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**STEMMING THE *HOBBY LOBBY* TIDAL WAVE:  
WHY RFRA CHALLENGES TO OBAMA'S  
EXECUTIVE ORDER  
PROHIBITING FEDERAL CONTRACTORS FROM  
DISCRIMINATING AGAINST LGBT EMPLOYEES  
WILL NOT SUCCEED**

Kayla A. Higgins

INTRODUCTION

Just one day after the Supreme Court handed down its decision in *Burwell v. Hobby Lobby*, holding that a religious employer could not be required to provide employees with certain types of contraception,<sup>1</sup> a group of faith leaders attempted to capitalize on that judicial victory by sending a letter to the White House arguing that the administration should show more deference to the interests of religious organizations.<sup>2</sup> The letter urged President Obama to “include a religious exemption in [his] planned executive order addressing federal contractors and LGBT employment policies.”<sup>3</sup> The letter’s signers argued that “[a] religious exemption in [his] executive order on LGBT employment rights would allow for . . . [the] balancing [of] the government’s interest in protecting both LGBT Americans, as well as the religious organizations that seek to serve in accordance with their faith and values.”<sup>4</sup> The letter was a strategic political move in the wake of the *Hobby Lobby* ruling, which “left open the question

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<sup>1</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

<sup>2</sup> Molly Ball, *Hobby Lobby is Already Creating New Religious Demands on Obama*, THE ATLANTIC (Jul. 2, 2014), <http://theatlantic.com/politics/archive/2014/07/hobby-lobby-is-already-creating-new-religious-demands-on-obama/373853/>.

<sup>3</sup> Email from Dr. Joel C. Hunter et. al., Senior Pastor, Northland, A Church Distributed, to President Barack Obama (July 1, 2014) (on file with Rainbow Blades, 6 The Gay Grassroots Newsletter 7 (2014)), <http://s3.documentcloud.org/documents/1211993/letter-to-obama-from-faith-leaders.pdf>.

<sup>4</sup> *Id.*

of whether certain corporations can challenge other legal requirements based on religious opposition.”<sup>5</sup>

Notably, the signers of the letter were not just right-wing religious leaders and CEOs of conservative Christian and Catholic organizations. Signers included faith leaders who have been generally friendly to the administration, including Michael Wear, who worked for the Obama administration and was the director of faith outreach for Obama’s 2012 presidential campaign, as well as “two members of Catholics for Obama and three former members of the President’s Advisory Council on Faith-Based and Neighborhood Partnerships.”<sup>6</sup>

Despite the appeals from these religious leaders, President Obama issued his executive order without providing a religious exemption.<sup>7</sup> On July 21, 2014, President Obama released Executive Order 13672, entitled “Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity.”<sup>8</sup> The express purpose of the order was to “provide for a uniform policy for the Federal Government to prohibit discrimination and take further steps to promote economy and efficiency in Federal Government procurement by prohibiting discrimination based on sexual orientation and gender identity.”<sup>9</sup> The Office of Federal Contract Compliance Programs (OFCCP) then issued the final rule implementing Executive Order 13672 on December 9, 2014, which stated the regulations would become effective starting April 8, 2015.<sup>10</sup> The OFCCP issued the Rule “without notice or an opportunity for public comment[.]”<sup>11</sup> which makes it difficult to predict what kind of compliance issues might arise.

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<sup>5</sup> Chris Opfer, *Obama Issues Order Banning LGBT Bias, Declines Call to Expand Religious Exemption*, BLOOMBERG BNA (July 24, 2014), <http://www.bna.com/obama-issues-order-n17179892851/>.

<sup>6</sup> Ball, *supra* note 2.

<sup>7</sup> Opfer, *supra* note 5. President Obama’s order, however, still left in place the “ministerial exception to make hiring, firing and other employment decisions related to clergy members” that was created by President George W. Bush via executive order in 2002. *Id.* On the other hand, “Stephen Schneck, the director of Catholic University’s Institute for Policy Research & Catholic Studies, told Bloomberg BNA via e-mail July 21” that “the extent of those exemptions as they apply to the new order may very well be tested in court.” *Id.*

<sup>8</sup> Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 21, 2014).

<sup>9</sup> *Id.*

<sup>10</sup> Implementation of Exec. Order No. 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 Fed. Reg. 72985 (Dec. 9, 2014) (codified as amended at 41 C.F.R. pt. 60).

<sup>11</sup> *Id.* The OFCCP explained this decision by stating that it was relying on the “good cause exemption[.]” which “allows the agency to dispense with notice and comment when

Some commentators believe that the order “could be the next battleground” for the competing views of religious leaders and liberals when it comes to how to weigh religious liberty against other priorities.<sup>12</sup> However, there are two main reasons why the most recent executive order—when faced with legal challenges regarding its lack of religious exemption in violation of the Religious Freedom and Restoration Act—will not crumble under the *Hobby Lobby* ruling.<sup>13</sup>

First, the order only extends to federal contractors, who are legally subject to more control by the federal government than businesses that do not contract with the federal government. The courts allow the federal government extra control over federal contractors because of legal precedent allowing the government deference in managing its internal affairs. Therefore, it can be argued that RFRA does not apply to the executive order because RFRA does not change the ability of government to manage its own internal affairs.

Second, even if the courts find that RFRA does apply and that the President’s executive order must be subject to a RFRA analysis, it would still survive such an analysis. The order would satisfy RFRA because merely preventing access to an unnecessary benefit like the ability to contract with the federal government does not constitute a “substantial burden” on those contractors who would prefer to continue to discriminate on the basis of sexual orientation or gender identity for religious reasons. And even if the courts were to find this limitation on access to federal contracts to be a “substantial burden,” the government would still be able to show a compelling interest in not subsidizing the unequal treatment of LGBT people in employment contexts.

Before exploring these arguments, however, this article begins with a brief overview of the historical context of Executive Order 13672 and contrasts its scope with that of the proposed federal Employment Non-Discrimination Act (ENDA).

## I. HISTORICAL CONTEXT OF EXECUTIVE ORDER 13672

The executive order announced by President Obama on July 21, 2014 pertains to all federal contractors and therefore, “affects 24,000

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‘impracticable, unnecessary, or contrary to the public interest.’” *Id.* (citing 5 U.S.C. § 553(b)(B)). It further explained that it was unnecessary in this case to provide a notice and comment period because “[n]otice and comment are unnecessary when changes to regulations merely restate the changes in the enabling authority they implement.” *Id.*

<sup>12</sup> Ball, *supra* note 2.

