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Unites States v. Windsor, Obergefell v. Hodges and the Future of LGBT Rights in the Workplace

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UNITED STATES V. WINDSOR, OBERGEFELL V. HODGES AND THE FUTURE OF LGBT RIGHTS IN THE WORKPLACE

People everywhere long for the freedom to determine their destiny; the dignity that comes with work; the comfort that comes with faith; and the justice that exists when governments serve their people—and not the other way around. The United States of America will always stand up for these aspirations, for our own people and for people all across the world. That was our founding purpose.¹

I. Scope of This Paper

On June 26, 2015, the United States Supreme Court in *Obergefell v. Hodges* held that it is constitutionally impermissible to deny same-sex couples the right to marry.² To do otherwise, the Court found, is a violation of both the Equal Protection Clause and the Due Process Clause of the 14th Amendment.³ While this case created a federally recognized right of same-sex couples to marry, it left unaltered the right of states to determine what protections, or lack of protections, they would extend to workers against employment discrimination on the basis of sexual orientation.⁴ Currently, there are a number of federal laws that protect workers against discrimination.⁵ Most notably, under Title VII of the Civil Rights Act of 1964 (“Title VII”), it is unlawful for an employer to discriminate based on the sex, national origin, race or color of an employee.⁶ Yet, not until the recent United States Equal

1. See Barack Obama, President of the United States, Remarks by the President to the UN General Assembly (Sept. 25, 2012), (transcript available on <https://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-un-general-assembly>).

2. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

3. *Id.* at 2604.

4. See *Sexual Orientation Discrimination*, WORKPLACE FAIRNESS, <http://www.workplacefairness.org/sexual-orientation-discrimination> (last visited May 16, 2016).

5. See *Laws Enforced by the EEOC*, EEOC, <http://www.eeoc.gov/laws/statutes/> (last visited Mar. 30, 2016).

6. 42 U.S.C. § 2000e-2(a)-(b) (2012); see also *Harris v. Forklift Systems, Inc.*, 510 U.S. 17,

Employment Opportunity Commission (“EEOC”) decision in *Complainant v. Foxx* was this prohibition against employment discrimination found to be inclusive of discrimination on the basis of sexual orientation.⁷

This paper will examine the current state of affairs for workers who seek employment based benefits coverage for their same-sex spouses through their employer. More specifically, this paper will address the implications of both *United States v. Windsor* and *Obergefell* on employment-based visas wherein the employee is in a same-sex marriage and seeks coverage for that spouse.⁸ This paper will provide an overview of the current landscape of anti-discrimination in the context of same-sex marriage in the wake of the *Obergefell* and *Windsor* decisions. This paper also proposes a new strategy for achieving true equality in the workplace for workers with a same-sex spouse.

II. Background on *United States v. Windsor*

At first glance, *Windsor* was a case concerning the tax law implications of a statutory act.⁹ The Defense of Marriage Act (“DOMA”), which became law in 1996, contains two primary substantive sections.¹⁰ Section 2, entitled “Powers Reserved to the States,” provides in sum that no state will be required to recognize a same-sex marriage that was legally performed in another state, if same-sex marriage is not also recognized in that state.¹¹ For purposes of later

21 (1993).

7. Joanna L. Grossman, *Based on Sex: The EEOC Rules That Sexual Orientation Discrimination is Sex Discrimination*, JUSTIA: VERDICT (July 21, 2015), <https://www.verdict.justia.com/2015/07/21/based-on-sex-the-eeoc-rules-that-sexual-orientation-discrimination-is-sex-discrimination>.

8. *Obergefell*, 135 S. Ct. at 2604-05; *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

9. Laura R. Westfall, *Tax Law: United States v. Windsor and Federal Tax Law*, 31 ABA SECTION OF TAXATION NEWSQUARTERLY 1, Fall 2013, at 18, http://www.americanbar.org/publications/gp_solo/2014/january-february/tax_law_united_states_v_windsor_and_federal_tax_law.html.

10. Peter Sprigg, *Understanding Windsor: What the Supreme Court Ruling on the Defense of Marriage Act Did—and Did Not—Say*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/understandingwindsor> (last visited May 12, 2016) (stating that “DOMA had two substantive provision: Section 2 . . . and Section 3 . . .”).

11. Pub. L. No. 104-199, § 2, 110 Stat. 2419 (1996) (providing that “[n]o State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”)

discussion, this is referred to as the “state of residence” rule.¹² Under this theory, the law of a state where the couple resides controls when determining what definition of “spouse” to apply in allocating employee benefits.¹³ Section 3 lists the “Definition of Marriage” as:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.¹⁴

Effectively, section 3 of DOMA “defined marriage for *federal* purposes as between one man and one woman.”¹⁵ Both sections of DOMA remained continuously in effect from 1996¹⁶ until the recent decision in *Windsor*.¹⁷ *Windsor* held unconstitutional section 3 of DOMA, but left unaltered section 2 of DOMA as the Supreme Court determined that issue was not properly before the *Windsor* Court.¹⁸

By way of background, after Congress passed DOMA, it was signed into law by then President Clinton.¹⁹ When the *Windsor* ruling

(codified as 28 U.S.C. § 1738C (1996)).

12. See Joseph Henchman, *IRS Issues “State of Celebration” Guidance for Same-Sex Couples-Further Guidance by 24 States May Be Required*, TAX FOUNDATION (Aug. 29, 2013), <http://www.taxfoundation.org/article/irs-issues-state-celebration-guidance-same-sex-couples-further-guidance-24-states-may-be-required>.

13. See *Windsor*, 133 S. Ct. at 2683 (“Section 3 is at issue here. It amends the Dictionary Act in Title 1, § 7, of the United States Code to provide a federal definition of ‘marriage’ and ‘spouse.’ Section 3 of DOMA provides as follows: ‘In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.’”).

14. Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996) (codified as 1 U.S.C. § 7 (1994)).

15. David S. Kemp, *The Imminent Demise of Section 2 of the Defense of Marriage Act*, JUSTIA: VERDICT (Aug. 12, 2013), <http://verdict.justia.com/2013/08/12/the-imminent-demise-of-section-2-of-the-defense-of-marriage-act#sthash.PjSdVwME.dpuf> (emphasis added).

16. See Caitlin Sandley & Stanford Moore, *Windsor May Have Paved the Way for Intermediate Scrutiny of DOMA*, A.B.A. (Feb. 11, 2013), <http://apps.americanbar.org/litigation/committees/civil/articles/winter2013-0213-windsor-may-have-paved-way-intermediate-scrutiny-doma.html>.

17. *Windsor*, 133 S. Ct. at 2696.

18. *Id.* at 2682; *Id.* at 2697 (Roberts, C.J., dissenting) (stating in agreement with the majority that the validity of Section 2 of DOMA is not properly before the Court).

19. See *id.* at 2682.

was released on June 26, 2013, it invalidated section 3 of DOMA.²⁰ Almost three years prior, on November 9, 2010, Edie Windsor sought judicial relief after her same-sex partner died and she had to pay over three-hundred thousand dollars in estate taxes that she would not have had to pay had she been legally married.²¹ Because the federal government did not recognize her marriage, she was not entitled to the spousal deduction when assessing estate taxes from the estate left to her by Thea Spyer.²² The outcome of *Windsor* was a pivotal moment in the fight to legalize same-sex marriage in the United States.²³ The Supreme Court held that “Windsor suffered a redressable injury when she was required to pay estate taxes from which, in her view, she was exempt but for the alleged invalidity of [section] 3 of DOMA.”²⁴

Edith Windsor and Thea met in New York City in 1967.²⁵ “Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993.”²⁶ After a long engagement,²⁷ they were legally wed in Canada in 2007.²⁸ On May 14, 2008, New York Governor, David A. Paterson, issued a directive to “all state agencies to begin to revise their policies and regulations to recognize same-sex marriages performed in other jurisdictions.”²⁹ “New York courts ruled that they would recognize same-sex marriages that

20. *Id.* at 2696.

21. *See id.* at 2682; *see also* Pete Williams & Erin McClam, *Supreme Court Strikes Down Defense of Marriage Act, Paves Way for Gay Marriage to Resume in California*, NBC POLITICS (June 26, 2013, 7:04 AM), http://nbcpolitics.nbcnews.com/_news/2013/06/26/19151971-supreme-court-strikes-down-defense-of-marriage-act-paves-way-for-gay-marriage-to-resume-in-california.

22. *See* Neal Devins & Tara Grove, *Commentary on Marriage Grants: Article III & Same-Sex Marriage*, SCOTUSBLOG (Dec. 8, 2012, 3:44 PM), <http://www.scotusblog.com/2012/12/commentary-on-marriage-grants-article-iii-same-sex-marriage/>.

23. *See id.*

24. *Windsor*, 133 S. Ct. at 2685.

25. *See* Lila Shapiro, *Edie Windsor vs. DOMA May Be Best Chance To Strike Federal Gay Marriage Bar*, HUFFPOST—QUEER VOICES, http://www.huffingtonpost.com/2012/07/17/edie-windsor-doma_n_1680217.html (last updated Feb. 2, 2016) (“[t]he two women met in 1965 at a West Village restaurant where lesbians went on Friday nights, Windsor recalled, and were engaged in 1967. Windsor was a computer systems consultant for IBM, and Spyer was a clinical psychologist. They finally wed in Toronto in 2007, just two years before Spyer died after years battling advanced multiple sclerosis. Their *New York Times* wedding announcement served also as a coming-out announcement to many friends and colleagues whom they’d never told about their relationship.”).

26. *Windsor*, 133 S. Ct. at 2683.

27. *See Windsor v. United States*, ACLU, <https://www.aclu.org/cases/lesbian-and-gay-rights/windsor-v-united-states> (last updated Apr. 25, 2014).

