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Let Me Be Queer: The Need for LGBT Protections in Indiana

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LET ME BE QUEER: THE NEED FOR LGBT PROTECTIONS IN INDIANA

I. INTRODUCTION

In 2015, Indiana Governor Mike Pence signed the state's Religious Freedom Restoration Act (RFRA) into effect.[1] This bill allows individuals and companies to claim their religious beliefs as a defense in legal proceedings by stating that their religious beliefs have been, or are likely to be, burdened by providing some service or good.[2] As a result, the LGBT+ (LGBT) community interpreted the passing of this bill as a direct attack on their rights and freedom.[3] Their fears were confirmed when a pizza restaurant in Walkerton, Indiana announced a week after the passage of the bill that they would refuse to cater any wedding for a same-sex couple.[4]

In July 2014, just days after the federal court struck down Indiana's law prohibiting gay marriages, Mark G. Ahearn, chief counsel to Governor Mike Pence, issued a memo to all executive branches outlining Indiana's position.[5] The memo stated that Indiana's law against same-sex marriages "is in full force and effect and executive branch agencies are to execute their functions as though the U.S. District Court order of June 25 had not been issued."[6] In Indiana, this decision struck down Indiana's law forbidding gay marriages, resulting in several hundred same-sex marriages.[7] While it seemed like a great victory, it took just two days for

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1 *See* IND. CODE § 34-13-9 (describing Indiana's infamous Religious Freedom Restoration Act). *See also* IND. CODE § 34-13-9-0.7 (observing the "fix" that Indiana added to the Religious Freedom Restoration Act, which was meant to prevent discrimination based on sexual orientation).

2 *See* IND. CODE § 34-13-9 (conveying Indiana's RFRA discriminatory purpose and effect on LGBT citizens).

3 *See* Kristine Guerra, *How Indiana's RFRA differs from federal version*, INDIANAPOLIS STAR (Mar. 31, 2015), https://www.indystar.com/story/news/politics/2015/03/31/indianas-rfra-similar-federal-rfra/70729888/ [https://perma.cc/WD2A-VS7B] (observing the outcry by LGBT citizens of Indiana who were concerned for their rights).

4 *See id.* (describing the state and national story of a pizza shop owner who refused to cater a same-sex couple's wedding, justifying his refusal using RFRA).

5 *See* Barb Berggoetz, *Indiana Won't Recognize Last Month's Same-Sex Marriages*, INDIANAPOLIS STAR (July 9, 2014), https://www.usatoday.com/story/news/politics/2014/07/09/gay-marriage-indiana/12412667/ [https://perma.cc/2ATL-ZDCK] (pointing out the chief counsel's position in opposition to same-sex marriage).

6 *Id.*

7 *See id*.

the Court of Appeals to stay the ruling.[8] This memo simply confirmed the governor of Indiana's refusal to recognize the legality of the several hundred same-sex marriages that occurred over those few days.[9]

In March 2016, Indiana attempted to pass a bill that would prevent cities and other local government entities from passing nondiscrimination protections that are greater than the protections offered at the state level.[10] The bill failed, but the rights provided by these cities and counties would have been eliminated if the bill had passed.[11] The North Carolina legislature argued a similar bill in March 2016, however the bill passed and was put into law in that state.[12]

Fortunately, the marriage equality issue changed with the monumental Supreme Court decision in *Obergefell* and the discriminatory bill eliminating local protections failed.[13] In addition, RFRA was amended to provide limited protections for the LGBT community.[14] However, an underlying problem remains: Indiana lacks comprehensive protections for the LGBT community.[15]

The simplest and most effective way for Indiana to protect its LGBT citizens from discrimination would be by simply amending its Civil Rights Act.[16] This Note proposes that Indiana amend its Civil Rights Act and add "sexual orientation" and "gender identity" to the list of protected groups because current LGBT citizens lack comprehensive, state-wide protections, which leaves these citizens susceptible to discrimination.[17] Next, Part II describes the various federal, state, and local protections for

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8 *See* Baskin v. Bogan, 766 F.3d 648, 672 (7th Cir. 2014) (staying the district court's decision to allow same-sex marriages in Indiana). *See also* Berggoetz, *supra* note 5 (reviewing the Court of Appeal's decision to stay the ruling).

9 *See* Berggoetz, *supra* note 5.

10 *See* S.B. 100, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016) (describing the bill in Indiana that failed in the Senate but that would have eliminated local city and county protections for the LGBT community).

11 *Id.*

12 *Compare* S.B. 100, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016) (portraying Indiana's failure to pass the Senate Bill eliminating local city and county protections for the LGBT community), *with* Public Facilities Privacy & Security Act, H.B. 2, 2016 Sess. L. 3 (N.C. 2016) (discussing North Carolina's legislature enacting the discriminatory bill).

13 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015) ("The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States."). *See also* S.B. 100, 119th Gen. Assemb., Reg. Sess. (Ind. 2016) (observing the failed Senate Bill).

14 *See* IND. CODE § 34-13-9-0.7 (exploring RFRA's fix, which added language preventing businesses and organizations from discriminating based on sexual orientation).

15 *See* IND. CODE § 22-9-1-2 (listing the groups protected by the Indiana Civil Rights Act, of which "sexual orientation" and "gender identity" are not included).

16 *See infra* Part IV.B.

17 *See infra* Part IV (proposing an amendment to Indiana's Civil Rights Act, Ind. Code § 22-9-1-2, which would prevent discrimination against these groups in all the areas listed in the Act).

LGBT citizens in Indiana.[18] Part III then analyzes the need for increased protections based on current discrimination and a review of the various levels of court scrutiny.[19] Part IV proposes an amendment to Indiana's Civil Rights Act, Ind. Code § 22-9-1-2, adding "sexual orientation" and "gender identity" to the list of protected groups.[20] Finally, Part V concludes by summarizing the pertinent information set forth in this Note and recommends the Indiana legislature vote to amend its Civil Rights Act.[21]

II. BACKGROUND

Throughout the country, the LGBT community has been in the public eye, especially in recent years, due to a push for total and complete equality under the law.[22] As a result, rights have been addressed from legal viewpoints, with opponents and proponents of equal rights and protections for the LGBT community vocalizing their opinions.[23] Because these rights are so heavily and openly discussed today, it is important to look at where the law currently stands in Indiana regarding the LGBT community.[24]

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18 *See infra* Part II (providing information necessary to understand the issue of LGBT discrimination in Indiana and the protections that currently exist).

19 *See infra* Part III (analyzing the current law in the state regarding the LGBT community, the counterarguments of proponents of religious liberties and freedom, and the benefits of adding protections).

20 *See infra* Part IV.

21 *See infra* Part V.

22 *See, e.g.*, Guerra, *supra* note 3 (portraying the state and national outcry in response to Governor Pence signing RFRA into effect). *See also* Berggoetz, *supra* note 5 (describing Governor Pence's refusal to allow same-sex marriage to be legalized in 2014 and emphasizing his memo, which stated that he was devoted to maintaining traditional marriage in Indiana).

23 *See, e.g.*, Hively v. Ivy Tech Cmty. Coll. Ind., 853 F.3d 339, 359 (7th Cir. 2017) (exploring the Seventh Circuit case prohibiting employment discrimination based solely on sexual orientation). The court decided discrimination based on sexual orientation was forbidden because it fell under "sex" as a protected group. *Id*. *See also* INDIANAPOLIS, MARION COUNTY, INDIANA CODE OF ORDINANCES § 581-101 (2016) [hereinafter ORD. § 581] (identifying counties, such as Marion County, which provide protections for the LGBT community greater than those the state of Indiana provides); Obergefell v. Hodges, 135 S. Ct. 2584, 2585 (2015) (legalizing gay marriage throughout the country by analyzing marriage as a fundamental right); Mariga v. Flint, 822 N.E.2d 620, 626 (Ind. Ct. App. 2005) (analyzing the Indiana Court of Appeals case allowing a homosexual adoptive parent visitation rights to a child born to same-sex parents).

24 *See, e.g.*, ORD. § 581, *supra* note 23 (expressing that some Indiana counties and cities, such as Marion County, provide increased protections for their LGBT citizens). This code section added "sexual orientation" and "gender identity" to its list of protected groups, therefore preventing discrimination against these groups in various areas under the law. *Id*. *See also Obergefell*, 135 S. Ct. at 2607. *See also Mariga*, 822 N.E.2d at 626 (Ind. Ct. App. 2005)

First, Part II.A introduces both Indiana's current Civil Rights Act and Colorado's Anti-Discrimination Laws.[25] Second, Part II.B describes the current "patchwork" of protections that prevent discrimination against the LGBT community in Indiana.[26] Part II.C then discusses the various oppositions to providing protections, generally under the guise of "religious liberties" or "religious freedom."[27] Finally, Part II.D addresses the varying levels of scrutiny a court uses in its equal protection analysis.[28]

A. Indiana's Civil Rights Act

The Indiana Civil Rights Act currently protects against discrimination "based solely on race, religion, color, sex, disability, national origin, or ancestry," as articulated in § 22-9-1-2 of the Indiana Code.[29] The Act states:

> (a) It is the public policy of the state to provide all of its citizens equal opportunity for education, employment, access to public conveniences and accommodations, and acquisition through purchase or rental of real property, including but not limited to housing, and to eliminate segregation or separation based solely on race, religion, color, sex, disability, national origin, or ancestry, since such segregation is an impediment to equal opportunity. Equal education and employment opportunities and equal access to and use of public accommodations and equal opportunity for acquisition of real property are hereby declared to be civil rights.
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> (b) The practice of denying these rights to properly qualified persons by reason of the race, religion, color, sex, disability, national origin, or ancestry, of such person is contrary to the principles of freedom and equality of opportunity and is a burden to the objectives of the public policy of this state and shall be considered as discriminatory practices. The promotion of equal opportunity without regard to race, religion, color, sex,

(recognizing a surprising Indiana Court of Appeals case allowing a homosexual mother to have visitation rights to her adopted child, despite objections by the biological mother).

25 *See infra* Part II.A.

26 *See infra* Part II.B (describing the various protections that are provided to LGBT citizens of Indiana at the federal, state, and local level).

27 *See infra* Part II.C.

28 *See infra* Part II.D.

29 *See* IND. CODE § 22-9-1-2 (listing the groups protected by the Indiana Civil Rights Act, of which "sexual orientation" and "gender identity" are not included).

> disability, national origin, or ancestry, through reasonable methods is the purpose of this chapter.
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> . . . .
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> (d) It is hereby declared to be contrary to the public policy of the state and an unlawful practice for any person, for profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, religion, color, sex, disability, national origin, or ancestry.[30]

Amongst the various protections provided to the protected groups is the right of "access to public conveniences and accommodations."[31] According to the "definitions" section under Indiana Code § 22-9-1-3, "'[p]ublic accommodation' means any establishment that caters or offers its services or facilities or goods to the general public."[32]

Unlike Indiana, Colorado's Civil Rights Act added "sexual orientation" to the list of protected groups.[33] While it does not explicitly add "gender identity" to the list of protected groups, Colo. Rev. Stat. § 24-

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30 *Id.*

31 *See* IND. CODE § 22-9-1-3(m) ('"Public accommodation' means any establishment that caters or offers its services or facilities or goods to the general public."). Unlike Colorado's definition, Indiana's definition of "public accommodation" is very short and concise. *See also* Justin Muehlmeyer, *Toward a New Age of Consumer Access Rights: Creating Space in the Public Accommodation for the LGBT Community*, 19 CARDOZO J.L. & GENDER 781, 783 (2013) ("At the center of this debate is the definition of the term 'public accommodation' under the state civil rights acts; it is the definition of this term that determines whether a state can enforce the civil rights law against private establishments like the Hope Christian preschool.").

32 *Compare* IND. CODE § 22-9-1-3(m) (defining the term "public accommodations" as used throughout the Indiana Civil Rights Act), *with* COLO. REV. STAT. § 24-34-601(2) (observing Colorado's definition of "place of public accommodation" as used throughout the Colorado Civil Rights Act). Unlike Colorado, Indiana's definition is very short and precise. Colorado specifically lists areas that are considered public accommodations. However, both definitions make the same point. If a business or entity offers a product or service to the public, they will not be allowed to discriminate against protected groups based solely on those characteristics.