<sup>13</sup> Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (2015).

companies employing nearly one-fifth of the U.S. workforce.”<sup>14</sup> The order adds protection against employment discrimination based on sexual orientation and gender identity to a previous executive order from 1969.<sup>15</sup> Specifically, it adds “sexual orientation” and “gender identity” as protected characteristics under Executive Order No. 11246’s requirement that “all Government contracting agencies shall include in every Government contract [that] . . . [t]he contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.”<sup>16</sup> The order also requires that any bidder, prospective contractor, or subcontractor submit a statement in writing with supporting information “to the effect that the signer’s practices and policies do not discriminate on the grounds of” these characteristics and that the signer “consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the order.”<sup>17</sup> President Obama’s order also added “gender identity” as a protected characteristic under Executive Order No. 11478’s requirement that the Government of the United States “provide equal opportunity in Federal employment” for all persons and “prohibit discrimination in employment because of race, color, religion, sex,” national origin, handicap, age, or sexual orientation.<sup>18</sup>

The order provides much-needed civil discrimination protection for people who openly identify as LGBT, as it is still the case that in 29 states workers can “be legally fired or harassed for being gay, lesbian or

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<sup>14</sup> Shadee Ashtari, *Most Americans Don’t Think Churches Should Be Exempt From LGBT Non-Discrimination Laws*, THE HUFFINGTON POST (Oct. 31, 2014, 2:55 PM), [http://www.huffingtonpost.com/2014/10/31/lgbt-employment-discrimination-churches\\_n\\_6082846.html](http://www.huffingtonpost.com/2014/10/31/lgbt-employment-discrimination-churches_n_6082846.html).

<sup>15</sup> Opfer, *supra* note 5. The order as it impacts federal contractors “is expected to go into effect in early 2015, after the Labor Department’s Office of Federal Contract Compliance Programs issues implementing regulations. The ban on gender identity bias by federal agencies[,]” however, “is effective immediately.” *Id.*

<sup>16</sup> Exec. Order 13672, *supra* note 8, at 42971 (1967 amendment to the 1965 order adding “sex” to the list of protected characteristics). See Exec. Order 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965) (codified as amended at 3 C.F.R. pt. 339).

<sup>17</sup> Exec. Order 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965) (as codified as amended at 3 C.F.R. pt. 339).

<sup>18</sup> Exec. Order 13672, *supra* note 8, at 42971; Exec. Order 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969) (codified as amended at 3 C.F.R. pt. 803). See also Mathew S. Nosanchuk, *The Endurance Test: Executive Power and the Civil Rights of LGBT Americans*, 5 ALB. GOV’T L. REV. 440, 453 (2012).

bisexual.”<sup>19</sup> Employees also can be legally fired or harassed for being transgender in 32 states.<sup>20</sup>

The order builds upon strides made during the Clinton administration to remove barriers to federal service by gay men and lesbians. Most directly, it builds upon President Clinton’s amendment to Executive Order 11478 that added sexual orientation as a protected category.<sup>21</sup> In addition, it builds upon an even larger barrier to federal employment faced by LGBT people that President Clinton removed in 1995. That year, President Clinton issued Executive Order 12968,<sup>22</sup> which removed “the longstanding bar on granting homosexuals access to classified information,” based on the presumption “that their sexual orientation rendered them vulnerable to being blackmailed” or intimidated by foreign powers because they “lived closeted lives.”<sup>23</sup> It was “a move long sought by gay rights groups[,]” and was called by Elizabeth Birch, the Executive Director of the Human Rights Campaign Fund, “an important step toward ending governmentally sanctioned job-discrimination against gay and lesbian people.”<sup>24</sup>

But the move was still criticized by conservative groups. An analyst for the Family Research Council, Robert Maginnis, issued a statement at the time saying homosexuality should justifiably raise a red flag in security clearances “because in all healthy societies, homosexuality is recognized as a pathology with very serious implications for a person’s behavior” and “is a behavior that is associated with a lot of anti-security markers such as drug and alcohol abuse, promiscuity and violence.”<sup>25</sup>

These prior justifications for denying LGBT individuals access to federal jobs shows how far the gay rights movement has come in just twenty years. From being openly considered a pathology and a basis for denying people federal employment, same-sex marriage is now legal nationwide as a result of the Supreme Court’s June 2015 decision in *Obergefell v. Hodges*.<sup>26</sup> However, discrimination against LGBT people in

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<sup>19</sup> Ashtari, *supra* note 14; *Non-Discrimination Laws: State by State Information—Map*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map> (last visited Mar. 1, 2015).

<sup>20</sup> *Id.*

<sup>21</sup> Nosanchuk, *supra* note 18, at 453.

<sup>22</sup> Exec. Order No. 12968, 60 Fed. Reg. 40245 (Aug. 7, 1995).

<sup>23</sup> Todd S. Purdum, *Clinton Ends Ban on Security Clearance for Gay Workers*, N.Y. TIMES (Aug. 5, 1995), <http://www.nytimes.com/1995/08/05/us/clinton-ends-ban-on-security-clearance-for-gay-workers.html>; see also Nosanchuk, *supra* note 18, at 452-53.

<sup>24</sup> Purdum, *supra* note 23.

<sup>25</sup> *Id.*

<sup>26</sup> See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

the workforce is still a common occurrence, and it is something that many gay rights groups have tried to address through legislation, such as the federal Employment Non-Discrimination Act (ENDA).

Interestingly, the lack of a religious exemption in Executive Order 13672 took the reach of the order further than ENDA,<sup>27</sup> which passed the Senate in 2013 but died at the end of the last Congress.<sup>28</sup> ENDA includes a religious exemption, expressly exempting “a broad array of faith-based organizations, from churches to religious-service groups to religious newspapers, meaning those groups could still decline to hire gay or transgender people if they believe it conflicts with their faith.”<sup>29</sup> The broader reach of the President’s executive order, at least as applied to federal contractors, is why some commentators believe that the order “could be the next battleground . . .” for the competing views of religious leaders and liberals when it comes to how to weigh religious rights against other priorities.<sup>30</sup> Other commentators have even more explicitly posited that Executive Order 13672’s lack of a religious exemption for religiously affiliated federal contractors “may result in a test of the reach of the Supreme Court’s 2014 decision in *Burwell v. Hobby Lobby Stores, Inc.*”<sup>31</sup>

However, there are several reasons why Executive Order 13672 should not crumble under the *Hobby Lobby* holding when faced with the likely challenges claiming that the order’s lack of a religious exemption is a violation of RFRA.<sup>32</sup> First, the order’s scope is limited to federal contractors, who are subject to more control by the federal government than businesses who do not receive funding from the federal government. This has already been established by previous legislation such as Title VI of 1964 Civil Rights Act,<sup>33</sup> prohibiting racial discrimination by private groups that get federal funding, and by Title IX of the Education Amendments of

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<sup>27</sup> See S. 815, 113th Cong. § 6(a) (2013).

