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ARTICLES

PUBLIC ACCOMMODATION STATUTES, SEXUAL ORIENTATION AND RELIGIOUS LIBERTY: FREE ACCESS OR FREE EXERCISE?

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The L.G.B.T. movement is the main thing, the primary thing that's going to be challenging religious liberties . . . . They don't have a right to be served in every single store. People need to have the ability to refuse service if it violates their religious convictions.[1]

This isn't 1950 Alabama; it's 2015 Indiana.[2]

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1. Richard Fausset & Alan Blinder, *States Weigh Legislation to Let Businesses Refuse to Serve Gay Couples*, N.Y. TIMES (Mar. 5, 2015), *available at* http://www.nytimes.com/2015/03/06/us/anticipating-nationwide-right-to-same-sex-marriage (quoting Oklahoma State Senator Joseph Silk).

2. *New Indiana Law Sparks 'No Hate' Protest, Vows to Boycott*, ASSOCIATED PRESS (Mar. 28, 2015), *available at* http://www.sfgate.com/nation/article/New-Indiana-law-sparks-no-hate-protest-vows-61654 (quoting Indianapolis City Council member Zach Adamson).

INTRODUCTION

The past two years have been characterized by enormous strides toward equality for the LGBT community. The U.S. Supreme Court's opinion in *United States v. Windsor* holding that Section 3 of the Defense of Marriage Act denying federal recognition of same-sex marriages was a violation of the Fifth Amendment's Due Process Clause was followed by an almost uninterrupted string of victories on the issue of marriage equality in federal and state courts.[3] These opinions were followed by the U.S. Supreme Court's opinion in *Obergefell v. Hodges* in June 2015.[4] In July 2014, President Obama issued a long-awaited executive order protecting federal government employees from discrimination on the basis of gender identity and prohibiting federal contractors from engaging

3. *See also* Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013) (invalidating the prohibition upon same-sex marriage in California); Latta v. Otter, 771 F.3d 456, 476 (9th Cir. 2014) (invalidating prohibitions upon same-sex marriage in Idaho and Nevada); Baskin v. Bogan, 766 F.3d 648, 671-72 (7th Cir. 2014) (invalidating the prohibition upon same-sex marriage in Indiana); Wolf v. Walker, 986 F. Supp. 2d 982, 1028 (W.D. Wis. 2014) (invalidating the prohibition upon same-sex marriage in Wisconsin); Bishop v. Smith, 760 F.3d 1070, 1081 (10th Cir. 2014) (invalidating the prohibition upon same-sex marriage in Oklahoma); Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014) (invalidating the prohibition upon same-sex marriage in Virginia); Kitchen v. Herbert 755 F.3d 1193, 1229-30 (10th Cir. 2014) (invalidating the prohibition upon same-sex marriage in Utah); Searcy v. Strange, No. 14-0208-CG-N, 2015 U.S. Dist. LEXIS 7776, at *12-13 (S.D. Ala. Jan. 23, 2015); Rosenbrahn v. Daugaard, No. 4:14-CV-04081-KES, 2015 U.S. Dist. LEXIS 4018, at *32 (D.S.D. Jan. 12, 2015); Rolando v. Fox, 23 F. Supp. 3d 1227, 1236 (D. Mont. 2014); Bradacs v. Haley, No. 3:13-cv-02351, 2014 U.S. Dist. LEXIS 162184, at *32-35 (D.S.C. Nov. 18, 2014); McGee v. Cole, No. 3:13-24068, 2014 U.S. Dist. LEXIS 158680, at *32 (S.D.W.V. Nov. 7, 2014); Marie v. Moser, No. 14-cv-02518-DDC/TJJ, 2014 U.S. Dist. LEXIS 157093, at *57 (D. Kan. Nov. 4, 2014); Guzzo v. Mead, No. 14-CV-200-SWS, 2014 U.S. Dist. LEXIS 148481, at *18-21 (D. Wyo. Oct. 17, 2014); Hamby v. Parnell, No. 3:14-cv-00089-TMB, 2014 U.S. Dist. LEXIS 145876, at *34-35 (D. Alaska Oct. 12, 2014); General Synod of the United Church of Christ v. Resinger, 12 F. Supp. 3d 790, 791 (W.D.N.C. 2014); Majors v. Jeanes, No. 2:14-cv-00518JWS, 2014 U.S. Dist. LEXIS 127942, at *16-17 (D. Ariz. Sept. 12, 2014); Brenner v. Scott, 999 F. Supp. 2d 1278, 1293 (N.D. Fla. 2014); Burns v. Hickenlooper, No. 14-cv-01817-RM-KLM, 2014 U.S. Dist. LEXIS 100894, at *5-8 (D. Colo. July 23, 2014); Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1146 (D. Or. 2014); Whitewood v. Wolf, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014); Varnum v. Brien, 763 N.W.2d 862, 904 (Iowa 2009); Garden State Equality v. Dow, 79 A.3d 1036, 1044 (N.J. 2013); Griego v. Oliver, 316 P.3d 865, 889 (N.M. 2013).

4. No. 14-556, 2015 U.S. LEXIS 4250, at *26-32, *36-42, *50 (U.S. June 26, 2015) (holding that same-sex couples may exercise the right to marry pursuant to the Due Process and Equal Protection Clauses of the U.S. Constitution and that there is no lawful basis upon which states may deny recognition to lawful same-sex marriages performed in other states).

in employment discrimination against members of the LGBT community.[5] These developments come on the heels of public opinion polls evidencing shifting attitudes toward homosexuality and greater social acceptance of the LGBT community.[6]

These developments have occurred at such a pace as to outstrip the adaptation of many areas of the law to new on-the-ground realities. The impact of judicial opinions, statutes, and administrative rules and regulations upon areas as diverse as employment, taxation, domestic relations, housing, and probate to name but a few remain uncertain.[7] In

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5. Exec. Order No. 13,672, §§ 1-2, 79 Fed. Reg. 42,971 (July 23, 2014) (to be codified or implemented at 41 C.F.R. §§ 60-1, 60-2, 60-4, 60-50). *See also* Press Release, The White House, Taking Action to Support LGBT Workplace Equality is Good for Business (July 21, 2014) (contending that employers recognize that workplace equality is in their best interest and that equality is supported by U.S. public opinion, state and local governments, and some faith communities).

6. *See, e.g.*, Chris Cillizza, *The Absolutely Stunning Rise in Support for Gay Marriage, in One Chart*, WASH. POST (May 20, 2015), *available at* http://www.washingtonpost.com/blogs/the-fix/wp/2015/05/20/the-absolutely-stunning-rise-in-support-for-gay-marriage-in-one-chart (summarizing the results of Gallup's annual "Values and Beliefs Poll" in which 60% of the survey pool supported allowing same-sex couples to marry, the highest support for same-sex marriage Gallup has ever measured in the 19 year history of asking this question and a 23% increase from 2005); Lisa Keen, *New Gallup Poll Sees Rise in Moral Acceptability of Gay and Lesbian Relations*, PRIDE SOURCE (June 5, 2014), *available at* http://www.pridesource.com/article.html=66464 (summarizing the results of Gallup's annual "Values and Beliefs Poll" in which 58% of the survey pool found gay and lesbian relations morally acceptable and 63% supported allowing same-sex couples to adopt children); Carrie Wofford, *Why Equality is Winning*, U.S. NEWS & WORLD REP. (Mar. 26, 2014), *available at* www.usnews.com/opinions/blogs/carrie-wofford/2014/03/26/how-did-public-opinion-on-gay-marriage-shift-so-quickly (concluding that "gay rights are suddenly ascendant" and attributing their rapid rise to efforts to encourage members of the LGBT community to self-identify and characterize same-sex marriage as encouraging loving and committed relationships). *But see* Nate Cohn, *Alabama, Where Same-Sex Marriage Remains Deeply Unpopular*, N.Y. TIMES (Feb. 9, 2015), *available at* http://www.nytimes.com/2015/02/10/upshot/alabama-where-same-sex-marriage-remains-deeply-unpopular (summarizing a 2014 Pew Research survey in which 79% of white evangelical Christians opposed the legalization of same-sex marriage).

7. For example, only 31 states currently prohibit discrimination in private or public employment or both on the basis of sexual orientation with a smaller number of states extending protection on the basis of gender identity. *See* IN YOUR STATE, WORKPLACE, LAMBDA LEGAL 2 (2014), *available at* http://www.lambdalegal.org/states-regions. Although unlikely to be widespread, efforts to repeal these prohibitions remain a possibility. *See* Exec. Order No. 15-01 (Kan. Feb. 10, 2015), *available at* http://www.governor.ks.gov/media-room/executive-orders/2015/02/10/executive-order-no.-15-01 (rescinding previously-issued Executive Order No. 07-24 which prohibited discrimination and harassment in public employment on the basis of sexual orientation and gender identity). *See also* Bryan Lowry, *Gov. Sam Brownback Rescinds Protected-Class Status for LGBT State Workers in Kansas*, K.C. STAR (Feb. 11, 2015), *available at* http://www.kansascity.com/news/government-politics/article9694028.html (quoting Governor Brownback as stating that "[t]his Executive Order ensures that state employees enjoy the same civil rights as all Kansans without creating additional 'protected classes' as the previous order did. Any expansion of 'protected classes' should be done by the legislature and not through

this regard, marriage equality is but the end of the beginning.[8]

The ascendancy of gay rights has been accompanied by a rise in assertions of religious freedom.[9] These assertions have primarily taken the form of state legislative initiatives. Supporters have cited perceived growing threats and hostility to religious liberty as a basis for such initiatives.[10] Three examples receiving nationwide attention were

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unilateral action"); Tara Siegel Bernard, *What's at Stake*, N.Y. TIMES, June 14, 2015, at B2 (discussing the implications of legalization of same-sex marriage in the areas of taxation, estate planning, divorce, Social Security, veterans' benefits, and medical decisions).

8. *See, e.g., Despite Resistance, Alabama Heads the Right Way on Same-Sex Marriage*, WASH. POST, Feb. 10, 2015 ("[M]arriage equality is just one of many goals. State legislatures and federal lawmakers need to be convinced to enhance civil rights protections for gay men and lesbians - prohibiting employment discrimination . . . or discrimination in business transactions"); Frank Bruni, *Do Gays Unsettle You?*, N.Y. TIMES (Feb. 7, 2015), *available at* http://www.nytimes.com/2015/02/08/opinion/sunday/frank-bruni-same-sex-marriage-republican-scorn-and-unfinished-work (quoting Sarah Kate Ellis, the chief executive officer and president of GLAAD, as stating "[w]e want to make sure that marriage is looked at as the benchmark and not the finish line"); Erik Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, N.Y. TIMES, June 27, 2015, at A1; *The Challenges that Remain After Marriage Equality*, N.Y. TIMES (July 29, 2015), *available at* http://www.nytimes.com/2015/07/29/opinion/the-challenges-that-remain-after-marriage-equality ("[T]he marriage equality victory should not be regarded as the final battle, or even a clear sign the lesbian, gay, bisexual and transgender Americans are on the cusp of enjoying full equality under the law. They are not").

