoming 2021); Netta Barak-Corren, *Religious Exemptions Increase Discrimination Towards Same-sex Couples: Evidence from*

The *Masterpiece* effect was equally strong in urban areas, which are often assumed to be particularly inclusive of same-sex couples, and did not vary with the political conservativeness of the county. *Id.* However, the effect varies with the religiosity of the environment, such that businesses in areas dense with religious congregations, and particularly Evangelical congregations, were more likely to change their behavior to same-sex couples post-*Masterpiece* (even as before *Masterpiece*, businesses in religiously-dense areas did not differ from other areas in how they responded to same-sex and opposite-sex couples). *Id.*

Based on the *Masterpiece* experiment and her analysis of Louisville Metro’s antidiscrimination law, Kentucky’s Religious Freedom Restoration Act, and evidence regarding religiosity in Louisville and Kentucky more generally, Professor Barak-Corren opines that granting Chelsey Nelson a religious exemption from the application of Louisville’s antidiscrimination law in this case could significantly increase the likelihood that same-sex couples attempting to hire wedding vendors in Louisville, Kentucky will experience discrimination resulting in the denial of equal access to goods and services. *Id.* at ¶¶ 12-23.

## **II. Professor Yancey’s Rebuttal Opinion**

On July 26, 2021, in response to Professor Barak-Corren’s Expert Report, Plaintiffs submitted the opinion of a rebuttal expert witness—George Yancey, Ph.D. *See* Rebuttal Expert Report, attached hereto as Exhibit 2. Professor Yancey is a Professor of Sociology at Baylor University with a joint appointment in the Department of Sociology and the Institute of Studies of Religion. *Id.*, ¶ 1. Professor Yancey’s rebuttal opinion is divided into two parts. Part one critiques the methods utilized by Professor Barak-Corren in her *Masterpiece* experiment. *Id.* at ¶¶ 10-33.

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*Masterpiece Cakeshop*, Journal of Legal Studies (forthcoming 2021). (Papers attached to Defendants’ Expert Report).

Although Defendants disagree with the opinions expressed therein, the admissibility of this part of Professor Yancey's report is not challenged by this motion.

Defendants seek to exclude the second part of Professor Yancey's rebuttal report (*id.* at ¶¶ 34-45 (the "Part Two Opinions")), which asserts scattershot opinions regarding matters which Professor Barak-Corren "does not consider." *Id.* at ¶ 34. To the extent these opinions have any basis, it appears to be past attitudinal studies conducted by Professor Yancey and others.<sup>2</sup> For example, Professor Yancey opines that "some individuals favor members of the LGBT community due to their antipathy towards conservative Christians." Rebuttal Report at ¶ 36. Professor Yancey purports to apply these attitudinal studies to this case by asserting that, "[t]o the extent that administrators responsible for enforcing sexual-orientation antidiscrimination laws have college degrees and are politically progressive, then there is reason to believe that such rules would not be enforced in a neutral manner against conservative Christians and in fact may be enforced more rigidly than in other circumstances." *Id.* at ¶ 40. Not only do Professor Yancey's past attitudinal studies not support this inferential leap, but this opinion is plainly irrelevant to this case because no discrimination complaints have ever been filed against Chelsey and she has never been investigated by Louisville Metro's Human Relations Commission ("HRC"). Chelsey never contacted Louisville Metro or HRC to request a religious exemption to Louisville's antidiscrimination law. Indeed, Louisville Metro had not heard of Chelsey before she filed this lawsuit.

Other opinions attempt to predict the impact of a Court ruling against Chelsey Nelson in this case, but these opinions have no empirical basis whatsoever and instead constitute Professor

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<sup>2</sup> See, e.g., George Yancey, *Religious Likes and Dislikes as Potential Explanations for Support of Sexual Minorities*, *Interdisciplinary Journal of Research on Religion*, Vol. 14, Art. 2 (2018), attached hereto as Exhibit 3 ("Yancey 2018").

Yancey’s pure speculation. For example, Professor Yancey opines that “an adverse ruling against Plaintiffs could possibly lead to more loss of rights by Christians compared to the potential loss of services by same-sex couples in the event of a favorable ruling for Plaintiffs.” *Id.* at ¶ 35. Yet Professor Yancey has never studied the impact of Court rulings regarding religious exemptions and has certainly never conducted a field study like the *Masterpiece* experiment conducted by Professor Barak-Corren.

Professor Yancey takes this speculation even further by asserting that the pro-social benefits of religious communities will be reduced if the public sector is permitted to “attack” religious communities (*id.* at ¶¶ 43-44) and that court rulings denying plaintiffs like Chelsey Nelson religious exemptions from compliance with antidiscrimination laws will “driv[e] out” Christian wedding vendors and “may eventually help to drive out Christian social work agencies . . . , educational institutions, or perhaps even medical facilities.” *Id.* at ¶ 45. These sections of Professor Yancey’s opinion contain citations evidencing the fact that religious communities are engaged in charitable and other work that benefits the public—a fact that Defendants do not dispute—but contain no citations whatsoever for his opinions regarding how a Court ruling regarding religious exemptions will impact this public service work.

### **LEGAL STANDARD**

Fed. R. Evid. 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

The requirement that expert testimony “help the trier of fact” has “been interpreted to mean that scientific testimony must ‘fit’ the facts of the case, that is, there must be a connection between the scientific research or test result being offered and the disputed factual issues in the case in which the expert will testify.” *Pride v. BIC Corp.*, 218 F.3d 566, 578 (6th Cir. 2000) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993)). In other words, the expert opinion must be relevant.

To be admissible, the expert opinion must also be reliable. Sub-parts (b)-(d) of Fed. R. Evid. 702 set forth general standards for reliability. The U.S. Supreme Court has further provided a non-exclusive list of factors for evaluating the reliability of expert testimony, including “testing, peer review, publication, error rates, the existence and maintenance of standards controlling the technique’s operation, and general acceptance in the relevant scientific community.” *Daubert*, 509 U.S. at 593-94. “The task for the district court in deciding whether an expert’s opinion is reliable is not to determine whether it is correct, but rather to determine whether it rests upon a reliable foundation, as opposed to, say, unsupported speculation.” *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 529-30 (6th Cir. 2008).

Fed. R. Civ. P. 26(a)(2)(D)(ii) limits the scope of rebuttal expert testimony to evidence “intended solely to contradict or rebut evidence on the same subject matter” discussed by another party’s expert witness. “Rebuttal experts can use ‘new methodologies’ to refute the opinions of other experts” (*Pogue v. Northwestern Mut. Life Ins. Co.*, 2017 WL 4227657, at \*2 (W.D. Ky. Sept. 22, 2017) (internal citation omitted)), but cannot “‘advance new arguments or new evidence’ outside the scope of the opposing expert’s testimony.” *Bentley v. Highlands Hospital Corp.*, 2016 WL 5867496, at \*5 (E.D. Ky. Oct. 6, 2016) (internal citations omitted).

## ARGUMENT

### **I. Professor Yancey’s Part Two Opinions Must Be Excluded as Outside the Scope of Rebuttal.**

Professor Barak-Corren’s report considers one discrete question: the effect of granting Chelsey Nelson a religious exemption to Louisville Metro’s antidiscrimination law on wedding vendors’ willingness to provide services to same-sex couples. Professor Yancey’s Part Two Opinions go well beyond rebutting Professor Barak-Corren’s report and instead offer affirmative opinions on matters admittedly “not consider[ed]” by Professor Barak-Corren. *See* Rebuttal Report, ¶ 34. Professor Yancey’s Part Two Opinions must be excluded for this reason alone.

For example, Professor Yancey’s observation that “some individuals favor members of the LGBT community due to their antipathy towards conservative Christians” (*id.* at ¶ 36) has nothing to do with Professor Barak-Corren’s opinion. Whatever the reasons for favor towards the LGBTQ community or antipathy towards conservative Christians, Professor Yancey does not suggest that those reasons—or indeed the favor or antipathy itself—were not present during the *Masterpiece* experiment or would be in any way impacted by whether Chelsey Nelson is granted a religious exemption. Similarly, Professor Yancey’s speculation regarding the likely attitudes of HRC employees, based on their education or politics, do not make Professor Barak-Corren’s opinion more or less credible. Professor Barak-Corren’s opinion is focused on how the market of wedding vendors would react to a judicially-granted religious exemption, and does not speak at all to how HRC would address a hypothetical religious objection to compliance with Louisville’s antidiscrimination law.

Professor Yancey’s speculative opinions regarding the impacts on Christian communities of denying Chelsey Nelson a religious exemption do not rebut Professor Barak-Corren’s opinion regarding the impact on wedding vendors of *granting* Chelsey an exemption. Rather, they

introduce a wholly independent consideration not implicated by Professor Barak-Corren's opinion. This attempt to improperly back-door an opinion that should have been disclosed as an affirmative expert report under the guise of rebuttal must be rejected.

Perhaps the most obvious reason why Professor Yancey's Part Two Opinions exceed the proper scope of rebuttal is that—to the extent they are based on any evidence at all—that evidence is newly referenced in the Rebuttal Report and was not part of either the discovery record in this case or anything considered by Professor Barak-Corren. For example, the attitudinal studies and articles regarding the value of religious communities cited by Professor Yancey are new evidence and therefore not properly the basis of any rebuttal opinion.

Professor Yancey's Part Two Opinions are precisely the kind of “new argument[s]” supported by “new evidence” that are not permitted in a rebuttal expert's testimony. *Blake v. Securitas Sec. Servs., Inc.*, 292 F.R.D. 15, 18 (D.D.C. 2013). In other words, “an attempt by the Plaintiff to offer previously undisclosed opinions under the guise of rebuttal.” *Id.*

## **II. Professor Yancey's Part Two Opinions Are Not Helpful to the Trier of Fact.**

Professor Yancey's Part Two Opinions are not helpful to the trier of fact because they do not relate to any issue in dispute. Whatever the attitudes of people in favor of same-sex couples or hostile to religious communities, those attitudes have existed and will continue to exist regardless of the outcome of this litigation. By contrast, Professor Barak-Corren's work focuses on the behavioral consequences of a Court ruling regarding religious objections to antidiscrimination laws, which are relevant to Louisville's interest in uniformly enforcing its antidiscrimination law and the Court's balancing of that interest against Chelsey Nelson's religious freedoms. Professor Yancey's observations regarding individual attitudes should be excluded because they will not assist the Court in deciding any issue presented by this case.

### **III. Professor Yancey's Part Two Opinions Are Not Reliable and Instead Constitute Pure Speculation.**

Finally, Professor Yancey's Part Two Opinions must be excluded because they are replete with inappropriate speculation and unsupported by any evidence in the record. An expert's opinion must be reliable to be admissible. *See In re Scrap Metal Antitrust Litigation*, 527 F.3d at 529-30. To be reliable, the opinion must not have "too great an analytical gap" between the expert's conclusion, on the one hand, and the data that allegedly supports it, on the other. *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 675-76 (6th Cir. 2010) (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)).

Professor Yancey's report is rife with unsupported speculation and inferential leaps. Professor Yancey's report attempts to describe the nature and extent of society's anti-Christian animosity before explaining how that animosity harms religious communities. One of the articles cited by Professor Yancey in support of these opinions is his own 2018 paper in the *Interdisciplinary Journal of Research on Religion* (attached hereto as Exhibit 3). This paper analyzes data from the 2016 American National Election Study in an attempt to correlate the "warmth" or "coolness" of attitudes towards sexual minorities and religious groups with other characteristics, such as sex, race, political leanings, the degree to which an individual attends religious services, and so on. In the rebuttal report, Professor Yancey attempts to equate "coolness" in attitudes toward Christians, which Professor Yancey's scoring system defined to mean "you don't feel favorable toward the group" and "you don't care too much for that group" (*id.*, p. 11) with hostility, "attack[s]," and a willingness to deprive Christians of their rights.

The inferential leap from "you don't care too much for that group" to a willingness to attack the group is reason enough to disregard Professor Yancey's observations. But Professor Yancey's study actually found that Christians were the most popular group among survey respondents, with

45.2% reporting “pro” sentiments and just 3.8% reporting “anti” sentiments towards Christians. *Id.*, p. 12 (Christians were more popular than gay (18.5% pro and 12.8% anti), transgendered (10.8% pro and 18.0% anti), Muslim (5.8% pro and 16.4% anti), and Jewish groups (25.2% pro and 2.5% anti)). To the extent Professor Yancey’s opinions with respect to attitudes toward Christians are based on results associated with the “Christian Fundamentalist” group (10.3% pro and 29.9% anti), his own paper acknowledges that the data he analyzed “did not provide a way to understand how individuals define fundamentalists” and that respondents may have perceived “fundamentalists as a mere fringe group, such as Westboro Baptist Church members, or a larger group that makes up a significant percentage of the United States, such as the 36 percent of Americans who claim to be ‘born-again.’” *Id.*, p. 23. In any event, Professor Yancey’s observations regarding which groups are more or less likely to support wedding businesses that do not want to serve same-sex weddings or more or less likely to support anti-discrimination laws based on sexual orientation are not only irrelevant, but unreliable.

Professor Yancey also relies on a self-designed questionnaire designed to measure respondents’ preferred punishments for landlords who discriminate against same-sex couples to conclude that “some individuals favor members of the LGBT community *due to* their antipathy towards conservative Christians.” Rebuttal Report, ¶ 36 (emphasis added). The survey question mentioned cited in the Rebuttal Report asked respondents “how much they would punish a Christian landlord who refused to rent an apartment to a same-sex couple.” *Id.* Professor Yancey asserts that nearly half of the respondents would impose the maximum fine of \$10,000, which leads Professor Yancey to conclude that “those with animosity towards Christians are much more likely to pronounce the highest punishment possible when provided an opportunity to punish Christians.” *Id.* Professor Yancey does not explain his quantum leap from respondents’ preference

for strong anti-discrimination enforcement to a deep-seated desire to punish Christians. Professor Yancey offers no explanation how this lone survey question can accurately determine how a particular respondent feels about same-sex couples or Christians—let alone how the preference for one group *causes* animosity toward the other. Again, these opinions are not only irrelevant, but also unreliable and therefore should be excluded from evidence.

Professor Yancey also asserts that individuals who are politically progressive are likely to harbor anti-Christian animus. Rebuttal Report, ¶ 40. He then speculates, without evidence, that members of these groups will likely be “responsible for enforcing sexual-orientation antidiscrimination laws.” *Id.* Thus, according to Professor Yancey, “there is reason to believe that such rules would not be enforced in a neutral manner against conservative Christians.” *Id.* Professor Yancey’s “guess or speculation” about individuals’ biases and the political affiliation of Louisville Metro’s civil servants charged with enforcing the antidiscrimination law must be excluded. *United States v. L.E. Cooke Co., Inc.*, 991 F.2d 336, 342 (6th Cir. 1993).

Professor Yancey’s improper speculation does not stop with the nature of anti-Christian bias, he compounds his error by using those unsupported conclusions to speculate about the harm that Louisville Metro’s Christians will suffer if Chelsey Nelson is not granted an exemption to the antidiscrimination law. He speculates that Christians will be denied access to their religious community because “public-sector efforts” that “attack” Christians “have the potential to reduce” the “pro-social benefits” of Christian communities because they will “hinder [Christian’s] ability to “live out their stated values.” Rebuttal Report, ¶ 44. Again, Professor Yancey offers no evidence to support his sensational claim that requiring Christian business owners to serve all Louisvillians denies them access to Christian communities within Louisville or prohibits them from living a life aligned with their values. There is no basis whatsoever for Professor Yancey’s opinion that

denying Chelsey Nelson a religious exemption will drive out Christian wedding vendors or lead to the closure of Christian social work agencies, educational institutions, or medical facilities. Professor Yancey does not even attempt to include a citation to support these assertions and none of his previously cited work provides any evidence to support these opinions.

Expert opinions “must find some support in the record.” *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 801 (6th Cir. 2000) (citation omitted). Because Professor Yancey does not support his speculation about anti-Christian bias and the likely effects of denying Chelsey Nelson a religious exemption in this case with *any* evidence in the record, it must be excluded. *See McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 801 (6th Cir. 2000) (citation omitted).

### **CONCLUSION**

For the foregoing reasons, Defendants’ motion to exclude Paragraphs 34-45 of Professor Yancey’s rebuttal expert report and any related testimony should be GRANTED. A proposed order has been tendered with this motion.

/s/ Casey L. Hinkle \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 30, 2021, the foregoing was filed via the Court's electronic filing system, which will automatically send notice of such filing to all counsel of record.

/s/ Casey L. Hinkle  
*Counsel for Defendants*

**Exhibit 1**

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION**

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**CHELSEY NELSON PHOTOGRAPHY  
LLC and CHELSEY NELSON,**

**Plaintiffs,**

**v.**

**LOUISVILLE/JEFFERSON COUNTY  
METRO GOVERNMENT, et al.,**

**Defendants.**

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**Case No. 3:19-cv-851-BJB**

**EXPERT REPORT OF NETTA BARAK-CORREN**

June 30, 2021

**EXPERT WITNESS DISCLOSURE**

1. I have been retained as an expert in this matter by Defendants Louisville/Jefferson County Metro Government (“Louisville Metro”), Louisville Metro Human Relations Commission – Enforcement and Louisville Metro Human Relations Commission – Advocacy, Verná Goatley, in her official capacity as Executive Director of the Louisville Metro Human Relations Commission, Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Leslie Faust, William Sutter, Ibrahim Syed, and Leonard Thomas, in their official capacities as members of the Louisville Metro Human Relations Commission-Enforcement (collectively, “Defendants”), through their counsel, Kaplan Johnson Abate & Bird LLP (“Counsel”), in connection with litigation brought by Plaintiffs Chelsey Nelson Photography LLC and Chelsey Nelson (collectively, “Chelsey Nelson”).

2. Chelsey Nelson is a wedding photographer in Louisville, Kentucky who filed this litigation to challenge the constitutionality of two provisions in Louisville’s Fairness Ordinance (Louisville Metro Ordinance § 92.01, et seq.), which prohibits discrimination in employment, housing, and the provision of goods and services (public accommodations). Specifically, Ms. Nelson challenges the “Denial Clause,” which makes it “an unlawful practice for a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation . . . on the ground of . . . sexual orientation . . .”, and the “Unwelcome Clause,” which makes it “an unlawful practice for a person, directly or indirectly, to publish, . . . [a] communication, notice, or advertisement, which indicates that the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation . . . will be refused, withheld, or denied an individual on account of his [or her] . . . sexual orientation . . .” Louisville Metro Ordinance § 92.05(A) & (B).

3. Chelsey Nelson alleges that her religious beliefs prevent her from providing wedding photography and related services to same-sex couples and wishes to advertise her intent

to deny services to same-sex couples in violation of the Unwelcome Clause in Louisville’s Fairness Ordinance. Chelsey Nelson asks the Court to grant her an exception to application of the challenged provisions in the Fairness Ordinance based on her purported rights to free speech and free exercise of religion under the First Amendment. Chelsey Nelson has also asserted claims for declaratory relief under the First Amendment’s establishment clause, Fourteenth Amendment’s due process clause, and Kentucky’s Religious Freedom Restoration Act (“RFRA”) (KRS 446.350).

4. I have been asked to provide an expert opinion regarding the anticipated effects of granting Chelsey Nelson the relief sought by her Complaint on the willingness of other wedding vendors to provide services to same-sex couples.

5. The opinions expressed in this report are based on information available to me at this time and are subject to supplementation or revision based on additional information that may emerge from depositions, additional document submissions, or other developments, including my ongoing research.

#### **PROFESSIONAL EDUCATION AND BACKGROUND**

6. I am a legal scholar and cognitive scientist, focusing on empirical and behavioral analysis of constitutional and public law, with a particular interest in conflicts of rights and the interaction between law and religion and law and social norms.

7. I received my LL.B. in Law and B.A. in Cognitive Science from the Hebrew University (Valedictorian and three-time recipient of the Albert Einstein and Rector awards). I then clerked for the Chief Justice of the Israeli Supreme Court, Hon. Dorit Beinisch, and pursued doctoral studies at Harvard, graduating in 2016. During my time at Harvard, I received the Shapiro scholarship, Gammon fellowship, Sinclair Kennedy Travelling Fellowship, and the Program on Negotiation’s Graduate Research Fellowship, and won the Dean’s Prize in Law and Economics,

and empirical research grants from the Program on the Legal Profession, Harvard's Interfaculty Initiative on Mind, Brain, and Behavior and the Program on Negotiation's Next Generation Grant. I also served as the Inaugural Fellow of the Empirical Legal Research Group in Harvard Law School.

8. Currently, I am an Associate Professor of Law (with tenure) at the Hebrew University of Jerusalem and the Academic Director of the Center for the Study of Multiculturalism and Diversity at the Hebrew University. During 2020-2022 I am also a Nootbaar Religious Freedom Fellow at Pepperdine University School of Law.

9. My academic work was selected to important international fora, including the Stanford International Junior Faculty Forum (~5% acceptance rate) and the WZB Migration and Diversity Conference (~3% acceptance rate) and won several awards, among which Hebrew University's Birk Prize for Excellence in Legal Research, the Israeli Association of Public Law's Gorni Prize for an Outstanding Junior Scholar in Public Law, and the Menachem Goldberg, Howard Raiffa, and Fisher-Sanders Best Paper Awards.

10. My curriculum vitae, which includes any publications I have authored within the last 10 years, is attached hereto as Exhibit 1. This is my first engagement to provide expert services in connection with litigation. I am being compensated for my services in this matter at a rate of \$300/hour. My compensation does not depend in any way on the outcome of this litigation or the opinions stated herein.

**INFORMATION REVIEWED AND/OR RELIED UPON**

11. In developing my opinions in this matter, I had discussions with Counsel and reviewed and/or relied upon the Complaint, the Court's Order and Opinion granting Chelsey Nelson's motion for preliminary injunction, Louisville's Fairness Ordinance (Louisville Metro Ordinance § 92.01, et seq.), Kentucky's RFRA (KRS 446.350), and the materials cited in my two

forthcoming papers: Netta Barak-Corren, A License to Discriminate? The Market Response to *Masterpiece Cakeshop*, 56(2), Harvard Civil Rights-Civil Liberties Law Review (forthcoming 2021), attached hereto as Exhibit 2; Netta Barak-Corren, Religious Exemptions Increase Discrimination Towards Same-sex Couples: Evidence from *Masterpiece Cakeshop*, Journal of Legal Studies (forthcoming 2021), attached hereto as Exhibit 3.

### **OPINION**

12. Based on my work to date, I have formed the opinion that granting Chelsey Nelson a religious exemption from the application of Louisville’s Fairness Ordinance in this case could significantly increase the likelihood that same-sex couples attempting to hire wedding vendors in Louisville, Kentucky will experience discrimination resulting in the denial of equal access to goods and services.

### **BASIS FOR MY OPINION**

13. The basis for my opinion set forth above is largely the *Masterpiece*<sup>1</sup> experiment, described in detail in my forthcoming papers attached hereto as Exhibit 2 and Exhibit 3. As further described in these papers, I examined the impact of the *Masterpiece Cakeshop* decision on the wedding market by conducting a field experiment before and after the decision was rendered. I fielded the experiment in Iowa, North Carolina, Indiana, and Texas, states that, while sharing similar socio-economic characteristics and social and political attitudes, represent the four types of legal regimes currently in existence in the United States with respect to non-discrimination and religious freedom: regimes that prohibit discrimination on the basis of sexual orientation versus regimes that do not; and regimes that subject restrictions of religious exercise to a stringent test (primarily via state RFRAs) versus regimes that do not. My study audited wedding businesses

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<sup>1</sup> See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n*, 138 S. Ct. 1719 (2018).

(photographers, bakers, and florists) in those regimes both before and after the *Masterpiece* ruling and measured the impact of the decision on the willingness of wedding vendors to provide services to same-sex couples, as compared with opposite-sex couples.

14. I found that the *Masterpiece* ruling – which was decided in favor of a baker that refused to create a wedding cake for a same-sex couple – significantly reduced the agreement to serve same-sex couples as compared with opposite-sex couples, even among previously willing vendors (the “*Masterpiece* effect”). I found that the *Masterpiece* effect was stable and robust to the inclusion of all experimental covariates, including the legal regime, the type of business, and the wave of inquiry. The effect was equally strong in urban areas, which are often assumed to be particularly inclusive of same-sex couples, and did not vary with the political conservativeness of the county. However, I found that the effect varies with the religiosity of the environment, such that businesses in areas dense with religious congregations, and particularly Evangelical congregations, were more likely to change their behavior to same-sex couples post-*Masterpiece* (even as before *Masterpiece*, businesses in religiously-dense areas did not differ from other areas in how they responded to same-sex and opposite-sex couples).

15. The negative effect of *Masterpiece* was found in all legal regimes except for counties in Texas and Indiana (RFRA states) that enacted local AD rules. As I discuss in the paper attached hereto as Exhibit 3 (pages 13-18), RFRA differ substantively across states, with Texas and Indiana belonging in a specific category of RFRA that is not available in all states. Therefore, for the purpose of preparing this opinion, I compared Kentucky’s RFRA with the RFRA laws in Texas and Indiana. Specifically, unlike the RFRA in Indiana and Texas, which both include carve-outs for local anti-discrimination laws, Kentucky’s law does not have any such carve out. Kentucky’s law has only one provision, which states that “Government shall not substantially

burden a person’s freedom of religion” unless the government satisfies the strict scrutiny standard. *See* KRS 446.350. The Indiana and Texas laws both contain similar language prohibiting the government from substantially burdening free exercise of religion except where the government can satisfy the strict scrutiny standard, but these laws carve-out civil rights laws. *See* Ind. Code Ann. § 34-13-9-0.7 (“This chapter does not (1) authorize a provider to refuse to offer or provide services . . . on the basis of . . . sexual orientation; (2) establish a defense to a civil action or criminal prosecution for refusal by a provider to offer or provide services . . . on the basis of . . . sexual orientation . . .”); TX CIV PRAC & REM § 110.011 (Except for religious non-profits, “this chapter does not establish or eliminate a defense to a civil action or criminal prosecution under a federal or state civil rights law.”). The Indiana carve-out was added to the law after passage of Indiana’s initial RFRA (which contained no such carve-out) resulted in significant public blow-back and loss of convention/events revenue.

16. As I write in the paper attached hereto as Exhibit 3 (p. 51), different RFRA designs could have different impact on discrimination, especially as these designs interact with existing or inexistent AD laws. Because of these differences between Kentucky’s RFRA, on the one hand, and Texas and Indiana’s RFRAs, on the other hand, with particular notice to the differences in the laws’ interaction with local AD laws, I would not expect the Louisville Metro area to be immune from the statistically significant *Masterpiece* effect I observed in the *Masterpiece* experiment. That conclusion is bolstered by the high degree of religiosity of Louisville/Kentucky, which I found increased the *Masterpiece* effect in jurisdictions studied as part of the *Masterpiece* experiment.

17. To analyze religiosity, I analyzed data from the Pew Institute (Religious Landscape Data (2014), <https://www.pewforum.org/religious-landscape-study/#religions>) and compared that data to the same metrics observed in my paper for the jurisdictions studied as part

of the *Masterpiece* experiment.

18. The Pew Institute ranks all U.S. states by religiosity based on data from 2014. Kentucky is placed 13th with 63% of adults who are highly religious (a combined index score composed of belief in God, importance of religion, frequency of prayer, and worship attendance). This result is close to tied to that of Texas (64%) and North Carolina (65%) and higher than Indiana (54%, 22th place) and Iowa (55%, 19th place).

19. Kentucky ranks high also on importance of religion, the measure I focus on in my papers. Here, Kentucky is tied with Texas (86% who say religion is somewhat or very important in their lives), slightly above North Carolina (84%) and ahead of Iowa (79%) and Indiana (78%).

20. According to the Pew study, 49% of Kentucky's population are Evangelicals, much higher than that of all four states in my study (28%-35%), the same as Alabama and second only to Tennessee (52%). I also observed that Louisville, Kentucky is home to the Southern Baptist Theological Seminary<sup>2</sup> and some of the largest evangelical megachurches in the country (Southeast Christian Church and St. Stephen Baptist Church).<sup>3</sup>

21. According to the Pew study, Kentucky also has stronger views against homosexuality and same-sex marriage than any of the states in the *Masterpiece* experiment (44% who say that homosexuality should be discouraged, as compared to 36-37% in the states in the experiment, and 52% who are opposed or strongly opposed to same-sex marriage, as compared to 41-46% in the states in the experiment).

22. A comparison of religiosity metrics in Kentucky and the *Masterpiece* experiment

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<sup>2</sup> See: <https://www.sbts.edu/>.

<sup>3</sup> See: [https://en.wikipedia.org/wiki/Religion\\_in\\_Louisville,\\_Kentucky](https://en.wikipedia.org/wiki/Religion_in_Louisville,_Kentucky); Southeast Christian Church website (<https://www.southeastchristian.org/home>); St. Stephens Baptist Church website (<https://www.ssclive.org/church-history/>).

states is below:

Criterion	Definition	Kentucky	Iowa	North Carolina	Indiana	Texas
Importance of Religion	Religion is Somewhat/Very Important (National average: 77%)	86%	79%	84%	78%	86%
% Conservatives	(National average: 36%)	42%	41%	40%	41%	39%
% Evangelicals	(National average: 25%)	49%	28%	35%	31%	31%
Attitudes Towards Homosexuals	“Homosexuality should be discouraged” (National average: 31%)	44%	36%	36%	37%	36%
Attitudes Towards Same-Sex Marriage	Opposing/Strongly Opposing Same-Sex Marriage (National average: 39%)	52%	41%	45%	45%	46%

Source: PEW RESEARCH CENTER, RELIGIOUS LANDSCAPE STUDY (2014).

23. In closing, it is important to note that studies like the *Masterpiece* experiment can never predict future behavior with absolute certainty. The *Masterpiece* study provides evidence that judicial decisions favoring religious objectors to non-discrimination laws can have statistically significant and robust consequences, particularly in very religious areas. In the present case, due to the high degree of religiosity in the area, I would expect to observe the *Masterpiece* effect in Louisville Metro if Chelsey Nelson is granted a religious exemption to application of the Fairness Ordinance in this litigation.

  
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 Netta Barak-Corren

**Exhibit 1**

## Netta Barak-Corren

Hebrew University Law School | Mt. Scopus, Jerusalem 91905, Israel | [netta@huj.ac.il](mailto:netta@huj.ac.il)

### ACADEMIC POSITIONS

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Associate Professor (tenured), Hebrew University Law School	2020 – Present
Assistant Professor, Hebrew University Law School	2017 – 2020
Head of the Law & Psychology Program	2017 – Present

### EDUCATION

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S.J.D. Harvard Law School <i>Dissertation:</i> When Law and Religion Conflict: A Behavioral Examination <i>Committee:</i> Cass Sunstein, Martha Minow, Tom Tyler (Yale)	2016
LL.M. Harvard Law School (waived on admission to the S.J.D.) <i>Dean's Prize in Law and Economics</i> <i>Dissertation awarded the Fisher-Sanders Award</i>	2013
LL.B. and B.A. in Law and Cognitive Science, Hebrew University of Jerusalem <i>Valedictorian, Summa cum laude with highest honors</i>	2012

### RESEARCH INTERESTS

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Constitutional Law, Law and Religion, Law and Social Norms, Empirical Legal Studies, Behavioral Economics, Moral Psychology, Conflict Resolution.