33 *See* COLO. REV. STAT. § 24-34-601 (establishing the Colorado Civil Rights Act, which prevents discrimination because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry in a place of public accommodation). *See also* Lucien J. Dhooge, *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?*, 21 WM. & MARY J. WOMEN & L. 319, 344 (2015) (describing that despite protections provided for LGBT citizens in states like Colorado, many of these protections still exclude those areas that are closely tied to religion). "For example, Colorado's statute specifically excludes churches, synagogues, mosques and other places principally used for religious purposes." *Id.* at 344–45.

34-301(7) defines "sexual orientation," which includes "transgender status or another individual's perception thereof."[34] This makes it unlawful to deny someone, based solely on sexual orientation or gender identity, "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation."[35]

B. The "Patchwork" of Protections

Without protections under Indiana's Civil Rights Act, the LGBT community in Indiana is provided only a patchwork of protections from discrimination.[36] These protections come in the form of amendments, court cases, and executive orders.[37] Section II.B.1 defines the various protections and how they achieve the goal of preventing discrimination based on sexual orientation and gender identity.[38] Section II.B.2 discusses the various state law protections that prevent discrimination.[39] Finally, Section II.B.3 acknowledges several county and city protections in Indiana shielding the LGBT community from discrimination.[40]

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[34] *See* COLO. REV. STAT. § 24-34-301(7) ("'Sexual orientation' means an individual's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another individual's perception thereof.").

[35] COLO. REV. STAT. § 24-34-601(2). Subsection 1 states:

> As used in this part 6, "place of public accommodation" means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof . . . .

COLO. REV. STAT. § 24-34-601(1).

[36] *See, e.g.*, Hively v. Ivy Tech Cmty. Coll. Ind., 853 F.3d 339, 345, 350 (7th Cir. 2017) (reporting the federal case prohibiting employment discrimination based on sexual orientation). *See also* ORD. § 581, *supra* note 23 (reviewing county and city ordinances, including counties like Marion County, which provide more protections for the LGBT community than the state does); Mariga v. Flint, 822 N.E.2d 620, 626 (Ind. Ct. App. 2005) (analyzing the Indiana Court of Appeals case that allowed an adoptive mother visitation rights to the child against the will of the biological mother).

[37] *See, e.g.*, CITY OF CARMEL, INDIANA CODE OF ORDINANCES § 6-8(a) City Nondiscrimination Policy (2016) [hereinafter ORD. § 6-8] ("[N]o person, corporation, partnership, company, or other individual or entity located within, or conducting business within, the City's corporate limits shall discriminate . . . on the basis of the latter's race, color, religion, national origin, gender, disability, sexual orientation, gender identity or expression, family or marital status, ancestry, age, and/or veteran status."). *See also* Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015) (considering the landmark Supreme Court case that legalized gay marriage throughout the country by stating that marriage is a fundamental right available to same-sex couples).

[38] *See infra* Section II.B.1.

[39] *See infra* Section II.B.2.

[40] *See infra* Section II.B.3.

1. Federal Protections

The federal courts have provided numerous protections and assisted the LGBT community throughout the country in achieving equality in recent years.[41] In *Windsor*, the Supreme Court, with Justice Kennedy writing for the majority, declared the Defense of Marriage Act unconstitutional.[42] The Defense of Marriage Act (DOMA) was a bill passed in Congress that declared marriage as only between a man and a woman.[43] Edith Windsor, who was considered legally married to her wife in New York and other states, was unable to receive an estate tax waiver available to married couples under federal law after her wife passed away.[44] This was because the federal government refused to recognize her marriage in accordance with DOMA.[45] In his opinion, Justice Kennedy reasoned that "DOMA seeks to injure the very class New York seeks to

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41 *See* 42 U.S.C. § 2000(e) (clarifying that the Equal Employment Opportunity Commission decided that discrimination based on sexual orientation and gender identity is prohibited because they are protected under the category of "sex"). *See also Hively*, 853 F.3d at 350 (interpreting the Seventh Circuit decision that concluded similarly to the Equal Employment Opportunity Commission). The court decided that discrimination based on sexual orientation was forbidden because it fell under "sex" as a protected group. *Id*. at 351–52. *See also Obergefell*, 135 S. Ct. at 2596.

42 *See* United States v. Windsor, 133 S. Ct. 2675, 2681 (2013). *See also* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 199–200 (2016) (conveying the cases of *Windsor* and *Obergefell*, particularly focusing on Justice Kennedy's jurisprudence in these cases). Robinson gets into a very interesting discussion about differences in Justice Kennedy's voting record in cases involving equal protection claims. *Id*. at 198. In Robinson's research regarding Justice Kennedy's voting record, "we found a clear divergence between race and sex cases, on the one hand, and sexual orientation cases on the other." *Id*. at 199. The research found that in nonunanimous cases, Justice Kennedy cast liberal votes 33% of the time when it came to race, 15% of the time when it came to gender, and 75% of the time when it came to sexual orientation case. *Id*. at 199–200.

43 *See* Defense of Marriage Act, 1996 Enacted H.R. 3396, 104 Enacted H.R. 3396, 110 Stat. 2419 (declaring marriage as only between one man and one woman). *See also* Jeffrey L. Rensberger, *Same-Sex Marriage and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 410–11 (1998) ("The critics contend that to the extent the Defense of Marriage Act attempts to lower that floor, to allow states to give less faith and credit to sister-state law and judgments than the first sentence of the clause requires, it is an improper attempt to amend the constitution by legislation.").

44 *See Windsor*, 133 S. Ct. at 2696 (concluding that DOMA is unconstitutional). *See also* Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 204 (2013) (explaining that *Windsor* may actually be less about equal protection, and more about a newer concept being referred to as the animus test). Instead of seeing *Windsor* as a substantive liberty or conventional equal protection decision, it should be seen primarily as an animus case. *Id*. at 203.

45 *See Windsor*, 133 S. Ct. at 2683 ("Windsor paid $363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a 'surviving spouse.'").

protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government."[46]

In *Obergefell*, the Supreme Court, with Justice Kennedy again writing for the majority, decided marriage is a fundamental right and, as a result, legalized same-sex marriage throughout the United States.[47] In this case, several same-sex couples and a few individuals whose partners were deceased brought equal protection claims based on various injuries associated with the lack of legal recognition for their marriages.[48] The court analyzed this case by looking at fundamental rights and considering whether or not marriage was considered to be a fundamental right.[49] Justice Kennedy, after looking at whether or not marriage was something "based in history and tradition," determined that marriage was in fact a fundamental right.[50] Same-sex couples therefore have the legal right to

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[46] *Id*. at 2693. Justice Kennedy wrote:

> DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

Id. at 2694.

[47] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) ("[T]he Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.").

[48] *See id*. at 2594 (reviewing the landmark case where James Obergefell and several other same-sex couples or individuals whose partner had passed away sought access to the state and federal protections that come with marriage). Obergefell's partner, John Arthur, was diagnosed with ALS, and the two men decided to marry before Arthur died from the disease. *Id*. They traveled to Maryland because same-sex marriage was legal in the state. *Id*. Because it was so difficult for Arthur to move, the two were married in the medical transport plane. *Id*. Arthur passed away two months later; however, Ohio law did not allow Obergefell to be listed as Arthur's surviving spouse, which Obergefell described as "hurtful for the rest of time." *Id*. at 2594–95.

[49] *See Obergefell*, 135 S. Ct. at 2608. "[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." *Id*. at 2604.

[50] *See id*. at 2602 (highlighting Justice Kennedy's discussion of history and tradition in his analysis of marriage as a fundamental right). *See also* Loving v. Virginia, 388 U.S. 1, 12 (1967) (discussing the Virginia case where the Court decided that interracial marriage laws violated the petitioners' due process rights). In this case, marriage between whites and blacks was considered illegal in Virginia and fifteen other states. *Id*. at 6–7. The Court decided:

> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these

marry, and receive all of the state and federal benefits that come along with that right.[51]

In *Hively*, the Seventh Circuit Court of Appeals declared that employment discrimination based on sexual orientation violated the Civil Rights Act.[52] In this case, Ms. Hively was employed at Ivy Tech College, but her employment was terminated.[53] Ms. Hively was out openly to the public, including her employer, as a lesbian.[54] Ms. Hively was successful in proving that her employment was terminated with her sexual orientation as a consideration.[55] The court here stated that this type of discrimination violated the Civil Rights Act because sexual orientation fell under the umbrella of "sex," and was therefore a protected class under the

> statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

Id. at 12.

51 *See Obergefell*, 135 S. Ct. at 2608 (evaluating the holding of this landmark Supreme Court case that legalized gay marriage throughout the country and provided these same-sex couples with equal rights under the law).

52 *See* Hively v. Ivy Tech Cmty. Coll. Ind., 853 F.3d 339, 352 (7th Cir. 2017) ("We hold only that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes."). The court decided discrimination based on sexual orientation was forbidden because it fell under "sex" as a protected class. *Id.* Hively was an openly lesbian part-time professor at Ivy Tech Community College in Indiana. *Id*. at 341. Hively applied to numerous full-time positions but was never allowed to move to these positions. *Id.* After years of trying, Ivy Tech eventually refused to renew Hively's contract for even part-time employment. *Id.* After Hively filed suit claiming she was being discriminated against due to her sexual orientation, the district court granted Ivy Tech's motion to dismiss for failure to state a claim upon which relief could be granted based on sexual orientation not being a protected class. *Id*. at 342.

53 *See Hively*, 853 F.3d at 341 ("Believing that Ivy Tech was spurning her because of her sexual orientation, she filed a pro se charge with the Equal Employment Opportunity Commission on December 13, 2013.").

54 *See id*. ("[W]e conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination."). *See also* Stephanie Pisko, *(Un?)Lawful Religious Discrimination*, 9 DREXEL L. REV. 101, 128 (2016) ("It is possible that Congress will eventually amend Title VII to comport with this trend and explicitly protect LGBT employees under Title VII.").

55 *See Hively*, 853 F.3d at 341 (portraying that Ms. Hively's sexual orientation was a consideration of Ivy Tech Community College in their decision to deny her promotion and eventually terminate her).

Act.[56] Indiana itself has provided its own protections in addition to the federal protections discussed above.[57]

2. Indiana State Protections

While Indiana courts have made decisions—and the Indiana legislature has passed bills—that conflict with the rights of LGBT citizens in the state, both have also made moves that provide protections for these citizens.[58] As will be discussed later, Indiana showed its preference for the religious liberties movement when it passed RFRA in 2014.[59] As a result of this Act, a pizza restaurant was allowed to refuse service to a same-sex couple because the restaurant owner claimed his religious liberties allowed him to refuse this service.[60] Based on public policy considerations similar to those listed in Section II.D.1, Governor Pence and the Indiana legislature amended RFRA and incorporated language prohibiting this

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[56] *See id*. at 351–52 (holding that sexual orientation is a protected class in the Seventh Circuit because it is included under the category of "sex").

[57] *See, e.g.*, ORD. § 581, *supra* note 23 (highlighting Marion County and the City of Indianapolis adding "sexual orientation" and "gender identity" to their list of classes protected from discrimination). *See also* Mariga v. Flint, 822 N.E.2d 620, 633 (Ind. Ct. App. 2005) (examining this surprisingly progressive Indiana case where the Court of Appeals found the Circuit Court had the authority to grant the adoptive mother's adoption, despite being a same-sex couple).

[58] *See, e.g.*, Shalyn L. Caulley, Note, *The Next Frontier to LGBT Equality: Securing Workplace Discrimination Protections*, 2017 U. ILL. L. REV. 909, 944–45 (2017) (analyzing various forms of state legislation and how they can help cure issues of LGBT discrimination in light of RFRAs). Caulley explains, "State legislation is by far the best protection currently in place. The laws empower LGBT workers to seek legal recourse if they experience discrimination and provide additional penalties to violators, such as jail time or fines." *Id*. at 944.