<sup>28</sup> Chris Johnson, *House Panel Rejects Last-Ditch Effort to Pass ENDA*, WASH. BLADE (Dec. 3, 2014), <http://www.washingtonblade.com/2014/12/03/house-panel-rejects-last-ditch-panel-pass-enda/>; *S.815 – Employment Non-Discrimination Act of 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/815> (last visited Mar. 1, 2015) (showing that the bill passed the Senate on November 7, 2013).

<sup>29</sup> Ball, *supra* note 2.

<sup>30</sup> *Id.*

<sup>31</sup> Jill Pedigo Hall, *Will Religiously Based Federal Contractors Challenge OFCCP’s New LGBT Regulations?*, NAT’L L. REV. (Jan. 28, 2015), <http://www.natlawreview.com/article/will-religiously-based-federal-contractors-challenge-ofccp-s-new-lgbt-regulations>.

<sup>32</sup> See Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb (2015).

<sup>33</sup> Prohibition Against Exclusion From Participation in, Denial of Benefits of, and Discrimination Under Federally Assisted Programs on Ground of Race, Color, or National Origin, 42 U.S.C. § 2000d (2012).

1972, prohibiting discrimination based on sex by such groups.<sup>34</sup> In addition, the legislative history of RFRA itself recognizes that “government actions involving only management of internal Government affairs or the use of the Government’s own property or resources” do not have to meet the compelling interest test set forth in the act.<sup>35</sup>

Second, it is likely courts would hold RFRA does not apply in a situation where the “substantial burden” allegedly being imposed on religious expression is the inability to contract with the federal government. RFRA is likely not to apply in such a case because the Act is meant to prevent the government from inflicting penalties on parties for religious expression and should not apply where the only burden is the lack of access to a government-provided benefit.

Finally, even if the courts do decide that the order would constitute a substantial burden under RFRA, the government would likely have a compelling interest in enforcing the order under the Fourteenth Amendment’s Equal Protection Clause. Importantly, it is not necessary for the courts to determine that LGBT people constitute a “suspect class” triggering strict scrutiny analysis under the Fourteenth Amendment for the government’s interest in promoting non-discrimination against LGBT people to be considered “compelling.” The government can argue it has a non-constitutional compelling interest in promoting equality in the workplace. Nevertheless, the expansion of Fifth Amendment and Fourteenth Amendment protections to sexual orientation in recent gay rights cases<sup>36</sup> and the aggressive application of the rational basis doctrine by the Court in such cases suggest that a heightened scrutiny standard does exist for sexual orientation discrimination.

Moreover, recent polls show that about two-thirds of Americans support federal legislation that would bar employers from discriminating against workers on the basis of sexual orientation and gender identity, and fifty-five percent reject exemptions for any employers—even churches.<sup>37</sup> This social support for anti-discrimination measures protecting LGBT workers is likely to impact courts’ analyses of the government’s compelling

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<sup>34</sup> Discrimination Based on Sex or Blindness, 20 U.S.C. § 1681 (2012).

<sup>35</sup> S. REP. NO. 103-111, at 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898 (“[P]re-Smith case law makes it clear that strict scrutiny does not apply[.]”).

<sup>36</sup> See *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 15 (1st Cir. 2012); *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. 1, § 7.5 (2008).

<sup>37</sup> *Most Americans Say Employers Should Never Discriminate, Even on Religious Grounds, According to Latest Harris/Out & Equal Poll*, HARRIS POLL (Oct. 30, 2014, 12:00AM), [http://media.theharrispoll.com/documents/FINAL\\_2014\\_Out\\_Equal\\_Workplace\\_Survey\\_Release\\_10.30.2014.pdf](http://media.theharrispoll.com/documents/FINAL_2014_Out_Equal_Workplace_Survey_Release_10.30.2014.pdf).



interest in promoting non-discrimination against LGBT workers. Indeed, history shows that presidents have often played “a central role in the advancement of civil rights” by using their executive power to “nudge[] the federal government closer towards the goal of greater” social equality at times when it was extremely difficult, for political rather than social reasons, to move civil rights legislation through Congress.<sup>38</sup>

## II. RFRA DOES NOT CHANGE THE ABILITY OF THE GOVERNMENT TO MANAGE ITS OWN INTERNAL AFFAIRS

To begin, one thing setting apart President Obama’s recent executive order from legislation such as the Affordable Care Act (ACA)—the legislation challenged by the plaintiffs in *Hobby Lobby*<sup>39</sup>—is that the order’s limitations only extend to employers who contract with the federal government.<sup>40</sup> The ACA, on the other hand, extends to all “employers with 50 or more full-time employees” that do not fall under one of the Act’s exceptions.<sup>41</sup> This is an important distinction because it means that the reach of President Obama’s order is much more limited than the reach of the ACA. It only applies to those employers that are directly paid by the federal government. This limits the order to only protecting the federal government’s interest in not itself underwriting discrimination based on sexual orientation or gender identity.

The fact that the executive order deals only with how the federal government would like to conduct its own financial dealings and labor contracts puts it squarely in the arena of case law dealing with the federal government’s management of its own internal affairs. The Senate Report accompanying RFRA highlights two landmark decisions by the Supreme Court demonstrating how pre-Smith case law “makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government’s own property or resources.”<sup>42</sup> The two cases the Senate Report references to support this assertion are *Bowen v. Roy* and *Lyng v. Northwest Cemetery Protective Association*.<sup>43</sup>

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<sup>38</sup> Nosanchuk, *supra* note 18, at 441 (providing examples such as President Franklin Delano Roosevelt’s executive order prohibiting racial discrimination in the defense industry and President Harry S. Truman’s executive order ending racial segregation in the U.S. military before Congress passed the Civil Rights Act of 1964).

<sup>39</sup> *Burwell*, 134 S. Ct. at 2762.

<sup>40</sup> See Exec. Order No. 13672, *supra* note 8, at 42972.

<sup>41</sup> *Burwell*, 134 S. Ct. at 2762.

<sup>42</sup> S. REP. NO. 103-111, at 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898.

<sup>43</sup> *Id.* at 9 n. 19.

In *Bowen*, the Court decided that a federal statute requiring states to use a Social Security number in administering the federal Food Stamp and “Aid to Families with Dependent Children” programs did not burden the free exercise rights of Native Americans. They believed obtaining a Social Security number for their 2-year-old daughter would violate their religious beliefs.<sup>44</sup> Even more broadly, the Court held that “[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government’s internal procedures.”<sup>45</sup>

Similarly, in *Lyng*, the Court held that Native Americans’ free exercise rights were not burdened when the United States Forest Service constructed mining or timber roads over public lands that were sacred to the Native American religion, and thus, the compelling interest test was not triggered.<sup>46</sup> The Court explained that its holdings in *Lyng* and *Bowen* were consistent with the Free Exercise Clause because in both cases the affected individuals were not “coerced by the Government’s action into violating their religious beliefs . . .”<sup>47</sup>

The situation resulting from Obama’s executive order is very similar. The order is the federal government’s way of dictating its own standards for what constitutes acceptable labor practices for the contractors it employs. One counter-argument that challengers to the executive order might make is that the government’s contracts with outside businesses and organizations are not “internal affairs” because they constitute an interaction between the government and the private sector. However, Supreme Court precedent demonstrates that the federal government’s dealings with federal contractors constitute the “management of internal government affairs.”