### PUBLICATIONS

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20. Netta Barak-Corren, *Religious Freedom in Israel*, in HANDBOOK ON ISRAELI CONSTITUTIONAL LAW (forthcoming, Barak A., Medina, B., and Roznai, Y. Eds., forthcoming, Oxford University Press)
19. Netta Barak-Corren and Lotem Perry-Hazan, *Bidirectional Legal Socialization and the Boundaries of Law: The Case of Enclave Communities Compliance with COVID-19 Regulations*, JOURNAL OF SOCIAL ISSUES (special issue for the 50<sup>th</sup> anniversary of legal socialization)
  - ✧ Press coverage: [Ha'aretz](#), [The Marker](#), [Haredim10](#), [Seder Yom \(IDF radio\)](#)
  - ✧ Invited presentations at Israeli Knesset, Ministry of Education, Ministry of Justice, and Israeli Democracy Institute.
  - ✧ Non-technical summary written and circulated by [Chief Scientist, Ministry of Education](#).
18. Netta Barak-Corren and Yael Kariv-Teitelbaum, *Behavioral Responsive Regulation*, Minor Revision, REGULATION AND GOVERNANCE.
  - ✧ Invited presentation at Israeli Ministry of Justice, Department of Regulation.
17. Yuval Barak-Corren, Netta Barak-Corren, Alex Gileles-Hillel, and Eyal Heiman, *The Effect of C-Reactive Protein on Chest X-Ray Interpretation: A Decision-Making Experiment Among Pediatricians*,

[Pediatric Pulmonology.](#)

16. Netta Barak-Corren, *The Empirical Consequences and Normative Implications of Religious Exemptions*, 56(1) [HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW](#) (forthcoming 2021)
15. Netta Barak-Corren, *Religious Exemptions Increase Discrimination Towards Same-sex Couples: Evidence from Masterpiece Cakeshop*, [JOURNAL OF LEGAL STUDIES](#) (forthcoming 2021)
  - ✧ Invited presentations at Chicago Law School, Harvard Law School, Stanford Law School, Texas Law School, Virginia Law School, and Yale Law School.
  - ✧ Press coverage: [Boston Globe](#), [SCOTUSblog](#), [National Constitution Center](#)
  - ✧ Summarized for [the Atlantic](#).
14. Netta Barak-Corren, *Regulating for Social Integration by Behavioral Design: An Evidence-Based Approach for Culturally Responsive Regulation*, [REGULATION AND GOVERNANCE](#) (forthcoming 2021)
13. Karen Huang, Regan Bernhard, Netta Barak-Corren, Max H. Bazerman, and Joshua D. Greene, *Veil-of-Ignorance Reasoning Mitigates Self-Serving Bias in Resource Allocation During the COVID-19 Crisis*, JUDGMENT AND DECISION MAKING (2021)
  - ✧ Summarized for [HARVARD BUSINESS REVIEW](#).
12. Netta Barak-Corren, *Taking Conflicting Rights Seriously*, 65(2) VILLANOVA LAW REVIEW 295 (2020)
  - ✧ Lead article of the issue
  - ✧ Selected for the 2018 Stanford International Junior Faculty Forum (~5% acceptance rate)
  - ✧ Selected for CELS 2018 at Michigan Law School, Ann Arbor
  - ✧ Invited presentations at Chicago Law School, Harvard Law School, and Toronto Law School.
  - ✧ Recipient of the Gorni Junior Faculty Award for Outstanding Research in Public Law.
11. Netta Barak-Corren & Daphna Lewinsohn-Zamir, *What's in a name? The asymmetric effects of identifiability on offenders and victims of sexual harassment*. 16(4) JOURNAL OF EMPIRICAL LEGAL STUDIES 955 (2019)
  - ✧ Selected for CELS 2018 at Michigan Law School, Ann Arbor
  - ✧ Selected for SJDM 2018 at New Orleans (%20 acceptance rate)
10. Netta Barak-Corren, *Reexamining the evidence on Ultra-Orthodox attitudes and gender separation in academia*. 49 MISHPATIM—HEBREW U. LAW REVIEW (2019) [in Hebrew].
  - ✧ Summarized for [the ICON-S-IL Blog](#), 2019.
  - ✧ Press coverage: [Ha'aretz](#), [Globes](#), [Ynet](#)
  - ✧ Recipient of the Gorni Junior Faculty Award for Outstanding Research in Public Law.
9. Netta Barak-Corren & Max H. Bazerman, *Indecision and decision making in moral conflicts*, ORG. DYNAMICS (2019).
8. Netta Barak-Corren, Yuval Feldman, & Noam Gidron. *The Provocative Effect of Law: Majority Nationalism and Minority Discrimination*, 15(4) JOURNAL OF EMPIRICAL LEGAL STUDIES 951-986 (2018).
7. Netta Barak-Corren & Max H. Bazerman, *Saving lives your task or God's? The nuanced relationship between religiosity and moral judgment*, 12(3) JUDGMENT AND DECISION MAKING 280-296 (2017).

6. Netta Barak-Corren, [\*Beyond dissent and compliance: Religious decision-makers and secular law\*](#), 6(2) OXFORD JOURNAL OF LAW AND RELIGION 293-322 (2017).
  - ✧ Translated and reprinted in 4 [\*BIFRAT U'BICHLAL\*](#) 17-53 (2019) [in Hebrew].
5. Netta Barak-Corren, Chia-Jung Tsay, Fiery A. Cushman, & Max H. Bazerman, [\*If you're going to do wrong, at least do it right: Moral conflict promotes moral consistency\*](#), 64(4) MANAGEMENT SCIENCE 1528-1540 (2017).
4. Netta Barak-Corren, [\*Does Antidiscrimination Law Influence Religious Behavior? An Empirical Examination\*](#), 67(4) HASTINGS LAW JOURNAL 957 (2016).
3. Netta Barak-Corren, [\*Antidiscrimination Law and the Religious Workplace\*](#), LGBT LAW IN ISRAEL (2016) [in Hebrew].
2. Netta Barak-Corren\*, Edy Glozman\*, & Ilan Yaniv, [\*False Negotiations: The Art and Science of Not Reaching an Agreement\*](#), 59(4) JOURNAL OF CONFLICT RESOLUTION 671 (2015). (\* equal contribution)
  - ✧ Recipient of the Howard Raiffa Doctoral Student Paper Award.
  - ✧ Reviewed in Harvard's Program on Negotiation Magazine.
1. Netta Barak-Corren, [\*Property Rights and Workers Rights: Protecting the Wage of Independent Workers\*](#), 42(3) MISHPATIM—HEBREW U. LAW REVIEW 973 (2012) [in Hebrew]
  - ✧ Recipient of the M. Goldberg Prize for the best paper on labor law in Israel in 2011.

Netta Barak-Corren, *Compliance with the law under religion-based normative conflicts: A behavioral analysis and preliminary prescriptions* (Unpublished master thesis)

- ✧ Recipient of the Fisher-Sanders Award for the best paper written on conflict resolution in Harvard, MIT and Tufts, 2013

## SHORTER PIECES

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Netta Barak-Corren, *On the Lethal Cocktail of Israeli Democracy and the End Problem of the HCJ wars*, TEL AVIV UNIVERSITY LAW REVIEW FORUM (forthcoming 2021, Hebrew)

Netta Barak-Corren, [\*How One Supreme Court Decision Increased Discrimination Against LGBTQ Couples\*](#), THE ATLANTIC (2021)

Netta Barak-Corren, [\*Shared Fate, Unshared Faith: Israel and the Haredi Society in the Current Corona Moment\*](#), THE JEWISH QUARTERLY REVIEW (JQR) FORUM

David Enoch, Netta Barak-Corren, Michal Shur-Ofri, Ofer Malcai, and David Heyd, *Personal Decisions, Public Consequences: On Distinguishing between the Vaccinated and the Non-Vaccinated in Coronavirus Management*, HEBREW UNIVERSITY LAW JOURNAL FORUM (2021, [Hebrew](#), [English synopsis](#))

Max H. Bazerman, Regan Bernhard, Joshua Greene, Karen Huang, and Netta Barak-Corren, [\*How Should We Allocate Scarce Medical Resources?\*](#) HARVARD BUSINESS REVIEW (2020).

Netta Barak-Corren, [Gender Segregation in Israeli ultra-Orthodox Academia is not a Zero-Sum Game](#) [Hebrew], ICON-S-IL BLOG (2019)

**SELECTED WORKS IN PROGRESS**

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*Religion-equality conflicts and the war within religion*, R&R, AMERICAN JOURNAL OF COMPARATIVE LAW (A\*)

*Majority Nationalism Laws and the Equal Protection of Minorities: Experimental and Observational Evidence from Israel*, R&R, JOURNAL OF LEGAL STUDIES (A\*) (with Noam Gidron and Yuval Feldman)

**SELECTED AWARDS, GRANTS, AND HONORS**

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Cornell University Center for Social Sciences Grant Competition Award (\$12,000, w/ Nelson Tebbe)	2021
Nootbaar Religious Freedom Fellow, Pepperdine University School of Law	2020-21
Gorni Prize for an Outstanding Junior Scholar in Public Law	2019
Israeli Science Foundation Research Grant No. 1487/19 (\$152,676 for four years, w/ Lotem Perry-Hazan)	2019
Sacker Prize for Paper Accepted to <i>Mishpatim</i> (\$1500)	2019
Selected for the Seventh WZB Migration and Diversity Conference (~3% acceptance rate)	2019
Selected for the Stanford International Junior Faculty Forum (~5% acceptance rate)	2018
Birk Prize for Excellence in Legal Research	2018
Alicia Fund, Cherrick Center for the Study of Zionism Research Grant (\$2000)	2018
Minerva Center for Human Rights Research Grant (\$2000)	2018
Barak Center for Interdisciplinary Research Grant (\$3500, \$2500, \$4500)	2016-19
Empirical Legal Research Group Inaugural Fellow, Harvard Law School	2015-16
Graduate Research Fellowship, Program on Negotiation, Harvard Law School	2015-16
Sinclair Kennedy Travelling Fellowship, Society and Fellows of Harvard College	2014-15
Human Rights and Judaism Fellowship, Israeli Democracy Institute	2014-17
Next Generation Grant, Program on Negotiation, Harvard Law School	2014
Harvard's Interfaculty Initiative on Mind, Brain, and Behavior Student Award	2014
Cravath International Grant, Harvard Law School	2014
Student Empirical Research Grant, Program on the Legal Profession	2013
Harvard Law School Summer Academic Fellowship	2013
Dean's Prize in Law and Economics, Harvard Law School	2013
Gammon Fellowship, Harvard Law School	2012
Shapiro Scholarship, Harvard Law School	2012-13
International Peace Scholar, P.E.O.	2012-13
Pearlman Scholarship, Hebrew University of Jerusalem	2012-13
Valedictorian (1 of 230), Hebrew University of Jerusalem School of Law	2012
Lord Wolf Award for Leadership and Social Contribution, Hebrew University	2012
Albert Einstein Award	2009-11
✧ Three-time recipient of HUJI's highest honor for academic excellence	
Rector Prize & Dean's List	2009-11

◇ Ranked 1 of 900 students in the law school for three consecutive years	
The Cognitive Science Excellence Program Award	2011
◇ Ranked at the top of the interdisciplinary excellence program	
Oberlander Prize for excellence in international Moot Court Competitions	2011
Quarter-Finalist in the Jessup International Moot Court Competition	2011
◇ Reached for the first time in the history of Israel	
Top Oralist and Memorial Honors in the Jessup International Moot Court Competition	2010
Best Oralist, Hebrew University’s Moot Court competition	2009
Best Speaker, The European Model United Nations, the Hague, Netherlands	2009
<i>Miscellaneous:</i>	
Head of Intelligence Creativity Award for Contribution to Israeli National Security	2007
Israeli Young Scientist Competition, second prize (during high school)	2002

**SELECTED OTHER ACTIVITY**

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Coauthored white papers as part of the COVID-Collective Impact Academia-IL initiative	2020
◇ Ethics Guidelines during the COVID-19 pandemic	
◇ How to harness public cooperation with the COVID-19 regulations	
Academic advisor to JDC Israel on designing behaviorally informed intervention programs	2019
Founded and organized the Empirical Legal Research Group in Harvard Law School	2013-16
Behavioural Insights Team (BIT), London, UK, Research Fellow	2014
Behavioral Insights Group, Harvard University, Undergraduate research mentor	2013-14
Israeli Supreme Court, Chambers of Chief Justice Dorit Beinisch, Law Clerk	2011-12
Mishpatim—Hebrew University Law Review, Editor-in-law	2008-10

**SELECTED TALKS AND PRESENTATIONS**

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\* Only talks and presentations are included, no posters.

1. **2014, Harvard Law School**, Program on the legal Profession Speaker Series (invited). Paper titled: “Not in My School: The Conflict between Law and Religion from the Eyes of Religious Educators”;
2. **2014, Stanford Law School**, Inaugural Conference for Junior Researchers, the Program in Law and Society. Paper titled: “Not in My School: The Conflict between Law and Religion from the Eyes of Religious Educators”;
3. **2014, Harvard Business School**, the Behavioral Insights Group Lab Meeting. Paper titled: “If You’re Going to Do Wrong, at Least Do It Right: Reconciling Moral Concerns under Joint Evaluation”;
4. **2014, Hebrew University**, International Workshop on Behavioral Legal Studies (invited). Paper titled: “If You’re Going to Do Wrong, at Least Do It Right: Reconciling Moral Concerns under Joint Evaluation”;
5. **2014, Behavioral Insights Team, London, UK** (invited). Paper titled: “If You’re Going to Do Wrong, at Least Do It Right: Reconciling Moral Concerns under Joint Evaluation”;
6. **2015, Israeli Democracy Institute**, Human Rights and Judaism Colloquium. Paper titled: “Does Antidiscrimination Law Influence Religious Behavior?”;
7. **2015, Yale Law School**, Conference on Law, Religion and Politics, doctoral workshop. Paper titled: “Does Antidiscrimination Law Influence Religious Behavior?”;

8. **2015, Harvard Psychology Department**, Boston Area Moral Cognition Group (invited). Paper titled: “Does Antidiscrimination Law Influence Religious Behavior?”;
9. **2015, Washington University St. Louis**, Annual Conference on Empirical Legal Studies. Paper titled: “Does Antidiscrimination Law Influence Religious Behavior?”;
10. **2015, Hebrew University Law School**, Faculty workshop (invited). Paper titled: “Does Antidiscrimination Law Influence Religious Behavior?”;
11. **2015, Bar Ilan Law School**, Faculty workshop (invited). Paper titled: “Does Antidiscrimination Law Influence Religious Behavior?”;
12. **2015, Haifa Law School**, Faculty workshop (invited). Paper titled: “Does Antidiscrimination Law Influence Religious Behavior?”;
13. **2015, IDC Law School**, Faculty workshop (invited). Paper titled: “Does Antidiscrimination Law Influence Religious Behavior?”;
14. **2016, Israeli Democracy Institute**, Human Rights and Judaism Colloquium. Paper titled: “Social Impact Discrimination”;
15. **2016, Harvard Business School**, the International Behavioral Exchange 2016 conference (invited). Presentation titled: “Law, Values, and Norm Conflicts”;
16. **2016, Hebrew University Law School**, the Israeli ICON-S conference. Paper titled: “Social Impact Discrimination”;
17. **2016, McGill Law School**, Annual Law and Religion Roundtable (invited). Paper titled: “Social Impact Discrimination”;
18. **2016, Israeli Democracy Institute**, the weekly roundtable (invited guest speaker). Paper titled: “Mitigating Norm Conflicts by Affirming Identity: Evidence from the Core Curriculum Conflict”;
19. **2016, Bar Ilan Law School**, International Conference on Decision-making and Law (invited). Paper titled: “The Nation Law and Minority Discrimination”;
20. **2017, Jerusalem Institute**, Conference on Ultra-Orthodox Education (invited keynote speaker). Paper titled: “Mitigating Norm Conflicts by Affirming Identity: Evidence from the Core Curriculum Conflict”;
21. **2017, Ben Gurion University**, Decision Making and Economic Psychology (DMEP) Seminar (invited). Paper titled: “Mitigating Norm Conflicts by Affirming Identity: Evidence from the Core Curriculum Conflict”;
22. **2017, Tel Aviv Law School**, Law and Economics Workshop (invited). Paper titled: “Social Impact Regulation”;
23. **2017, Hebrew University Law School**, Public Law Workshop. Paper titled: “Social Impact Regulation”;
24. **2017, Bar Ilan Law School**, Empirical Legal Studies workshop (invited). Paper titled: “Social Impact Regulation”;
25. **2017, Notre Dame Law School**, Annual Law and Religion Roundtable (invited). Paper titled: “Mitigating Norm Conflicts by Affirming Identity: Evidence from the Core Curriculum Conflict”;
26. **2017, Cornell Law School**, Annual Conference on Empirical Legal Studies. Paper titled: “The Provocative Effect of Law: Majority Nationalism and Minority Discrimination”;
27. **2017, Virginia Law School**, Annual Comparative Constitutional Law Roundtable (invited). Paper titled: “The Provocative Effect of Law: Majority Nationalism and Minority Discrimination”;
28. **2017, Ben Gurion University**, joint workshop of the Hebrew University Federman Center for the Study of Rationality & Ben Gurion Center on Decision Making and Economic Psychology (invited). “The Asymmetric Effects of Identifiability on Offenders and Victims of Sexual Harassment”;
29. **2018, Hebrew University Law School**, Law and Economics Workshop. Paper titled: “Social

- Impact Regulation”;
30. **2018, Hebrew University Federman Center for the Study of Rationality**, Annual Retreat (invited guest speaker). Presentation titled: “Conflicts Between Law and Religion: An Empirical Examination”;
  31. **2018, American Law and Economics Annual Meeting (ALEA)**. Paper titled: “The Provocative Effect of Law: Majority Nationalism and Minority Discrimination”;
  32. **2018, Hebrew University Law School**, Public Law Workshop. Paper titled: “The Provocative Effect of Law: Majority Nationalism and Minority Discrimination”;
  33. **2018, Hong Kong University Law School**, ICON-S Conference. Paper titled: “The War Within”;
  34. **2018, Harvard Psychology Department**, Moral Psychology Lab (invited speaker). Paper titled: “The Asymmetric Effects of Identifiability on Offenders and Victims of Sexual Harassment”;
  35. **2018, Harvard-MIT Program on Negotiation Seminar Series** (invited speaker). Paper titled: “The Asymmetric Effects of Identifiability on Offenders and Victims of Sexual Harassment”;
  36. **2018, Harvard Law School**, Empirical Legal Studies Series (invited). Paper titled: “The War Within”;
  37. **2018, Chicago Law School**, Public Law and Legal Theory Workshop (invited). Paper titled: “The War Within”;
  38. **2018, Stanford Law School**, International Junior Faculty Forum (invited). Paper titled: “The War Within”;
  39. **2018, Michigan Law School**, Annual Conference on Empirical Legal Studies. Paper titled: “The War Within”;
  40. **2018, Michigan Law School**, Annual Conference on Empirical Legal Studies. Paper titled: “What’s in a Name?: The Asymmetric Effects of Identifiability on Offenders and Victims of Sexual Harassment”;
  41. **2018, University of Toronto Law School**, Law and Religion Workshop (invited). Paper titled: “The War Within”;
  42. **2018, Society on Judgment and Decision-Making Annual Conference**, New Orleans. Paper titled: “The Asymmetric Effects of Identifiability on Offenders and Victims of Sexual Harassment”;
  43. **2018, IDC Law School**, Justice M. Cheshin Memorial Conference (invited). Paper titled: “Reexamining the Evidence on Ultra-Orthodox Attitudes and Gender Separation in Academia”;
  44. **2019, Tel Aviv Law School**, Israeli Law and Society Conference. Paper titled: “Reexamining the Evidence on Ultra-Orthodox Attitudes and Gender Separation in Academia”;
  45. **2019, Tel Aviv Law School**, faculty workshop (invited). Paper titled: “Do Religious Exemptions Increase Discrimination? Evidence from *Masterpiece*”;
  46. **2019, WZB Berlin**, Seventh WZB Migration and Diversity Conference (invited). Paper titled: “How Majority Nationalism Laws Shape Intergroup Relations in Ethnically Diverse Societies: Experimental and Observational Evidence from Israel”;
  47. **2019, Bar Ilan Law School**, Conference on the Interpretation of the Nation Law (invited). Paper titled: “How Majority Nationalism Laws Shape Intergroup Relations in Ethnically Diverse Societies: Experimental and Observational Evidence from Israel”;
  48. **2019, Federman Center for the Study of Rationality**, joint workshop of the Hebrew University Federman Center & Ben Gurion Center on Decision Making and Economic Psychology (invited). Paper titled: “How Majority Nationalism Laws Shape Intergroup Relations in Ethnically Diverse Societies: Experimental and Observational Evidence from Israel”;
  49. **2019, Hebrew University Law School**, public law workshop. Paper titled: “Do Religious Exemptions Increase Discrimination? Evidence from *Masterpiece*”;

50. **2019, Hebrew University Law School**, Humboldt-Minerva Human Rights Under Pressure joint seminar. “Do Religious Exemptions Increase Discrimination? Evidence from *Masterpiece*”;
51. **2019, Hebrew University Law School**, International Workshop on Behavioral Legal Studies. Paper titled: “Do Religious Exemptions Increase Discrimination? Evidence from *Masterpiece*”;
52. **2019, Hebrew University Law School**, faculty workshop. Paper titled: “What’s in a Name?: The Disparate Effects of Identifiability on Offenders and Victims of Sexual Harassment”;
53. **2019, University of Toronto Law School**, Annual Law and Religion Roundtable (invited). Paper titled: “Do Religious Exemptions Increase Discrimination? Evidence from *Masterpiece*”;
54. **2019, Claremont McKenna College**, Annual Conference on Empirical Legal Studies (waived). Paper titled: “How Majority Nationalism Laws Shape Intergroup Relations in Ethnically Diverse Societies: Experimental and Observational Evidence from Israel”;
55. **2020, Bar Ilan Law School**, Faculty Seminar (invited). Paper titled: “Do Religious Exemptions Increase Discrimination? Evidence from *Masterpiece*”;
56. **2020, Hebrew University School**, Private Law Workshop. Paper titled: “Do Religious Exemptions Increase Discrimination? Evidence from *Masterpiece*”.
57. **2020, Law, Society, and Psychological Science CRN Summer Research Series**, Paper titled: “Do Religious Exemptions Increase Discrimination? Evidence from *Masterpiece*”.
58. **2020, International Forum on the Future of Constitutionalism**, Works-in-Progress Comparative Constitutional Law Summer Roundtable (invited). Paper titled: “Do Religious Exemptions Increase Discrimination? Evidence from *Masterpiece*”.
59. **2020, Chicago Law School**, Measuring Impact in Constitutional Law Conference (invited). Paper titled: “Do Religious Exemptions Increase Discrimination? Evidence from *Masterpiece*”.
60. **2020, Hebrew University**, Jewish and Israeli Law Student Club. Talk titled: Prayers and Demonstrations during COVID-19.
61. **2020, Ministry of Justice**, Regulation Forum. Paper titled: “Behavioral Responsive Regulation”.
62. **2020, Bar Ilan University**, Jewish and Democratic Law Center. Talk titled: “Religion in the Public Sphere”.
63. **2020, Tel Aviv University**, The Wars of the High Court of Justice Conference. TBA.
64. **2020, Israeli Democracy Institute**, Ultra-Orthodox Researchers Forum. Paper titled: “Bidirectional Legal Socialization and the Boundaries of Law: The Case of Enclave Communities Compliance with COVID-19 Regulations”.
65. **2020, UCLA Law School**, Private Law Workshop. Paper titled: “Do Religious Exemptions Increase Discrimination? Evidence from *Masterpiece*”.
66. **2020, Haifa University School of Education**, Law, Religion, and Education webinar. Paper titled: “Bidirectional Legal Socialization and the Boundaries of Law: The Case of Enclave Communities Compliance with COVID-19 Regulations”.
67. **2020, Pepperdine Law School**, Nootbarr Fellows Workshop. Paper titled: “Bidirectional Legal Socialization and the Boundaries of Law: The Case of Enclave Communities Compliance with COVID-19 Regulations”.
68. **2021, Hebrew University of Jerusalem Law School**, Public Law Workshop. Paper titled: “Bidirectional Legal Socialization and the Boundaries of Law: The Case of Enclave Communities Compliance with COVID-19 Regulations”.
69. **2021, University of Virginia Law School**, Family Law Center Symposium, Paper titled: “The Effects on Children of Equality Rules for Religious Placement Agencies”.
70. **2021, University of Virginia Law School**, Law and Economics Workshop (invited). Paper titled: “Do Religious Exemptions Increase Discrimination? Evidence from *Masterpiece*”.

71. **March 2021, Tel Aviv University, School of Government, Political Science and International Relations**, faculty seminar. “The day after the elections: how to fix Israeli democracy?”
72. **March 2021, Philosophy 360**, Paper titled: “Personal Decisions, Public Consequences: On Distinguishing between the Vaccinated and the Non-Vaccinated in Coronavirus Management”.
73. **March 2021, Rutgers University, Center for Population-Level Bioethics** seminar, Paper titled: “Personal Decisions, Public Consequences: On Distinguishing between the Vaccinated and the Non-Vaccinated in Coronavirus Management”.
74. **March 2021, Israeli National Academy of Arts and Sciences**, (invited) special webinar, “Personal Decisions, Public Consequences: On Distinguishing between the Vaccinated and the Non-Vaccinated in Coronavirus Management”.
75. **April 2021, Hebrew University of Jerusalem, School of Public Policy**, faculty seminar (invited). Paper titled: “Behavioral Responsive Regulation.”
76. **April 2021, IDC Herzliya Law School**, Constitutional Law Workshop (invited). Paper titled: “Personal Decisions, Public Consequences: On Distinguishing between the Vaccinated and the Non-Vaccinated in Coronavirus Management”.
77. **April 2021, Bar Ilan Law School**, Constitutional Law Workshop (invited). Paper titled: “Personal Decisions, Public Consequences: On Distinguishing between the Vaccinated and the Non-Vaccinated in Coronavirus Management”.
78. **April 2021, Yale Law School**, Religious Freedom Clinic (invited). Paper titled: “Do Religious Exemptions Increase Discrimination? Evidence from *Masterpiece*”.
79. **April 2021, Israeli Ministry of Justice**, Department of Consulting and Legislation Advanced Seminar in Constitutional law, (keynote speaker). “Constitutional Law: A General Perspective and Current Trends”.
80. **May 2021, Law and Society Association Annual Meeting**, virtual conference. Paper titled: “Bidirectional Legal Socialization and the Boundaries of Law: The Case of Enclave Communities Compliance with COVID-19 Regulations”.
81. **May 2021, Law and Society Association Annual Meeting**, virtual conference. Paper titled: “Behavioral Responsive Regulation.”
82. **May 2021, Hebrew University Center for Interdisciplinary Data Science Research workshop**. Paper titled: “Examining the Effect of Anti-Discrimination Legislation on Outcomes of Children in Adoption and Foster Care.”
83. **June 2021, Haifa University Law School**, faculty seminar (invited). Paper titled: “Do Religious Exemptions Increase Discrimination? Evidence from *Masterpiece*”.
84. **June 2021, Annual Law and Religion Roundtable** (invited). Paper titled: “Examining the Effect of Anti-Discrimination Legislation on Outcomes of Children in Adoption and Foster Care.”.

~ last update: June 2021

**Exhibit 2**

56(2) HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW (forth. 2021)

*A License to Discriminate?*

*The Market Response to Masterpiece Cakeshop*

Netta Barak-Corren\*

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

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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—providing 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>1</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

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<sup>1</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).

for a same-sex couple.<sup>2</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>3</sup> and another case involving wedding cakes.<sup>4</sup> An impressive number of similar cases have been making their way through the courts in recent years, involving photographers and video artists,<sup>5</sup> a web-designer,<sup>6</sup> a t-shirt store,<sup>7</sup> a custom wedding invitation studio,<sup>8</sup> and a bed and breakfast<sup>9</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>10</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>11</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> *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1720 (2018).

<sup>3</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>4</sup> *Klein v. Or. Bureau of Lab. & Indus.*, 139 S. Ct. 2713 (2019).

<sup>5</sup> *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 747 (8th Cir. 2019).

<sup>6</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>7</sup> *Lexington-Fayette Urban Cnty. Hum. Rts. Comm'n v. Hands On Originals*, 592 S.W.3d 291, 294 (Ky. 2019).

<sup>8</sup> *Brush & Nib Studio v. City of Phoenix*, 448 P.3d 890, 897 (Ariz. 2019).

<sup>9</sup> *Aloha Bed & Breakfast v. Cervelli*, 415 P.3d 919, 923 (Haw. Ct. App. 2018), *cert. denied*, 139 S. Ct. 1319 (2019).

<sup>10</sup> *See infra* notes 66–69.

<sup>11</sup> *See infra* notes 76–82.

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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>12</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>13</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>14</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>15</sup> to *Burwell v. Hobby Lobby Stores, Inc.*,<sup>16</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

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<sup>12</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>13</sup> *Id.* at 45–46.

<sup>14</sup> *Id.* at 46.

<sup>15</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>16</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.”).

jurisdictions facilitate religious exemptions via a Religious Freedom Restoration Act (“RFRA”) and others do not.<sup>17</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.

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>18</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

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<sup>17</sup> These are broad distinctions. Additional nuances are discussed *infra* Part II.B.

<sup>18</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.

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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 RFRA, 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.

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

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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>19</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>20</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>21</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 homosexuality and to present it as one of the roots of discrimination towards

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<sup>19</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 965 n.29 (Mass. 2003).

<sup>20</sup> *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009).

<sup>21</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).

gay people in society.<sup>22</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>23</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>24</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>25</sup> even if it did, it limits “public accommodation” to hotels, restaurants, gas stations, and places of exhibition or entertainment.<sup>26</sup> This definition does not include most of the businesses currently refusing service to same-sex couples, in particular most wedding vendors.<sup>27</sup>

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<sup>22</sup> Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 444–45 (Conn. 2008).

<sup>23</sup> *Id.* at 445.

<sup>24</sup> *Obergefell*, 576 U.S. at 741 (Alito, J., dissenting).

<sup>25</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>26</sup> 42 U.S.C. § 2000a(b).

<sup>27</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).

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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>28</sup> Most of these laws permit no religious exemptions,<sup>29</sup> and their definitions of “public accommodations” are generally much broader than that of federal law,<sup>30</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>31</sup> Concomitantly, and particularly after the recognition of marriage equality in *Obergefell*, conservative faith groups began calling for religious exemptions from AD laws.<sup>32</sup> On the legislative front, some states took steps to advance these calls.<sup>33</sup> In courts,

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<sup>28</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.

<sup>29</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>30</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>31</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>32</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>33</sup> See *infra* Part I.C.

most wedding-vendor cases ended in defeat for the vendors.<sup>34</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>35</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 offered to sell other products at his store to the couple: Phillips argues that he “offered to make any other cake for them,”<sup>36</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>37</sup> and that “the bakery has repeatedly refused to provide any baked goods . . . for wedding receptions or commitment ceremonies of same-sex couples.”<sup>38</sup>

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<sup>34</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).

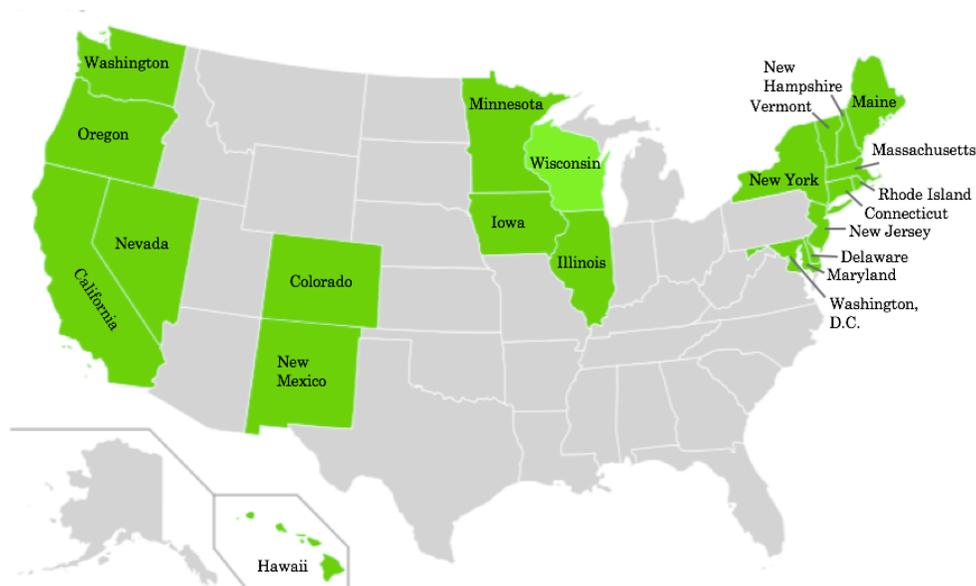
<sup>35</sup> Before *Masterpiece Cakeshop*, the Supreme Court denied certiorari in *Elane Photography, L.L.C. v. Willock*, 572 U.S. 1046 (2014). After *Masterpiece Cakeshop*, the Supreme Court granted certiorari in *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018), and *Klein v. Or. Bureau 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.

<sup>36</sup> Petition for Writ of Certiorari at 6, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

<sup>37</sup> Brief for Respondents Charlie Craig & David Mullins at 4, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

<sup>38</sup> *Id.* at 1, 4–5.

## AD states



Source: Human Rights Campaign

**Figure 1. States prohibiting sexual orientation and gender identity discrimination in public accommodations as of 2018.<sup>39</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 their religion to hurt others.”<sup>40</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

<sup>39</sup> HUM. RTS. CAMPAIGN FOUND., *supra* note 28, 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.

