OVERLAND PARK
KANSAS

ABOVE AND BEYOND. BY DESIGN.

City of Overland Park
8500 Santa Fe Drive
Overland Park, Kansas 66212

Dear Attorney General Derek Schmidt,

Numerous cities across Kansas have adopted non-discrimination ordinances (NDOs), which are intended to prohibit discrimination on the basis of sexual orientation and gender identity or expression (LGBT Discrimination). Our questions relate to how to analyze a claim or defense challenging the enforcement of a NDO under the Kansas Preservation of Religious Freedom Act (KPRFA), K.S.A. 60-5301 et seq.

No Kansas state court of appellate jurisdiction has applied the KPRFA yet, let alone analyzed whether NDOs impose substantial burdens under the KPRFA, or whether NDOs serve interests that satisfy the KPRFA's compelling interest test. Without any guidance, it is difficult or impossible for cities to know how to draft or enforce NDOs in a manner that is consistent with the KPRFA. Because of the growing number of cities adopting NDOs,[1] and legislative history indicating the KPRFA was intended to be used as a claim or defense against NDOs,[2] we think this is a significant issue of statewide interest.

There has been an abundance of legal commentary[3] but a dearth of case law about the tension between laws prohibiting discrimination on the basis of sexual orientation and gender identity, and the federal and/or state religious freedom acts (RFRAs). I respectfully request your office's guidance on this issue in the context of the KPRFA and Kansas NDOs. Pursuant to your Statement of Policy Relating to the Furnishing of Written Opinions, we have included our legal research and conclusions with this opinion request. We appreciate that your office will not opine on questions of fact, but if examples of religious objections are needed for your analysis, we offer the hypothetical religious objections listed in Attachment A. Additionally, if needed for the purposes of your analysis, we have attached a NDO that we think generally reflects the majority of NDOs adopted in Kansas (Attachment B).

We also respectfully request that you allow any reasonable amount of time requested by interested parties to submit legal briefs on this issue.

Sincerely,

Tammy M. Owens
City Attorney and Chief Legal Counsel

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[1] Cities of Lawrence (Municipal Code Section 10-108); Leawood (Municipal Code Section 11-1103); Manhattan (Municipal Code Section 10.18); Mission Hills (Municipal Code Section 9-103); Mission; Mission Woods; Prairie Village (Municipal Code Section 5-803); Roeland Park (Municipal Code Section 5-1203); Shawnee (Municipal Code Section 9.80); Westwood Hills; and the Unified Government of Wyandotte County/Kansas City, Kansas/ (Municipal Code Section 18-84).

[2] *See* Minutes, House Judiciary Committee, Attachment 8, Feb. 18, 2013 (citing NDOs in Salina and Hutchinson as one of the reasons KPRFA was needed to provide a defense to burdens on religious exercise).

[3] Gantt, *Religious Exemptions And Same-sex Marriage Discrimination Post Trump*, 37 N.E. J. Legal Stud. 3 (2018); Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes*, 49 Conn. L. Rev. 1 (2016); Brennan, *Playing Outside The Joints: Where The Religious Freedom Restoration Act Meets Title VII*, 68 Am. U.L. Rev. 569 (2018); Hersh, *Daniel in the Lion's Den: A Structural Reconsideration of Religious Exemptions from Nondiscrimination Laws Since Obergefell*, 70 Stan. L. Rev. 265 (2018); NeJaime & Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 Yale L.J. Forum 201 (2018).

Questions

Proper Standard

Question 1. Should decisions applying the federal RFRA, Kansas Constitution, Religious Land Use and Institutionalized Persons Act (RLUIPA), or some other source of law be used to apply the KPRFA?

Our first question is which law or laws' decisions applying such law or laws should be used to apply the KPRFA. We think the primary options are: 1) the federal RFRA, 2) Section 7 of the Kansas Constitution's Bill of Rights, or 3) the framework used for RLUIPA claims. Below are some reasons each of these may or may not be appropriate:

1. Federal RFRA. Some state courts have concluded that based on legislative history, and the similarity between their state RFRA and the federal RFRA, decisions applying the federal RFRA should be used to interpret their state RFRA.[4] The legislative history for the KPRFA,[5] and its plain language, indicate the federal RFRA was the inspiration for the KPRFA, and the intent was to restore the strict scrutiny standard outlined in *Sherbert* and *Yoder* (pre-dating *Employment Div. v. Smith*, 494 U.S. 872 (1990)) for any law that substantially burdens a person's exercise of religion under the First Amendment. For these reasons, we believe (and assume for the purpose of subsequent questions) that decisions applying the federal RFRA should be used to interpret the KPRFA. If the decisions applying the federal RFRA should be used to interpret the KPRFA, we also appreciate any thoughts you may have on the significance of the federal RFRA's intent to revive the strict scrutiny analysis from *Sherbert* and *Yoder*, and whether the KPRFA requires balancing the government's interests against a person's right to exercise religion or the burden-shifting framework where the government must prove its imposition of a burden achieves compelling interests of the highest order through the least restrictive means.[6] We note Kansas

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[4] *See Johnson v. Levy*, 2010 Tenn. App. LEXIS 14, at 19-21 (Ct. App. Jan. 14, 2010) ("The legislative history of Tennessee's religious freedom statute reveals that the purpose in enacting the statute was to mirror RFRA for the purpose of restoring heightened free exercise protections. This is abundantly evident from the fact that RFRA and Tenn. Code Ann. § 4-1-407 are substantially similar."); *see also Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009) ("Because TRFRA, RFRA, and RLUIPA were all enacted in response to *Smith* and were animated in their common history, language, and purpose by the same spirit of protection of religious freedom, we will consider decisions applying the federal statutes germane in applying the Texas statute."); *see also Brush & Nib Studio, LC v. City of Phoenix*, 244 Ariz. 59, 77 (Ct. App. 2018) ("FERA parallels the Federal Religious Freedom Restoration Act of 1993; as such we look to federal law as instructive on this issue.").

[5] *See* Minutes, House Judiciary Committee, Attachment 8, Feb. 18, 2013 (citing the need to reinstate portions of the Federal Religious Freedom Restoration Act after those were held to be not applicable to the states); *see also* Minutes, House Judiciary Committee, Attachment 5, Feb. 18, 2013 (citing the need to maintain the same protections for religious freedoms within that existed pre-*Smith*).

[6] *See Toward a RFRA That Works*, 61 Vand. L. Rev. 1027, 1051 (2008) ("RFRA thus attempted to overrule the Supreme Court's interpretation in *Smith* and to restore the "compelling interest test" as that test was "set forth" in *Sherbert* and *Yoder*. Yet, the simple text of the statute fails to resolve serious questions about its meaning. On the one hand, the statute's requirement that a government action be the "least restrictive means of furthering [a] compelling governmental interest" suggests a true compelling governmental interest test, on par with the test applied in the Court's equal protection jurisprudence. On the other hand, the Act expressly states that its purpose is to "restore" the "compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*." Yet, as detailed above, *Sherbert* and *Yoder* did not set forth a true "compelling interest test," but rather an intermediate form of scrutiny in which the state's regulatory interests were merely balanced against the burdens imposed on religious practice. Hence, it is unclear which "compelling interest test" was codified in RFRA - a true compelling governmental interest test, or a watered down compelling governmental interest test?"); *see also Employment Div. v. Smith*, 494 U.S. 872, 885 (1990) ("We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [*Sherbert*] test inapplicable to [religious exercise] challenges."); *see also Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1312 (2007) ("It is readily imaginable that the Supreme

courts seem to have applied a balancing test for pre-*Smith* free exercise strict scrutiny analysis,[7] and decades ago your office opined that the right to free exercise of religion could not serve as a defense to an ordinance that prohibited discrimination on the basis of sexual orientation.[8] We appreciate any thoughts you may have on the continued validity of those opinions in light of the fact that the KPRFA was arguably intended to restore the free exercise strict scrutiny analysis operative at the time they were issued.[9] Finally, if decisions applying the federal RFRA should be used to apply the KPRFA, we note that the language of the KPRFA appears to have some distinctions from the federal RFRA (e.g. the government's burden of proof is clear and convincing evidence). Other state courts interpreting their RFRAs have noted the importance of such distinctions,[10] and we appreciate any thoughts you have on the KPRFA's distinctions.

2. Section 7 of the Kansas Constitution's Bill of Rights. Some of the KPRFA's legislative history indicates the intent was to adopt the standard used by Kansas courts to analyze free exercise claims under Section 7 of the Kansas Bill of Rights.[11] Although the four-part test adopted in *Stinementz* to determine if laws run afoul of Section 7 of the Kansas Constitution's Bill of Rights appears similar to the framework in the KPRFA,[12] the four-part *Stinementz* test may require a lower threshold for establishing a burden.[13] Additionally, based on the compelling interest analysis in *Stinementz*, we are not certain the analysis of whether a law violates Section 7 of the Kansas Bill of Rights requires the "more focused inquiry" we think is required under the federal RFRA.[14] There may be other important distinctions we are not aware of.

