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Clash of the Titans: Seeking Guidance for Adjudicating the Conflict Between Equality and Religious Liberty in LGBT Litigation

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I. INTRODUCTION

Considered the next frontier of LGBT litigation, equality groups and state civil rights organizations have had to confront religious liberty advocates in court over the question of religious exceptions. Photographers, florists, innkeepers, and even doctors have brought suits arguing that the Free Exercise Clause of the First Amendment requires states to provide religious exceptions from state nondiscrimination laws that prohibit sexual orientation discrimination.[1] Religious liberty advocates argue that these individuals should be allowed to refuse to provide services based on sexual orientation, in contravention of protective nondiscrimination statutes, provided that the refusal stems from a sincerely held religious belief.

Under current First Amendment doctrine, these claims have almost universally failed. Starting with the United States Supreme Court case *Sherbert v. Verner*, Free Exercise doctrine provided individual exceptions to statutes that substantially burdened religious beliefs when the government could not satisfy strict scrutiny—that is, demonstrate that the statute burdening those beliefs was narrowly tailored to a compelling governmental interest.[2] In 1990, however, the Supreme Court decided *Employment Division v. Smith*,[3] substantially altering Free Exercise jurisprudence. In that case, the Court both denied a religious exception from state drug laws and created a new standard: if a statute is neutral, generally applicable, and only incidentally burdens religious liberty, the

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1. *See* Elane Photography, LLC v. Willock, 284 P.3d 428, 445 (N.M. Ct. App. 2012), *aff'd*, 309 P.3d 53 (N.M. 2013) (rejecting a photographer's claim that New Mexico's antidiscrimination provision prohibiting sexual orientation discrimination violated her First Amendment rights); N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct., 189 P.3d 959, 970-71 (Cal. 2008) (finding the application of state prohibitions against sexual orientation discrimination to a religiously motivated physician constitutional); Baker v. Wildflower Inn, No. 183-7-11 Cacv, 3 (Vt. Super. Ct. Apr. 11, 2012), *available at* https://www.aclu.org/files/assets/wildflower_-_order_denying_mot_to_dimiss_granting_renewd_mot_to_intervene_and_granting_mot_to_amend.pdf, *archived at* http://perma.cc/P5TZ-ABWH (denying inn's motion to dismiss claim of sexual orientation discrimination in violation of Vermont's public accommodations act); Complaint at 2, Ingersoll v. Arlene's Flowers, Inc., No. 13-2-00953-3 (Super. Ct. Wash. Apr. 18, 2013), *available at* https://aclu-wa.org/sites/default/files/attachments/Complaint%20-%20Intersoll%20v%20Arlene's%20Flowers%20(2).pdf, *archived at* http://perma.cc/D453-E9JR; *see also ACLU Files Suit for Gay Couple Discriminated Against by Florist*, ACLU WASH. ST. (Apr. 18, 2013), http://aclu-wa.org/news/aclu-files-suit-gay-couple-discriminated-against-florist, *archived at* http://perma.cc/N47-5SBZ (describing *Ingersoll v. Arlene's Flowers, Inc.*, recently filed in Washington state court).

2. 374 U.S. 398, 403-10 (1963); *see also* Wisconsin v. Yoder, 406 U.S. 205, 235-36 (1972) (granting a religious exception from compulsory education laws to Amish parents, whose religious beliefs required that their children not attend high school).

3. 494 U.S. 872, 890 (1990).

government only needs to demonstrate that the statute bears a rational relationship to a legitimate government interest to justify denying a religious exception.[4] However, as the Court reaffirmed three years later, when a statute is not neutral or generally applicable, *Sherbert*'s strict scrutiny standard still applies.[5] Because state nondiscrimination statutes are neutral and generally applicable, both textually and in application, religious liberty advocates using the First Amendment to support requesting an exception have generally failed.[6]

However, religious liberty advocates have begun turning to state constitutional free exercise clauses and state statutory religious liberty protections to justify religious exceptions.[7] These laws present a threat to the enforceability of state nondiscrimination statutes against those seeking an exception based on religious beliefs. Every state has a constitutional religious liberty provision, and sixteen states have enacted Religious Freedom Restoration Acts.[8] Many of these laws reinstate the *Sherbert* standard; however, these provisions have barely been litigated, and neither academic scholarship nor courts have provided consistent guidance on how to analyze state claims for religious exceptions from state sexual orientation nondiscrimination provisions.

State supreme courts have, however, provided an analytical framework that courts may use to adjudicate the conflict between religious liberties and sexual orientation nondiscrimination laws. Between 1990 and 1996, state courts faced the question of whether state constitutional free exercise clauses, independent of the federal Free Exercise Clause, provided exceptions for landlords whose religious

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4. *Id.* at 880-81. In delivering the majority opinion, Justice Scalia did suggest, however, that a free exercise claim might be viable if the alleged infringement implicated "the Free Exercise Clause in conjunction with other constitutional protections," such as the right to free speech or the right of parents to direct the education of their children. *Id.* at 881.

5. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546-47 (1993) (finding that certain statutes were not neutral or generally applicable because they targeted Santeria's religious animal sacrifices and applying strict scrutiny).

6. *See Elane Photography*, 284 P.3d at 441-43; *N. Coast Women's Care Med. Grp., Inc.*, 189 P.3d 959. This is also true for those challenging nondiscrimination provisions in professional and academic ethics codes. *Compare* Keeton v. Anderson-Wiley, 664 F.3d 865, 880 (11th Cir. 2011) (finding that requiring a graduate counseling student to abide by sexual orientation nondiscrimination provisions in the American Counseling Association's Code of Ethics did not unconstitutionally burden the student's religious freedoms under the First Amendment), *with* Ward v. Polite, 667 F.3d 727, 738 (6th Cir. 2012) (finding that a university enforced its requirement that students comply with the Code of Ethics in a manner "riddled with exemptions" that burdened religious beliefs but not secular beliefs).

7. *See Elane Photography*, 284 P.3d at 440-41, 444-45 (raising a state constitutional and state statutory religious liberty claim).

8. Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 477 (2010).

beliefs were burdened by marital status nondiscrimination provisions.[9] These cases arose in a neat bubble: they reached state supreme courts in fairly quick succession, and the later cases referenced or built from the analyses of prior cases. The state courts created a coherent and comprehensive framework for analyzing the conflict between state constitutional free exercise provisions and state marital status nondiscrimination laws. That framework is applicable to the current conflict between state constitutional and state statutory religious liberty provisions and state sexual orientation nondiscrimination laws.