9. *See, e.g.*, Adam Serwer, *Religious Freedom Used to Chip Away at LGBT Rights*, MSNBC (Feb. 19, 2014), www.msnbc.com/msnbc/religious-freedom-chip-away-gay-rights (describing gay rights from the viewpoint of social conservatives as an issue of religious freedom); Amy Stone, *The New Religious Freedom Argument*, POL. RES. (Oct. 30, 2012), www.politicalresearch.org/2012/10/30/the-new-religious-freedom-argument-gay-marriage-in-the-2012-election (describing same-sex marriage as the "weapon that will be and is being used to marginalize and repress Christianity and the church" and utilization of religious freedom arguments as a means by which to appeal to evangelical Christians, libertarians, and moderates); Kristina Torres, *Clergy Clash on 'Religious Liberty' Efforts at Capitol*, ATLANTA J. CONST., Jan. 29, 2015, at B1 (quoting J. Robert White, the executive director of the Georgia Baptist Convention as stating "[i]f there has been discrimination in this country, quite honestly, it has been against people of Christian faith, and it must stop"). *But see* Cathy Lynn Grossman, *Survey: Americans Turn Sharply Favorable on Gay Issues*, WASH. POST (Feb. 26, 2014), *available at* http://www.washingtonpost.com/national/religion/survey-americans-turn-sharply-favorable-on-gay-issues/2014/02/26 (citing a survey conducted by the Public Religion Research Institute which found that nearly one in four people who left their childhood religion were motivated to do so by their former churches' negative teachings or treatment of the LGBT community).

10. *See, e.g.*, Michael Barbaro & Erik Eckholm, *Indiana Law Denounced as Invitation to Discriminate Against Gays*, N.Y. TIMES (Mar. 27, 2015), *available at* http://www.nytimes.com/2015/03/28/us/politics/indiana-law-denounced-as-invitation-to-discriminate (quoting Indiana Governor Mike Pence as stating that "many feel their religious liberty is under attack by government action"); Juliet Eilperin, *After Veto in Arizona, Conservatives Vow to Fight for Religious Liberties*, WASH. POST (Feb. 27, 2014), *available at* http://www.washingtonpost.com/politics/after-veto-in-arizona-conservatives-vow-to-fight (in which a commentator expressed concern about "a public that is hostile to the very idea of religious liberty"); *Religious Freedom Bill Riles Gay Rights Supporters*, ASSOCIATED PRESS, Feb. 21, 2014 (in which Josh Kredit, legal counsel for the Center for Arizona Policy, stated that there is "a

Arizona Senate Bill 1062, which was vetoed by Governor Jan Brewer in February 2014,[11] Indiana Senate Bill 101, signed into law in March 2015,[12] and Arkansas Senate Bill 975 signed into law in April 2015.[13] Similar legislation was introduced in numerous other statehouses.[14] The

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growing hostility toward religion"). *But see In Indiana, Using Religion as a Cover for Bigotry*, N.Y. TIMES, Mar. 31, 2015, at A24 (stating that "[t]he freedom to exercise one's religion is not under assault in Indiana, or anywhere else in the country. Religious people - including Christians, who continue to make up the majority of Americans - may worship however they wish and say whatever they like" and further contending that the underlying purpose of the Indiana religious liberty bill was bigotry).

11. *See* S.B. 1062, 51st Leg., 2d Reg. Sess. §§ 1(5), 2(A-D) (Ariz. 2014) (prohibiting state action substantially burdening the exercise of religion by any individual, business association, trust, foundation, church or religious organization in the absence of a compelling governmental interest advanced by the least restrictive means even if the burden arose from facially neutral laws, laws of general applicability and in judicial and administrative proceedings regardless of whether the government was a party). *See also* Fernanda Santos, *Arizona Vetoes Right to Refuse Service to Gays*, N.Y. TIMES, Feb. 27, 2014, at A1.

12. *See* S.B. 101, 119th Gen Assemb., 1st Reg. Sess. §§ 8-9 (Ind. 2015), *as amended by* S.B. 50, 119th Gen Assemb., 1st Reg. Sess. § 1 (prohibiting state action substantially burdening the exercise of religion by any individual, organization, or business association in the absence of a compelling governmental interest advanced by the least restrictive means even if the burden arises from facially neutral laws, laws of general applicability and in judicial and administrative proceedings regardless of whether the government is a party but further providing that the bill does not authorize denial of access to public accommodations on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or U.S. military service).

13. *See* S.B. 975, 90th Gen Assemb., Reg. Sess. § 1 (Ark. 2015) (prohibiting state action substantially burdening the exercise of religion by any person in the absence of a compelling governmental interest advanced by the least restrictive means even if the burden arises from a law of general applicability).

14. *See, e.g.*, H.B. 757, 154th Leg., Reg. Sess. § 2-2 (Ga. 2016) (prohibiting the state government from taking adverse action against a person or faith-based organization on the basis that such person or organization believes, speaks or acts in accordance with a sincerely-held religious belief regarding marriage); S.B. 180, 16th Reg. Sess. §§ 1-2 (Ky. 2016) (exempting all individuals and business associations from providing services, accommodations, advantages, facilities, goods, or privileges related to the celebration of any civil union, domestic partnership or marriage if so doing would violate sincerely-held religious beliefs); H.B. 1523, 2016 Reg. Sess. §§ 3, 7 (Miss. 2016) (exempting all individuals and business associations from providing services, accommodations, advantages, facilities, goods, or privileges related to the celebration of any civil union, domestic partnership or marriage if so doing would violate sincerely-held religious beliefs and prohibiting the state government from taking adverse action against a person or faith-based organization on the basis that such person or organization believes, speaks or acts in accordance with a sincerely-held religious belief regarding marriage); S.J.R. 39, 98th Leg., Reg. Sess. § 1 (Mo. 2016) (proposing an amendment to the state constitution exempting all individuals and business associations from providing services, accommodations, advantages, facilities, goods, or privileges related to the celebration of any civil union, domestic partnership or marriage if so doing would violate sincerely-held religious beliefs); H.J.R. 55, 84th Leg., Reg. Sess. § 1 (Tex. 2015) (proposing an amendment to the state constitution prohibiting the state government from substantially burdening the free exercise rights of any person in the absence of a compelling governmental interest advanced by the least restrictive means); H.B. 4012, 82d Leg. Sess. Reg.

introduction of such measures represented a revival of state legislative efforts which had been relatively moribund since the late 1990s.[15] Although most of these efforts failed, twenty-one states currently have express constitutional or legislative provisions purporting to protect the free exercise of religion.[16] These efforts may proliferate in future legislative sessions in many parts of the country.[17]

One of the sources of perceived threats to religious freedom are public accommodation statutes. Twenty-one states and the District of Columbia prohibit businesses deemed to be public accommodations from refusing

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Sess. § 4 (W.Va. 2016) (prohibiting the state government from substantially burdening the free exercise rights of any person in the absence of a compelling governmental interest advanced by the least restrictive means even if the burden results from a rule of general applicability); H.B. 83, 63rd Leg., Reg. Sess. § 1 (Wyo. 2015) (prohibiting the state government from substantially burdening the free exercise rights of any person in the absence of a compelling governmental interest advanced by the least restrictive means even if the burden results from a rule of general applicability). *See also* Fausset & Blinder, *supra* note 1 (detailing efforts to enact religious liberty legislation in Arkansas, Colorado, Georgia, Hawaii, Indiana, Michigan, Oklahoma, South Dakota, Texas, Utah, West Virginia, and Wyoming).

15. *See* Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 475 (2010) (noting that ten states adopted religious freedom restoration acts between 1998 and 2000 but only three had done so in the following ten years). *See also* Bruce Ledewitz, *Experimenting with Religious Liberty: The Quasi-Constitutional Status of Religious Exemptions*, 6 ELON L. REV. 37, 72-73 (2014) (tracing the history of state RFRAs from the adoption of the first such statute by Connecticut in 1993).

16. *See* ARIZ. REV. STAT. ANN. §§ 41-1493 to 41-1493.02 (2015 (West) (adopted 1999); CONN. GEN. STAT. § 52-571b(a-f) (2015) (adopted 1993); FLA. STAT. §§ 761.01-.05 (2015) (adopted 1998); IDAHO CODE ANN. §§ 73-401—73-404 (West 2015) (adopted 2000); 775 ILL. COMP. Stat. 35/1-99 (2015) (adopted 1998); KAN. STAT. ANN. §§ 60-5301 to 60-5307 (2015) (adopted 2013); KY. REV. STAT. ANN. § 446.350 (West 2015) (adopted 2013); MISS. CODE ANN. § 11-61-1 (West 2015) (adopted 2014); MO. REV. STAT. § 1.302.1 (2015) (adopted 2004); N.M. STAT. §§ 28-22-2 to 28-22-5 (2015) (adopted 2000); OKLA. STAT. tit. 51, §§ 251-58 (2015) (adopted 2000); 71 PA. CONS. STAT. §§ 2401-2408 (2015) (adopted 2002); R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (2015) (adopted 1998); S.C. CODE ANN. §§ 1-32-10 to 1-32-60 (2015) (adopted 1999); TENN. CODE ANN. § 4-1-407 (2015) (adopted 2009); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012 (Vernon 2015) (adopted 1999); VA. CODE ANN. §§ 57-2.02(A-F) (2015) (adopted 2007). Protection of the free exercise of religion in Alabama is set forth in the state constitution. *See* ALA. CONST. art. I, § 3.01. *See also supra* notes 12-13 and accompanying text.

17. *See, e.g.*, Ledewitz, *supra* note 15, at 100 (predicting that "the demands by religious believers for exemptions will increase and this will lead to greater conflict with the larger society"); Jim Galloway, *Religious Liberty Fight will Live on*, ATLANTA J. CONST., Apr. 2, 2015, at B1 (contending that the debate regarding RFRAs will continue "[b]ecause Southern Baptists . . . are also the heart of the evangelical Christian wing of the Republican party - especially in the all-important South"). Such legislation may also proliferate at the federal level. *See* First Amendment Defense Act, H.R. 2802, 114th Cong. § 3(a) (2015) (prohibiting the federal government from discriminating against any person "wholly or partially on the basis that such person believes or act in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage").

to serve prospective patrons on the basis of sexual orientation.[18] These statutes also prohibit a wide range of associated behaviors, such as aiding and abetting discrimination, refusing accommodation to those who associate with members of the LGBT community, and posting notices of the right to refuse service. Application of these statutes in two well-publicized cases involving religious objections to providing goods and services to same-sex couples celebrating marriages or civil unions have been the source of considerable controversy.[19]

Despite the uniform outcome in these cases, public accommodation laws are ill-prepared to address sexual orientation let alone same-sex marriage. This is due in part to the many different forms public accommodation statutes take throughout the country. Further complicating this area is the wide variety of terminology, definitions (or the absence thereof), coverage, and prohibited practices among these statutes. These differences have the potential to create uncertainty, confusion and disparate treatment with respect to access to public accommodations for the LGBT community.