Court might apply different versions of strict scrutiny to different categories of cases. For example, as noted above, it is widely acknowledged that the version of strict scrutiny that the Court employed in Free Exercise Clause cases prior to *Employment Division v. Smith* was essentially a balancing test."); *see also Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 809 (2006) ("There is one area of law in which strict scrutiny has been widely recognized to be less than fatal in practice: free exercise cases.").

[7] *State ex rel. O'Sullivan v. Heart Ministries, Inc.*, 227 Kan. 244, 257 (1980) ("The compelling interest of the State, as *parens patriae,* is the protection of its children from hunger, cold, cruelty, neglect, degradation, and inhumanity in all its forms. To fulfill this responsibility, the legislature has elected to impose licensing and inspection requirements. To these requirements the defendants' free exercise rights must bow; the balance weighs heavily in favor of those unfortunate children whom the State must protect.").

[8] Att'y Gen. Op. No. 1977-247 ("Freedom of religious exercise does not include the right to deny employment, housing or public accommodations to any person on the basis of race, sex, color, national origin or ancestry, or religion itself, and religious belief furnishes no more compelling justification for denial of equal treatment on any other ground which the state, or in this instance the city, may reasonably determine to impose impermissible, arbitrary or artificial barriers to its declared policy of equal opportunity.")

[9] *Supra* note 5.

[10] *Johnson v. Levy*, 2010 Tenn. App. LEXIS 14, at 21-22 (Ct. App. Jan. 14, 2010).

[11] *See* Minutes, House Judiciary Committee, Attachment 6, Feb. 18, 2013 ("The legal standard that would be codified by HB 2203 is already existing federal law… In fact, this same legal standard is already used by Kansas courts. In the 2011 *Stinemetz v. Kansas Health Policy Authority* case, the Kansas Court of Appeals reaffirmed this same standard in upholding the religious liberty of a Jehovah's Witness. We seek only codification of the current standard already in use in federal law and by Kansas courts.").

[12] *See Stinemetz v. Kan. Health Policy Auth.*, 45 Kan. App. 2d 818, 849 (2011).

[13] *See Roman Catholic Archdiocese of Kan. City v. City of Mission Woods*, 337 F. Supp. 3d 1122, 1149 n.12 (D. Kan. 2018) ("Defendant's motion argues that only state action that "heavily" burdens a religious exercise can trigger § 7's protection…The Kansas Court of Appeals [in *Stinemetz*] never used the phrase "heavy burden" in any other aspect of its opinion. So, based on the words actually used in *Stinemetz*, the court holds that plaintiffs, to carry this aspect of its burden, need only show a burden on their religious practices.").

[14] *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006). Despite the likely applicability of *O Centro*'s "more focused" analysis to anti-discrimination laws, there's a strong argument that analysis would never change the result for anti-discrimination laws. In *O Centro*, the court expressly found no compelling interest in uniform application of the Controlled Substances Act. As explored further in Question 3(c),

3. RLUIPA Standard. The only court to apply the KPRFA is the United States District Court for the District of Kansas, and it adopted the framework that federal courts use for RLUIPA claims because that framework was used by another federal court to interpret the Illinois Religious Freedom Restoration Act.[15] We could not find any legislative history for the KPRFA supporting use of this standard, and we think there are some important distinctions between the KPRFA and the RLUIPA (e.g. KPRFA burden of proof is clear and convincing evidence, KPRFA allows claims for actions "substantially likely" to burden a person's right to exercise of religion) that weigh against reliance on RLUIPA when construing and applying the KPFRA.

NOTE: Because of the deference generally granted by courts to religious objectors about whether their religious objection is a sincerely held religious belief,[16] please assume for the purposes of the following questions that such religious objector is objecting to performing an act that would constitute an "exercise of religion" as defined by K.S.A. 60-5302.

Substantial Burden[17]

Question 2. For the purposes of this question, we acknowledge that the definition of "burden" in K.S.A. 60-5302 includes civil and administrative penalties, and we assume that a governmental entity has imposed a fine on a person for, or sought an injunction prohibiting, their "exercise of religion." Does imposing a fine in an amount of $500, or seeking an injunction, constitute a "substantial" burden under the KPRFA?

The KPRFA defines "burden" in K.S.A. 60-5302. There are a number of standards and rules that courts have used to determine whether a burden is a substantial burden on a person's exercise of religion.[18] In *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), the 10th Circuit said of substantial burdens under the federal RFRA that, "a government act imposes a 'substantial burden' on religious exercise if it: (1) requires participation in an activity prohibited by a sincerely held religious belief, (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places

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there is precedent and strong arguments that there is a compelling interest served in uniform application of anti-discrimination laws.

[15] *Roman Catholic Archdiocese of Kan. City v. City of Mission Woods*, 337 F. Supp. 3d 1122, 1150 (D. Kan. 2018) ("With no Kansas guidance to the contrary, the court follows *Maum*'s lead and applies [the RLUIPA] standard to the Kansas statute.").

[16] *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) ("[I]t is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction… and there is no dispute that it does.'").

[17] *See Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1176 (10th Cir. 2015) ("Whether a challenged law or policy substantially burdens religious exercise is a question of law.").

[18] *See Mack v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996) ("The Fourth, Ninth, and Eleventh Circuits define "substantial burden" as one that either compels the religious adherent to engage in conduct that his religion forbids (such as eating pork, for a Muslim or Jew) or forbids him to engage in conduct that his religion requires (such as prayer)… The Eighth and Tenth Circuits use a broader definition--action that forces religious adherents "to refrain from religiously motivated conduct,"… or that "significantly inhibits or constrains conduct or expression that manifests some central tenet of a [person's] individual beliefs,"… imposes a substantial burden on the exercise of the individual's religion. The Sixth Circuit seems to straddle this divide, asking whether the burdened practice is "essential" or "fundamental."").

substantial pressure on an adherent to engage in conduct contrary to a sincerely held religious belief."[19] The KPRFA's definition of "burden" appears to include actions that would trigger one or more of the standards used from *Little Sisters of the Poor*.[20] That court also said, "When evaluating RFRA claims, we have therefore recognized that not all burdens alleged by plaintiffs amount to substantial burdens."[21]

Regarding decisions applying laws other than the federal RFRA, Section 7 of Kansas Constitution's Bill of Rights does not appear to require that a burden on religious exercise be substantial to constitute a violation of that right.[22] Other state courts that have interpreted their RFRAs have said that any prohibition of conduct sincerely motivated by religious belief substantially burdens an adherent's free exercise of that religion.[23]

Here, requiring a religious objector to pay a civil penalty for their exercise of religion, or obtaining an injunction prohibiting their exercise of religion, seemingly "requires participation in an activity prohibited by a sincerely held religious belief," which the court in *Little Sisters of the Poor* said qualified as a substantial burden. Further support for this conclusion can be found in *Wisconsin v. Yoder*, where the court noted the $5 fine was a substantial burden because it was "inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[24]

However, in *Brush & Nib Studio, LC v. City of Phoenix*, 244 Ariz. 59 (Ct. App. 2018), the Arizona Court of Appeals found no substantial burden under Arizona's RFRA because the court framed the religious objector's burden as being required to provide goods or services to LGBT persons, rather than being subject to civil or criminal penalties for discriminating against them.[25] Similarly, in *EEOC v. R.G., 884 F.3d 560* (6th Cir. 2018), the Sixth Circuit Court of Appeals held that requiring an employer, "to refrain from firing an employee with different religious views from [the employer] does not, as a matter of law, mean that [the employer] is endorsing or supporting those views."[26] The reasoning in these cases seems to arise out of Free Speech cases saying there's no First Amendment violation where the person alleging they're being compelled to speak a message cannot reasonably be understood to be endorsing that message.[27]