[59] *See* IND. CODE § 34-13-9. Though there was later a "fix," this was a huge basis for discrimination in Indiana. *Id.*

[60] *See* Susanna Kim, *Indiana Pizza Restaurant Says It Wouldn't Cater a Gay Wedding, Supports Religious Freedom Law*, ABC NEWS (Apr. 1, 2015), http://abcnews.go.com/Business/indiana-pizza-restaurant-cater-gay-wedding-supports-religious/story?id=30045085 [https://perma.cc/5NAB-69BE] (considering the pizza restaurant who made national news after refusing to cater a same-sex couple's wedding, citing to RFRA as a defense). The owners of Memories Pizza in Walkerton, Indiana, told ABC news that they would serve same-sex couples in the restaurant, however they refused to cater a same-sex wedding because catering the wedding would violate their religious beliefs. *Id*.

type of discrimination based on sexual orientation.[61] This was considered a "fix" to the Act.[62]

The Indiana Court of Appeals was surprisingly progressive regarding LGBT visitation rights for adoptive parents of the same sex.[63] In the early 2000s, prior to the landmark case of *Obergefell*, one woman in a same-sex relationship adopted the other woman's biological children.[64] The relationship failed, and as a result the biological mother moved to another state with the children.[65] After seeking visitation rights with the adopted children, the court granted the adoptive mother visitation rights.[66]

3. Local City and County Protections

In addition to the federal and state protections discussed above, many Indiana cities and counties have taken various measures to prevent discrimination based on sexual orientation.[67] One such county that

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61 *See* IND. CODE § 34-13-9. *See also* Rachel Johnson Hammersmith, Comment, *Equality Trumps Religion: Why Indiana's Religious Freedom Restoration Act Is Inherently Promoting Discrimination Based on Sexual Orientation*, 48 U. TOL. L. REV. 109 (2016) (outlining the backlash states had as rights for LGBT citizens increased in order to protect the religious rights of their citizens). "Due to the language of Indiana's RFRA and the fact Indiana had no statewide ban prohibiting discrimination based on sexual orientation, many were concerned businesses could once again be permitted to discriminate based on individual characteristics." *Id.* at 110–11.

62 *See* IND. CODE § 34-13-9-0.7 (observing the "fix" that Indiana added to the Religious Freedom Restoration Act, which added minimal protections against discrimination).

63 *See, e.g.*, Mariga v. Flint, 822 N.E.2d 620, 623 (Ind. Ct. App. 2005) (explaining the case allowing visitation rights to a child born to same-sex parents).

64 *See id*. (explaining the case allowing visitation rights to a child born to same-sex parents). In this case, Lori and her children's biological father divorced, at which point Lori and Julie began a romantic relationship. *Id*. at 624. The children's biological father agreed to terminate his parental rights to permit Julie to adopt the children without terminating Lori's parental rights. *Id*. Lori left and married a second husband, and the Indiana Court of Appeals stated that Julie was still entitled to parental rights. *Id*. The court stated:

> This case requires us to examine the nature of parenthood. Whether a parent is a man or a woman, homosexual or heterosexual, or adoptive or biological, in assuming that role, a person also assumes certain responsibilities, obligations, and duties. That person may not simply choose to shed the parental mantle because it becomes inconvenient, seems ill-advised in retrospect, or becomes burdensome because of a deterioration in the relationship with the children's other parent.

Id. at 622–23.

65 *See Mariga*, 822 N.E.2d at 624 ("Lori moved to Georgia with her husband and children because her husband was promoted by his employer and transferred to Georgia.").

66 *See id.* at 633 ("As to Julie's petition to vacate the adoption of her children, we find that the Circuit Court had authority to grant her petition for adoption in 1997, and it was not procured by fraud.").

67 *See supra* Section II.A.1 (explaining the various protections provided to the LGBT community throughout the United States by the federal courts); *supra* Section II.A.2

provides these increased protections in Indiana is Marion County.[68] A second example is the City of Carmel, which passed an ordinance protecting the LGBT community from discrimination by creating a system that imposes warnings and fines against businesses discriminating based on sexual orientation.[69]

These protections vary in strength from city to city and from county to county.[70] Some cities and counties have enacted ordinances that prevent discrimination only based on sexual orientation.[71] Others have enacted ordinances that prevent discrimination based on both sexual orientation and gender identity.[72] Some cities even have executive orders in place to prevent discrimination based on both sexual orientation and

(conveying the various protections provided to the LGBT community throughout the state of Indiana).

68 *See* ORD. § 581, *supra* note 23 (2016) (illustrating ordinances in Marion County and the City of Indianapolis, which added "sexual orientation" and "gender identity" to the list of groups protected from discrimination).

69 *See* ORD. § 6-8, *supra* note 37 (underlining the city's addition of "sexual identification" and "gender identity or expression" to the classes protected from discrimination). *See also* Chris Sikich, *Carmel narrowly passes LGBT protections*, INDIANAPOLIS STAR (Oct. 5, 2015), https://www.indystar.com/story/news/2015/10/06/carmel-city-council-passes-anti-discrimination-ordinance/73400716/ [https://perma.cc/HX49-EK52] (explaining the system of warnings and fines that will result if a business or entity discriminates against any of the protected groups based on the protected characteristics).

70 *See* Stephanie Wang, *How Local LGBT Anti-discrimination Laws Vary in Indiana*, INDIANAPOLIS STAR (Sept. 23, 2015), https://www.indystar.com/story/news/politics/2015/09/22/local-lgbt-anti-discrimination-laws-vary-indiana/72651754/ [https://perma.cc/HJ99-FE6K] (conveying the effects of various local city and county protections for the LGBT communities in Indiana). According to the article, a total of fifteen Indiana communities had antidiscrimination ordinances that included sexual orientation and gender identity. *Id*. In addition, the mayors of Martinsville and Goshen have pursued executive orders. *Id*.

71 *See* CITY OF HAMMOND, INDIANA CODE OF ORDINANCES § 37.053 Discrimination in Public Accommodations (2016) ("It shall be unlawful for any person or establishment which caters or offers its services or facilities or goods to the general public to discriminate against anyone."). Unlike those of Marion County and the City of Carmel, Hammond's ordinance simply limits discrimination to anyone rather than specifically listing "sexual orientation" and "gender identity." *Id*.

72 *See, e.g.*, The Herald Bulletin, *Anderson Joins Indiana Cities Protecting LGBT Rights*, INDIANAPOLIS STAR (Dec. 24, 2015), https://www.indystar.com/story/news/politics/2015/12/24/anderson-joins-indiana-cities-protecting-lgbt-rights/77892944/ [https://perma.cc/4ES2-SB7R] (discussing Andersonville's ordinance banning discrimination based on sexual orientation or gender identity). "The ordinance extends local protections on housing, education, employment and public accommodations." *Id*. *See also* ORD. § 581 (identifying ordinances in Marion County and the City of Indianapolis, which prevent discrimination based solely on sexual orientation or gender identity).

gender identity.[73] These variations represent the current patchwork of insufficient LGBT protections in Indiana.

C. The LGBT Community, Religious Liberties, and a History of Discrimination

The proponents of religious liberties are the largest opposition to providing protections to the LGBT community in both Indiana and throughout the United States.[74] Part II.C discusses three legal actions that have either eliminated or attempted to eliminate protections based on sexual orientation or gender identity with religious liberties as a justification.[75] First, Section II.C.1 addresses Indiana's RFRA.[76] Section II.C.2 then discusses *Mullins v. Masterpiece Cakeshop, Inc.*[77] Finally, Section II.C.3 describes *Indiana Family Institute v. City of Carmel, Indiana*, an ongoing case in Indiana that is attempting to eliminate city and county protections for the LGBT community.[78]

1. Indiana's Religious Freedom Restoration Act

As referenced in this Note's introduction, in 2015, Governor Mike Pence of Indiana signed the state's RFRA into effect.[79] This bill allowed

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[73] *See* Wang, *supra* note 70 (examining how the mayors of both Martinsville and Goshen have issued executive orders that prevent discrimination based solely on sexual orientation and gender identity).

[74] *See, e.g.*, Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. Ct. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 137 S. Ct. 2290 (June 26, 2017) (analyzing the case in which a baker discriminated against a same-sex couple by refusing to bake them a cake). *See also* Verified Complaint for Declaratory and Injunctive Relief, Ind. Family Institute v. Carmel, Indiana, No. 29D01-1512-MI-10207 (Ind. Hamilton Cty. Super. Ct. Dec. 10, 2015) [hereinafter Verified Compl., Ind. Family Inst.] (describing the complaint filed by several religious groups in Indiana that challenges the "fix" to RFRA banning discrimination and local ordinances preventing discrimination based on sexual orientation or gender identity).

[75] *See, e.g.*, IND. CODE § 34-13-9 (scrutinizing Indiana's infamous RFRA, which was signed into law by Governor Pence and allows religious groups to discriminate by claiming their religious liberties are being violated). *See also* IND. CODE § 4-13-9-0.7 (examining the "fix" that Indiana added to RFRA that prevents discrimination based solely on sexual orientation); Verified Compl., Ind. Family Inst., *supra* note 74 (interpreting the Indiana case in which religious freedom groups are trying to eliminate city and county protections for the LGBT community).

[76] *See infra* Section II.B.1 (discussing Indiana's RFRA, which allowed private businesses to discriminate based on sexual orientation).

[77] *See infra* Section II.B.2 (describing the *Mullins* case).

[78] *See infra* Section II.B.3 (conveying details about the case of *Indiana Family Institute v. City of Carmel, Indiana*, which was allowed to proceed in Indiana courts).

[79] *See* IND. CODE § 34-13-9 (authorizing Indiana's infamous RFRA). *See also* IND. CODE § 34-13-9-0.7. However, LGBT individuals were not happy with the solution. The fix hardly corrected the issue of potential discrimination against the LGBT community based on religious liberties justifications.

individuals and companies to assert that their exercise of religion has been, or is likely to be, substantially burdened as a defense in legal proceedings. LGBT citizens feared that this would allow private businesses to discriminate against them with no repercussions or protections.[80] The LGBT community's fears were confirmed when Memories Pizza in Indiana came out publicly and stated it would not cater a same-sex wedding.[81] The owner refused to cater the wedding, stating that he believed marriage was meant to be between a man and a woman.[82] He asserted that this conviction was based on his religious beliefs and that he held these beliefs dearly.[83] As a result, he refused to cater a gay wedding and stated that doing so would be a substantial burden on his religious beliefs.[84]

When corporations heard of the RFRA, they saw it as government approval to discriminate against LGBT individuals.[85] As a result, the corporations reacted negatively.[86] After the RFRA was signed, many large corporations and organizations in Indiana threatened to leave if this

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[80] *See* IND. CODE § 34-13-9 (discussing Indiana's RFRA allowing a person to assert religious beliefs as a defense after violating a discrimination law). The statute states:

> A person whose exercise of religion has been substantially burdened, or is likely to be substantially burdened, by a violation of this chapter may assert the violation or impending violation as a claim or defense in a judicial or administrative proceeding, regardless of whether the state or any other governmental entity is a party to the proceeding.

IND. CODE § 34-13-9. *See also* Guerra, *supra* note 3 (interpreting Indiana's RFRA and the ways it allows people and businesses to legally discriminate).

[81] *See* Cavan Sieczkowski, *That Anti-Gay Indiana Pizzeria That Received $840,000? This 'Pizza' Supports the LGBT Community*, HUFFINGTON POST (Apr. 6, 2015), https://www.huffingtonpost.com/2015/04/06/equality-house-virtual-pizza_n_7010190.html [https://perma.cc/CA8M-NAZ8] (describing the Indiana pizza restaurant that stated it would refuse to cater a gay wedding and would use Indiana's RFRA for protection).

[82] *See* Tom Coyne, *Pizza Shop That Backed Indiana Religious Freedom Law Reopens*, TIME (2015), http://time.com/3816667/indiana-religious-freedom-law-pizza-shop/ [https://perma.cc/HMU9-D322] (outlining the backlash Memories Pizza experienced when they refused to cater a same-sex wedding); Sieczkowski, *supra* note 81 (describing the owner of the pizza restaurant's ability to raise $840,000 when the owners faced backlash for refusing to serve the same-sex couple).

[83] *See* Sieczkowski, *supra* note 81 ("The law, which many have condemned for promoting discrimination against LGBT people, allows individuals and businesses to cite religious beliefs as a defense when sued by a private party.").

[84] *See* Sieczkowski, *supra* note 81 (reciting Crystal O'Connor's additional comment that "God has blessed us for standing up for what we believe, and not denying him").

[85] *See* Tim Evans, *Angie's List Canceling Eastside Expansion Over RFRA*, INDIANAPOLIS STAR (Mar. 28, 2015), https://www.indystar.com/story/money/2015/03/28/angies-list-canceling-eastside-expansion-rfra/70590738/ [https://perma.cc/PZN6-Y5HN].