28. *See id.*

29. Jeremy W. Peters, *New York to Back Same-Sex Unions From Elsewhere*, N.Y. Times, (May 29, 2008), <http://www.nytimes.com/2008/05/29/nyregion/29marriage.html>.

were legally conducted out of state.”³⁰ This was inclusive of same-sex marriages legally performed in other countries.³¹ Meaning, Edith and Thea’s marriage, which was performed in Canada, was legally recognizable in New York.³² In 2011, New York became the largest state to legally recognize same-sex marriage.³³

The *Windsor* decision effectively meant that Edith’s marriage to Thea would be retroactively recognized and Edith would then be entitled to the same relief from estate taxes that opposite-sex married couples were entitled to.³⁴ The Supreme Court’s ruling allowed Windsor’s marriage to be recognized by the federal government.³⁵ At the time, “[a]lthough the executive [branch] [was] not defending DOMA, it [was] enforcing the law; in this case, the executive [branch] mandated that Windsor pay a federal tax on the estate she inherited from her same-sex spouse.”³⁶ This was because if the federal government treated Windsor’s marriage the same as an opposite-sex marriage, Edith would have been entitled to a spousal estate tax exemption.³⁷ The Court found that the executive branch “injured Windsor.”³⁸ This injury “set the stage for a constitutional challenge.”³⁹ Certiorari was then properly granted to resolve “the concrete dispute between the executive [branch] and Windsor.”⁴⁰

Windsor effectively held that the law of the state where the couple

30. Ariel Levy, *The Perfect Wife: How Edith Windsor Fell in Love, Got Married, and Won a Landmark Case for Gay Marriage*, THE NEW YORKER (Sept. 30, 2013), <http://www.newyorker.com/magazine/2013/09/30/the-perfect-wife>.

31. *Windsor v. United States*, 669 F.3d 169, 177-78 (2d Cir. 2012) (In 2009, “[t]hree of New York’s four appellate divisions have concluded that New York recognized foreign same-sex marriages before the state passed its marriage statute in 2011. [Additionally,] Windsor’s marriage would have been recognized under New York law at the time of Spyer’s death. . . .”).

32. *Id.*

33. See Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES (June 24, 2011), http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html?pagewanted=all&_r=0.

34. Westfall, *supra* note 9 (“*Windsor* applies retroactively for the purpose of filing original, amended, and adjusted returns, or claims for credit or refund for tax overpayments, except with respect to certain retirement plans.”).

35. See *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (“[DOMA] is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”)

36. See Devins & Grove, *supra* note 22.

37. See *id.*

38. See *id.*

39. *Id.*

40. *Id.*

resides controls for the definition of “spouse.”⁴¹ As the tax code is a federal statute and the United States federal government did not previously recognize same-sex marriage, Edith was denied the spousal benefit as the executor of Thea’s estate.⁴² This implicated federal tax law.⁴³

Pursuant to section 3 of DOMA, even same-sex couples who were legally married in their home state, could not receive federal law based benefits.⁴⁴ Since *Windsor* did not challenge section 2 of DOMA and this issue was not properly brought before the court, only section 3 was struck down.⁴⁵ The “state of residence” rule is apparent in section 2 of DOMA.⁴⁶ This meant that, with section 2 of DOMA still intact, individual states could elect not to recognize the same-sex marriages performed in another state.⁴⁷

Just four years after the *Windsor* decision, the *Obergefell* decision made it illegal for individual states to refuse to recognize the same-sex marriages of couples based on where their ceremony was.⁴⁸ In the interim after *Windsor* but prior to *Obergefell*, the federal government did have to recognize same sex marriages that are legal in their home state.⁴⁹ That is, same-sex couples who were legally married in their own states at the time of the *Windsor* decision or married after the decision, would now be able to receive federal protections such as Social Security, Veterans’ benefits, health insurance, retirement savings, the right to creative and intellectual property, as well as other federally recognized rights including immigration protections for bi-national couples.⁵⁰

The effect of *Windsor* was immediately palpable even while the case was advancing through the courts.⁵¹ Several cases were put on

41. *Frequently Asked Questions: FMLA Notice of Proposed Rulemaking*, WAGE & HOUR DIVISION, U.S. DEP’T OF LAB., <http://www.dol.gov/whd/fmla/nprm-spouse/faq.htm#4> (last visited Mar. 8, 2015).

42. See Devins & Grove, *supra* note 22.

43. See *id.*

44. See Sprigg, *supra* note 10.

45. See *id.*

46. Henchman, *supra* note 12 (explaining the “state of residence” standard as “[a] federal joint filing [which] would be permitted only by residents of states that recognize the marriage as valid.”).

47. See *id.*

48. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015).

49. See Joanna L. Grossman, *Interstate Marriage Recognition: When History Meets the Supreme Court*, JUSTIA: VERDICT (Apr. 28, 2015), <https://verdict.justia.com/2015/04/28/interstate-marriage-recognition-when-history-meets-the-supreme-court>.

50. See *id.*; *Obergefell*, 135 S. Ct. at 2601; *United States v. Windsor*, 133 S. Ct. 2675, 2690 (2013).

51. See Richard Socarides, *The Growing Impact of the Supreme Court’s Gay-Marriage*

temporary hold pending the outcome of *Windsor*.⁵² In the wake of the *Windsor* decision, numerous rulings have been issued⁵³ overturning state prohibitions of same-sex marriage. The full impact of *Windsor* is still developing to this day.⁵⁴

Cases that were stalled pending release of the decision in *Windsor*, were then re-examined after the decision was issued.⁵⁵ For example, the plaintiffs in *Bishop v. Smith* challenged the Oklahoma state law prohibiting same-sex marriage.⁵⁶ Ultimately, in *Bishop*, the United States Court of Appeals for the 10th Circuit held that the Oklahoma law was unconstitutional.⁵⁷ Similarly, in *Kitchen v. Herbert*, a Utah state constitutional amendment that defined marriage as a union exclusively between a man and a woman, was held to be unconstitutional.⁵⁸ On October 6, 2014, the Supreme Court denied certiorari for both cases as well as five other cases regarding issues of marriage equality.⁵⁹ These denials allowed that Circuit's decision "recognizing a constitutional right to same-sex marriage to stand, clearing the way for marriage equality in all of the states within that Circuit."⁶⁰

The overturn of section 3 of DOMA had broad implications not just for marriage equality up until the decision in *Obergefell* issued, but also for how employers handle employment-based immigrant and non-immigrant visa applications.⁶¹ Prior to *Windsor*, employees could only legally apply for immigrant dependent visa status or non-immigrant dependent visa status on behalf of their opposite-sex spouse.⁶² After

Ruling, THE NEW YORKER (Jan. 27, 2014), <http://www.newyorker.com/news/news-desk/the-growing-impact-of-the-supreme-courts-gay-marriage-ruling>.

52. See Scottie Thomaston, *Supreme Court Puts Same-Sex Marriages in Utah Hold Pending Tenth Circuit Appeal*, HUFFPOST QUEER VOICE (Jan. 6, 2014), http://www.huffingtonpost.com/scottie-thomaston/supreme-court-puts-samesex_b_4549002.html.

53. *The History of the Freedom to Marry in the United States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage> (last visited Oct. 12, 2014).

54. See Socarides, *supra* note 51.

55. See, e.g., *Bishop v. Smith*, 760 F.3d 1070, 1076 (10th Cir. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1193 (D. Utah 2013).

56. *Bishop*, 760 F.3d at 1075.

57. *Id.* at 1074.

58. *Kitchen*, 961 F. Supp. 2d at 1188.

59. *Bishop v. Smith*, 135 S. Ct. 271 (2014); *Kitchen v. Herbert*, 135 S. Ct. 265 (2014); see also Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. TIMES (Oct. 6, 2014), http://www.nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html?_r=0.

60. *Baskin v. Bogan* (7th Cir.), CONSTITUTIONAL ACCOUNTABILITY CENTER, <http://theconstitution.org/cases/baskin-v-bogan-7th-cir> (last visited Oct. 12, 2014).

61. See *Same-Sex Marriages*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/family/same-sex-marriages> (last updated Apr. 3, 2014).

62. See *id.*

Windsor, in theory, all legally married couples should be able to apply for and, if not otherwise inadmissible, receive immigrant and/or non-immigrant visa status for they applied.⁶³

On the national level—in particular for federal employers—changes have been made from a policy perspective, if not in actual practice yet.⁶⁴ For example, a number of federal employers have made changes to their formal nondiscrimination policies since *Windsor* and these changes seem to be coming hand in hand with policy changes put forth by the executive office.⁶⁵ As there has been some movement by federal employers, an examination of how these employers are or are not changing their nondiscrimination policies in reaction to *Windsor*, can provide one litmus test for how other, non-federal employers may eventually decide to change or not change their nondiscrimination policies.⁶⁶

On the federal level, there were changes in how the official policy was spoken about.⁶⁷ For example, just three months after the *Windsor* decision came out, Secretary of State, John Kerry stated: “[t]here are few areas where I think our task is so clear, and what we need to do is make sure that we are working for that larger freedom for all people, and for the rights and the dignity of LGBT persons around the world.”⁶⁸ His comments were a call to action to change the federal government’s formal nondiscrimination policy to one that *explicitly* included protection from discrimination *on the basis of sexual orientation*.⁶⁹ While there are a number of federal laws prohibiting discrimination in the workplace, “[c]urrent federal law does not explicitly extend civil rights protections to lesbian, gay [and] bisexual . . . employees.”⁷⁰ Title

63. *See id.*

64. *See Sexual Orientation Discrimination, WORKPLACE FAIRNESS*, <http://www.workplacefairness.org/sexual-orientation-discrimination> (last visited Mar. 30, 2016).

65. *See id.*

66. *See id.* (President Obama’s July 21, 2014 Executive Order provides protections from discrimination only to “all federal workers, including contractors and subcontractors of the Federal government.”).

67. *See* United States Dep’t of State: Office of the Spokesman, *Fact Sheet: Lesbian, Gay, Bisexual, and Transgender Human Rights Issues* (May 16, 2014), <http://www.state.gov/r/pa/prs/ps/2014/05/226253.htm>.

68. *Id.* (quoting Secretary of State John Kerry’s comments made on Sept. 26, 2013).

69. *See id.* (emphasis added).