<sup>40</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

unconstitutional religious hostility towards his beliefs.<sup>41</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>42</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>43</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>44</sup> Before *Smith*, one of the

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<sup>41</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>42</sup> *Id.* at 1742 (Thomas, J., concurring).

<sup>43</sup> *Id.* at 1727.

<sup>44</sup> 494 U.S. 872, 879 (1990).

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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>45</sup> Congress 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>46</sup> But the Supreme Court limited the national RFRA’s scope to the federal government and invalidated it as applied to the states.<sup>47</sup> Twenty-one states responded by enacting state-level RFRA to ensure that their governments are subject to the same high level of scrutiny as the federal government (see Figure 2).<sup>48</sup> In ten additional states, courts have interpreted their constitutions to require strict scrutiny.<sup>49</sup>

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<sup>45</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 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>46</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>47</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 USC § 2000bb-2.

<sup>48</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 RFRA).

<sup>49</sup> Eugene Volokh, *IA. 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 RFRA and state interpretations of their constitutions to require strict scrutiny; since then, AR, IN, and MI also enacted RFRA).

## RFRA states



Source: National Conference of State Legislatures

www.gutmacher.org

**Figure 2. States that have enacted Religious Freedom Restoration Acts as of 2018.** Note: The map does not include states that interpret their constitutions to require a RFRA-like protection of religious freedom: AK, MA, ME, MI, MN, MT, NC, OH, WA, and WI.<sup>50</sup>

While RFRA laws do not provide absolute guarantees of religious exemptions, conservative legislators in RFRA-less states began pushing for the enactment of RFRA laws 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>51</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>52</sup> In the process, RFRA laws came to be viewed as the legislative opposite of AD laws.<sup>53</sup>

<sup>50</sup> *Id.*

<sup>51</sup> NCSL, *supra* note 48.

<sup>52</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-la/>, archived at <https://perma.cc/77XQ-AUDA>.

<sup>53</sup> See, e.g., David Ferguson, *LGBT rights amendment proves to be 'poison pill' for*

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

Figures 1 and 2 show that the distribution of AD laws and RFRA 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>54</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>55</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-

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*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).

<sup>54</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 49, 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>55</sup> Lupu, *supra* note 54, 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.

sex couple. In solely AD states, a discrimination claim will likely result in victory for the couple.<sup>56</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.

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 RFRA construed their RFRA to apply only to government agencies, excluding legislatures and courts, or limited relief to be only against the government, excluding private parties.<sup>57</sup> This structure led the New Mexico Supreme Court to reject the claim that the state's RFRA prevents the application of the state's AD law to a photographer declining service to a same-sex couple.<sup>58</sup> Courts in Washington<sup>59</sup> and Hawai'i<sup>60</sup>—states that Lupu

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<sup>56</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).

<sup>57</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>58</sup> *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53, 59, 76 (N.M. 2013) (holding that because the NMRFRA 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>59</sup> *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1234 (Wash. 2019) (holding that Washington's AD law survives strict scrutiny).

<sup>60</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).

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classifies as hybrid because of RFRA-like constitutional norms<sup>61</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 RFRA's are construed to apply to state laws (not only executive agencies), without excluding relief against private parties. Such are the Texas and Indiana RFRA's,<sup>62</sup> and new RFRA bills have followed this model.<sup>63</sup> Both the Texas and Indiana RFRA's 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>64</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 that enacted local AD protections.<sup>65</sup> These clauses are yet to be interpreted by courts as to whether they resolve the tension or not. More generally, RFRA's 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

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<sup>61</sup> Lupu, *supra* note 54, at 45–46.

<sup>62</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>63</sup> In addition to the newly enacted Indiana and Mississippi RFRA's, MISS. CODE § 11-61-1 (2014), many recent RFRA 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>64</sup> TEX. CIV. PRAC. & REM. CODE ANN § 110.014 (1999); IND. CODE § 34-13-9-7 (2015).

<sup>65</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.”).

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>66</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 transformation."<sup>67</sup> Hence, they argue that religious accommodations "may continue democratic conflict in new forms,"<sup>68</sup> and faith claims would escalate in number and significance.<sup>69</sup> Law professors also expressed these concerns

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<sup>66</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>.

<sup>67</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>68</sup> *Id.* at 2521.

<sup>69</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

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to legislatures deliberating new RFRA's, urging them to reconsider the bills.<sup>70</sup>

In the opposing camp are advocates and scholars—including some supporters of same-sex marriage<sup>71</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>72</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>73</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>74</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

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EQUALITY 187 (Susanna Mancini & Michel Rosenfeld eds., 2018).

<sup>70</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://georgiaunites.org/wp-content/uploads/2015/01/Georgia-Religious-Freedom-Letter.pdf>, *archived at* <https://perma.cc/2HB4-LEMP> (criticizing the Georgia RFRA proposal).

<sup>71</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>72</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.blogspot.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.blogspot.com/files/hawaii-special-session-letter-10-17-13-1.pdf>, *archived at* <https://perma.cc/FUK6-H6KS>.

<sup>73</sup> Koppelman, *supra* note 71, at 624.

<sup>74</sup> *Id.* at 643.

won't make any difference."<sup>75</sup> Similarly, Professors Thomas Berg and Douglas Laycock argue that states do not have a compelling interest in enforcing their antidiscrimination laws against religious objectors where "ample alternative providers exist (as they nearly always do)."<sup>76</sup> *Masterpiece Cakeshop*, in their view, is precisely one such case because other bakers were readily available to provide the service.<sup>77</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>78</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>79</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,

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<sup>75</sup> *Id.* at 627.

<sup>76</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>77</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>78</sup> Koppelman, *supra* note 71, at 644.

<sup>79</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].

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then the premise of market alternatives could erode further.<sup>80</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:

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>81</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>82</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

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<sup>80</sup> NeJaime & Siegel, *supra* note 67, 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 71, at 644.

<sup>81</sup> Berg & Laycock's Brief, *supra* note 79, at 31.

<sup>82</sup> *Id.* at 32.

in their lives, if such exemption also causes many other vendors to refuse service that they would have otherwise provided willingly?<sup>83</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 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>84</sup> As “one of the most anticipated decisions of the term,”<sup>85</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

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<sup>83</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.

<sup>84</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 12, 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>85</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>.

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attitudes and conduct.<sup>86</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>87</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>88</sup> At the same time, many conservative leaders and religious liberty advocates hailed the decision as a victory, expressing significantly less reservations about its scope.<sup>89</sup> Fox News held a supportive

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<sup>86</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>87</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>88</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-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>89</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

interview with Phillips, who defined the decision as a “big win.”<sup>90</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>91</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>92</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

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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>90</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>91</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>92</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>.

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protecting against sexual orientation discrimination.

Some progressive commentators observed these enthusiastic responses and voiced concerns that *Masterpiece Cakeshop* will grant objectors a license 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>93</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>94</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>95</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>96</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>97</sup> and an increase in personal support for same-

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<sup>93</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>94</sup> *Id.*

<sup>95</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>96</sup> Linos & Twist, *supra* note 86, at 247.

<sup>97</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).

sex marriages<sup>98</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>99</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 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*

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<sup>98</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>99</sup> Eugene K. Ofosu 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).

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*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>100</sup>

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<sup>100</sup> IOWA CODE § 216.7 (2017). Notably, the Iowa Supreme Court has been a

Indiana and Texas model together the two final categories: both have state RFRA<sup>101</sup> and no state AD laws, yet some jurisdictions within these states have local AD laws.<sup>102</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.

TABLE 1 – CHARACTERISTICS OF SAMPLED REGIMES

Criterion	Definition	IA <sup>103</sup>	NC <sup>104</sup>	IN <sup>105</sup>	TX <sup>106</sup>	Dallas	Houston
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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>101</sup> IND. CODE § 34-13-9 (2015); TEX. CIV. PRAC. & REM. CODE ANN § 110.011 (1999).

<sup>102</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 55. 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 55. 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.*

<sup>103</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>104</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>105</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>106</sup> PEW RSCH. CTR., RELIGIOUS LANDSCAPE STUDY: ADULTS IN TEXAS (2015), <https://www.pewforum.org/religious-landscape-study/state/texas/>, archived at

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						Metro, TX <sup>107</sup>	Metro, TX <sup>108</sup>
GDP (\$) <sup>109</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>110</sup>		No	No	Yes	Yes	Yes	Yes
State/Local AD law <sup>111</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 RFRA-like standard; and (3) local AD laws within RFRA states. The primary reason

<https://perma.cc/DNF2-4PPF>.

<sup>107</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>108</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>109</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>110</sup> IND. CODE § 34-13-9 (2015); TEX. CIV. PRAC. & REM. CODE ANN § 110.011 (1999).

<sup>111</sup> This refers to public accommodation laws that apply to private businesses and are enacted at the state or city level.

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 (RI, CN, NM, IL) 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>112</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>113</sup> Only vendors who published an email address

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<sup>112</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>113</sup> For an extended discussion of the sample, see Barak-Corren, *supra* note 18, at 12–

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were sampled.<sup>114</sup> Vendors were contacted by email, a highly common method for communication in the wedding market. There is ample guidance 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>115</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>116</sup> The

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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>114</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.

<sup>115</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>116</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),

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>117</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>118</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 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>119</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>120</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,

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<https://www.pewresearch.org/fact-tank/2019/02/13/8-facts-about-love-and-marriage/>, archived at <https://perma.cc/UL9E-FKVE>.

<sup>117</sup> See Barak-Corren, *supra* note 18, 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>118</sup> Barak-Corren, *supra* note 18, 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.

<sup>119</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>120</sup> *Id.* at 17–20. Further details on the procedure and treatment of the data can be found at this source. *Id.*

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sending carefully designed materials of fictitious individuals instead of real auditors creates a controlled setting for the study and removes inadvertent auditor biases.<sup>121</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>122</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>123</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>124</sup> This is because the conflict about discrimination in wedding services focuses on the specific stage of the transaction that is studied here: the initial inquiry about the service.<sup>125</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>126</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

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<sup>121</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>122</sup> *Id.*

<sup>123</sup> *See, e.g.*, sources cited *supra* note 115.

<sup>124</sup> Bertrand & Mullainathan, *supra* note 121, at 997.

<sup>125</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>126</sup> Bertrand & Mullainathan, *supra* note 121, at 991–93.

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>127</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 4: 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 4)—an issue that pervades studies that repeatedly measure the same respondents over time.<sup>128</sup>

<sup>127</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>128</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 & DONALD P. GREEN, *FIELD EXPERIMENTS: DESIGN, ANALYSIS, AND*

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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>129</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>130</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>131</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>132</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.

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INTERPRETATION 236–40 (Ann Shin ed., 1st ed. 2012).

<sup>129</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>130</sup> See Barak-Corren, *supra* note 18, 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>131</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>132</sup> For elaborations, robustness checks, and follow up studies, see Barak-Corren, *supra* note 18.

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 decision. 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>133</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>134</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>135</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

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<sup>133</sup>  $p = .0006$ . *Id.* at 24 tbl.5.

<sup>134</sup> See John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 1, 10 (2004); cf. Bertrand & Mullainathan, *supra* note 121, at 1006.

<sup>135</sup>  $Z = 3.26$ ,  $p = .001$ . Barak-Corren, *supra* note 18, at 26.

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increase of such responses for opposite-sex couples.<sup>136</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 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 1, 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*.

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<sup>136</sup>  $Z = 2.14, p = .03$ . Barak-Corren, *supra* note 18, 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>.

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

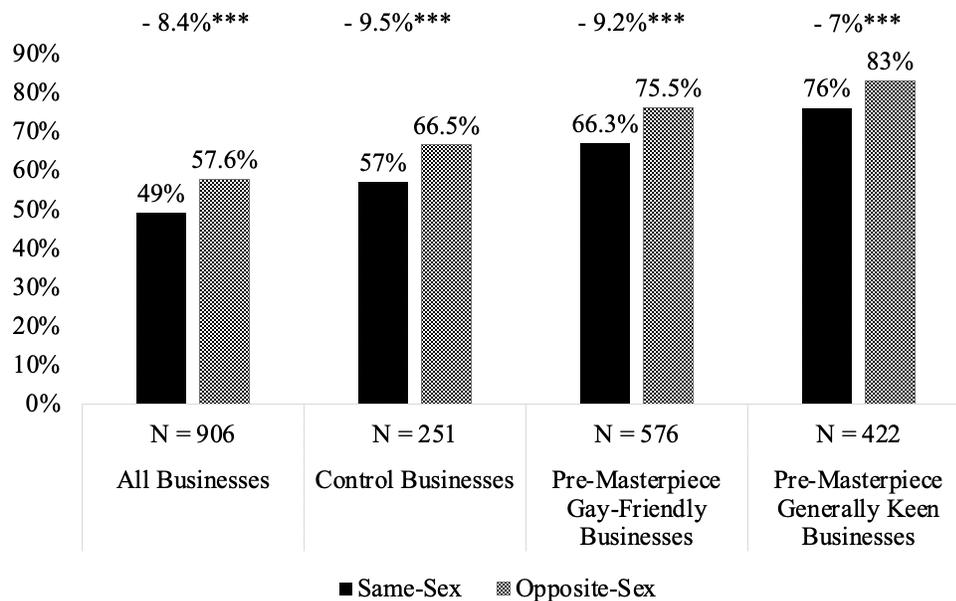


Figure 1.<sup>137</sup> The average positive response rate to same-sex and opposite-sex couples after the *Masterpiece Cakeshop* decision, by four groups of businesses: all businesses; businesses that were sampled for the first time after *Masterpiece Cakeshop* (control businesses); businesses that, 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>138</sup> A conservative estimate of the number of

<sup>137</sup> *Id.* at 28.

<sup>138</sup> Photographers were generally less responsive (to all couples) than other businesses, but the negative effect of sexual orientation was robust across business types.

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-couple interaction presents an independent risk of incurring discrimination,<sup>139</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>140</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?

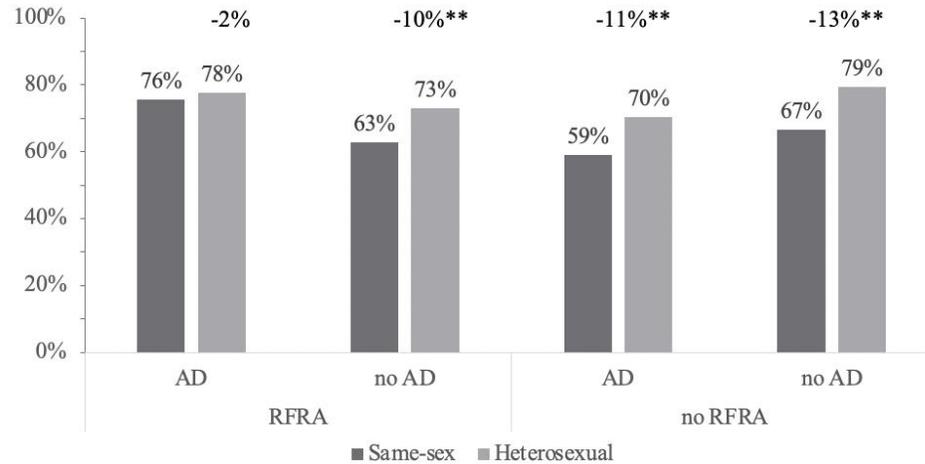
The results demonstrate a substantial reduction in businesses' willingness to provide services to same-sex couples, as compared with opposite-sex couples, after the *Masterpiece Cakeshop* decision. Next, this section asks how this effect displays in different socio-legal regimes. Because of space limitations, the results are summarized in Figure 2. 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>139</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 18, 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>140</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 2. 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 RFRA and have enacted local AD laws; +RFRA, -AD regimes are counties in Indiana and Texas that are subject to state RFRA 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>141</sup> Although individual-level evidence on the

<sup>141</sup> PEW RSCH. CTR., U.S. PUBLIC BECOMING LESS RELIGIOUS 108–09 (2015), <https://www.pewforum.org/wp->

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religiosity 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>142</sup> These data help me examine whether religious environment influences previously gay-friendly businesses after *Masterpiece Cakeshop*.

Figure 3 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 3 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>143</sup>

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content/uploads/sites/7/2015/11/201.11.03\_RLS\_II\_full\_report.pdf, archived at <https://perma.cc/NW2E-998M>.

<sup>142</sup> See generally CLIFFORD GRAMMICH ET AL., 2010 U.S. RELIGION CENSUS: RELIGIOUS CONGREGATIONS AND MEMBERSHIP STUDY (2012).

<sup>143</sup> For the results of the regression analyses that account for religious and Evangelical density, see Barak-Corren, *supra* note 18, 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>.

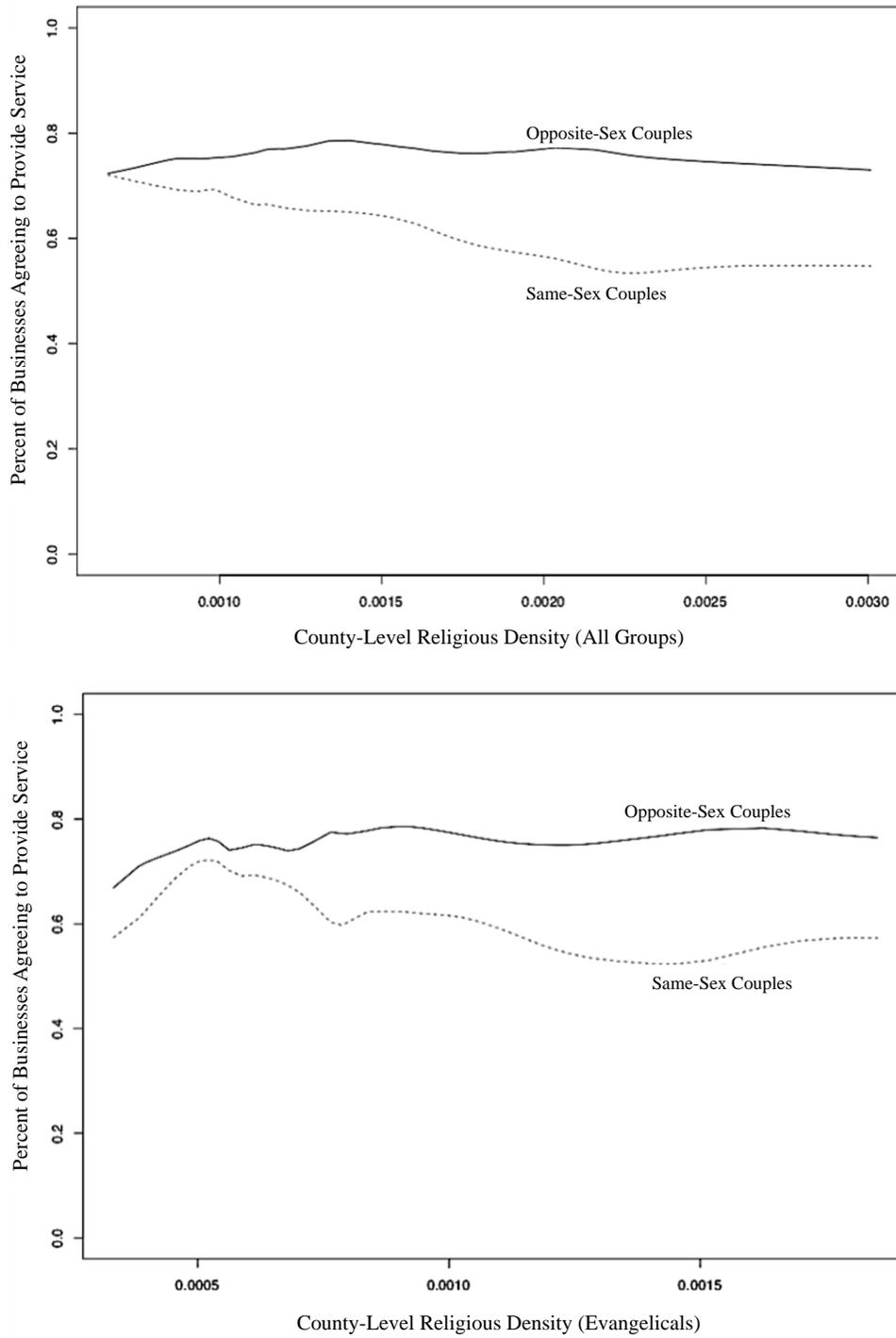


Figure 3. The agreement to serve same-sex and opposite-sex couples post-

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*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>144</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>145</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 3 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

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<sup>144</sup>  $Z = 3.69, p = .0002$ . Barak-Corren, *supra* note 18, at 36.

<sup>145</sup> A 17.2 percentage point vs. 3.6 percentage point gap, respectively,  $Z = 3.133, p = .0017$ . *Id.*

proposed or revived new religious liberty bills<sup>146</sup> and two states surveyed in the experiment—Texas and North Carolina—passed legislation related to religious liberty or LGBTQ rights.<sup>147</sup> Given the constantly dynamic legal and political landscape on these issues, whatever has been the conduct of businesses 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>148</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*

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<sup>146</sup> This includes Iowa and Texas. See Rodriguez, *supra* note 100; 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>147</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 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>148</sup> Barak-Corren, *supra* note 18, at 36–39.

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*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 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>149</sup> The *Masterpiece Cakeshop* decision was a lopsided 7–2 ruling that

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<sup>149</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).

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>150</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>151</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 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*

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<sup>150</sup> See *supra* notes 89–92.

<sup>151</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 97, at 1339; Kazyak & Stange, *supra* note 98, at 2044–45.

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(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>152</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>153</sup> The last states to enact new RFRA until recently were Arkansas and Indiana in 2015;<sup>154</sup> the resulting commercial and public

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<sup>152</sup> Linos & Twist, *supra* note 86, at 223.

<sup>153</sup> Platoff, *supra* note 147.

<sup>154</sup> NCSL, *supra* note 48. 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).

backlash might have deterred other states from following that route.<sup>155</sup>

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>156</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>157</sup> Twenty-seven states have not yet enacted such laws.<sup>158</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

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<sup>155</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, 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 RFRA's, 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>156</sup> VA. CODE ANN. § 2.2-3900 (2020).

<sup>157</sup> 77 Del. Laws 90 (2009) (amending 28 sections in the Delaware Code to include sexual orientation).

<sup>158</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>.

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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 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's 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>159</sup> Yet it is interesting to observe that regimes that enacted an AD law, but no RFRA,

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<sup>159</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).

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>160</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>161</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. 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>162</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>163</sup>

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<sup>160</sup> See sources cited *supra* note 100 and accompanying text.

<sup>161</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).

<sup>162</sup> See Platoff, *supra* note 87.

<sup>163</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.

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>164</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>165</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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365, 389–96 (2019).

<sup>164</sup> McAdams, *supra* note 149, 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>165</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. RFRA's 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 RFRA's 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 RFRA's 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 RFRA's 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>166</sup> The Indiana legislature quickly passed a "fix" that clarified that the new Act does not trump local AD laws,<sup>167</sup> a provision very similar to the one included in Texas' RFRA from its inception.<sup>168</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>169</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 3). 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

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<sup>166</sup> Briggs, *supra* note 155.

<sup>167</sup> See *supra* notes 64–65.

<sup>168</sup> *Id.*

<sup>169</sup> I thank Stephanie Barclay for proposing this point.

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hybrid regimes and sexual orientation discrimination should be further examined. In particular, RFRA comes in many shapes and forms—e.g., with or without recourse against local governments, private lawsuits, and civil rights law.<sup>170</sup> Different RFRA designs could have different impacts on discrimination, especially as these designs interact with existing or in-existent AD laws. To be sure, businesses in RFRA regimes without AD laws strongly showed 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>171</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 RFRA (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>172</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)

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<sup>170</sup> See *supra* notes 57–64 and accompanying text.

<sup>171</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 RFRA, 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>172</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).

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>173</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 RFRA's all around the nation and exacerbate cultural divides and political polarization. Were the opposing parties to suspend their assumptions about 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.

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<sup>173</sup> See, e.g., Ofosu et al., *supra* note 99, at 8847–48; Tankard & Paluck, *supra* note 97, at 1336–39.

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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>174</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>175</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 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>176</sup> the court first examines whether the law substantially burdens the

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<sup>174</sup> Laycock & Berg, *supra* note 76; *see also* Transcript of Oral Argument, *supra* note 12, at 46 (U.S. Attorney General arguing in support of the baker that “products are widely available from many different sources”).

<sup>175</sup> *Id.* at 44–45.

<sup>176</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.

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>177</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

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<sup>177</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)).

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been successful. *Masterpiece Cakeshop* has ultimately increased discrimination in the wedding industry and bolstered legislators and advocates in their attempts to expand religious protections and narrow the scope of antidiscrimination protections.<sup>178</sup> The two subsequent unreasoned decisions in *Arlene's Flowers*<sup>179</sup> and *Klein*<sup>180</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

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<sup>178</sup> See Simpson, *supra* note 87 (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 147 (describing bills in Texas expanding protections for religious professionals and corporations).

<sup>179</sup> *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671, 2671–72 (2018).

<sup>180</sup> *Klein v. Or. Bureau of Lab. & Indus.*, 139 S. Ct. 2713, 2713 (2019).

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 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>181</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,

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<sup>181</sup> Cf. Ofosu et. al, *supra* note 99, 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 97, 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).

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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>182</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>183</sup> Recently, Professor Barclay suggested to formalize this theory in 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>184</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*

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<sup>182</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>183</sup> Berg & Laycock's Brief, *supra* note 79, at 32.

<sup>184</sup> Barclay, *supra* note 177, at 27–28 (relying in part on Christopher Lund, *Martyrdom and Religious Freedom*, 50 CONN. L. REV. 959, 965–67 (2018)).

*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>185</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>186</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>187</sup> These findings require courts to probe deeper into the characteristics of religious objection and explore more 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

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<sup>185</sup> Despite the conscientious harms they experienced. This is the “broken conscience” concern developed in the context of harms by Barclay, *supra* note 177, at 27–28.

<sup>186</sup> See *supra* Part III.A.

<sup>187</sup> Barclay, *supra* note 177, at 27–28.

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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.

**Exhibit 3**

50(1) THE JOURNAL OF LEGAL STUDIES 1 (in press)

## Religious Exemptions Increase Discrimination Towards Same-Sex Couples: Evidence from Masterpiece Cakeshop

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### ABSTRACT

In 2018, the Supreme Court decided *Masterpiece Cakeshop v. Colorado Civil Rights Commission* in favor of a baker who refused service to a same-sex couple due to his religious beliefs. This article examines the behavioral effect of this decision in an experiment (N=1,155 businesses) that measured discrimination towards same-sex couples in wedding services shortly before and after *Masterpiece*. I find that *Masterpiece* significantly reduced the agreement to serve same-sex couples as compared with opposite-sex couples, even among previously willing vendors. Considering the variety of vendors involved in a typical wedding, I estimate the odds that same-sex couples would experience discrimination post-*Masterpiece* between 61% and 85%. These results show that even a narrowly construed exemption can have a significant and robust, even if inadvertent impact on a market and its customers. I discuss the implications of these results for the research on Supreme Court effects on the public.

### 1. INTRODUCTION

What are the consequences of exempting religious objectors from antidiscrimination law?

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Answering this question is crucial to resolving the escalating tension between religious freedom and sexual orientation and gender equality in the United States. So far, the primary legal tool that has been proposed as a solution has been religious exemptions. But the use of exemptions have also raised considerable objections. Central among those is the concern that granting exemptions would escalate the number and significance of religious claims and extend LGBTQ discrimination (NeJaime 2012; NeJaime and Siegel 2015; Stern 2014). 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 LGBTQ equality, and that exempting religious objectors will not expand discrimination against same-sex couples (Koppelman 2014; Berg and Laycock 2017; Laycock and Berg 2018; Laycock 2017, 3:962).

Currently, there is almost no evidence that could clarify which of the contradictory factual arguments is actually true. Not only that such evidence is required to settle and refine theoretical debates, it is also crucial to inform legislators debating whether to enact religious exemptions, and courts deliberating whether to grant such exemptions. From *Reynolds v. United States* (1878), the first case to bring the question of religious exemptions before the Supreme Court, through key decisions such as *Employment Division v. Smith*<sup>1</sup> and *Burwell v. Hobby Lobby Stores, Inc.*,<sup>2</sup> up to *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*<sup>3</sup>--the decision at focus in the present study—the Supreme Court has always cited the social consequences of exemptions (or

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<sup>1</sup> 292 U.S. 872 (1990) (Scalia, J.) (Citing *Reynolds v. United States* (1878): "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.")

<sup>2</sup> 134 S. Ct. 2751, 2782 (2014) (Alito, J.) (resting the majority opinion on the assumption that the exemption's effect on third-parties "would be precisely zero").

<sup>3</sup> 138 S. Ct. 1719 (U.S. 2018).

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lack thereof) when determining whether to reject (or grant) petitions for religious exemptions.

This article elucidates the consequentialist debate on religious exemptions by studying, for the first time, the effects of religious exemptions on sexual orientation discrimination. Part 2 begins by presenting the necessary legal background and the *Masterpiece* decision, in which the Supreme Court ruled in favor of a religious baker who refused service to a same-sex couple. Next, Part 3 describes a large-scale experiment that I designed to measure the impact of *Masterpiece* on sexual orientation discrimination in the wedding services market. To this end, I combined methods from pseudo-experiments (studies that examine the impact of a reform by focusing on events occurring shortly before and after the reform) and field-experiments (studies that randomly allocate different treatments to subjects in the field). Wedding vendors (bakers, photographers, and florists) were sampled to the experiment from the four legal regimes currently existing in the United States that differ based on whether they prohibit sexual orientation discrimination in public accommodations (AD law) or not, and on whether they facilitate religious exemptions via a Religious Freedom Restoration Act (RFRA) or not.<sup>4</sup> This resulted in a 2 (AD law/no AD law) by 2 (RFRA/no RFRA) matrix from which 906 businesses were sampled to the experiment. Each business was examined shortly before (May 8<sup>th</sup>-15<sup>th</sup>, 2018) and after (June 13<sup>th</sup>-20<sup>th</sup>, 2018) the *Masterpiece* decision (rendered on June 4<sup>th</sup>, 2018). In each period, wedding businesses were contacted via email by a same-sex or an opposite-sex couple inquiring about wedding services. Each business was contacted by the two types of couples both before and after the decision, resulting in four observations per business and a rich dataset that allows for both within-business and across-businesses comparisons. A “control” group of 251 businesses was contacted for the first time after

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<sup>4</sup> RFRA is not the only legal vehicle facilitating religious exemptions. Others are addressed in Part 2.

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*Masterpiece*, by both couple types, following the same procedures. The question of interest was whether businesses agreed to provide the requested service to couples, and specifically whether *Masterpiece* influenced the responses businesses provide to same-sex couples.

Part 4 presents the results of the *Masterpiece* experiment. Briefly, the decision significantly reduced the willingness to serve same-sex couples, from 63.6% before *Masterpiece* to only 49.2% 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*, responded positively to same-sex couples, I find that these businesses discriminate between opposite-sex and same-sex couples after *Masterpiece*. Previously “gay-friendly” businesses that are randomly contacted by opposite-sex or same-sex couples after the decision was rendered respond less favorably to same-sex couples (75.5% vs. 66.3%, a 9 percentage-point gap, or 12 percent fewer favorable responses). This effect is not an artifact of the experiment itself, as it is identically found in the “control” group. Probing into the differences between the four legal regimes, I find that the negative *Masterpiece* effect appears in all regimes, except for those that enacted *both* an AD law and a RFRA. The effect is robust, including in analyses that control for county-level conservativeness and analyses limited to businesses located in big cities (where, it is often argued, there is no discrimination problem). However, the effect of *Masterpiece* is significantly more pronounced in religious environments, as proxied by the density of congregations in the county where the business is located.

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

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list); and that they often inquire with several vendors of each category; and that the average risk of experiencing discrimination post-*Masterpiece* is about 9%; I estimate the aggregate risk of discrimination for same-sex couples between 61% and 85%. This means that, across the observed differences between legal regimes and religious environments, *Masterpiece* has the general effect of exposing same-sex couples to heightened risk of discrimination in the organization of weddings.