For example, in *NASA v. Nelson*, the Court upheld the constitutionality of an initiative extending background checks required for many government jobs to contract employees.<sup>48</sup> The Court rejected the argument that because the Respondents were contract employees and not civil servants that the “[g]overnment’s broad authority in managing its affairs should apply with diminished force.”<sup>49</sup> The Court held, rather, that the “[g]overnment’s interest as a ‘proprietor’ in managing its operations . . .

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<sup>44</sup> *Bowen v. Roy*, 476 U.S. 693, 695, 711-12 (1986). More specifically, the parents believed that the use of a numerical identifier would “‘rob the spirit’ of [their] daughter and prevent her from attaining greater spiritual power.” *Id.* at 696.

<sup>45</sup> *Id.* at 700.

<sup>46</sup> *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 447 (1988).

<sup>47</sup> *Id.* at 449.

<sup>48</sup> *NASA v. Nelson*, 562 U.S. 134, 150 (2011).

<sup>49</sup> *Id.*

does not turn on such formalities.”<sup>50</sup> In other words, the government’s authority in managing its affairs applies equally to its management of its own employees and its management of contract employees.

In addition, various federal circuit courts have upheld the validity of executive orders dealing specifically with the imposition of labor regulations only extending to federal contractors.<sup>51</sup> They have upheld these other executive orders using similar reasoning to the Supreme Court’s reasoning in *Bowen* and *Lyng*: that the federal government is entitled to manage its internal affairs and spend its limited financial resources in the way it views as most efficient.<sup>52</sup>

For example, in *Contractors Association of East Pennsylvania. v. Secretary of Labor*, the Third Circuit Court of Appeals held that the Philadelphia Plan<sup>53</sup> was a “valid Executive action designed to remedy the perceived evil that minority tradesmen have not been included in the labor pool available for the performance of construction projects in which the federal government has a cost and performance interest.”<sup>54</sup> In other words, the affirmative action plan was justified on the basis that it served the government’s fiscal interest in getting the best labor performance for the lowest cost. The court also emphasized that in this case, as well as in previously decided cases dealing with challenges to similar types of executive orders, the President was not attempting “to impose [his] notions of desirable social legislation on the states wholesale,” but rather was acting “in the one area in which discrimination in employment was most likely to affect the cost and the progress of projects in which the federal government had both financial and completion interests.”<sup>55</sup> The court then went on to hold that “the federal government has a vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects.”<sup>56</sup>

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

<sup>51</sup> See, e.g., *Contractors Ass’n of E. Pa. v. Sec’y of Labor*, 442 F.2d 159 (3d Cir. 1971); *Farkas v. Tex. Instrument, Inc.*, 375 F.2d 629 (5th Cir. 1967).

<sup>52</sup> *Bowen*, 476 U.S. at 699; *Lyng*, 485 U.S. at 448.

<sup>53</sup> The Philadelphia Plan was a plan promulgated under the authority of Executive Order No. 11246 (one of the two orders amended by President Obama in July 2014 to include language about sexual orientation and gender identity) that required “bidders on any federal or federally assisted construction contracts for projects in a five-county area around Philadelphia . . . [to] submit an acceptable affirmative action program which includes specific goals for the utilization of minority manpower in six skilled crafts: ironworkers, plumbers and pipefitters, steamfitters, sheetmetal workers, electrical workers, and elevator construction workers.” *Contractors Ass’n of E. Pa.*, 442 F.2d at 163.

<sup>54</sup> *Id.* at 177.

<sup>55</sup> *Id.* at 171.

<sup>56</sup> *Id.*

Similarly, the Fifth Circuit Court of Appeals earlier held in *Farkas v. Texas Instrument, Inc.* that the antidiscrimination provisions of Executive Order No. 10925, which prohibited federal contractors from discriminating on the basis of race, creed, color or natural origin, had “the force and effect of law” because “Congress ha[d] committed to the President broad authority to prescribe [the] policies and directions” necessary to effectuate the “procurement of property and services for the government.”<sup>57</sup> Since the order’s antidiscrimination measures were cognizably related to the establishment of “an economical and efficient system” for obtaining property and services for the government, it was a valid exercise of presidential authority.<sup>58</sup> We see again from this case that the courts view the federal government’s interest in being able to spend its financial resources efficiently and get the best labor available as sound justification for using whatever policies and directions deemed necessary for those purposes. The same interest lies behind President Obama’s Executive Order 13672. Antidiscrimination measures that prohibit federal contractors from discriminating against LGBT employees promote hiring practices that will encourage the hiring of the best and most qualified employees to do the work, rather than excluding a particular class of people for prejudicial, rather than economic, reasons.

### III. EVEN IF THE COURTS FIND THAT RFRA DOES APPLY TO THE PRESIDENT’S EXECUTIVE ORDER, IT WOULD STILL SURVIVE STRICT SCRUTINY

#### *A. There is No “Burden” When the Legislation Merely Limits Access to an Unnecessary Benefit*

Under RFRA, “only governmental actions that place a substantial burden on the exercise of religion must meet the compelling interest test set forth in the act.”<sup>59</sup> Therefore, the presence or lack of a “substantial burden” is the essential first step to determining whether Executive Order 13672 is even the kind of governmental action that RFRA applies to.

The classic situation that RFRA was designed to address is one in which the government passes a law that, through some sort of criminal or financial penalty, compels a person to act in violation of his or her religious beliefs.<sup>60</sup> Executive Order 13672 is clearly not such a law. However, RFRA’s reach has expanded beyond laws that are explicitly punitive. To

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<sup>57</sup> *Farkas*, 375 F.2d at 632 n. 1.

<sup>58</sup> *Id.*

<sup>59</sup> S. REP. NO. 103-111, at 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898.

<sup>60</sup> S. REP. NO. 103-111, at 5, 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1894, 1897.

understand what types of free exercise burdens RFRA is meant to address, it is important to consider what legal developments led Congress to pass the Act in the first place.