This Article examines potential issues posed by the wide variety of state public accommodation statutes in the context of sexual orientation and religious freedom. The Article first classifies state public accommodation laws into six separate categories with specific emphasis upon their commonalities and differences. The Article proposes greater uniformity among state public accommodation laws with respect to definitions and exemptions granted either by statute or through the enactment of religious freedom legislation.

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18. *See* CAL. CIVIL CODE §§ 51-51.5 (2015) (adopted 2005); COLO. REV. STAT. § 24-34-601 (2015) (adopted 2008); CONN. GEN. STAT. §§ 46a-81d, 46a-811 (2015) (adopted 1991); DEL. CODE ANN. tit. 6, §§ 4501-04 (2015) (adopted 2009); D.C. CODE §§ 2-1401.01-.02, 2-1402.01, 2-1402.31 (2015) (adopted 1977); HAW. REV. STAT. §§ 489-2-5 (2015) (adopted 2006); 775 ILL. COMP. STAT. 5/1-102-03, 5/5-101-03, 5/8A-104 (2015) (adopted 2006); IOWA CODE § 216.7 (2015) (adopted 2007); ME. REV. STAT. ANN. tit. 5, §§ 4591-92(1) (2015) (adopted 2005); MD. CODE ANN., STATE GOV'T §§ 20-101, 20-301-04 (West 2015) (adopted 2009); MASS. GEN. LAWS ch. 272, §§ 92A, 98 (2015) (adopted 1989); MINN. STAT. §§ 363A.02-.03, 363A.11, 363A.24 (2015) (adopted 1993); NEV. REV. STAT. §§ 233.010, 651.050-.070 (2015) (adopted 2009); N.H. REV. STAT. ANN. §§ 354-A:16-17 (2015) (adopted 1998); N.J. STAT. ANN. §§ 10:5-3-5 (2015) (adopted 1992); N.M. STAT. §§ 28-1-2, 7-9 (2015) (adopted 2004); N.Y. EXEC. LAW §§ 290-96 (2015) (adopted 2002); OR. REV. STAT. §§ 659A.003-.006, 659A.406-09, 659A.885 (2015) (adopted 2007); R.I. GEN. LAWS §§ 11-24-2-2.1 (2015) (adopted 1995); VT. STAT. ANN tit. 9, § 4502 (2015) (adopted 1992); WASH. REV. CODE §§ 49.60.030, 49.60.215 (2015) (adopted 2006); WIS. STAT. §§ 106.52 (2015) (adopted 2009).

19. *See* Elane Photography, L.L.C. v. Willock, 309 P.3d 53, 62-68 (N.M. 2013) (holding that the refusal of a wedding photography business to photograph a same-sex commitment ceremony violated the New Mexico Human Rights Act). *See also* Final Agency Order, Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008, at 1-2 (Colo. Civ. Rts. Comm'n May 30, 2014) (upholding an administrative law judge's determination that the refusal by a bakery to prepare a wedding cake for a same-sex couple violated Colorado's public accommodation statute).

I. PUBLIC ACCOMMODATIONS, SEXUAL ORIENTATION AND RELIGIOUS LIBERTY: A TANGLE OF LEGISLATIVE APPROACHES

A. *Introduction*

State public accommodation laws may be placed in one of six categories. Category One statutes are those prohibiting discrimination on the basis of sexual orientation in states which also provide legislative recognition of same-sex marriage and accompanying exemptions for religious organizations and clergy.[20] Category Two statutes are those containing exemptions for religious organizations and individuals within the body of existing public accommodations laws or by applicable case law.[21] Category Three statutes are those containing exemptions for religious organizations and individuals through Religious Freedom Restoration Acts (RFRA).[22] Category Four statutes are those containing exemptions for religious organizations and clergy and a RFRA.[23] Category Five statutes are those that do not contain explicit religious exemptions and that do not have an accompanying RFRA.[24] Finally, Category Six laws encompass those states lacking public accommodations statutes.[25] The following section of the article compares and contrasts laws within each of these six categories.

B. *Category One Statutes*

Category One statutes are currently in force in nine states, specifically, Delaware, Hawaii, Maine, Maryland, Minnesota, New Hampshire, New York, Vermont, and Washington, as well as the District of Columbia. These statutes share three common features. First, each of these jurisdictions recognize same-sex marriages through legislation.[26] The

20. *See infra* notes 26-45 and accompanying text.
21. *See infra* notes 46-61 and accompanying text.
22. *See infra* notes 62-95 and accompanying text.
23. *See infra* notes 96-138 and accompanying text.
24. *See infra* notes 139-47 and accompanying text.
25. *See infra* notes 148-64 and accompanying text.
26. *See* DEL. CODE ANN. tit. 13, § 129(a) (2015) (providing for equal treatment pursuant to all sources of law to "same-gender and different-gender married couples and their children"); D.C. CODE §§ 46-401(a), 46-405.01 (2015) (defining marriage as "the legally recognized union of 2 persons" and extending recognition to same-sex marriages legally performed in other jurisdictions); HAW. REV. STAT. §§ 572-1, 572-3 (2015) (permitting marriage "between two individuals without regard to gender" and extending recognition to same-sex marriages legally performed in other jurisdictions); ME. REV. STAT. ANN. tit. 19-A, §§ 650-A, 650-B (2015) (defining marriage as "the legally recognized union of two people" and extending recognition to same-sex marriages legally performed in other jurisdictions); MD. CODE ANN. FAM. LAW § 2-201(B) (West 2015) (permitting marriage between "two individuals who are not otherwise prohibited from marrying"); MINN. STAT. § 517.01 (2015) (defining marriage as "a civil contract

second common feature of these statutes is the religious exemption that accompanies the legislative recognition of same-sex marriage. All of these statutes contain a ministerial exemption for clergy who refuse to solemnize marriages on the basis of religious objections.[27] Similarly, all of these statutes but one exempt religious associations, organizations, and societies from providing accommodations for the solemnization of marriages to which they have a religious objection or which violate their beliefs.[28]

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between two persons"); N.H. REV. STAT. ANN. § 457:1-a (2015) (defining marriage as "the legally recognized union of twotwo2two2 people"); N.Y. DOM. REL. LAW § 10-A (2015) (validating marriages "regardless of whether the parties to the marriage are of the same or different sex"); VT. STAT. ANN. tit. 15, § 8 (2015) (defining marriage as "the legally recognized union of two people"); WASH. REV. CODE § 26.04.010(1) (2015) (defining marriage as "a civil contract between two persons").

27. *See* D.C. CODE § 46-406(c) (exempting priests, imams, rabbis, ministers, or other officials of any religious society who is authorized to solemnize or celebrate marriages); HAW. REV. STAT. § 572-12.1(a) (exempting clergy, ministers, priests, rabbis, and officers of "any religious denomination or society"); ME. REV. STAT. ANN. tit. 19-A, § 655-(3) (exempting "any member of the clergy"); MD. Civil Marriage Protection Act, 2012 Md. Laws. Ch. 2, sec. 2, § 2-202 (H.B. 438) (2012) (to be codified as amended at MD. CODE ANN. FAM. LAW § 2-202(c)(2)) (exempting officials of "a religious order or body"); MINN. STAT. § 517.09(2) (exempting licensed or ordained members of the clergy); N.H. REV. STAT. ANN. § 457:37(III) (exempting "any individual who is managed, directed, or supervised by or in conjunction with a religious organization, association, or society"); N.Y. DOM. REL. LAW § 11(1)(A) (exempting clergymen or ministers of "any religion"); VT. STAT. ANN. tit. 18, § 5144(b) (exempting clergy authorized by state law to solemnize marriages); WASH. REV. CODE § 26.04.010(4) (exempting ministers, priests, imams, rabbis and other "similar officials of any religious organization"). The exemption is broadest in Delaware where any person authorized to solemnize a marriage, including, but not limited to, clergypersons and ministers, may refuse to do so for any reason whatsoever without penalty. *See* DEL. CODE ANN. tit. 13, § 106(e).

28. *See* D.C. CODE § 46-406(e)(1) (exempting religious societies and nonprofit organizations that are "operated, supervised, or controlled by or in conjunction with" such societies); HAW. REV. STAT. § 572-12.2(a) (exempting religious societies and nonprofit organizations that are "operated, supervised, or controlled by" such societies); ME. REV. STAT. ANN. tit. 19-A, § 655-(3) (exempting "any church, religious denomination or other religious institution"); MD. CIVIL MARRIAGE PROTECTION ACT, 2012 Md. Laws. Ch. 2, sec. 2, § 2-202 (H.B. 438) (2012) (to be codified as amended at MD. CODE ANN. FAM. LAW § 2-202(c)(3) (exempting religious organizations, associations and societies and nonprofit institutions and organizations subject to their supervision or control); MINN. STAT. §§ 363A.26(2), 517.09(3) (exempting religious associations, corporations and societies and nonprofit institutions subject to their supervision or control); N.H. REV. STAT. ANN. § 457:37(III) (exempting religious organizations, associations, and societies and any nonprofit institution or organization "operated, supervised, or controlled by or in conjunction with" such organizations, associations, and societies); N.Y. DOM. REL. LAW § 10-b(1) (exempting religious corporations and nonprofit corporations subject to their supervision or control); N.Y. EXEC. LAW § 296(11) (exempting religious or denominational institutions and organizations or charitable organizations "operated, supervised, or controlled by or in connection with" such institutions and organizations); VT. STAT. ANN. tit. 9, § 4502(l) (exempting religious organizations, associations, societies and nonprofit institutions and organizations "operated, supervised, or controlled by or in conjunction with" such organizations,

However, only three of the ten statutes explicitly define "religion" or "religious associations, organizations and societies." The most comprehensive definition is set forth in the District of Columbia marriage ordinance. "Religious societies" are voluntary associations of individuals for "religious purposes."[29] It is clear from the use of the term "individual" that membership in such societies is limited to natural persons. The ordinance further elaborates upon what purposes are deemed "religious." Specifically, in order for a purpose to be "religious," it must include or pertain to "a belief in a theological doctrine, a belief in and worship of a divine ruling power, a recognition of a supernatural power controlling man's destiny, or a devotion to some principle, strict fidelity or faithfulness, conscientiousness, pious affection, or attachment."[30]

The definitions in the remaining two statutes are much less detailed. New York's marriage statute makes specific reference to definitions contained within the state's religious corporation law.[31] The religious corporation law requires such organizations to consist of "members" who meet for "divine worship or other religious observances."[32] What constitutes "divine worship" or "religious observances" remain undefined as does whether "members" are restricted to individuals or can consist of non-natural persons. The definition of a "religious organization" for purposes of the ministerial exemption in Washington is more detailed. Although failing to explicitly define "religion," the Washington marriage statute nevertheless includes "churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and ecumenical organizations, mission organizations, faith-based social agencies, and other entities whose principal purpose is the study, practice, or advancement of religion."[33]

Religious exemptions also vary among jurisdictions. For example, although Delaware allows any person authorized to solemnize a marriage to refuse to do so for any reason whatsoever, this exemption is not

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associations, or societies); WASH. REV. CODE § 26.04.010(5) (exempting religious organizations).