Part II of this Article provides an overview of state religious liberty provisions. Part III examines a collection of marital status housing discrimination cases and demonstrates that these cases created a comprehensive analytical framework for the conflict between state constitutional free exercise clauses and state marital status nondiscrimination provisions. Finally, Part IV argues that this framework is applicable to the conflict between state constitutional and statutory religious liberty provisions and state sexual orientation nondiscrimination provisions and demonstrates how the framework may be applied.

II. STATE CONSTITUTIONAL AND STATE STATUTORY RELIGIOUS LIBERTY PROVISIONS

As religious liberty advocates fail to procure religious exceptions from state nondiscrimination provisions through the Free Exercise Clause, they might turn to two alternate forms of religious liberty protections: state constitutional free exercise clauses and state statutory Religious Freedom Restoration Acts (RFRAs). This Part provides an overview of each and demonstrates how either could reinstate the *Sherbert* standard, under which LGBT advocates are forced to meet a heightened standard of scrutiny to justify the burden nondiscrimination provisions place on individual religious beliefs.

A. State Constitutional Free Exercise Clauses

Every state has a constitutional free exercise clause.[10] Some of these clauses are textually similar to the federal Free Exercise Clause,[11]

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9. *See infra* Part III.

10. RANDY J. HOLLAND, STEPHEN R. MCALLISTER, JEFFREY M. SHAMAN & JEFFREY S. SUTTON, STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE 523 (2010).

11. *See, e.g.*, MASS. CONST. amend. art. XVIII, § 1; PA. CONST. art. I, § 3; VA. CONST. art. I, § 16.

while others include lengthier provisions.[12] Additionally, some states interpret their state constitutional provisions as identical to and tracking the federal equivalent—a doctrine known as "lockstepping"[13]—while other states interpret their provisions as providing heightened protections beyond the floor the Constitution requires.[14] For example, Montana enacted a free exercise clause that is textually similar to the federal Free Exercise Clause[15] and implicitly lockstepped its state constitutional provision with the federal Free Exercise Clause.[16] Tennessee enacted a lengthier free exercise clause[17] and has interpreted its clause to provide "a substantially stronger guaranty of religious freedoms" than the federal Free Exercise Clause.[18] Colorado enacted a lengthier free exercise clause[19] but has consistently interpreted its state provision in lockstep with the federal Free Exercise Clause.[20] Thus, state free exercise clauses are (1) either textually similar to or lengthier than the federal Free Exercise Clause and (2) either interpreted in lockstep with or interpreted as more protective than the federal Free Exercise Clause. As demonstrated by Colorado, the two variables do not necessarily move in tandem; that is, a longer provision does not necessitate a more protective standard. Before *Smith*, state laws burdening religious beliefs required a strict scrutiny analysis in order to justify denying a religious exception regardless of the text of the state's constitutional provisions, because of the high standard instituted by *Sherbert*[21] and because each state must provide at least as much protection as the U.S. Constitution.[22]

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12. *See, e.g.*, MINN. CONST. art. I, § 16; NEB. CONST. art. I, § 4; OHIO CONST. art. I, § 7; TEX. CONST. art. I, § 6.

13. *See* Helen Gunnarsson, *The Limited Lockstep Doctrine*, 94 ILL. B.J. 340, 340 (2006) ("[W]hen a state constitutional provision placed at issue is effectively identical to one in the federal constitution, Illinois courts have generally followed the decisions of the United States Supreme Court in construing state constitutional provisions. This rule is known as the 'lockstep doctrine.'").

14. HOLLAND ET AL., *supra* note 10, at 125-26; *see also* Stephen McAllister, Comment, *Interpreting the State Constitution: A Survey and Assessment of Current Methodology*, 35 U. KAN. L. REV. 593, 604-18 (1987).

15. *See* MONT. CONST. art. II, § 5.

16. *See* Miller v. Catholic Diocese of Great Falls, Billings, 728 P.2d 794, 797 (Mont. 1986) (using U.S. Supreme Court standards to find that an action violated both the Free Exercise Clause and Montana's state constitutional free exercise clause).

17. *See* TENN. CONST. art. I, § 3.

18. State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 107 (Tenn. 1975).

19. *See* COLO. CONST. art. II, § 4.

20. *See* Conrad v. City & County of Denver, 656 P.2d 662, 670-71 (Colo. 1982) (en banc) (stating that the state constitutional free exercise provision "embod[ies] similar values" as the First Amendment).

21. Sherbert v. Verner, 374 U.S. 398, 403-10 (1963).

22. HOLLAND ET AL., *supra* note 10, at 126.

Once the Supreme Court substantially reduced the likelihood that individuals could receive religious exceptions through the Free Exercise Clause, some states that had previously interpreted their constitutional provisions in lockstep with the Free Exercise Clause explicitly diverged from the Supreme Court and retained the *Sherbert* standard for state constitutional free exercise claims.[23] Additionally, some states that retained the *Sherbert* standard lacked state case law analyzing their constitutional free exercise provisions and rejected the use of federal case law as guidance.[24] As a result, these states began to engage in unique analyses, facing the implementation of the *Sherbert* strict scrutiny standard in state constitutional claims as questions of first impression. In this post-*Smith* world, state constitutional free exercise cases present a substantially different analysis and methodology than those of the past. Additionally, some state courts may grant religious exceptions to nondiscrimination provisions that incidentally burden religious liberty unless those provisions can withstand strict scrutiny.

B. State Religious Freedom Restoration Acts

In response to *Smith*, the United States Congress passed the Religious Freedom Restoration Act (RFRA), which reinstated the *Sherbert* standard: laws that substantially burden an individual's religious beliefs must withstand strict scrutiny or provide a religious exception to the burdened individual.[25] Passed in 1993, Congress intended RFRA to apply to both federal and state law,[26] and only Connecticut passed a contemporaneous state RFRA.[27] However, in *City of Boerne v. Flores*, the Supreme Court rejected the application of RFRA

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23. *See* Hill-Murray Fed'n of Teachers, St. Paul, Minn. v. Hill-Murray High Sch., Maplewood, Minn., 487 N.W.2d 857, 865 (Minn. 1992); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 182 (Wash. 1992) (en banc); *see also* Angela C. Carmella, Symposium: New Directions in Religious Liberty, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 BYU L. REV. 275, 319-25 (1993); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 211-12 (2004) (analyzing which states maintained pre-*Smith* standards and which adopted *Smith*). *But see* Smith v. Emp't Div., 799 P.2d 148, 149 (Or. 1990) (per curiam).

24. *See, e.g.*, Humphrey v. Lane, 728 N.E.2d 1039, 1044 (Ohio 2000) (stating that Ohio's free exercise protections are broader than the federal government's and that "[t]he *Smith* decision made it clear that earlier federal jurisprudence on free exercise claims should not be relied upon when contemplating religion-neutral, generally applicable laws").

25. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2006).

26. *Id.* § 2000bb-2 (defining "government" to include both federal and state government entities).

27. 1993 Conn. Legis. Serv. 801 (West) (codified at CONN. GEN. STAT. § 52-571b (2006)).

to state laws.[28] In quick succession, ten states passed similar laws,[29] with four more states passing state RFRAs in the succeeding twelve years.[30] Barely litigated, state RFRAs now create an imposing and unknown legal specter in fifteen states.[31]

State RFRAs generally reinstate the *Sherbert* standard, requiring statutes to withstand strict scrutiny once an individual's beliefs have been sufficiently burdened.[32] Additionally, the vast majority of state RFRAs directly reject *Smith* and explicitly stipulate that even generally applicable laws may trigger strict scrutiny.[33] However, the statutes differ regarding how much of a burden must exist before the statute's heightened scrutiny is triggered. Some, like the standard in *Sherbert*, require that a religious belief be substantially burdened;[34] others apply to any burden[35] or restriction on religious liberty.[36] The few courts that have considered state RFRA claims have unsurprisingly interpreted state RFRAs as requiring laws that sufficiently burden religious liberties to undergo a more heightened scrutiny analysis than the Free Exercise Clause requires.[37] Ultimately, whether through state RFRAs or reinterpretations of state constitutional provisions, many states have independently reinstated the *Sherbert* strict scrutiny analysis.

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28. City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (upholding RFRA's constitutionality with respect to federal law).

29. ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. §§ 41-1493.01 (2013); FLA. STAT. ANN. §§ 761.01-.05 (West 2010); IDAHO CODE ANN. §§ 73-402 (West 2013); 775 ILL. COMP. STAT. ANN. 35/1-99 (West 2009); N.M. STAT. ANN. §§ 28-22-1 to -5 (West 2012); OKLA. STAT. ANN. tit. 51, §§ 251-258 (West 2010); R.I. GEN. LAWS ANN. §§ 42-80.1-1 to .4 (West 2006); S.C. CODE ANN. §§ 1-32-10 to -60 (2010); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012 (West 2009).

30. MO. REV. STAT. §§ 1.302-.307 (2013); 71 PA. CONS. STAT. ANN. §§ 2401-2407 (West 2013); TENN. CODE ANN. §§ 4-1-407 (2009); VA. CODE ANN. §§ 57-2.02 (2009).

31. *See* Lund, *supra* note 8, at 473-79, 496-97 (discussing the history and possible implications of state RFRAs).

32. *E.g.*, ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. §§ 41-1493.01 (West 2013); FLA. STAT. ANN. §§ 761.01-.05 (West 2010); 775 ILL. COMP. STAT. ANN. 35/1-99 (West 2009); N.M. STAT. ANN. §§ 28-22-1 to -5 (West 2012); OKLA. STAT. ANN. tit. 51, §§ 251-258 (West 2010); R.I. GEN. LAWS ANN. §§ 42-80.1-1 to -4 (West 2006); S.C. CODE ANN. §§ 1-32-10 to -60 (2010); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012 (West 2009).

33. *E.g.*, ARIZ. REV. STAT. §§ 41-1493.01 (West 2013); CONN. GEN. STAT. § 52-571b (2006); FLA. STAT. ANN. §§ 761.01-.05 (West 2010); IDAHO CODE ANN. §§ 73-402 (West 2013); 775 ILL. COMP. STAT. ANN. § 35/1-99 (West 2009); *see* R.I. GEN. LAWS ANN. §§ 42-80.1-1 to -4 (West 2006); S.C. CODE ANN. §§ 1-32-10 to -60 (2010); TENN. CODE ANN. § 4-1-407 (2009).

34. *E.g.*, ARIZ. REV. STAT. §§ 41-1493.01 (2013); IDAHO CODE ANN. § 73-402 (West 2013); OKLA. STAT. ANN. tit. 51, §§ 251-258 (West 2010); PA. CONS. STAT. ANN. §§ 2401-2407 (West 2013); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012 (West 2009).

35. *E.g.*, ALA. CONST. art. I, § 3.01; CONN. GEN. STAT. § 52-571b (2006).

36. *E.g.*, MO. REV. STAT. §§ 1.302-.307 (2013); N.M. STAT. ANN. §§ 28-22-1 to -5 (West. 2012); R.I. GEN. LAWS ANN. §§ 42-80.1-1 to -4 (West 2006).

37. *See, e.g.*, Warner v. City of Boca Raton, 887 So. 2d 1023, 1032 (Fla. 2004); State v. Hardesty, 214 P.3d 1004, 1006-07 (Ariz. 2009) (en banc).

III. *DESILETS*, *SWANNER*, AND THE MARITAL STATUS HOUSING DISCRIMINATION CASES

Between 1990 and 1996, as states independently began to retain the *Sherbert* standard, six different state appellate courts adjudicated conflicts between religious liberties and state marital status nondiscrimination provisions. In each of these cases, landlords with religious beliefs claimed they were entitled to religious exceptions from state housing nondiscrimination laws.[38] The landlords argued that the nondiscrimination provisions burdened their religious beliefs by prohibiting them from refusing to rent housing to unmarried couples; they demanded that the state provide individual religious exceptions from the provisions at issue.[39] One court used an independent analysis that was later discounted,[40] and another found that the statute's burden on the landlord's religious beliefs was insufficient to trigger strict scrutiny.[41] Four courts explicitly referenced, used, and built upon each other's analyses, each requiring that the statute survive the *Sherbert* standard and each reaching the question of whether the state's constitutional provision required that the state exempt these landlords from the marital status nondiscrimination provision. In *Attorney General v. Desilets*,[42] *Swanner v. Anchorage Equal Rights Commission*,[43] *Donahue v. Fair Employment & Housing Commission*,[44] and *State by Cooper v. French*[45]—those courts ultimately examined the same three factors to determine whether the state possessed a compelling interest in eradicating marital status housing

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38. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 276-77 (Alaska 1994) (per curiam); Smith v. Fair Emp't & Housing Comm'n, 913 P.2d 909, 911-13 (Cal. 1996); Donahue v. Fair Emp't & Housing Comm'n, 2 Cal. Rptr. 2d 32, 33-35 (Ct. App. 1991), *review granted and opinion superseded*, 5 Cal. Rptr. 2d 781 (1992), *review dismissed as improvidently granted and remanded*, 23 Cal. Rptr. 2d 591 (1993); Att'y Gen. v. Desilets, 636 N.E.2d 233, 234-35 (Mass. 1994); McCready v. Hoffius, 586 N.W.2d 723, 725 (Mich. 1998), *vacated in part by* 459 Mich. 1235 (1999); State by Cooper v. French, 460 N.W.2d 2, 3-4 (Minn. 1990).