The history of cases leading up to the passage of RFRA most sensibly begins with the Supreme Court's decision in *Sherbert v. Verner*. The case was brought by a member of the Seventh-day Adventist Church who was fired from her job after she refused to work on Saturday, the Sabbath Day of her faith, and then she was denied unemployment compensation benefits by the state of South Carolina because it found her religious justification for not working on Saturday unacceptable.<sup>61</sup> The Court ultimately held that South Carolina was not permitted under the Free Exercise Clause of the First Amendment "to constrain a worker to abandon his [or her] religious convictions respecting the day of rest."<sup>62</sup> More generally, the Court held that the government could not substantially burden an individual's religious practice except where necessary to promote a compelling interest.<sup>63</sup>

During the 1980's, however, the Court increasingly began to cut back on this protection for religious freedoms, culminating in the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, which essentially overruled *Sherbert*.<sup>64</sup> In *Smith*, the Court held that the State of Oregon did not violate the Free Exercise Clause by denying unemployment benefits to workers fired for using illegal drugs for religious purposes.<sup>65</sup> The plaintiffs in *Smith* were two Native Americans who were fired for ingesting sacramental peyote and were then denied unemployment compensation "because they had been discharged for work-related misconduct."<sup>66</sup> Essentially negating the holding in *Sherbert*, the Court "held that the right of free exercise does not relieve an individual of the obligation to comply with 'a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"<sup>67</sup>

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<sup>61</sup> *Sherbert v. Verner*, 374 U.S. 398, 399-401 (1963).

<sup>62</sup> *Id.* at 410.

<sup>63</sup> *Id.* at 406.

<sup>64</sup> Steven J. Heyman, *The Third Annual C. Edwin Baker Lecture for Liberty, Equality, and Democracy: The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 257 n. 148 (2014).

<sup>65</sup> *Emp't Div., Dep't of Human Res. of OR. v. Smith*, 494 U.S. 872, 890 (1990).

<sup>66</sup> *Id.* at 874.

<sup>67</sup> *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982) (Stevens, J., concurring)).

Three years later, Congress responded to *Smith* by enacting RFRA.<sup>68</sup> In fact, RFRA was enacted with the explicit purpose of “restor[ing] the compelling interest test as set forth in *Sherbert*” and “guarantee[ing] its application in all cases where free exercise of religion is substantially burdened.”<sup>69</sup> RFRA was successful in doing so as applied to the federal government, but in *City of Boerne v. Flores* the Supreme Court held that it was unconstitutional as applied to the states.<sup>70</sup>

The Court’s recent decision in *Hobby Lobby* demonstrated that RFRA has teeth as applied in situations where the governmental action is imposing a substantial burden on the free exercise of religion. The holding has already made ripples. Peter S. Dickinson, a partner at the prominent law firm Bush Gottlieb in Los Angeles, said at the November 2014 ACA update session of the American Bar Association’s Labor and Employment Law Conference, “I really do think we will be dealing with the implications [of the decision] for years and years to come.”<sup>71</sup> Indeed, the decision has spurred a movement of litigants testing just how far the religious freedom argument can go under RFRA, with several attempted expansions finding success in the courts.<sup>72</sup>

For example, in *Perez v. Paragon Contractors, Corp.*, the Central Division for the United States District Court of Utah expanded the scope of RFRA in holding that a member of the Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS) was not required to provide information to the federal government regarding allegations of child labor used by the Church.<sup>73</sup> The court’s holding was based on its finding that to require the FLDS member to provide this information would burden his sincerely held religious belief not to disclose internal church matters.<sup>74</sup>

In addition, the Eleventh Circuit Court of Appeals held in *Davila v. Gladden* that a prisoner’s religious beliefs were “substantially burdened” when the government denied him access to the Ache-infused<sup>75</sup> beads and

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<sup>68</sup> *Burwell*, 134 S. Ct. at 2760.

<sup>69</sup> Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb(b)(1) (2015).

<sup>70</sup> *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

<sup>71</sup> David McAfee, *Hobby Lobby May Spur Further Challenges To Preventive Services Rules, Speaker Says*, 41 PENS. & BEN. REP. (BNA) No. 45 2358, 2358 (2014).

<sup>72</sup> See *Davila v. Gladden*, 777 F.3d 1198, 1207 (11th Cir. 2015); *Perez v. Paragon Contractors, Corp.*, No. 2:13CV00281-DS, 2014 WL 4628572, at \*4 (D. Utah Sept. 11, 2014).

<sup>73</sup> *Perez*, 2014 WL 4628572, at \*1, 4.

<sup>74</sup> *Id.* at \*4.

<sup>75</sup> “Ache” is a spiritual force in Mr. Davila’s religion of Santeria that is “infused into the beads and shells during [a] ceremony” that involves “soaking the beads and shells in animal

shells that his religious beliefs required him to wear.<sup>76</sup> The Court held that this substantial burden triggered the requirement under RFRA for the government to show a compelling interest.<sup>77</sup>

The *Davila* court explicitly noted the impact of the *Hobby Lobby* decision on its ruling. It explained that although its holding may have been inconsistent with an unpublished 2005 case involving similar facts, that case was “decided well before the Supreme Court’s *Hobby Lobby* decision.”<sup>78</sup> In addition, the Supreme Court recently decided a case very factually similar to *Davila* called *Holt v. Hobbs*, which dealt with RFRA’s sister statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA).<sup>79</sup> The Court held in *Holt* that the Arkansas Department of Correction’s “grooming policy” was a violation of RLUIPA because it prevented the “petitioner from growing a [half-inch] beard in accordance with his religious beliefs.”<sup>80</sup>

These cases demonstrate the ripple effect of *Hobby Lobby* and the expansion of religious litigants’ use of RFRA as a sword against the government. However, these cases simultaneously demonstrate the limitations of using RFRA as a tool for challenging President Obama’s recent executive order. This is because the “substantial burdens” recognized in these cases are very different in nature from the consequences that the President’s order has on faith-based organizations that may wish to contract with the federal government.

The burdens in the cases just discussed include government actions that directly prevent believers from engaging in the ritual practices of their religion as well as government actions aiming to compel behavior that is a direct violation of a person’s religious beliefs. In contrast, Executive Order 13672 merely requires companies who choose to contract with the federal government to not discriminate based on an employee’s sexual orientation or gender identity. If a company does not wish to comply with those requirements, it will miss out on the benefit of being able to bid on federal contracts. However, the company will not be penalized in any way.

Indeed, the history leading up to the enactment of RFRA demonstrates that its primary concern was with laws that inflicted some sort of punishment or penalty on someone as a result of them acting in accordance with their religious beliefs. It is significant, therefore, that one

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blood, and then rinsing them in an ‘elixir’ containing dozens of plants and minerals.” *Davila*, 777 F.3d at 1202.

<sup>76</sup> *Id.* at 1205.

<sup>77</sup> *Id.* at 1207.