70. *EEOC Rules Workplace Sexual Orientation Discrimination Illegal*, BUSINESS INSURANCE (July 17, 2015), <http://www.businessinsurance.com/article/20150717/NEWS06/150719848/eoc-rules-workplace-sexual-orientation-discrimination-illegal?tags=%7C70%7C329%7C302>; *see also Federal Laws Prohibiting Job Discrimination Questions and Answers*, EEOC, <http://www.eeoc.gov/facts/qanda.html> (last visited Jul. 19, 2015) (including Title VII of the Civil Rights Act of 1964 (Title VI), the Equal Pay Act of 1963 (EPA), the Age Discrimination in

VII only delineates explicit protections against employment discrimination for five categories and sexual orientation is not one of them.⁷¹ However, up until the most recent EEOC decision *Complainant v. Foxx*, Title VII was not held to prohibit discrimination on the basis of sexual orientation as the term sex was not found to be inclusive of sexual orientation.⁷² In fact, the United States Court of Appeals for the Sixth Circuit explicitly stated in *Vickers v. Fairfield Medical Center* that “sexual orientation is not a prohibited basis for discriminatory acts under Title VII.”⁷³

Given that context, Secretary Kerry’s comments were a call to make a legislative change—and no longer leave the issue to be decided before the courts—to create a federal law that explicitly incorporated protection against employment discrimination on the basis of an employee’s actual or perceived sexual orientation.⁷⁴ The Secretary of State’s words were backed by President Obama’s actions. Just prior to Secretary of State John Kerry’s statements, President Obama issued an executive order proclaiming that only those employers who had an anti-discrimination policy that specifically prohibited discrimination on the basis of sexual orientation would be eligible to receive a federal government contract.⁷⁵ That is, the President’s executive order made it impermissible for an employer to obtain a federal government contract unless that employer has an anti-discrimination policy in place that specifically prohibits discrimination against employees on the basis of actual or perceived sexual orientation.⁷⁶

On the national level, the *Windsor* decision marked a huge milestone in the fight to have more inclusive protections against discrimination in the workplace.⁷⁷ The momentum stirred by the

Employment Act of 1967 (ADEA), Title I and Title V of the Americans with Disabilities Act of 1990 (ADA), Sections 501 and 505 of the Rehabilitation Act of 1973, Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA) and the Civil Rights Act of 1991).

71. *Federal Laws Prohibiting Job Discrimination Questions and Answers*, *supra* note 72.

72. See *Baldwin v. Foxx*, EEOC Appeal No. 0120133080 (2015), <https://www.eeoc.gov/decisions/0120133080.pdf>.

73. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006).

74. See United States Dep’t of State, *supra* note 67.

75. Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 Fed. Reg. 72985-01 (proposed Dec. 9, 2014), 2014 WL 6879534 (to be codified at 41 C.F.R. pts. 60-1, 60-2, 60-4 and 60-5).

76. See *id.*

77. *Sexual Orientation and Gender Identity: Public Policy Issue Statement*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (June 2014), <https://www.shrm.org/Advocacy/PublicPolicyStatusReports/Federal/Documents/014SexualOrientation%20Statement%20Final%206-20-14.pdf>.

Windsor decision was continued when the President issued Executive Order 13672.⁷⁸ This order, which was released by President Obama shortly after the *Windsor* decision, made it illegal for a federal contractor to discriminate based on sexual orientation when making employment related decisions and was a huge step toward comprehensive federal recognition of protection against discrimination on the basis of sexual orientation.⁷⁹ The order was also a huge step forward toward including gender identity as a protected category as well.⁸⁰

While this was not the first time a sitting president had issued an executive order to directly address issues of discrimination,⁸¹ this was the first time that protection against discrimination was explicitly extended to gender identity, in addition to sexual orientation.⁸² President Obama's order amended two prior executive orders: President Johnson's 1965 order,⁸³ and President Clinton's 1998 order.⁸⁴ Johnson's order was to "provide equal opportunity in Federal employment and in employment by Federal contractors on the basis of merit and without discrimination."⁸⁵ More specifically, the order was aimed directly at discrimination in hiring practices on the basis of "race, color, religion, sex, or national origin."⁸⁶ Four years after he signed it, Johnson's order was expanded by President Nixon to include "age and disability" in the protected categories.⁸⁷ In 2002, the order was amended one last time.⁸⁸ This time, however, the signing president reduced the scope of protection.⁸⁹ President George W. Bush amended the order in 2002 to allow an exemption for religious groups.⁹⁰

78. Exec. Order 13672, 79 Fed. Reg. 72985, *supra* note 75.

79. Ben James, *DOL Releases Final Rule To Hike Contractor Minimum Wage*, LAW360 (Oct. 2, 2014, 5:45 PM), <http://www.law360.com/articles/583638/dol-releases-final-rule-to-hike-contractor-minimum-wage>.

80. *Sexual Orientation Discrimination*, WORKPLACE FAIRNESS, <http://www.workplacefairness.org/sexual-orientation-discrimination> (last visited Apr. 14, 2016).

81. See Associated Press, *Obama Signs Executive Order to Protect Gay, Transgender Employees from Workplace Discrimination*, ABC 7 (July 21, 2014), <http://www.wjla.com/articles/2014/07/obama-signs-executive-order-to-protect-to-gay-transgender-employees-from-workplace-discrimination-10.html#ixzz3RBN8mhgv>.

82. See *id.*

83. Exec. Order No. 11375, 32 Fed. Reg. 14303 (Oct. 13, 1967).

84. Exec. Order 13087, 63 Fed. Reg. 30097 (May 28, 1998) (amending Exec. Order 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969)).

85. Exec. Order No. 11375, *supra* note 83.

86. *Id.*

87. See Associated Press, *supra* note 81.

88. See *id.*

89. See *id.*

90. *Id.*

In 1998, Clinton issued the second of the two executive orders on which Obama based his order.⁹¹ Clinton's order expanded an earlier order, Executive Order 11478, to include a prohibition of discrimination in the *federal civilian workforce* on the basis of sexual orientation.⁹² While the order applied equally to government employees in D.C. and to United States Postal Service (USPS) employees, it did not extend to uniformed members of the United States military.⁹³ The order only covered civilian workers in the United States military.⁹⁴ Instead, uniformed members of the United States military remained subject to the deeply flawed policy of Don't Ask, Don't Tell (DADT).⁹⁵ DADT became Clinton's policy in 1993, on service by lesbians and gays in the military.⁹⁶

While Clinton's 1998 order did not provide well-rounded protection to non-civilian workers, it did provide a clear framework for how to seek redress for claim of discrimination.⁹⁷ Under the order, federal employees could file complaints of discrimination on the basis of sexual orientation.⁹⁸ The federal government even issued a handbook guiding civilian employees of the federal government on how to report and pursue an incident of discrimination on the basis of sexual orientation.⁹⁹ The handbook specifically highlighted the role that the federal government should play in setting an example for other employers in the United States.¹⁰⁰ For example, it stated: "As the Nation's largest employer, the Federal Government sets an example for other employers that employment discrimination based upon sexual orientation is not acceptable."¹⁰¹

Currently, in order for a non-federal employee to seek redress against an employer who discriminates on the basis of sexual

91. Exec. Order 13087, 63 Fed. Reg. 30097, *supra* note 84.

92. *Id.*

93. *Id.*

94. *See id.*

95. 10 U.S.C. § 654 (2006), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. 111-321, § 2(f)(1)(B), 124 Stat. 3516 (2010).

96. *See* Paul F. Horvitz, 'Don't Ask, Don't Tell, Don't Pursue' Is White House's Compromise Solution: New U.S. Military Policy Tolerates Homosexuals, N.Y. TIMES (July 20, 1993), http://www.nytimes.com/1993/07/20/news/20iht-gay_1.html.

97. *See Addressing Sexual Orientation Discrimination in Federal Civilian Employment: A Guide to Employee's Rights*, FEDDESK, at 2-3, <http://federalhandbooks.lettercarriernetwork.info/Addressing%20Sexual%20Orientation%20Discrimination.pdf> (last visited Apr. 11, 2015).

98. *See id.*

99. *See id.*

100. *See id.* at 1.

101. *Id.*

orientation, an injured employee has to follow the grievance procedure put in place by the employer-agency.¹⁰² In limited instances, appeals could be made to either the Merit Systems Protection Board (MSPB) or the Office of Special Counsel (OSC).¹⁰³

President Obama's executive order built off of both Johnson's and Clinton's executive orders.¹⁰⁴ President Obama's order, however, broke new ground as it was the first executive order to incorporate "sexual orientation and gender identity" to the list of protected categories when addressing discrimination in federal and federally-contracted employees.¹⁰⁵ At the signing event, President Obama said:

It doesn't make much sense . . . but today in America, millions of our fellow citizens wake up and go to work with the awareness that they could lose their job, not because of anything they do or fail to do, but because of who they are—lesbian, gay [and] bisexual . . . [a]nd that's wrong.¹⁰⁶

While this was undoubtedly a huge step for a sitting United States President,¹⁰⁷ it has not yet been matched by a similar pronouncement from the legislature.¹⁰⁸

III. The Politics of Disgust and the Rise of Religious Right: The Changing Landscape of LGBT Worker's Rights Since *Windsor* and *Obergefell*

Even after the repeal of Clinton's DADT and more recently, President Obama's comments at the Executive Order signing event, politicians have continued to use dialog that deliberately plays off of an undercurrent of distaste or disgust for same-sex relationships.¹⁰⁹ In

102. *Id.* at 3.

103. *Id.* at 3-4.

104. See Associated Press, *supra* note 81.

105. See David Hudson, *President Obama Signs a New Executive Order to Protect LGBT Workers*, THE WHITE HOUSE (July 21, 2014, 3:00 PM), <http://www.whitehouse.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers>.

106. *Id.*

107. In addition, President Obama was the first president to use the word "gay" in an inaugural address. See Kevin Robillard, *First Inaugural Use of the Word 'Gay'*, POLITICO (Jan. 21, 2013, 12:40 PM), <http://www.politico.com/story/2013/01/first-inaugural-use-of-the-word-gay-086499>.

108. See Hudson, *supra* note 105 (stating that the public should "keep putting pressure on Congress to pass federal legislation that resolves this problem once and for all.").

109. See, e.g., Alan Blinder & Richard Pérez-Peña, *Kim Davis, Released From Kentucky Jail, Won't Say if She Will Keep Defying Court*, N.Y. TIMES (Sept. 8, 2015),

doing so, this dialogue has led to the passage of numerous legislative actions on the state level that have the effect of permitting discrimination against LGBT individuals and workers in a variety of circumstances.¹¹⁰

This “politics of disgust” has led to the current rise of backlash against same-sex marriage and workers with same-sex spouses.¹¹¹ While the first Religious Freedom Restoration Act (RFRA) was passed back in 1993 and was a *federal* RFRA,¹¹² there was virtually no backlash surrounding its passage.¹¹³ Instead, the current standoff in the United States is about *state* RFRA.¹¹⁴

There is a rise in the number and severity of state RFRA being enacted.¹¹⁵ Overall if we look at what change has occurred, it is generally that the core dynamic of the fight has shifted.¹¹⁶ Now we have companies masquerading as religious organizations in order to obscure their inclinations to discriminate against members of the LGBT community.¹¹⁷ This is done in an effort to perpetuate the politics of disgust and to continue to keep members of the LGBT community marginalized, while acting under the guise of sincerely held religious beliefs.