39. *Swanner*, 874 P.2d at 277; *Smith*, 913 P.2d at 913-14; *Donahue*, 2 Cal. Rptr. 2d at 33; *Desilets*, 636 N.E.2d at 234-35; *McCready*, 586 N.W.2d at 725; *Cooper*, 460 N.W.2d at 8.

40. *McCready*, 586 N.W.2d at 729.

41. *Smith*, 913 P.2d at 913-31 (examining Free Exercise Clause, state constitutional, and federal RFRA, and Free Exercise Clause arguments, citing *Swanner*, discounting *Desilets* and *Cooper*, and ultimately finding that an insufficient burden on the landlord's religious beliefs did not trigger strict scrutiny under either RFRA or the state constitution).

42. 636 N.E.2d at 236-38 (examining a state constitutional argument, referencing federal RFRA in a footnote, and citing *Swanner*, *Donahue*, *Cooper*, and *Smith*).

43. 874 P.2d at 280-81 nn.9-10 (examining a state constitutional argument, referencing federal RFRA in a footnote, and distinguishing *Donahue* and *Cooper*).

44. 2 Cal. Rptr. 2d at 38 (examining Free Exercise Clause and state constitutional arguments and citing *Cooper*).

45. 460 N.W.2d at 8-9 (examining a state constitutional argument instead of a Free Exercise argument due to *Smith*).

discrimination: (1) state interest in prohibiting the discrimination at issue, (2) state legislature and judicial treatment of the particular form of discrimination, and (3) the impact of providing individual religious exceptions.[46]

This Article will focus on *Attorney General v. Desilets* and *Swanner v. Anchorage Equal Rights Commission*. *Desilets*, the last of this collection of cases to be decided, presents the most complete analysis of the question before it and of the marital status housing discrimination cases that preceded it and serves as an illustrative example of the analysis used in each of the cases. *Swanner*, the only of these four cases to deny a religious exception, presents a countervailing view of how this common analytical framework may be applied.

A. State Interests and Suspect Classification

The first factor considered in these cases was whether the state possessed an interest in prohibiting marital status housing discrimination[47] beyond its general interest in prohibiting all kinds of discrimination.[48] The court in *Desilets* focused more specifically on whether the Massachusetts Constitution prohibited discrimination based on marital status.[49] After noting that the state constitution did not explicitly prohibit such discrimination, the court determined that marital

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46. *Swanner*, 874 P.2d at 282; *Donahue*, 2 Cal. Rptr. 2d at 44; *Desilets*, 636 N.E.2d at 241; *Cooper*, 460 N.W.2d at 10. Though the cases focused on whether the state had an interest in eradicating the particular form of discrimination, Justice Thomas's dissent from the U.S. Supreme Court's denial of certiorari in *Swanner* indicated that either a state or national policy to eradicate a particular form of discrimination may justify a court finding a compelling state interest in eradicating that form of discrimination. Swanner v. Anchorage Equal Rights Comm'n, 513 U.S. 979, 981 (1994).

47. *See infra* notes 49-57 and accompanying text; *see also Donahue*, 2 Cal. Rptr. 2d at 44 (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983)) (examining the state's interest in eradicating marital status discrimination by considering its position in the hierarchy of discrimination and concluding that race discrimination in education is a "fundamental, overriding" interest while marital status discrimination against unmarried cohabitating couples "simply does not rank very high"); *Cooper*, 460 N.W.2d at 10 (finding that marital status discrimination is not "pernicious" and that the state's interest in eradicating non-pernicious forms of discrimination is less important).

48. *Desilets*, 636 N.E.2d at 238 ("The general objective of eliminating discrimination of all kinds . . . cannot alone provide a compelling State interest that justifies the application of that section in disregard of the defendants' right to free exercise of their religion."); *Donahue*, 2 Cal. Rptr. 2d at 44 ("The state . . . must demonstrate more than the existence of the challenged law to defeat the guarantee of the free exercise of religion.").

49. *Desilets*, 636 N.E.2d at 239.

status discrimination is "of a lower order than those discriminations to which [the state constitution] refers."[50]

Conversely, *Swanner* looked beyond the explicit text of the state constitution. The court identified two kinds of state interests that motivate statutes: (1) a "derivative interest," in which a statute regulates actions that indirectly affect state interests, and (2) a "transactional interest," in which a statute regulates actions that directly impact state interests.[51] As an example of a "derivative interest," the court discussed a case where the Alaska Supreme Court granted a religious exception from moose-hunting regulations to an individual whose religious funereal practices involved hunting a moose.[52] In that case, the state's interest was derivative because the state passed moose-hunting regulations in order to help maintain a healthy moose population, not to categorically prohibit the hunting of moose.[53] To illustrate a "transactional interest," the court pointed to *Prince v. Commonwealth of Massachusetts*, in which the Supreme Court denied religious exceptions to child labor laws under the *Sherbert* standard.[54] There, the governmental interest was not in regulating a derivative effect of child labor, but in prohibiting the act of child labor itself.[55]

The court in *Swanner* identified the state transactional interest in the marital status nondiscrimination provision as an interest in preventing discrimination based on irrelevant characteristics.[56] Providing a religious exception to landlords would directly conflict with the state's transactional interest, and because housing discrimination "degrades individuals, affronts human dignity, and limits one's opportunities," the court viewed the transactional nature of the state's interest in prohibiting such discrimination as illustrative of a heightened state interest.[57] Where *Desilets* focused on the text of state constitutional provisions to determine if the state had a heightened interest in prohibiting marital status housing discrimination, the court in *Swanner* identified the relevant state interests and weighted the compelling nature of each.

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50. *Id.*; *see also* MASS. CONST. pt. 1, art. I (listing those forms of discrimination explicitly prohibited).
51. *Swanner*, 874 P.2d at 282.
52. *Id.*
53. *Id.*
54. Prince v. Massachusetts, 321 U.S. 158, 166-71 (1944).
55. *Swanner*, 874 P.2d at 282.
56. *Id.*
57. *Id.* at 283.