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[19] *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1175 (10th Cir. 2015).
[20] K.S.A. 60-5302.
[21] *Little Sisters of the Poor,* 794 F.3d 1151 at 1177.
[22] *See Roman Catholic Archdiocese of Kan. City v. City of Mission Woods*, 337 F. Supp. 3d 1122, 1149 n.12 (D. Kan. 2018) ("Defendant's motion argues that only state action that "heavily" burdens a religious exercise can trigger § 7's protection…The Kansas Court of Appeals [in *Stinemetz*] never used the phrase "heavy burden" in any other aspect of its opinion. So, based on the words actually used in *Stinemetz*, the court holds that plaintiffs, to carry this aspect of its burden, need only show a burden on their religious practices. ")
[23] *See A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 (5th Cir. 2010) ("[W]e know that 'at a minimum, the government's ban of conduct sincerely motivated by religious belief substantially burdens an adherent's free exercise of that religion.'").
[24] *Wis. v. Yoder*, 92 S. Ct. 1526, 1534 (1972).
[25] *Brush & Nib Studio, LC v. City of Phoenix*, 244 Ariz. 59, 77, 418 P.3d 426 (Ct. App. 2018) ("Here, Appellants have failed to prove that Section 18-4(B) substantially burdens their religious beliefs by requiring that they provide equal goods and services to same-sex couples… Section 18-4(B) merely requires that, by operating a place of public accommodation, Appellants provide equal goods and services to customers regardless of sexual orientation... Although providing the same goods and services to same-sex couples might "decrease . . . the satisfaction" with which Appellants' practice their religion this does not, a fortiori, make their compliance with Section 18-4(B) a substantial burden to their religion.").
[26] *EEOC v. R.G.*, 884 F.3d 560, 589 (6th Cir. 2018).
[27] *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006) ("[N]othing about recruiting suggests that law schools agree with any speech by recruiters," and "students can appreciate the difference between

We agree with the reasoning in *Little Sisters of the Poor* that there may be instances where the modifier "substantial" may result in some burdens not meeting the substantial burden standard under the KPRFA. However, it appears that if a criminal, civil or administrative penalty in any amount is imposed on a person for their exercise of religion, that penalty is a substantial burden. Because *Yoder* is controlling in Kansas, but *Brush & Nib* and *Harris Funeral Homes* are not, we assume the penalties in NDOs would constitute a substantial burden for purposes of the KPRFA, even when the religious objector could simply choose to comply with an anti-discrimination law by not discriminating. That said, we think the arguments in *Brush & Nib* and the Court of Appeals in *Harris Funeral Homes* are compelling, and that obtaining an injunction requiring a person to provide goods, services, housing or employment may not constitute a substantial burden, even if that person claims it violates their sincerely held religious beliefs.

Compelling Interests[28]

Question 3(a). Under the KPRFA, do governmental entities in Kansas have compelling interest(s) in prohibiting discrimination on the basis of sexual orientation and gender identity or expression in housing, employment, and public accommodations?

There is little guidance for what qualifies as a compelling interest of the highest order for purposes of the KPRFA or federal RFRA.[29] Kansas courts have identified a number of compelling interests when applying strict scrutiny, including protecting society from sexually violent predators,[30] providing special education services to exceptional children,[31] and safety on public roads.[32] We have not found a Kansas decision saying the interests served by laws prohibiting discrimination against historically marginalized groups as determined by legislative bodies (including LGBT Discrimination) are compelling interests of the highest order for the purpose of free exercise strict scrutiny.

However, several state[33] and federal courts[34] outside of Kansas have held that laws prohibiting discrimination (including LGBT Discrimination) serve compelling interests for the purposes of free

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speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy.").

[28] *See Hodes & Nauser v. Schmidt*, 52 Kan. App. 2d 274, 324 (2016) ("Whether an asserted governmental interest is compelling requires an independent judicial determination.").

[29] *United States v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002) ("There is, however, little guidance from the Supreme Court in determining what qualifies as a compelling interest.").

[30] *State v. Williams*, 46 Kan. App. 2d 36 (2011).

[31] *Board of Educ. v. Kansas State Bd. of Educ.*, 266 Kan. 75 (1998).

[32] *State v. Steckline*, 387 P.3d 862 (Kan. Ct. App. 2017).

[33] *Cervelli v. Aloha Bed & Breakfast*, 142 Haw. 177 (Ct. App. 2018) ("HRS Chapter 489 is narrowly tailored to achieve Hawai'i's compelling interest in prohibiting discrimination in public accommodations. HRS Chapter 489 'responds precisely to the substantive problem [of discrimination in public accommodations] which legitimately concerns the State.'"); *State v. Arlene's Flowers, Inc.*, 193 Wn.2d 469 (2019) ("[P]ublic accommodations laws do not simply guarantee access to goods or services. Instead, they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace."); *Brush & Nib Studio, LC v. City of Phoenix*, 244 Ariz. 59 Ct. App. 2018) ("When faced with similar contentions, other jurisdictions have overwhelmingly concluded that the government has a compelling interest in eradicating discrimination. Prohibiting places of public accommodation from discriminating against customers is not just about ensuring equal access, but about eradicating the construction of a second-class citizenship and diminishing humiliation and social stigma.").

[34] *EEOC v. R.G.*, 884 F.3d 560 ("The undisputed record demonstrates that Stephens has been and would be harmed by the Funeral Home's discriminatory practices in this case, and the EEOC has a compelling interest in eradicating and remedying such discrimination."); *see also Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 38 (D.C. 1987) ("We consider that the Council of the District of Columbia

exercise strict scrutiny analysis (collectively, such state and federal court decisions are hereafter referred to as the "Anti-Discrimination Decisions").

The compelling interests that the Anti-Discrimination Decisions generally cite include broad interests in prohibiting discrimination,[35] eradicating barriers to equal treatment in the marketplace,[36] and diminishing humiliation and social stigma.[37] Notably, of the Anti-Discrimination Decisions in state courts, only *Brush* applied a state RFRA; and although all apply a type of strict scrutiny analysis, none appear to have applied *O Centro*'s "more focused inquiry" analysis[38] (explored further in Question 3(b)).

The Anti-Discrimination Decisions often cite *Bob Jones Univ.*, 461 U.S. at 604 (1983), for the principle that anti-discrimination laws will withstand religious exercise challenges because the government's compelling interests in eradicating discrimination outweigh burdens on person's exercise of religion. Some legal commentators believe the case stands for the principle that eradicating discrimination in any form is a compelling interest,[39] while others hold it only applies to racial discrimination in education.[40]

The Anti-Discrimination Decisions often cite *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), for the principle that government's compelling interests in diminishing dignitary harms and ensuring equal access to the marketplace justify anti-discrimination laws for the purposes of First Amendment strict scrutiny. In *Roberts*, the U.S. Supreme Court said that an organization's First Amendment right to expressive association did not allow the organization to prohibit female membership in violation of the state's anti-discrimination law. The court said that the anti-discrimination law did not impose any serious burdens on the male members' freedom of expressive association, and even if it had, the law achieved the aforementioned compelling interests in the least restrictive means possible.[41]

Courts have also recognized that, if a government can demonstrate a compelling interest in uniform application of a law by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program, the federal RFRA would not allow religious

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acted on the most pressing of needs when incorporating into the Human Rights Act its view that discrimination based on sexual orientation is a grave evil that damages society as well as its immediate victims.").

[35] *Aloha Bed & Breakfast*, 142 Haw. at 193 ("HRS Chapter 489 is narrowly tailored to achieve Hawai'i's compelling interest in prohibiting discrimination in public accommodations.").

[36] *Arlene's Flowers, Inc.*, 193 Wn.2d at 531 ("[P]ublic accommodations laws do not simply guarantee access to goods or services. Instead, they serve a broader societal purpose: eradicating barriers to the equal treatment of all citizens in the commercial marketplace.").

[37] *Brush & Nib Studio, LC*, 244 Ariz. at 78. ("Prohibiting places of public accommodation from discriminating against customers is not just about ensuring equal access, but about eradicating the construction of a second-class citizenship and diminishing humiliation and social stigma.").

[38] *See supra* text accompanying note 14.

[39] *See* Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes*, 49 Conn. L. Rev. 1 (2016).

[40] Tracey, *Bob Jonesing: Same-Sex Marriage and the Hankering to Strip Religious Institutions of Their Tax-Exempt Status*, 11 FIU L. Rev. 85, 135 (2015) ("Bob Jones is an anomaly. Eradicating race discrimination in education is the only public policy the Court has held so "fundamental" and "overriding" to abrogate the autonomy of religious schools… No similar context exists for sexual orientation discrimination in education.")

[41] *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984).

accommodations to those laws.[42] Some courts outside of Kansas[43] and legal commentators[44] have said that laws prohibiting discrimination (including LGBT Discrimination) serve a compelling interest only by uniform application of such laws (this issue is explored further in Question 3(c)).

Strict scrutiny analysis outside of the free exercise context may be helpful in identifying compelling interests. In the equal protection context, several courts with jurisdiction in Kansas have held that discrimination against LGBT individuals does not require strict scrutiny.[45] Candidly, we are not sure how much weight to give these decisions (if any). The level of scrutiny applied to a law based on the type of class it discriminates against is obviously a different analysis than whether the government has a compelling interest to protect a certain group from private discrimination.[46] However, some courts have stated the relationship is a factor to consider.[47]

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[42] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) ("We do not doubt that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA."); *see also United States* v. *Lee*, 455 U.S. 252 (1982) ("[M]andatory participation is indispensable to the fiscal vitality of the social security system" and that the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."); *see also Braunfeld* v. *Brown*, 366 U.S. 599, (1961) (plurality opinion) (Court denied a claimed exception to Sunday closing laws, in part because allowing such exceptions "might well provide [the claimants] with an economic advantage over their competitors who must remain closed on that day," and the whole point of a "uniform day of rest for all workers" would have been defeated by exceptions.).