IV. RFRA: The Unseen Adversary

Prior to 1990, “the federal Free Exercise Clause . . . required religious exemptions unless the government had a compelling interest in enforcing its regulation.”¹¹⁸ It was not until 1990 that “the Supreme

http://www.nytimes.com/2015/09/09/us/kim-davis-same-sex-marriage.html?_r=0.

110. See *Discrimination is Not Religious Freedom: The Wording of Indiana's Religious Freedom Law Makes Clear its Discriminatory Intent*, THE HARV. CRIMSON (April 3, 2015), <http://www.thecrimson.com/article/2015/4/3/staff-indiana-rfra-discrimination/>.

111. See Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL'Y 105, 147 (2010).

112. See generally Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2012).

113. See H.R. 1308 (103rd): *Religious Freedom Restoration Act of 1993*, GOVTRACK.US, <https://www.govtrack.us/congress/votes/103-1993/s331> (last visited Apr. 12, 2016) (displaying that almost every member of Congress voted to approve RFRA, voting 97-3).

114. See, e.g., *Miller v. Davis*, 123 F. Supp. 3d 924, 939 (E.D. Ky. 2015).

115. See David Johnson & Katy Steinmetz, *This Map Shows Every State With Religious-Freedom Laws*, TIME (Apr. 2, 2015), <http://time.com/3766173/religious-freedom-laws-map-timeline/>.

116. See *2015 State Religious Freedom Restoration Legislation*, NAT'L CONF. OF ST. LEGIS. (Sept. 3, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx>.

117. See *Using Religion to Discriminate*, ACLU, <https://www.aclu.org/feature/using-religion-discriminate> (last visited May 14, 2016).

118. John McCormack, *UVA Law Prof Who Supports Gay Marriage Explains Why He*

Court changed that rule, and basically said that the free exercise of religion is protected only against discrimination.”¹¹⁹ That is, the Supreme Court “shift[ed] free-exercise doctrine under the First Amendment in . . . radical ways” finding neutral and generally applicable laws exempt from the burdensome compelling-interest test.¹²⁰ The holding of *Employment Division, Department of Human Resources v. Smith* announced this departure.¹²¹

In *Smith*, the plaintiff-employees were fired by their employer because they had previously used peyote—classified as a hallucinogenic drug under Oregon criminal law—while participating in a religious ceremony with their Native American church.¹²² While the plaintiffs were never formally charged with any criminal conduct stemming from their use of peyote, they were nevertheless denied unemployment compensation when they applied for benefits since they were fired for “misconduct,” thus disqualifying them for benefits.¹²³ The plaintiffs brought suit alleging a violation of their Free Exercise Clause rights under the First Amendment.¹²⁴ The case was remanded by the Supreme Court for determination by the lower courts as to whether sacramental use of a hallucinogenic drug is still under the purview of the Oregon state criminal law.¹²⁵ The State Supreme Court held that it was and the case was granted certiorari by the U.S. Supreme Court.¹²⁶ The Supreme Court then upheld the finding of the lower court, holding that the Free Exercise Clause allows the State of Oregon to ban the use of peyote and therefore, withhold unemployment benefits to persons fired for such use.¹²⁷

Since the Oregon criminal code was neutral on its face and did not single out any particular religion or religious practice, it could stand.¹²⁸ However, “[a]lthough the court ruled against the religious argument in

Supports Indiana's Religious Freedom Law, THE WEEKLY STANDARD (Mar. 29, 2015, 8:32 PM), <http://www.weeklystandard.com/uva-law-prof-who-supports-gay-marriage-explains-why-he-supports-indianas-religious-freedom-law/article/902928> (quoting Douglas Laycock, a professor at the University of Virginia Law School).

119. *Id.*

120. See Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343 at 359 (2013).

121. See *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 888-90 (1987).

122. *Id.* at 874.

123. See *id.*

124. *Id.*

125. See *id.* at 875.

126. See *id.* at 876.

127. *Id.* at 888-90.

128. See *id.*

that case, it suggested that governments could establish explicit protections that would exempt people from certain laws if they have a genuine religious objection.”¹²⁹ This language became the heart of the movement to persuade the government to create a carve-out for religious free exercise exceptions—and this carve-out ultimately took the form of the federal RFRA as signed by President Clinton in 1993.¹³⁰

The 1993 federal RFRA provided “broad protections for the free exercise of religion” and “[protected] religious freedom . . . [via] the stringent compelling-interest requirement even in cases in which the statute was found to be neutral and generally applicable.”¹³¹ In effect, the federal RFRA pushed the state of the law back to pre-*Smith* parameters and reinstated the compelling interest test as the prevailing method for evaluating the level of burden the government places on the exercise of religion in a given context.¹³² The 1993 federal RFRA unanimously passed in the House and to an overwhelming majority in the Senate (97-3), before being signed into law by President Clinton.¹³³

This remained the federal law for four years until, in 1997, the Supreme Court held that it was unconstitutional to apply the federal RFRA to the states.¹³⁴ Instead, states would have to individually enact state RFRAs if they elected to do so.¹³⁵ After this, certain states began enacting their own state RFRAs.¹³⁶ Currently, there are twenty states with RFRAs on the books,¹³⁷ and only recently have movements to pass state-level RFRAs attracted the attention of the media.¹³⁸

Until *Hobby Lobby*, few cases that include defenses on the basis of a statewide RFRA attracted widespread attention.¹³⁹ *Hobby Lobby* marked a turning point. The plaintiffs in *Hobby Lobby* brought suit as

129. German Lopez, *How Indiana's Religious Freedom Law Sparked a Battle over LGBT Rights*, VOX (Apr. 2, 2015, 6:35 PM), <http://www.vox.com/2015/3/31/8319493/Indiana-rfra-lgbt>.

130. See McCormack, *supra* note 118, at 2.

131. Chaganti, *supra* note 120, at 364, 358; see also McCormack *supra* note 118 (quoting Douglas Laycock's remarks regarding the change in 1993 that “creat[ed] a statutory right to practice your religion, free of government regulation except where necessary to serve a compelling government interest.”).

132. See Chaganti, *supra* note 120, at 360.

133. See McCormack, *supra* note 118.

134. *Id.*

135. *Id.*

136. See *id.*

137. *Id.*

138. See, e.g., Lopez, *supra* note 129; see also Stephanie Wang, *What the 'Religious Freedom' Law Really Means for Indiana*, THE INDIANAPOLIS STAR (Apr. 3, 2015, 11:13 AM), <http://www.indystar.com/story/news/politics/2015/03/29/religious-freedom-law-really-means-indiana/70601584/>.

139. See McCormack, *supra* note 118.

they objected to the Department of Health and Human Services' requirement that all employment-based group health care plan cover contraception,¹⁴⁰ including for those employees at Hobby Lobby stores.¹⁴¹ They sought relief under the theory that this requirement was a violation of both the Free Exercise Clause and the RFRA.¹⁴² Up until that point, the RFRA related cases that did make it to court generally dealt with the religious beliefs that only a minority held.¹⁴³ For example, in a Minnesota case, a law required Amish buggies to "use bright fluorescent signs" in order to be more visible to other drivers using the roads.¹⁴⁴ While the "court agreed [that] the government has a compelling interest to uphold public safety on the roads, but that it could do so in a manner that doesn't burden Amish religious adherence to a simple lifestyle."¹⁴⁵ Ultimately, "silver reflective tape and kerosene lanterns" were the lower burden opted for.¹⁴⁶

A similar free exercise claim was advanced in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, wherein the Court applied strict scrutiny to hold that a city ordinance barring ritual animal sacrifice violated the Free Exercise Clause by targeting the practices of one particular religion, Santeria.¹⁴⁷ The ordinance was not narrowly tailored enough to advance a government interest.¹⁴⁸ The common theme between these two cases was that the religions affected were practiced only by a small minority in the United States.¹⁴⁹ In contrast, the religious belief claimed to be affected by the ACA contraception requirements, was Christianity—a religion practiced by the vast majority of Americans who identify with a particular religion.¹⁵⁰

140. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1120, 1123 (10th Cir. 2013) (stating that the DHS "require[s] coverage for '[a]ll Food and Drug Administration [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed by a provider.").

141. See *id.*

142. See *id.* at 1125.

143. See Lopez, *supra* note 129.

144. *Id.* (citing Stephanie Wang, *What the 'Religious Freedom' Law Really Means for Indiana*, THE INDIANAPOLIS STAR (Apr. 3, 2015, 11:13 AM), <http://www.indystar.com/story/news/politics/2015/03/29/religious-freedom-law-really-means-indiana/70601584/>) (discussing *Minnesota v. Hershberger*, 462 N.W.2d 393 (Minn. Sup. Ct. 1990)).

145. *Id.*

146. *Id.*

147. See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993).

148. *Id.* at 546.

149. See *id.* at 525; Lopez, *supra* note 132.

150. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013); see also *America's Changing Religious Landscape*, PEWRESEARCHCENTER (May 12, 2015), <http://religions.pewforum.org/reports>.

RFRA “started . . . as a shield for minority religious practitioners like Native Americans and the Amish[, but is now] in danger of being weaponized into a sword against civil rights.”¹⁵¹ And perhaps it already has been weaponized. Indiana as a state does not have any anti-discrimination laws on the books that are specifically designed to protect LGBT individuals.¹⁵² Moreover, even when specifically appearing in an interview with ABC News’s George Stephanopoulos to address the outcry over the Indiana RFRA, Indiana Governor Mike Pence still indicated that “it’s not on his agenda to add explicit legal protections for gays and lesbians.”¹⁵³ While there are some cities in Indiana that explicitly extended civil rights protections to LGBT individuals,¹⁵⁴ there is no state-wide initiative to do the same and, given Governor Pence’s statements in the Stephanopoulos interview,¹⁵⁵ it is unlikely to change until a new Governor is elected.