B. State Legislative and Judicial Treatment

Courts adjudicating these cases next considered whether the state demonstrated an interest in preventing marital status discrimination,[58] focusing on two kinds of legislation: legislation that provided benefits to individuals based on marital status and thus implicitly sanctioned discrimination and legislation that explicitly disadvantaged individuals based on marital status. The court in *Desilets* found that the state's provision of various benefits and rights to married couples but not unmarried couples demonstrated an implicit sanctioning of disparate treatment based on marital status.[59] Conversely, the court in *Swanner* found statutes that treated individuals differently based on marital status in nonhousing contexts unpersuasive for two reasons: (1) the court focused only on marital status housing discrimination and rejected as irrelevant statutes that allowed disparate treatment nonhousing contexts,[60] and (2) the court found that the nonhousing statutes had to require married couples to prove the legitimacy of their marriage in order to avoid the fraudulent provision of benefits available only to spouses, which is not a concern in the housing context.[61]

The courts that examined statutes that explicitly disadvantaged individuals based on marital status often focused on fornication prohibitions.[62] The court in *Desilets* found that the presence of a statute that criminalized fornication,[63] even though the statute was of doubtful constitutionality, nevertheless "suggest[ed] some diminution in the strength of the Commonwealth's interest in the elimination of housing discrimination based on marital status."[64] Meanwhile, the court in

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58. *See infra* notes 59-65 and accompanying text; *see also* Donahue v. Fair Emp't & Housing Comm'n, 2 Cal. Rptr. 2d 32, 44-45 (Ct. App. 1991) (examining legislation either sanctioning or accepting unmarried couples); State by Cooper v. French, 460 N.W.2d 2, 10 (Minn. 1990) (discussing statutes that preference married couples or criminalize fornication).

59. Att'y Gen. v. Desilets, 636 N.E.2d 233, 240 (Mass. 1994).

60. *Swanner*, 874 P.2d at 283.

61. *Id.* The opinion does not discuss whether the provision of benefits only to married spouses was evidence of the state sanctioning differential treatment. However, by the court's reasoning, this differential treatment may not have been persuasive because it occurred in nonhousing contexts.

62. *See infra* notes 63-65 and accompanying text; *see also Cooper*, 460 N.W.2d at 10 (considering a fornication statute as evidence that the state lacks a compelling state interest in eradicating marital status discrimination).

63. *See* MASS. GEN. LAWS ANN. ch. 272, § 18 (West 2013); *see also* Petition of R—, 56 F. Supp. 969, 970 (D. Mass. 1944) (defining fornication as "if a woman has sexual intercourse with a man to whom she is not married").

64. *Desilets*, 636 N.E.2d at 240.

Swanner found it persuasive that Alaska's legislature had already repealed the state's fornication prohibition.[65]

C. The Impact of Providing Religious Exceptions

Lastly, courts examined the likely impact of providing religious exceptions.[66] *Desilets* focused on the practical implications of providing religious exceptions—the likelihood that unmarried couples may be effectively shut out from housing if religious exceptions were provided and whether religious exceptions may be accommodated "without significantly impeding the availability of rental housing for people who are cohabiting or wish to cohabit."[67] Though the court ultimately remanded the case for more fact finding on this question,[68] the court's dicta indicated that religious exceptions might be provided if only some landlords sought exceptions, but religious exceptions might not be provided if too many landlords wished to refuse housing to unmarried couples.[69]

Swanner focused not on the practical ability to accommodate religious exceptions, but rather on the impact that providing religious exceptions would have on individuals' rights. The court considered, beyond the rights of religious landlords and interests of the state, the third-party rights of unmarried couples not to be unfairly discriminated against in housing.[70] Because providing religious exceptions would have led to third-party harms to unmarried couples, the court ultimately refused to grant a religious exception.[71]

D. Scope of the Framework

All of these cases examined the same three factors: (1) the presence of a heightened state interest beyond those general state interests that often justify statutes, (2) state governmental treatment demonstrating an interest in either eradicating or sanctioning discrimination based on

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65. *Swanner*, 874 P.2d at 281 n.10.

66. *See infra* notes 67-71 and accompanying text; *see also* Donahue v. Fair Emp't & Housing Comm'n, 2 Cal. Rptr. 2d 32, 45 (Ct. App. 1991) (noting that providing exceptions in this instance would not deny unmarried couples access to all housing); *Cooper*, 460 N.W.2d at 11 (noting that the court ought not to further erode the fundamental institution of marriage without considering the rampant social ills of drug abuse, a rising underclass, and children without one or both parents).

67. *Desilets*, 636 N.E.2d at 240.

68. *Id.*

69. *Cf. id.* (discussing the practicality of enforcement).

70. *Swanner*, 874 P.2d at 283-84.

71. *Id.*

marital status, and (3) the likely impact of providing religious exceptions. As demonstrated by *Desilets* and *Swanner*, courts have some room to maneuver within this framework and may arrive at different conclusions. However, it is clear that, when faced with conflicts between religious liberty and nondiscrimination provisions in the years following *Smith*, various state courts created a framework with which to analyze those conflicts.

Though the marital status nondiscrimination statutes had to satisfy strict scrutiny before the court could justify denying a religious exception, it is not clear whether this framework applies solely to the question upon which the cases hinged—compelling governmental interest—or to the requirement of both a compelling interest and narrow tailoring. In general, the cases did not substantially analyze the narrow tailoring requirement.[72] It is possible that satisfying the analytical framework presented would demonstrate only a compelling governmental interest without reaching the issue of narrow tailoring. However, it is also possible that an examination of the impact of providing religious exceptions *is* an examination of narrow tailoring. By analyzing whether the state can advance its interests even if exceptions are provided, the court is examining whether requiring some religious individuals to comply with these statutes is the least restrictive means of advancing the state's compelling interest.[73] As the *Swanner* court persuasively stated: "The most effective tool the state has for combatting discrimination is to prohibit discrimination; these laws do exactly that. Consequently, the means are narrowly tailored and there is no less restrictive alternative."[74] The framework either formally includes narrow tailoring by examining the impact of religious exceptions or functionally addresses narrow tailoring by deciding whether the least restrictive means of working to eliminate a form of discrimination requires prohibiting exceptions. As a result, a party that can demonstrate a compelling interest in the nondiscrimination provision at issue by utilizing the analytical

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72. *See Desilets*, 636 N.E.2d at 243 (remanding the case for further fact-finding regarding a compelling state interest and not explicitly addressing narrow tailoring); *Swanner*, 874 P.2d at 280 n.9 (referencing narrow tailoring explicitly in only a footnote); Donahue v. Fair Emp't Housing Comm'n, 2 Cal. Rptr. 2d 32, 45 (Ct. App. 1991) (examining narrow tailoring in one sentence); State by Cooper v. French, 460 N.W.2d 2, 11 (Minn. 1990) (stating only that a less restrictive means is available).

73. *Cf. Donahue*, 2 Cal. Rptr. 2d at 45 (stating briefly that religious exceptions can be accommodated without denying unmarried couples all access to housing and that requiring religious landlords to provide housing to unmarried couples is therefore not the least restrictive means of furthering the state's interest).