29. D.C. CODE § 46-406(a)(3) (2013).

30. *Id.* § 46-406(a)(2) (2013).

31. *See* N.Y. DOM. REL. LAW § 10-b(1).

32. N.Y. RELIG. CORP. LAW § 2. This section also defines "clergymen" and "ministers" to include:

> A duly authorized pastor, rector, priest, rabbi . . . and a person having authority from, or in accordance with, the rules and regulations of the governing ecclesiastical body of the denomination or order, if any, to which the church belongs, or otherwise from the church or synagogue to preside over and direct the spiritual affairs of the church or synagogue.

Id.

33. WASH. REV. CODE §§ 26.04.007, 26.04.010 (2012)

applicable to clerks of the peace and deputies who are expressly required to solemnize marriages if requested by the applicants.[34] Religious organizations, associations and societies in Maryland are prohibited from denying "services, accommodations, advantages, facilities, goods, or privileges" to an individual if the request relates to the promotion of marriage through governmentally-funded social or religious programs or services.[35] Minnesota expressly excludes secular business activities from its exemption for religious organizations.[36]

The final common feature of Category One statutes is the prohibition upon discrimination in public accommodations on the basis of sexual orientation. However, these statutes are not uniform. For example, the statutes differ in their definition of public accommodations. Two statutes contain broad definitions which include any establishment offering goods or services to the public.[37] The remaining statutes list establishments considered to be "public accommodations."[38] The listed establishments primarily focus on lodging of transient guests, establishments serving food and beverages, places of exhibition, amusement and recreation, retail establishments offering goods, services and recreation to the public, and transportation facilities.[39]

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34. *See* DEL. CODE ANN. tit. 13, § 106(e) (2015).

35. *See* Civil Marriage Protection Act, 2012 MD. Laws. Ch. 2, sec. 2, § 2-202 (H.B. 438) (2012) (to be codified as amended at MD. CODE ANN. FAM. LAW § 2-202(c)(3)(a)(2)) (2015).

36. *See* MINN. STAT. § 517.09(3) (2015) (defining "secular business activities" as "conduct . . . unrelated to the religious and educational purposes" for which the religious association, corporation or society was organized).

37. *See* DEL. CODE ANN. tit. 6, § 4502(14 (2015) ("any establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general public"); VT. STAT. ANN tit. 9, § 4501(1) (2015) ("any school, restaurant, store, establishment or other facility at which services, facilities, goods, privileges, advantages, benefits or accommodations are offered to the general public").

38. *See* HAW. REV. STAT. § 489-2(1-12) (2015) ("a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public as customers, clients, or visitors" followed by a list of twelve specific types of establishments); ME. REV. STAT. ANN. tit. 5, § 4553(8)(A-N) (2015) ("[A] facility, operated by a public or private entity, whose operations fall within at least one of the following [fourteen] categories"); N.H. REV. STAT. ANN. §354-A:2(XIV) (2015) (an "establishment which caters or offers its services or facilities or goods to the general public" with twenty specific examples of such establishments); N.Y. EXEC. LAW § 292 (2015) (all places offering lodging to transient guests, establishments serving food or beverages, places of exhibition, amusement and recreation, wholesalers and retailers offering goods, services and recreation to the public, and transportation facilities followed by a list of 51 types of establishments but specifically excluding public educational institutions); WASH. REV. CODE § 49.60.040(2) (2015) ("any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities" followed by a list of twenty-three types of locations).

39. Maryland's statute encapsulates these general areas of coverage through its application

By contrast, the sections of these statutes identifying protected classes are relatively uniform. All of these statutes include heterosexuality, homosexuality and bisexuality within the term "sexual orientation."[40] The statutes, with the exceptions of Delaware and Vermont, specifically include perceived orientation within the definition of "sexual orientation."[41] However, only eight of these statutes expressly include gender identity or expression.[42]

Practices that may be deemed discriminatory also vary among Category One statutes. Eight of the ten statutes prohibit acts that aid or abet discrimination in public accommodations.[43] However, only five of

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to lodging of transient guests, facilities principally engaged in the sale of food or alcoholic beverages, all places of exhibition or entertainment and retail establishments offering goods, services, entertainment, recreation or transportation to the public without a further detailed list of facilities or businesses. *See* MD. CODE ANN., STATE GOV'T § 20-301. *See also* D.C. CODE § 2-1401.02(24) (2015); MINN. STAT. § 363A.02(34).

40. *See* DEL. CODE ANN. tit. 6, § 4502(16); D.C. CODE § 2-1401.02(28); HAW. REV. STAT. § 489-2(12); ME. REV. STAT. ANN. tit. 5, § 4553(9-C); MD. CODE ANN., STATE GOV'T § 20-101(f); MINN. STAT. § 363A.03(44); N.H. REV. STAT. ANN. § 21:49; N.Y. EXEC. LAW § 292(27); VT. STAT. ANN tit. 1, § 143; WASH. REV. CODE § 49.60.040(26).

41. *See* D.C. CODE § 2-1402.31(a); HAW. REV. STAT. § 489-2(12); ME. REV. STAT. ANN. tit. 5, § 4553(9-C); MD. CODE ANN., STATE GOV'T § 20-101(f); MINN. STAT. § 363A.03(44); N.H. REV. STAT. ANN. § 21:49; N.Y. EXEC. LAW § 292(27); WASH. REV. CODE § 49.60.040(26). The Delaware statute makes no reference to perceived sexual orientation but does state that it "shall be liberally construed to the end that the rights herein provided for all people, without regard to . . . sexual orientation may be effectively safeguarded" from which it may be concluded that discrimination on the basis of perceived sexual orientation would be prohibited. DEL. CODE ANN. tit. 6, § 4501. Vermont's statute does not distinguish between actual and perceived orientation. *See* VT. STAT. ANN tit. 1, § 143. The questionnaire utilized by the Civil Rights Unit of the Vermont Attorney General's Office allows for aggrieved persons to file a complaint with respect to perceived orientation, but the Vermont Human Rights Commission does not make this distinction in the complaint form utilized in employment discrimination cases. *See* ANTI-DISCRIMINATION LAW IN VERMONT,GAY & LESBIAN ADVOCATES & DEFENDERS (2014), http://www.glad.org/rights/vermont/c/anti-discrimination-law-in-vermont.

42. *See* DEL. CODE ANN. tit. 6, § 4503; D.C. CODE § 2-1402.31(1); HAW. REV. STAT. § 489-3; ME. REV. STAT. ANN. tit. 5, § 4553(9-C); MD. CODE ANN., STATE GOV'T § 20-304; MINN. STAT. § 363A.11(1)(a); VT. STAT. ANN tit. 9, § 4502(a); WASH. REV. CODE § 49.60.215(1).

43. *See* DEL. CODE ANN. tit. 6, § 4504(a), (c) (indirect participation in unlawful discriminatory practices or assisting, inducing, inciting or coercing another person to engage in such practices); D.C. CODE §§ 2-1402.31(a)(1), 2-1402.61(a), 2-1402.62 (indirect participation in unlawful discriminatory practices, denying equal access to public accommodations through coercion, threats, or retaliation, and aiding and abetting unlawful discriminatory practices); HAW. REV. STAT. § 489-5(a)(2) (conspiracies to aid, abet, incite, or coerce a person to engage in discriminatory practices); ME. REV. STAT. ANN. tit. 5, §§ 4553(10)(D), 4592(1) (aiding, abetting, inciting, compelling or coercing unlawful discriminatory practices and indirect participation in such practices); MD. CODE ANN., STATE GOV'T § 20-801(1) (aiding, abetting, inciting, compelling or coercing another person to engage in unlawful discriminatory practices); N.H. REV. STAT. ANN. §§ 354-A:2(XV)(d), A:17 (aiding, abetting, inciting, compelling or coercing another person to engage in unlawful discriminatory practices and indirect participation in such practices); N.Y. EXEC. LAW § 296(2)(a) (indirect participation in unlawful discriminatory practices); WASH. REV.

the statutes expressly prohibit the publication, posting, circulation or other dissemination of written or electronic communications that the patronage of certain persons will be refused or denied or that such persons are unwelcome, objectionable, or undesirable.[44] Only one statute defines discriminatory practices to include refusals of service based upon association with a member of a protected class.[45]

C. *Category Two Statutes*

Category Two statutes are currently in force in seven states, specifically, California, Colorado, Iowa, Nebraska, New Jersey, Oregon, and Utah. Category Two statutes are those containing exemptions for religious organizations and individuals within the body of existing public accommodations laws themselves or by applicable case law. Recognition of same-sex marriage was the result of judicial opinion in each of these states.[46]

Despite their inclusion of religious exemptions, Category Two statutes differ in several ways. The primary difference is whether sexual orientation is designated as a protected class for purposes of public accommodations discrimination. Two states, Nebraska and Utah, do not include sexual orientation in their respective lists of protected classes.[47] The remaining states specifically prohibit discrimination in public accommodations on the basis of actual and perceived sexual orientation[48] and, with the exception of New Jersey, gender identity and expression.[49]

Six of the states define "public accommodations," but these definitions differ from one another.[50] Three states define "public

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CODE §§ 49.60.215(1), 220 (indirect participation in unlawful discriminatory practices and aiding, abetting, encouraging or inciting such practices).

44. *See* DEL. CODE ANN. tit. 6, § 4504(b) ("any written, typewritten, mimeographed, printed or radio communications"); D.C. CODE § 2-1402.31(a)(2) ("a statement, advertisement, or sign"); ME. REV. STAT. ANN. tit. 5, § 4592(2) ("a notice or advertisement"); N.H. REV. STAT. ANN. §§ 354-A:17 ("a written or printed communication, notice or advertisement"); N.Y. EXEC. LAW § 296(2)(a) ("a written or printed communication, notice or advertisement").

45. *See* MINN. STAT. § 363A.15 (2015).

46. *See supra* notes 3-4 and accompanying text.

47. *See* NEB. REV. STAT. § 20-134 (2015) (defining protected classes to include race, creed, color, gender, religion, national origin, and ancestry); UTAH CODE ANN. § 13-7-3 (West 2015) (defining protected classes to include race, color, gender, religion, ancestry, and national origin).

48. *See* CAL. CIV. CODE §§ 51-51.5(a) (West 2015); CAL. GOV'T CODE § 12926(s) (West 2015); COLO. REV. STAT. §§ 24-34-301(7), 24-34-601 (2015); IOWA CODE §§ 216.2(14), 216.7 (2015); N.J. STAT. ANN. §§ 10:5-4 (2015); OR. REV. STAT. §§ 174.100 (66767), 659A.003-.006, 659A.406-09, 659A.885 (2015).