<sup>78</sup> *Id.* at 1208 n. 4.

<sup>79</sup> *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).

<sup>80</sup> *Id.* at 867.

difference between President Obama's executive order and the Affordable Care Act is that the ACA imposed a serious financial penalty on those private employers who failed to comply with the Act's requirements.<sup>81</sup> The Act mandated that any covered employer who did not comply with the ACA's group-health-plan requirements must "pay \$100 per day for each affected individual."<sup>82</sup> In addition, if an employer decided "to stop providing health insurance altogether and at least one full-time employee enroll[ed] in a health plan and qualifie[d] for a subsidy on one of the government-run ACA exchanges," the Act required the employer to pay \$2,000 per year for each full-time employee.<sup>83</sup> The Supreme Court viewed these economic consequences for non-compliance as "severe,"<sup>84</sup> and ultimately held that the economic penalty constituted a substantial burden on the plaintiffs' religious beliefs under RFRA, triggering a strict scrutiny analysis.<sup>85</sup>

President Obama's order, on the other hand, inflicts no such penalty. In addition, no organization or business is required to contract with the government, and therefore, any organization can avoid having to comply with the order's discrimination prohibitions by simply deciding not to bid on a federal contract. In other words, the order could be construed as limiting access to a beneficial economic opportunity to organizations that, for religious reasons, continue discriminating against LGBT employees. However, the order does not inflict any sort of penalization that could be considered a "substantial burden."

Challengers might counter-argue based on the "unconstitutional conditions" doctrine. The unconstitutional conditions doctrine is the principle that the government cannot condition a benefit on the requirement that recipients forgo constitutionally protected speech, or another constitutional right.<sup>86</sup> This doctrine was articulated by the Supreme Court in *Perry v. Sindermann*, which held "that even though a person has no 'right' to a valuable governmental benefit," the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected

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<sup>81</sup> See *Burwell*, 134 S. Ct. at 2775.

<sup>82</sup> *Id.* at 2762 (internal quotations omitted).

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

<sup>84</sup> *Id.* at 2775.

<sup>85</sup> *Id.* at 2779 ("Because the contraceptive mandate forces them to pay an enormous sum of money—as much as \$475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.").

<sup>86</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 980 (3d ed. 2006).



interests—especially, his interest in freedom of speech.”<sup>87</sup> Therefore, challengers to Executive Order 13672 could try to claim that the order still imposes a substantial burden on religious federal contractors because it conditions a benefit (the ability to contract with the federal government) on the requirement that the contractor forgo his or her free exercise right to discriminate against LGBT employees.

However, the best response to this argument would be to point out the limited scope of the unconstitutional conditions doctrine. The Supreme Court qualified the doctrine in cases like *Rust v. Sullivan* and *Regan v. Taxation with Representation of Washington*.<sup>88</sup> In *Regan*, the Court considered whether it was an unconstitutional condition for the IRS to require non-profit groups not to engage in “substantial lobbying” in order to receive the benefit of 501(c)(3) tax-deduction privileges.<sup>89</sup> It rejected the non-profit group’s contention that the prohibition counted as an unconstitutional condition and held that Congress could reasonably refuse to subsidize the lobbying activities of these organizations.<sup>90</sup> More specifically, the Court “reject[ed] the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.”<sup>91</sup>

Similarly, in *Rust*, the Court upheld the constitutionality of the Department of Health and Human Services (HHS) regulations that prohibited the use of Title X funds spent by the U.S. government for promoting family planning from being used in programs where abortion was a method of family planning.<sup>92</sup> The Court held that requiring Title X grantees to “engage in abortion-related activity separately from” receiving federal funding does not deny them the right to engage in those activities but merely is Congress permissibly “refus[ing] to fund such activities out of the public fisc.”<sup>93</sup> Furthermore, the Court emphasized that the “refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.”<sup>94</sup>

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<sup>87</sup> *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). See also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

<sup>88</sup> See generally *Rust v. Sullivan*, 500 U.S. 173 (1991); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983).

<sup>89</sup> *Regan*, 461 U.S. at 541-42.

<sup>90</sup> *Id.* at 545-46.

<sup>91</sup> *Id.* at 546 (citing *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)).

<sup>92</sup> *Rust*, 500 U.S. at 177-78.

<sup>93</sup> *Id.* at 198.

<sup>94</sup> *Id.* at 193 (quoting *Harris v. McRae*, 448 U.S. 297, 317 n. 19 (1980)).

Applying the holdings in *Rust* and *Regan* to President Obama's executive order prohibiting federal contractors from discriminating against LGBT employees reveals why the order cannot be characterized as imposing an "unconstitutional condition" on religious federal contractors. The order merely refuses to subsidize discriminatory employment practices against LGBT people, which under *Regan*'s holding does not appear to constitute an infringement upon the employer's Free Exercise rights. According to *Rust*, it is legitimate for the government to refuse to use public money to fund certain activities, such as discrimination.

It is also difficult to imagine how being required to give fair employment opportunities to LGBT people could substantially burden someone's religious beliefs. Simply having to possibly employ someone who identifies as a homosexual or who is transgender does not seem to compel any kind of behavior on the part of the employer that would be contrary to the employer's religious beliefs. The only possible "burden" that could be raised by such a scenario might be that the employer would have to pay family benefits to an LGBT employee in a same-sex relationship. This is because "Title VII and Supreme Court precedent require employers to make available the same benefits for spouses regardless of" an employee's gender.<sup>95</sup> Therefore, "OFCCP enforcement of the new Rule's nondiscrimination prohibitions would bring within OFCCP's purview the provision of [employee] benefits to an employee's same-sex spouse."<sup>96</sup> Contractor employers who oppose same sex marriage for religious reasons, then, might raise the complaint that they are being forced to participate in or facilitate an activity that goes against their religious beliefs.

This argument would be analogous to the argument raised by the plaintiffs in *Hobby Lobby*, which was that the ACA forced them to fund the use of abortifacient drugs.<sup>97</sup> However, the relationship between paying for an LGBT employee's family benefits and the violation of certain religious beliefs seems much more tenuous than the relationship between funding an employee's contraceptives and the violation of certain religious beliefs. This is because in the instance of abortifacient contraceptives, the employee is directly funding the very thing that they consider to be blasphemous – drugs that can inhibit an already fertilized egg from attaching to the uterus, thereby preventing its development.<sup>98</sup> In the context of paying for family benefits, however, the payments are not directly funding homosexual sex or

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<sup>95</sup> Hall, *supra* note 31, at 2.

<sup>96</sup> *Id.*

<sup>97</sup> *Burwell*, 134 S. Ct. at 2759.