74. *Swanner*, 874 P.2d at 280 n.9.

framework outlined in the marital status discrimination cases likely satisfies both requirements of strict scrutiny.

IV. APPLICATION TO RELIGIOUS CONFLICTS WITH SEXUAL ORIENTATION NONDISCRIMINATION LAWS

The framework state courts developed in the marital status housing discrimination cases can give courts guidance as they examine the growing conflict between religious liberties protected by strict scrutiny and the equality interests in sexual orientation nondiscrimination provisions. This Part argues that applying the marital status housing discrimination framework to the current conflict surrounding sexual orientation nondiscrimination provisions is appropriate and examines how courts may actually apply this three-factor framework to current conflicts between religious liberty and equality.

A. Appropriateness of the Framework's Applicability

Applying the framework developed from the conflict between state religious liberty provisions and marital status nondiscrimination provisions to the current conflict between state religious liberty provisions and sexual orientation nondiscrimination provisions is appropriate because the two conflicts balance similar issues.

On one side of the scale, both examine similar religious liberty interests. The analysis in the marital status discrimination cases is the most robust overall examination of state constitutional free exercise clauses and demonstrates the similarity of state analyses of free exercise clauses when faced with countervailing nondiscrimination provisions. As a result, it is appropriate for analyzing the religious liberty interests currently challenging sexual orientation nondiscrimination provisions. On the other side of the scale, both examine comparable nondiscrimination interests. While marital status and sexual orientation are far from identical, both are textually unprotected by the U.S. Constitution and by all state constitutions.[75] While some courts may consider sexual orientation discrimination identical to or similar to sex discrimination[76] or

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75. *See* JEROME HUNT, CTR. FOR AM. PROGRESS ACTION FUND, A STATE-BY STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES 5-14 (2012), *available at* http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf, *archived at* http://perma.cc/7KCX-KWC2.

76. *See* Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 485-96 (2001).

as a protected class on its own,[77] current precedent does not require state courts to view sexual orientation as a suspect classification.[78] State courts may very well treat sexual orientation as similar to marital status when deciding the appropriate level of scrutiny and the importance of a governmental interest in eradicating discrimination. In one of the few published opinions examining the conflict between religious liberties and state sexual orientation nondiscrimination provisions, *Elane Photography, LLC v. Willock*, a New Mexico state court explicitly recognized the similarities between the marital status discrimination cases and the current slew of sexual orientation discrimination cases by favorably comparing the facts of its case—in which a wedding photographer refused to photograph a same-sex marriage ceremony due to religious beliefs—to the facts of *Swanner*.[79]

Secondly, the framework's three-factor analysis is applicable to state RFRAs as well as appropriately interpreted state constitutional provisions because both have the effect of triggering a strict scrutiny review. When the marital status discrimination cases were being litigated, almost no state RFRAs existed, and none existed in the jurisdictions whose state appellate courts developed the three-factor analytical framework.[80] However, every case that occurred after the federal RFRA's enactment explicitly addressed the identical nature of the strict scrutiny standard required both by the federal RFRA and by the state constitutional provisions each of the cases analyzed.[81] Though the federal RFRA was later held inapplicable to state laws, state RFRAs now require a strict scrutiny analysis identical to the standard required by both the federal RFRA and the state constitutional provisions examined in the marital status nondiscrimination cases.[82] As a result, applying the marital status discrimination framework to cases in which an individual is demanding religious exceptions from sexual orientation nondiscrimination

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77. Windsor v. United States, 699 F.3d 169, 181-82 (2d Cir. 2012), *aff'd on other grounds*, 133 S. Ct. 2675 (2013).

78. Lawrence v. Texas, 539 U.S. 558, 578-79 (2003); Romer v. Evans, 517 U.S. 620, 635-36 (1996).

79. 284 P.3d 428, 444-45 (N.M. Ct. App. 2012), *aff'd*, 309 P.3d 53 (N.M. 2013).

80. *See* Lund, *supra* note 8, at 474-76.

81. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280 n.9 (Alaska 1994) ("Assuming [RFRA] is constitutional and applies to this case, it does not affect the outcome, because we hold . . . that compelling state interests support the prohibitions on marital status discrimination."); Smith v. Fair Emp't & Housing Comm'n, 913 P.2d 909, 921-29 (Cal. 1996) (stating that the court's analysis of plaintiff's federal RFRA claim similarly disposes of the plaintiff's state constitutional claim); Att'y Gen. v. Desilets, 636 N.E.2d 233, 236 n.5 ("The standard that we apply appears to be the same as that prescribed by [RFRA]").

82. *See supra* Part II.B.

provisions is appropriate because state RFRAs and the relevant state constitutional provisions require the same standard and should, therefore, undergo a similar analysis.[83]

B. Application of the Framework

Even if a court applies the three-factor framework developed in the marital status discrimination cases, each court's outcome will vary depending on (1) how the court interprets each of the factors and (2) the unique set of sexual orientation nondiscrimination protections in each jurisdiction. A court that follows a *Swanner*-style analysis of the factors might deny religious exceptions. This is because (1) the court would likely utilize a broader interpretation of "state interest" and include the important transactional interest states have in eliminating discrimination, and (2) the court must contend with the likelihood of third-party harm resulting from granting an exception and allowing individuals with religious beliefs to discriminate. Under a *Swanner* interpretation, enforcing a sexual orientation nondiscrimination statute against an individual with contrary religious beliefs likely withstands strict scrutiny, requiring the court to deny a religious exception.

If a court implements a more *Desilets*-like interpretation, the outcome becomes more state-specific. To demonstrate the wide variation in possible outcomes, this Article will apply a narrower, *Desilets*-like interpretation of the framework to two sample states: Massachusetts and Alaska, the two states from which *Desilets* and *Swanner*, respectively, arose. This Article assumes that the religious liberty advocate has demonstrated a sufficient burden to trigger strict scrutiny, either through a state constitutional provision or a state RFRA.[84]

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83. *But see Elane Photography*, 284 P.3d at 444-45 (finding that New Mexico's state RFRA, which states that a "government agency" may not restrict a person's free exercise of religion, explicitly limited itself to only allow individuals to sue the government and did not intend to apply in cases between private litigants). This narrow reading is unique to New Mexico's interpretation of its state RFRA but may have an impact on other states' interpretations of their state RFRAs, should their state RFRA similarly use a more restricted term than the more commonly used "government." *Compare* ARIZ. REV. STAT. ANN. § 41-1493.01 (2013) (using "government"), *and* IDAHO CODE ANN. § 73-402 (West 2013) (same), *with* OKLA. STAT. ANN. tit. 51, §§ 251-258 (West 2010) (using "government entity"), *and* TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012 (West 2009) (using "government agency").