49. *See* CAL. CIV. CODE § 51.5(a); COLO. REV. STAT. § 24-34-601(2); IOWA CODE § 216.7(1)(a); OR. REV. STAT. § 659A.403.

50. The California statute does not use the term "public accommodations." *See* CAL. CIV. CODE § 51.5 ("No business establishment of any kind whatsoever shall discriminate against,

accommodations" very broadly to include any establishment offering goods or services to the public.[51] The Colorado and New Jersey statutes contain lengthy lists of establishments considered to be "public accommodations."[52] Nebraska's statute is much narrower and applies only to lodging of transient guests, facilities principally engaged in the sale of food, gasoline stations, places of exhibition or entertainment and facilities owned, operated, or managed by the state or any agency or subdivision thereof while omitting establishments serving beverages, retail establishments offering goods and services to the public, and transportation facilities.[53]

Discriminatory practices also vary among Category Two statutes. Four statutes prohibit aiding or abetting discrimination.[54] Two of the seven statutes expressly prohibit the publication, posting, circulation or other dissemination of written or electronic communications that the

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boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person . . . on account of any characteristic listed [herein]"). The term "business establishment" is to be interpreted "in the broadest sense reasonably possible." Curran v. Mt. Diablo Council of the Boy Scouts of Am., 952 P.2d 218, 236 (Cal. 1998). The term has been applied to for-profit commercial enterprises and non-profit organizations with an underlying business or economic purpose. *See, e.g.*, Stevens v. Optimum Health Inst., 810 F. Supp. 2d 1074, 1088-89 (S.D. Cal. 2011) (religious organization); O'Connor v. Village Green Owners Ass'n, 662 P.2d 427, 431 (Cal. 1983) (condominium association); Rotary Club of Duarte v. Bd. of Dirs., 224 Cal. Rptr. 213, 221-26 (Cal. Ct. App. 1986) (non-profit civic association). *But see Curran*, 952 P.2d at 236 (holding that charitable organizations whose activities are not related to economic purposes are not business establishments within the meaning of the public accommodation statute).

51. *See* IOWA CODE § 216.2(13)(a) ("[E]ach and every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods for a fee or charge to nonmembers of any organization or association utilizing the place, establishment, or facility . . ." and all such places, establishments, or facilities that offer services, facilities, or goods gratuitously if they receive governmental support or a subsidy); OR. REV. STAT. § 659A.400(1) ("[A]ny place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise . . ."); UTAH CODE ANN. § 13-7-2(1)(a) ("[E]very place, establishment, or facility of whatever kind, nature, or class that caters or offers its services, facilities, or goods to the general public for a fee or charge . . .").

52. *See* COLO. REV. STAT. § 24-34-601 ("[A]ny place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public . . ." followed by a list of thirty-eight specific types of establishments); N.J. STAT. ANN. §§ 10:5-5(l) (providing all places offering lodging to transient guests, establishments serving food or beverages, places of exhibition, amusement and recreation, producers, manufacturers, wholesalers, distributors and retailers offering goods, services and recreation to the public, transportation facilities, and educational institutions at any level followed by a list of twenty-nine specific types of establishments).

53. *See* NEB. REV. STAT. § 20-133(1-6)(2015).

54. *See* CAL. CIV. CODE § 52(a) (aiding or inciting discriminatory practices); COLO. REV. STAT. § 24-34-601(2) (indirect participation in unlawful discriminatory practices); NEB. REV. STAT. § 20-135 (aiding, abetting, inciting, compelling or coercing discriminatory practices); OR. REV. STAT. § 659A.406 (aiding or abetting unlawful discriminatory practices).

patronage of certain persons will be refused or denied or that such persons are unwelcome, objectionable, or undesirable.[55] California also prohibits discrimination against third persons on the basis of their association with members of a protected class.[56]

Religious exemptions exist in each of the Category Two statutes but vary with respect to identification of the persons and organizations entitled to their utilization. As a general rule, the majority of Category Two statutes exclude places utilized for religious purposes from the definition of public accommodations[57] or specifically exempt religious organizations from compliance.[58] However, unlike Iowa and Nebraska, Oregon's exemption is inapplicable to decisions regarding the use of facilities that are "connected with a commercial or business activity that has no necessary relationship to the church or institution."[59] The New Jersey and California exemptions are outliers to these general principles. New Jersey limits its exemption to "any educational facility operated or maintained by a bona fide religious or sectarian institution."[60] The legality of any exemption granted for religious purposes in California is to be determined by application of the standards set forth in *Employment Division v. Smith.*[61] One uniform feature of these exemptions is the complete absence of definitions of "religion," "bona fide religious purpose," and "bona fide religious associations, institutions, and organizations."

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55. *See* COLO. REV. STAT. § 24-34-601(2) ("[A]ny written, electronic, or printed communication, notice, or advertisement . . ."); OR. REV. STAT. § 659A.409 ("[A]ny communication, notice, advertisement or sign of any kind. . . .").

56. *See* CAL. CIV. CODE § 51.5(a).

57. *See, e.g.*, COLO. REV. STAT. § 24-34-601(1) (excluding churches, synagogues, mosques, and other places that are "principally used for religious purposes" from the definition of public accommodations).

58. *See, e.g.*, IOWA CODE § 216.7(2)(a) (2015) (stating that the public accommodation statute shall not apply to "[A]ny bona fide religious institution with respect to any qualifications the institution may impose based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose"); NEB. REV. STAT. § 20-137 (exempting public accommodations owned or operated by a "religious corporation, association, or society" to the extent that they give preferences to the use of such accommodations to members of the same faith as that of the administering body); OR. REV. STAT. § 659A.006(3) (permitting "a bona fide church or other religious organization" to regulate the use of its facilities based upon "a bona fide religious belief about sexual orientation as long as . . . the use of facilities is closely connected with or related to the primary purposes of the church or institution").

59. OR. REV. STAT. § 659A.006(3).

60. *See* N.J. STAT. ANN. § 10:5-5(l) (2015).

61. *See* N. Coast Women's Care Med. Grp., Inc. v. Superior Court, 189 P.3d 959, 966-68 (Cal. 2008) (concluding that the Unruh Civil Rights Act was "a valid and neutral law of general applicability," that the Act furthered "California's compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation" and that there were "no less restrictive means for the state to achieve that goal" (citing Employment Div. v. Smith, 494 U.S. 872, 879 (1990)).

D. *Category Three Statutes*

Category Three statutes are currently in force in Arizona, Arkansas, Florida, Idaho, Indiana, Louisiana, Missouri, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Virginia. Category Three statutes are those containing exemptions for religious organizations and individuals through RFRAs or similarly-titled legislation. Recognition of same-sex marriage was the result of judicial opinion in each of these states.[62] None of these statutes prohibit discrimination in public accommodations on the basis of sexual orientation.[63] However, Indiana's RFRA specifically provides that it may not serve as a basis for denying access to public accommodations on the basis of sexual orientation and gender identity.[64]

All but one of the Category Three statutes define "public accommodations."[65] Five states define "public accommodations" to include any establishment offering goods or services to the public.[66]

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62. *See supra* notes 3-4 and accompanying text.

63. *See* ARIZ. REV. STAT. ANN. § 41-1442 (A) (2015) (limiting coverage to race, color, religion, gender, national origin and ancestry); ARK. CODE ANN. § 16-123-107(a)(2) (2015) (defining protected classes to include gender, disability, race, religion, and national origin); FLA. STAT. § 760.08 (2015) (limiting coverage to race, color, religion, gender, national origin, handicap, and marital status); IDAHO CODE ANN. § 67-5901(2) (WEST 2015) (limiting coverage to race, color, religion, gender, and national origin); IND. CODE § 22-9-1-2(a-b) (2015) (defining protected classes to include gender, disability, race, color, religion, national origin, and ancestry); LA. STAT. ANN. § 51:2447244722447 (2015) (limiting coverage to race, color, creed, religion, gender, age, national origin, and disability); MO. REV. STAT. § 213.065(2) (2015) (limiting coverage to race, color, religion, gender, national origin, disability, and ancestry); OKLA. STAT. tit. 25, § 1402 (2015) (limiting coverage to race, color, religion, gender, national origin, age, and disability); 43 PA. CONS. STAT. § 955(i)(1) (2015) (limiting coverage to race, color, religious creed, gender, national origin, ancestry, handicap, and disability); S.C. CODE ANN. § 45-9-10(A) (2015) (limiting coverage to race, color, religion, and national origin); TENN. CODE ANN. § 4-21-501 (2015) (limiting coverage to race, color, creed, religion, gender, national origin, and age); VA. CODE ANN. § 2.2-3901 (2015) (limiting coverage to race, color, religion, gender, pregnancy, childbirth, national origin, age, marital status, and disability).

64. *See* IND. CODE § 34-13-9-0.7. (2015)

65. Virginia's statute does not expressly define the term "public accommodations." However, it may be inferred from applicable case law that Virginia adheres to the definition of public accommodations found in Title II of the Civil Rights Act of 1964. *See* Grimes v. Canadian Am. Transp., C.A.T. (U.S.), Inc., 72 F. Supp.2d 629, 634 (W.D. Va. 1999) ("[T]he Virginia Human Rights Act essentially makes any federal violation a violation of Virginia law as well"). *See also infra* note 150 and accompanying text.

66. *See* ARIZ. REV. STAT. ANN. § 41-1441(2) (2015) ("[A]ll establishments which cater or offer their services, facilities or goods to or solicit patronage from the members of the general public . . . ."); ARK. CODE ANN. § 16-123-102(7) (2015) ("[A]ny place, store, or other establishment, either licensed or unlicensed, that supplies accommodations, goods, or services to the general public, or that solicits or accepts the patronage or trade of the general public, or that is supported directly or indirectly by government funds . . . ."); IDAHO CODE ANN. § 67-5902(9) ("[A] business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or

Pennsylvania's statute has a lengthy list of establishments considered to be "public accommodations."[67] Oklahoma's statute is narrower as a result of its exclusion of certain types of establishments from its definition.[68] Missouri's statute is narrower still and applies only to lodging of transient guests, facilities principally engaged in the sale of food for consumption on the premises, gasoline stations, places of exhibition or entertainment and facilities owned, operated, or managed by the state or any agency or subdivision thereof.[69] Florida's statute omits state-owned, operated, or managed facilities from its definition of public accommodations.[70] South Carolina's statute is the narrowest of all and is limited to those establishments required to obtain a license or permit from state or local governmental authorities as a condition of lawful operation.[71]

Category Three statutes are less protective with respect to actions associated with denial of access to public accommodations than their Category One and Two counterparts. Four Category Three statutes prohibit the publication, posting, circulation or other dissemination of written or electronic communications that the patronage of persons will be refused or denied or that persons are unwelcome, objectionable, or undesirable based upon their membership in a protected class,[72] and only

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accommodations are extended, offered, sold, or otherwise made available to the public . . . ."); IND. CODE § 22-9-1-3(m) (2015) "[A]ny establishment that caters or offers its services or facilities or goods to the general public . . . ."); LA. REV. STAT. ANN. § 51:2232(10) ("[A]ny place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public, or which is supported directly or indirectly by government funds . . . ."; TENN. CODE ANN. § 4-21-102(15) (2015) ("[A]ny place, store, or other establishment, either licensed or unlicensed, that supplies goods or services to the general public or that solicits or accepts the patronage or trade of the general public, or that is supported directly or indirectly by government funds . . . .").