[43] *Arlene's Flowers, Inc.*, 193 Wash. 2d at 531 ("Were we to carve out a patchwork of exceptions for ostensibly justified discrimination, that purpose would be fatally undermined."); *see also EEOC v. R.G.*, 884 F.3d 560, 595 (6th Cir. 2018) ("If the government's interest in a "uniform day of rest for all workers" is sufficiently weighty to preclude exemptions… then surely the government's interest in uniformly eradicating discrimination against employees exerts just as much force."); *EEOC v. Mississippi College*, 626 F.2d 477, 489 (5th Cir. 1980) ("We conclude that creating an exemption from the statutory enactment greater than that provided by [Title VII] would seriously undermine the means chosen by Congress to combat discrimination and is not constitutionally required.").

[44] Dhooge, *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?*, 21 Wm. & Mary J. of Women & L. 319, 375-376 (2015) ("Public accommodation statutes serve three interests: the protection of human dignity by prohibiting the degradation associated with discrimination, guaranteeing access to public establishments by imposing upon them a duty not to discriminate with respect to identified protected classes, and defining citizenship "based on the idea that markets seek consumers and thereby bring individuals into central social dynamics that are a part of citizenship." The government has a compelling interest in the advancement of these interests. A religious exemption from public accommodation statutes on the basis of sexual orientation sends a message contrary to these interests. These interests will only be advanced by "broad and uniform application" of public accommodation statutes to all commercial enterprises without exception or exemptions.").

[45] *See Rich v. Secretary of Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) ("Plaintiff contends that the Army's policy of excluding homosexuals violates his rights under the equal protection component of the Fifth Amendment due process clause because homosexuality is an immutable characteristic which must be evaluated under the strict scrutiny standard of review. Furthermore plaintiff says that even if we do not agree that homosexuality is a suspect classification, there is nevertheless an equal protection violation because the Army has not met its burden of justifying discrimination against homosexuals. We cannot agree. A classification based on one's choice of sexual partners is not suspect."); *see also City of Topeka v. Movsovitz*, 1998 Kan. App. Unpub. LEXIS 790, at 12-13 (Ct. App. Apr. 24, 1998) ("Based on case law, it appears that homosexuals are subject to the "rational basis" test.").

[46] Markey, *The Price of Landlord's "Free" Exercise Of Religion: Tenant's Right to Discrimination-Free Housing and Privacy*, 22 Fordham Urb. L.J. 699, 794 (1995) ("United States Supreme Court jurisprudence is replete with examples of compelling governmental interests that did not impact or implicate constitutional interests in the slightest.").

[47] *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 36 (D.C. 1987) ("Although by no means a prerequisite to our conclusion of a compelling governmental interest, we note parenthetically that sexual orientation appears to possess most or all of the characteristics that have persuaded the Supreme Court to apply strict or heightened constitutional scrutiny to legislative classifications under the Equal Protection Clause.").

We are also seeking confirmation of our position that the application of an anti-discrimination law to a commercial business open to the public is not controlled by the Supreme Court's decision in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). In that case, the U.S. Supreme Court held that New Jersey's interest in state law prohibiting LGBT discrimination did not outweigh the Boy Scouts' First Amendment right to free association. In other words, the state's interest in prohibiting LGBT discrimination was not a compelling enough interest to survive expressive association strict scrutiny.[48] Although expressive association and religious exercise are treated differently under the First Amendment, the Supreme Court has indicated First Amendment strict scrutiny tests should be used to apply the federal RFRA.[49] However, as one legal commentator stated, "While the Boy Scouts is properly characterized as an association, and thus may have a collective, associational viewpoint entitled to First Amendment protections, for-profit, commercial entities do not have any characteristics of an association. They are not associations of like-minded people; rather, they exist to sell goods and provide services to the general public--a diffuse, diverse, unassociated collection of people."[50]

Finally, we recognize that whether there's a compelling interest may depend on whether the law applies to housing, employment or public accommodations. For example, many courts have held there is no compelling interest in prohibiting housing discrimination against unmarried couples,[51] but a court might use a very different analysis to determine if there is a compelling interest in prohibiting employment discrimination based on marital status.[52] Any guidance regarding potential differences is appreciated.

Question 3(b). Assuming there are compelling interests in prohibiting discrimination (including on the basis of sexual orientation and gender identity), is it correct that the "more focused inquiry" standard is not required for NDOs, given the broad interests served by anti-discrimination laws, which may be fundamentally undermined by the "more focused inquiry" standard?

The Anti-Discrimination Decisions have generally held that the government's "broadly formulated" interests in prohibiting discrimination on the basis of several protected class statuses, including sexual orientation and gender identity or expression, are compelling interests for the purpose of strict scrutiny

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[48] *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000)

[49] *O Centro*, 546 U.S. at 430. ("The Congress's express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test.").

[50] Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes*, 49 Conn. L. Rev. 1 (2016).

[51] *See State v. French*, 460 N.W.2d 2 (Minn. 1990); *see also Donahue v. Fair Employment & Housing Com.*, 13 Cal. App. 4th 350 (1991); *see also Smith v. Fair Employment & Housing Com.*, 39 Cal. App. 4th 877 (1994).

[52] *State v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 852-54 (Minn. 1985) ("[I]n employment context, state antidiscrimination law passed strict scrutiny in religious free exercise challenge because "[t]he state's overriding compelling interest of eliminating discrimination based upon sex, race, marital status, or religion could be substantially frustrated if employers, professing as deep and sincere religious beliefs as those held by appellants, could discriminate against the protected classes"); *see also State by Johnson v. Porter Farms, Inc.*, 382 N.W.2d 543, 544 (Minn. Ct. App. 1986) ("Manager's constitutional rights to freedom of speech, religion, and association were not violated when he was found to have discriminated against unmarried employee because State had compelling interest in prohibiting employment discrimination.").

analysis,[53] and (other than the Court of Appeals in *Harris Funeral Homes*) do not appear to apply *O Centro*'s "to the person" analysis.[54] *O Centro*'s "to the person" analysis was discussed in *Hobby Lobby*:

> "RFRA, however, contemplates a "more focused" inquiry: It "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." This requires us to "loo[k] beyond broadly formulated interests" and to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants"—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases."[55]

The reason the Anti-Discrimination Decisions cite broadly formulated interests rather than performing a "more focused inquiry" may be because they assume that the interests served by anti-discrimination laws are unique in that they are always compelling whether applied "to the person" or not (i.e. the compelling interest in preventing a specific harm cannot be served if a religious accommodation is granted). This issue is illustrated by the different compelling interest analyses used by the United States District Court for the Eastern District of Michigan and the Sixth Circuit Court of Appeals in *EEOC v. R.G. & G.R. Harris Funeral Homes*. The district court in that case said, "Without any authority to indicate that Title VII is exempted from the analysis set forth in *Hobby Lobby*, this Court concludes that it must be applied here,"[56] and, "The Sixth Circuit could conclude, on appeal, that the more focused analysis set forth in *Hobby Lobby* should not apply in a Title VII case. There is no existing authority to support such a position and it is not this Court's role to create such an exception."[57] Conversely, the Court of Appeals stated:

> "In [*Yoder* and *Holt*], the Court ultimately determined that the interests generally served by a given government policy or statute would not be "compromised" by granting an exemption to a particular individual or group.... Here, the same framework leads to the opposite conclusion. Failing to enforce Title VII against the Funeral Home means the EEOC would be allowing a particular person—Stephens—to suffer discrimination, and such an outcome is directly contrary to the EEOC's compelling interest in combating discrimination in the workforce.... It is true, of course, that the specific harms the EEOC identifies in this case, such as depriving Stephens of her livelihood and harming her sense of self-worth, are simply permutations of the generic harm that is always suffered in employment discrimination cases. But *O Centro*'s "to the person" test does not mean that the government has a compelling interest in enforcing the laws only when the failure to enforce would lead to uniquely harmful consequences. Rather, the question is whether "the asserted harm of granting specific exemptions to particular religious claimants" is sufficiently great to require compliance with the law. *O Centro*, 546 U.S. at 431. Here, for the reasons stated above, the EEOC has adequately demonstrated that Stephens has and would suffer substantial harm if we exempted the Funeral Home from Title VII's requirements."[58]

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[53] *Supra* note 34.

[54] *O Centro*, 546 U.S. at 430-31 ("RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person" -- the particular claimant whose sincere exercise of religion is being substantially burdened.").