[86] *See* Eric Rosenbaum, *The Business Case Against Indiana's Religious Faith*, CNBC (Mar. 26, 2015), https://www.cnbc.com/2015/03/26/the-business-case-against-indianas-religious-act.html [https://perma.cc/VPN8-ZSKM] (asserting reactions of large corporations and businesses to Governor Pence signing the RFRA into effect).

blatant discrimination was allowed based on religious justifications.[87] Among these corporations and organizations are the NCAA, Angie's List, and Subaru.[88] A prime example of economic backlash came from the NCAA, which stated that this law may affect future events and job opportunities in Indiana.[89] Because the NCAA is "deeply committed to providing an inclusive environment for all [its] events," the organization stated that it would need to see the implications of the act.[90] At that point it would make a decision about future events in the state.[91] Luckily, the "fix" to the RFRA was enacted before any assessment of future events was required.[92]

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87 *See, e.g.*, Rosenbaum, *supra* note 86 (discussing the various corporations who threatened to leave Indiana as a result of RFRA). Large corporations who joined in the discussion include Yelp, PayPal, and the NCAA. *Id.* There is also a discussion about the amount of talent that would likely leave the state as the result of the discriminatory act. *Id.*

88 *See* Kay Steiger, *The Growing Backlash Against Indiana's New LGBT Discrimination Law*, THINK PROGRESS (Mar. 27, 2015), https://thinkprogress.org/the-growing-backlash-against-indianas-new-lgbt-discrimination-law-68727eff4f02/ [https://perma.cc/9U2W-6BEH] (observing various corporations and organizations who threatened to leave Indiana as a result of the discriminatory act). *See also* Matthew Belvedere, *NCAA President: Indiana Law Against Our Core Values*, CNBC (Mar. 31, 2015), https://www.cnbc.com/2015/03/31/ncaa-president-indiana-law-against-our-core-values.html [https://perma.cc/R4XE-MUVS] (describing the NCAA president's concern that the RFRA goes against the organization's "core values"). "It's important to us because we're an employer here in this state. But most importantly . . . it strikes at the core values of inclusion and diversity." *Id.* *See also* Evans, *supra* note 85 (conveying Angie's List's dedication to tolerance and opposition to RFRA). Angie's List's co-founder and chief executive officer Bill Oesterle said, "Angie's List is open to all and discriminates against none . . . and we are hugely disappointed in what this bill represents." *Id.*

89 *See* Mark Alesia, *NCAA: 'Religious Freedom' Law Creates Concern for Future Events*, INDIANAPOLIS STAR (Mar. 26, 2015), https://www.indystar.com/story/sports/college/2015/03/26/ncaa-indiana-religious-freedom-law-mike-pence-mark-emmert-final-four-indianapolis/70490096/ [https://perma.cc/DS45-WBK7] (outlining the reaction of the NCAA in regard to Indiana's Religious Freedom Restoration Act in which the NCAA threatened to pull business from the state).

90 Mark Emmert, *Statement on Indiana RFRA Updated Language*, NCAA, http://www.ncaa.org/about/resources/media-center/news/statement-indiana-rfra-updated-language [https://perma.cc/9J2T-MKJH]. Mark Emmert, the NCAA president, released this statement regarding the updated language:

> We are very pleased the Indiana legislature is taking action to amend Senate Bill 101 so that it is clear individuals cannot be discriminated against. NCAA core values call for an environment that is inclusive and non-discriminatory for our student-athletes, membership, fans, staff and their families. We look forward to the amended bill being passed quickly and signed into law expeditiously by the governor.

Id.

91 *See* Alesia, *supra* note 89 (highlighting the NCAA's serious consideration to leave Indiana based on RFRA and the discrimination that would come with it).

92 *See* IND. CODE § 34-13-9-0.7 (outlining the amendment to RFRA that allegedly fixed the issue of discrimination based on sexual orientation). The amendment states:

Based on the negative outcry regarding RFRA, Governor Pence and the state government of Indiana amended RFRA and incorporated language prohibiting this type of discrimination based on sexual orientation.[93] This was considered a "fix" to the Act.[94] Neither side considered this "fix" to be perfect, even though it successfully limited the government in discriminating in a private setting.[95] This has led to groups asserting their religious freedom protections in the form of legal action in Indiana.[96]

2. Potential Elimination of Local Protections for the LGBT Community

Groups and individuals in Indiana have attempted to eliminate local city and county LGBT protections on two occasions.[97] First, this section will discuss *Indiana Family Institute v. City of Carmel, Indiana*, which sought to eliminate local protections and the "fix" to the RFRA.[98] Second, this

> This chapter does not: (1) authorize a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service . . . .

Id.

93 *See* IND. CODE § 34-13-9. Though there was a later a "fix," this was a huge basis for discrimination in Indiana. *Id.*

94 *See* IND. CODE § 34-13-9-0.7 (adopting the "fix" that Indiana added to RFRA, which added minimal protections against discrimination). *See also* Hammersmith, *supra* note 61, at 127 *Freedom*("Based on previous case law and the theory of state action, the Indiana RFRA is invalid in that it unconstitutionally involves the state in discrimination against individuals based on their sexual orientation.").

95 *See* IND. CODE § 34-13-9-0.7. *See also* United States v. Stanley, 109 U.S. 3 (1883) (establishing the state action doctrine, which prevents discrimination only by those who are "state actors"); Terri R. Day & Danielle Weatherby, *LGBT Rights and the Mini RFRA: A Return to Separate But Equal*, 65 DEPAUL L. REV. 907, 920 (2016) ("In fact, Arkansas's attempt to pass an expansive religious freedom law followed the mini RFRA saga in Indiana, where, after public outcry, Governor Mike Pence demanded amendments to the law to appease the concern that the law would open the door to sex and gender discrimination.").

96 *See, e.g.*, Verified Compl., Ind. Family Inst., *supra* note 74 (addressing an Indiana case in which religious freedom groups are trying to eliminate city and county protections for the LGBT community).

97 *See, e.g.*, IND. CODE § 34-13-9 (describing Indiana's infamous RFRA). *See also* IND. CODE § 34-13-9-0.7; Verified Compl., Ind. Family Inst., *supra* note 74 (analyzing an Indiana case that was allowed to progress in state court that alleged the RFRA "fix" and local protections for the LGBT community are unconstitutional).

98 *See infra* Section II.B.2 (describing the actions by religious freedom groups and individuals that attempt to eliminate or reduce protections for the LGBT community in Indiana).

section will describe the bill that the Indiana Senate attempted to pass that would have eliminated local city and county protections in the state.[99]

After the Indiana government created the "fix" to the RFRA, several groups, such as the Indiana Family Institute, Indiana Family Action, and The American Family Association of Indiana, felt that their religious freedom was still being substantially burdened.[100] The groups also felt that local city and county protections throughout the state were substantially burdening their religious freedom.[101] As a result, these groups filed a complaint alleging constitutional violations.[102] What came as a surprise to most was that the judge allowed the complaint to proceed.[103] This means that the case will be heard.[104] If these groups succeed, the "fix" to the RFRA protecting the LGBT community will be void, and the local city and county protections currently in place throughout Indiana will be eliminated.[105]

In addition to their prayer for relief regarding local protections and the "fix" to the RFRA, the groups have filed a brief in a Colorado case that was recently heard before the United States Supreme Court.[106] This case

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99 *See infra* Section II.B.2.

100 *See* Indiana Family Institute, *Religious Freedom Legal Defense Fund*, https://secure2.convio.net/ifi/site/Donation2;jsessionid=00000000.app222b?df_id=1520&1520.donation=landing&NONCE_TOKEN=D0A2EA3A271A763FF88ECAA95595012 [https://perma.cc/7ECZ-MSNT] ("On December 10, 2015, The Indiana Family Institute, Indiana Family Action, and The American Family Association of Indiana filed a lawsuit challenging the Constitutionality of last spring's Religious Freedom Restoration Act (RFRA) 'fix' as well as the Carmel and Indianapolis-Marion County Nondiscrimination Ordinances."). *See also* Wang, *supra* note 70 (describing the groups believing their rights were being violated).

101 *See* Wang, *supra* note 70.

102 *See* Verified Compl., Ind. Family Inst., *supra* note 74 (highlighting the allegations of various religious groups that the RFRA fix and local protections for the LGBT community are unconstitutional because they violate these groups' religious freedom and liberties).

103 *See* Wang, *supra* note 70.

104 *See id*. (describing the groups who felt their religious rights were being violated by the RFRA "fix" and the local protections provided to the LGBT community).

105 *See, e.g.*, IND. CODE § 34-13-9-0.7 (observing the "fix" that Indiana added to RFRA, which added minimal protections against discrimination). *See also* ORD. § 6-8 (underlining the city's addition of "sexual identification" and "gender identity or expression" to the classes protected from discrimination); ORD. § 581 (examining Indianapolis and Marion County's addition of "sexual orientation" and "gender identity" as protected classes).

106 *See* Brief for Indiana Family Institute, Inc. et al. as Amici Curiae Supporting Petitioners, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913765 (analyzing the brief filed by these religious groups in Indiana asking the Supreme Court to rule broadly enough to dispose of the ongoing Indiana case). *See also* Maureen Groppe, *How the Gay Wedding Cake Case in Colorado May Affect LGBT Rights in Indiana*, INDIANAPOLIS STAR (Aug. 31, 2017), https://www.indystar.com/story/news/politics/2017/08/31/conservative-foegroups-challenging-rfra-fix-ask-supreme-court-weigh-through-colorado-gay-wedding-cas/621782001/ [https://perma.cc/2EA6-E4DR]

will be discussed further in the next subsection.[107] The brief filed in the Supreme Court case asked the Court to rule broad enough to decide the prayer for relief in Indiana.[108]

3. The Colorado Wedding Cake Case

In *Mullins v. Masterpiece Cakeshop, Inc.*, a same-sex couple in Colorado asked a baker to create a cake for their wedding.[109] Unlike Indiana, Colorado's Civil Rights Act protects individuals from discrimination based on sexual orientation in access to public accommodations.[110] Also, Colorado does not have a religious freedom act that allows private businesses to discriminate if they feel their religious freedom is substantially burdened.[111] Regardless, the Colorado baker refused, stating that creating this cake for a same-sex wedding would substantially burden his religious freedom.[112] Both the state trial court and the Colorado Supreme Court decided that this type of discrimination violated Colorado's Civil Rights Act.[113] As a result, one cannot discriminate based

(explaining the plaintiffs in *Indiana Family Institute v. City of Carmel, Indiana* filing a brief with the Supreme Court in *Mullins v. Masterpiece Cakeshop, Inc.* asking the Justices to rule broad enough that it would conclude this case as well).

107 *See infra* Section II.B.3 (describing the case of *Mullins v. Masterpiece Cakeshop, Inc.*, which was recently argued before the United States Supreme Court).

108 *See* Brief for the Petitioners, *supra* note 106 (highlighting the brief filed by various religious groups requesting that the Supreme Court rule broadly in this case).

109 *See* Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276 (Colo. App. 2015) *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 137 S. Ct. 2290 (June 26, 2017) (describing the Colorado Supreme Court case, which sided with the same-sex couple). The same-sex couple, Craig and Mullins, visited Phillip's bakery in Lakewood, Colorado, and requested that he make a wedding cake. *Id*. at 277.

110 *See* COLO. REV. STAT. § 24-34-601 (establishing that it is unlawful to discriminate based on sexual orientation if providing a "public accommodation").

111 *See, e.g.*, IND. CODE § 34-13-9-0.7 (exploring the RFRA's fix, which added language preventing businesses and organizations from discriminating based on sexual orientation).

112 *See Mullins*, 370 P.3d at 276 ("Phillips declined, telling them that he does not create wedding cakes for same-sex weddings because of his religious beliefs, but advising Craig and Mullins that he would be happy to make and sell them any other baked goods."). *See* also Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. Rev. 2083, 2087 (2017) ("[B]usinesses have argued that their refusal to provide wedding-related services to same-sex couples is not a form of unlawful discrimination on the basis of sexual orientation, but rather simply disapproval of same-sex marriage.").