The media attention on the Indiana RFRA has been enormous both in Indiana and across the country.¹⁵⁶ Given the outcry over the Indiana RFRA Bill, one would think that this state’s accommodations statute is an aberration or one-of-a-kind, however, unfortunately, that is not the case.¹⁵⁷ “Forty percent of U.S. states have something similar to Indiana, as does the federal government.”¹⁵⁸ Part of the explanation for that is how the general public’s understanding of LGBT issues has changed from when the federal RFRA was signed in 1993, through today.¹⁵⁹ The other explanation is that Indiana’s RFRA is more expansive than any previous RFRA and is set against the backdrop of a movement for increased civil rights for all Americans.¹⁶⁰

Discrimination on the basis of sexual orientation or perceived

151. Dale Carpenter, *The Clash of ‘Religious Freedom’ and Civil Rights in Indiana*, WASH. POST: VOLOKH CONSPIRACY (Mar. 30, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/30/the-clash-of-religious-freedom-and-civil-rights-in-indiana/>.

152. See Stephanie Wang, *How Local LGBT Anti-Discrimination Laws Vary in Indiana*, THE INDIANAPOLIS STAR (Sept. 23, 2015, 2:30 PM), <http://www.indystar.com/story/news/politics/2015/09/22/local-lgbt-anti-discrimination-laws-vary-indiana/72651754/>.

153. See Lopez, *supra* note 129.

154. See Wang, *supra* note 138.

155. See Lopez, *supra* note 129.

156. See *id.*

157. See *id.*

158. Hunter Schwarz, *19 States That Have ‘Religious Freedom’ Laws Like Indiana’s That No One is Boycotting*, THE WASH. POST: THE FIX (Mar. 27, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/03/27/19-states-that-have-religious-freedom-laws-like-indianas-that-no-one-is-boycotting/>.

159. See *id.*

160. See Lopez, *supra* note 129.

sexual orientation is only amplified by laws like Indiana's RFRA. Moreover, as sexual orientation is not included as a protected category under Title VII, courts have not held that discrimination on the basis of sexual orientation states a valid claim for relief.¹⁶¹ This is true regardless of whether a disparate treatment or a disparate impact theory is applied.¹⁶² One potential solution that has been proposed is that a new federal civil rights law be passed without delay that specifically "extends legal protection from discrimination to LGBT individuals."¹⁶³ That is:

Such a federal law would preclude state RFRA's, like Indiana's, from being used in ways that allow discrimination; it would also offer a clearer legal recourse to LGBT individuals who have been discriminated against. In the short term, an immediate fix is desperately needed to Indiana's religious freedom law; looking forward, federal action is necessary to prevent similar laws from being passed or enforced in the future.¹⁶⁴

While this may be a good solution, it still leaves to be determined what shape the civil rights law would take; would it just tack on to the Civil Rights Act or Title VII, or would this law differ from the protections offered under the Equal Protections Clause of the United States Constitution? However, even this proposal would not go far enough, as it would throw us right back into the wash cycle replicated continuously over the past twenty years.¹⁶⁵ Or it may bring about a further push for reform on a national level, marked by a backlash against that push, and followed by a potentially permanent stalling of civil rights change – a federal civil rights bill specifically calling out protections for LGBT individuals that stalls in Congress indefinitely and further polarizes the community, both within the LGBT community and the larger American public.

Hobby Lobby pushed the borders of RFRA to be more expansive than it probably ever was intended to be even under the 1993 Federal

161. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 766 (6th Cir. 2006); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

162. See *Vickers*, 453 F.3d at 759.

163. The Crimson Staff, *Discrimination is Not Religious Freedom: The Wording of Indiana's Religious Freedom Law Makes Clear its Discriminatory Intent*, THE HARV. CRIMSON (Apr. 3, 2015), <http://www.thecrimson.com/article/2015/4/3/staff-indiana-rfra-discrimination/>.

164. *Id.*

165. See, e.g., *id.* (proposing a solution to remedy discrimination against LGBT individuals that may not be substantial enough).

RFRA enactment signed by President Clinton.¹⁶⁶ In addition to non-profit churches and religious organizations, for-profit businesses could bring a suit alleging violation of their religious freedom rights under RFRA or use RFRA as a valid defense to a suit brought against them.¹⁶⁷ *Hobby Lobby* effectively transformed what was a minority religious rights issue into a mainstream issue.¹⁶⁸ What had previously been relevant only to the religious views of the minority—like a Native American Church, Jehovah’s Witnesses, or the Amish—was now relevant to major religions in the United States such as Christianity.¹⁶⁹ The barrier between non-profit and for-profit availability of a RFRA defense was similarly broken.¹⁷⁰

What’s key in understanding the impact of *Hobby Lobby* is that this not only changed the dialogue about what entities could be understood as having a viable claim under a RFRA, but it also greatly expanded the notion of what type of activities those entities could object to on the basis of “sincerely held” religious beliefs.¹⁷¹ However, Justice Ginsburg pointedly stated in her dissent in *Hobby Lobby*, “Congress does not ‘hide elephants in mouseholes.’”¹⁷² Thereby suggesting that it was never the intent of Congress when they enacted the RFRA to have its scope be so extensive as to cover for-profit companies and non-minority religious beliefs.¹⁷³

V. Federally Contracted Employees and Choice of Law Analysis

Currently, only those employees who either work for the federal government directly or work pursuant to a federal contract are explicitly protected from discrimination on the basis of sexual orientation.¹⁷⁴ Congress has yet to enact any legislation that explicitly protects non-federal employees against discrimination on the basis of sexual orientation.¹⁷⁵ Without clear legal protections, non-federal employees

166. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759-61 (2014).

167. See *id.* at 2759.

168. See *id.* at 2778 (citing *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981)).

169. See *id.* at 2804.

170. See *id.* at 2794.

171. See *id.* at 2777.

172. *Id.* at 2796 (Ginsburg, J., dissenting) (citing *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001)).

173. See *id.* at 2796.

174. Hudson, *supra* note 105.

175. See *id.*

are vulnerable to experiencing discrimination and adverse treatment, for which no adequate form of legal redress exists.¹⁷⁶ For example, if an employee is not a federal employee or a federally contracted employee, that employee may lose their employment and associated employment-based benefits he or she may have enjoyed if they married a same-sex spouse.¹⁷⁷

Employees with same-sex spouses who seek immigration benefits at their place of work are a prime example of this.¹⁷⁸ The following hypothetical illustrates this. Bjorn, a Swedish national, is hired as a new employee at a mid-size law firm specializing in local land-use ordinances. The firm has no federal contracts. Bjorn approaches the firm's Human Resources department to see about obtaining H-1B¹⁷⁹ work authorization prior to his October 15th start date. He also seeks dependent H-4 Visa¹⁸⁰ status for his same-sex spouse, Alejandro. Since the couple is married legally in their home country of Sweden, Bjorn assumes that their Swedish benefits will readily transfer to the United States. However, unbeknownst to Bjorn, his new employer has an unspoken policy that it does not cover dependent visas for same-sex spouses of employees.

Under Obama's executive order, if Bjorn was a federal employee or a federally contracted employee, he would have a cause of action against his new employer.¹⁸¹ "Spouse" in his employment contract can be defined either according to the law of the state in which he will work or by the law of the state in which Bjorn was married, often referred to as the place of celebration.¹⁸² However, since Bjorn works in a mid-size

176. See *id.*

177. *Id.*

178. See Gary Chodorow, *Same-Sex Spouses: U.S. Immigration Benefits Eligibility*, U.S. & CHINA VISA L. BLOG (Aug. 3, 2013), <http://lawandborder.com/supreme-court-ruling-makes-same-sex-spouses-eligible-for-immigration-benefits/>.

179. See U.S. DEP'T OF HOMELAND SECURITY, *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models> (last updated Nov. 23, 2015) (general eligibility criteria for H-1B specialty occupations).

180. See *DHS Extends Eligibility for Employment Authorization to Certain H-4 Dependent Spouses of H-1B Nonimmigrants Seeking Employment-Based Lawful Permanent Residence*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Feb. 24, 2015), <https://www.uscis.gov/news/dhs-extends-eligibility-employment-authorization-certain-h-4-dependent-spouses-h-1b-nonimmigrants-seeking-employment-based-lawful-permanent-residence>. The Department of Homeland Security "amended the regulations to allow these H-4 dependent spouses to accept employment in the United States." *Id.*

181. See Hudson, *supra* note 105.

182. *Fact Sheet: Final Rule to Amend the Definition of Spouse in the Family and Medical*

law firm with no federal contract and because he is not individually federally contracted, he has no means of redress.¹⁸³ His private employer is not bound to the definition of “spouse” set forth in President Obama’s order.¹⁸⁴ Instead, he has to suffer the harm inflicted by the firm’s refusal to accept the H-4 dependent visa application for Bjorn’s spouse. Alternatively, he can chose to work somewhere else.

Now imagine that the same facts apply except that, instead of working for a federal or federally contracted employer, Bjorn works for the state government. Would the state government be able to deny Bjorn medical coverage for his same-sex spouse? After *Windsor*, while the federal government could not deny medical coverage to Bjorn’s same-sex spouse provided that he and his spouse were legally married according to the state law of their place of residence,¹⁸⁵ the state government could deny medical coverage to Bjorn’s same-sex spouse if state laws did not recognize same-sex marriages, and they were not legally married as a result.¹⁸⁶ The *Windsor* decision left unchanged how state laws handled employee benefits for non-federal workers or federally contracted workers.¹⁸⁷

There is a history of discrimination, in both the private and the public sector, against LGBT individuals and LGBT employees who enter into same-sex marriages.¹⁸⁸ Before the fall of section 3 of DOMA, after the decision in *Windsor*, same-sex bi-national couples were frequently subject to unequal and discriminatory treatment on both the state and federal government levels.¹⁸⁹ For example, Judy Rickard, a

Leave Act Regulations, WAGE & HOUR DIVISION, U.S. DEP’T OF LAB. (Feb. 2015), <https://www.dol.gov/whd/fmla/spouse/factsheet.htm>.

183. See Hudson, *supra* note 105.

184. See Sex Discrimination Guidelines, 41 C.F.R. § 60-20.1 (2015) (applies to contractors or subcontractors of the government, or those performing work under federal contracts).

185. See *Fact Sheet: Final Rule to Amend the Definition of Spouse in the Family and Medical Leave Act Regulations*, *supra* note 182.

186. See *id.*

187. *United States v. Windsor*, 133 U.S. 2675, 2695-96 (2013) (judgment of the Court of Appeals was affirmed).

188. Christy Mallory & Brad Sears, *Discrimination Against State and Local Government LGBT Employees: An Analysis of administrative Complaints*, 4 HARV. KENNEDY SCH. LGBTQ POL’Y J. 37, 38 (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQJPJ-MALLORYSEARS-2014.pdf>.