[55] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 727 (2014).

[56] *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 858 (E.D. Mich. 2016)

[57] *Id.* at 860 n.10.

[58] *EEOC v. R.G.*, 884 F.3d 560, 591 (6th Cir. 2018).

It appears that the Court of Appeals held that the compelling interest in eradicating employment discrimination, unlike other compelling interests, could not permit a religious accommodation to an anti-discrimination law because such accommodations would cause the precise harms the law is intended to prevent; thus, even under the "to the person" analysis, the religious exemption should be denied.

Regarding the principle that anti-discrimination laws cannot be served if a religious accommodation is granted (i.e. uniform application of anti-discrimination laws is the only way to serve the laws' compelling interests), we think the reasoning by the Sixth Circuit Court of Appeals is a much more persuasive than the conclusory holdings in the other Anti-Discrimination Decisions. At least one other district level federal court has adopted reasoning similar to the Court of Appeals,[59] but we have not found any court with jurisdiction in Kansas that has done so, and we note some legal commentators believe the Court of Appeals was wrong to reject the district court's approach.[60]

Question 3(c). Assuming that uniform application of NDOs serves a compelling state interest in prohibiting discrimination (including based on sexual orientation and gender identity), are such NDOs the least restrictive means of achieving that compelling interest under the KPRFA?

The Anti-Discrimination Decisions generally hold that laws prohibiting discrimination (including LGBT Discrimination) are always the least restrictive means of achieving those laws' compelling interests,[61] while other courts (hereafter the "Free Exercise Decisions") have held less restrictive means may exist to achieve the interests served by such laws.[62] We think the Anti-Discrimination Decisions may be assuming

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[59] *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 810-11 (S.D. Ind. 2002) ("[T]he EEOC's intrusion into [the defendant's] religious practices is pursuant to a compelling government interest,"—i.e., "the eradication of employment discrimination based on the criteria identified in Title VII....").

[60] Brennan, *Playing Outside The Joints: Where The Religious Freedom Restoration Act Meets Title VII*, 68 Am. U.L. Rev. 569 (2018) ("The district court's decision in Harris Funeral Homes, continues the trend of diverging away from Congress's intent to establish a pre-*Smith* interpretation of RFRA, and is consistent with *Hobby Lobby*... The Sixth Circuit's reversal diverged from Supreme Court precedent.").

[61] *Brush & Nib Studio, LC v. City of Phoenix*, 244 Ariz. 59, 77-78 (Ct. App. 2018) ("Other courts have addressed this "go elsewhere" argument and found it unpersuasive. We agree with those courts. Prohibiting places of public accommodation from discriminating against customers is not just about ensuring equal access, but about eradicating the construction of a second-class citizenship and diminishing humiliation and social stigma. The least restrictive way to eliminate discrimination in places of public accommodation is to expressly prohibit such places from discriminating."); *see also Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 39 (D.C. 1987) ("To tailor the Human Rights Act to require less of the University than equal access to its "facilities and services," without regard to sexual orientation, would be to defeat its compelling purpose."); *see also* Transcript of Oral Argument at 28-29, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 419 (2017) (No. 16-111) (Justice Sotomayor stating, "[M]ost military bases are in isolated areas far from cities and that they're in areas where the general population, service population, is of one religion or close to one religious belief. So where there might be two cake bakers.... Or two florists or one photographer. Very small number of resources... And in those situations, they posit, and I don't think probably wrongly, that it may come to pass where the two cake bakers will claim the same abstention here. So how do we protect the military men and women who are of the same sex who want to get married in that town because that's where all their friends are, because the base is there?").

[62] *Lexington Fayette Urban Cty. Human Rights Comm'n v. Hands on Originals, Inc.*, 2017 Ky. App. Unpub. LEXIS 371, at *24 (Ct. App. May 12, 2017) (Lamber, concurring) (unpublished) ("Here, instead of providing an owner of a closely-held business, or the like, with an alternative means of accommodating a patron who wishes to promote a cause contrary to the owner's faith, the fairness ordinance forces the owner to either join in the requested violation of

that governments have a compelling interest in uniform application of anti-discrimination laws (or that their compelling interests can only be served through uniform application), and that such anti-discrimination laws are always the least restrictive means of achieving that interest. However, only a handful of decisions expressly cite this reasoning. One court that did is the Court of Appeals in *Harris Funeral Homes*:

> "The EEOC, Stephens, and several amici argue that searching for an alternative to Title VII is futile because enforcing Title VII is itself the least restrictive way to further EEOC's interest in eradicating discrimination based on sex stereotypes from the workplace… We agree.
>
> To start, the Supreme Court has previously acknowledged that "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA." *O Centro*, 546 U.S. at 436. The Court highlighted *Braunfeld v. Brown*, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961), as an example of a case where the "need for uniformity" trumped "claims for religious exemptions." *O Centro*, 546 U.S. at 435. In *Braunfeld*, the plurality "denied a claimed exception to Sunday closing laws, in part because . . . [t]he whole point of a 'uniform day of rest for all workers' would have been defeated by exceptions." *O Centro*, 546 U.S. at 435 (quoting *Sherbert*, 374 U.S. at 408 (discussing *Braunfeld*)). *Braunfeld* thus serves as a particularly apt case to consider here, as it too concerned an attempt by an employer to seek an exemption that would elevate its religious practices above a government policy designed to benefit employees. If the government's interest in a "uniform day of rest for all workers" is sufficiently weighty to preclude exemptions, *see O Centro*, 546 U.S. at 435, then surely the government's interest in uniformly eradicating discrimination against employees exerts just as much force."[63]

The district court in *Harris Funeral Homes* reached the opposite conclusion, saying, "This Court does not read [*Hobby Lobby*] as indicating that a RFRA defense can never prevail as a defense to Title VII or that Title VII is exempt from the focused analysis set forth by the majority." The district court ultimately concluded the EEOC failed the least restrictive means test, saying "the EEOC has not provided a focused 'to the person' analysis of how the burden on the Funeral Home's religious exercise is the least restrictive means of eliminating clothing gender stereotypes at the Funeral Home under the facts and circumstances presented here."

Comparing the least restrictive means analysis in the district court and Court of Appeals opinions in *Harris Funeral Homes* is difficult because the former doesn't even address whether there's a compelling

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a sincerely held religious belief, or face a penalty…. Such coercion violates KRS 446.350."); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 860 (E.D. Mich. 2016) ("Thus, the EEOC has not provided a focused "to the person" analysis of how the burden on the Funeral Home's religious exercise is the least restrictive means of eliminating clothing gender stereotypes at the Funeral Home under the facts and circumstances presented here.); *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 693 (N.D. Tex. 2016) ("The government has failed to demonstrate how exempting Private Plaintiffs pursuant to their religious beliefs would frustrate the goal of ensuring "nondiscriminatory access to health care and health coverage," and the government has numerous less restrictive means available to provide access and coverage for transition and abortion procedures."). We note that *Burwell* is not in the anti-discrimination context, but in the medical context, where the government and insurance companies can step in to ensure no third-party harms occur. No similar option appears to be available in the anti-discrimination context.

[63] *EEOC v. R.G.*, 884 F.3d 560, 594 (6th Cir. 2018) ("The EEOC, Stephens, and several amici argue that searching for an alternative to Title VII is futile because enforcing Title VII is itself the least restrictive way to further EEOC's interest in eradicating discrimination based on sex stereotypes from the workplace… We agree.")

interest in uniform application of Title VII (or that the compelling interests served by Title VII can only be achieved through uniform application), while the latter makes that an essential part of its ruling. Some legal commentators have said the district court applied the correct least intrusive means analysis,[64] but that's a difficult conclusion to reach either way when the district court didn't even address whether the government had a compelling interest in uniform application of Title VII.

We think the Supreme Court's statement in *Hobby Lobby*, that laws prohibiting racial discrimination in employment are compelling and precisely tailored to achieve those interests, supports the principle that uniform application of anti-discrimination laws serves those laws' compelling interests through the least restrictive means.[65] Laws that prohibit racial discrimination often include protections for other classes, such as sex and sexual orientation; thus, this passage of *Hobby Lobby* appears instructive in the present context. This statement seems to echo the ruling in *Bob Jones Univ. v. United States*, 461 U.S. at 604 (1983), which held the government's fundamental, overriding interest in eradicating racial discrimination in education "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs," and that a religious accommodation could never be granted when such an interest was being pursued.[66] To justify this blanket preclusion of a religious accommodation for laws intended to eradicate racial discrimination in education, the *Bob Jones* court referenced reasoning from *United States v. Lee*, 455 U.S. 252 (1982) that said the government's interest in uniform application of a law sometimes outweigh the burdens that law places on a person's religious beliefs.[67]

In summary, if there is a compelling interest in prohibiting discrimination that can only be achieved through the uniform application of anti-discrimination laws (that include prohibitions on LGBT Discrimination), then there are strong arguments that enforcing those laws will always be the least restrictive means of achieving that compelling interest.