Part 5 discusses the results. First, I consider potential explanations for the effect of *Masterpiece* on vendors' behavior, examining both cognitive mechanisms (how the decision is perceived and factored into the decision-making process) and social mechanisms (how social factors, particularly religion, interact with the decision-making process). Moving to implications, I discuss the contributions of the study to the research of Supreme Court effects on the public. In particular, the study sheds new light on the argument that courts are ineffective at spurring social change (Rosenberg 2008), by highlighting the risk that the court will emerge as effective, paradoxically, by spurring inadvertent social change. On the constitutional end, the results discredit the argument that religious exemptions will not expand discrimination. Instead, what the *Masterpiece* experiment shows is that even a narrow exemption can have a significant and robust impact on a market and its customers. Next to these implications, the observed variation between legal regimes and religious environments provides preliminary evidence that discrimination can be minimized under certain conditions. These findings can guide future research on religion-equality conflicts, Supreme Court effects, and the dynamics of discrimination more broadly.

## **2. LEGAL BACKGROUND**

### **A. The “legislative mismatch” of Antidiscrimination and Religious Freedom Laws**

The regulation of sexual orientation discrimination and religious freedom in the U.S. vary at the state and local level. Some jurisdictions prohibit public accommodations (such as wedding businesses) from discriminating on the basis of sexual orientation (hereinafter: “AD laws”), while other jurisdictions do not prohibit such discrimination.<sup>5</sup> Concomitantly, some jurisdictions enacted rules that facilitate the creation of religious exemptions from rules of general applicability (often these are Religious Freedom Restoration Acts, or RFRA), while other jurisdictions have not enacted such rules.<sup>6</sup> With the legalization of same-sex marriage, new RFRA were enacted in Mississippi (2014), Indiana, and Arkansas (NCSL 2017). In other states, e.g., Iowa and Georgia, RFRA bills failed due to concerns about their implications for LGBTQ rights and fears from commercial boycotts (Foody 2015). In the process, RFRA became the legislative antonym of AD laws (Ferguson 2015).

The distribution of AD laws and RFRA across states is a “legislative mismatch” (Lupu 2015) with a narrow overlap. The overlap consists of four states that enacted both laws,<sup>7</sup> a maximum of seven states that have enacted AD laws and have extended protections on religious freedom in their constitutions,<sup>8</sup> and a considerable number of local governments in RFRA states that enacted municipal AD laws (Lupu 2015, pp. 48-49). This last category includes a number of major cities

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<sup>5</sup> Twenty-two states, the District of Columbia, and numerous local governments enacted such laws (HRC 2018).

<sup>6</sup> Twenty-one states enacted RFRA (NCSL 2017) and ten states interpreted their constitutions to require a RFRA-like standard of review (Volokh 2013). Lupu (2015) and Volokh (2013) classify differently which states have interpreted their constitutions to require a RFRA-like standard. I return to this issue in Section 3.B, where I note that the lack of clarity regarding the legal status in these states was a reason to avoid sampling businesses from them.

<sup>7</sup> Connecticut, Illinois, New Mexico, and Rhode Island.

<sup>8</sup> Maine, Massachusetts, Minnesota, New York, Vermont, Washington, and Wisconsin.

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in conservative states, such as Dallas, Indianapolis, Phoenix, and Atlanta (Lupu 2015, p. 49). To date, no local government in an AD state has enacted a local RFRA.

In summary, the regulation of the tension between marriage equality and religious liberty divides into four categories: regimes (state or local) with both AD laws and RFRA; AD-law-only regimes; RFRA-only regimes; and regimes that have enacted none. This is the diverse legal background against which *Masterpiece Cakeshop* was decided.

**B. *Masterpiece Cakeshop v. Colorado Commission of Human Rights***

The *Masterpiece* case presented a conflict between Jack Phillips—the owner of Masterpiece Cakeshop—and Charlie Craig and David Mullins, a same-sex couple who entered his cakeshop to inquire about a wedding cake, unaware of Phillips' beliefs. Phillips declined to make the cake citing his objection to same-sex unions.

The Colorado Civil Rights Commission found that the baker discriminated against the couple based on their sexual orientation. The Supreme Court reversed and invalidated the Commission's decision, writing that the Commission showed unconstitutional religious hostility. While the baker won the case on free exercise grounds, the majority acknowledged that "if that [religious] exception 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." (*Masterpiece*, p. 1727). For these reasons, the Court did not rule out the possibility that Colorado could enforce its AD law in similar cases in the future. More generally, the majority's opinion did not expressly solve the tensed relationship between religious liberty and sexual orientation equality

### **3. THE MASTERPIECE EXPERIMENT**

#### **A. The motivation and setting for the experiment**

The primary purpose of the project is to examine the contradicting empirical assumptions regarding the effects of religious exemptions on discrimination towards same-sex couples. The present contradictions and omissions have made it impossible to assess the merits of the opposing positions and leave 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 decision would yield an exemption of sorts.<sup>9</sup> As “one of the most anticipated decisions of the term” (Howe 2018), the decision was likely to draw extensive coverage and discussion in the public media (as it did), thus to potentially have an impact on public attitudes and conduct (Linos and Twist 2016).

When the decision was finally rendered on June 4<sup>th</sup>, 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 (Simpson 2018; Platoff 2018; McGaughy 2018). 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 (Liptak 2018; Williams 2018; Goldfeder 2018). At the same time, many conservative leaders and religious liberty advocates hailed the decision as a victory,

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<sup>9</sup> This expectation was based on the comments of Justice Kennedy, then the Court’s swing seat, who hinted that the Court thinks that there was “a significant aspect of hostility to a religion in this case”, Tr. of Oral Arg. 53. This became a dominant line of questions for the conservative judges on the bench, *id.* at 53-59. 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 63.

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expressing less reservations about its scope.<sup>10</sup> Fox News Insider (2018) held a supportive interview with Phillips, who defined the decision as a “big win.”<sup>11</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” and emphasizing the decision’s expression of pluralism and tolerance (Catholic News Agency 2018). The Family Research Council (2018) 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 that Jack will remain free to live according to his beliefs whether he is at work, at home, or in his place of worship.” These statements do not betray any doubt about the scope of the decision or mention the Court’s recognition of the important role of AD laws in protecting LGBTQ people.

Some LGBTQ advocates and progressive commentators observed these enthusiastic responses and voiced concerns that *Masterpiece* will grant objectors a license to discriminate. GLAAD president said that “it leaves the door wide open for religious exemptions to be used against LGBTQ people” (Lang 2018). The president of LGBTQ Victory Institute further warned that “Homophobic forces will purposefully over-interpret the ruling and challenge existing non-

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<sup>10</sup> To give the readers a better sense of the conservative and religious framing of the decision, I survey key quotes in the footnotes. Consider Kao (2018): “the decision... [exposed] 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.”; Liberty Counsel (2018) :“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>11</sup> See also Starnes (2018) (“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 decision, e.g. Mears (2018) (“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.”).

discrimination laws by refusing service to LGBTQ people in even more situations” (Lang 2018). NBC’s columnist Scott Lemieux (2018) 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.”

This combination of factors—a highly anticipated decision, a court that appeared positioned to exempt the religious objector, and the massive coverage that communicated the above messages—created a favorable setting for an empirical test of the behavioral effects (or lack thereof) of religious exemptions. In a previous study, Linos and Twist found that Supreme Court decisions can increase support for controversial policies that were vindicated by the Court (e.g., Obamacare), even when the court was divided and the decision was nuanced (Lincoln and Twist, 2016). Similarly, three recent studies that measured the effect of same-sex marriage legalization on public attitudes documented increases in support for same-sex marriage post-*Obergefell* (Kazyak and Stange 2018); increases in the perception that social norms support same-sex marriage (Tankard and Paluck 2017); and, prior to *Obergefell*, sharper decreases in antigay bias in states that legalized same-sex marriage compared with states that did not (Ofosu et al. 2019). All of these studies were based on attitudinal surveys conducted shortly before and after court decisions or legislative acts, sometimes with an additional experimental component that randomized the framing of the decision. Additional surveys examined public attitudes about LGBTQ discrimination, irrespective of Supreme Court decisions or same-sex marriage legalization (Powell, Schnabel, and Apgar 2017). Yet none of these studies examined the impact of Supreme Court decisions on the behavior of pertinent decision-makers. In the present case, the pertinent decision-makers are wedding vendors and the question is whether they are influenced from a ruling for a vendor who denied

service to a same-sex couple.

In addition, most previous studies did not investigate whether the effect of Supreme Court decisions varies between socio-legal regimes. Yet different legal regimes can direct wedding vendors towards different behaviors and therefore differentiate their response to *Masterpiece*. For example, businesses in regimes that resemble Colorado—with AD laws and without RFRA—might adopt their response to same-sex couples if *Masterpiece* is perceived as relaxing their AD obligations. One may expect such 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*. 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* as they were before the ruling.

In sum, *Masterpiece* provided a unique opportunity to study the behavioral effect of religious exemptions from antidiscrimination law, a question of which no empirical data exist to date, and which bears heavily on contemporary legal debates. In addition, the study advances the research of the effects of Supreme Court decisions in several ways: First, the study expands the examination from attitudes to behaviors, and from the general public to pertinent decision-makers. Second, the study goes deeper than previous studies in probing the relationship between the national judicial “shock” and the preexisting legal structures that could vary the effect of the decision between otherwise similar subnational regimes.

## **B. Research design and methods**

To assess whether *Masterpiece* had an effect on sexual orientation discrimination in the

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wedding industry, I combined methods from pseudo- and field-experiments. As in pseudo-experiments, I examined the behavior of wedding in businesses in two periods: before (May 8<sup>th</sup>-15<sup>th</sup>) and after (June 13<sup>th</sup>-20<sup>th</sup>) the decision (June 4<sup>th</sup>, 2018). As in field experiments, the methods of this examination aimed to control the setting of the examination and the allocation of the sexual orientation treatment between subjects (businesses) to allow for causal inference. The following subsections describe the construction of the sample, materials, and procedure of the experiment.

**Sample.** Sample construction began with a preliminary comparison of all states, to find those that were most comparable in their overall characteristics yet differed in their legal regime. The comparison included GDP per capita, the importance of religion for state residents, the share of Evangelicals in the state, the share of conservatives, attitudes towards homosexuals, and attitudes towards same-sex marriage. After matching demographic resemblance against legal regime variation, four states were selected for sampling: Indiana, Texas, Iowa and North Carolina. Table 1 shows that these states have roughly the same attitudinal and economic characteristics, that are either at the national average or more conservative.

TABLE 1 – CHARACTERISTICS OF SAMPLED REGIMES

Criterion	Definition	Iowa	North Carolina	Indiana	Texas	Dallas Metro, TX	Houston Metro, TX
GDP per capita (\$)		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	41%	45%	45%	46%	44%	51%

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(National average: 39%)

State RFRA	No	No	Yes	Yes	Yes	Yes
State/Local AD law	Yes	No	Some	Some	Yes	No

*Notes:* GDP per capita is calculated based on data from 2018, Q2. Sources: GDP: THE U.S. BUREAU OF ECONOMIC ANALYSIS, GROSS DOMESTIC PRODUCT BY STATE, SECOND QUARTER 2018 (2018); Population: U.S. CENSUS BUREAU, 2018 NATIONAL AND STATE POPULATION ESTIMATE (2018); All other data: PEW RESEARCH CENTER, RELIGIOUS LANDSCAPE STUDY (2014). State/Local AD Law (row 8) refers to public accommodation laws that apply to private businesses and are enacted at the state or city level.

Alongside their demographic and attitudinal similarity, the sampled states vary in how they regulate religious freedom and public accommodations. North Carolina has no RFRA and no AD law at any level of government.<sup>12</sup> Iowa has no RFRA (at no level of government) but has a state AD law (IOWA CODE § 216.7). Both Indiana (IND. CODE § 34-13-9) and Texas (TEX. CIV. PRAC. & REM. CODE ANN § 110.011) have state RFRAs and no state AD laws, yet some local governments within these States have AD laws. Sampling from all of these regimes produced a 2 (+/- AD) by 2 (+/- RFRA) sampling matrix (Table 2).

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 2 describes, the overlap between RFRAs and AD laws has three versions: (1) states that enacted both laws; (2) states that enacted an AD law and their courts interpreted their constitution to provide a RFRA-like standard; and (3) local AD laws within RFRA states. The primary reason for choosing the third version to model the category was that the demographic and attitudinal characteristics of the four states that enacted both laws (RI, CN, NM, IL) and the states that only had RFRA, without an AD law, differed too widely than the states populating the other matrix categories. Second, not all RFRA designs raise the same tension with AD laws. RFRAs in the first overlap category are mostly narrow and not

<sup>12</sup> NC has enacted a specific religious exemption allowing magistrates to refuse to perform same-sex marriages, SB 2 (2015), but there is no exemption for private businesses. NC also prohibited cities or counties from passing sexual orientation AD laws, HB 2 (2016), what explains the complete absence of local AD laws in the state.

conducive for the examination of this tension, while the second category raises considerable uncertainty regarding the very existence of the tension (Volokh 2013, cf. Lupu 2015). 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.

TABLE 2 – THE LEGAL REGIME MATRIX AND SAMPLED STATES

	RFRA	No RFRA
AD law	Specific jurisdictions in Indiana and Texas <sup>13</sup>	Iowa
No AD law	Specific jurisdictions in Indiana and Texas <sup>14</sup>	North Carolina

To be sure, although I invest great efforts in facilitating the comparison between regimes, I do not argue that this design is capable of identifying a causal relationship between specific regimes and behavioral outcomes. First, it is difficult to separate the legal regime from the underlying political and social climate that produced the law.<sup>15</sup> Second, different laws provide different behavioral guidance—as discussed above—but businesses might not be fully aware of law’s dictates. Nevertheless, legal regimes are likely to matter, if not for the direct impact of law then for the underlying socio-political structures that it reflects. Had I only sampled from one regime, important variation would have been masked and misleading interpretations might have been construed. Exploring how businesses in different regimes respond to *Masterpiece* is thus

<sup>13</sup> At the time of the experiment, these included the following: in Indiana, Indianapolis, Fort Wayne, Evansville, Bloomington, Muncie, South Bend, Terre Haute. In Texas, Dallas, San-Antonio, Austin, El-Paso, Plano, Fort Worth.

<sup>14</sup> At the time of the experiment, these included the following: in Indiana, West Lafayette. In Texas: Houston, Irving, Arlington, Corpus Christi, Lubbock, Garland, Amarillo, Grand Prairie, Brownsville, McKinney, Killeen, McAllen, Waco, Denton, Round Rock, College Station.

<sup>15</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 RFRA as providing no protection against AD claims—but it is very difficult to account for all interactions between judge-made law and legislated law.

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necessary, even if the results are only suggestive and causal inference is limited.

A power analysis (via G\*Power) determined that a sample size of 179 businesses per legal category is needed to detect a medium-size effect (.25) with 80% power (assuming four legal regime groups and two covariates—see below). The detection of within-subject effects (sexual orientation and the effect of *Masterpiece* itself) required a considerably smaller sample. Yet due to pitfalls that could result in sample reduction (e.g., inactive businesses or email addresses; technical failures) the sampling aimed for 250 businesses per legal category.

The wedding industry includes a variety of vendors and services, such as photography, videography, flower arrangements, dresses, suits, wedding cakes, wedding planning, venues, and more. Recent cases in which businesses refused service to same-sex couples involved bakers, photographers, and florists, among others. I was particularly interested in bakers and photographers, because these businesses represent different models of involvement in the wedding: photographers typically spend many hours with the couple, take an active part in the event and are present throughout the wedding, often for 9-10 hours. Typically they also create the couple's wedding album, requiring continued relationship with the couple. In contrast, bakers typically have a more limited interaction with the couple (during tastings and the order), do not play an active role in the event and are not present in the wedding. These differences in personal involvement could bear on vendors' willingness to serve couples. Therefore the sampling focused on these two types of vendors, supplementing them with florists in one legal regime (Iowa) where not enough photographers and bakers were found.<sup>16</sup>

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<sup>16</sup> Iowa contained smaller populations of bakeries and photographers compared with the other regimes (and particularly bakeries). Florists were chosen to augment the sample because of prior conflicts involving this industry

The sample was built by collecting all vendors in each legal regime that could be found on a simple Google search and published an email address as a form of communication.<sup>17</sup> Contacting wedding vendors via email is a very common, if not the most common method of communication of couples: There is ample guidance online on how to write an email to potential wedding vendors and multiple websites assume that email is the default or best form of communication with vendors.<sup>18</sup> After mapping states and cities/counties that fitted into the legal regime typology, businesses were sampled based on regime size, from large to small. Thus, the sampling gave preference to large political units (e.g., big cities) over small political units (e.g., small cities and rural counties) and ended when the designated sample size was obtained.<sup>19</sup> Each business included in the sample was individually checked and verified to be a relevant business (e.g., a bakery rather than a coffee shop). The final sample includes the entire population of bakeries that met the search criteria in each legal regime, and a large sample of the respective photographers' population.<sup>20</sup>

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(e.g., *Arlene Flowers*, *supra* note 2) and because florists' involvement in the wedding was assumed to be intermediate: florists do not fill an active role in the event and are not present throughout the event, similar to bakers; and they do not appear to be offering shelf products, similar to photographers.

<sup>17</sup> The search words were “[profession] in [jurisdiction]” (e.g., “wedding photographers in Indianapolis, IN”).

<sup>18</sup> *See, e.g.*, Forrest (2017) (assuming communication is done via email); Currey (2019) (providing guidance on how to write emails to potential wedding vendors); Malie (2018) (“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.”). 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.

<sup>19</sup> If the search yielded more results than needed, only the first valid results were included. The rationale for including top results rather than a random sample of search results was based on the Google search algorithm, which prioritizes relevant results, and also on the researchers' experience that first result pages include more relevant results than advanced pages. Top results were typically within the geographic boundaries I searched for, whereas later results were often in suburbs or other cities/counties; in addition, top results typically met the definition of the searched business, whereas later results sometimes belonged to other types of businesses (e.g., a Starbucks coffee shop that came up in a wedding bakeries search).

<sup>20</sup> In Iowa (+AD – RFRA), the sample also includes the entire photographer population (Iowa was the only category in which the search was not able to collect 250 businesses and exhausted all business types at 218 businesses). In North Carolina (- RFRA - AD) the sample exhausted 89% of relevant photographers. In the +RFRA -AD regime (Texas and Indiana) the sample exhausted 88% of the population. In the +RFRA +AD regime (Indiana and Texas) our sample exhausted about 50% of the relevant population (the photographer population in this regime was bigger than other regimes).

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In addition to the main experiment sample, I also constructed a “control” group of 251 vendors which was only contacted after *Masterpiece*. The control group was composed of photographers and florists from three of the four legal regimes (as all businesses in Iowa and bakers in all jurisdictions were exhausted in the experimental group). The control exhausted the relevant photographers population in each regime in addition to 45 florists from each regime. As explained in more detail in the procedure, the control group was not designed to test differences between regimes or business types, but to evaluate the effect of the experimental procedure itself.

***Procedure and materials.*** Sixteen fictitious email profiles were created for the experiment. In order to assess the baseline discrimination pattern, each business received two emails prior to *Masterpiece* from two different ‘couples’: a same-sex couple (1<sup>st</sup> wave) and a different-sex couple (2<sup>nd</sup> 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 white 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 a white American male or female, depending on the couple’s identity (Adam, Paul, Harry; Jessica, Ashley, Rebecca). The emails had similar properties, including similar information about the fictitious couple, the service requested from the vendor, and the prospective timing of that service,<sup>21</sup> and they were written in the same level of cordiality. Small, meaningless changes were inserted to diminish suspicion (including variations in wording, font size, font color, and signature style). The emails were sent one week apart, during

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<sup>21</sup> The timing of the prospective wedding noted in the email was determined based on market norms about when approximately to contact specific vendors. While the recommended timeline somewhat varies from one wedding portal to another, the emerging norm seems to be that photographers should generally be contacted between 9-11 months in advance, and florists and cakeshops should be contacted 6-9 months in advance (some advices provide a shorter timeframe for cakeshops). Thus, emails to photographers noted a wedding date which was 11 months away and emails to florists and cakeshops noted a date which was 8 months away.

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business days and hours, at about the same day of the week and time of the day, with an intentional hour lag to reduce suspicion.<sup>22</sup> All email versions are included in the Online Appendix.

A week after *Masterpiece*, on June 13<sup>th</sup>, all businesses were randomized to receive an email from a same-sex or a different-sex couple (3<sup>rd</sup> wave); and on the following week, each business received an email from the opposite-orientation couple (4<sup>th</sup> wave) (Overall, each business received emails from both couple types, one week apart). The emails of each wave had similar properties and were different from the two pre-*Masterpiece* emails. To increase responsiveness and further distinguish the communication from previous waves, post-*Masterpiece* emails included profile pictures and phone numbers, and alternated further the style and formatting of the 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.

Businesses of the control group were contacted for the first time in the 3<sup>rd</sup> and 4<sup>th</sup> waves (after the decision was rendered), following the exact same post-*Masterpiece* procedure and during the exact same times. The control group was included to evaluate the possibility that the repeated measurement of businesses in the experiment group could have influenced their behavior, independent from the effect of the decision or couple's identity. More specifically, the goal of the control group was to assess whether the effects of *Masterpiece* were similar among businesses that were contacted both before and after *Masterpiece* and businesses that were freshly-contacted only after *Masterpiece*. This comparison provided an independent reference for response rate and attrition rate, which allowed for an additional robustness check.

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<sup>22</sup> In each wave, some subjects received the email 24 or 48 hours after the main group, due to logistic issues. All emails were sent during business days and hours.

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In order to reduce suspicion and fatigue, the research team answered each responding business manually once, soon after the response was received, and before the next wave of emails. The answers were personal and varied based on each business’ response. Typically, the responses requested more time to think or mentioned a reason for not continuing the correspondence which was unrelated to the details of the offer. Fifty-nine vendors had to be excluded from the sample because of email communication failures (typically, not receiving one of the four emails), and 15 were omitted due to explicit or potential suspicion.<sup>23</sup> The final sample, after exclusions, remained significantly larger than required to detect the minimal effect, based on the power analysis:

TABLE 3 – THE FINAL SAMPLE OF BUSINESSES IN THE EXPERIMENT

	RFRA	No RFRA
	N = 212	N = 210
AD	Photographers: 125 Bakers: 87	Photographers: 93 Bakers: 35; Florists: 82
	N = 244	N = 238
No AD	Photographers: 179 Bakers: 65	Photographers: 155 Bakers: 83

For any given inquiry, I measure the response it elicits from the business based on the email communication. Two RAs coded the entire dataset of emails under the close supervision of the PI. The research team conducted numerous meetings throughout the coding process to discuss the coding method, resolve open issues, and fine-tune the coding scales.<sup>24</sup> The main outcome of interest in all analyses is whether businesses agreed to provide service to the couple.<sup>25</sup>

Between the 3<sup>rd</sup> and 4<sup>th</sup> email waves a phone survey was conducted with a random sample of

<sup>23</sup> Online Appendix, Section OA2, details reasons for exclusions and the number of vendors excluded.

<sup>24</sup> Online Appendix, Section OA5, provides further information regarding the coding process.

<sup>25</sup> I had two measures for this outcome, binary and nuanced. The scale for Nuanced Response was: 1 = positive response, 0.5 = cooperative response, e.g., a vendor that asks for more information on the date or the location, 0 = no response, -0.5 = a negative response that includes a referral to other providers/services, -1 = negative response. Binary Response coded all responses > 0 as 1 (positive) and all responses <= 0 as 0 (negative).

wedding vendors to gain insight on non-response patterns observed in waves 1 and 2 (See below). The appendix describes the phone survey's sample, procedure, and results.

### **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* 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 (Bertrand and Mullainathan 2003). Third, the outcome measure—agreement to provide services to the couple—is less crude than, for example, callbacks in employment experiments (Bertrand and Mullainathan 2003). This is because the argument about discrimination in wedding services relates to the specific stage of the transaction that is studied here: the initial inquiry about the service.

Alongside these strengths, the experiment also has limitations. First, similar to Bertrand and Mullainathan (2003), I study asynchronous communication rather than face to face or phone communication. There are good reasons for that: Using emails enables the creation of a highly controlled experimental setting, including with respect to 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/auditors 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 (Bertrand and Mullainathan, 2003). In addition, while email inquiries do not capture the entire variation in how

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couples interact with vendors, emails are one of the most common methods of communication between couples and vendors, especially in the inquiry phase. 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. However, how the results translate to additional methods of communication remains an open question. This can be a topic for a future study.

An additional limitation, that flows directly from the method of a pseudo and controlled experiment, is that I examine the effect of *Masterpiece* 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. Shortly after the decision, legislatures in Texas, Iowa, and North Carolina have proposed, revived and even passed legislation pertaining to religious liberty and LGBTQ rights (Rodriguez 2019; Platoff 2019a; Platoff 2019b; Fitzsimons 2019). In this dynamic landscape, the conduct of businesses can no longer be linked to *Masterpiece*. Future cases may provide opportunities to examine additional effects of religious exemptions on society.

TABLE 4: OVERALL RESPONSE RATES IN EACH WAVE

<u>Wave</u>	<u>Overall Response Rate</u>
W1	70.8
W2	58.7
W3	63.4
W4	61.9

Finally, and this is an issue pervasive in studies that repeatedly measure the same respondents over time (Kalton, 2009; Gerber and Green 2012, pp. 236-238), I encountered a large attrition of businesses in the second wave of inquiries before *Masterpiece* (See Table 4). This pattern hindered

the ability to detect discrimination in the pre-*Masterpiece* 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, Fitzgeralds et. al 1998), 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>26</sup> To minimize the impact of attrition on the robustness of the design, in the following waves I randomized couples' identity within each wave. In addition, as described in the procedure, the following waves were designed to increase responsiveness by altering the style and formatting of the emails and the couples' profiles.<sup>27</sup> This effort succeeded in increasing responsiveness to wave 3 and in reducing attrition between waves 3 and 4. Nevertheless, I concede that the attrition of businesses from wave 2 prevents the evaluation of the existence and extent of sexual orientation discrimination before *Masterpiece*.<sup>28</sup> To overcome this pitfall and evaluate the effect of *Masterpiece* on the existence and extent of discrimination *after* the decision, I developed several strategies of analysis which I present next.

#### **4. RESULTS**

This Section is organized as follows: it begins with the main analysis, which focuses on businesses that agreed to serve same-sex couples before *Masterpiece* and examines their behavior post-*Masterpiece*. The second analysis examines within-business changes of behavior across all

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<sup>26</sup> Online Appendix, Section OA3, reports that vendors who did not respond to the 2<sup>nd</sup> wave email were also less likely to answer the phone than vendors who replied to that email (36% vs. 52%, respectively). In addition, no 'phone favoritism' was found among email non-responders, *id.*

<sup>27</sup> Among these alterations, each profile was allocated a unique phone number, including a personalized outgoing message (identical in content).

<sup>28</sup> It is possible to infer that prior to *Masterpiece*, opposite-sex couples were disfavored relative to same-sex couples (reversed discrimination), but this inference seems tenuous. To the extent it is true, the magnitude of the *Masterpiece* effect is much larger than estimated below. Section OA4.1 in the Online Appendix reports these results.

businesses over time. I then move to examining differences between legal jurisdictions and between religious environments. Robustness checks and follow up studies can be found in the Online Appendix and are referenced along the way.

### **A. Has Masterpiece Increased Discrimination Towards Same-Sex Couples?**

To answer this question, I evaluate the impact of *Masterpiece* on businesses that agreed to serve same-sex couples before the decision (N=575 businesses \* 2 post-*Masterpiece* observations per business, resulting in 1150 observations). The assumption underlying this analysis is that businesses who responded favorably to same-sex couples before *Masterpiece* were equal treatment businesses (for the very least, they were “gay-friendly” businesses). Examining their behavior *after* the decision can provide an answer as to whether *Masterpiece* had a negative effect on the willingness of businesses to provide service to same-sex couples.

Some readers might have expected that a diff-in-diff strategy would be applied to answer the question. But the problem with the diff-in-diff approach is that the attrition between the first and second waves (both of which were pre-*Masterpiece*) meant that a diff-in-diff would be subject to criticism as not having comparable opposite-sex-couple-treated observations. Focusing on businesses who were gay-friendly in the pre-*Masterpiece* period circumvents the need to rely on data from the second wave of emails before *Masterpiece*, where significant attrition occurred. This is possible because all emails from same-sex couples were sent in the first wave of emails and therefore data on responsiveness to same-sex couples were not affected from the subsequent attrition.<sup>29</sup> Because assignment to wave in the post-period was randomized (unlike in the pre-

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<sup>29</sup> Ideally, had attrition not occurred, data from all waves should have been used to simultaneously assess both the existence of discrimination pre-*Masterpiece* and the effect of *Masterpiece* on preexisting discrimination. But because the data from wave 2 suffers from significant attrition, it is not possible to evaluate pre-*Masterpiece* discrimination

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period), there is no concern about attrition creating a confound if one conditions on the pre-period behavior and uses post-period outcomes to measure the effect of the decision.

Second, while the sample is smaller than the original sample (N= 906), it is still large enough to detect the effect in question.<sup>30</sup> The self-selection of businesses into this sample is not a concern, since these are exactly the businesses that require our focus. Businesses that discriminated against same-sex couples both before and after *Masterpiece* would not influence the results. In contrast, businesses that shifted from positive response to discrimination are precisely the object of the inquiry. Because businesses were randomized post-*Masterpiece* to receive an inquiry from a same-sex or an opposite-sex couple (and the vice versa in the following wave, such that each business was contacted by both couples post-*Masterpiece*), I can estimate the effect of *Masterpiece* precisely, using both within and between businesses data.

TABLE 5 - AVERAGE RESPONSE RATES OF LGBT-SERVING BUSINESSES AFTER *MASTERPIECE*, BY SEXUAL ORIENTATION OF COUPLES (NUANCED RESPONSE)

Sample	Couple	Negative Responses		No Response	Positive Responses		Total PR	Percent Difference in PR ( <i>p-value</i> )	Total RR	Obs.
		<i>Neg. w/ Referral</i>	<i>Neg.</i>	<i>Coop.</i>	<i>Pos.</i>					
All Inquiries	Opposite-sex	2.78	2.08	19.62	2.26	73.26	75.52	9.20 (0.0006)	80.38	576
	Same-sex	4.17	1.74	27.78	1.74	64.58	66.32		72.22	576
Wave 3	Opposite-sex	1.39	2.43	19.44	2.43	74.65	77.08	9.38 (0.011)	80.56	289
	Same-sex	3.47	1.74	26.74	2.08	65.63	67.71		73.26	287
Wave 4	Opposite-sex	4.17	1.74	19.79	2.08	71.88	73.96	9.03 (0.018)	80.21	287
	Same-sex	4.86	1.74	28.82	1.39	63.54	64.93		71.18	289

patterns. At the same time, it is possible to answer the second question—what the effect of *Masterpiece* is—by relying exclusively on the first wave of emails, as described in the text.

<sup>30</sup> As the effect size exceeded the conservative assumptions of the power analysis, it was detectable also in analyses that relied on smaller samples. This is also true for the robustness analysis reported below.

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*Notes:* The table reports the response rates, by type of response, for opposite-sex couples and same-sex couples, for businesses that prior to Masterpiece provided a positive response to same-sex couples ('gay-friendly'). Response types include: Negative response (column 3), negative response moderated by a referral of the couple to a different vendor (column 4), no response (column 5), cooperative response (column 6), and positive response (column 7). The table also reports total of positive responses per couple type (column 8), as well as the difference in positive responses between couple types (column 9). Column 9 also reports the *p*-value for a test of proportions testing the null hypothesis that the positive response rates are equal across sexual orientation groups. Finally, the table reports the total response rate, positive and negative, per couple type (column 10) and the total number of observations (column 11).

Table 5 tabulates average response rates by the sexual orientation of the couple. Row 1 and 2 present the results for all inquiries collected post-*Masterpiece* by sexual orientation. Inquiries from a same-sex couple have a 66.3 percent chance of receiving a positive response. Equivalent inquiries from an opposite-sex couple have a 75.5 percent chance of being answered positively. This represents a difference of 9.2 pp, or 14 percent, that can be solely attributed to the names manipulation. Column 9 shows that this difference is highly statistically significant.<sup>31</sup>

Rows 3-4 and 4-5 present the same results for each wave of inquiries sent post-*Masterpiece* separately. On the first week after *Masterpiece*, 67.7% of the businesses randomly contacted by same-sex couples responded positively, as compared with 77% who responded positively to opposite-sex couples. This represents a difference in positive response rate of 9.3 pp, or 14 percent. On the second week after *Masterpiece*, the randomization flipped such that each business received an email from the counter-orientation couple. Of the businesses now contacted by opposite-sex couples, ~74% responded favorably, as compared with ~65% who responded favorably to opposite-sex couples. This represents a difference in positive response rate of 9 pp, or 14 percent. These differences are significant in both waves.