<sup>98</sup> *Id.* at 2762-63.

any other specific activity that is a religious violation. Furthermore, the executive order does not “force” any organization or business to do anything, since they can easily avoid the reach of its prohibitions by choosing not to contract with the federal government.

One other important distinction between the religious burden at issue in *Hobby Lobby* and the potential one implicated by Executive Order 13672 is that *Hobby Lobby* dealt with access to abortion and contraception, while Executive Order 13672 deals with LGBT civil rights. The courts have in recent history treated these two issues very differently.<sup>99</sup> As will be discussed further in the following section, courts have been increasingly sympathetic toward expanding LGBT rights over the past couple of years. This trend stands in stark contrast to the way courts have increasingly placed ever-greater limits on access to abortions. Indeed, many of the abortion-related decisions by the Supreme Court shortly preceding *Hobby Lobby* were in favor of the “pro-life” litigant.<sup>100</sup> *Hobby Lobby*’s holding, then, was consistent with the Supreme Court’s recent decisions regarding women’s rights to contraception and abortion. However, it seems likely that the courts would be more sympathetic to a religious freedom argument challenging compelled support of abortifacient contraception than a similar argument challenging compelled support of equal treatment for LGBT people. The reasons why the courts should evaluate the government’s interest in preventing discrimination against LGBT people as compelling under RFRA are laid out in the following section.

*B. Even if Courts Hold That Executive Order 13672 Does Create a Substantial Burden, the Government Will Be Able to Show A Compelling Interest*

Even if the courts do determine that Executive Order 13672 creates a substantial burden under RFRA, it will still prevail under the RFRA analysis because the government will be able to show a compelling interest in preventing discrimination against LGBT employees by federal contractors. Importantly, it is not necessary for the courts to determine that

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<sup>99</sup> See Jay Michaelson, *Ten Reasons Women Are Losing While Gays Keep Winning*, THE DAILY BEAST (July 6, 2014, 7:06 AM), <http://www.thedailybeast.com/articles/2014/07/06/ten-reason-women-are-losing-while-gays-keep-winning.html> (explaining how the Supreme Court’s *Hobby Lobby* decision “is yet another entry in the latest disturbing trend of civil rights cases, in which gays win, and women lose”).

<sup>100</sup> For example, the Court held in *Gonzales v. Carhart* that Congress’s ban on partial-birth abortion was not unconstitutionally vague and did not impose an undue burden on the right to an abortion. 550 U.S. 124, 168 (2007). In *Mazurek v. Armstrong*, the Court upheld a Montana law requiring abortions to be done by licensed physicians. 520 U.S. 968, 969-70, 976 (1997).

LGBT people constitute a “suspect class” triggering strict scrutiny analysis under the Fourteenth Amendment for the government’s interest in promoting non-discrimination against LGBT people to be considered “compelling.” The two assessments are distinct. That is because even under strict scrutiny analysis, a non-constitutional interest can still be considered a compelling government interest.<sup>101</sup>

For example, the Supreme Court held in *Planned Parenthood of Southeastern Pennsylvania v. Casey* that a state’s interest in fetal life is important enough to allow it to prohibit abortion after viability,<sup>102</sup> “despite the fact[] that abortion is a constitutional right and that protecting fetal life is not” a recognized constitutional interest.<sup>103</sup> More recently, the Court held in *Holder v. Humanitarian Law Project* that the government’s interest in preventing terrorism survived First Amendment scrutiny.<sup>104</sup> It held this non-constitutional interest to be compelling enough to survive First Amendment scrutiny even though the Court agreed with the plaintiffs that the statute at issue regulated speech on the basis of content and therefore, required a more demanding standard than intermediate scrutiny.<sup>105</sup> These are just a few examples of how strict scrutiny allows for “constitutional rights to be limited to achieve subconstitutional goals.”<sup>106</sup>

In this case, Executive Order 13672 expresses that the executive branch has identified equality in the workplace to be a compelling interest. Even though the judicial branch has not yet decided that strict scrutiny applies to sexual orientation discrimination, it does not mean that other branches cannot decide that prohibiting discrimination against LGBT people is an important and fundamental government interest.

Alternatively, it is arguable that the government interest could be considered compelling in this case because the courts have been applying an ever-higher standard of review for sexual orientation discrimination. A relevant case study for predicting how the courts might interpret a challenge against government action prohibiting discrimination at the expense of the

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<sup>101</sup> Mark D. Rosen, *When Are Constitutional Rights Non-Absolute? McCutcheon, Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535, 1538 (2015).

<sup>102</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992) (holding that “subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion”).

<sup>103</sup> Rosen, *supra* note 101, at 1538.

<sup>104</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8 (2010) (upholding a federal statute “prohibit[ing] the provision of material support or resources to certain foreign organizations that engage in terrorist activity[,]” despite plaintiffs’ claim that the statute infringes their rights to freedom of speech and association).

<sup>105</sup> *See id.* at 27-29.

<sup>106</sup> Rosen, *supra* note 101, at 1538.

sincerely held religious beliefs is *Bob Jones University v. United States*.<sup>107</sup> Bob Jones University is a school in South Carolina dedicated to “fundamentalist Christian religious beliefs,”<sup>108</sup> which at one time had prohibitions against “interracial dating and marriage.”<sup>109</sup> The school’s disciplinary rules held that students who were “partners in an interracial marriage” or who “date[d] outside of their own race” would be expelled.<sup>110</sup> In 1970, the Internal Revenue Service (IRS) changed its policies in order to stop providing tax-exempt status to private schools engaged in racial discrimination.<sup>111</sup> When the IRS revoked Bob Jones University’s tax-exempt status due to the school’s racially discriminatory policies, the university claimed that the IRS had abridged its religious liberty.<sup>112</sup> The Court ultimately held that the government’s “interest in eradicating racial discrimination in education” overrode “whatever burden denial of tax benefits place[d] on petitioners’ exercise of their religious beliefs.”<sup>113</sup>

Although *Bob Jones University* was decided before RFRA was passed, the outcome would likely have been the same even after RFRA’s passage because the Court found the government interest in eradicating discrimination to be “compelling” due to the history of racial discrimination in the country.<sup>114</sup>

Although LGBT discrimination has not reached the same standard of scrutiny as racial discrimination under the Equal Protection clauses of the Fourteenth Amendment, the courts have recently evaluated it under increasingly heightened scrutiny. For example, in 2000, the Supreme Court did not use any equal protection language in *Boy Scouts of America v. Dale*, where it held that New Jersey’s law requiring the Boy Scouts to admit an openly gay man as an assistant scoutmaster violated the Boy Scouts’ First Amendment right of expressive association.<sup>115</sup> Since then, state and federal courts have largely adopted an equal protection analysis when it comes to discrimination on the basis of sexual orientation. Just three years after *Boy Scouts of America*, the Supreme Court held in *Lawrence v. Texas* that a Texas statute making it a crime for two persons of the same sex to engage

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<sup>107</sup> See *Bob Jones Univ. v. United States*, 461 U.S. 574, 612 (1983).