67. *See* 43 PA. CONS. STAT. § 954(l (2015) ("any accommodation, resort or amusement which is open to, accepts or solicits the patronage of the general public" followed by a list of fifty-eight specific types of establishments).

68. *See* OKLA. STAT. tit. 25, § 1401(1) (2015) ("any place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public, or which is supported directly or indirectly by government funds" but specifically excluding barber and beauty shops and "privately-owned resort or amusement establishments").

69. *See* MO. REV. STAT. § 213.010(15 (2015).

70. *See* FLA. STAT. § 760.02(11)(a)-(d) (2015).

71. *See* S.C. CODE ANN. § 45-9-10(B)(1)-(6) (2015).

72. *See* IDAHO CODE ANN. § 67-5902(5) (2015) (any "statement, advertisement or sign"); LA. REV. STAT. ANN. § 51:2248 (2015) (any "written, printed, oral, or visual communication, notice, or advertisement"); 43 PA. CONS. STAT. § 954(i)(2) ("any advertisement and any similar written, printed, taped, or broadcast communication, notice, statement or the like § 954(i)(2) ("any"); TENN. CODE ANN. § 4-21-502 (2015) (any "written, printed, oral or visual communication, notice or advertisement"). Ironically, Virginia prohibits the publication, posting, circulation or other dissemination of written or electronic communications that the patronage of persons will be refused or denied or that persons are unwelcome, objectionable, or undesirable based upon their

one statute expressly prohibits acts that aid or abet discrimination.[73] None of the Category Three statutes prohibit discrimination on the basis of association with members of a protected class.

The hallmark of Category Three states is exemptions for religious organizations and individuals through RFRAs or similarly-titled legislation. The uniformity of these RFRAs is unsurprising given the blueprint provided by the federal RFRA.[74] Ten of these RFRAs adopt the federal standard of prohibiting governmental actions that "substantially burden" the exercise of religion.[75] Missouri's RFRA utilizes the term "burden" without the adjective "substantial."[76] Indiana's RFRA not only prohibits substantial burdens upon the exercise of religion but also actions that are "likely" to result in a substantial burden regardless of whether such actions are engaged in by the government or a private individual.[77]

Eight states expressly define the term "substantial burden" but utilize three different definitions."[78] The most specific definitions are those in the Pennsylvania and Louisiana RFRAs.[79] Pennsylvania prohibits governmental actions constraining religiously-motivated conduct, expression and activities or compelling conduct, or expression in violation of a person's religious faith.[80] Perhaps equally broad is the

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religion. *See* VA. CODE ANN. § 57-2.1(2) (2015).

73. *See* ARIZ. REV. STAT. ANN. § 41-1442(B) (2015) (aiding or inciting discriminatory practices).

74. *See generally* 42 U.S.C. §§ 2000bb-2000bb-4 (2015).

75. *See* ARIZ. REV. STAT. ANN. § 41-1493.01(B (2015); ARK. CODE ANN. § 16-123-404(a) (2015); FLA. STAT. § 761.03(1 (1998); IDAHO CODE ANN. § 73-402(2 (2015); LA. REV. STAT. ANN. § 13:5233; (2010); OKLA. STAT. tit. 51, § 253(A) (2015); 71 PA. CONS. STAT. § 2402(1 (2002); S.C. CODE ANN. § 1-32-40; (1999); TENN. CODE ANN. § 4-1-407(b (2015); VA. CODE ANN. § 57-2.02(B (2009). *See also* 42 U.S.C. § 2000bb-1(a) (providing that the "[g]overnment shall not substantially burden a person's exercise of religion . . ." except as otherwise provided therein).

76. *See* MO. REV. STAT. § 1.307(2) (2015).

77. IND. CODE § 34-13-9 (2015).

78. The terms "burden" and "substantial burden" are not defined in the Arkansas, Indiana, Missouri and South Carolina RFRAs. *But see* ARK. OP. ATT'Y GEN. NO. 2015-075 (Aug. 5, 2015), *available at* 2015 WL 4734478, at *6 (opining that an Arkansas court interpreting this provision would define a "substantial burden" as a government action which compels a claimant to refrain from religiously-motivated conduct).

79. *See* 71 PA. CONS. STAT. § 2403. (2002); LA. REV. STAT. ANN. § 13:5234.

80. 71 PA. CONS. STAT. § 2403. "Substantial burdens" upon religion are defined as governmental action that:

> (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs.
> (2) Significantly curtails a person's ability to express adherence to the person's religious faith.
> (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion.
> (4) Compels conduct or expression which violates a specific tenet of a person's

definition shared by Idaho, Oklahoma, Tennessee and Virginia providing that a "substantial burden" is governmental action that "inhibit[s] or curtail[s] religiously motivated practices."[81] By contrast, Arizona's act defines "substantial burden" as intended to ensure that "trivial, technical or de minimis infractions" resulting from governmental actions are not actionable.[82]

There is some uniformity with respect to other definitions contained in these RFRAs. Five states define the exercise of religion through specific reference to the First Amendment to the U.S. Constitution or religious protections provided in state constitutions.[83] Six states share a more detailed definition in which the "exercise of religion" is "the ability to act or refusal to act in a manner substantially motivated by a religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief."[84] Louisiana's RFRA includes this language as well as specific references to the First Amendment to the U.S. Constitution and the Louisiana Constitution.[85]

However, the parties that may exercise religion remain vague as only four states define affected "persons," and these definitions vary considerably.[86] The question of whether free exercise rights may be

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religious faith . . . .

Id. The Louisiana RFRA is identical but removes the adjectives "significantly" in subsection one and "specific" in subsection four which potentially broadens the definition. *See* LA. REV. STAT. ANN. § 13:5234(2)(a-d) (2010).

81. *See* IDAHO CODE ANN. § 73-401(5) (2015); OKLA. STAT. tit. 51, § 252(7) (2015); TENN. CODE ANN. § 4-1-407(a)(7) (2015); VA. CODE ANN. § 57-2.02(A) (2015).

82. ARIZ. REV. STAT. ANN. § 41-1493.01(E) (2015). *See also* IDAHO CODE ANN. § 73-402(5) (2015). Such potentially limiting language is not found in the Oklahoma, Tennessee and Virginia RFRAs. Florida has defined the term "substantial burden" through case law. *See* Warner v. City of Boca Raton, 887 So. 2d 1023, 1033 (Fla. 2004) (limiting "significant burden" to instances where the government either "compels the religious adherent to engage in conduct that his religion forbids . . . or forbids him to engage in conduct that his religion requires").

83. *See* OKLA. STAT. tit. 51, § 252(2) (2000) (referencing the U.S. and Oklahoma Constitutions); 71 PA. CONS. STAT. § 2403 (2002) (referencing the Pennsylvania Constitution); S.C. CODE ANN. § 1-32-20(2 (2015) (referencing the U.S. Constitution and the South Carolina Constitution); TENN. CODE ANN. § 4-1-407(a)(2) (2015) (referencing the U.S. and Tennessee Constitutions); VA. CODE ANN. § 57-2.02(A) (2009) (referencing the U.S. and Virginia Constitutions).

84. *See* ARIZ. REV. STAT. ANN. § 41-1493(2) (2010); FLA. STAT. § 761.02(3) (2015); IDAHO CODE ANN. § 73-401(2) (2000); IND. CODE § 34-13-9(5) (2015); MO. REV. STAT. § 1.302(2) (2015). Arkansas' RFRA rather meaninglessly defines "exercise of religion" as "religious exercise." ARK. CODE ANN. § 16-123-403(2) (2015). *But see* ARK. OP. ATT'Y GEN. NO. 2015-075, *supra* note 78, at *5 (opining that an Arkansas court interpreting this provision would require a sincerely-held religious belief).

85. *See* LA. REV. STAT. ANN. § 13:5234(5) (2010).

86. *See* S.C. CODE ANN. § 1-32-20(3) (1999) (defining "person" to include "[a]n individual, corporation, firm, partnership, association, or organization"). *But see* LA. REV. STAT. ANN. §

asserted by organizations remains undecided in the remaining states although it is most likely that they would follow the U.S. Supreme Court's lead in *Burwell v. Hobby Lobby Stores, Inc.* and extend such rights to at least close corporations.[87] The identity of governmental actions subject to the prohibitions upon burdening religious exercise is clearer. All but one RFRA includes rules of general applicability within their scope,[88] but only four states also include facially neutral laws.[89]

The most homogenous sections of these statutes relate to the applicable constitutional standards for determining whether governmental action impermissibly interferes with free exercise rights. Seven RFRAs reference the first prong of the *Sherbert* test, specifically, the requirement that a burden upon the exercise of religion is justified only in furtherance of a compelling state interest.[90] Five states appear to

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13:5234(1 (2010); 71 PA. CONS. STAT. § 2403 (2002) (limiting the definition of "person" to individuals and churches, associations of churches, and other religious orders, bodies, or institutions). Louisiana's RFRA was clarified to apply to non-profit and for-profit corporations by an executive order issued by Governor Bobby Jindal in May 2015, but the order is of questionable validity to the extent it purports to amend existing state law without legislative consent. *See* Exec. Order BJ 15-8, § 1 (May 19, 2015), *available at* http://www.doa.louisiana.gov/osr/other/bj15-8.htm. *See also* IND. CODE § 34-13-9(7)(1)-(3) (defining "person" to include individuals, organizations operated primarily for religious purposes, and any type of business association regardless of whether it is organized and operated for profit or non-profit purposes). However, Indiana's RFRA distinguishes between "persons" and "providers" who are prohibited from refusing to "offer or provide services, facilities, use of public accommodations [and] goods . . . to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service." *Id.* § 34-13-9-.07. "Providers" include individuals and any form of business association but not churches, nonprofit religious organizations or societies, religiously affiliated schools and ministerial personnel. *Id.* § 34-13-9-7.5.

87. 134 S. Ct. 2751, 2768-69 (2014) (holding that "protecting the free-exercise rights of corporations . . . protects the religious liberty of the humans who own and control those companies" and that "no conceivable definition of the term [person for purposes of the RFRA] includes natural persons and nonprofit corporations, but not for-profit corporations."). For an example of a state RFRA adopting this reasoning, see ARK. OP. ATT'Y GEN. No. 2015-075, *supra* note 78, at *5 (opining that an Arkansas court would include business associations within the definition of "person" covered by the state RFRA).