Note that this pattern indicates both between-subject differences (in each week, between the

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<sup>31</sup> These statistical tests assume independence of responses. However, as tables OA4.1-3 in the Online Appendix show, the results remain significant when the analysis assumes that the responses are correlated at the business level.

random groups) and within-subject differences (across weeks, within each group). Weekly attrition cannot explain the within-subject pattern, as the rate of response went *up* in the group that received the first message from a same-sex couple and the second message from an opposite-sex couple. In fact, as column 10, rows 3-5, show, opposite-sex couples experienced no reduction in positive responses from the first to the second wave. Only same-sex couples experienced such reduction. Yet, as Table OA4.1 in the Appendix shows, the effect of wave was not significant.

How do businesses communicate negative responses to couples? As Table 5, Column 5 indicates, the most common form of declining service is simply no response. This result is anticipated, as writing an negative response is both time costly and awkward, and the easiest way is to ignore the inquiry (Dovidio and Gaertner 2004; Bertrand and Mullainathan 2003). While it is possible that failures to respond result from not receiving an email, or forgetting to respond to it, 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 percent chance of not receiving a response to their inquiry. Same-sex couples had a 27.8 percent of not receiving a response. That is, the chance of same-sex couples to not receive a response was 42 percent higher ( $Z=3.26$ ,  $p=.001$ ).

The additional checks that are reported below and in the Online Appendix indicate that the negative effect of *Masterpiece* on the willingness to provide service to same-sex couples was robust across analyses. I find it 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* yields a drop of 14.4 pp, or about 23 percent. Observing only the responses after *Masterpiece* in the entire sample, the rate of positive responses for same-sex couples was lower than the respective rate for opposite-sex couples in 8.4 pp on average (Section OA4.2 in the Online Appendix); We find the

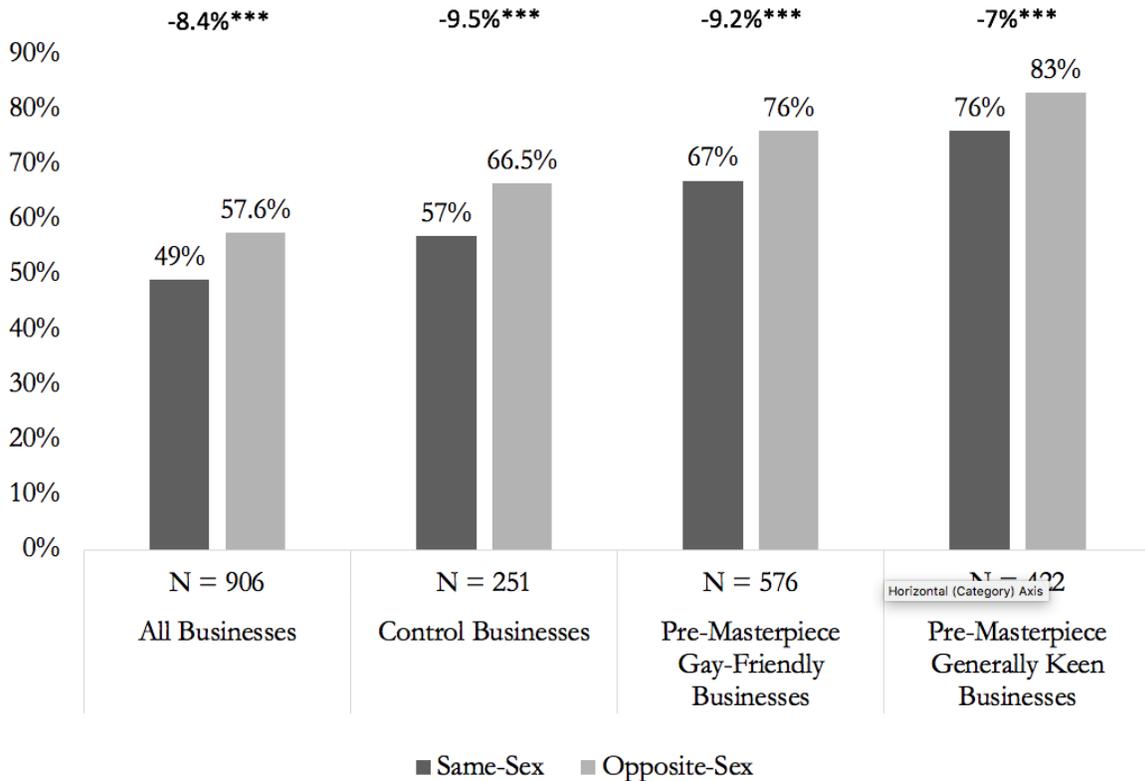
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same effect in the control group, where the gap between couple types was 9.5 pp (Section OA4.3 in the Online Appendix). We also find this effect among the particularly keen group of businesses that responded positively to both couples before *Masterpiece*. 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* (~7 pp difference, Section OA4.4 in the Online Appendix). The summary of these results is presented in Figure 1, that shows that all business cohorts respond to *Masterpiece* with unfavorable treatment of same-sex couples, notwithstanding different baselines of positive response rates that characterize each cohort in separate.

In all of these analyses, I find that the *Masterpiece* effect is stable and robust to the inclusion of all experimental covariates, including the legal regime, the type of business, and the wave of inquiry. 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, Sub-Section D finds that the effect varies with the religiosity of the environment, such that businesses in areas dense with religious congregations, and particularly Evangelical congregations, are more likely to adopt their behavior post-*Masterpiece*.

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**Figure 1.** Agreement to serve same-sex and opposite-sex couples after *Masterpiece*

How substantial are these effects? Take the average 9% gap in the willingness to serve same-sex and opposite-sex couples that was documented in most analyses. Now consider the typical couple, that contracts with about 10 vendors in the process of organizing the wedding, including photographers, bakers, florists, videographers, venues, DJs, bridal/groom salons, calligraphers, jewelers, wedding planners, and more.<sup>32</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-couple

<sup>32</sup> Photographers were generally less responsive (to all couples) than other businesses, but the negative effect of sexual orientation was robust across business types.

interaction presents an independent risk of incurring discrimination,<sup>33</sup> the aggregate risk that same-sex couples would encounter discrimination at least once in their interactions post-*Masterpiece* 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>34</sup> and can go higher (or lower) the more (less) vendors a couple encounters.

### **B. Within-Business Transitions**

Thus far we studied the effect of *Masterpiece* on businesses that provided favorable responses to same-sex couples prior to the ruling—that is, holding constant the pre-*Masterpiece* behavior, I asked how these businesses respond to random inquiries from same-sex and opposite-sex couples after *Masterpiece*. A complementary approach is to study within-business transitions throughout the duration of the experiment. As each business received four inquiries, two before and two after the decision, one from each couple type in each period, it is possible to study changes not only across businesses but also within businesses over time. While this analysis is compromised by the attrition that occurred in the second wave of inquiries before *Masterpiece*, zooming in on within business transitions alleviates this issue to some extent, as I will show below.

Table 6 tabulates the transitions from no/negative response pre-*Masterpiece* to positive

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<sup>33</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* 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 (Section OA2 in the Online Appendix).

<sup>34</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.

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response post-*Masterpiece*, and vice versa, for same-sex and opposite-sex couples. The table indicates that transitions occur in all directions, but overall, they are significantly biased in favor of opposite-sex couples and against same-sex couples.<sup>35</sup> Businesses were three times more likely to transition from agreeing to declining service to same-sex couples after *Masterpiece* than transitioning in the opposite direction (row 2, column 4). In contrast, businesses were 42 percent more likely to transition in favor of providing service to opposite-sex couples after *Masterpiece* (row 1, column 4). Studying the same results at the level of the couples indicates that opposite-sex couples were more than twice as likely than same-sex couples to experience a *positive transition*, such that a previously declining business would agree to serve them post-*Masterpiece* (Column 1). In contrast, same-sex couples were twice as likely to experience a negative transition, such that a previously willing business would decline to provide service post-*Masterpiece* (Column 2). Notably, the estimates in first cell in Table 5 (row 1, column 1) should have probably been lower, because the general attrition that followed the pre-*Masterpiece* inquiry from opposite-sex couples might have yielded unintended declines of service – ultimately resulting in more positive transitions post-*Masterpiece*. The other cells, however, are not influenced from the attrition issue. In particular, the comparison of the transitions in column 2 and row 2, both showing that same-sex couples are very likely to experience a negative transition after *Masterpiece*, are unaffected.

TABLE 6 – WITHIN-BUSINESS TRANSITIONS BEFORE AND AFTER *MASTERPIECE*  
BY SEXUAL ORIENTATION OF COUPLES

<u>Percent of Businesses Transitioning From:</u>		Percent Difference (p-value)	Ratio
Declining to Agreeing	Agreeing to Declining		

<sup>35</sup> The occurrence of transitions in all directions is not surprising in and of itself. For example, Bertrand and Mullainathan (2003) found that alongside equal treatment employers (in that study, 88% of all employers) and white-favoring employers (8.4%), there 3.5% of the employers favored black applicants. Transitions in all directions are also expected because of communication failures. Note, however, that omissions to respond were not randomly distributed across couple types, as the p-values of the comparisons in Table 5 indicate.

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Opposite-Sex Couples	15.3%	10.8%	4.5%	1.42%
	[139]	[98]	(0.004)	
Same-Sex Couples	7.1%	21.4%	-14.3%	0.33%
	[64]	[194]	(0.0000)	
Percent Difference	8.2%	-10.6%		
(p-value)	(0.0000)	(0.0000)		
OS/SS Ratio	2.16%	0.5%		

*Notes:* The table reports the transition rates within-businesses from declining service (negative or no response) pre-*Masterpiece* to agreeing to provide service (positive response) post-*Masterpiece* (column 1), and vice versa (column 2), for opposite-sex couples (row 1) and same-sex couples (row 2). In brackets in each cell is the number of businesses in that cell. Column 3 reports the percent difference between columns 1 and 2, as well as the p-value of the difference, and Column 4 reports the ratio between Columns 1 and 2 (for each couple type, the ratio of positive/negative transitions). Row 3 reports the percent difference and p-value of the difference for rows 1 and 2, and Row 4 reports the ratio between Rows 1 and 2 (for each transition type, the ratio of opposite-sex vs. same-sex couples experiencing the transition).

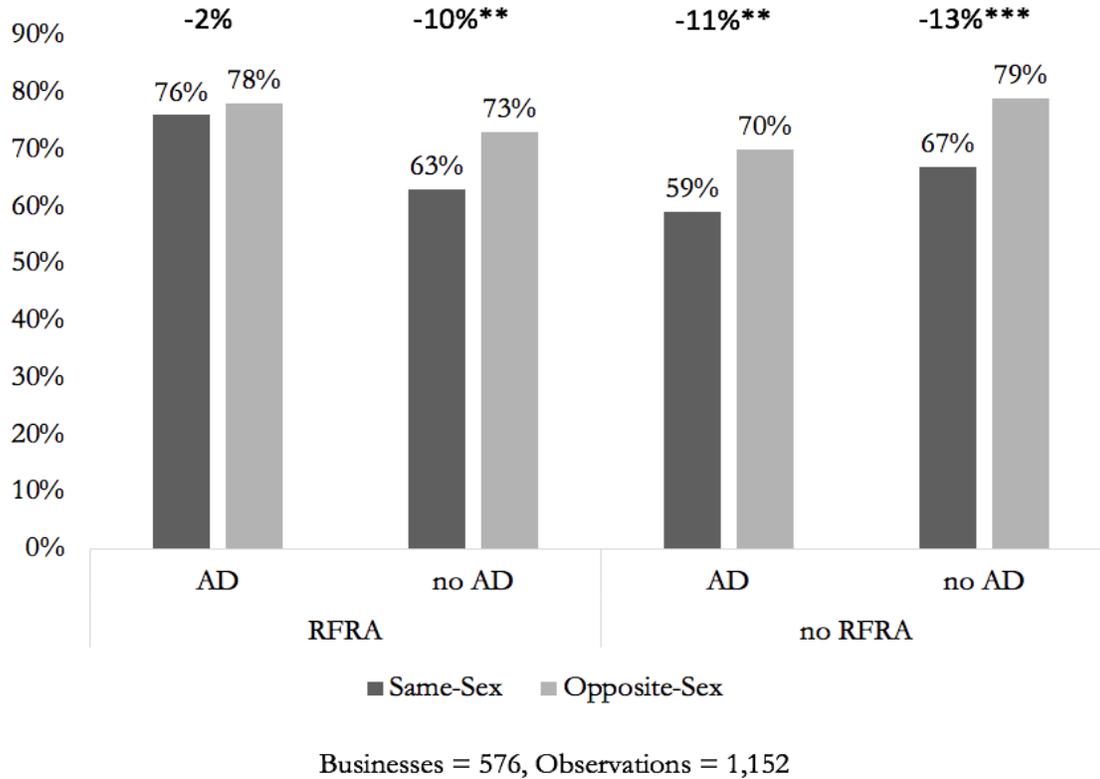
These findings complement the main analysis by indicating that the reduction in willingness to provide services to same-sex couples that is evident across businesses post-*Masterpiece* is also evident within-businesses post-*Masterpiece*. This reduction is not offset by businesses that prior to the decision did not serve same-sex couples and transitioned to serving them after the decision (this is also evident from the analysis of the full dataset in Section OA4.2 of the Online Appendix). While transitions from a positive to a negative response occur in all directions, same-sex couples encounter the largest percent of negative directions and the smallest percent of positive transitions.

**C. Does the Masterpiece Effect Vary Between Legal Regimes?**

The results so far demonstrate a substantial reduction in businesses’ willingness to provide service to same-sex couples, as compared with opposite-sex couples, after the *Masterpiece* decision. Next, we would like to learn more about the factors that may influence this gap. More specifically, this Section asks how this effect displays in different socio-legal regimes. Because of space limitations, the results are summarized in Figure 2. Briefly, I find that *Masterpiece* had a highly statistically significant negative effect in all regimes, *except* for regimes that enacted both

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an antidiscrimination law and a religious freedom law. The full analysis is reported in Section OA4.5 of the Online Appendix. I return to these results in the discussion.



**Figure 2.** The effect of Masterpiece on previously gay-friendly businesses, by legal regime

**D. Is the Masterpiece Effect More Pronounced in Religious Environments?**

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*, and as a result, the effect will be more pronounced in these environments. This hypothesis is particularly plausible with respect to Evangelical areas, as Evangelicals have been involved in a large number of wedding conflicts and are the denomination with the lowest rates of support in same-sex

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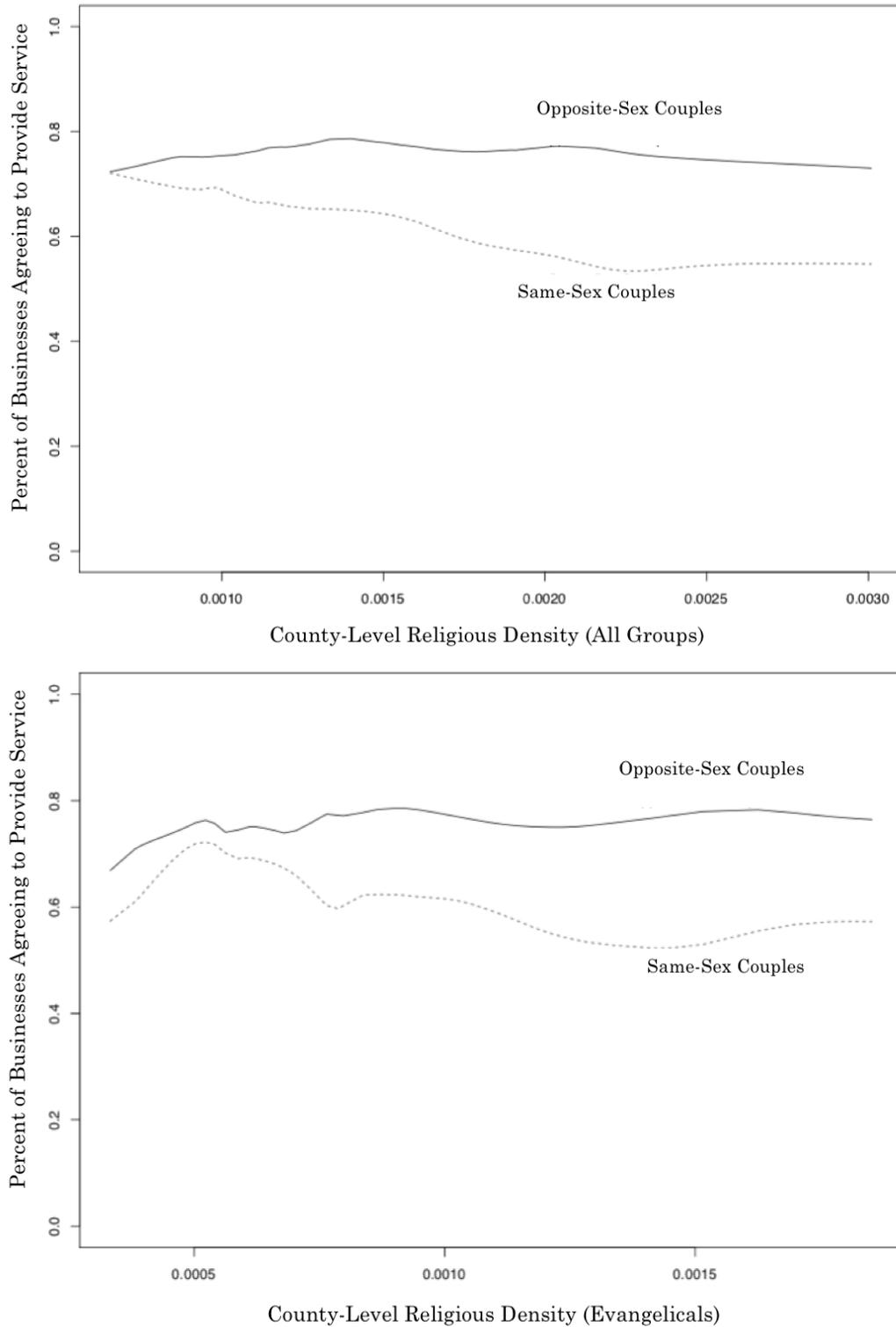
marriage (Pew Research Center 2014). Although individual-level evidence on the religiosity of the businesses is unavailable in this study, I can examine the impact of religious environment by observing the density of Evangelical congregations in the county where businesses are located.

I explored this hypothesis using public data on county-level density of religious and particularly Evangelical congregations from the U.S. Religion Census: Religious Congregations and Membership Study, 2010 (County File), available in the Association of Religion Data Archives (ARDA) (Grammich et. al 2010). The data include county-level counts of the number of congregations and adherents for 236 religious groups, as well as county population. As the number of adherents appeared less reliable than the number of congregations,<sup>36</sup> I computed the congregations/population ratio (religious density), for all religious congregations and for Evangelical congregations in particular. I then examine whether religious environment, as proxied by these measures, influences previously gay-friendly businesses after *Masterpiece*.

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<sup>36</sup> As Grammich et. al (2010) explain, only about 36% of the 236 groups reported data on their adherents and in 31 counties the number of reported adherents exceeded the total population in 2010. While groups can err in counting heads or overstate their actual membership, these biases are less likely in counting congregations and are more likely to be detected by ARDA data checkers.

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**Figure 3.** The effect of Masterpiece on previously gay-friendly businesses, by religious environment (top panel - all denominations; bottom panel – Evangelicals).

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Figure 3 plot the results. The top panel shows that the gap in the agreement to serve same-sex and opposite-sex couples varies with the religiosity of the environment of the businesses. All of the businesses in this analysis agreed to serve same-sex couples before *Masterpiece*. After *Masterpiece*, however, businesses in religiously dense areas show a large gap between same- and opposite-sex couples. In contrast, businesses in areas with few congregations do not 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 3 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 gap widens with Evangelical density. Notably, the percent of businesses agreeing to provide service to opposite-sex couples is fairly stable across high- and low-religious/Evangelical density areas. The fluctuation occurs mostly with respect to same-sex couples.

Section OA4.6 in the Online Appendix includes the results of the regression analyses that account for religious and Evangelical density.<sup>37</sup> Both are statistically significant, and with the interaction term between sexual orientation and religious/Evangelical density in the model, the effect of sexual orientation is no longer significant. In other words, the negative effect of *Masterpiece* on the agreement to provide service to same-sex couples is significantly concentrated in more religious environments. To get a concrete appreciation of the magnitude of this result, I compared businesses in high vs. low Evangelical density environments (top 25% (N=141) v.

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<sup>37</sup> One may ask how religious environment influenced behavior before *Masterpiece*. It is not possible to examine this question in full because of the Wave 2 attrition, that affected businesses across different levels of Evangelical density. However, a comparison of each pre-*Masterpiece* wave in separate shows that businesses in highly- and slightly-Evangelical environments did not significantly differ in their agreement to serve opposite-sex ( $p=.31$ ) and same-sex couples ( $p=.71$ ) before *Masterpiece*.

bottom 25% (N=109)). In highly Evangelical environments, previously gay-friendly businesses develop a whopping 20.5 pp gap between couples (78 pp vs. 57.5 pp,  $Z=3.69$ ,  $p = .0002$ ), whereas in slightly Evangelical environments, the gap is 2.7 pp (70.6 pp vs. 67.9 pp, n.s.). Observing high vs. low general religious density areas yields the same results.<sup>38</sup> These results indicate that businesses in more religious areas updated their behavior after *Masterpiece* significantly more than businesses in less religious areas.

## 5. CONCLUSIONS AND IMPLICATIONS

Combining methods from pseudo-experiments and field-experiments, this study finds a robust reduction in the willingness to serve same-sex couples after the Supreme Court *Masterpiece* decision, as compared with opposite-sex couples. The negative effect of *Masterpiece* on same-sex couples is evident in the population of businesses that prior to *Masterpiece* were willing to provide service to same-sex couples, as well as in the entire sample of businesses drawn from four different legal regimes in different US States. We see the causal effect of *Masterpiece* both within businesses, over time, and between businesses randomly contacted by same-sex or opposite-sex couples after the decision was rendered. The negative effect of *Masterpiece* is not an artifact of the experiment, as it is identically found in the control group.

What explains the effect of the *Masterpiece* decision on wedding vendors? The first aspect of this question relates to the *cognitive mechanisms* that translated *Masterpiece* to behavioral change. First, *Masterpiece* may have been interpreted as relieving a previously-anticipated penalty for discrimination or reducing the likelihood of enforcement (Becker 1968). Yet this explanation

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<sup>38</sup> A 17.2 pp vs. 3.6 pp gap, respectively (High-density N=144; Low-density N=110;  $Z=3.133$ ,  $p = .0017$ ).

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appears less plausible given the design of the experiment and the observed data. The experiment eliminated the risk of getting caught by design, as emails allowed vendors –both before and after *Masterpiece* – to entirely avoid detection, by simply ignoring the sender. In addition, vendors changed their behavior even in regimes that do not prohibit sexual orientation discrimination (Figure 2). A more likely possibility is an expressive effect (McAdams 2000; Sunstein 1996), i.e. that the decision led vendors' to perceive the social norm as more permissive of service refusal to same-sex couples. This explanation is supported by Tankard and Paluck (2017) and Kazyak and Stange (2018) who found that the *Obergefell* decision shaped individuals' perceptions of the social norm regarding same-sex marriage. Whereas the *Obergefell* court emphasized marriage equality, the *Masterpiece* court stressed the need to tolerate religious objection to marriage equality. The decisions may have had similar effects on social norm perceptions, only in opposite directions.

The second explanation for the effect could be the *social environment*, and particularly its religiosity, as businesses in religiously-dense areas updated their behavior substantially more than businesses in less religious areas. This may be explained by a greater concentration of religious vendors in these areas, or greater diffusion of conservative frames of the decision that may have influenced also non-religious vendors. The precise mechanism by which religion translated *Masterpiece* to negative consequences should be examined in future studies.

The findings from the *Masterpiece* experiment have several important theoretical implications. First, the experiment indicates that the Court can extend its influence beyond shaping public attitudes to shaping behavior itself. Second, the novel examination of the interaction between national and subnational legal structures highlights that the Court's effects can vary between legal regimes, sometimes in unexpected ways. In the present setting, *Masterpiece* had an effect in

regimes that were not supposed to be influenced from the decision (no AD regimes) and had no effect in regimes where change were expected (AD+RFRA regimes). These results underscore the need to account for subnational variation in future studies. Third, the study sheds new light on the argument that courts are ineffective at spurring social change (Rosenberg 2008), by highlighting the risk that the court will be effective, paradoxically, in spurring *inadvertent* social change. Rosenberg argued that courts are incapable of shaping public opinion but they may produce backlash by mobilizing opponents to block further rulings or reverse existing ones by means of legislation (Rosenberg 2008, pp. 362-370; 418-19). This study adds another risk to this list: that unsuccessful litigation will produce the opposite social consequences, independent from any political mobilization, by influencing market players. The *Masterpiece* Court clearly worried that its decision might increase discrimination against same-sex couples, a concern which may have contributed to the narrow ruling. Were the consequences different had the Court provided a bright line rule rather than “something for everyone”? This question could be explored in future studies.

Last but not least, the present study brings crucial and heretofore unobserved data to bear on a central normative question in constitutional law, one that is essential to the resolution of conflicts between equality and freedom. First, the results discredit the argument that religious exemptions will not expand discrimination. Instead, what the *Masterpiece* experiment shows is that even a narrow exemption can have a significant and robust impact on a market and its customers. These findings advance the debate on the impact of religious exemptions: now that data are available, more nuanced analyses can be performed: We can estimate the actual, aggregate risk of discrimination (which, as I showed above, is likely to be very high); and we can direct research efforts to the factors that are found to aggravate or attenuate the risk (including legal regime and

religious environment), and divest efforts from arguments that have been contradicted in fact (including that discrimination is not an issue in urban or progressive areas). These findings provide concrete guidance for future research.

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**Exhibit 2**

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION**

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**Chelsey Nelson Photography LLC and  
Chelsey Nelson,**

Plaintiffs,

v.

**Louisville/Jefferson County Metro  
Government; Louisville Metro Human  
Relations Commission-Enforcement;  
Louisville Metro Human Relations  
Commission-Advocacy; Verná Goatley,**  
in her official capacity as Executive  
Director of the Louisville Metro Human  
Relations Commission-Enforcement; and  
**Marie Dever, Kevin Delahanty,  
Charles Lanier, Sr., Leslie Faust,  
William Sutter, Ibrahim Syed, and  
Leonard Thomas,** in their official  
capacities as members of the Louisville  
Metro Human Relations Commission-  
Enforcement,

Defendants.

**Case No. 3:19-cv-00851-BJB-CHL**

**Rebuttal Expert Report of George  
Yancey, Ph.D.**

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I have been retained by Plaintiffs Chelsey Nelson Photography LLC and Chelsey Nelson, through their counsel, Alliance Defending Freedom, to serve as a rebuttal expert in *Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metro Government*, Case No. 3:19-cv-00851-BJB-CHL. I submit the following report in rebuttal to Professor Netta Barak-Corren's June 30, 2021 report in this matter.

**I. Educational Background and Professional Credentials.**

1. I am a tenured Professor of Sociology at Baylor University with a joint appointment in the Department of Sociology and the Institute for Studies of Religion. I received my Ph.D. in Sociology from the University of Texas at Austin in 1994, my M.A. in Economics from the University of Texas at Austin in 1989, and my B.A. in Economics from West Texas State University in 1985.

2. To date, I have authored or co-authored 14 academic books and thirty-nine peer reviewed articles. I have co-authored a book (Yancey and Brunson 2018) explaining how individuals in the media shape stories according to their racial, gender, and religious biases. I have also published on other subjects including media and academic bias, institutional racial diversity, racial identity, and anti-Christian attitudes. I have been published in the *American Sociological Review*, the top-rated journal in sociology. Another of my publications won the Charles J. Miller Christian Scholar's Award which is given to the best article of the year in *Christian Scholar Review*.

3. I bring special expertise to the topics raised by Professor Barak-Corren's report as it concerns the potential effect on Christian communities. This expertise comes from my peer-reviewed work on anti-Christian hostility (Yancey and Williamson 2014, Yancey 2010) and the treatment of Christians by those with high levels of cultural power (Yancey and Brunson 2018, Yancey 2011). I have been recognized as one of the few scholars who have studied anti-Christian bias in the

United States (Shellnutt 2017) and may arguably be the most prominent expert on that subject.

4. I also have experience in producing peer-review qualitative and quantitative empirical work and have acted as a reviewer for the top sociological journals, including *American Journal of Sociology* and *Social Forces*. This experience includes, but is not limited to, assessing experimental techniques, determining the viability of qualitative methodology to comprehend the actions of social actors, and applying statistical analysis to the understanding of sociological phenomenon. I also have used audit research (defined below) in my previous publication concerning media bias (Yancey and Brunson 2018). In that book we sent out surveys with contrasting potential media stories to see if reporters would react differently if certain racial, sexuality, religious or political characteristics were altered in those stories. This work informs my awareness of the strengths and weaknesses of audit approaches as well as the way bias affects the way media stories are presented.

5. A fuller review of my professional experience, publications, and awards is provided in my curriculum vitae, a copy of which is attached as Exhibit A. In addition to the publications listed in Exhibit A, I have published on the following websites: <https://www.patheos.com/blogs/shatteringparadigms/2017/07/welcome-to-shattering-paradigms/>; <https://www.christianitytoday.com/edstetzer/2020/august/white-fragility-order-of-unity.html>; <https://www.christianitytoday.com/ct/2015/march-web-only/what-christianophobia-looks-like-in-america.html>; <https://stream.org/california-universities-religious-discrimination-problem/>; <https://spiritualdirections.tumblr.com/post/626881579992662017/not-white-fragilitymutual-responsibility>; <https://www.thepublicdiscourse.com/author/george-yancey/>; and <https://www.thegospelcoalition.org/profile/george-yancey/>.

6. This is my first engagement to provide expert services in connection with litigation. I am being compensated for my services at a rate of \$200/hour. My compensation does not depend in any way on the outcome of this litigation, or the opinions stated herein.

7. In this rebuttal report, I provide my expert views, with reference to my own scholarship, other academic literature, and other cited materials, on two questions:

- Does Professor Barak-Corren's report support the conclusion that a judicially created religious exemption for Plaintiffs' photography and editing services from Louisville's Metro Ordinance (§ 92.01, et seq.) will significantly increase the likelihood that same-sex couples will be denied services because of their sexual orientation when attempting to hire photographers in Louisville, Kentucky?
- Does Professor Barak-Corren's report adequately account for the potential costs to religious freedom if Louisville's Metro Ordinance (§ 92.01, et seq.) is allowed to force Plaintiffs to create photographs and blogs to celebrate same-sex marriage in violation of their religious beliefs?

## **II. Summary of Opinions.**

8. In my opinion, Professor Barak-Corren's report cannot determine the potential effect on same-sex couples of a religious exemption from Louisville's Metro Ordinance for Plaintiffs' photography and editing services. I explain the basis for this opinion in Section III below. It is also my opinion that Professor Barak-Corren's report does not sufficiently account for the converse of her conclusions, i.e., how the lack of a religious exemption for Plaintiffs in this case could limit religious freedom and how the loss of that freedom will impact the larger society. I explain the basis for this opinion in Section IV below.

9. In developing my opinions in this matter, I reviewed and/or relied on Professor Barak-Corren's report and her forthcoming papers Netta Barak-Corren, A License to Discriminate? The Market Response to *Masterpiece Cakeshop*, 56(2), Harvard Civil Rights-Civil Liberties Law Review (forthcoming 2021) ("HCRCL") and Netta Barak-Corren, Religious Exemptions Increase Discrimination Towards Same-sex Couples: Evidence from *Masterpiece Cakeshop*, Journal of Legal Studies (forthcoming 2021) ("JLS").<sup>1</sup> I also reviewed and/or relied on Professor Barak-Corren's online appendix and anonymized data and code (available at [https://osf.io/ve5yn/?view\\_only=8853549b0fc248afb793ef41d4e953f8](https://osf.io/ve5yn/?view_only=8853549b0fc248afb793ef41d4e953f8)). I also reviewed and/or relied on Plaintiffs' Complaint. Furthermore, I reviewed and/or relied upon the academic articles and other materials cited in this report and/or listed below as references as well as my background as researcher in forming my opinions.