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[64] Brennan, *Playing Outside The Joints: Where The Religious Freedom Restoration Act Meets Title VII*, 68 Am. U.L. Rev. 569, 610 (2018) ("After assuming the EEOC had a compelling interest, the district court properly applied the narrower least restrictive alternative analysis as set forth in *O Centro* and applied in *Hobby Lobby*. Unlike the Sixth Circuit, the district court did not find itself beholden to the *Hobby Lobby* dicta.").

[65] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733, (2014) ("The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.").

[66] Some legal commentators think it was significant that the *Hobby Lobby* court limited their statement to "racial" discrimination. *See* Lupu, *Moving Targets: Obergefell, Hobby Lobby, and The Future of LGBT Rights, 7 Ala. C.R. & C.L. L. Rev. 1, 62-63* (2015) ("[I]n dicta, Hobby Lobby singled out only race discrimination as a concern of civil rights law that religious freedom should not be able to trump. This prominent omission of discrimination based on sex, religion, national origin, or LGBT status suggests that the government interests in eradicating any of those categories of discrimination might not be compelling, and that religious freedom might therefore prevail over such interests. This omission was of particular and obvious alarm to advocates of equality rights for women as well as members of the LGBT community."). However, the laws discussed by the Court that prohibit racial discrimination often include protections for other classes, such as sex and sexual orientation; thus, this passage of *Hobby Lobby* appears instructive in the present context.

[67] *United States v. Lee*, 455 U.S. 252, 259-60, (1982) ("[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs...The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief... Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.")

Question 3(d). Could exceptions to a NDO prevent the interests served by that law from being found to be compelling for purposes of the KPRFA, and if so, would a governmental entity be able to present evidence that such exceptions do not frustrate its compelling interest(s)?

Courts have recognized that if a law contains exceptions, those exceptions may prove the government lacks a compelling interest for purposes of the federal RFRA (i.e. if the law is underinclusive, it does not serve a compelling interest).[68] However, courts have also said those underinclusiveness arguments may be rebutted by, "showing that [the government] hasn't acted in a logically inconsistent way — by (say) identifying a qualitative or quantitative difference between the particular religious exemption requested and other secular exceptions already tolerated, and then explaining how such differential treatment furthers some distinct compelling governmental concern."[69]

We are not able to identify any reasons that carve-outs for small businesses or schools from anti-discrimination laws would cause less dignitary or equal access harms (or other potential compelling interests served by anti-discrimination laws) than a religious accommodation, or what compelling interests such carve-outs would promote. However, carve-outs for constitutionally protected organizations (e.g. religious institutions, social associations with free expression rights, etc.) may achieve protection of constitutionally protected activities that are as or more compelling than the free exercise rights of the religious objector. For this reason, we think that generally a government will only be able to satisfy KPRFA's compelling interest test for an anti-discrimination law if its only exceptions are for constitutionally protected areas.

Question 3(e). For purposes of the KPRFA, what evidence must a city introduce to establish, as a matter of law, a compelling interest that is served by a law prohibiting discrimination on the basis of sexual orientation and gender identity or expression?[70]

Guidance on what qualifies as a compelling interest for purposes of the KPRFA or the federal RFRA appears limited to a handful of federal court decisions,[71] along with legal commentary.[72] Comparing what courts have found to be compelling interests for purposes of the federal RFRA (e.g. protecting eagle feathers),[73] with the evidence of harms caused by historic discrimination against LGBT individuals,[74] it is

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[68] *EEOC v. R.G.*, 884 F.3d 560, 595 (6th Cir. 2018) ("As both the Supreme Court and other circuits have recognized, "[t]he very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less-restrictive alternatives could exist."); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'").

[69] *Yellowbear v. Lampert*, 741 F.3d 48, 61-62 (10th Cir. 2014).

[70] *Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994) ("Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance, is a question of law.").

[71] *See United States v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002) (collecting examples of compelling interests).

[72] Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U.L. Rev. 917 (1988).

[73] *United States v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002).

[74] *See Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 245 (2008) ("[W]e agree fundamentally with the analysis and conclusion of that case that gay persons are entitled to heightened judicial protection as a suspect class. In

difficult to understand how a government would not be able use that evidence to establish a compelling interest in prohibiting LGBT discrimination. Our question is what type of evidence would a city need to introduce for purposes of the KPRFA to establish a compelling interest of the highest order in eradicating LGBT Discrimination.

Although we have not been able to find much guidance on what evidence a city may introduce to establish a compelling interest for purposes of free exercise strict scrutiny, we think guidance for equal protection strict scrutiny may be useful. In *Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994), the court said:

> An inference of discrimination may be made with empirical evidence that demonstrates "a significant statistical disparity between the number of qualified minority contractors... and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Id.* at 509 (plurality)…That must be evaluated on a case-by-case basis… Further, the adequacy of a municipality's showing of discrimination must be evaluated in the context of the breadth of the remedial program advanced by the municipality. *Id.* at 498. Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance, is a question of law. *Associated Gen. Contractors v. New Haven*, 791 F. Supp. 941, 944 (D. Conn. 1992). Underlying that legal conclusion, however, are factual determinations about the accuracy and validity of a municipality's evidentiary support for its program.

We appreciate any thoughts on the applicability of this analysis to the KPRFA, or any other guidance that may exist.

Private Cause of Action[75]

Question 4. Does the KPRFA provide a claim or defense in a private cause of action?

Federal courts differ on whether the federal RFRA may[76] or may not[77] be used as a defense in a private cause of action. The New Mexico Supreme Court addressed this issue with their state's RFRA

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deciding that issue, the court first observed that the state had conceded that sexual orientation is a characteristic that (1) bears no relation to a person's ability to perform or contribute to society, (2) is associated with pernicious discrimination marked by a history of legal and social disabilities, and (3) is immutable for purposes of the suspectness inquiry."); *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014) (finding that sexual orientation discrimination was entitled to strict scrutiny because of a history of discrimination, that class contributes equally to society, the characteristic is immutable, and the class is politically powerless); *see also Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 38 (D.C. 1987).

[75] *Estate of Pemberton v. John's Sports Ctr., Inc.*, 35 Kan. App. 2d 809, 816 (2006) ("Whether a private right of action exists under a statute is a question of law.").

[76] Some circuits have allowed RFRA to provide a defense in citizen suits, but these may be limited to disputes where the government is capable of enforcing the statute at issue. *Hankins v. Lyght*, 444 F.3d 96,103 (2d Cir. 2006) ("The RFRA language surely seems broad enough…The statutory language states that it 'applies to all Federal law, and the implementation of that law."); *see also EEOC v. Catholic University of America*, 83 F.3d 455, 468–469 (D.C. Cir. 1996) (treating the EEOC and the private plaintiff alike in holding that Catholic University is allowed to claim a RFRA defense).

[77] Some circuits have held that the language in the judicial relief section and in the remainder of the statute suggest that RFRA meant to provide a defense only when obtaining appropriate relief against a government and therefore cannot apply to suits in which the government is not a party. *See* e.g., *Hankins*, 441 F.3d 96 at 144 (Sotomayor J., dissenting); *General Conference Corp. of Seventh Day Adventists v. McGill*, 617 F.3d 402, 410–411 (6th Cir. 2010) (finding that the legislative history and the text of the statute make clear Congress's intent to only provide a defense

("NMRFRA"), saying the NMRFRA did not apply to disputes between private parties because those did not constitute a government restriction.[78] The court found significant that the statute said the only relief authorized is injunctive or declaratory relief *against a government agency*, and that:

> "The list of government agencies does not include the Legislature or the courts. It could be expected that the Legislature would have included itself and the courts… if it meant the NMRFRA to apply in common-law disputes or private enforcement actions."[79]

Unlike the NMRFA, the KPRFA says a "court may grant appropriate relief as may be necessary," [80] rather than "obtain appropriate relief *against a government agency*." Additionally, the KPRFA includes the legislative and judicial branches in its definition of "government."[81] These distinctions may have additional significance because KPRFA's legislative history references *Elane Photography* as one of the reasons the KPRFA was needed.[82]

However, in *McGill*, the court concluded that the federal RFRA did not apply to private disputes because it included language like "*governments* should not substantially burden religious exercise," and its legislative history only included examples of hypothetical lawsuits where the government was a party.[83] Similarly, the KPRFA states that, "*Government* shall not substantially burden a person's civil right to exercise of religion… unless such *government* demonstrates…," and "In order to prevail… the *government* shall demonstrate…." KPRFA's legislative history also appears to only include hypotheticals contemplating the government as a party to a suit.[84] For these reasons, we think the rationale used in *McGill* applies to the KPRFA, and that the KPRFA should not be able to be used as a defense in a suit where the government is not a party.