189. Respect for Marriage Act, Human Rights Campaign, <http://www.hrc.org/resources/respect-for-marriage-act?gclid=CIKEqYim2swCFVFZhgodTf0CDw> (last updated Jan. 21, 2016); see, e.g., Mike Honda, Congressman, 17th Dist. of Cal., Statements: *Keep Our Families Together—Reform Immigration Laws* (Oct. 23, 2009), <https://honda.house.gov/news/statements/keep-our-families-together-reform-immigration-laws> (a constituent, Judy Rickard, opted to leave her employment and residence in the

constituent of the 17th Congressional District of California, was forced to choose between leaving the United States, the job where she had worked for twenty-seven years, and living more than 3,000 miles away from her wife, who was a U.K. national, or remain in the United States and separated from her wife due to U.S. laws.¹⁹⁰ Judy worked at San Jose State University as the Director of Marketing for International and Extended Studies.¹⁹¹ While Judy wanted to sponsor her partner, Karin Bogliolo, for permanent residency, U.S. immigration laws prior to June 2013 meant that she was not eligible to do so.¹⁹² So, rather than trying to carry on a partnership while living in separate countries, Judy took an early retirement to move to the U.K.¹⁹³

When section 3 of DOMA fell, Judy was ultimately able to successfully sponsor her wife for a green card.¹⁹⁴ In late July of 2013, her wife received her green card.¹⁹⁵ While their immigration hurdles were cleared, they faced many issues in receiving other federally sponsored benefits.¹⁹⁶ From Judy and Karin's viewpoint, they were in "uncharted territory."¹⁹⁷ Their case handler informed them that the "Social Security computer system wasn't set up for people like [them] yet."¹⁹⁸ That is, since Judy and Karin were technically in a domestic partnership from 2007 and not legally *married* until 2011, the official start date of Karin's residency in the United States had to be determined.¹⁹⁹

After Karin's social security benefits were finally resolved, the couple still had to make sure Medicare benefits were properly allotted to

United States, for placement in Europe, because the laws in the United States does not provide her and her same-sex partner the same treatment and opportunities for residency, as married heterosexual couples).

190. Honda, *supra* note 189.

191. Mary Gottschalk, *Judy Richard, Karin Bogliolo Can Now Travel Internationally, Thanks to DOMA Decision*, MERCURY NEWS (Aug. 7, 2013), http://www.mercurynews.com/san-jose-neighborhoods/ci_23817691/judy-richard-karin-bogliolo-can-now-travel-internationally.

192. *See id.*

193. Honda, *supra* note 189.

194. Gottschalk, *supra* note 191.

195. Judy Rickard, "Post-DOMA 'Meet the Feds' Round 2: Social Security," HUFFINGTON POST (Sept. 19, 2013), http://www.huffingtonpost.com/judy-rickard/post-doma-meet-the-feds-round-2-social-security_b_3942575.html; *see also* Sveta Apodaca, *Lesbian Couple in San Jose, CA Receives The Third Marriage-Based Green Card After Supreme Court Strikes Down DOMA*, DOMA PROJECT (July 15, 2013), <http://www.domaproject.org/2013/07/lesbian-couple-in-san-jose-ca-receives-the-third-marriage-based-green-card-after-supreme-court-strikes-down-doma.html>.

196. *See id.*

197. *Id.*

198. *Id.*

199. *Id.* (emphasis added).

Karin as Judy's spouse.²⁰⁰ In contrast to the struggle to obtain benefits prior to the fall of Section 3 of DOMA, after *Windsor*, Karin was easily able to obtain both Social Security and Medicare benefits.²⁰¹ In fact, the process was relatively straightforward, and went smoothly.²⁰² Judy started receiving Medicare benefits after completing an online application, "an office visit and a follow-up office visit."²⁰³ Once the open enrollment period begins again, Judy can add Karin to her pension plan, CalPERS.²⁰⁴

Prior to the *Windsor* decision, other similarly situated couples faced similar or even more pronounced patterns of discrimination.²⁰⁵ For example, "[j]ust two days after the Supreme Court decision . . . , the first 'stand-alone' green-card petition was approved on June 28, 2013, for another [bi-national] gay couple . . . Julian Marsh and Traian Popov."²⁰⁶ Similarly, a "'stand alone' green card petition was also approved for Tom Smeraldo, a gay American living in forced exile in Canada with his Venezuelan husband, Emilio Ojeda."²⁰⁷ In terms of benefits, both couples were able to receive them through the sponsoring spouse's employer.²⁰⁸

VI. Right of Redress for Past Harm

It was more difficult to determine the legal status of those couples that were denied the opportunity to apply for marriage based immigrant visa status prior to both the *Windsor* and *Obergefell* decisions.²⁰⁹

200. See Judy Rickard, *Update on Post-DOMA 'Meet the Feds' Round 2: Social Security*, HUFFINGTON POST, http://www.huffingtonpost.com/judy-rickard/update-on-postdoma-meet-t_b_3978727.html (last updated Feb. 2, 2016).

201. See *id.*; see also Apodaca, *supra* note 195.

202. Rickard, *supra* note 189.

203. *Id.*

204. *Id.*

205. See Apodaca, *supra* note 195.

206. *Id.*

207. *Id.*

208. Caroline Fairchild & Jillian Berman, *DOMA Ruling Brings Much-Needed Financial Benefits To Same-Sex Spouses*, HUFFINGTON POST, http://www.huffingtonpost.com/2013/06/26/doma-ruling-financial_n_3505223.html (last updated Jun. 26, 2013); see also Written Testimony of The Williams Institute, UCLA SCH. OF L., M.V. Lee Badgett ET AL., *Hearing on S.598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families* (July 20, 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Meryer-Gates-Hunter-Pizer-Sears-Testimony-DOMA-Jul-2011.pdf>.

209. See, e.g., *Adams v. Howerton*, 673 F.2d 1036, 1038-39 (9th Cir. 1982) (using a two-step analysis, where the first prong is to determine if the marriage is valid under state law, the validity of which was dependent on the law in the "place of celebration").

Anthony Sullivan's case illustrates the complexities that frequently arise.²¹⁰ Richard Adams, a naturalized American citizen residing in California, married Anthony Sullivan, an Australian national, on April 21, 1975.²¹¹ As an Australian citizen, Anthony was in the country on a tourism-based visa known as a B-2 visa.²¹² B-2 visas include many restrictions on what the visitor can do while in the United States, including getting a job.²¹³ While B-2 visas can be renewed, they are a non-immigrant visa category meaning that the B-2 visa cannot be used to obtain permanent residence.²¹⁴

Anthony and Richard married immediately "after learning that the county clerk in Boulder, Colorado was issuing marriage licenses to same-sex couples. . . ."²¹⁵ They were one of only six same-sex couples married in Colorado in 1975.²¹⁶ The couple resided in Los Angeles (LA), California and, after returning to their home in LA, Adams filed a green card petition with the Immigration and Naturalization Service (INS), now known as the U.S. Citizenship and Immigration Services (USCIS).²¹⁷ Adams, citing Section 201 of the Immigration and Nationality Act of 1952, sought a marriage-based green card for Sullivan, as his spouse.²¹⁸

The INS quickly rejected Adams' petition.²¹⁹ In their letter dated November 24, 1975, the INS denied the petition, giving the reason that Adams had "failed to establish that a bona fide marital relationship can exist between two faggots."²²⁰ The INS sent a revised letter indicating that "[a] marriage between two males is invalid for immigration purposes and cannot be considered a bona fide marital relationship since

210. See *infra*, notes 218-19.

211. Sveta Apodaca, *Listen: Anthony Sullivan Speaks After Filing Motion to Re-Open With USCIS*, DOMA PROJECT (Apr. 25, 2014), <http://www.domaproject.org/2014/04/listen-anthony-sullivan-speaks-after-filing-motion-to-re-open-with-uscis.html>.

212. Moni Basu, *Love Wins in Gay Couple's 40-Year Immigration Fight*, CNN (June 28, 2014, 8:26 AM), <http://www.cnn.com/2014/06/26/us/gay-rights-immigration-struggle/>; *Visitor Visa*, U.S. DEP'T OF ST., <https://travel.state.gov/content/visas/en/visit/visitor.html> (last visited Apr. 3, 2016).

213. See *Visitor Visa*, *supra* note 212.

214. *Id.*

215. Sveta Apodaca, *Gay Immigrant Seeks Reversal of Infamous 1975 Green Card Denial, Based on Historic Same-Sex Marriage*, DOMA PROJECT (Apr. 18, 2014), <http://www.domaproject.org/2014/04/anthony-sullivan.html>.

216. Margalit Fox, *Richard Adams, Same-Sex Spouse Who Sued U.S., Dies at 65*, N.Y. TIMES (Dec. 24, 2012), http://www.nytimes.com/2012/12/25/us/richard-adams-who-sued-us-after-1975-gay-marriage-dies-at-65.html?_r=1.

217. Apodaca, *supra* note 195.

218. *Id.*; see also *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982).

219. *Id.*

220. *Id.*

neither party to the marriage can perform the female functions in marriage.”²²¹

In the face of this inflammatory rationale, the couple fought back and sued the INS alleging a violation of their constitutional rights under the Due Process and Equal Protection clauses.²²² After applying a rational basis test, the district court rejected the lawsuit’s claims, noting that the law of the place where the marriage took place did not dictate the petitioner’s immigration status.²²³

The constitutional claims were similarly rejected.²²⁴ The court held that, as federal law did not recognize same-sex marriage, then any state law that recognized a same-sex marriage was void for purposes of obtaining immigration benefits on that basis.²²⁵ The court stated that even though:

[S]ome persons are allowed to marry and their union is given full recognition and constitutional protection even though the above stated justification—procreation—is not possible, [same-sex couples should still not be allowed to marry because even] if the classification of the group who may validly marry is over inclusive, it does not affect the validity of the classification.²²⁶

Undeterred, Anthony and Richard appealed to the ninth circuit, but they also lost that appeal.²²⁷ Faced with the prospect of almost certain deportation, and since Anthony was not in valid visa status in the U.S. and ineligible for a marriage-based green card, the couple chose to leave the U.S. voluntarily.²²⁸ Australia, Anthony’s home country, then denied him residency.²²⁹ Over the next year, Sullivan and Adams remained outside the United States, unable to return to either Australia or to the United States.²³⁰

Had Sullivan’s case been before the court after the decision in

221. Peter N. Nardi, *The Endless Debate on Gay Union*, BALTIMORE SUN (Feb. 20, 1996), http://articles.baltimoresun.com/1996-02-20/news/1996051136_1_same-sex-marriages-institution-of-marriage-gay-publications.