**III. The Report cannot assess the potential impact of a ruling in favor of Plaintiffs on discrimination against same-sex couples in Louisville, Kentucky.**

10. The Report is unable to show that same-sex couples in a specific area (Louisville, Kentucky) will be adversely impacted by a court ruling in favor of Plaintiffs with the current data. The Report uses an audit study design. An audit study is a type of study used to test for potential discrimination where investigators pose as fictitious customers who differ by one key factor, send requests to experimental units, and then the study compares treatment and control groups on a dichotomous outcome. For example, in the Report's study, auditors differed by sexual orientation (the key factor), sent requests to wedding vendors (the

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<sup>1</sup> For clarity, I will refer to Professor Barak-Corren's report in the remainder of this rebuttal as "the Report." When I reference the "Report" I am referring to her written report, her article A License to Discriminate? The Market Response to *Masterpiece Cakeshop*, and her article Religious Exemptions Increase Discrimination Towards Same-sex Couples: Evidence from *Masterpiece Cakeshop*.

experimental units), and measured responses (the dichotomous outcome). The key in audit studies is to keep all characteristics of the fictitious customers the same and only change the one factor being tested. That way the test can determine if the experimental units react differently to the changed characteristic.

11. But the Report here used multiple contacts to the same vendors. This creates several problems with the audit. First, there is the possibility of a fatigue effect where the experimental units (e.g., wedding vendors), no longer respond to the audit. As I explain below, this may have led to a problem of attrition between waves 1 and 2 of the Report, a problem which significantly undermines the Report's findings.

12. Second, repeated audits may allow the sampled wedding vendors to suspect they are being studied. For example, Barak-Corren noted twelve instances of explicit or implicit suspicion and identified several additional instances of suspicion in follow-up telephone calls. (Appendix pp. 10-11, 13-14). Despite Barak-Corren's attempts to account for those possibilities, it is not possible to completely control for the effects of the problems identified in paragraphs 11 and 12 because of the study's design.

13. A third problem is the way the Report contacts the same business multiple times, specifically that Barak-Corren must fashion different emails for each hypothetical couple. (Appendix p. 1-10). This is problematic because the use of different emails in Barak-Corren's study introduces the potential problem that vendors react differently to the contrasting ways the emails are worded. In my research using an audit study (Yancey and Brunson 2018), I handled this problem by including enough respondents so that I could provide half of the respondents with the treatment condition and half with the control condition. But other than the experimental treatment, my audit study used the same documents. Other researchers have tried to alleviate the problem posed by different content in

requests by rotating many different content among the respondents. This minimizes the impact that minor variations in only two inquires (for example, the use of a general date in waves 1 and 2 and a specific date in waves 3-4 in Barak-Corren's study) has on the experimental unit's outcome. (Neumark, Bank, and Van Nort 1996).

14. The issue of content differences is compounded by Barak-Corren's strategy to send out the emails in waves. For example, emails to photographers in wave 1 (emails from purported same-sex couples) asked for the services to be provided in April generally. (Appendix p. 2). But emails to photographers in waves 3 and 4 from purported same-sex couples identified a specific date in May for their proposed wedding. (Appendix pp. 4-8). Then Barak-Corren coded a suggestion of a different date in wave 1 as a positive response but coded a suggestion of a different date in waves 3 and 4 as a negative response. (Appendix p. 29 n.16). The change in the date for the requested services combined with the coding differences in the responses compound the problem of the change in the email content. We cannot know how the vendors would have reacted to identical emails where the only difference was whether the couple was the same or different sex. An approach that is more appropriate and more widely accepted in the field of audit studies would have been for Barak-Corren to send out emails from same-sex testers to half of the vendors and emails from opposite-sex testers to the other half of the vendors. Then after the *Masterpiece* decision, she should have sent out identical emails of the opposite type of couple to those wedding vendors (so that a wedding vendor who received an email from a same-sex couple before *Masterpiece* would receive an email from an opposite-sex couple after *Masterpiece* and vice versa). As it stands, these problems alone make it difficult to have any confidence in the Report's findings since different wording and timing in emails likely affected the propensity of a wedding vendor to respond to an email.

15. The analysis in the Report is bivariate, meaning that the Report tests two variables: the purported customer's sexual orientation and the vendor's response. Barak-Corren provides a multivariate analysis (meaning an analysis measuring more than one outcome variable, like AD law, RFRA, Republican vote rate) in the Appendix to try to determine whether the relative power of a single variable (i.e., sexual orientation) affects a given statistical relationship (the likelihood of a positive response). (Appendix pp. 15-17, 20, 23, 25). But one of the assumptions of the linear or logistic regression analysis used in the Appendix is that the vendors' characteristics are not related to each other. When I say a regression analysis, I mean the method for measuring the relationship between a dependent variable (in this case a positive or negative response to providing a service for a same-sex wedding) and one or more independent variables (such as whether the vendor lives in an AD state or RFRA state, Republican vote rates, etc.). This assumption is violated, though, when drawing cases from only four states and using the characteristics of those states (i.e., +/- AD and +/- RFRA) as potential independent variables. Because the vendors come from the same states and vendors within the same jurisdictions share AD/RFRA characteristics, the vendors are "nested."

16. A nested dataset means that the subject data come from the same cluster (e.g., students in a classroom or vendors from the same geographical region). When you have a nested dataset, the researcher cannot run a linear or logistic regression analysis because those analyses assume the individuals' independence. But vendors nested in the same geographic cluster are more likely to behave the same way—and therefore be more dependent. For example, by coming from the same jurisdiction, these vendors share social contexts in a variety of ways, such as socialization patterns, traditions, attitudes, outlooks, and professional goals.

17. To account for this issue, the research must use some type of multilevel modeling to disaggregate the clustered subjects from their cluster. For example, in

the Report, a multilevel model could include assessment of the data on multiple levels such as the level of the individual (level 1), possibly the level of the county or municipality (level 2), and the level of the state (level 3). This would make any inferences more accurate by reducing standard errors and increasing the chances of locating more significant relationships. Stated differently, a multilevel model would increase the accuracy of predicting whether certain variables (i.e., sexual orientation of the purported customer, income level of the wedding vendor, etc.) are significant in determining likely positive or negative responses. By failing to use a multilevel model, the conclusions in the Report possibly overestimate the potential impact of a ruling in Plaintiffs' favor by downplaying the possible significance of independent variables other than a couple's sexual orientation.

18. I also question how much we can assert about the effect of same-sex status on the customer's ability to receive services given the relatively low number of independent variables in the Report's regression models. The Report relies on discussing a few state-level characteristics (religiosity, attitudes towards homosexuality, Republican vote) to assess a particular metropolitan area (Louisville). (e.g., Report ¶¶ 19-23). But it is risky to rely on so few variables to predict what will occur in Louisville. We simply do not know if those variables sufficiently explain the results. Without the inclusion of other independent variables (e.g., income level, education, percent of population that are sexual minorities, racial makeup) in a robust multivariate model, we can only speculate about the potential of discrimination against same-sex couples in Louisville. A multilevel regression model would provide important information such as whether the effect of different types of couples can be explained by differences in other variables. This is critical if we are going to make assertions about whether these results indicate whether the status of same-sex couples leads them to face discrimination. Are the number of variables used by Barak-Corren sufficient for us

to have confidence that she has captured alternative explanations of differential treatment by the couples? It is impossible to say because the regression models did not have any measurement of coefficient of determinants. So I could not determine how much of the variation in responses was due to the other variables which could affect response rate. Coefficient of determinants tell us the degree to which vendors' willingness to respond to emails is tied to the independent variables in the models such as the sexual orientation of the couple or some other variable (i.e., income of wedding vendor, education level of wedding vendor, etc.). In other words, coefficient of determinants would help to explain how one factor (i.e., a positive or negative response) can be caused by its relationship to another related factor (i.e., sexual orientation of the couple or income, race, or political affiliation of the wedding vendor). The higher the coefficient, the more likely that relationship would lead to a particular conclusion. Do the variables in Barak-Corren's model ( i.e., sexual orientation, political population, religiosity) explain half of that willingness? Ten percent? Half of one percent? We cannot know without any measurement of coefficient of determinants.

19. My inclination is to include as many independent variables as possible regardless of the size of coefficient of determinants. The exclusion of other social and demographic measurements (such as income level, education, percent of population that identify as LGBT, or support for LGBT issues) indicates that we will not know if those other variables explain the relationship between a couple's same-sex status and their ability to find a wedding vendor. For example, it may be that certain metropolitan areas contain a high percentage of African-Americans who tend to be more religious than whites (Smith et al. 2002, Yancey 2005) and may be less supportive of sexual minorities (Lewis 2003, Glick and Golden 2010). Without racial controls, we do not know if the results in the Report would be mediated with the inclusion of a racial makeup variable. Nevertheless, we cannot

determine the degree to which religiosity or attitudes towards homosexuality matter in the potential effects observed in the current data because the Report does not account for additional variables and cannot assess the particular results in Louisville.

20. But even if the Report included sufficient independent variables and utilized the proper statistical techniques (which it does not), we still cannot state that we know what will happen in Louisville. We would be limited in making assessments of how a ruling in favor of Plaintiffs will impact individuals in this particular metropolitan area. Sociological methodology does not allow us to determine what will happen in a particular case. It only allows a prediction, and that prediction will always be incomplete. For example, if you told me a person was five feet ten inches tall and asked me to guess the sex of that person, I would say that this person is a male. Regression models can show that men are taller than women even after all appropriate controls (such as income and nutrition content) have been utilized. Since five feet ten inches is taller than the average height for women, I will be right more times than wrong. But I could generally be wrong if the sample size included only women from the WNBA. I will also always be wrong if the person in question is Brittney Griner (a 6 foot 9 inches tall WNBA basketball player), Maria Sharapova (a 6 foot, 2 inches tall profession tennis player), my first adult girlfriend (who was 6 foot, 4 inches tall), or many other above-average woman. Similarly, solid systematic work can be predictive over a large number of metropolitan areas, but it is much less reliable when predicting the actions of persons within a specific city or county. The Report's findings, as applied to Louisville, are speculative and cannot be an accurate prediction of what will happen in Louisville in the event of a favorable ruling for Plaintiffs.

21. Beyond the statistical limitations, there are also methodological assumptions made by Barak-Corren in the Report that affect its usefulness in this particular

court case. One of the first problems is the short-term nature of the study. Barak-Corren argues that a change in social norms allows vendors to perceive service refusals to be more permissible (HCRCL pp. 38, 47-48; JLS p. 37), which allows even formerly “gay-friendly” businesses to decline wedding services to perceived same-sex couples. Yet this argument assumes that these attitudes will persist over time. But the Report’s research design does not measure long-term effects. To the degree the Report measures attitudinal change, there is no guarantee that such a change will be lasting.

22. To illustrate the likely temporal nature of attitude changes, we can examine the literature on diversity training and prejudice reduction. In contrast to a single public event, individuals in diversity training are subject to an intense program with the aim to reduce their prejudice. Generally, there is a short-term reduction of prejudice. Yet meta-analysis research on prejudice reduction indicates that six months after such a program, individuals exhibit similar levels of prejudice than they had going into the program (Bezrukova et al. 2016).

23. Given what we know about the inability of diversity programs to produce long-term change, the burden is on the Report to show that a single court case will impact attitudes long-term. But if individuals are unlikely to alter their long-term racial prejudices after an intense program designed to produce such attitudinal alterations, then it is highly unlikely that a significant number of individuals alter their long-term attitudes after a single court verdict. To the degree that the Report has captured any attitudinal change, it is doubtful that this change is permanent or even long-lasting.

24. By contrast, an adverse ruling against Plaintiffs in this case could have an ongoing damaging impact on the religious freedom of religious groups who share Plaintiffs’ views on marriage as I will assess in Section IV.

25. It should also be noted that there was not a differentiation of the effects between photographers, bakers, or florists in the bivariate presentation of Barak-Corren's research in Table 5. (JLS pp. 24-25). In her regression analysis, there is an attempt to measure whether photographers, bakers, or florists have different propensities to offer services in general. This measurement is noted in the tables as an "Agreement to Provide Service." (Appendix pp. 23-28). But I could not find a direct measurement of differences between photographers, bakers, and florists in their explicit declines to provide a service for a same-sex couple because of their sexual orientation. That is an important omission and requires the Report's conclusions to be based on the assumption that all types of wedding vendors respond to all requests for services equally because Barak-Corren equates a "no response" to a decline in waves 3 and 4. (HCRCL pp. 38-39; JLS p. 26). If explicit refusals of service are nearly identical between photographers, bakers, and florists though, then this should be part of the research. Such a finding would not be conclusive, but it would indicate that we have reason to believe that there is a similar effect across all wedding vendors. Without such information, it is unrealistic to believe that all different types of wedding vendors will treat all requests for same-sex weddings equally. In fact, Barak-Corren notes that vendors do not respond to requests for services equally. Barak-Corren notes that photographers "were less likely to agree to provide service than bakers and florists" and hypothesized that "photographers might be pickier in general about their customers as they are more intimately involved in the wedding than bakers and florists." (Appendix p. 17 n.11). But Barak-Corren assumes photographers, bakers, and florists respond to all requests similarly to predict an increase in same-sex discrimination across all wedding vendors. Without some evidence that wedding vendors will act in similar manners when processing requests for services, that assumption is not sustainable. Indeed, it is possible that there may be certain types

of vendors who prefer same-sex marriages to opposite-sex marriages and their inclusion would dramatically lower, or even possibly erase, any impact on same-sex couples.

26. There are also questions about whether the Report's experimental design reflects reality. An experimental design is when a researcher introduces a population to a situation that is normal (control group) and one that includes the characteristic the experimenter wants to learn about (treatment group).

Experimental designs are useful because they allow the research to control for all possible effects except the one being studied. Indeed, as I explained above (paragraphs 11-14), part of my disappointment with Barak-Corren's treatment of the email messages is that by offering different emails from same-sex and opposite-sex couples, she allows for the possibility of different content to impact the results, instead of having a pure study concentrated on same-sex/opposite-sex differences.

27. However, even in the best of circumstances, the artificial nature of this experiment does not allow it to reflect reality. For example, this research is based only on email communication. At best, this research may indicate the potential actions of wedding vendors when contacted by emails. It is unclear how often a couple uses email as opposed to social media messaging or phone or face-to-face conversations to initiate a request for wedding services. Barak-Corren states that it is common to communicate with wedding vendors via email (HCRCL pp. 32-33), but I did not see any statistics on how often emails are the first contact for wedding vendors or any analysis about whether photographers, bakers, or florists have different preferences for the initial inquiry. Barak-Corren also assumes that same-sex couples will require multiple services to be obtained through cold calling different wedding vendors (HCRCL p. 7), but she supplies no evidence that this is the typical experience for wedding couples. Without such information, it is

impossible to calculate even a baseline prediction of the extent of discrimination same-sex couples may face.

28. Barak-Corren argues that using emails instead of real individuals in an audit study reduces the chances of accidental bias by real life auditors. (JLS pp. 20-21). However, it is quite possible that the email audit technique increases the possibility of false negatives. The classic work of LaPiere (1934) strongly suggests that individuals are more tolerant in person than they are through a remote medium. LaPiere sent mail correspondence to hotels to see if they would accept a Chinese guest. The vast majority (over 90 percent) of the hotels stated that they would not accept a Chinese guest. Yet when LaPiere went to the hotels with a Chinese couple only one of sixty-six hotels refused the couple a room. Mailing correspondence is a poor predictor of how individuals are likely to act. Accordingly, I would expect that email correspondence to be a poor predictor of how wedding vendors would react to face-to-face or phone contacts or direct social-media messaging. LaPiere's work suggests that more personal contacts are more likely to elicit a supportive response than an email inquiry. Barak-Corren's research supports LaPiere's conclusions. For example, of the wedding vendors who answered phone calls requesting services for a same-sex wedding, eighty-three percent of those who answered the phone responded favorably to the request and only one vendor (unidentified by service type) declined because of an objection to same-sex weddings. (Appendix p. 14 n.9).

29. I find the attrition (i.e., non-responses) between wave 1 and wave 2 to be problematic to the Report's conclusions as well. The response rates in waves 1 and 2 were 70.8% and 58.7% respectively. (HCRCL p. 36; JLS p. 21). Since the first wave inquired about services for same-sex couples and the second wave inquired about services for opposite-sex couples, this non-response cannot be due to hostility towards same-sex couples. Yet Barak-Corren codes non-responses in waves 3 and 4 as discrimination against same-sex couples. (HCRCL pp. 38-39; Appendix pp. 15,

20, 23, 25). She argues that the greater attrition (i.e., non-response) for same-sex couples in waves 3 and 4 is due to discrimination. (HCRCL pp. 38-39; Appendix pp. 15, 20, 23, 25). Yet same-sex couples were more likely to receive responses in wave 1 than opposite-sex couples in wave 2. Applying Barak-Corren's logic of attrition in waves 3 and 4 to waves 1 and 2 would lead to the conclusion that businesses discriminated more against opposite-sex couples than same-sex couples prior to *Masterpiece*. But this result calls into question the idea of using attrition (or non-response) as a measurement of discrimination. Since there are other reasons for possible non-response (differences in email language between waves, lost emails, failed business, change in response policies, business is overbooked, vendors vacation more in June when waves 3 and 4 were sent), it is possible that businesses that were more responsive to same-sex requests in wave 1 are more vulnerable to other reasons for attritions and thus were less likely to respond in waves 3 and 4. I note that Barak-Corren's telephone survey identified many reasons for non-responses, including "various reasons for not responding" such as "having intended to respond." (Appendix p. 14). The use of a more traditional audit study where half of the businesses received identical inquiries from the same-sex couple and half from an opposite-sex couple would have helped answer this question, but it is not possible to replicate that design from this point forward.

30. Barak-Corren argues that the *Masterpiece* case changes attitudes towards religious exemptions, making it more plausible for discrimination against same-sex couples to take place. (HCRCL pp. 38-40, 46-49). Yet the *Masterpiece* case wasn't a religious exemption case, and indeed the Supreme Court did not rule on the viability of a religious exemption. The *Masterpiece* ruling was based on the presence of religious hostility by government officials. So, to make her argument that religious exemptions may lead to an increase in sexual orientation discrimination, Barak-Corren cannot use the ruling in the case itself. Instead, Barak-Corren relies

on how the media reports about the case. (HCRCL pp. 25-27). Most notably, she cites conservative media sources such as FOX news and Catholic News Agency. But they are a minority of the media sources reporting on the case, as Barak-Corren acknowledges. (HCRCL pp. 25-27). Barak-Corren must rely on one of two assumptions to reach her conclusions.

31. First, Barak-Corren could be assuming that most media covered *Masterpiece* positively as a religious exemption case. But I do not think this assumption is justifiable. My research suggests that most of the media is not sympathetic to conservative Christians, generally defined as conservative Protestants (which would include Southern Baptists) who are likely to share Plaintiffs' beliefs about marriage. (Yancey and Brunson 2018). My co-author and I showed that when given competing scenarios, media personnel are more likely to emphasize free speech rights when speech is aimed at criticizing Christians than when free speech is directed at objecting to same-sex marriage. It is unlikely that general media coverage of the *Masterpiece* decision focused on a positive assertion of the right of conservative Christians to exercise their religious freedom. It seems more likely that most news coverage criticized the opinion or presented the case as a narrow opinion, not as a religious exemption case, and/or criticized the opinion. Barak-Corren even confirms that "[a]ll mainstream outlets" reported the decision as "narrow." (HCRCL p. 25). Barak-Corren's potential assumption that a few conservative media outlets created a generally favorable media atmosphere for conservative Christians and for broad religious exemptions goes against current research on religious media bias. (Kerr 2003, Kerr and Moy 2002, Yancey and Brunson 2018).

32. Second, Barak-Corren could be assuming that the vendors who responded negatively or with no-response in waves 3 and 4 were exposed only or primarily to conservative media sources. But this assumption is not justifiable either because Barak-Corren did not provide any evidence about which vendors were exposed to

what news coverage. Barak-Corren also does not differentiate the responses between vendors who consume conservative media sources and vendors who consume mainstream or liberal media.

33. In sum, for the reasons I have described above, I must conclude that the Report cannot determine the potential effect that a religious exemption from Louisville's Metro Ordinance for Plaintiffs' photography and editing services would have across all wedding vendor's willingness to provide services for same-sex couples in Louisville or anywhere else. However, the lack of such an exemption could come at considerable costs of religious freedom to the larger Christian communities, a factor Barak-Corren also did not adequately consider. I will do so in the next section.

**IV. The Report does not assess the potential harm an adverse ruling against Plaintiffs may inflict on Christian vendors.**

34. It is essential to weigh the issues of sexual-orientation antidiscrimination laws and religious freedom. Barak-Corren argues that a favorable ruling for Plaintiffs will change the social atmosphere in such a way as to make discrimination against same-sex couples by wedding vendors more acceptable. (HRCLC pp. 46-49). I question whether her analysis adequately measures this potential change in our social atmosphere and urge caution in using this assertion as a basis for a ruling, as I discuss in Section III. By contrast, it is also plausible that a ruling against Plaintiffs—meaning a court finding that the Metro Ordinance requires Plaintiffs to create photographs and blogs contrary to their religious beliefs—could threaten religious freedoms by making Christian communities vulnerable to attack. Barak-Corren does not consider this possibility.

35. Predicting how this case will affect the larger Louisville community with absolute certainty is not possible with even the best sociological techniques. However, Barak-Corren has derived her prediction based on either bivariate

analysis of type of couple and type of response (which cannot assess causality) or regression models that fail to account for other independent variables (income, race, etc.) and failed to use a coefficient of determination to measure causal connections, as I explained in Section III. In contrast, in my work, I rely on both qualitative and quantitative analysis. My assessment about the characteristics of those likely to reject Christians (Yancey and Williamson 2014) and my assertion that many individuals favor those in the LGBT community due to apathy towards Christians (Yancey 2018) are based on regression models using national probability data and use a reliable number of social and demographic independent variables as controls. The nature of that animosity and the willingness of those with it to take away the rights of Christians are shaped by qualitative analysis of hundreds of respondents (Yancey and Williamson 2014) and experimental research not burdened by the content and timing issues of Barak-Corren's work (Yancey 2013). Overall, the empirical evidence presents a stronger possibility of the potential detrimental effects on the Christian community than the evidence of potential detrimental effects on same-sex couples. For these reasons, as well as the additional reasons explained below, it is reasonable to argue that an adverse ruling against Plaintiffs could possibly lead to more loss of rights by Christians compared to the potential loss of services by same-sex couples in the event of a favorable ruling for Plaintiffs.

36. Recent research I have conducted indicates that some individuals favor members of the LGBT community due to their antipathy towards conservative Christians, as defined by the respondents in the study. (Yancey 2018). For example, in an academic book (Yancey 2013), I used a scenario in a survey asking respondents how much they would punish a Christian landlord who refused to rent an apartment to a same-sex couple. Nearly fifty percent of those that demonstrated hostility towards Christians wanted a maximum fine (\$10,000) while only about fifteen percent of those that did not demonstrate hostility towards Christians

wanted the maximum fine. It is not surprising that those with animosity towards Christians are much more likely to pronounce the highest punishment possible when provided an opportunity to punish Christians. The support and implementation of sexual orientation anti-discrimination laws can provide individuals with anti-Christian animosity the opportunity to punish Christians. This is not to say that all individuals eager to enforce such laws have such animosity or that we cannot have laws to protect against sexual-orientation discrimination. But this research does point out the importance of building safeguards into such laws to protect conservative Christians from aversive effects.

37. We have already seen examples of the link between hostility towards conservative Christians and sexual-orientation antidiscrimination laws. The *Masterpiece* decision turned largely on the anti-Christian comments of the members of the Colorado Civil Rights Commission and how the Commission treated Jack Phillips differently from three other bakers because of his religious objection to creating a wedding cake celebrating a same-sex wedding.

38. Indeed, since *Masterpiece* was decided, Jack Phillips has been sued two more times. In one case, a federal judge in *Masterpiece Cakeshop Incorporated v. Elenis*, 445 F. Supp. 3d 1226 (D. Colo. 2019) found that it was plausibly alleged that the Colorado Civil Rights Commission again demonstrated hostility towards Jack Phillips and may have prosecuted him in bad faith for declining to create a custom cake that violates his religious beliefs. After that case was dismissed, a private litigant sued Jack Phillips again for declining to create that cake. Amended Complaint, *Scardina v. Masterpiece Cakeshop Inc.*, Case No. 2019CV32214 (Colo. Dist. Ct. May 13, 2020).

39. The very framing of the Report can make discrimination against Christians more possible. Barak-Corren's argument is that *Masterpiece* has led to an increase in discrimination against same-sex couples due to religious exemptions from

antidiscrimination laws. But *Masterpiece* did not grant a religious exemption. It was a religious hostility case that found the government acted with hostility. The underlying assumption of the Report's argument is that courts should allow religious hostility against religious wedding vendors to avoid same-sex discrimination.

40. It is also important to explore who is likely to possess anti-Christian hostility. In my previous work, I documented that those with hostility towards conservative Christians are more likely to be well-educated (meaning at least a college degree), wealthy, politically progressive, and non-religious. (Yancey and Williamson 2014, Yancey 2010). These are also fairly accurate descriptions of two groups that have been documented as discriminating against conservative Christians: academics (Yancey 2011, Hyers and Hyers 2008, Gartner 1986) and media personnel (Yancey and Brunson 2018, Kerr 2003). Furthermore, higher education and political progressiveness also predict prejudice against conservative Christians (Yancey and Williamson 2014). To the extent that administrators responsible for enforcing sexual-orientation antidiscrimination laws have college degrees and are politically progressive, then there is reason to believe that such rules would not be enforced in a neutral manner against conservative Christians and in fact may be enforced more rigidly than in other circumstances.

41. If Plaintiffs and those who hold similar beliefs about marriage are not allowed a religious exemption from the Metro Ordinance (and especially if administrators of such laws have a higher propensity to rule against conservative Christians), then Plaintiffs and those with their religious beliefs lose rights to self-expression not denied to other individuals. In this case, the rights of a photographer are at stake. Photographers make artistic decisions as Plaintiffs explain in their Complaint. They can create their photos to express and promote their values. If courts do not protect Plaintiffs' free-speech and free-expression rights, then the

freedom to exercise those rights become tied to the expression of acceptable secular or religious beliefs as determined by the administrators of the Metro Ordinance.

42. The potential cost to Christian communities is possibly higher in the case of an adverse ruling than the potential cost to same-sex couples in the case of a ruling in Plaintiff's favor for other reasons. A positive ruling for Plaintiffs does not require members of the LGBT communities to violate their strongly held norms and values. This is not the case for those in conservative Christian communities. Instead, individuals external to Christian communities (potential consumers and government officials) will assess and approve which values Christians can maintain in their businesses and occupations. I have cited previous court cases and sociological research indicating that those who tend to have anti-Christian sentiment are unlikely to apply the same rules to other social communities that they do to Christians.

43. While some people are tempted to think of religious freedom as issues relegated to only one's thoughts, families, and church/synagogue/mosques, this limited vision underestimates the full value of religious communities and the benefits they provide their members and the rest of society. Religiosity has been found to contribute to an individual's happiness (Childs 2010, Argyle 2003, Stavrova, Fetchenhauer, and Schlösser 2013), reduction of suicide (Ellison, Burr, and McCall 1997, Saiz et al. 2021, Gearing and Lizardi 2009), aid in the coping of trauma (Krause, Pargament, and Ironson 2017, Reiland and Lauterbach 2008), and marital stability/satisfaction (Brown, Orbuch, and Bauermeister 2008, Olson, Goddard, and Marshall 2013, Schramm et al. 2012, Wilmoth, Blaney, and Smith 2015), among other social benefits. These positive characteristics are not simply buttressed by individual's religiosity but also rely upon the social support of a religious community. (Olson, Goddard, and Marshall 2013, Galen, Sharp, and McNulty 2015, Crosby III and Smith 2015, Van Cappellen, Saroglou, and Toth-

Gauthier 2016, McClure 2017). Thus, for individuals to gain the full benefit of their religious belief system, they must have access to a larger religious community. Public-sector efforts that attack this community have the potential to reduce the potential pro-social benefits found within religious communities because these attacks will hinder the ability of those in the community to live out their stated values.

44. Costs of a loss of vitality from religious communities is not limited to those with faith but also to those who may benefit from those religious communities. Given the importance of religious communities in supporting both religious and non-religious charities (Regnerus, Smith, and Sikkink 1998, Brooks 2007), providing support for marginalized groups (Stivers 2011, Sherman 2017, Sullivan 2008), and acting as a buffer against criminality (Jang and Johnson 2001, Salas-Wright, Vaughn, and Maynard 2014, Desmond, Soper, and Kraus 2011, Kerley, Matthews, and Blanchard 2005), it is in the interest of the state to do what it can to aid religious communities. Given that previous research has indicated that highly educated and political progressives are more vulnerable to anti-Christian attitudes and are more likely to enforce antidiscrimination rules against Christian wedding vendors, (Bolce and De Maio 1999, Yancey and Williamson 2014), courts must be careful in how such rules are constructed and be relatively liberal in allowing for religious exemptions.

45. It is possible that an unfavorable ruling against Plaintiffs will inhibit the ability of Christian communities to continue to deliver prosocial benefits to the larger society because it could allow those outside the Christian community to pressure Christians to give up their stated values in order to deliver benefits to that society. In this current case, driving out conservative Christian wedding vendors reduces the services of those business and makes them less assessable to others. The ramifications of such decisions are possibly even greater when considering how

such rulings may eventually help to drive out Christian social work agencies (like foster care and adoption agencies), educational institutions, or perhaps even medical facilities. As suggested in the last paragraph, the loss of the ability of Christians communities to fully serve society will be felt by individuals both inside and outside Christian communities.

**V. Conclusion.**

46. In closing, Barak-Corren's report is not adequate to predict whether a decision in favor of Plaintiffs in this case will lead to more discrimination against same-sex couples in Louisville. Because of the weaknesses I pointed out, it is reasonable to assume that Barak-Corren has vastly overestimated the potential for discrimination against same-sex couples by wedding vendors in the event of a favorable decision for Plaintiffs. Barak-Corren's study also does not account for the possibility that the policies advocated for by Louisville/Jefferson County Metro Government would have an aversive antireligious effect on wedding vendors. I also anticipate that such policies could over time have a detrimental effect on valuable Christian communities and extract a toll on the larger society.

/s/ George Yancey  
George Yancey, Ph.D.

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- Yancey, George. 2013. *Dehumanizing Christians: Cultural Competition in a Multicultural World*: Transaction Publishers.
- Yancey, George. 2018. "Religious Likes and Dislikes as Potential Explanations for Support of Sexual Minorities." *Interdisciplinary Journal of Research on Religion* 14.
- Yancey, George, and Alicia L. Brunson. 2018. *Prejudice in the Press?: Investigating Bias in Coverage of Race, Gender, Sexuality and Religion*. Jefferson, NC: McFarland
- Yancey, George, and David Williamson. 2014. *So Many Christians, So Few Lions: Is there Christianophobia in the United States?* Lanham, MD: Rowman and Littlefield Publishers.

# EXHIBIT A

DR. GEORGE ALAN YANCEY

Professor

One Bear Place #97236  
Baylor University - Institute for Studies of Religion  
Waco, TX 76798

Education

1994 Ph.D., Sociology, (1994) University of Texas at Austin  
Dissertation Topic: "The Utilization of Weber's Elective Affinity to Reconcile the  
Macro and Micro Schools within Sociology of Science" (Advisor - Norval Glenn)  
1989 M.A., Economics, University of Texas at Austin  
1985 B.S., Economics, West Texas State University

Employment

2019 – Present Professor, Institute for Studies of Religion/Sociology, Baylor University  
2008 – 2019 Professor, Department of Sociology, University of North  
Texas  
2002 – 2008 Associate Professor, Department of Sociology, University of North  
Texas  
1999 – 2001 Assistant Professor, Department of Sociology, University of North  
Texas  
1996-1999 Assistant Professor, Department of Sociology, University of  
Wisconsin at Whitewater  
1993-1996 Visiting Assistant Professor, Division of Social and Policy  
Science, University of Texas at San Antonio  
1994-1996 Special Projects Consultant, Round Top Consulting Associates  
11901 Toepperwein Road, San Antonio, Texas 78233

Grants

2020 “Planning Grant for “Evaluation of Effectiveness of Faith Based, and  
Non-Faith Based Agencies in Creating Long Term Change in Homeless Clients”  
project. \$50,000  
2011-2012 “Administrative Support for Development of Christian Studies  
Initiative” funded by Apgar Foundation. \$25,000  
2009 “A Qualitative Examination of the Challenges Faced by Hispanic-  
American, First Generation College Students” \$14,695.49  
2003-2004 “Handling Cultural Differences Among Interracial Couples” Faculty Research  
Grant funded by the University of North Texas. \$3,500

- 1999-2001 “Multiracial Congregations and their People” funded by the Lilly Endowment. Co-Investigator with Michael Emerson. \$484,884.
- 1997-1998 “Course Development - “Biracial Families”” funded by the University of Wisconsin System Institute on Race and Ethnicity. \$750.