88. *See* ARIZ. REV. STAT. ANN. § 41-1493.01(B) (1999); ARK. CODE ANN. § 16-123-404(a) (2015); FLA. STAT. § 761.03(1) (1998); IDAHO CODE ANN. § 73-402(2) (2000); IND. CODE § 34-13-9(8)(a) (2015); LA. REV. STAT. ANN. § 13:5233; (2010); OKLA. STAT. tit. 51, § 253(A) (2000); 71 PA. CONS. STAT. § 2404(a) (2002); S.C. CODE ANN. § 1-32-40; (1999); TENN. CODE ANN. § 4-1-407(b) (2015); VA. CODE ANN. § 57-2.02(B) (2009). *But see* MO. REV. STAT. § 1.302(1) (2003) (exempting restrictions upon free exercise in the form of rules of general applicability).

89. *See* ARIZ. REV. STAT. ANN. § 41-1493.01(A); IDAHO CODE ANN. § 73-402(1); LA. REV. STAT. ANN. § 13:5233; 71 PA. CONS. STAT. § 2402(1). *But see* MO. REV. STAT. § 1.302(1) (exempting restrictions upon free exercise in the form of neutral rules that do not discriminate against or among religions). Facially neutral laws are not referenced in the Arkansas, Florida, Indiana, Oklahoma, South Carolina, Tennessee, and Virginia statutes, and their status pursuant to these RFRAs remains undecided.

90. *See* ARIZ. REV. STAT. ANN. § 41-1493.01(C)(1); ARK. CODE ANN. § 16-123-404(a)(1);

have a higher standard requiring the state to demonstrate that the burden is "essential to further a compelling governmental interest."[91] Whether the requirement of essentiality sets a higher standard for burdens upon the exercise of religion in these states or is merely a drafting anomaly is uncertain as there is no applicable case law in four of these states.[92] The definition of "compelling state interest" most likely derives from *Sherbert* as all of the statutes fail to provide a specific definition.[93] Furthermore, all of these RFRAs except Missouri require that the state utilize the least restrictive means by which to further its compelling interest.[94] Five statutes explicitly define the government's evidentiary burden with respect to these requirements.[95]

E. *Category Four Statutes*

Category Four statutes are currently in force in Connecticut, Illinois, Kansas, Kentucky, New Mexico, and Rhode Island. Category Four statutes are those recognizing same-sex marriage either statutorily or by judicial opinion with accompanying exemptions for religious organizations and RFRAs. Three of these jurisdictions extended recognition to same-sex marriage through legislation.[96] Recognition of

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FLA. STAT. § 761.03(1)(a); IND. CODE § 34-13-9(8)(b)(1); LA. REV. STAT. ANN. § 13:5233(1); 71 PA. CONS. STAT. § 2404(b)(1); S.C. CODE ANN. § 1-32-40(1). *See also* Sherbert v. Verner, 374 U.S. 398, 406 (1963).

91. IDAHO CODE ANN. § 73-402(3)(a); MO. REV. STAT. § 1.302(1)-(2); OKLA. STAT. tit. 51, § 253(B)(1); TENN. CODE ANN. § 4-1-407(b)(1); VA. CODE ANN. § 57-2.02(B)(i).

92. The difference between the "in furtherance of" and "essentiality" standards has been discussed in Tennessee. *See* Johnson v. Levy, No. M2009-02596-COA-R3-CV, 2010 Tenn. App. LEXIS 14, at *22-23 (Tenn. Ct. App. Jan. 14, 2010) (holding that the essentiality requirement is "more than semantics; it reveals that the Tennessee General Assembly intended to provide greater protection of religious freedom than that afforded by the federal RFRA").

93. *See Sherbert*, 374 U.S. at 406 (defining "compelling state interests" as those implicating "only the gravest abuses [and] endangering paramount interests. . . .").

94. *See* ARIZ. REV. STAT. ANN. § 41-1493.01(C)(2); ARK. CODE ANN. § 16-123-404(a)(2); FLA. STAT. § 761.03(1)(b); IDAHO CODE ANN. § 73-402(2)(b); IND. CODE § 34-13-9(8)(b)(2); LA. REV. STAT. ANN. § 13:5233(2); OKLA. STAT. tit. 51, § 253(B)(2); 71 PA. CONS. STAT. § 2404(b)(2); S.C. CODE ANN. § 1-32-40(2); TENN. CODE ANN. § 4-1-407(c)(2); VA. CODE ANN. § 57-2.02(B)(ii). *But see* MO. REV. STAT. § 1.302.1(2) (stating that the governmental act in question may not be "unduly restrictive").

95. *See* IDAHO CODE ANN. § 73-401(1) (clear and convincing evidence); OKLA. STAT. tit. 51, § 252(1) (clear and convincing evidence); 71 PA. CONS. STAT. §§ 2404(b), 2405(f) (providing that "[a government] agency may substantially burden a person's free exercise of religion if the agency proves, by a preponderance of the evidence, that the burden is . . . [i]n furtherance of a compelling interest of the agency [and] [t]he least restrictive means of furthering the compelling interest." and that persons asserting violations of the act must prove such claims by clear and convincing evidence); TENN. CODE ANN. § 4-1-407(a)(1) (clear and convincing evidence); VA. CODE ANN. § 57-2.02(A) (clear and convincing evidence).

96. *See* CONN. GEN. STAT. § 46b-20(4) (2015); 750 ILL. COMP. STAT. 80/1, 80/10(a)-(d)

same-sex marriage was the result of judicial opinion in Kansas, Kentucky and New Mexico.[97] Four of these states prohibit discrimination in public accommodations on the basis of actual or perceived sexual orientation.[98]

All of the Category Four statutes define "public accommodations," but the definitions vary from one another. Three states define "public accommodations" to include any establishment offering goods or services to the public.[99] Illinois, Kansas and Rhode Island utilize lists of establishments considered to be "public accommodations."[100] Three statutes prohibit the publication, posting, circulation or other dissemination of written or electronic communications that the patronage of persons will be refused or denied or that persons are unwelcome, objectionable, or undesirable based upon their membership in a protected class,[101] and one statute expressly prohibits acts that aid or abet discrimination.[102] None of these statutes prohibit discrimination on the basis of association with members of a protected class.

Religious liberty is protected in Category Four statutes through a combination of exclusions, exemptions and RFRAs. The religious exclusions contained in the Category Four statutes are diverse. For

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(2015); R.I. GEN. LAWS §§ 15-1-1, 15-1-8 (2015).

97. *See supra* notes 3-4 and accompanying text.

98. *See* CONN. GEN. STAT. §§ 46a-81d, 46a-811; 775 ILL. COMP. STAT. 5/1-102-103, 5/5-101-103, 5/8A-104; N.M. STAT. §§ 28-1-2, 28-1-7, 28-1-9 (2015); 11 R.I. GEN. LAWS §§ 11-24-2-2.1. These statutes also expressly include gender identity or expression. *See* CONN. GEN. STAT. § 46a-64a(1)-(2); 775 ILL. COMP. STAT. 5/5-102(A); N.M. STAT. § 28-1-7; 11 R.I. GEN. LAWS §§ 11-24-2, 2.3. Kansas and Kentucky do not include sexual orientation in their respective lists of protected classes. *See* KAN. STAT. ANN. § 44-1002(i)(A) (2015) (defining protected classes to include race, color, gender, religion, national origin, ancestry, and disability); KY. REV. STAT. ANN. § 344.120 (2015) (defining protected classes to include race, color, religion, and national origin).

99. *See* CONN. GEN. STAT. § 46a-63 ("[A]ny establishment which caters or offers its services or facilities or goods to the general public . . . ."); KY. REV. STAT. ANN. § 344.130 ("[A]ny place, store, or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds . . ."); N.M. STAT. § 28-1-2(H) ("[A]ny establishment that provides or offers its services, facilities, accommodations or goods to the public. . . . .").

100. *See* 775 ILL. COMP. STAT. 5/5-101(A)(1)-(13) (thirteen types of establishments that are to be considered "public accommodations"); KAN. STAT. ANN. § 44-1002(h) ("[A]ny person who caters or offers goods, services, facilities and accommodations to the public" followed by a list of eighteen types of establishments); 11 R.I. GEN. LAWS §§ 11-24-3 (listing 45 types of establishments that are to be considered "public accommodations").

101. *See* 775 ILL. COMP. STAT. 5/5-102(B) ("any written communication"); KY. REV. STAT. ANN. § 344.140 (any "written, printed, oral, or visual communication, notice, or advertisement. . . ."); R.I. GEN. LAWS §§ 11-24-2 (any "written, printed or painted communication, notice, or advertisement. . . .").

102. *See* N.M. STAT. § 28-1-7(I) ("aiding, inciting, compelling or coercing discriminatory practices. . . .").

example, the Kansas statute excludes "religious . . . association[s] or corporations" from the definition of "public accommodations."[103] "Religion" is not defined in this exclusion but is defined in Kansas' subsequently-adopted RFRA.[104] Kentucky's public accommodation statute contains a similar exclusion.[105] However, "religion" is not defined in Kentucky's accompanying RFRA, and the exemption is significantly limited in the public accommodations statute.[106] Similarly, acts of a "religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with" such institution are excluded from the public accommodation statute in New Mexico if such acts are "calculated . . . to promote the religious or denominational principles for which it is established or maintained."[107] Unlike Kentucky, New Mexico defines activities constituting the exercise of religion in its RFRA.[108] Illinois excludes the "free exercise of religion or expression of religiously based views by any individual or group" from its statute.[109] Acts constituting the "exercise of religion" are to be determined from Illinois' RFRA.[110] Rhode Island's exclusion is unusual to the extent that it is contained within the statute's definition of sexual orientation, merely provides that the inclusion of orientation does not "impose any duty on a religious organization," and does not define the terms religion or the exercise thereof.[111] Connecticut's religious exclusion is specifically limited to consideration of sexual orientation and gender identity with respect to employment decisions made by "a religious corporation, entity, association, educational institution or society."[112]

The three states that have extended recognition to same-sex marriage through legislation recognize a ministerial exemption for clergy who refuse to solemnize marriages on the basis of religious objections.[113]

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103. *See* KAN. STAT. ANN. § 44-1002(h) (2015).

104. *See infra* note 126 and accompanying text.

105. *See* KY. REV. STAT. ANN. § 344.130(3) (West 2015) (excluding religious organizations and their activities and facilities if the proposed use is inconsistent with religious tenets).

106. *Id.* § 344.130(3)(a-c) (excluding hate groups from the definition of religious organizations, prohibiting discrimination on the basis of disability, race, color, or national origin regardless of whether the organization is religious, and excluding "nonreligious activities" sponsored by religious organizations and activities offered to the general public).

107. N.M. STAT. ANN. § 28-1-9(B) (2015). The exclusion is unavailable to organizations that restrict membership on account of race, color, national origin or ancestry. *Id.*

108. *See infra* note 128 and accompanying text.