222. *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff’d*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 111 (1982).

223. *See id.* at 1121-22.

224. *Id.* at 1123-24.

225. *Id.* at 1122-23.

226. *Id.* at 1124.

227. Basu, *supra* note 212.

228. *See id.*

229. *See id.*

230. *Id.*

Windsor, the outcome would have been very different. On July 1, 2013, Janet Napolitano, the Secretary of Homeland Security, issued an official statement stating: “effective immediately, . . . [the] U.S. Citizenship and Immigration Services (USCIS) [will] review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.”²³¹ The U.S. Department of State issued a similar official statement stating “[e]ffective immediately, U.S. Embassies and Consulates will adjudicate visa applications that are based on a same-sex marriage in the same way that we adjudicate applications for opposite gender spouses.”²³²

International couples are now “allowed to sponsor foreign-born spouses for United States residency,” as “the federal government now recognizes benefits under DOMA.”²³³ “Individuals who are legally married have begun to receive green cards following the Supreme Court decision on DOMA.”²³⁴ What remains to be seen is whether there will be an uptick in challenges to non-inclusive employment practices in the context of immigrant and non-immigrant visa applications.

VII. Supreme Court Applied Heightened Scrutiny in *United States v. Windsor*

While *Windsor* was being decided, the Attorney General issued a statement that section 3 of DOMA would not be defended by the Department of Justice should an issue be brought before them.²³⁵ Up until that point, the Department of Justice upheld DOMA every time a claim was brought by same-sex couples that were legally married according to their state’s law.²³⁶ In making this pronouncement, the Attorney General looked to the President’s conclusion that, “given a

231. Press Release, Janet Napolitano, *Statement by Secretary of Homeland Security Janet Napolitano on the Implementation of the Supreme Court Ruling on the Defense of Marriage Act*, DEP’T OF HOMELAND SECURITY (July 1, 2013), <https://www.dhs.gov/news/2013/07/01/statement-secretary-homeland-security-janet-napolitano-implementation-supreme-court>.

232. U.S. Visas For Same-Sex Spouses: FAQs for Post-Defense of Marriage Act, U.S. DEP’T OF ST., <https://travel.state.gov/content/dam/visas/DOMA/DOMA%20FAQs%20-%202015%20Supreme%20Court%20Ruling.pdf> (last visited Apr. 3, 2016).

233. *Frequently Asked Questions: Defense of Marriage Act (DOMA)*, GLAAD, <http://www.glaad.org/marriage/doma> (last visited Mar. 27, 2016).

234. *Id.*

235. Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, U.S. DEP’T OF JUSTICE (Feb. 23, 2011), <https://www.justice.gov/opa/pr/statement-attorney-general-litigation-involving-defense-marriage-act>.

236. *See id.*

number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny.”²³⁷ This was not the first time that the Attorney General’s office stated that it would no longer defend certain laws that the office found to be unconstitutional.²³⁸

Historically, “The Department of Justice has submitted many § 530D letters over the years refusing to defend laws it deems unconstitutional, when, for instance, a federal court has rejected the Government’s defense of a statute and has issued a judgment against it.”²³⁹ However, this was unusual, because such an announcement *preceded* any adverse judgment against a particular law.²⁴⁰ Here, the announcement known as a § 530D letter²⁴¹ “reflected the Executive’s own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.”²⁴²

237. *Id.*

238. *Id.*

239. *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

240. *Id.*

241. *See id.*; 28 U.S.C. § 530D.

242. *Windsor*, 133 S. Ct. at 2683-84; 28 U.S.C. § 530D.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U.S.C. § 530D, that the Department of Justice would no longer defend the constitutionality of DOMA’s [section]

3. Noting that “the Department has previously defended DOMA against . . . challenges involving legally married same-sex couples,” App. 184, the Attorney General informed Congress that “the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.” [] The Department of Justice has submitted many §530D letters over the years refusing to defend laws it deems unconstitutional, when, for instance, a federal court has rejected the Government’s defense of a statute and has issued a judgment against it. This case is unusual, however, because the §530D letter was not preceded by an adverse judgment. The letter instead reflected the Executive’s own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.

Windsor, 133 S. Ct. at 2683-84; 28 U.S.C. § 530D.

VIII. Effect of *Windsor* and *Obergefell* on Foreign National Workers

Virtually all non-immigrant and immigrant spouses were affected by the outcome of both *Windsor* and *Obergefell*.²⁴³ Of particular note is the effect that the change in the law has on foreign national workers who are either seeking employment-based visa status or marriage-based visa status.²⁴⁴ Additionally, those applicants for asylum are uniquely affected by this change in the law.²⁴⁵

According to the USCIS, “[r]efugee status or asylum may be granted to people who have been persecuted or fear they will be persecuted on account of race, religion, nationality, and/or membership in a particular social group or political opinion.”²⁴⁶ An individual can be granted asylum on the basis of past persecution or a presumption of “a well-founded fear of [future] persecution.”²⁴⁷ In order to get a rebuttable presumption of “a well-founded fear of [future] persecution,” there has to be a link between the past persecution and the future persecution that is feared.²⁴⁸ For example, if the past persecution was suffered on account of the applicant being a Bangladeshi Christian—that is on the basis of religion—then the future persecution must *also* be on account of religion, or one of the other classifications.²⁴⁹

“Asylum is a form of protection available to people who: meet the definition of [a] refugee[,] are already in the United States[, or] are seeking admission at a port of entry.”²⁵⁰ Entirely absent of one’s country of origin or current immigration status, an individual who meets the definition of a refugee may either file an affirmative application for asylum²⁵¹ or file a defensive application.²⁵²

243. See Basu, *supra* note 212; Rickard, *supra* note 189.

244. See *Same-Sex Marriages*, *supra* note 61; see also *U.S. Visas*, U.S. DEP’T OF ST. BUREAU OF CONSULAR AFF., TRAVEL.STATE.GOV, <https://travel.state.gov/content/visas/en.html> (last visited Apr. 4, 2016) (listing different visa categories for people traveling to the United States for various purposes).

245. See *id.*

246. *Refugees & Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/humanitarian/refugees-asylum> (last updated Nov. 12, 2015).

247. *Questions & Answers: Reasonable Fear Screenings*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-reasonable-fear-screenings> (last updated June 18, 2013).

248. *Id.*

249. See *id.* (emphasis added).

250. *Refugees & Asylum*, *supra* note 246.

251. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> (last updated Oct. 19, 2015).

An application for asylum can be filed defensively if a defendant is already in removal hearings with the Immigration Court.²⁵³ Defendants have the burden of proof to establish, at their Immigration Court hearing, that they are requesting relief in the form of asylum, withholding of removal, and protection against the Convention Against Torture (CAT).²⁵⁴ The Immigration Judge then decides whether to grant the withholding of removal.²⁵⁵ If granted, the case is then administratively closed within the Immigration Court and the defendant then has to appear before, or contact, an Asylum Officer and has to file an application for asylum.²⁵⁶

In order to establish eligibility for asylum, an individual must also not be beyond the one-year filing deadline and cannot otherwise be ineligible for asylum.²⁵⁷ The one-year bar means that an applicant must file for asylum within one calendar year of the applicant's last arrival into the United States.²⁵⁸ If the individual fails to do so prior to filing for asylum, that applicant must demonstrate either extraordinary circumstances or changed circumstances.²⁵⁹ A changed circumstance is one that materially affects the individual's eligibility for asylum.²⁶⁰ These changed circumstances include:

[C]hanged conditions in the applicant's country of nationality or, if stateless, the applicant's country of last habitual residence[;] . . . changes in applicable U.S. law[;] . . . changes in the applicant's personal circumstances, such as recent political activism, conversion from one religion to another, etc[; . . . or] the ending of the applicant's spousal or parent-child relationship to the principal applicant in a previous application.²⁶¹

252. *Id.*

253. *Id.*

254. *Id.*; *Questions & Answers*, *supra* note 247; *Obtaining Asylum in the United States*, *supra* note 251.

255. *See Questions & Answers*, *supra* note 247.

256. *See Post-Order Instructions for Individuals Granted Relief or Protection From Removal By Immigration Court*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Apr. 1, 2015), <https://www.uscis.gov/sites/default/files/files/article/PostOrderInstr.pdf>.

257. *Asylum Officer Basic Training Course One-Year Filing Deadline*, U.S. CITIZENSHIP & IMMIGR. SERVICES 4 (Aug. 31, 2010), <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBT%20Lesson%20Plans/One-Year-Filing-Deadline-31aug10.pdf>.

258. *Id.*

259. *Id.* at 4, 8-10.

260. *Id.*

261. *Id.* at 9-10.

In an asylum inquiry, it is settled law that extraordinary circumstances are established by-showing:

[T]he existence of an extraordinary circumstance; establish[ing] that the extraordinary circumstance was directly related to the failure to timely file; not hav[ing] intentionally created the extraordinary circumstance, through his or her action or inaction, for the purpose of establishing a filing-deadline exception; and fil[ing] the application within a reasonable period given the circumstances that related to the failure to timely file.²⁶²

Examples of extraordinary circumstances include a “serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past,” or “the death or serious illness or incapacity of the applicant’s legal representative or a member of the applicant’s immediate family,” and a “legal disability.”²⁶³

IX. The Path to a Green Card for Same-Sex Spouses

Prior to *Windsor*, same-sex spouses were not eligible to receive a green card on the basis of their marriage to a U.S. citizen.²⁶⁴ They were not considered married for immigration purposes.²⁶⁵ “U.S. citizens and permanent residents cannot successfully petition for their spouses; same-sex spouses cannot accompany their American spouse who receives a family or employment-based visa. . . .”²⁶⁶ Further, even if a non-citizen were in a same-sex marriage considered valid outside the United States, that spouse could not rely on it as a basis for obtaining relief or withholding of removal from the United States.²⁶⁷

In 2011, the USCIS reaffirmed its policy of denying green card applications in such cases.²⁶⁸ As mentioned in Part II of this paper, initially, a temporary hold had been placed on same-sex married

262. *Id.* at 12-13.

263. *Id.* at 14.

264. See *Immigration and the Defense of Marriage Act (DOMA): A Question and Answer Fact Check*, AM. IMMIGR. COUNCIL (Aug. 18, 2011), http://immigrationpolicy.org/sites/default/files/docs/DOMA_QA_081811.pdf.