113 *See Mullins*, 370 P.3d at 277 (observing the decisions of the Colorado state trial court and Supreme Court in deciding whether Phillips violated the state's antidiscrimination law). Craig and Mullins later filed charges of discrimination with the Colorado Civil Rights Division (Division), alleging discrimination based on sexual orientation. *Id*. The ALJ then found for the same-sex couple, and the Commission affirmed the decision. *Id*. Masterpiece and Phillips then appealed this decision. *Id*.

solely on sexual orientation, even as a private business with religious freedom as a justification.[114]

The baker, Masterpiece Cakeshop, requested certiorari, which the United States Supreme Court granted.[115] Considering the brief filed by the Plaintiffs in the Indiana case, *Indiana Family Institute v. City of Carmel, Indiana*, a lot of rights could have been determined by this landmark case.[116] The Department of Justice under President Trump's administration also released an opinion on the matter.[117] In this opinion, the Department of Justice sided with the baker, stating that his religious freedom should be protected over those of the same-sex couple being refused service.[118] The Supreme Court may have decided this case without even considering the opinion of the Department of Justice, but it is currently clear that our nation's executive branch has decided discrimination based on sexual orientation is justified.[119]

D. Not So Equal Protections

The Fourteenth Amendment of the United States Constitution provides in part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[120] The Supreme Court has relied on this clause of the Fourteenth Amendment, known as the Equal

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114 *See id*. at 277 ("We conclude that the act of same-sex marriage is closely correlated to Craig's and Mullins' sexual orientation, and therefore, the ALJ did not err when he found that Masterpiece's refusal to create a wedding cake for Craig and Mullins was "because of" their sexual orientation, in violation of CADA.").

115 *See* Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 137 S. Ct. 2290 (June 26, 2017).

116 *See* Brief for the Petitioners, *supra* note 106 (evaluating the request by various religious groups in Indiana to rule broadly enough to dispose of their case). *See also* Groppe, *supra* note 106 (reviewing the request by Plaintiffs in the Indiana case to rule broadly).

117 *See* Ryan J. Reilly, *Trump DOJ To Supreme Court: Making Gay Wedding Cake Would Violate Baker's Rights*, HUFFINGTON POST (Sept. 11, 2017), https://www.huffingtonpost.com/entry/trump-justice-department-gay-wedding-cake_us_59b1af6fe4b0dfaafcf69ee6 [https://perma.cc/K5W9-4ELX] (conveying the content of the brief filed by the Department of Justice under Trump siding with the baker in *Mullins v. Masterpiece Cakeshop, Inc.*).

118 *See id*. ("Forcing Phillips to create expression for and participate in a ceremony that violates his sincerely held religious beliefs invades his First Amendment rights."). *See also* Brief for the United States as Amicus Curiae Supporting Petitioners, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 138 S. Ct. 1719 (2017) (No. 16-111), 2017 WL 4004530 (analyzing the brief filed by the Department of Justice that sided with the baker who refused service to same-sex couple).

119 *See* Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 137 S. Ct. 2290 (June 26, 2017). *See also* Reilly, *supra* note 117 (noting that the Department of Justice supports the baker who denied service to the same-sex couple on First Amendment grounds).

120 U.S. CONST. amend. XIV.

Protection Clause, as a key provision for combating invidious discrimination.[121] The Fourteenth Amendment, however, has been interpreted to apply only to state action and not to private, or non-state, actors.[122]

When an equal protection claim is brought against a state actor, a court will look at a law or policy using one of three types of judicial scrutiny: strict scrutiny, intermediate scrutiny, or rational basis.[123] Strict scrutiny is reserved for those groups considered to be "suspect classifications," such as race or national origin, and requires a court to look at whether the law or policy is narrowly tailored and necessary to achieve a compelling government interest.[124] Intermediate scrutiny does not rise to the level of strict scrutiny, but instead requires that the law or policy be substantially related to an important government interest.[125] Finally, there is rational basis review, which only requires a law or policy be rationally related to a legitimate government interest.[126] Under rational basis

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121 *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (outlining the Supreme Court's analysis, which sparked the modern era of equal protection jurisprudence). Justice Warren writing for the Court stated:

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Id. at 495.

122 *See* United States v. Stanley, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."). *See also* Hammersmith, *supra* note 61, at 124 ("The Constitution, however, only gives an individual rights against the government and not a private party. In other words, private conduct need not comply with the Constitution.").

123 *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (setting the standard at "rational basis" when determining the constitutionality of legislation that discriminates against persons based on sexual orientation); Fisher v. Univ. of Tex., 570 U.S. 297 (2013) (establishing the application of strict scrutiny based on race); Craig v. Boren, 429 U.S. 190 (1976) (applying intermediate scrutiny for discrimination based on gender).

124 *See* 16B AM. JUR. 2D *Constitutional Law* § 862 (describing the strict scrutiny test that courts apply and the groups covered by this test). *See also Fisher*, 570 U.S. at 298–99 (announcing the application of strict scrutiny based on racial discrimination).

125 *See* 16B AM. JUR. 2D *Constitutional Law* § 861 (outlining the intermediate scrutiny test that courts apply and the groups covered by this test). *See also Craig*, 429 U.S. at 197–98 (establishing the application of intermediate scrutiny based on gender).

126 *See* 16B AM. JUR. 2D *Constitutional Law* § 858 (detailing the rational basis test that courts apply and the groups covered by the test). *See also Romer*, 517 U.S. at 627–36 (setting the standard at "rational basis" when determining the constitutionality of legislation that discriminates against persons based on sexual orientation).

review, the burden of proof is on the party challenging a law or policy, and the government or state actor will usually win.[127]

As in *Romer v. Evans*, when a state actor discriminates based on sexual orientation or gender identity, a court will analyze using rational basis review.[128] In *Windsor*, the Court analyzed the constitutionality of the DOMA after an equal protection claim was brought by a widowed lesbian in New York.[129] The Court again discussed the standard that the court should apply when looking at equal protection based on sexual orientation, and it again seemed to apply rational basis, though this now appears to be rational basis with a bite.[130]

While the Supreme Court has yet to decide otherwise, the Ninth Circuit seems to have begun the trend towards heightened scrutiny.[131] In *SmithKline Beecham Corp. v. Abbott Labs.*, the court finally mentioned heightened scrutiny based on sexual orientation.[132] While it is true that

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127 *See* McGowan v. Maryland, 366 U.S. 420, 425–26 (1961) (explaining the deference given to state actors and legislators in passing laws, even if those laws create some discrimination, when courts use rational basis review). *See also* Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281, 324 (2011) (noting the challenger's burden is to "negative every conceivable basis which might support [the statute], whether or not the basis has a foundation in the record").

128 *See Romer*, 517 U.S. 627–36 (observing the court's analysis in whether or not to invalidate the discriminatory law, which involved looking at whether the law was rationally related to a legitimate government interest).

129 *See* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) ("In granting certiorari on the question of the constitutionality of § 3 of DOMA, the Court requested argument on two additional questions: whether the United States' agreement with Windsor's legal position precludes further review and whether BLAG has standing to appeal the case."). In this case, Justice Kennedy, speaking for the majority, states:

> The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. In determining whether a law is motived by an improper animus or purpose, "'[d]iscriminations of an unusual character'" especially require careful consideration. DOMA cannot survive under these principles.

Id. at 2693 (citations omitted).

130 *See Windsor*, 133 S. Ct. at 2693 ("The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.").

131 *See* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 481 (9th Cir. 2014) ("In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review.").

132 *See id.* (holding that discrimination based on sexual orientation during jury selection violated equal protection because the court should apply a heightened standard). The Ninth Circuit in this case looks to the Supreme Court's reasoning in *Windsor* to determine the level of scrutiny to be applied. *Id*. The court came to the conclusion that "*Windsor*'s 'careful consideration' of DOMA's actual purpose and its failure to consider other unsupported bases is antithetical to the very concept of rational basis review." *Id*. at 482. The court decided that a heightened level of scrutiny is required based on the reasoning from *Windsor*. *Id*. at 484.

the Court in *Windsor* hinted at it, the Ninth Circuit Court of Appeals in *SmithKline* expressly stated that "[they were] required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection."[133] Regardless, when a Plaintiff brings an equal protection claim based on sexual orientation discrimination, the Supreme Court will analyze using rational basis review.[134]

III. ANALYSIS

Indiana, as well as its citizens, would benefit from comprehensive, state-wide protections for the LGBT community.[135] As described in Part II.B of this Note, the LGBT citizens of Indiana are currently only protected by a patchwork of protections.[136] In order to protect the LGBT community from further discrimination, Indiana should amend its Civil Rights Act and add the terms "sexual orientation" and "gender identity" to the list of protected groups.[137] Without these protections, LGBT citizens are left only with the option of an equal protection claim if the discrimination is by a state actor and no legal options if the discrimination is by a private party.[138]

First, Part III.A emphasizes the important issues the LGBT community faces in Indiana and the need for increased protections.[139] Second, Part III.B describes the possible equal protection claims the LGBT community could bring when a state actor discriminates against members of the LGBT community.[140] Third, Part III.C analyzes Colorado's solution to private party discrimination, such as amending its Civil Rights Act to provide

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133 *Compare* United States v. Windsor, 133 S. Ct. 2675 (2013) (noting that courts must give careful consideration), *with* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484 (9th Cir. 2014) (creating rational basis with a bite).

134 *See* Parker Williams, *Scrutiny of the Venire, Scrutiny from the Bench:* Smithkline Beecham Corp. v. Abbott Laboratories *and the Application of Heightened Scrutiny to Sexual Orientation Classifications*, 64 CATH. U. L. REV. 803, 803, 817 (2015) ("[In *Romer*, t]he Supreme Court struck down the law under rational basis review, finding that it 'fail[ed], indeed defie[d], even [the rational basis] conventional inquiry.'").

135 *See infra* Part II.D (discussing how providing protections to the LGBT community would benefit the state of Indiana as a whole).

136 *See supra* Part II.A (conveying the current protections, both federal and state, that LGBT citizens have preventing discrimination).

137 *See infra* Part IV (proposing a simple solution of amending Indiana's Civil Rights Act, which would provide LGBT citizens with increased protections from discrimination).

138 *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974).

139 *See infra* Part III.A (describing the various reasons both LGBT citizens and non-LGBT citizens in Indiana need comprehensive protections for LGBT citizens).

140 *See infra* Part III.B (analyzing the realities of an equal protections claim as an option for LGBT citizens in Indiana when they are discriminated against).

LGBT citizens a private cause of action.[141] Finally, Part III.D discusses the realities of amending Indiana's Civil Rights Act to include protections for LGBT citizens.[142]

A. The Need for Comprehensive Protections

Through legislation, many states provide protections to LGBT citizens based on sexual orientation and gender identity.[143] These states demonstrate that discrimination based on these characteristics, whether by the state or by private parties, will no longer be tolerated.[144] States such as Indiana that have failed to add these types of protections harm not only their LGBT citizens by leaving them vulnerable to blatant discrimination based on nothing but ideology but also harm the economic well-being of the state.[145]

In terms of vulnerability to discrimination, currently, Indiana Code § 31-11-1-1 invalidates any marriage between members of the same gender in the state, even if these marriages are legally valid in the state where they were solemnized.[146] While it is true that this statute cannot be upheld due to *Obergefell*,[147] protections for LGBT citizens in Indiana are

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141 *See infra* Part III.C (detailing the advantages of antidiscrimination legislation for LGBT citizens, especially the steps that Colorado took to protect its citizens).

142 *See infra* Part III.D (observing that amending Indiana's Civil Rights Act seems extreme, however it is actually not that unlikely based on the state's history).

143 *See, e.g.*, WASH. REV. CODE ANN. 49.60.030 (noting "[t]he right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation"); N.Y. EXEC. LAW 296 ("For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation . . . ."); WIS. STAT. ANN. 111.36 (defining employment discrimination as "[d]iscriminating against any individual in promotion, compensation paid for equal or substantially similar work, or in terms, conditions or privileges of employment or licensing on the basis of sex . . ."). *See also State Maps of Laws & Policies: Public Accommodations*, HUM. RIGHTS CAMPAIGN (Apr. 25, 2015), https://www.hrc.org/state-maps/public-accomodations [https://perma.cc/A4PD-FHDG] (portraying a map of various states that provide protections for LGBT citizens from discrimination in public accommodations).

144 *See* Muehlmeyer, *supra* note 31, at 782–83 (discussing various state's protections for LGBT citizens from discrimination in public accommodations and the impact these changes have had on those states); David M. Forman, *A Room for "Adam and Steve" at Mrs. Murphy's Bed and Breakfast: Avoiding the Sin of Inhospitality in Places of Public Accommodation*, 23 COLUM. J. GENDER & L. 326, 365 n.174 (2012) (conveying various businesses' refusals to accommodate gay and lesbian couples at bed and breakfast establishments for religious reasons).