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when the government is a party to the suit); *see also Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006).

[78] *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 77, 309 P.3d 53 ("The government's adjudication of disputes between private parties does not constitute government restriction of a party's free exercise rights for purposes of the NMRFRA.").

[79] *Id.* at 63.

[80] K.S.A. 60-5303(b).

[81] K.S.A. 60-5302.

[82] *See* Minutes, House Judiciary Committee, Attachment 6, Feb. 18, 2013 (Citing infringements on religious liberty, the Kansas Catholic Conference referenced, "A young Christian husband and wife who operated a photography business in New Mexico declined to photograph a same-sex commitment ceremony on the basis of their religious beliefs, and were subsequently fined nearly $7,000 by the State Human Rights Commission.").

[83] *General Conf. Corp. v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010).

[84] *See* Minutes, House Judiciary Committee, Attachment 6, Feb. 18, 2013; *see also* Minutes, House Judiciary Committee, Attachment 5, Feb. 18, 2013.

Attachment A – Hypotheticals

Public accommodations: A caterer refuses to provide catering services for a same-sex wedding based on the caterer's sincerely held religious beliefs.

Employment: A corporation terminates a public-facing employee, who identifies as a woman but is biologically a male, for wearing a dress to work based on the corporation's sincerely held religious beliefs.

Housing: A landlord refuses to rent an apartment to a same-sex couple based on the landlord's sincerely held religious beliefs.

ORDINANCE NO. 1794

AN ORDINANCE CONCERNING DISCRIMINATION IN EMPLOYMENT, HOUSING, AND PUBLIC ACCOMMODATIONS; AMENDING CHAPTER 35 OF THE CODE OF ORDINANCES OF THE CITY OF MERRIAM, KANSAS CONCERNING HUMAN RESOURCES AND SOCIAL SERVICES BY ADDING ARTICLE III – DISCRIMINATION IN EMPLOYMENT, HOUSING, AND PUBLIC ACCOMMODATIONS PROHIBITED AND SECTIONS 35-50, 35-51, 35-52, AND 35-53.

WHEREAS, The City of Merriam is a community that respects and actively seeks to welcome and protect all those who reside, visit, or do business in our community; and

WHEREAS, the governing body finds that providing protection against wrongful discrimination contributes to the creation of a diverse, welcoming community that promotes harmony and mutual respect, and otherwise promotes the health, safety, and welfare of the citizens of Merriam; and

WHEREAS, the governing body finds that discrimination based on age, race, religion, color, sex, sexual orientation, national origin or ancestry, gender identity, disability, military status, genetic information, marital status, or familial status is wrongful discrimination and inconsistent with the community's goals and values; and

WHEREAS, local, state, and federal laws provide protection against discrimination against certain classes of individuals in housing and state and federal laws provide protection against discrimination against certain classes of individuals in employment and public accommodations, and such laws provide a complaint and enforcement process for parties who allege discrimination in violation of local, state, or federal law; and

WHEREAS, in some instances, current state and federal employment, housing, and public accommodation laws have been interpreted to exclude protection against discrimination and retaliation on the basis of sexual orientation and gender identity, thereby precluding the use of the complaint and enforcement process outlined therein; and

WHEREAS, The City of Merriam desires to extend the law to prohibit discrimination and retaliation based upon sexual orientation and gender identity, giving these characteristics the same protection state and federal law already consistently provide with respect to age, race, religion, color, sex, national origin or ancestry, disability, military status, genetic information, marital status, and familial status, and to provide a complaint and enforcement process to effectuate such protection.

NOW, THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF MERRIAM, KANSAS:

SECTION 1. That the Code of Ordinances, City of Merriam, Kansas, is hereby amended by adding Chapter 35, Article III to be named, "Discrimination in Employment, Housing, and Public Accommodations Prohibited."

SECTION 2. That the Code of Ordinances, City of Merriam, Kansas, is hereby amended by adding a section to be numbered 35-50, which the section reads as follows:

Sec. 35-50. – Definitions.

Except to the extent they are in conflict with the definitions below, the definitions contained within the Kansas Act Against Discrimination, K.S.A. 44-1001 et seq., the Kansas Age Discrimination in Employment Act, K.S.A. 44-1111 et seq., and the Discrimination Against Military Personnel Act, K.S.A. 44-1125 et seq., and amendments thereto, shall be applicable under this article. For purposes of this article, certain terms shall be interpreted or defined as follows unless the context clearly indicates otherwise.

(a) ***Days*** means calendar days. If a deadline falls on a day city hall is not open (*i.e.* a weekend, a holiday recognized by the city, emergency closure) the deadline will be extended to the day city hall is open.

(b) ***Employee*** means any individual employed by an employer, but does not include any individual employed by such individual's parents, spouse, or child or in the domestic service of any individual. Employee also does not include an independent contractor.

(c) ***Employer*** means any individual or entity (*i.e.* corporation, partnership, limited liability company, association, labor organization, mutual company, joint-stock company, trust, unincorporated organization) employing four or more employees, the city (including all departments, boards, agencies), and any city contractor. For purposes of this article, no religious organization or non-profit fraternal or social association/corporation shall be considered to be an employer.

(d) ***Gender identity*** means the actual or perceived gender-related identity, expression, appearance, or mannerisms, or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth.

(e) ***Hearing officer*** means an individual appointed by the mayor, with the consent of the city council, who is charged with determining the validity of alleged violations of this article, and upon determining that a violation has occurred, assessing appropriate damages, penalties, and/or costs, as provided in this article.

(f) ***Investigator*** means an individual(s) appointed by the mayor, with the consent of the city council, who shall be charged with investigating alleged violations of this article.

(g) ***Nonprofit fraternal or social association/corporation*** means an association or corporation that meets all of the following requirements: (1) it is organized in good faith

for social or fraternal purposes; (2) membership entails the payment of bona fide initiation fees or regular dues; (3) there exists a regularly established means of self-government by the members; (4) there is a regularly established means of and criteria for admitting members and for expulsion of members by the existing membership or by their duly elected or appointed delegates; and (5) it is not operated, directly or indirectly for purposes of profit for any individual or groups of individuals other than the membership as a whole.

(h) ***Place of public accommodation*** shall include every establishment within the city that is open to the public and offers any product, service, or facility. The term "place of public accommodation" shall include, but not be limited to, all taverns, hotels, motels, apartment hotels, apartment houses with more than four tenant units, restaurants or any place where food or beverages are sold, retail and wholesale establishments, hospitals, theaters, motion picture houses, museums, bowling alleys, golf courses and all public conveyances, as well as the stations or terminals thereof. The term "place of public accommodation" shall not, however, include: (1) a religious organization; (2) any hotel, motel, restaurant or theater operated by a nonprofit fraternal or social association/corporation that restricts its facilities and services to the members of such association/corporation and their guests; or (3) any nonprofit fraternal or social association/corporation, or bona fide civic, political, or religious organization, when the profits of such association/corporation or organization, above reasonable and necessary expenses, are solely for its benefit or mission.

(i) ***Religious organization*** means a church, mosque, synagogue, temple, nondenominational ministry, interdenominational and ecumenical organization, mission organization, faith-based social agency, or other entity principally devoted to the study, practice, or advancement of religion.

(j) ***Rent*** means to lease, to sublease, to let, or otherwise to grant for a consideration the right to occupy a premises not owned by the occupant.

(k) ***Rental housing*** means any real property, consisting of more than four dwelling units, which is required to obtain a license or permit pursuant to the provisions of Chapter 14 of the Merriam Code.

(l) ***Respondent*** means the individual or entity against whom a complaint alleging discrimination or retaliation has been filed with the city.

(m) ***Sexual orientation*** means an individual's perceived or actual emotional, romantic, or sexual attraction to other people. It can be described as, but not limited to, heterosexual, homosexual, bisexual, or asexual.

SECTION 3. That the Code of Ordinances, City of Merriam, Kansas, is hereby amended by adding a section to be numbered 35-51, which the section reads as follows:

Sec. 35-51. – Declaration of Policy.

(a) The right of an otherwise qualified individual to be free from discrimination because of that individual's age, race, religion, color, sex, sexual orientation, national origin or ancestry, gender identity, disability, military status, genetic information, marital status, or

familial status is hereby recognized. This right shall include, but not be limited to, any of the following:

1. The right to pursue and hold employment and the benefits associated therewith without wrongful discrimination.
2. The right to the full enjoyment of any of the services, advantages, or privileges of any place of public accommodation without wrongful discrimination.
3. The right to engage in property transactions, including obtaining housing for rent or sale and credit therefor, without wrongful discrimination.
4. The right to exercise any right granted under this ordinance without retaliation.