84. The determination of whether a burden exists is a preliminary issue; only if a burden exists will the court then consider the constitutionality of the statute at issue. *See Smith*, 913 P.2d at 921-23 (considering a statutory and state constitutional challenge to a marital status housing nondiscrimination law, finding that no substantial burden existed, and ceasing its analysis). *Smith* is the only marital status housing discrimination case to find insufficient burden, and debate exists as to whether nondiscrimination laws burden, or substantially burden, religious liberties; however, this discussion is outside the scope of this Article, and this Article will proceed as if the

1. State Interests and Suspect Classification

Currently, neither the Massachusetts nor the Alaska Constitution requires courts to apply heightened protections based on sexual orientation.[85] Under *Desilets*'s reasoning, sexual orientation discrimination may be considered discrimination "of a lower order" than discrimination based on characteristics that are explicitly protected by either state's constitution.

The Supreme Court's decision in *United States v. Windsor*[86] may provide persuasive reasoning for state courts determining whether a heightened interest in eradicating sexual orientation discrimination exists. Even though the Court did not consider sexual orientation to be a suspect class, its dicta may indicate the kind of "firm national policy" that Justice Thomas, in his dissent to the denial of certiorari in *Swanner*, believed may justify a state court's conclusion that eradicating a particular form of discrimination is a compelling state interest.[87] In arguing that Alaska's interest in eradicating marital status discrimination was not compelling on either a national or a state level, Justice Thomas contrasted the weaker national interest in eradicating marital status discrimination with the clear and compelling interest of preventing racial discrimination in education[88] and pointed to the Court's previous statement, "Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education."[89]

Admittedly, the federal government has not demonstrated a long-standing commitment to eradicating sexual orientation discrimination. In 1986, the Supreme Court validated criminal sodomy statutes in *Bowers v. Hardwick*,[90] and in 1996, Congress passed the Defense of Marriage Act.[91]

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court had already found a sufficient burden to trigger its analysis of the statute's constitutionality. *See generally* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989) (discussing the burden threshold requirement).

85. *See* MASS. CONST. pt. 1, art. I; Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003) (applying rational basis review to a same-sex marriage ban and noting that sexual orientation is not a suspect classification); ALASKA CONST. art. I, § 3; *cf.* Alaska Civil Liberties Union v. State, 122 P.3d 781 (Alaska 2005) (applying minimum scrutiny rather than heightened scrutiny without addressing the merits because minimum scrutiny was sufficient to find the differential treatment unconstitutional).

86. 133 S. Ct. 2675 (2013).

87. *See* Swanner v. Anchorage Equal Rights Comm'n, 513 U.S. 979, 981 (1994) (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983)).

88. *Id.*

89. *Bob Jones Univ.*, 461 U.S. at 593.

90. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

91. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), *invalidated by* United States v. Windsor, 133 S. Ct. 2675, 2695-96 (2013).

However, despite the fact that states have varied greatly in the extent to which they combat sexual orientation discrimination,[92] each branch of the federal government has since worked to eradicate it. Congress repealed "Don't Ask Don't Tell," the military policy that discriminated against service members based on sexual orientation.[93] The White House, under President Bill Clinton, signed Executive Order 13,087, including sexual orientation in the list of characteristics upon which the federal government may not discriminate in the competitive service of the federal civilian workforce.[94] The Supreme Court overturned criminal sodomy statutes[95] and state constitutional amendments prohibiting sexual orientation nondiscrimination ordinances.[96] Notably, the Court also overturned section 3 of the Defense of Marriage Act, holding that the discrimination the federal government sought to impart on same-sex couples demeaned those couples, undermined the "public and private significance" of their marriages, and humiliated their children.[97] While the federal government has not demonstrated a commitment to combatting sexual orientation discrimination as clearly as it has to eliminating racial discrimination, the actions it has taken in more recent years certainly constitute persuasive evidence of a growing national interest in the eradication of sexual orientation discrimination. Such evidence may be sufficient on its own to show a heightened interest in eradicating sexual orientation discrimination and may be even more likely to demonstrate a heightened interest when paired with a state's own independent actions.

2. State Legislative and Judicial Treatment

Massachusetts and Alaska paint starkly contrasting pictures of legislative and judicial treatment of sexual orientation discrimination. On the one hand, Massachusetts possesses extensive prohibitions against sexual orientation discrimination in employment, public accommoda-

92. For an overview of the patchwork nature of state LGBT employment nondiscrimination provisions, see, e.g., *Non-Discrimination Laws: State by State Information—Map*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map (last visited Feb. 23, 2014), *archived at* http://perma.cc/WYW2-XG55. For an overview of marriage equality laws, see, e.g., *States*, FREEDOM TO MARRY, http://www.freedomtomarry.org/states/ (last updated Dec. 20, 2013), *archived at* http://perma.cc/M6RW-UM9J.

93. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

94. Exec. Order No. 13,087, 3 C.F.R. 191 (1998).

95. *Lawrence*, 539 U.S. at 585-86.

96. Romer v. Evans, 517 U.S. 620, 635-36 (1996).

97. United States v. Windsor, 133 S. Ct. 2675, 2694 (2013).

tions, healthcare, and insurance, among other sectors.[98] It defines crimes motivated by bigotry based on sexual orientation as "hate crimes" and has a commission on gay and lesbian youth.[99] Its ban on same-sex marriage has been declared unconstitutional,[100] and it currently lacks a state sodomy law.[101] Massachusetts's record, both through advancing legislation intended to combat sexual orientation discrimination and rejecting laws that reflect disparate treatment based on sexual orientation—like a sodomy law or ban on same-sex marriage—demonstrates a clear, comprehensive state interest in eradicating sexual orientation discrimination.

By contrast, Alaska possesses no legislation prohibiting sexual orientation discrimination[102] and has both constitutional and statutory bans on same-sex marriage, thereby allowing the rights and benefits of marriage to apply only to different-sex couples.[103] Alaska's bright light in its dismal patchwork of laws is the fact that it no longer has a criminal sodomy statute.[104] Repeal of a criminal sodomy statute, like repeal of a fornication statute, is an affirmative legislative action that may show an interest in eliminating sexual orientation discrimination.[105] However, even if a state retained a criminal sodomy statute in its laws,[106] it is unclear how persuasive that is in showing diminished interest in eradicating sexual orientation discrimination. Unlike sodomy statutes, fornication statutes are constitutionally dubious but not explicitly rejected, and a legislature's repeal or inactivity theoretically influences the

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98. MASS. GEN. LAWS ch. 151B, § 4 (2012) (employment); *id.* ch. 272, § 98 (public accommodations); *id.* ch. 176I, § 4 (healthcare); *id.* ch. 175, § 4C (homeowners insurance).