145 *See* Lauren Box, Note, *It's Not Personal, It's Just Business: The Economic Impact of LGBT Legislation*, 48 IND. L. REV. 995, 997 (2015) ("This Note explores the impact of LGBT legislation on a state's economy, arguing that a refusal to pass positive LGBT legislation can have a negative economic impact on a state's coffers and its ability to attract economic investment.").

146 *See* IND. CODE § 31-11-1-1 (stating that "a marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized").

147 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015) ("The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.").

only provided by the patchwork described in Part II.A of this Note.[148] While it is also true that this patchwork provides limited protections in the form of court cases and local ordinances, many issues may still arise as a result of lacking state-wide protection.[149] For example, LGBT citizens may be denied access to public accommodations, such as when Memories Pizza refused to cater a same-sex couple's wedding because of religious beliefs.[150] Many of these issues are the result of the religious liberties movement and a difference in moral ideology.[151] Discrimination against LGBT citizens is a real and ongoing problem in Indiana; therefore, providing protections against discrimination is imperative.[152]

A lack of tolerance for the LGBT community has also been shown to impact state economics.[153] Eliminating protections and allowing for discrimination negatively impacts a state's economy.[154] The outcries from

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148 *See infra* Part II.A (describing current protections, both federal and state, that LGBT citizens have preventing discrimination).

149 *See, e.g.*, Hively v. Ivy Tech Cmty. Coll. Ind., 853 F.3d 339 (7th Cir. 2017) (prohibiting employment discrimination based on sexual orientation). The court decided discrimination based on sexual orientation was forbidden because it fell under "sex" as a protected group. *Id*. *See also* ORD. § 581-101 (2016) (observing Marion County's protections for the LGBT community that are beyond those provided by the State); Mariga v. Flint, 822 N.E.2d 620 (Ind. Ct. App. 2005) (allowing visitation rights to a child born to same-sex parents).

150 *See* Coyne, *supra* note 82 ("A northern Indiana pizzeria that closed after its owner said his religious beliefs wouldn't allow him to cater a gay wedding opened Thursday to a full house of friends, regulars and people wanting to show their support.").

151 *See* Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment of Religion*, 84 UMKC L. REV. 749, 782 (2016) (exploring the impact freedom of religious expression has on the rights of LGBT citizens). In her article, Knauer states the following with regard to attitudes about LGBT citizens:

> There is no question that religious beliefs that teach disapproval and even animus towards LGBT individuals and their families enjoy absolute protection under the Free Exercise Clause. However, when religious beliefs translate into public action they traditionally step over the line and become subject to state regulation. For example, a county clerk who refuses to issue a marriage license to a same-sex couple could face internal discipline or criminal charges for the failure to discharge her official duties or a federal lawsuit for deprivation of civil rights. Religious marriage exemption laws would protect the clerk from such actions provided the refusal was based on his religious belief that marriage is between one man and one woman.

Id. at 782.

152 *See LGBT Rights in Indiana*, EQUALDEX (2018), https://www.equaldex.com/region/united-states/indiana [https://perma.cc/2VH2-WMRY] (outlining the areas in which LGBT citizens in Indiana still lack protection, including in employment discrimination, housing discrimination, and public accommodations).

153 *See* Box, *supra* note 145, at 1013–20 (conveying the various economic impacts that discrimination has on a state).

154 *See, e.g.*, Alesia, *supra* note 89 ("NCAA President Mark Emmert expressed concern Thursday about Indiana's 'religious freedom' law, saying the Indianapolis-based group

Indiana-based corporations after Governor Pence signed the Religious Freedom Restoration Act into effect demonstrate some of these negative implications.[155] After this Act was signed, many large corporations and organizations in Indiana threatened to leave the state if this blatant discrimination was allowed based on religious justifications.[156] These corporations and organizations include those whose headquarters are located in Indiana, such as the NCAA, Angie's List, and Subaru.[157]

Texas also experienced similar corporate outcries after attempting passage of its bathroom ban bill.[158] According to a Dallas News article, "CEOs from 51 Fortune 500 companies have publicly condemned the bathroom bill as discriminatory and bad for the Texas economy. Three of those firms are in the top 10, and 20 are headquartered in Texas."[159] These examples demonstrate that various corporations actively opposed the elimination of LGBT protections.[160] This shows that failure to provide protections may lead to adverse economic effects on Indiana as a whole.[161]

B. Is All Discrimination Equal?

The Fourteenth Amendment provides LGBT citizens with equal protection under the law.[162] As a result, LGBT citizens may use the

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would examine 'how it might affect future events as well as our workforce.'"). *See also* Box, *supra* note 145, at 998 ("Consequently, states lacking inclusive LGBT policies will miss out on valuable investment."). "For example, executives of large Fortune-500 companies like Facebook have expressed hesitancy toward investing in states lacking pro-LGBT legislation." *Id*.

155 *See, e.g.*, IND. CODE § 34-13-9 (portraying Indiana's infamous RFRA, which allowed religious groups to assert that their religious beliefs would be substantially burdened by something as a defense).

156 *See* Rosenbaum, *supra* note 86 (discussing the various corporations who threatened to leave Indiana as a result of RFRA). Large corporations who joined in the discussion include Yelp, PayPal, and the NCAA. *Id.* There is also a discussion about the amount of talent that would likely leave the state as a result of the discriminatory act. *Id*.

157 *See* Steiger, *supra* note 88 (observing various corporations and organizations such as NCAA, Angie's List, and Subaru, who threatened action based on RFRA passage).

158 *See* S.B. 6, 85th Leg., 1st Spec. Sess. (Tex. 2017) (relating to regulations and policies for entering or using a bathroom or changing facility; authorizing a civil penalty).

159 Lauren McGaughy & Ariana Giorgi, *Big Business Has (Almost) Killed the Texas Bathroom Bill*, DALLAS NEWS (Aug. 10, 2017), https://www.dallasnews.com/news/texas-legislature/2017/08/09/big-business-almost-killedthe-texas-bathroom-bill [https://perma.cc/5DY7-JWFU].

160 *See* Steiger, *supra* note 88 (observing various corporations and organizations who threatened to leave Indiana as a result of the discriminatory act).

161 *See* Box, *supra* note 145, at 998 (discussing the various economic impacts that discrimination based on sexual orientation and gender identity has on a state).

162 *See* U.S CONST. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). *See also* Stephen Michael Sheppard, *Bouvier Law Dictionary Equal Protection Clause*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY

Fourteenth Amendment as a cause of action when they are discriminated against based on sexual orientation or gender identity.[163] The issue, however, is that the Fourteenth Amendment only prevents state actors from discriminating.[164] Therefore, an LGBT citizen may only sue state actors under the Fourteenth Amendment and may not assert an equal protection claim against a private party.[165] In addition, equal protection claims based on sexual orientation or gender identity against state actors are very difficult to win, especially in light of religious freedom protections.[166] Section III.B.1 acknowledges the inadequacies of an equal protection claim when an LGBT citizen is discriminated against.[167] Section III.B.2 addresses the difficult burden an LGBT citizen bringing an equal protection claim would have to meet.[168]

1. The Realities of an Equal Protection Claim

Even when it is a state actor discriminating, an equal protection claim is nearly impossible to win due to the rational basis review a court would apply.[169] Of the three types of scrutiny discussed in Part II.C, laws affecting LGBT citizens in Indiana would likely not be entitled to strict or

(2012) ("The guarantee of equal protection of the laws requires the assessment of all categories created by laws that assign a burden or a benefit to one group but not to another.").

163 *See* John Nicodemo, Comment, *Homosexuals, Equal Protection, and the Guarantee of Fundamental Rights in the New Decade: An Optimist's Quasi-Suspect View of Recent Events and Their Impact on Heightened Scrutiny for Sexual Orientation-Based Discrimination*, 28 TOURO L. REV. 285, 289 (2012) ("Fourteenth Amendment scholars and enthusiasts have witnessed a series of events in the years 2010 and 2011 that somehow indicate a potential for a change in the status of the LGBT community in Equal Protection issues.").

164 *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) ("Our cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination.").

165 *See id*. at 173 ("Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations' in order for the discriminatory action to fall within the ambit of the constitutional prohibition.").

166 *See* Heller v. Doe, 509 U.S. 312, 320 (1993) ("The burden is to 'negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.'").

167 *See infra* Section III.B.1 (outlining the realities of an equal protection claim for an LGBT citizen who has been discriminated against).

168 *See infra* Section III.B.2 (analyzing the difficult burden that an LGBT citizen will have to meet, especially in light of the heightened level of scrutiny based on religious liberties).

169 *See* Farrell, *supra* note 127, at 324 (describing the heavy burden that must be met by a plaintiff under rational basis review). *See also Rational Basis Scrutiny Law and Legal Definition*, USLEGAL.COM (2016), https://definitions.uslegal.com/r/rational-basis-scrutiny/ [https://perma.cc/XGL3-QARL] ("Under rational basis scrutiny, the means need only be 'rationally related' to a conceivable and legitimate state end.").

intermediate scrutiny.[170] In fact, it appears that a court would actually look at these laws under a rational basis review.[171] In *Romer v. Evans*, the Supreme Court set the standard at "rational basis" when determining the constitutionality of legislation that discriminates against persons based on sexual orientation.[172] However, the Supreme Court as of late seemed to almost waiver in its conviction to applying a rational basis standard.[173]

There is of course an argument that the Court actually applies a higher standard based on sexual orientation.[174] There is also an argument that courts should apply an even higher level of scrutiny based on sexual orientation being an immutable trait.[175] This, however, is a topic for another scholarly work that the author will likely pursue in the future.[176] Regardless, as of now, a court will likely only use some variation of rational basis review when an equal protection claim is brought against a state actor who is discriminating based on sexual orientation or gender

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170 *See* Romer v. Evans, 517 U.S. 620, 635 (1996) (conveying the standard at "rational basis" when determining the constitutionality of legislation that discriminates against persons based on sexual orientation). *See also* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 489 (9th Cir. 2014) (finding that discrimination based on sexual orientation during jury selection violated equal protection, however the court here appears to use a more stringent test than simply rational basis).

171 *See* Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 950–51 (7th Cir. 2002) (holding that the Seventh Circuit applies rational basis review in cases of discrimination based on sexual orientation). "Homosexuals do not enjoy any heightened protection under the Constitution." *Id*. at 951.

172 *See Romer*, 116 S. Ct. at 1629. *See also* Katie R. Eyer, *Protected Class Rational Basis Review*, 95 N.C. L. REV. 975, 992–93 ("Thus, while discussions of 'animus' and a special 'rational basis with bite' standard have dominated scholarly descriptions of the LGBT rights cases' connection with rational basis review, in fact the cases themselves—and the lower courts' application of them—have, as in the 1970s, applied a variety of diverse, often diffuse and poorly defined approaches to robust rational basis scrutiny.").

173 *Compare* United States v. Windsor, 133 S. Ct. 2675 (2013) (finding the DOMA to be unconstitutional), *with SmithKline Beecham Corp.*, 740 F.3d at 471 (ruling that discrimination based on sexual orientation during jury selection violated equal protection).

174 *See Windsor*, 133 S. Ct. at 2693 (highlighting the holding of this monumental case that declared the DOMA unconstitutional and arguably applied a heightened standard). The court does not seem to conclude exactly what level of scrutiny should be applied. *Id. See also SmithKline Beecham Corp.*, 740 F.3d at 481. The Ninth Circuit in this case looks to the Supreme Court's reasoning in *Windsor* to determine the level of scrutiny to be applied. *Id*. The court came to the conclusion that "*Windsor*'s 'careful consideration' of DOMA's actual purpose and its failure to consider other unsupported bases is antithetical to the very concept of rational basis review." *Id*. at 482. The court decided that a heightened level of scrutiny was required based on the reasoning in *Windsor*. *Id*. at 484.

175 *See, e.g.*, Samuel A. Marcosson, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646 (2001) (discussing the new concepts of which traits are considered immutable by the courts and traits that are not). Marcosson makes a strong argument that sexual orientation is constructively immutable, meaning that the characteristic of sexual orientation should be treated as immutable by the law. *Id*. at 691.