### Academic Books

- Yancey, George and Ashlee Quosigk (2021) *One Faith No Longer: The Transformation of Christianity in Red and Blue America* New York: NYU Press.
- Yancey, George, Laurel Shaler and Jerald Walz (2019) *Investigating Political Tolerance at Conservative Protestant Colleges and Universities* New York: Routledge.
- Yancey, George and Alicia Brunson (2018) *Prejudice in the Press?: Investigating Bias in Coverage of Race, Gender, Sexuality and Religion* Jefferson, NC: McFarland Publishers.
- Yancey, George and David Williamson (2014) *So Many Christians, So Enough Lions: Is There Christianophobia in the United States?* Lanham, MD: Rowman and Littlefield.
- Yancey, George. (2013) *Dehumanizing Christians: Cultural Competition in a Multicultural World* Piscataway, NJ: Transaction Publishers
- Williamson, David and George Yancey (2013) *There is No God: Atheists in America*. Lanham, MD: Rowman and Littlefield.
- Yancey, George and David Williamson (2012) *What Motivates Cultural Progressives*. Waco, TX: Baylor University Press.
- Emerson, Michael and George Yancey (2011) *Transcending Racial Barriers: Toward a Mutual Obligations Approach* New York: Oxford Press.
- Yancey, George (2010) *Neither Jew nor Gentile: Exploring Issues of Racial Diversity on Protestant College Campuses*. New York: Oxford Press.
- Yancey, George (2011) *Compromising Scholarship: Religious and Political Bias in Academia*. Waco, TX: Baylor University Press.
- Yancey, George and Richard Lewis (2008) *Interracial Families: Current Concepts and Controversies*. New York: Routledge

Yancey, George (2007) *"Interracial Contact and Social Change"*. Boulder, Co :Lynne Rienner Publishers

Yancey, George (2003) *Who Is White?: Latinos, Asians, and the New Black/Nonblack Divide*. Boulder, Co :Lynne Rienner Publishers

DeYoung, Curtiss, Michael Emerson, George Yancey and Karen Chai (2003) *United by Faith*. Oxford: Oxford University Press.

### Refereed Publications

Yancey, George "Is Christianity Still a Dominant Group in the United States" (2021) *Journal of Contemporary Religion* 36(1): 143-160

Yancey, George (2018) "Has Society Grown More Hostile Towards Conservative Christians? Evidence from ANES Surveys" *Review of Religious Research*. 60(1): 71-94.

Yancey, George (2018) "Religious (Dis)Like as Potential Explanations Support of Sexual Minorities" *Interdisciplinary Journal of Research on Religion* 14: Article 2

Yancey, George and Michael O. Emerson (2018) "Having Kids: Assessing Differences in Fertility Desires between Religious and Nonreligious Individuals." *Christian Scholar Review* 47: 263-280

- Winner of Charles J. Miller Christian Scholar's Award

Yancey, George (2017) "Christian Fundamentalists or Atheists: Who do Progressive Christians Like or Hate More?" *Journal of Society and Religion* 19: 1-25.

Yancey, George, Marie A. Eisenstein and Ryan Burge (2017) "Christian Theology and Attitudes Towards Political and Religious Ideological Groups." *Interdisciplinary Journal of Research on Religion* 13: Article 6.

Yancey, George and Michael Emerson (2016) "Does Height Matter? An Examination of Height Preferences in Romantic Coupling." *Journal of Family Issues* 37(1): 53-73

Yancey, George, Sam Reimer, Jake O'Connell (2015) "How Academics View Conservative Protestants." *Sociology of Religion* 76(3): 315-336.

Yancey, George "Atheists, Agnostics, Spirituals and Christians: Assessing Confirmation Bias within a Measure of Cognitive Ability" (2014) *Research in the Social Scientific Study of Religion* 25: 17-3

- Yancey, George (2014) Watching the Watchers: The Neglect of Academic Analysis of Progressive Groups. *Academic Questions* 27(1): 65-78
- Yancey, George (2012). Recalibrating Academic Bias." *Academic Questions* 25 (2): 267-278
- Yancey, George (2010) "Who has Religious Prejudice?: Differing Sources of Anti-Religious Animosity in the United States." *Review of Religious Research* 52(2): 159-171
- George, Douglas and George Yancey (2009) "Forming a More Perfect Union: Racial Perceptions of Unity and Diversity in the United States." *Sociological Focus* 42(1): 1-19
- Yancey, George (2009) "Crossracial Differences in the Racial Preferences of Potential Dating Partners: A Test of the Alienation of African-Americans and Social Dominance Orientation" *Sociological Quarterly* 50:121-143
- Emerson, Michael and George Yancey (2008) "African Americans in Interracial Congregations: An Analysis of Demographics, Social Networks and Social Attitudes." *Review of Religious Research* 49(3): 301-318
- Yancey, George and Kim, Yu Jung (2008) "Racial Diversity, Gender Inclusiveness and SES Diversity in Christian Congregations: Exploring the Connections of Racism, Sexism, and Classism in Multiracial and Non-Multiracial Churches." *Journal for the Scientific Study of Religion* 47(1): 103-111.
- George, Douglas and George Yancey (2007) "Racial Aspirations for late Twentieth Century Multicultural America." *Sociological Imagination* 43:52-68.
- Yancey, George (2007) "Homogamy over the Net: Using Internet Advertisements to Discover who Interracially Dates. *Journal of Social and Personal Relationships* 24(6): 913-930
- Yancey, George (2007) "Experiencing Racism: Differences in the Experiences of Whites Married to Blacks and Non-Black Racial Minorities." *Journal of Comparative Family Studies* 38(2): 197-213
- Yancey, George (2005) "A Comparison of Religiosity Between European-Americans, African-Americans, Hispanic-Americans and Asian-Americans." *Research in the Social Scientific Study of Religion*. 16: 83-104.

- Yancey, George (2005) "Blacks Cannot be Racists: A Look at How European-Americans, African-Americans, Hispanic-Americans and Asian-Americans Perceive Minority Racism" *Michigan Sociological Review* 19(Fall): 138-154.
- George, Douglas and George Yancey (2004) "Taking Stock of America's Attitudes on Cultural Diversity: An Analysis of Public Deliberation of Multiculturalism, Assimilation and Intermarriage." *Journal of Comparative Family Studies* 35(1): 1-19.
- Yancey, George and Michael Emerson (2003) "Intracongregational Church Conflict: A Comparison of Monoracial and Multiracial Churches." *Research in the Social Scientific Study of Religion*. 14: 113-128.
- Yancey, George, and Michael Emerson (2003) "Integrated Sundays: An Exploratory Study into the Formation of Multiracial Churches." *Sociological Focus* 36(2): 111-126.
- Yancey, George (2003). "A Preliminary Examination of Differential Sexual Attitudes among Individuals Involved in Interracial Relationships: Testing 'Jungle Fever.'" *The Social Science Journal*. 40(1): 153-157.
- Yancey, George (2002) "Reconciliation Theology: How a Christian Ethic Tackles the Problem of Racism." *Christian Scholar's Review*. 17(1): 93-108
- Yancey, George (2002) "Who Interracially Dates?: Examinations of the Characteristics of Those who Have Interracially Dated" *Journal of Comparative Family Studies* 33(2): 179-190.
- Emerson, Michael O., Rachel T. Kimbro and George Yancey (2002). "Contact Theory Extended: The Effects of Prior Racial Contact on Current Social Ties." *Social Science Quarterly* 83(3): 745-761.
- Emerson, Michael, George Yancey and Karen Chai (2001) "Does Race Matter in Residential Segregation? Exploring the Preferences of White Americans." *American Sociological Review*. 66: 922-935
- Yancey, George (2001). "Racial Attitudes: Differences in Racial Attitudes of People Attending Multiracial and Uniracial Congregations." *Research in the Social Scientific Study of Religion*. 12: 185-206.
- Yancey, George and Michael Emerson (2001). "An Analysis of Resistance to Racial Exogamy: The 1998 South Carolina Referendum." *Journal of Black Studies*. 31(5): 635-650

- Yancey, George (1999). "An Examination of Effects of Residential and Church Integration upon Racial Attitudes of Whites." *Sociological Perspectives*. 42(2): 279-304.
- Yancey, George (1998). "Differential Attitudes of American Sociologists in Assessment Of NOW: A Test of the Gender Gap in a Progressive Subculture." *Sociological Imagination*. 35(2/3): 119-136.
- Yancey, George and Sherelyn Yancey (1998)." Interracial Dating: Evidence from Personal Advertisements." *Journal of Family Issues*. 19(3):334-348.
- Yancey, George and Sherelyn Yancey. (1997). "Black-White Differences in the Utilization of Personal Advertisements for Individuals Seeking Interracial Relationships." *Journal of Black Studies*. 27(5):650-667.
- Lewis, Richard, George Yancey, and Siri Bletzer (1997). "Racial and Nonracial Factors Which Influence Spouse Choice in Black/White Marriages." *Journal of Black Studies*. 28(1): 60-78.
- Lewis, Richard and George Yancey (1995). "Bi-Racial Marriages in the United States: An Analysis of Variation in Family Member Support of the Decision to Marry" *Sociological Spectrum*. 15(4): 443-462.
- Lewis, Richard and George Yancey. (1994-1995) "A Comparison of the Acceptance of Hyperandry and Hypergamy Interracial Relationships: A Test of Sexual Racism." *Journal of Intergroup Relations*. 21(4): 44-52.
- Yancey, George. (1994)."An Examination of the Propensity of Women and Racial Minorities to Specialize in Gender and Racial/Ethnic Relations Studies" *The American Sociologist*. 25(4): 73-77.

#### Book Chapters and Invited Articles

- Yancey, George (2018) "Yes Academic Bias is a Problem and We Need to Address it: A Response to Larregue" *The American Sociologist* 49(2): 336-343.
- Yancey, George (2015) "Both/And Instead of Either/Or." *Society* 52(1): 23-27
- Edison, Alicia and George Yancey (2010) "Black and White Movies: *Crash* between Class and Biracial Identity Portrayals of Black/White Biracial Individuals in Movies" Pgs 88-96 in Kathleen O. Korgen (Edit.) *Multiracial Americans and Social Class*. Routledge: New York.

Yancey, George, Emily J. Hubbard and Amy Smith. (2009). "Unequally Yoked: How Willing Are Christians to Engage in Interracial and Interfaith Dating?" Pgs 114-140 in Earl Smith and Angela Hattery (Edits.) *Interracial Relationships in the 21<sup>st</sup> Century*. Carolina Academic Press: Durham, NC.

Yancey, George. (2009) "Neither Jew nor Gentile: Lessons About Intercultural Competence in Religious Organizations" Pgs. 374-386 in Darla K. Deardorff (Edit.) *The Sage Handbook of Intercultural Competence*. Sage: London

Yancey, George. (2009). "A New Coalition: Reaching the Religious Right to Deal with Racial Justice." Pgs. 211-236 in Curtis Stokes (Edit.) *Race and Human Rights* East Lansing, MI: Michigan State University Press.

Yancey, George. (2006). "Racial Justice in a Black/NonBlack Society" Pgs. 49-62 in David L. Brunsma, (Edit.) *Mixed Messages: Multiracial Identities in the "Color-Blind" Era*. Boulder: CO: Lynne Rienner Publishers.

Yancey, George (2002). "Black Professor/White Students: The Unique Problems Minority Professors Face When Teaching Race/Ethnicity to Majority Group Students." Pgs. 226-239 in Robert Moore (Edit.) *The Quality and Quantity of Contact: African Americans and Whites on College Campuses*. Lanham, MD: University Press of America

### Book Reviews

Yancey, George (2016) Review of Atheist Awakening: Secular Activism and Community in America. *Contemporary Sociology* 45(5): 587-589.

Yancey, George (2005) "Survival of the African American Family: The Institutional Impact of U.S. Social Policy." *Journal of Comparative Family Studies* 37(3): 485-486.

Yancey, George (1998). "Skin Deep: How Race and Complexion Matter in the 'Color-Blind' Era" *American Journal of Sociology* 110(1): 254-255.

Yancey, George (1998). "Race and Other Misadventures: Essays in Honor of Ashley Montagu in His Ninetieth Year." *Sociological Imagination*. 35(1): 85-88

Yancey, George (1997). "Getting an Academic Job: Strategies for Success" *The Journal of Staff, Program and Organization Development*. 15(1): 37-38.

Yancey, George (1996). "The Arena of Racism" *The Great Plains Sociologist* 9

(Paper presentations available upon request)

### Community Service

- 2004-2010 Board of Directors – Mosaix
- 2002-2008 Campus Advisor – Plumline (A predominately black campus ministry on the University of North Texas)
- 2004-2008 Campus Advisor - International Dream & Love Fellowship (A predominately Asian campus ministry on the University of North Texas)
- 2007-present Campus Advisor – Graduate Christian Student Fellowship.
- 2007 Consultant – Harrisburg Brethren in Christ. This is a multiracial urban church that sought advice as to how to deal with some current issues of diversity and how to become more racially diverse.
- 2006 Consultant – Cornerstone Bible Church in Cedar Hill, Texas– This is a predominately white church. I am in the process of using sociological techniques so that I can provide advice that will help it to reach people of other races and become multiracial.
- 2005 Consultant – Grace Presbyterian Church in Dover, Delaware – This is a predominately white church. I used sociological analysis to evaluate the church to provide advice that will help it to reach people of other races and become multiracial.
- 1998 Consultant - Bridgebuilders of Janesville/Beloit. (A group of church leaders who are dealing with issues of racial reconciliation). I provided racial sensitivity training for the group.

### Non-Academic Publications

- Yancey, George (2022) *Beyond Racial Division: A Unifying Alternative to Colorblindness and Antiracism* Downers Grove, IL: InterVarsity Press
- Yancey, George (2015) *Hostile Environment: Understanding and Responding to Anti-Christian Bias* Downers Grove, IL: InterVarsity Press
- Yancey, George (2007). "Preparing to Minister in a Multiracial World." *Enrichment* 12(3): 66-78.
- Yancey, George (2006) *Beyond Racial Gridlock: Embracing Mutual Responsibility* Downers Grove, IL: InterVarsity Press.
- Yancey, George (2003) *One Body, One Spirit: Seven Principles of Successful Multiracial Churches*. Downers Grove, IL: InterVarsity Press.

Yancey, George (2001). "Color Blindness, Political Correctness, or Racial Reconciliation: Christian Ethics and Race." *Christian Ethics Today* 35(7): 15-17.

Yancey, George (1996). *Beyond Black and White: Reflections on Racial Reconciliation* Grand Rapids, MI: Baker Book House Company.

Yancey, George (1994). "The Bible and Interracial Relationships" *Interrace* April: 32-33.

**Exhibit 3**

*Interdisciplinary Journal of  
Research on Religion*

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Volume 14

2018

Article 2

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Religious Likes and Dislikes as Potential  
Explanations for Support of Sexual Minorities

George Yancey\*

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Denton, Texas

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# Religious Likes and Dislikes as Potential Explanations for Support of Sexual Minorities

George Yancey

University of North Texas  
Denton, Texas

## Abstract

This paper explores the role of emotional warmth and dislike towards a variety of religious groups in the shaping of support of sexual minorities. Previous research indicates that hostility towards sexual minorities is linked to lower support for their rights. Theories of symbolic hostility, or favorability, suggest that emotional feelings towards religious groups may also influence support for the rights of sexual minorities. Regression models indicate that support or nonsupport of sexual minority rights are associated with attitudes towards religious groups even after controlling for attitudes towards sexual minorities as well as other social and demographic factors. While overall political ideology and attitudes towards sexual minorities have stronger relationships to support of sexual minorities' rights, there is no denying the consistency of the finding of the impact of attitudes towards religious groups, especially those who dislike Christian fundamentalists. Emotional warmth or coolness towards Muslims, however, were not strongly associated with attitudes towards the rights of sexual minorities. Given the controls of emotional warmth or coolness towards sexual minorities, and the differential effects tied to Muslim dislike, these results suggest that part of support of sexual minorities is tied to whether a respondent dislikes conservative Christians.

With the *Obergefell v. Hodges* ruling, same-sex marriage rights have been established into law. Recent efforts in North Carolina and Texas to pass laws forcing individuals to use bathrooms based on their biological sex are either being rolled back or are being stopped. These events indicate growing support for the rights of sexual minorities. Growth in support for the rights of sexual minorities has developed at a rapid rate over the last several years (Brewer and Wilcox 2005; Sherkat et al. 2011; Stern et al. 2017). But even with this recent growth, there is still a large minority of individuals who resist those rights. For example, according to McCarthy (2015), 40 percent of Americans still believe that same-sex marriage should be illegal. Furthermore, 39 percent of Americans favor laws that require transgendered individuals to use bathrooms that correspond to their birth sex (Jones et al. 2017).

Previous research has identified several variables predictive of support of sexual minorities. This research suggests that the most explanatory of those variables are beliefs in traditional gender roles (Claman 2008; Norton and Herek 2013; Whitley 2001), religious identity (Gaines and Garand 2010; Nagoshi et al. 2008; Olson, Cadge, and Harrison 2006), religiosity (Claman 2008; Norton and Herek 2013; Sherkat, De Vries, and Creek 2010), political ideology (Jones 2012; Lewis and Gossett 2008; Norton and Herek 2013; Sherkat et al. 2011), and contact with sexual minorities (Barth, Overby, and Huffmon 2009; Becker 2012; King, Winter, and Webster 2009). These factors indicate that individuals with more traditional political and religious attitudes are less likely to support sexual minorities. Consequently, those with more progressive political and religious attitudes are more supportive. Thus, positive or negative attitudes towards sexual minorities strongly impact whether individuals support legal measures that promote rights for such minorities.

It is also possible, however, that liking or disliking religious groups influences support of sexual minorities. This hypothesis is quite possible if we are in a culture war (Hunter 1992) where culturally conservative groups known for opposition to sexual minorities, such as religious conservatives, have a social identity at least partially based on that opposition. Individuals at the opposite end of the culture war may have animosity towards those who identify with the cultural conservatism tied to a variety of religious groups known for their resistance to sexual minorities. Some individuals may have animosity towards religious groups for reasons other than their attitudes towards same-sex marriage and be willing to support sexual minorities as an expression of that hostility. The purpose of this paper is to explore the role of emotional warmth or coolness towards sexual minorities and a variety of religious groups in the shaping of same-sex marriage support.

*STUDIES OF SUPPORT FOR SEXUAL MINORITIES*

Previous research indicates that support for sexual minorities is predicted by a respondent's political (Gaines and Garand 2010; Jones 2012; Sherkat et al. 2011), educational (Baunach 2012; Olson, Cadge, and Harrison 2006), and religious (Adamczyk and Pitt 2009; Gaines and Garand 2010; Olson, Cadge, and Harrison 2006; Whitley 2001) characteristics. There is also evidence of cohort effect whereby those in younger cohorts are more supportive (Becker 2012; Gaines and Garand 2010; Stern et al. 2017) and a racial effect whereby blacks are less supportive (Han 2007; Lewis and Gossett 2008) of sexual minority rights. Proximity to sexual minorities also matters (Flores 2015; Gaines and Garand 2010), which indicates potential contact effects.

Of these characteristics, recent research suggests that religious based factors may be the strongest determinants of attitudes towards the rights of sexual minorities. For example, Sherkat, De Vries, and Creek (2010) find that religious factors play a crucial role in explaining the racial differences of support for same-sex marriage. Higher African-American religiosity appears to be tied to lower support. Olson, Cadge, and Harrison (2006) find that religious variables perform better than other demographic variables in explaining attitudes towards same-sex unions. Sherkat et al. (2011) find that Christians who subscribe to biblical fundamentalism are more likely to reject same-sex marriage and that while support for same-sex marriage has grown, it has grown the least among conservative Christians. As it concerns issues transgendered individuals face, there is also significant religious resistance to bathroom access (Bryk 2015; Stone 2017).

Much of this hostility may be due to an ideology of Christian nationalism which links political and religious identities in a way that motivates Christians to have an image of the United States as a Christian nation (Whitehead and Perry 2015). Christian nationalists may see promotion of same-sex marriage as a threat to this image since they see such marriages as outside the will of God. Furthermore, support of transgender individuals may be seen as an attack on a traditional understanding of sex roles (Nagoshi and Brzuzy 2010; Norton and Herek 2013; Tebbe and Moradi 2012). If Christians have a tendency to reaffirm traditional sex roles, then they may see the challenge to those roles as an affront to their understanding of a Christian nation. Therefore Christians, particularly conservative Christians, may be seen as especially troublesome to the advancement of issues concerning sexuality minorities.

Hunter (1992) argues that much of our society is shaped by a larger culture war. In this war, there are opposing groups with differing visions about our society. Cultural conservatives tend to envision a society that maintains traditional gender and family relations and are hesitant to embrace some of the modernist cultural adaptations. Conservative religious groups tend to side with cultural conservatives.

On the other hand, cultural progressives have a higher willingness to accept modernist alterations in gender and family structures. They tend to envision such changes as improvements since they represent an increase in individualistic freedoms. Homosexuality and transgenderism are tied to both the modern gender roles and novel family structures that cultural progressives are willing to embrace. Consequently, support for sexual minority rights is tied to rejection of traditional gender roles (Gaines and Garand 2010; Tebbe and Moradi 2012; Whitehead and Perry 2015).

Support or nonsupport for sexual minorities may play an important symbolic role in a larger culture war. Gaines and Garand (2010) find that attitudes towards same-sex marriage are connected to moral and religious considerations towards gays and lesbians as well as gender roles but not towards women and African-American rights. They assess basic attitudes towards gays and lesbians and find that basic hostility towards them is significantly correlated to rejection of same-sex marriage even after the application of relevant religious, political, and demographic controls. Individuals who oppose same-sex marriage, however, may not always do so out of animosity towards sexual minorities but oppose such marriages out of a desire to promote a traditional set of sexual values. Gaines and Garand only investigated the role of hostility towards sexuality minorities in shaping opposition towards same-sex marriage, leaving open the possibility that hostility towards other groups may buttress support for same-sex marriage. Support or nonsupport for same-sex marriage, and other issues relevant to the rights of sexual minorities, can be tied to how individuals construct their sexual and/or moral values, but it is also possible that they are both tied to hostility towards groups that promote alternate perspectives of those values.

Culture war considerations may also play a role in how individuals understand issues involving transgendered individuals. For example, Yarhouse (2015) argues that a culture war mentality often shapes how individuals comprehend issues of gender identity. In particular religious conservatives may envision themselves besieged by cultural changes they want to resist. In such a situation, religious conservatives may link transgender issues to larger modernist alterations to sexuality issues. If this linkage is a major motivating factor for how religious individuals interpret the rights of transgendered individuals, then it is not surprising that religiosity is inversely related to support of the rights of the transgendered. It is likely that cultural progressives understand the religious source of much of the hostility to sexual minorities and may react to that hostility with their own hostility towards religious groups. This pattern, however, is not the only source of religious hostility.

*SOURCES OF RELIGIOUS HOSTILITY*

Although freedom of religion is conceived as a common American value, several groups have experienced, and continue to experience, anti-religious bias. For example, there has been an increase in the hostility towards conservative Christians among those in the American left (Pieper 2011). Furthermore, education is also related to rejection of Christian fundamentalists (Bolce and De Maio 2008; Yancey and Williamson 2014). Given that progressive political ideology and education are also related to support of sexual minorities, it should not be a surprise to find that those who support issues framed as rights for sexual minorities are also likely to have animosity towards Christian fundamentalists. It is unlikely, however, that animosity to Christians is only driven by perceptions of their non-support of sexual minorities. Yancey and Williamson (2014) document other reasons for animosity towards conservative Christians such as fears of a governmental takeover, sexism, perceptions that such individuals are unintelligent, and a general hostility towards religion. It is worth investigating how much the ideology of those with animosity towards Christians is directly linked to support of marginalized sexuality groups. More specifically, if hostility towards conservative Christians predates their affection towards sexual minorities, can that hostility motivate some support for those sexual minorities?

If specific hostility towards conservative Christians can impact support for sexual minorities, then it is likely that Islam, which is also a socially conservative religion, is treated in a qualitatively different manner. Previous research has documented the importance of terrorism fears in the development of Islamophobia in the United States (Gottschalk and Greenberg 2008; Mamdani 2002; Shryock 2010). The September 11 attacks are an important turning point in the relations of Muslims to other Americans (Akram and Johnson 2002; Nacos and Torres-Reyna 2003). Although there are plenty of non-Middle Eastern Muslims, an ethnic element in Islamophobia ties hostile perspectives towards Middle Easterners to Muslims. Thus Muslims are often stereotyped as dangerous, patriarchal, violent, and barbaric (Aziz 2009; Bullock 2002; Gottschalk and Greenberg 2008; Sides and Gross 2013). Anti-Muslim hostility after the September 11 attacks has made Muslims wary of both political parties (Barreto and Bozonelos 2009); however, in recent years they have become more supportive of Democrats (Schoenfeld 2007). Even though Muslims have a reputation of endorsing regressive social practices, they vote for political candidates who support culturally progressive goals. This distinction likely creates alternative sources of support and opposition for Muslims relative to other religious groups. These distinctions may play an important role in understanding how attitudes towards Muslims relate to attitudes towards sexual minorities.

Anti-Semitism has also been a problem in the United States. Jews have often been the victims of religious stereotyping. For example, work on anti-Semitism

illustrates that fear of a takeover by Jews animates some of the hostility they face (Dinnerstein 1994; Jaher 1994). These fears created a desire among those with anti-Semitism to limit the potential influence of Jews. Anti-Semites paid special attention to efforts at limiting Jewish influence in the educational realm since education may provide Jews with higher ability to shape society (Dinnerstein 1994). Much of the animosity towards Jews comes from political conservatives (Diamond 1995; Smith 1999), and indeed Jews are often seen as part of the politically progressive coalition (Lefkowitz 1993; Levey 1996; Podhoretz 2010). Consequently, Jews may be more likely to be envisioned as individuals who support the rights of sexual minorities than other religious groups. One would not expect a desire to protect sexual minorities to be reflected in animosity towards Jews.

Hostility towards conservative religious groups may be shaped by the resistance of conservative religion towards sexual minorities (Hout and Fischer 2002, 2014). Thus Christian fundamentalists, and Christians in general, can experience hostility from the cultural progressive subcultures that buttress LGBT activism. Yancey and Williamson (2012) find in their work on cultural progressive activists that such activists exhibit culture war-based concerns that Christian fundamentalists are attempting to move our society back to an intolerant and repressive period. They conceptualize Christian fundamentalists as enemies who oppose science and modernity. In theory, Muslims also tend to oppose sexual minorities and should be subject to rejection by supporters of those sexuality groups. Yet it is not clear that Muslims are seen as openly opposing the aims of cultural progressives since Muslims tend to support progressive political groups (Ayers 2007; Jalalzai 2009). While there is little evidence that Muslims support specific cultural progressive causes, Muslims' voting patterns tend to support those who will promote such causes. This observation may be why cultural progressive activists are less hostile towards Muslims than towards conservative Christians (Yancey and Williamson 2012).

If a lack of advocacy of conservative cultural issues is part of the image individuals have of U.S. Muslims, and the idea of a culture war is useful for understanding attitudes towards sexual minorities and religious groups, then dislike of Muslims should not be heavily tied to support for the rights of sexual minorities. If dislike of Muslim is not tied to support of sexual minorities, then one may doubt that supporters of sexual minorities use a generalized value of equality to evaluate all religious groups. An alternate directionality of this relationship becomes possible as unique characteristics of a particular religious group may motivate emotional coolness towards them. This disaffection can shape an individual's attitudes towards political issues important to disrespected groups. Issues concerning the rights of sexual minorities can be a proxy for those who dislike a particular conservative religious group. Hostility towards conservative religious

groups may play an important symbolic role in promoting cultural progressive values.

*EMOTIONAL WARMTH OR COOLNESS AS A SOURCE OF SUPPORT FOR SEXUAL MINORITIES*

In modern society there is social pressure to present oneself as not prejudiced towards religious or sexuality groups. Despite this pressure, it is naïve to assert that antipathy towards such groups does not exist. Individuals with bias against religious or sexuality groups are likely to hide it when it is not socially acceptable. Nonetheless, this bias is still likely to reveal itself in ways so that those with such prejudice can lessen the possibility of experiencing stigma. In addition to the role negative emotions can play in the shaping of attitudes towards social groups, positive perceptions also inform such attitudes. While individuals may not want to show favoritism when it can lead to accusations of unfairness, it is likely that affirmative biases shape their perceptions of how a preferred group should be treated.

Theories of symbolic racism (Kinder and Sears 1981; McConahay and Hough 1976) offer a way to understand how individuals can express their disaffection for out-groups but avoid the stigma related to having out-group bias. Symbolic hostility can manifest itself on racial issues while also supplying a level of plausible deniability. For example, a person hostile towards Hispanics is unlikely to state support directly for an overt stereotype of Hispanics due to a desire to be seen as unbiased. Such a person can, however, safely express such hostility on issues of immigration reform since opposing such reform is not automatically seen as racist. In this way, immigration policy is a symbolic issue by which anti-Hispanic hostility can be expressed.

Such theories have focused on racial attitudes and are generally tied to attempts to avoid self-presentation of overt hostility towards minority racial groups. There is also incentive to avoid self-presentation of overt hostility towards religious and sexuality groups. Notions of symbolic hostility may be relevant in the exploration of negative attitudes towards religious and sexuality groups. While no one has previously theorized about symbolic sympathy, it is reasonable to contend a similar process may occur when individuals have positive attitudes towards social groups. It may be socially unacceptable to provide unearned benefits to social groups one favors. Thus, rather than overtly favoring selected in-groups, individuals may support issues that symbolically show favoritism towards that group. Such actions can allow individuals to express their emotional warmth while still maintaining a social identity of fairness.

In a culture war, it can be important for cultural conservatives and progressives to express hostility towards out-groups in ways that cannot be denounced as

bigotry. Issues involving the rights of sexual minorities can symbolically express an individual's comfort or discomfort for religious groups or sexual minorities. Individuals may oppose the rights of sexual minorities for reasons other than hostility towards sexual minorities, yet those with such hostility can exhibit it through opposition to the rights of sexual minorities and reduce the chances they will be accused of bigotry. Likewise, individuals with hostility towards certain religious groups may realize the antipathy those groups have towards the rights of sexual minorities. This realization may buttress their support for those rights since it can also express their hostility towards those religious groups. On the other hand, those with sympathy towards sexual minorities are likely to support the rights of sexual minorities, regardless of the reason for that sympathy, since support of same-sex marriage can be a symbolic way they express their support of sexual minorities. Furthermore, religious conservatives have become aware of the hostility they face from progressives and/or the highly educated (Perl and Bendyna 2002; Rosik and Smith 2009). Consequently, individuals with emotional warmth towards those religious groups may express that sympathy by sharing their rejection of the rights of sexual minorities.

Important social and demographic factors influence sympathy or dislike towards either sexual minorities or religious groups. For example, education has been found to be positively correlated to support for sexual minorities (Kosciw, Greytak, and Diaz 2009; Sherkat, De Vries, and Creek 2010) and negative attitudes towards Christians, although not towards Muslims fundamentalists (Yancey and Williamson 2014). It is possible that education is the driving factor behind attitudes towards certain religious groups such as Christian fundamentalists and towards sexual minorities. If an intrinsic link does exist, then support of sexual minorities would be tied to animosity towards Christians or Christian fundamentalists even after application of proper demographic controls.