99. MASS. GEN. LAWS ch. 22C, § 32 (2012) (hate crimes); *id.* ch. 3, § 67 (youth commission).

100. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969-70 (Mass. 2003).

101. Gay & Lesbian Advocates & Defenders v. Att'y Gen., 763 N.E.2d 38, 41-42 (Mass. 2002).

102. HUNT, *supra* note 75, at 22. For analysis of employment discrimination, see Brad Sears, Christy Mallory & Nan D. Hunter, WILLIAMS INST., *Analysis of Scope and Enforcement of State Laws and Executive Orders Prohibiting Employment Discrimination Against LGBT People*, *in* DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT (2009), *available at* http://escholarship.org/uc/item/0k93c8mh, *archived at* http://perma.cc/EBM9-9EJC.

103. ALASKA CONST. art. I, § 25; ALASKA STAT. § 25.05.013 (2013).

104. *See* WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 113 (4th ed. 2011).

105. *Cf.* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 291 n.10 (Alaska 1994) (distinguishing *Swanner* from State by Cooper v. French, 460 N.W.2d 2 (Minn. 1990), by noting that Alaska had repealed its fornication provision, showing greater intent to eradicate marital status discrimination).

106. *E.g.*, FLA. STAT. ANN. § 800.02 (West 2012); IDAHO CODE ANN. § 18-6605 (West 2013); MICH. COMP. LAWS § 750.158 (2013).

enforceability of the statute and may evidence state interests.[107] Conversely, the Supreme Court has explicitly declared sodomy statutes unconstitutional.[108] Thus, legislative inaction has no impact on the enforceability of the statute and may not evidence a lack of state interest in eradicating sexual orientation discrimination.[109]

3. Impact of Providing Religious Exceptions

A *Desilets*-style interpretation of the three-factor framework will consider the practical impact of providing religious exceptions and the ability to accommodate those exceptions. Unfortunately, though sexual orientation discrimination has been documented nationally,[110] state data is less comprehensive. Even less evidence, if any, is available to demonstrate how much sexual orientation discrimination arises from religious beliefs and how many individuals would seek a religious exception from a state's sexual orientation nondiscrimination provision. As long as a court focuses only on the numerical, practical impact of religious exceptions, it must grapple with the current lack of facts. Additionally, in *United States v. Windsor*, the Supreme Court focused predominantly on the dignitary and rights-based, rather than numerical, harm same-sex couples experienced when discriminated against due to the Defense of Marriage Act.[111] This emphasis may persuasively demonstrate to state courts that *Swanner*'s approach, focused on rights-based and third-party harms, is more appropriate than *Desilets*'s numerical balancing.

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107. *See* Att'y Gen. v. Desilets, 636 N.E.2d 233, 240 (Mass. 1994) (noting that Massachusetts's fornication statute is of doubtful constitutionality, but nevertheless remains a criminal statute of the Commonwealth).

108. Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

109. *But see* Carlos Maza, *State Sodomy Laws Continue To Target LGBT Americans*, EQUAL. MATTERS (Aug. 8, 2011, 3:26 PM), http://equalitymatters.org/blog/201108080012, *archived at* http://perma.cc/NAJ4-5XDK (discussing how some state law enforcement officers continue to harass LGBT individuals under the guise of enforcing criminal sodomy statutes that, though declared unconstitutional by the U.S. Supreme Court, remain in the state's statutes).

110. *See, e.g.*, Jennifer C. Pizer, Brad Sears, Christy Mallory & Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 719-20, 778-79 (2012); L. Camille Hébert, *Prevalence of Employment Discrimination Based on Sexual Orientation and Gender Identity*, 2 EMPL. PRIVACY LAW § 9:4 (database updated on Westlaw Nov. 2013); Rebecca L. Stotzer, *Comparison of Hate Crime Rates Across Protected and Unprotected Groups—An Update*, WILLIAMS INST. (May 2012), http://williamsinstitute.law.ucla.edu/research/violence-crime/comparison-hate-crime-rates-update/, *archived at* http://perma.cc/DT6P-EX5S.

111. United States v. Windsor, 133 S. Ct. 2675, 2692 (2013).

4. Likelihood of Preventing Individual Religious Exceptions

For advocates to successfully prevent religious exceptions, they should demonstrate to courts that the *Swanner* interpretation is correct. A state's greater interest in prohibiting discrimination cannot be narrowly interpreted to consist only of textual state constitutional protections; the impact of providing religious exceptions lies not only in the possibility that individuals may not receive services due to their sexual orientation, but also in the inherent harm stemming from being a victim of sexual orientation discrimination. If a court nevertheless adopts a *Desilets*-style interpretation of the three-factor test, advocates' likelihood of preventing religious exceptions will vary state by state. In Massachusetts, a state that provides broad protections from sexual orientation discrimination and has a strong record demonstrating the state's compelling interest, sexual orientation nondiscrimination advocates will likely successfully withstand strict scrutiny and demonstrate to courts that denial of religious exceptions is appropriate; in Alaska, with only a single executive order prohibiting sexual orientation discrimination and laws that discriminate based on sexual orientation, advocates may be less successful. On the bright side, a state must already be inclusive enough to pass laws that prohibit sexual orientation discrimination, unlike Alaska, before religious advocates would be able to seek exceptions from those laws. Thus, hopefully, states in which religious liberty advocates seek religious exceptions will already be states that possess a strong record of eradicating sexual orientation discrimination and can therefore meet the strict scrutiny requirements to justify denying individual religious exceptions.

V. CONCLUSION

Prior marital status housing discrimination cases have provided to courts a three-factor analytical framework that they may use when examining the current conflict between state-protected religious liberty and the state's equality interests in sexual orientation nondiscrimination provisions. In its most beneficial, *Swanner* form, the three-factor framework may provide to advocates a useful outline with which to structure arguments that reject religious exceptions to sexual orientation nondiscrimination provisions. In its narrowest, *Desilets* form, the three-factor framework perpetuates the current patchwork of sexual orientation nondiscrimination provisions; states with extensive protections will likely maintain those protections, and states with fewer protections will be more likely to provide religious exceptions and further diminish those

protections. Though the identified three-factor framework provides guidance in litigation surrounding religious exceptions, federal nondiscrimination laws are necessary to ensure the protection of individuals from sexual orientation discrimination and to fully address the inconsistent variation of protection seen in the nation today.