176 The author reserves this topic for further discussion and analysis.

identity.[177] This leaves a plaintiff bringing an equal protection claim with a very heavy burden, and the plaintiff is therefore likely to lose on this claim.[178]

2. An Equal Protection Claim Is Insufficient

While the Supreme Court seems to have opted for the rational basis test in regard to sexual orientation, the Court has opted for a heightened level of scrutiny when looking at religious liberties.[179] In *Employment Division v. Smith*, Justice Scalia delivered the majority opinion for the Supreme Court, analyzing how religious liberties apply to certain laws.[180] Most significant, however, is Justice O'Connor's discussion in her concurrence about the level of scrutiny to apply when looking at First Amendment protection.[181] These rights will be encroached upon only if they are narrowly tailored to serve a compelling governmental interest.[182] The Supreme Court again used strict scrutiny in *Burwell v. Hobby Lobby*.[183] In this case, the Supreme Court held that the Affordable Care Act's contraceptive mandate violated equal protection because it substantially burdened Hobby Lobby's religious exercise.[184]

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177 *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759–60 (2011) (describing the tendency of the canon to focus on specific theories of "rational basis with bite" and "animus" as the exclusive explanations for meaningful rational basis review, including the LGBT rights cases).

178 *See* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("[O]ur decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.").

179 *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (discussing the heightened level of scrutiny courts apply when looking at religious expression).

180 *See* Emp't Div. v. Smith, 494 U.S. 872 (1990).

181 *See id*. at 894 (O'Connor, J., concurring) ("Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute."). *See also* Michael D. Currie, *Scrutiny Mutiny: Why the Iowa Supreme Court Should Reject* Employment Division v. Smith *and Adopt a Strict Scrutiny Standard for Free-Exercise Claims Arising Under the Iowa Constitution*, 99 IOWA L. REV. 1363, 1378 ("Every state supreme court that has rejected *Smith*'s rational-basis test in favor of adopting a heightened or strict scrutiny standard of review has compared the text of its state constitution's free-exercise provision to the Free Exercise Clause.").

182 *See* Emp't Div. v. Smith, 494 U.S. 872 (1990) (O'Connor, J., concurring) (describing the level of scrutiny applied by the court regarding freedom of speech as strict scrutiny). Justice O'Connor noted, "The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests 'of the highest order.'" *Id*. at 895.

183 *See Hobby Lobby*, 573 U.S. at 688–92 (discussing the heightened level of scrutiny courts apply when looking at religious expression).

184 *See id.* As discussed by Justice Alito in the majority opinion:

Due to varying levels of scrutiny, if it came down to a conflict between protections of religious liberties and protections based on sexual orientation or gender identity, religious liberties would likely win.[185] This would mean continued discrimination against the LGBT community based on "religious liberties," and also the possibility of increased discrimination.[186] This is a legitimate concern that citizens of Indiana must address in light of both recent legislation and lawsuits that are attempting to limit, or even eliminate, protections against blatant discrimination based on sexual orientation or gender identity.[187]

As a result, a Fourteenth Amendment equal protection claim is therefore insufficient to protect LGBT citizens in Indiana against discrimination.[188] First, equal protection claims, even if successful, only protect LGBT citizens in Indiana from discrimination by state actors.[189] Second, even when these claims can be brought by LGBT citizens, they are

> The "exercise of religion" involves "not only belief and profession but the performance of (or abstention from) physical acts" that are "engaged in for religious reasons." Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition. Thus, a law that "operates so as to make the practice of . . . religious beliefs more expensive" in the context of business activities imposes a burden on the exercise of religion.

Id. at 2770.

185 *Compare* Romer v. Evans, 517 U.S. 620 (1996) (setting the standard at "rational basis" when determining the constitutionality of legislation that discriminates against persons based on sexual orientation), *with* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–92 (2014) (discussing the heightened level of scrutiny applied by courts when analyzing religious expression).

186 *See, e.g.*, Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty*, 95 IOWA L. REV. 747, 780 (2010) (conveying the proposed form of mediation that in order to help proponents of LGBT rights and proponents of religious liberties reconcile their differences). "A significant subset of objectors to LGBT rights feels an emerging threat to religious liberty; they fear that a law or policy ensuring LGBT equality will require them to do something inconsistent with their religious beliefs or prevent them from doing something that their religious beliefs require." *Id*. at 750.

187 *See, e.g.*, Verified Compl., Ind. Family Inst., *supra* note 74 (introducing a current lawsuit in Indiana, in which members of religious liberties groups are attempting to eliminate city and county protections for LGBT citizens); S.B. 100, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016) (describing the attempt by Indiana legislators to pass a bill that would eliminate all increased city and county protections for LGBT citizens).

188 *See* Farrell, *supra* note 127, at 318.

189 *See* Kevin Cole, *Federal And State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 329 (1990) (describing the state action doctrine as applied in both state and federal courts and as applied under both the U.S. Constitution and state constitutions). *See also* United States v. Stanley, 109 U.S. 3, 11 (1883) (holding that the constitution applies only to "state actors," and not to individuals).

nearly impossible to win because a court will only analyze using rational basis review.[190]

C. But Private Actors Can Still Discriminate?

Even if by chance an LGBT citizen were able to win an equal protection claim against a state actor based on discrimination, an LGBT citizen could not bring such a claim against private parties who discriminate.[191] Because the Fourteenth Amendment does not apply to private parties, individual states must provide protections in the form of Civil Rights Acts in order to protect citizens, such as LGBT citizens, from private party discrimination.[192]

One such state that provides protections from discrimination for its LGBT citizens is Colorado.[193] Colorado's Civil Rights Act gives LGBT citizens a cause of action when they are discriminated against.[194] These protections allow LGBT citizens to sue if denied access to a public convenience or accommodation based on their sexual orientation or gender identity.[195] More importantly, these protections would allow for a cause of action against anyone who discriminates, whether it is a state actor or a private citizen.[196] The protections therefore provide the LGBT citizen who has been discriminated against a cause of action against a

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190 *See also Rational Basis Scrutiny Law and Legal Definition*, USLEGAL.COM (2016), https://definitions.uslegal.com/r/rational-basis-scrutiny/ [https://perma.cc/XGL3-QARL].

191 *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 349–50 (1974) ("While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer.").

192 *See* Muehlmeyer, *supra* note 31, at 786 ("Absent a contravening statute, the common law general rule is that the owner or the agent of a public accommodation may refuse admission or service to anyone for any reason.").

193 *See* COLO. REV. STAT. § 24-34-601 ("It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse . . . because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods . . . or accommodations of a place of public accommodation.").

194 *See* Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 280 (Colo. App. 2015) ("[T]o prevail on a discrimination claim under CADA, plaintiffs must prove that, 'but for' their membership in an enumerated class, they would not have been denied the full privileges of a place of public accommodation.").

195 *See id.* at 279 ("We conclude that the act of same-sex marriage is closely correlated to Craig's and Mullins' sexual orientation, and therefore, the ALJ did not err when he found that Masterpiece's refusal to create a wedding cake for Craig and Mullins was 'because of' their sexual orientation, in violation of CADA.").

196 *See id*. at 280 ("[A] 'place of public accommodation' is 'any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public.'").

private party, such as a pizza restaurant, but also allows the citizen to avoid bringing a burdensome equal protection claim.[197]

Unlike Colorado, the Indiana Civil Rights Act does not include "sexual orientation" or "gender identity" as protected groups, and therefore does not provide "access to public conveniences and accommodations" based on these characteristics.[198] As a result, in Indiana, a same-sex couple denied services from a "public accommodation" would have no source of relief under the Indiana Civil Rights Act.[199] This means that had it not been for the backlash from businesses to the RFRA that eventually resulted in a "fix," an Indiana pizza restaurant could have continued discriminating without any repercussions under the Indiana Civil Rights Act.[200]

One example of Colorado's success is the case of *Masterpiece v. Mullins*, which allowed the plaintiffs to bring their discrimination claim using Colorado's antidiscrimination law as a legal platform.[201] In Indiana, the plaintiffs would have been unable to bring an equal protection claim because Masterpiece Cakeshop would likely not be considered a "state actor."[202] Even if they were able to somehow argue Masterpiece Cakeshop was a "state actor," the plaintiffs would still be required to meet the heavy burden associated with rational basis review, which is the level of scrutiny a court would apply based on sexual orientation discrimination.[203] The

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197 *See id*. at 283 ("CADA prohibits places of public accommodations from basing their refusal to serve customers on their sexual orientation, and Masterpiece violated Colorado's public accommodations law by refusing to create a wedding cake for Craig's and Mullins' same-sex wedding celebration.").

198 *See* IND. CODE § 22-9-1-3(m) (defining "public accommodations").

199 *Compare* IND. CODE § 22-9-1-2 (analyzing Indiana's Civil Rights Act, which does not provide protections based on sexual orientation and gender identity), *with* COLO. REV. STAT. § 24-34-601 (portraying Colorado's antidiscrimination law which prevents discrimination in public accommodations based on sexual orientation or gender identity). *See, e.g.*, Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 283 (Colo. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 137 S. Ct. 2290 (June 26, 2017) ("CADA prohibits places of public accommodations from basing their refusal to serve customers on their sexual orientation, and Masterpiece violated Colorado's public accommodations law by refusing to create a wedding cake for Craig's and Mullins' same-sex wedding celebration.").

200 *See* Kim, *supra* note 60 (portraying a pizza restaurant in Walkerton, Indiana, that refused to cater a same-sex wedding, citing to RFRA as a protection).

201 *See* Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 283 (Colo. App. 2015).

202 *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345, 354 (1974) ("Doctors, optometrists, lawyers, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status converts their every action, absent more, into that of the State.") *Id*.

203 *See, e.g.*, Yoshino, *supra* note 177, at 759–60 (describing the tendency of the canon to focus on specific theories of "rational basis with bite" and "animus" as the exclusive

plaintiffs were able to avoid these considerations because Colorado provided them a cause of action when discriminated against based on sexual orientation.[204] Therefore, amending the Indiana Civil Rights Act would give LGBT citizens in Indiana a cause of action against private actors when they are discriminated against and would also allow these citizens to avoid bringing a burdensome equal protection claim.[205]

D. Amending Indiana Code Section 31-11-1-1 Is Not So Far-Fetched After All

While there are legitimate concerns regarding the possibilities of blatant discrimination, this section addresses concerns that amending the Indiana Civil Rights Act to provide protections for the LGBT community is unrealistic.[206] It is inevitable that opposition to amending the Indiana Civil Rights Act will include religious liberties movement arguments, but opponents may also argue this solution is too far-fetched for a conservative state like Indiana.[207]

While it is true that Colorado is considered more progressive than Indiana in regard to LGBT rights, amending the Civil Rights Act in Indiana is still realistic.[208] First, Indiana demonstrated its favor towards the religious liberties movement when it passed RFRA in 2014.[209] As a result of this Act, Memories Pizza restaurant in Walkerton, Indiana, was allowed to refuse catering services to a same-sex couple because the restaurant owner claimed his religious liberties allowed him to refuse this

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explanations for meaningful rational basis review, including the LGBT rights cases). *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (deferring to the state when applying rational basis review).

204 *See Mullins*, 370 P.3d at 293 ("Without CADA, businesses could discriminate against potential patrons based on their sexual orientation. Such discrimination in places of public accommodation has measurable adverse economic effects.") *Id.*

205 *See, e.g.*, Muehlmeyer, *supra* note 31, at 786 (describing that without some form of statute or legislation making discrimination unlawful, the common law generally allows private parties to discriminate freely in providing goods or services).

206 *See, e.g.*, Box, *supra* note 145, at 998 (discussing the various economic impacts that discrimination has on a state).

207 *See* Lisa Bornstein & Megan Bench, *2015 Special Issue Advancing LGBTQIA Rights in a Post-Obergefell World: Married on Sunday, Fired on Monday: Approaches to Federal LGBT Civil Rights Protections*, 22 WM. & MARY J. WOMEN & L. 31, 51 ("While civil rights protections for sexual orientation and gender identity discrimination are increasingly recognized, these protections remain incomplete.").

208 *See, e.g.*, IND. CODE § 34-13-9-0.7 (observing the "fix" that Indiana added to RFRA, which added minimal protections against discrimination). This is one area at issue in the lawsuit mentioned above. *Id. See also* Mariga v. Flint, 822 N.E.2d 620 (Ind. Ct. App. 2005) (explaining the case allowing visitation rights to a child born to same-sex parents).