<sup>108</sup> *Id.* at 579-80.

<sup>109</sup> *Id.* at 580.

<sup>110</sup> *Id.* at 580-81.

<sup>111</sup> *Id.* at 581.

<sup>112</sup> *Id.* at 602-03.

<sup>113</sup> *Id.* at 604.

<sup>114</sup> *Id.*

<sup>115</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644-45 (2000).

in certain intimate sexual conduct violated the Due Process Clause.<sup>116</sup> In her concurring opinion, Justice O'Connor added that "[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."<sup>117</sup>

The First Circuit was the first federal appeals court to apply a new kind of heightened scrutiny, which has been called "rational basis with bite,"<sup>118</sup> to sexual orientation discrimination in *Massachusetts v. U.S. Department of Health & Human Services*.<sup>119</sup> The court held that Section 3 of the Defense of Marriage Act (DOMA), which denied federal economic and other benefits to lawfully married same-sex spouses and to surviving spouses from such couples, violated the Equal Protection Clause.<sup>120</sup> The court determined that "without insisting on 'compelling' or 'important' justifications or 'narrow tailoring,' the [Supreme] Court would scrutinize with care the purported bases for the legislation."<sup>121</sup>

Then, in the summer of 2013, the Supreme Court in *United States v. Windsor* struck Section 3 of DOMA from the United States Code.<sup>122</sup> "[T]he Court cited DOMA's legislative history as evidence that its 'purpose [wa]s to impose inequality' on gays and lesbians."<sup>123</sup> "[T]he Court [then] concluded that Congress's stated 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws'<sup>124</sup> was just another way of expressing disapproval of homosexuality and thus, failed to comport with equal protection."<sup>125</sup> Most recently, the Court held in *Obergefell* that "under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of" the right to marry.<sup>126</sup>

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<sup>116</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>117</sup> *Id.* at 582 (O'Connor, J., concurring).

<sup>118</sup> Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 872 (2014) (explaining that some have interpreted the Supreme Court's decision in *United States v. Windsor* to have applied intermediate scrutiny, while others have concluded that the Court used a heightened form of rational basis review "known colloquially as rational basis with bite").

<sup>119</sup> *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 15 (1st Cir. 2012).

<sup>120</sup> *Id.* at 8, 15.

<sup>121</sup> *Id.* at 11.

<sup>122</sup> *Windsor*, 133 S. Ct. at 2695.

<sup>123</sup> Franklin, *supra* note 118, at 868 (citing *Windsor*, 133 S. Ct. at 2694).

<sup>124</sup> *Id.* (citing *Windsor*, 133 S. Ct. at 2693).

<sup>125</sup> *Id.*

<sup>126</sup> *Obergefell*, 135 S. Ct. at 2604.

In addition, state courts have increasingly applied a heightened scrutiny to discrimination based on sexual orientation, finding justification in a long history of discrimination against homosexuals. For example, in the *In re Marriage Cases*, the Supreme Court of California determined that government classifications based on sexual orientation, including marriage restrictions, should be subject to strict scrutiny because sexual orientation “represents—like gender, race, and religion—a constitutionally suspect basis upon which to impose differential treatment,” and because the discrimination in the context of marriage restrictions “impinges upon a same-sex couple’s fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple.”<sup>127</sup> More specifically, the California Supreme Court held

that the most important factors in deciding whether a characteristic should be considered a constitutionally suspect basis for classification are whether the class of persons who exhibit a certain characteristic historically has been subjected to invidious and prejudicial treatment, and whether society now recognizes that the characteristic in question generally bears no relationship to the individual’s ability to perform or contribute to society.<sup>128</sup>

Even the Montana and Alaska Supreme Courts have recently held that unequal health insurance coverage for same-sex and different-sex partners of employees is indefensible, for being “an unjustifiable sexual orientation classification” and for “violat[ing] the state constitution’s equal protection clause[.]” respectively.<sup>129</sup>

It is clear, then, that courts have increasingly considered LGBT people as a suspect class for the sake of equal protection analysis, deserving of something more than just a rational basis review when discrimination is concerned. This trend towards applying an ever-greater level of scrutiny to LGBT discrimination makes it increasingly likely that the government will be deemed to have a compelling interest in eradicating discrimination against LGBT people in the workforce, whether that interest is constitutional or non-constitutional.

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<sup>127</sup> *In re Marriage Cases*, 183 P.3d at 401.

<sup>128</sup> *Id.* at 443.

<sup>129</sup> Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 770 (2012).

## CONCLUSION

Presidents have used their executive power to advance civil rights in America for much of this nation's history<sup>130</sup> For example, President Harry S. Truman used an executive order to end racial segregation in the U.S. military even before the Supreme Court's decision in *Brown v. Board of Education* in 1954 and before Congress passed the Civil Rights Act of 1964.<sup>131</sup> And Truman's executive order actually expanded upon an earlier executive order signed by President Franklin Delano Roosevelt, which prohibited "racial discrimination in the defense industry."<sup>132</sup> This is just one example of how presidents have previously "nudged the federal government closer towards the goal" of equality during a political climate that made it "extremely difficult to move . . . civil rights legislation through the Congress."<sup>133</sup>

Previous executive action has nudged the federal government towards increased equal treatment of LGBT people. For example, starting in 1975, it was executive branch action that "began to protect gay men and lesbians from discrimination."<sup>134</sup> Then, subsequent administrations largely left LGBT executive protections alone, despite having the ability to revoke them. "Because these executive orders and other executive branch actions were left 'on the books,' succeeding sympathetic administrations used them as a foundation for further executive branch actions to expand the rights of LGBT individuals."<sup>135</sup>

By design, the executive branch has limited power to change policies or to make sweeping changes to the country's laws. The federal system's separation of powers is designed to prevent such far-reaching executive powers. That is the primary reason why challenges brought against Executive Order 13672 under RFRA are likely to fail—the reach of the President's order is so limited that it would be difficult for challengers to even establish a "substantial burden" on their religious freedoms necessary to make a RFRA claim. However, would-be challengers are correct to be nervous about what this action could foretell about the future of LGBT rights expansion in the country, if history is any indicator.

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<sup>130</sup> Nosanchuk, *supra* note 18, at 441.

<sup>131</sup> *Id.* See also Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

<sup>132</sup> Nosanchuk, *supra* note 18, at 441. See also Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941).

<sup>133</sup> Nosanchuk, *supra* note 18, at 441.

<sup>134</sup> *Id.* at 442.

<sup>135</sup> *Id.* at 447.