### *VARIABLES*

This study uses data from the 2016 American National Election Study (ANES). To assess attitudes towards sexual minorities, I utilize five different dependent variables. The first dependent variable (Same-Sex Marriage) comes from a question about whether same-sex marriage should be allowed. Respondents were given the option of selecting no recognition of same-sex couples, allowing civil unions, or allowing same-sex marriages. I converted results into a dummy variable with those allowing same-sex marriage coded as 1 and all other respondents (those supporting only civil unions or no recognition of same sex couple) coded as 0. The second dependent variable (Wedding Businesses) asked if business owners who provide wedding-related services should be allowed to refuse service to same-sex weddings. Respondents were allowed to rank their yes or no answer as feeling very

strongly, moderately, or not a little about that answer, which provided me with a 1 to 6 scale variable with higher numbers indicating more willingness to allow business owners to refuse same-sex weddings. The third dependent variable (Anti-Discrim Law) asked if there should be laws to protect gays and lesbians. Respondents were allowed to rank their yes or no answer as feeling strongly or not strongly about that answer, which provided me with a 1 to 4 scale variable with higher numbers indicating less support for those laws. The fourth dependent variable (Same-Sex Adopt) came from a question on whether gay and lesbian couples should be allowed to adopt children. Respondents provided a dichotomous yes or no answer (yes = 1, no = 0). The fifth dependent variable (Transgender Bathroom) comes from a question on transgender bathrooms. Respondents were asked if transgendered individuals should have to use the bathroom of their biological gender or if they can use the bathroom of their identified gender. Respondents were allowed to rank their yes or no answer as feeling strongly, moderately, or a little about that answer, which provided the me with a 1 to 6 scale variable with higher numbers indicating less support for the use of bathrooms according to one's gender identity.

A variety of independent variables are used to control for factors previous research indicated influences same-sex marriage support. Age is measured with a 13-point scale. Female, Black, Hispanic, Other Race<sup>1</sup>, Heterosexual, Northcentral, Northeast, and West<sup>2</sup> are dummy variables. Education is measured with a 5-point scale, and income is measured with a 28-point scale. I convert the political viewpoint variable into a 7-point scale measuring political conservatism with higher values indicating higher levels of political conservatism. To capture measured acceptance of traditional gender roles with "Better if Wife at Home," I created a 7-point scale with higher numbers indicating a stronger assertion that it is better for a wife to stay at home while her husband works. I assess religious preference with a series of dummy variables that represented the Judeo-Christian faiths (Protestant believing the Bible is the word of God<sup>3</sup>, Protestant not believing

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<sup>1</sup> White is the reference group.

<sup>2</sup> South is the reference group.

<sup>3</sup> The question provided three possible answers: 1) that the Bible is the actual word of God and is to be taken literally word-for-word, 2) that the Bible is the word of God but not everything in it should be taken literally, word-for-word, and 3) that the Bible is a book written by men and is not the word of God. Protestants who provided the first answer were coded as believing the Bible is the word of God. Those who answered with the other two answers were coded as not believing the Bible to be the word of God.

the Bible is the word of God<sup>4</sup>, Catholic, and Jew<sup>5</sup>). Religious attendance (Religious Attendance) is captured with a 6-point scale where higher numbers indicated more attendance.

I investigated the possibility of constructing an index with the dependent variables. The Cronbach's alpha of these five variables, however, is 0.683. This score indicates some relationship between the variables but not enough to justify an index. Face validity, however, indicates that such variables deal with sexual minorities' rights. Thus my analytical strategy will be a series of OLS and logistic regression models for each dependent variable. Each dependent variable represents attitudes to sexual minorities' rights, but they likely reflect different aspects of one's attitudes toward sexual minorities. Furthermore, other important issues can be conflated with a given dependent variable. For example, a political libertarian may oppose having the government force a business to serve a same-sex wedding but also does not want the state to prevent that couple from getting married. Both positions can be consistent with a libertarian idea of less government interference. So while consistent associations of the dependent variables to a given independent variable are likely to indicate an overarching relationship of that independent variable to support, or non-support, of sexual minorities, it is also possible that specific associations are confounded by extramural forces not adequately captured by the independent variables.

To capture possible emotional warmth/coolness towards sexual minorities and religious groups, I use thermometer scores. These questions asked the respondents to rank groups on a scale of 0 to 100 according to how much affection they have towards those groups. As it concerned the meaning of those ratings, respondents were instructed, "Ratings between 50 degrees and 100 degrees mean that you feel favorable and warm toward the group. Ratings between 0 degrees and 50 degrees mean that you don't feel favorable toward the group and that you don't care too much for that group. You would rate the person at the 50-degree mark if you don't feel particularly warm or cold toward the group." Face validity of this question is

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<sup>4</sup> It was important to distinguish between conservative and moderate/liberal Protestants. Denominational differences have become less important over the last half of the 20th century (Wuthnow 1988), so theological differences are more useful. Previous research has used attitudes towards biblical inerrancy as the sole measure to operationalize potential theological fundamentalism (Sherkat 2011; Sherkat and Darnell 1999), evangelicalism (Hunter 1983), and orthodoxy (Freeman and Houston 2011; Roy 2016) within the Christian faith. Therefore, it is a viable measure for dividing Protestants into conservative and moderate/liberal camps.

<sup>5</sup> Those who are not either Christian or Jewish are the reference group. Unfortunately, this categorization creates a reference group with very disparate beliefs. These groups, however, which vary from highly religious Muslims to atheists, tend to be too small to have much of an impact on the results. The one exception would be those who classify themselves as "none of the above." Research has indicated, however, that this group as well is quite religiously diverse (Baker and Smith 2009; Lim, MacGregor, and Putnam 2010), and there was not much to gain by adding them as a dummy variable.

that it provides a continuous measure of emotional warmth/coolness towards a given group. This emotional warmth or coolness is conceptualized as either having sympathy for the group or having dislike for the group since sympathy and dislike are generally acknowledged as emotional responses.

One might use the stated score for each respondent to assess sympathy or dislike towards a given group. This approach is problematic, however, for at least two reasons. First, if these variables are not normed, then they will measure the propensity of respondents to rank others high or low, as well as to rank the particular group. Second, continuous variables do not differentiate between those who rank groups high or low relative to other groups. In other words, the basic score on a thermometer does not tell a researcher whether sympathy or dislike towards a group shapes support for sexual minorities. To deal with these issues, I used a variation of Yancey's (2010) technique in his assessment of attitudes towards religious groups. He operationalized emotional dislike with a dichotomous variable assessing if a respondent ranks a religious group a standard deviation below an average of the rankings of other religious groups. The ANES contains 27 thermometer variables connected to different social groups. I construct dichotomous variables whereby if a respondent ranked the group identified as gay a standard deviation above the mean of their ranking of other groups, then the respondent is labeled Pro-Gay, and if a respondent ranked the group identified as gay a standard deviation below the mean, then the respondent is labeled Anti-Gay.<sup>6</sup> A similar methodology creates Pro-Transgendered, Anti-Transgendered, Pro-Fundamentalist, Anti-Fundamentalist, Pro-Christian, Anti-Christian, Pro-Muslim, Anti-Muslim, Pro-Jew, and Anti-Jew. A breakdown of the percentage of respondents in each group can be seen on Table 1.<sup>7</sup>

**Table 1: Percentage of Respondents in Pro-/Anti- Variables (N = 3,199)**

	<b>Pro</b>	<b>Anti</b>
Gay	18.5%	12.8%
Transgendered	10.8%	18.0%
Christian Fundamentalist	10.3%	29.9%
Christian	45.2%	3.8%
Muslim	5.8%	16.4%
Jew	25.2%	2.5%

<sup>6</sup> Respondents who did not answer all 27 of the thermometer questions were dropped from all models.

<sup>7</sup> Only respondents who qualified for inclusion in the final model were used in this table.

*RESULTS*

Dependent variables concerning the wedding businesses, anti-discrimination laws, and support for transgender bathrooms were tested in OLS models. For each dependent variable, I first constructed a model with just the relevant social and demographic independent variables. The next model added either the Gay or Transgender thermometer depending on which one is the relevant group in the question. The final model adds in the relevant religious thermometer variables. This approach allows me to see how much explanatory power is added when including the different thermometer variables.

The final Wedding Business model (Table 2) indicates that men, whites, political conservatives, those who attend religious services more often, those who have positive feelings towards Christians, those who have negative feelings towards gays, those who lack positive feelings towards gays, and those who lack negative feelings towards Christian fundamentalists are more likely to support wedding businesses that do not want to serve same-sex weddings. There was a larger jump in coefficient of determination with the addition of the gay thermometer variables than the religious thermometer variables (0.027 v. 0.016), revealing that the power of attitudes towards sexual minorities is more powerful than attitudes towards religious groups to predict support for businesses to refuse to serve same-sex weddings. Only the standard beta of political conservatism (0.322) is higher than the standard betas of Pro-Gay (-0.13) and Anti-Gay (0.111), indicating that only one's overall political philosophy can matter more than attitudes towards sexual minorities as it concerns the right of businesses to refuse to serve same-sex weddings. Attitudes towards religions do matter, however, even after application of relevant controls, as seen in the results of Anti-Fundamentalist and Pro-Christian.

**Table 2: Betas and Standard Errors on Wedding Businesses**

	<b>Wedding Businesses</b>	<b>Wedding Businesses</b>	<b>Wedding Businesses</b>
Age	-0.004 (0.003)	-0.024 (0.003)	-0.033 (0.003)
Female	-0.060** (0.094)	-0.047* (0.093)	-0.049* (0.092)
Black	-0.051* (0.190)	-0.057* (0.186)	-0.063* (0.186)
Other Race	-.044 (0.132)	-0.053* (0.130)	-0.046* (0.129)
Heterosexual	0.010 (0.132)	0.010 (0.130)	0.006 (0.129)
Northcentral	-0.028 (.117)	-0.026 (0.115)	-0.028 (0.114)

Northeast	-0.023 (0.154)	-0.011 (0.152)	-0.007 (0.151)
West	-0.002 (0.129)	0.006 (0.126)	0.017 (0.126)
Education	-0.049 (0.047)	-.038 (0.047)	-0.027 (0.047)
Income	-0.004 (0.007)	0.010 (0.007)	0.016 (0.006)
Political Conservatism	0.406*** (0.035)	0.370*** (0.035)	0.322*** (0.037)
Better if Wife at Home	0.057* (0.036)	0.046 (0.035)	0.041 (0.035)
Protestant – Bible God’s Word	0.069* (0.147)	0.060* (0.145)	0.051 (0.144)
Protestant _ Bible Not God’s Word	-0.028 (0.137)	-0.013 (0.135)	-0.009 (0.135)
Catholic	-0.077** (0.133)	-0.068* (0.131)	-0.063 (0.131)
Jewish	-0.020 (0.339)	-0.024 (0.333)	-0.020 (0.335)
Religious Attendance	0.136*** (0.041)	0.111*** (0.040)	0.090*** (0.041)
Pro- Transgender Anti- Transgender			
Pro-Gay		-0.130*** (0.146)	-0.120*** (0.152)
Anti-Gay		0.111*** (0.134)	0.101*** (0.136)
Pro- Fundamentalist Anti- Fundamentalist			-0.003 (0.138) -0.078*** (0.124)
Pro-Muslim			-0.019 (0.208)
Anti-Muslim			0.022 (0.125)
Pro-Christian			0.085*** (0.106)
Anti-Christian			0.024 (0.381)

Pro-Jew			0.043 (0.107)
Anti-Jew			-0.004 (0.343)
R <sup>2</sup>	0.315	0.342	0.358
N	1,364	1,364	1,364

\* =  $p < 0.05$ ; \*\* =  $p < 0.01$ ; \*\*\* =  $p < 0.001$ ; Standard Beta are entries, Standard Error in parenthesis.

The final Anti-Discrimination Law model (Table 3) indicates that those not white or black, political conservatives, those who attend religious services more often, those believing it is better that a wife stays home, those who have negative feelings towards gays, those who lack positive feelings towards gays, those who have positive feelings towards Christian fundamentalists, and those who lack negative feelings towards Christian fundamentalists are less likely to support anti-discrimination laws based on sexual orientation. Once again there was a substantially greater increase in coefficient of determination when adding the gay thermometer variables than the religious thermometer variables (0.051 v. 0.014). As it concerns size effects, it is notable that Anti-Gay (0.196) rivals the power of Political Conservatism (0.201) but that Pro-Fundamentalist (0.094) is higher than Pro-Gay (-0.069). The power of animosity towards sexual minorities may be the driving force behind the powerful jump in coefficient of determination.

**Table 3: Betas and Standard Errors on Anti-Discrimination Law**

	Anti-Discrim Law	Anti-Discrim Law	Anti-Discrim Law
Age	-0.019 (0.002)	-0.038 (0.002)	-0.033 (0.002)
Female	-0.016 (0.056)	-0.005 (0.055)	-0.001 (0.055)
Black	0.009 (0.113)	0.003 (0.110)	0.002 (0.110)
Other Race	-0.047 (0.079)	-0.064* (0.076)	-0.060* (0.076)
Heterosexual	-0.037 (0.080)	-0.032 (0.077)	-0.027 (0.077)
Northcentral	0.031 (0.070)	0.031 (0.068)	0.034 (0.067)
Northeast	0.031 (0.092)	0.044 (0.089)	0.043 (0.089)
West	-0.057* (0.077)	-0.044 (0.074)	-0.045 (0.074)

Education	-0.027 (0.028)	-0.008 (0.027)	0.004 (0.028)
Income	-0.080** (0.004)	-0.057* (0.004)	-0.049 (0.004)
Political Conservatism	0.280*** (0.021)	0.237*** (0.020)	0.201*** (0.022)
Better if Wife at Home	0.082*** (0.021)	0.068** (0.021)	0.064* (0.021)
Protestant – Bible God’s Word	0.053 (0.088)	0.034 (0.086)	0.026 (0.086)
Protestant _ Bible Not God’s Word	-0.084** (0.082)	-0.064* (0.079)	-0.051 (0.079)
Catholic	-0.067* (0.080)	-0.055 (0.077)	-0.041 (0.077)
Jewish	-0.012 (0.203)	-0.017 (0.197)	-0.010 (0.199)
Religious Attendance	0.097*** (0.024)	0.066* (0.024)	0.058* (0.024)
Pro- Transgender Anti- Transgender Pro-Gay		- 0.085*** (0.087)	-0.069** (0.090)
Anti-Gay		0.220*** (0.079)	0.196*** (0.081)
Pro- Fundamentalist Anti- Fundamentalist Pro-Muslim			0.094*** (0.082) -0.054* (0.073) -0.004 (0.123)
Anti-Muslim			0.049 (0.074)
Pro-Christian			0.006 (0.063)
Anti-Christian			0.013 (0.226)
Pro-Jew			-0.027 (0.063)
Anti-Jew			0.008 (0.203)

R <sup>2</sup>	0.185	0.236	0.250
N	1,371	1,371	1,371

\* =  $p < 0.05$ ; \*\* =  $p < 0.01$ ; \*\*\* =  $p < 0.001$ ; Standard Beta are entries, Standard Error in parenthesis.

The final Transgender Bathroom model (Table 4) indicates that males, political conservatives, those who are not moderate/liberal Protestants, those who have positive feelings towards Christians, those who have negative feelings towards the transgendered, those who lack positive feelings towards the transgendered, and those who lack negative feelings towards Christian fundamentalists are less supportive of individuals using restrooms according to their gender identity. The difference in coefficient of determination when adding the transgendered thermometers as opposed to the religion thermometers (0.033 v. 0.031) was negligible. Indeed, the strength of the standard beta of Anti-Fundamentalist (-0.157) is greater than the standardized betas of Pro-Transgender (-0.097) and Anti-Transgender (0.111) and is only surpassed by the standard beta of Political Conservatism (0.331). The effect of animosity towards fundamentalist Christians may have a greater effect on support for transgendered bathrooms than any other factor outside of general political liberalism.

**Table 4: Betas and Standard Errors on Transgender Bathroom Support**

	<b>Transgender Bathroom</b>	<b>Transgender Bathroom</b>	<b>Transgender Bathroom</b>
Age	-0.013 (0.003)	0.005 (0.003)	-0.001 (0.003)
Female	-0.064** (0.094)	-0.057* (0.091)	-0.055* (0.090)
Black	0.056* (0.187)	0.046 (0.183)	0.038 (0.180)
Other Race	0.047 (0.130)	0.042 (0.127)	0.047 (0.125)
Heterosexual	0.017 (0.133)	0.014 (0.129)	0.016 (0.127)
Northcentral	0.025 (0.116)	0.030 (0.113)	0.025 (0.111)
Northeast	-0.035 (0.153)	-0.013 (0.150)	-0.011 (0.147)
West	-0.013 (0.127)	-0.004 (0.124)	0.009 (0.122)
Education	-0.069** (0.047)	-0.056* (0.046)	-0.033 (0.045)
Income	-0.064* (0.047)	-0.059* (0.046)	-0.045 (0.045)

	(0.007)	(0.006)	(0.006)
Political	0.445***	0.395***	0.331***
Conservatism	(0.034)	(0.035)	(0.036)
Better if Wife at	0.053*	0.044	0.034
Home	(0.035)	(0.034)	(0.034)
Protestant –	0.060*	0.048	0.039
Bible God’s	(0.145)	(0.142)	(0.139)
Word			
Protestant _	-0.092***	-0.083**	-0.069*
Bible Not	(0.136)	(0.133)	(0.131)
God’s Word			
Catholic	-0.046	-0.050	-0.042
	(0.132)	(0.129)	(0.127)
Jewish	-0.034	-0.037	-0.024
	(0.343)	(0.335)	(0.333)
Religious	0.073**	0.055*	0.036
Attendance	(0.040)	(0.039)	(0.040)
Pro-		-0.122***	-0.097***
Transgender		(0.179)	(0.179)
Anti-		-0.139***	0.111***
Transgender		(0.113)	(0.113)
Pro-Gay			
Anti-Gay			
Pro-			0.002
Fundamentalist			(0.133)
Anti-			-0.157***
Fundamentalist			(0.121)
Pro-Muslim			-0.029
			(0.205)
Anti-Muslim			0.053*
			(0.121)
Pro-Christian			0.075***
			(0.103)
Anti-Christian			0.028
			(0.369)
Pro-Jew			-0.000
			(0.103)
Anti-Jew			0.014
			(0.331)
R <sup>2</sup>	0.329	0.362	0.393
N	1,345	1,345	1,345

\* =  $p < 0.05$ ; \*\* =  $p < 0.01$ ; \*\*\* =  $p < 0.001$ ; Standard Beta are entries, Standard Error in parenthesis.

The variables Same-Sex Marriage and Same-Sex Adoption are both dummy variables, and logistic regression models are appropriate for exploring the effects of the independent variables upon them. Those models can be seen in Table 5. I used the same strategy of the first model being all non-thermometer variables, the second model adding in the gay thermometer variable, and the third model adding in the religion thermometer variables. The final Same-Sex Marriage model indicates that older, male, the lower educated, political conservatives, those who believe it is better that a wife stays home, Protestants who believe the Bible is the word of God, those who are not Protestants who do not believe the Bible is the word of God, non-Catholics, those who attend religious services more often, those who have positive feelings towards Christians and Jews, those who have negative feelings towards gays, those who lack positive feelings towards gays, and those who lack negative feelings towards Christian fundamentalists and Jews are less supportive of same-sex marriage. Looking at the Nagelkerke  $R^2$ , which is a pseudo-measurement of determination, it is clear that adding the gay thermometers adds about twice as much explanatory power as adding the religion thermometers (0.051 v. 0.026). Given the strength of the standard betas of Pro-Gay (-1.553) and Anti-Gay (1.218), this model indicates that affection or disaffection towards sexual minorities is the most powerful explanation for support or nonsupport of same-sex marriage.

**Table 5: Betas and Odds Ratios on Same-Sex Marriage and Same-Sex Adoption Support**

	Same-Sex Marriage	Same-Sex Marriage	Same-Sex Marriage	Same-Sex Adoption	Same-Sex Adoption	Same-Sex Adoption
Age	0.015*** (1.015)	0.011** (1.011)	0.009* (1.009)	0.009 (1.009)	0.007 (1.007)	0.006 (1.006)
Female	-0.393** (0.675)	-0.314* (0.730)	-0.317* (.728)	-0.342** (0.711)	-0.275* (0.759)	-0.276* (0.759)
Black	0.450* (1.568)	0.413 (1.539)	0.402 (1.495)	0.790** (2.203)	0.803** (2.233)	0.895*** (2.447)
Other Race	0.290 (1.336)	0.232 (1.262)	0.332 (1.394)	0.715*** (2.045)	0.645*** (1.907)	0.811*** (2.251)
Heterosexual	0.082 (1.086)	0.102 (1.107)	0.124 (1.132)	0.200 (1.221)	0.291 (1.337)	0.325 (1.384)
Northcentral	-0.058 (0.944)	-0.046 (0.955)	-0.031 (0.970)	0.003 (1.003)	0.014 (1.014)	0.052 (1.053)
Northeast	0.010 (1.010)	0.140 (1.151)	0.163 (1.177)	-0.676* (0.509)	-0.551* (0.576)	-0.563* (0.570)
West	-0.267 (0.766)	-0.256 (0.774)	-0.226 (0.798)	-0.171 (0.843)	-0.077 (0.926)	-0.019 (0.981)
Education	-0.186** (0.830)	-0.152* (0.859)	-0.124* (0.883)	0.001 (1.001)	0.060 (1.062)	0.096 (1.101)
Income	-0.019* (0.981)	-0.013 (0.987)	-0.012 (0.988)	-0.034*** (0.967)	-0.025** (0.975)	-0.024* (0.976)

Political	0.644***	0.591***	0.507***	0.484***	0.425***	0.329***
Conservatism	(1.905)	(1.805)	(1.660)	(1.622)	(1.530)	(1.389)
Better if Wife at Home	0.152**	0.131**	0.129**	0.276***	0.272***	0.269***
	(1.164)	(1.140)	(1.137)	(1.318)	(1.313)	(1.309)
Protestant – Bible God’s Word	0.800***	0.799**	0.698**	0.590**	0.542**	0.487*
	(2.226)	(2.224)	(2.010)	(1.803)	(1.720)	(1.627)
Protestant _ Bible Not God’s Word	-0.611**	-0.488**	-0.470*	-0.520**	-0.390*	-0.339
	(0.543)	(0.614)	(0.625)	(0.595)	(0.677)	(0.712)
Catholic	-0.560**	-0.482**	-0.373*	-0.328*	-0.264	-0.126
	(0.571)	(0.617)	(0.688)	(0.720)	(0.768)	(0.882)
Jewish	-0.709	-0.862	-0.891	0.275	0.119	0.369
	(0.492)	(0.422)	(0.410)	(1.316)	(1.126)	(1.447)
Religious Attendance	0.397***	0.359***	0.317***	0.382***	0.330***	0.278***
	(1.487)	(1.432)	(1.372)	(1.465)	(1.391)	(1.320)
Pro-Gay	-	-	-	-	-	-0.961**
		1.630***	1.553***		1.157***	(0.383)
		(0.196)	(0.212)		(0.315)	
Anti-Gay		1.259***	1.218***		1.722***	1.639***
		(3.521)	(3.382)		(5.598)	(5.148)
Pro-Fundamentalist			0.782***			0.592**
			(2.185)			(1.808)
Anti-Fundamentalist			-0.552**			-0.599**
			(0.576)			(0.549)
Pro-Muslim			-0.260			-0.673
			(0.771)			(0.510)
Anti-Muslim			0.103			0.258
			(1.108)			(1.294)
Pro-Christian			0.270*			0.526***
			(1.309)			(1.692)
Anti-Christian			0.442			0.042
			(1.556)			(1.043)
Pro-Jew			0.344*			0.066
			(1.411)			(1.068)
Anti-Jew			-1.224*			-1.035*
			(0.294)			(0.355)
Nagelkerke R <sup>2</sup>	0.429	0.480	0.506	0.363	0.436	0.466
-2 Log Likelihood	1370.228	1290.476	1248.421	1307.548	1207.218	1165.042
N	1,376	1,376	1,376	1,362	1,362	1,362

\* =  $p < 0.05$ ; \*\* =  $p < 0.01$ ; \*\*\* =  $p < 0.001$ ; Standard Beta are entries, Odds Ratios in parenthesis.

The final model of Same Sex Adoption indicates that individuals who are male, nonwhite, not living in the Northeast, have lower SES, political conservatives, those who believe it is better that a wife stays home, Protestants who believe that the Bible is the word of God, those who attend religious services more often, those who have positive feelings towards Christians, those who have negative feelings towards gays, those who lack positive feelings towards gays, and those who lack negative feelings towards Christian fundamentalists and Jews are less supportive of same-sex adoption. Once again adding the gay thermometers added much more explanatory power than adding the religion thermometers (0.073 v. 0.03). The standardized betas of Pro-Gay (-0.961) and Anti-Gay (1.639) are higher than those

of any other independent variable. Affection or disaffection towards sexual minorities is the strongest factor determining support for same-sex adoption.

A review of the analysis of these five dependent variables reveals important implications about the support of sexual minorities' rights. First, clearly one's overall political ideology and positive/negative feelings towards sexual minorities are the most powerful predictors of support for the rights of sexual minorities. Given the polarized nature of politics in the United States and the natural inclination to favor those towards whom we feel affection, such results are to be expected. Second, the religious thermometers were found to be significant in all five of the models. They may be only inferior to political ideology and affection/disaffection towards sexual minorities as having consistent power to predict support for sexual minorities. Third, among the religious thermometer variables, only Anti-Fundamentalist was found to be significant in all five models. While at times the standard betas of Pro-Fundamentalist were stronger than Anti-Fundamentalist, it was not consistently a significant predictor of nonsupport of sexual minorities. Even after applications of controls, disaffection towards Christian fundamentalists is a very reliable predictor of the religion thermometers. Finally, although not significant in all five models, gender and religious service attendance were still significant predictors in four of the models. It is reasonable to argue that men and regular church attendees are less supportive of sexual minorities.

### *DISCUSSION*

Attitudes towards religious groups was found to be associated with support or nonsupport of sexual minority rights even after controlling for a variety of other social and demographic factors. While overall political ideology and attitudes towards sexual minorities have stronger relationships to support of sexual minorities' rights, there is no denying the consistency of the finding of the impact of attitudes towards religious groups. Future work should consider how attitudes towards religious groups may influence the ability of activists to promote the interest of sexual minorities. The results of this research, however, suggest that the notions of a culture war may help to explain this relationship. Among the religious measures, dislike towards Christian fundamentalists is the most consistent predictor of support for sexual minorities. If Christian fundamentalists can be accurately seen as an important opponent of cultural progressives (Yancey and Williamson 2012), who tend to champion the rights of sexual minorities, then it is plausible that animosity towards them would be the most relevant measure of religious thermometer attitudes. For example, although Muslims are a culturally conservative subculture, they are not known for political opposition to cultural progressive measures. The political and social controls in the research indicate that it is not merely that political progressives who happen to support sexual minorities

are also less likely to have animosity towards a political ally. What is likely is that animosity towards Muslims cannot be expressed through support of sexual minorities, and there is little or no symbolic motivation for those resenting Muslims also to support sexual minorities.

Many respondents dislike these religious groups precisely because of their hostility to sexual minorities. There are two reasons, however, to suspect that it is also the case that the power of anti-religious animosity has fueled some support for sexual minorities. First, even with the sympathy towards sexual minorities controlled, sympathy or dislike towards religious groups still matters. If support of sexual minorities led to both animosity towards religious groups and support of the rights of sexual minorities, then controlling for affinity or animosity towards sexual minorities should eliminate the significant relationship of sexual minority support and attitudes towards religious groups. Second, if the direction of the relationship is caused only by respondents rejecting religious groups due to their opposition of sexual minorities, then the non-significant results concerning Anti-Muslims in four of the five models, as well as the positive relationship of animosity of Muslims with less support for transgendered bathrooms, does not fit. While there is not a strong tendency to think of Muslims as major political opponents to sexual minorities, Islamic theology is not known to favor them either. Anti-Muslim bias is not likely to develop because of a stereotype of Muslims supporting sexual minorities. Previous perceptions of religious groups' attitudes towards sexual minorities offer only partial explanation of the relationships of emotional warmth or coolness towards certain religious groups and support of the rights of sexual minorities.

These two factors suggest that animosity towards religious groups is not only linked to their non-support for sexual minorities but that animosity towards religious groups may engender more support for sexual minorities. To argue that the direction of this association is only religious group rejection of sexual minorities leading to rejection of that religious group by those supportive of sexual minorities, then one must find additional theories beyond the original theory that sympathy to sexual minorities motivates anger towards religious groups. In the absence of such theories, it is reasonable to consider if the direction of the association also works in the opposite direction. In other words, hostility towards religious groups may also lead to support of sexual minorities. The notion of using symbolic issues to signal antipathy towards out-groups is well established in race and ethnicity literature (Bobo 1983; Kinder and Sears 1981; McConahay and Hough 1976; Sniderman and Tetlock 1986). In a similar way, those with antipathy towards certain types of religious groups may express it with support of the rights of sexual minorities. Ironically, this practice may also lead to the possibility of symbolic sympathy as well as symbolic hostility whereby individuals use support of certain groups to signal their distance from other groups.

This analysis helps explain the stronger result of attitudes towards Christian fundamentalists relative to the other religious groups. Work on animosity towards Christian fundamentalists indicates that they are perceived as the major religious enemy to highly educated progressives (Yancey and Williamson 2014). Such educated progressives do not tend to have nearly as much animosity towards Muslims or Jews as they do towards conservative Christians and may be more open to the idea of sexual minorities' rights. Therefore, it is reasonable to expect that they would be more open to using issues surrounding sexual minorities to signal anti-conservative Christian hostility than hostility towards other religious groups.

It is expected that political advocacy furthers the causes of the proponents of a particular political cause. This research, however, offers a unique interpretation of the information we have on the relationship of attitudes towards religious groups and sexual minorities, and further research can spur efforts to explore the possibility of a reversed directionality. These current results introduce the possibility that advocacy against sexual minorities by religious groups may generate support for sexual minorities in some quarters of our society. There may be unique aspects in sexuality rights debates that produce this level of backlash. It remains to be seen if the support generated by religious groups' advocacy is greater than the nonsupport generated by that activism. These results suggest the need for qualitative work that explores the symbolic meaning of the rights of sexual minorities for those with anti-Christian animosity.

Finally, there is a unique challenge concerning the measurement of attitudes towards Christian fundamentalists. The ANES did not provide a way to understand how individuals define fundamentalists. It is possible that respondents perceive fundamentalists as a mere fringe group, such as Westboro Baptist Church members, or a larger group that makes up a significant percentage of the United States, such as the 36 percent of Americans who claim to be "born-again" (Chaves 2011). There have been limited efforts to determine how Americans define fundamentalism (Altemeyer and Hunsberger 1992; Emerson and Hartman 2006), and to comprehend fully the culture war implications of this research, it is important to understand how respondents define Christian fundamentalists. If respondents supporting same-sex marriage in part due to animosity towards fundamentalists only envision them as a small fringe group, then they are less likely to feel threatened than those who see fundamentalists as a larger group. The latter may be more likely to encourage support for same-sex marriage as a way possibly to combat the potential threat of Christian fundamentalism.

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION**

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<p><b>CHELSEY NELSON PHOTOGRAPHY LLC and CHELSEY NELSON,</b></p> <p style="text-align: center;"><b>Plaintiffs,</b></p> <p><b>v.</b></p> <p><b>LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT, et al.,</b></p> <p style="text-align: center;"><b>Defendants.</b></p>	<p style="text-align: center;"><b>Case No. 3:19-cv-851-BJB-CHL</b></p>
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**[PROPOSED] ORDER GRANTING  
DEFENDANTS’ MOTION TO LIMIT TESTIMONY BY  
PLAINTIFFS’ REBUTTAL EXPERT, GEORGE YANCEY**

Defendants Louisville/Jefferson County Metro Government, Louisville Metro Human Relations Commission – Enforcement, Louisville Metro Human Relations Commission – Advocacy, Verná Goatley, in her official capacity as Executive Director of the HRC, Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Leslie Faust, William Sutter, Ibrahim Syed, and Leonard Thomas, in their official capacities as members of the Louisville Metro Human Relations Commission-Enforcement (collectively, “Defendants”) have filed a motion to exclude or limit expert testimony offered by George Yancey, Ph.D., an expert witness disclosed by Plaintiffs Chelsey Nelson Photography and Chelsey Nelson (collectively, “Chelsey” or “Plaintiffs”) as rebuttal to the opinion offered by Defendants’ expert, Professor Netta Barak-Corren.

Having reviewed the parties’ arguments and being otherwise sufficiently advised, the Court GRANTS Defendants’ motion and ORDERS that Paragraphs 34-45 of Professor Yancey’s rebuttal expert report and any related testimony be and hereby is EXCLUDED from evidence in this matter.

Tendered by:

/s/ Casey L. Hinkle

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 30, 2021, the foregoing was filed via the Court's electronic filing system, which will automatically send notice of such filing to all counsel of record.

/s/ Casey L. Hinkle

*Counsel for Defendants*