265. *Id.*

266. *Id.*

267. *Id.*

268. Chris Geidner, *Immigration Official: The Hold is Over*, METRO WKLY. (Mar. 30, 2011), <http://www.metroweekly.com/2011/03/immigration-official-the-hold/>.

couples' green card applications, pending the outcome in *Windsor*.²⁶⁹ The Obama administration announced its decision on February 23, 2011, to stop defending section 3 of DOMA.²⁷⁰

After that announcement, the USCIS "issued guidance to [its] field [officers] asking that related cases be held in abeyance while awaiting final guidance. . . ." ²⁷¹ That is, all same-sex marriage based green card applications were stayed pending adjudication—neither denied nor approved.²⁷² This temporary hold, however, was short-lived. On March 30, 2011, the USCIS announced that "[t]he guidance we were awaiting . . . was received last night, so the hold is over, so we're back to adjudicating cases as we always have."²⁷³ This meant that same-sex marriage based green card applications that had been temporarily placed in abeyance pending a clarification of the law surrounding the Obama administration statement on section 3 of DOMA would now be denied.²⁷⁴

While green cards were then definitively off the table for those applying on the basis of a same-sex marriage, the situation was different if similarly situated applicants were applying instead for other types of immigration benefits.²⁷⁵ For example, visitor visas—a temporary visa category conferring no right to work or remain in the United States longer than ninety days—were available to same-sex spouses.²⁷⁶ Yet, instead of being termed "spouse," these non-U.S. citizen spouses were classified under the terms "civil union" or "domestic partnership."²⁷⁷

269. See *supra* Part II.

270. See *id.* In May 2008, New York Governor David Paterson had ordered state agencies to recognize same-sex marriages performed in other jurisdictions. Peters, *supra* note 29. Some lower-level state courts had made similar rulings, but whether the state's highest court would give such a ruling the force of law, as Windsor's claim for a refund required, remained uncertain and was disputed throughout her lawsuit. See *id.*

271. Geidner, *supra* note 268 (stating that the USCIS issued guidance to their field officers on March 28, 2011. It is routine practice for USCIS to hold in abeyance cases that have a possibility of being affected, "when there's a new law or regulation that will potentially affect their resolution of certain cases").

272. See *id.*

273. *Id.*

274. See *id.*

275. See *Same-Sex Marriages*, *supra* note 61.

276. *Visitor Visa*, U.S. DEP'T OF ST. BUREAU OF CONSULAR AFF., <http://travel.state.gov/content/visas/english/visit/visitor.html> (last visited Apr. 9, 2016); see also *U.S. Visas for Same-Sex Spouses*, *supra* note 232.

277. *U.S. Visas for Same-Sex Spouses*, *supra* note 232.

X. *Windsor*, *Obergefell*, and Their Impact on FMLA and Employer Benefit Plans

Immediately following the Supreme Court's decision in *Windsor*,²⁷⁸ employees were no longer denied requests pursuant to the Family and Medical Leave Act (FMLA) to care for a same-sex partner.²⁷⁹ Initially, however, the DOL extended the coverage provided by the FMLA to include only those employees who currently resided in states where same-sex marriage was legal.²⁸⁰ Referred to as the "state of residence" rule,²⁸¹ this meant that if the employee moved to a state where same-sex marriage was not recognized, that employee would no longer have the right to access his or her benefits under FMLA.²⁸²

The DOL, however, has historically taken an inconsistent approach as to when it applies the "state of residence" rule versus the "place of

278. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

279. See News Release, *Federal Job-Protected Family and Medical Leave Rights Extended to Eligible Workers in Same-Sex Marriages*, U.S. DEP'T OF LAB., WAGE & HOUR DIVISION (Feb. 23, 2015), <http://www.dol.gov/opa/media/press/whd/WHD20150285.htm>.

280. *Frequently Asked Questions: FMLA Notice of Proposed Rulemaking*, U.S. DEP'T OF LAB., WAGE & HOUR DIVISION, <http://www.dol.gov/whd/fmla/nprm-spouse/faq.htm> (last visited Apr. 11, 2016).

281. *Final Rule to Revise the Definition of "Spouse" Under the FMLA*, U.S. DEP'T OF LAB., WAGE & HOUR DIVISION, <https://www.dol.gov/whd/fmla/spouse/> (last visited May 16, 2016); but see *Frequently Asked Questions*, *supra* note 281 ("[u]nder the proposed 'place of celebration' rule, the employer must provide FMLA leave for all eligible employees in marriages that were valid in the place in which they were entered into, whether those marriages are same-sex, opposite-sex, or common law").

282. See *Family and Medical Leave Act*, U.S. DEP'T OF LAB., WAGE & HOUR DIVISION, <http://www.dol.gov/whd/fmla/> (last visited Apr. 11, 2016). According to the DOL's Wage and Hour Division (WHD) FMLA overview, the entitlement for eligible employees include:

Twelve workweeks of leave in a 12-month period for:

the birth of a child and to care for the newborn child within one year of birth; the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement; to care for the employee's spouse, child, or parent who has a serious health condition; a serious health condition that makes the employee unable to perform the essential functions of his or her job; any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty"; or [t]wenty-six workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member's spouse, son, daughter, parent, or next of kin (military caregiver leave).

Id.

celebration” rule.²⁸³ Since September 2013, the DOL has applied the “place of celebration” rule when determining ERISA benefits, but not when determining FMLA benefits.²⁸⁴ When interpreting the word “spouse” under the FMLA, the DOL applies the “state of residence” rule.²⁸⁵ This inconsistency has resulted in depriving benefits to many employees who sought and were denied FMLA coverage on this basis.²⁸⁶

Following the decision in *Windsor* and the President’s initiatives, the DOL announced on February 25, 2015 that it would apply the more expansive “place of celebration” rule when considering the definition of “spouse” under the FMLA.²⁸⁷ The effective date of this change was March 27, 2015.²⁸⁸

The new coverage is based on where the employee celebrated the same-sex marriage, and not where the employee resides at the time he or she seeks the benefit.²⁸⁹ This is referred to as the “place of celebration” rule.²⁹⁰ Under the “place of celebration” rule, if same-sex marriage is legal in the state where the employee was married, then the employer must extend FMLA coverage to the employee.²⁹¹ The regulatory definition of “spouse” under the FMLA, delineated in 29 C.F.R. §§ 825.102 and 825.122(b), “look[s] to the law of the place in which the marriage was entered into, as opposed to the law of the state in which the employee resides.”²⁹² The final rule was issued on February 25, 2015 and the effective date for the final rule was March 27, 2015.²⁹³

One of the key effects of the change²⁹⁴ will be that couples like

283. See *News & Knowledge: DOL’s Inconsistent Approach: Same-Sex Covered by FMLA Depending on State Residency*, TROUTMAN SANDERS LLP (Dec. 23, 2013), <http://www.troutmansanders.com/dols-inconsistent-approach-same-sex-spouses-covered-by-fmla-depending-on-state-residency-12-19-2013/>.

284. See *id.*

285. See *id.*

286. See *id.*

287. See *Fact Sheet: Final Rule to Amend the Definition of Spouse in the Family and Medical Leave Act Regulations*, WAGE & HOUR DIVISION, U.S. DEP’T OF LAB. (Feb. 2015), <https://www.dol.gov/whd/fmla/spouse/factsheet.htm>.

288. *Id.*

289. See *id.*

290. *Id.*

291. See *id.*

292. *Id.*

293. *Id.*

294. See *News Release: Federal Job-Protected Family and Medical Leave Rights Extended to Eligible Workers in Same-Sex Marriages*, U.S. DEP’T OF LAB. (Feb. 23, 2015), <https://www.dol.gov/newsroom/releases/whd/whd20150285> (When announcing the final rule regarding FMLA, U.S. Secretary of Labor, Thomas Perez said: “[t]he basic promise of the FMLA is

Todd and TR, a same-sex couple legally married in Minnesota in 2013 and who recently adopted a son, Camden, will be able to take a leave under FMLA to care for each other, and not just for their son.²⁹⁵ While the couple “was able to take unpaid, job-protected leave to care for Camden – a protection guaranteed by the Family and Medical Leave Act,” until the effective date of the new final rule, “they might have been denied that same protection if they wanted to take job-protected, unpaid leave to care for one another.”²⁹⁶

What remains to be seen is if legally married same-sex couples who had requested FMLA leave and were denied it on that basis in the interim between the *Windsor* decision and March 27, 2015, the effective date of the DOL’s final rule under the FMLA, will be determined to have a compensable cause of action for unjust deprivation of benefits. Additionally, it remains to be seen what impact *Obergefell* and *Fox* will have on the push for more inclusive federal legislation that explicitly includes protection against discrimination on the basis of sexual orientation in the workplace.

XI. What is the Best Strategy Going Forward?

So what does this all mean for the current state of LGBT rights in the United States today? Does the current trend toward increasingly harsh and over-expansive iterations of state RFRAs, in contrast to the huge advances in the court system for LGBT rights, mean that public opinion has moved, or are we in fact fooling ourselves into thinking that that change in public opinion really has moved dramatically since 2010, or are we actually fooling ourselves, and the resistance to that change has now just moved into a different arena?²⁹⁷

that no one should have to choose between the job and income they need, and caring for a loved one. . . . With our action today, we extend that promise so that no matter who you love, you will receive the same rights and protections as everyone else. All eligible employees in legal same-sex marriages, regardless of where they live, can now deal with a serious medical and family situation like all families – without the threat of job loss.”).

295. Thomas E. Perez, *FMLA Updated for a Modern Family*, HUFFINGTON POST, http://www.huffingtonpost.com/thomas-e-perez/fmla-updated-for-a-modern_b_6737096.html (last updated Feb 2, 2016, 1:16 PM).

296. *Id.* (stating that two years prior in 2011, the couple had a private ceremony and gained civil union status in Illinois where they had moved for Todd’s work, but married in Minnesota after same-sex marriage became legal in 2013).

297. See Erez Aloni, Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 Duke J. Gender L. & Pol’y 105 (2010).

Now is the time to decide whether we are at that juncture where we need to put a monumental change into effect in our federal law to stop the tide of discriminatory state RFRA's or if for public policy reasons it is better to continue along this path of incremental change of state-by-state anti-gay marriage laws failing, followed by a backlash of new state RFRA's being enacted to codify LGBT discrimination, followed by a subsequent clarification or counteraction that further polarizes LGBT communities and supportive businesses away from discriminatory states.

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