209 *See* IND. CODE § 34-13-9.

service.[210] Based on public policy considerations similar to those listed in Section II.D.1 of this Note, Governor Pence amended RFRA and incorporated language prohibiting this type of discrimination based on sexual orientation,[211] which was considered a "fix" to the Act.[212]

Second, Indiana was surprisingly progressive regarding LGBT rights prior to most regarding visitation rights for adoptive parents of the same sex.[213] In the early 2000s, prior to the landmark case of *Obergefell*, one woman in a same-sex relationship adopted the other woman's biological child because the women were unable to legally marry in Indiana at the time.[214] The relationship ended up failing, resulting in the biological mother moving to another state with the child.[215] After being denied visitation rights to the adopted child, the Indiana Court of Appeals ended up granting the adoptive mother visitation rights.[216]

As a result, both the executive and judicial branches of government in Indiana acknowledge that the LGBT citizens in Indiana need protection from discrimination perpetrated by both state actors and private parties.[217] Therefore, legislators should amend the Indiana Civil Rights Act to provide LGBT citizens with protections from discrimination by both state and private actors.

IV. CONTRIBUTION

This Note proposes that Indiana amend the Civil Rights Act and add "sexual orientation" and "gender identity" to the list of protected

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210 *See* Kim, *supra* note 60 (portraying the news story where a pizza restaurant refused to cater a same-sex couple's wedding, citing to RFRA for protection).

211 *See* IND. CODE § 34-13-9 (describing Indiana's infamous RFRA, and although there was a later a "fix," this was a huge basis for discrimination in Indiana).

212 *See* IND. CODE § 34-13-9-0.7.

213 *See Mariga*, 822 N.E.2d at 624 ("Julie and Lori decided that Julie should adopt the children for a variety of reasons, among them Julie's desire to provide financially for the children via life insurance, college assistance, and health insurance, and a hope to solidify their family unit.").

214 *See id*. ("The Tippecanoe County Circuit Court granted her petition for adoption on July 10, 1997, and the children's last names were officially changed to 'Mariga-Morris.'").

215 *See id*. ("In November 1998, Lori and Julie separated, and since that time both children have remained with Lori.").

216 *See id*. at 633 ("As to Julie's petition to vacate the adoption of her children, we find that the Circuit Court had authority to grant her petition for adoption in 1997, and it was not procured by fraud.").

217 *See, e.g.*, IND. CODE § 34-13-9-0.7 ("This chapter does not . . . authorize a provider to refuse to offer or provide services . . . to any member or members of the general public on the basis of . . . sexual orientation, gender identity . . . ."); Mariga v. Flint, 822 N.E.2d 620, 624 (Ind. Ct. App. 2005) ("In light of the purpose and spirit of Indiana's adoption laws . . . the legislature could not have intended such a destructive and absurd result.").

groups.[218] First, Part IV.A amends the current Civil Rights Act to reflect protections based on sexual orientation and gender identity.[219] Next, Part IV.B explains that amending the language of the current Civil Rights Act is the best solution to remedy LGBT discrimination in Indiana because it is realistic and adds the necessary protections.[220]

A. The Indiana Civil Rights Act

The Civil Rights Act currently protects citizens against discrimination "based solely on race, religion, color, sex, disability, national origin, or ancestry . . . ."[221] This Note proposes that Indiana amend the Civil Rights Act to include "sexual orientation" and "gender identity" to the list of protected groups.[222] This would provide the LGBT community with all the protections that other groups are currently provided.[223] The language would be as follows:

> (a) It is the public policy of the state to provide all of its citizens equal opportunity for education, employment, access to public conveniences and accommodations, and acquisition through purchase or rental of real property, including but not limited to housing, and to eliminate segregation or separation based solely on race, religion, color, sex, disability, national origin, ancestry, *sexual orientation, or gender identity* since such segregation is an impediment to equal opportunity. Equal education and employment opportunities and equal access to and use of public accommodations and equal opportunity for acquisition of real property are hereby declared to be civil rights.

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218 *See* IND. CODE § 22-9-1-2 (listing the groups protected by the Indiana Civil Rights Act).

219 *See infra* Part IV.B (conveying the changes that would be made to the current Indiana Civil Rights Act in order to provide protections for the LGBT community).

220 *See infra* Part IV.B (describing why the addition of "sexual orientation" and "gender identity" to the Indiana Civil Rights Act is the best solution).

221 IND. CODE § 22-9-1-2.

222 *See* IND. CODE § 22-9-1-2 (highlighting the lack of protections for citizens based on "sexual orientation" and "gender identity"). The proposed amendments are italicized and are the contribution of the author.

223 *See* IND. CODE § 22-9-1-3 (conveying the definition of "public accommodations"). Protections are provided to protected groups, including "access to public conveniences and accommodations." *Id. See also* IND. CODE § 22-9-1-2 (demonstrating that Indiana's Civil Rights Act currently only protects groups based on race, religion, color, sex, disability, national orientation, or ancestry).

> (b) The practice of denying these rights to properly qualified persons by reason of the race, religion, color, sex, disability, national origin, ancestry, *sexual orientation, or gender identity* of such person is contrary to the principles of freedom and equality of opportunity and is a burden to the objectives of the public policy of this state and shall be considered as discriminatory practices. The promotion of equal opportunity without regard to race, religion, color, sex, disability, national origin, ancestry, *sexual orientation, or gender identity* through reasonable methods is the purpose of this chapter.
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> . . . .
>
> (d) It is hereby declared to be contrary to the public policy of the state and an unlawful practice for any person, for profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, religion, color, sex, disability, national origin, ancestry, *sexual orientation, or gender identity*.[224]

B. Commentary

In order to remedy LGBT discrimination in Indiana, this Note recommends an amendment to the Indiana Civil Rights Act including "sexual orientation" and "gender identity" to the list of protected groups.[225] First, this amendment is important because the court applies a higher standard for freedom of speech and expression than it does for discrimination based on sexual orientation.[226] Second, this amendment would provide increased protections in light of current efforts to eliminate protections against discrimination.[227] Finally, an amendment would

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[224] IND. CODE § 22-9-1-2.

[225] *See* IND. CODE § 22-9-1-2 (urging that "sexual orientation" and "gender identity" be added to the list of protected groups). The proposed amendments are italicized and are the contribution of the author.

[226] *See supra* Section III.C.1 (analyzing the level of scrutiny the court uses when looking at discrimination based on sexual orientation, which is likely rational basis).

[227] *See supra* Section III.C.3 (reviewing the various legal fights and attacks occurring between the religious freedom proponents and the LGBT community).

provide the LGBT community with the same protections currently given to people based on race, religion, sex, etc., no more and no less.[228]

First, as discussed in Part III.C, the proponents of religious liberties and freedom would likely win the discrimination debate in a court of law. Unlike Colorado, the LGBT community currently lacks protections that would allow LGBT individuals to fight their way up to the United States Supreme Court.[229] For this reason, it is important to amend the Indiana Civil Rights Act and include "sexual orientation" and "gender identity" as protected categories so the LGBT community has at least some platform on which to fight.[230] The counterargument, of course, comes from the religious liberties proponents, who feel their rights are also being violated.[231] The issue here is a balancing of rights, and the right to "access to public conveniences and accommodations" for the LGBT community should prevail.

Second, including "sexual orientation" and "gender identity" to the list of protected groups is important based on current legitimate discrimination, or attempts to discriminate, because of these characteristics. There are ongoing attempts to eliminate the limited protections currently provided to the LGBT community, as discussed in Section III.C.3 of this Note.[232] Amending the Indiana Civil Rights Act would provide these citizens with a platform on which to challenge these various forms of discrimination.[233] One may argue that the LGBT community does not need these protections to the same extent that other citizens need these protections due to race, gender, or religion.[234] However, history has shown that discrimination in Indiana based on sexual orientation and gender identity is a real and legitimate issue,[235] and

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228 *See supra* Part II.D (describing some of the protections provided by the Indiana Civil Rights Act, specifically "access to public conveniences and accommodations").

229 *See, e.g.*, Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 279 (Colo. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 137 S. Ct. 2290 (June 26, 2017) (allowing a same-sex couple to file a complaint and win in state court because Colorado had protections against discrimination based on sexual orientation).

230 *See* IND. CODE § 22-9-1-2.

231 *See, e.g.*, Verified Compl., Ind. Family Inst., *supra* note 74 (challenging the "fix" to RFRA and various local LGBT protections in Indiana as unconstitutional).

232 *See supra* Section III.C.3 (outlining the various attempts in Indiana to limit protections for the LGBT community).

233 *See, e.g.*, *Mullins*, 370 P.3d at 279 (agreeing that the anti-discrimination protections provided by Colorado were a platform upon which citizens can sue).

234 *See, e.g.*, Lauren R. Deitrich, Note, *Transgender and the Judiciary: An Argument to Extend Batson Challenges to Transgender Individuals*, 50 VAL. U. L. REV. 719, 755 (2016) (encouraging that courts should reassess the standard of review based on the definition of "immutable," even though the courts currently do not recognize "transgender" as an immutable trait).

235 *See, e.g.*, Box, *supra* note 145, at 995–98 (providing various instances where LGBT discrimination resulted in economic impact). *See also* S.B. 100, 119th Gen. Assemb., 2d Reg.

amending the Civil Rights Act would prevent this discrimination from continuing.

Finally, amending Indiana's Civil Rights Act and including "sexual orientation" and "gender identity" would provide LGBT citizens with the same protections others receive.[236] In particular, this would eliminate the possibility of "segregation and separation" based on these characteristics.[237] Currently, protected groups cannot be denied "access to public conveniences and accommodations" based solely on their protected characteristic.[238] The LGBT community in Indiana is not provided this luxury, and it is in the interest of fairness and justice that the LGBT community should receive these protections in light of current discrimination.[239] Amending the Civil Rights Act and including language is a better solution than proposing new legislation based on counterarguments. Legislation created specifically to protect the LGBT community could result in negative responses by those groups currently protected by the Indiana Civil Rights Act.[240] By simply amending the Act as it stands, the LGBT community would avoid possible opposition by these minority groups, who would likely view this new legislation as unfair or as providing increased protections to just one group.[241]

V. CONCLUSION

Indiana needs statewide, comprehensive protections for its LGBT citizens. This can be achieved by simply amending Indiana's Civil Rights Act, Ind. Code § 22-9-1-2, and including the terms "sexual orientation" and "gender identity" to the list of protected groups. This solution is similar to that of states like Colorado, who have successfully limited discrimination by providing their citizens statewide protections.

Currently, the LGBT community in Indiana is protected only by a patchwork of protections, and therefore, members of the LGBT community are susceptible to discrimination. An equal protection claim

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Sess. (Ind. 2016) (noting a Senate Bill in Indiana that failed, but would have eliminated local protections for the LGBT community). *See also* Kim, *supra* note 60 (reporting an Indiana pizza restaurant's refusal to serve a same-sex wedding, citing RFRA as its justification).

236 *See supra* Part II.D (identifying various protections provided to listed groups under the Indiana Civil Rights Act).

237 *See* IND. CODE § 22-9-1-2(a).

238 *See* IND. CODE § 22-9-1-3 ("'Public accommodation' means any establishment that caters or offers its services or facilities or goods to the general public.").

239 *See, e.g.*, Box, *supra* note 145, at 995–98.

240 *See* Robinson, *supra* note 42, at 172 (observing that while groups based on race and national origin are entitled to strict scrutiny under the law, an animus review may actually be more beneficial than the so-called strict scrutiny analysis).

241 *See* Robinson, *supra* note 42, at 173.

is insufficient to protect these citizens from discrimination; therefore, a cause of action provided by Indiana is necessary. Unfortunately, political undertakings by Indiana's governor and various courts have proven that not all discrimination is equal under the law. As a result, the court applies a higher standard for religious freedom protections than it does for discrimination based on sexual orientation. The religious liberties groups would therefore win in a case such as *Indiana Family Institute v. City of Carmel, Indiana*. There is an active effort by the religious liberties and freedom groups in Indiana to prevent and eliminate protections for the LGBT community.

Based on the discussion of standards applied by the Court, there is a very real potential for LGBT protections against discrimination to be limited even further. Finally, there are policy reasons for protecting LGBT citizens in Indiana from discrimination. One such reason is economic, especially based on the backlash from passage of RFRA. Another is based on Colorado's success in amending its Civil Rights Act to provide protections. Therefore, Indiana should amend its Civil Rights Act and include "sexual orientation" and "gender identity" to its list of protected groups.

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