(b) To protect these rights, it is hereby declared to be the purpose of this article to extend the law to prohibit discrimination and retaliation based upon sexual orientation and gender identity and to provide a local process for the acceptance, investigation, and resolution of complaints of discrimination and retaliation relating to sexual orientation and/or gender identity arising hereunder.

SECTION 4. That the Code of Ordinances, City of Merriam, Kansas, is hereby amended by adding a section to be numbered 35-52, which the section reads as follows:

Sec. 35-52. – Unlawful Practices.

(a) **Employment**. It shall be an unlawful discriminatory practice for an employer, because of the sexual orientation or gender identity of any individual to refuse to hire or employ such individual, to bar or discharge such individual from employment, or to otherwise discriminate against such person in compensation or in terms, conditions, or privileges of employment; to limit, segregate, separate, classify, or make any distinction in regards to employees; or to follow any employment procedure or practice which, in fact, results in discrimination, or segregation without a valid business necessity.

(b) **Housing**. It shall be an unlawful discriminatory practice for an individual or entity to discriminate against any individual in the terms, conditions, or privileges of sale or lease of real property or lease of rental housing, or in the provision of services or facilities in connection therewith, because of sexual orientation or gender identity or to discriminate against any individual in such individual's use or occupancy of rental housing because of the sexual orientation or gender identity with whom such individual associates.

(c) **Public Accommodation**. It shall be an unlawful discriminatory practice for the owner, operator, lessee, manager, agent, or employee of any place of public accommodation to refuse, deny, or make a distinction, directly or indirectly, in offering its goods, services, facilities, privileges, advantages, and accommodations to any individual because of sexual orientation or gender identity.

(d) Nothing in this article shall:

(1) prohibit an employer from requiring an employee, during the employee's hours at work, to adhere to reasonable dress or grooming standards not prohibited by other provisions of federal, state, or local law.

(2) prohibit a religious organization from limiting the sale, rental, or occupancy of real property which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons. Nor shall anything in this article prohibit a nonprofit fraternal or social association/corporation in fact not open to the public, which as an incident to its primary purpose or purposes provides lodgings that it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

(3) be construed to prohibit an employer from requiring all of its employees, as a condition of employment, to utilize the employer's applicable established internal human resource procedure(s) to address any allegation of discrimination or retaliation in the workplace. The fact that an employer requires an employee to utilize the employer's applicable established internal human resource procedure(s) to address any allegation of discrimination or retaliation in the workplace shall not, in itself, be deemed a violation of this article. However, an employee may simultaneously file a complaint with the city as provided in this ordinance; completion of the employer's procedures is not a pre-requisite to filing a complaint with the city.

(4) be construed to require any entity subject to this article to make changes requiring a building permit to any existing facility, except as otherwise required by law.

(5) be construed to make it lawful to discriminate or retaliate against individuals on the basis of age, race, religion, color, sex, national origin or ancestry, disability, military status, genetic information, marital status, or familial status. Such discrimination and retaliation are not addressed in this article because federal and state law consistently address unlawful discriminatory and retaliatory practices related to those characteristics and provide a complaint, investigation, and enforcement process for such discrimination and retaliation.

SECTION 5. That the Code of Ordinances, City of Merriam, Kansas, is hereby amended by adding a section to be numbered 35-53, which the section reads as follows:

Sec. 35-53. – Enforcement.

(a) An aggrieved individual may file a written complaint with the city clerk that the individual has been, or is being, subject to an alleged unlawful discriminatory practice set forth in this article personally or through an attorney (or if a minor, through the minor's parent, legal guardian or attorney) by completing and signing the form provided by the city. The complaint form shall state the names and contact information of the aggrieved individual, the individual(s) and/or entity/entities alleged to have committed the unlawful discriminatory practice(s), a description of the alleged unlawful conduct and all other information as may be required by the form provided the city. The city will provide the complaint form without charge.

(b) The complaint form shall be submitted to the investigator and shall be considered complete if all information required by the city's form has been provided to the extent such requested information is reasonably available to the aggrieved individual.

(c) A completed complaint form must be filed within 60 days of the alleged unlawful discriminatory practice, unless the act complained of constitutes a continuing pattern or practice of discrimination, in which event it must be filed within 60 days of the last act of discrimination.

(d) Upon receipt of a completed complaint, the investigator shall notify the respondent(s) of the complaint, providing sufficient details related to the complaint so that the respondent(s) may respond. The investigator shall give the respondent(s) 30 days to file a written answer to the complaint and provide any documentation or evidence related to the complaint. The investigator may, at the request of the respondent(s), extend the answer period for an additional 30 days. If the respondent(s) charged with violating the provisions of this article is the city, the city will engage an independent investigator who shall not otherwise be an employee, agent, or contractor of the city and shall not have any association with the complainant or the respondent(s).

(e) Following the conclusion of the answer period, the investigator may initiate an investigation period, requesting that the complainant and/or respondent(s) provide additional information, documentation, or testimony as needed to facilitate the investigation of the complaint. This investigation period shall be completed within a reasonable period of time following the submission of additional information, documentation, or testimony.

(f) Upon the conclusion of the investigation period, the investigator will review all evidence received during the investigation and make a determination whether probable cause exists that the respondent(s) committed an unlawful discriminatory practice.

(g) If the investigator finds that probable cause does not exist, then the investigator shall notify the complainant and respondent(s) and no further action shall be taken by the city. The complainant may appeal the investigator's determination to the District Court of Johnson County, Kansas, in accordance with K.S.A. 60-2101(d), and amendments thereto. Within 30 days of service of notice of the appeal pursuant to K.S.A. 60-2101(d), or within further time allowed by the court or by other provision of law, the city shall transmit to the court a certified copy of the investigator's written determination and a certified copy of all evidence received by the investigator during the investigation.

(h) If the investigator finds that probable cause exists that an unlawful discriminatory practice was committed by respondent(s), the investigator shall notify the complainant and respondent(s) and request conciliation and settlement. If a party refuses to participate in conciliation and settlement, or if a settlement agreement is not executed within 60 days of the date of the finding of probable cause, the matter shall be referred to the hearing officer for a hearing. The investigator may extend the time for signing a settlement agreement for good cause and with written notice to the parties. Any fees charged by the investigator for investigating alleged violations of this article shall be split equally between the parties, unless the investigator determines that the circumstances warrant assessing the costs in some other manner.

(i) Upon referral to the hearing officer, the hearing officer shall schedule a hearing on the complaint. The parties shall be given at least ten days' written notice via certified mail of the date, time, and place of the hearing. At such hearing, the parties and the investigator shall

be entitled to call witnesses and to present such other evidence as appropriate. The hearing shall be conducted in accordance with such procedures as may be established by the hearing officer, but the rules of evidence used in courts of law need not be strictly enforced. Following the conclusion of the hearing, the hearing officer may announce a determination or may take the matter under advisement for determination at a later date.

(j) Any determination of the hearing officer shall be in writing, shall be based upon the preponderance of the evidence, and shall set forth the essential elements of the determination. If the hearing officer finds that a violation of this article has occurred, the hearing officer may award to the complainant actual damages, or a civil penalty in the amount of $1,000.00, whichever is greater, for each violation. Each party is to bear their own attorneys' fees, if any. The investigator's fees for participating in the hearing and the hearing officer's fees, if any, shall be assessed to the non-prevailing party unless the hearing officer determines that the circumstances warrant assessing the costs in some other manner.

(k) Any person aggrieved by a determination of the hearing officer under this section may appeal that determination to the District Court of Johnson County, Kansas, in accordance with K.S.A. 60-2101(d), and amendments thereto. Within 30 days of service of the notice of appeal pursuant to K.S.A. 60-2101(d), or within further time allowed by the court or by other provision of law, the city shall transmit to the court a certified copy of the written determination of the hearing officer and a certified copy of all the evidence presented at the hearing. On appeal, the district court may enter such order or judgment as justice shall require, and may award court costs and reasonable attorney fees incurred to prosecute or defend the appeal to the prevailing party.

(l) The filing of a complaint for an alleged violation of this article shall in no way preclude any individual from seeking other relief under state or federal law.

SECTION 6. Severability. If any section, subsection, sentence, clause or phrase of this Ordinance is, for any reason, held to be invalid, such invalidity shall not affect the validity of the remaining portions of this Ordinance and the Governing Body hereby declares that it would have passed the remaining portions of this Ordinance if it would have known that such part or parts thereof would be declared invalid.

SECTION 7. Effective Date. This Ordinance shall be in full force and effect from and after its passage, approval, and publication as provided by law.

PASSED AND APPROVED by the City Council this 14th day of January, 2019.

APPROVED by the Mayor this 14th day of January, 2019.

Ken Sissom, Mayor