109. 775 ILL. COMP. STAT. 5/5-102.1(b) (2015).

110. *See infra* note 127 and accompanying text.

111. *See* R.I. GEN. LAWS § 11-24-2.1(h) (2015).

112. CONN. GEN. STAT. §§ 46a-81p, 46a-81aa (2015).

113. *See id.* § 46b-21(a)-(b) (exempting "clergy" and "church or church-controlled organizations" as defined in the U.S. Internal Revenue Code). *See also* 750 ILL. COMP. STAT. 5/209(a-5) (2015) (exempting "ministers, clergy, or officiants acting as a representative of a

These statutes also exempt religious associations, organizations, and societies from providing accommodations for the solemnization of marriages to which they have a religious objection or which violate their beliefs.[114] The organizational exemptions vary among these statutes. The most explicit exemption is contained in the Illinois statute. This exemption is specifically limited to "religious facilities" which are defined as "sanctuaries, parish halls, fellowship halls, and similar facilities."[115] The Illinois exemption does not include facilities which serve arguably more secular purposes such as health care and educational facilities and social service agencies.[116] Most important for purposes of public accommodation law, the Illinois religious facility exemption does not include "facilities such as businesses."[117] It may be presumed that the exclusion of business facilities is applicable to facilities owned or operated by religious organizations, associations or societies and affiliated organizations which are otherwise made available to members of the general public without faith-based distinctions and on a for-profit basis. Unfortunately, the Illinois statute does not further elaborate upon this exclusion. "Religion" and the free exercise thereof are defined in Illinois' RFRA.[118] By contrast, the Connecticut and Rhode Island statutes do not define "religion," "religious organizations, associations or societies" or "religious facilities."

Religious liberty is also protected in Category Four states through RFRAs. These RFRAs states closely resemble their counterparts in Category Three states. Two Category Four RFRAs adopt the federal standard of prohibiting governmental actions that "substantially burden"

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religious denomination"); 15 R.I. GEN. LAWS § 15-3-6.1(b (2015) (exempting a "regularly licensed or ordained clergyperson, minister, elder, priest, imam, rabbi, or similar official of any church or religious denomination").

114. *See* CONN. GEN. STAT. § 46b-150d (2015) (exempting a "religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society" from providing "services, accommodations, advantages, facilities, goods or privileges" with respect to the solemnization or celebration of marriages in violation of its religious beliefs and faith); 750 ILL. COMP. STAT. 5/209(a-10) (2015) (exempting churches, mosques, synagogues, temples, nondenominational ministries, interdenominational or ecumenical organizations, mission organizations, or other organizations "whose principal purpose is the study, practice or advancement of religion" from providing "religious facilities" for the solemnization or celebration of a marriage in violation of their religious beliefs); 15 R.I. GEN. LAWS § 15-3-6.1(c) (2015) (exempting religious organizations, associations, or societies and "any nonprofit institution or organization operated, supervised or controlled by a religious organization, association or society" from providing "services, accommodations, advantages, facilities, goods, or privileges" for the solemnization, celebration or promotion of marriages in violation of their religious beliefs).

115. 750 ILL. COMP. STAT. 5/209(a-10) (2015).

116. *Id.*

117. *Id.*

118. *See infra* note 127 and accompanying text.

the exercise of religion.[119] The Illinois RFRA does not define "substantial burden," and the Kentucky RFRA merely provides that "burdens" include, but are not limited to, the withholding of government benefits, the assessment of penalties, and exclusion from programs or access to facilities.[120]

The remaining four states have adopted different prohibitions upon free exercise encroachments. Two statutes prohibit governmental actions that merely burden the free exercise of religion. Kansas' RFRA prohibits governmental action that "directly or indirectly constrains, inhibits, curtails or denies the exercise of religion by any person or compels any action contrary to a person's exercise of religion" including the withholding of benefits, assessment of penalties or exclusion from government programs or access to government facilities.[121] Any such governmental action is deemed to be a burden upon free exercise. However, later language contained in the statute prohibits governmental actions that "substantially burden" the exercise of religion.[122] It may be concluded from this language that Kansas adheres to the "substantial burden" test rather than a broader prohibition. By contrast, Connecticut prohibits the state or any subdivision thereof from burdening the exercise of religion without reference to "substantial."[123] New Mexico and Rhode Island prohibit governmental actions that "restrict" free exercise.[124] It is unclear whether usage of this term instead of "substantial burden" was intended to expand free exercise rights due to the absence of definitions in each of these statutes and interpretive case law.

There is also a lack of uniformity among the statutes in defining protected religious activities, persons, and government action which may impermissibly interfere with such activities. Three states expressly define the exercise of religion by statute in 3 different ways.[125] Kansas defines the "exercise of religion" by reference to the First Amendment to the U.S. Constitution and the Kansas Constitution with additional terminology stating that exercise includes "the right to act or refuse to act in a manner substantially motivated by a sincerely-held religious tenet or belief, whether or not the exercise is compulsory or a central part or requirement of the person's religious tenets or beliefs."[126] Illinois defines the "exercise of religion" as "an act or refusal to act that is substantially motivated by

119. *See* 775 ILL. COMP. STAT. 35/10(a)(3) (2015); KY. REV. STAT. ANN. § 446.350 (West 2015).

120. *See* KY. REV. STAT. ANN. § 446.350.

121. KAN. STAT. ANN. § 60-5302(a) (2015).

122. *Id.* § 60-5303(a).

123. CONN. GEN. STAT. § 52-571b(a) (2015).

124. *See* N.M. STAT. ANN. § 28-22-3 (2015); 42 R.I. GEN. LAWS § 42-80.1-3 (2015).

125. The term "exercise of religion" is not defined in the Connecticut, Kentucky or Rhode Island statutes.

126. KAN. STAT. ANN. § 60-5302(c) (2015).

religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief" without Kansas' specific reference to sincerity of belief.[127] New Mexico broadly defines the exercise of religion to include any "act or a refusal to act that is substantially motivated by religious belief" without reference to the sincerity of belief or the compulsory or central nature of the purported religious exercise.[128]

The parties that may exercise religious freedoms remain vague as only Kansas' RFRA expressly extends religious rights to for-profit organizations.[129] It is probable that the remaining states with the exception of Illinois would follow the U.S. Supreme Court's lead in *Burwell v. Hobby Lobby Stores, Inc.*[130] The identity of governmental actions subject to the prohibition upon burdening religious exercise is equally fragmented. Five statutes include rules of general applicability,[131] but only one statute explicitly provides that facially neutral laws may violate free exercise rights.[132]

Category Four RFRAs also address constitutional standards for determining whether governmental actions impermissibly interfere with free exercise rights. Four RFRAs provide that a governmental burden upon the exercise of religion is justified only in furtherance of a compelling state interest.[133] New Mexico and Rhode Island appear to have a higher standard requiring the state to demonstrate that the burden is "essential to further a compelling governmental interest."[134] The meaning of the term "compelling governmental interest" is most likely derived from *Sherbert* although only Illinois' RFRA makes specific

127. 775 ILL. COMP. STAT. 35/5 (2015).

128. N.M. STAT. ANN. § 28-22-2(A) (2015).

129. KAN. STAT. ANN. § 60-5302(f) (2015) (defining "person" to mean "any legal person or entity under the laws of the state of Kansas and the laws of the United States").

130. *See supra* note 87 and accompanying text. It is less certain that Illinois courts would interpret its RFRA to include closely-held businesses given that the religious facility exemption within its same-sex marriage statute does not include business facilities. *See supra* note 117 and accompanying text.

131. *See* CONN. GEN. STAT. § 52-571b(a) (2015); 775 ILL. COMP. STAT. 35/15; (2015); KAN. STAT. ANN. § 60-5303(a) (2015); N.M. STAT. § 28-22-3(A) (2015); R.I. GEN. LAWS § 42-80.1-3(b)(1) (2015). Kentucky's RFRA does not state whether it includes generally applicable laws.

132. *See* 775 ILL. COMP. STAT. 35/10(a)(2) (2015) (stating that "[l]aws 'neutral' toward religion, as well as laws intended to interfere with the exercise of religion, may burden the exercise of religion"). *But see* N.M. STAT. ANN. § 28-22-3(A) (2015) (exempting restrictions upon free exercise in the form of neutral rules that do not directly discriminate against or among religions); 42 R.I. GEN. LAWS § 42-80.1-3(b)(1) (exempting restrictions upon free exercise in the form of neutral rules that do not intentionally discriminate against or among religions). Facially neutral laws are not referenced in the Connecticut, Kansas and Kentucky statutes.

133. *See* CONN. GEN. STAT. § 52-571b(b)(1); 775 ILL. COMP. STAT. 35/15; KAN. STAT. ANN. § 60-5303(a)(1) (2015); KY. REV. STAT. ANN. § 446.350 (West 2015).

134. N.M. STAT. ANN. § 28-22-3(B); 42 R.I. GEN. LAWS § 42-80.1-3(b)(2).

reference to the opinion.[135] The Kansas RFRA explicitly defines the term, but it is uncertain whether this definition is intended to establish a different standard than that set forth in *Sherbert*.[136] All Category Four states require that the state utilize the least restrictive means by which to further its compelling interest.[137] Two states explicitly define the government's evidentiary burden with respect to these requirements.[138]

F. *Category Five Statutes*

Category Five statutes are currently in force in Alaska, Massachusetts, Michigan, Montana, Nevada, North Dakota, Ohio, South Dakota, West Virginia, Wisconsin, and Wyoming. Category Five statutes are those that do not contain explicit religious exemptions and do not have an accompanying RFRA. Recognition of same-sex marriage was the result of judicial opinion in all of these states.[139] Three of these statutes prohibit discrimination in public accommodations on the basis of sexual orientation.[140] The remaining statutes do not include sexual orientation in their lists of protected classes.[141]

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135. *See* 775 ILL. COMP. STAT. 35/10(a)(6) (describing the U.S. Supreme Court's opinion in *Sherbert v. Verner*, 374 U.S. 398 (1963) as providing "a workable test for striking sensible balances between religious liberty and competing governmental interests"). *But see* State v. Bent, 328 P.3d 677, 685 (N.M. Ct. App. 2013) (holding that guidance from the federal RFRA was "misplaced" given the differences between the federal statute and the New Mexico RFRA).

136. *See* KAN. STAT. ANN. § 60-5304 (2015) (defining "compelling state interest" as "only those interests of the highest order and not otherwise served" and further stating that "[t]he religious liberty interest protected by this act is an independent liberty that occupies a preferred position").

137. *See* CONN. GEN. STAT. § 52-571b(b)(2); 775 ILL. COMP. STAT. 35/15(ii); KAN. STAT. ANN. § 60-5303(a)(2); KY. REV. STAT. ANN. § 446.350; N.M. STAT. ANN. § 28-22-3(B); 42 R.I. GEN. LAWS § 42-80.1-3(b)(2).

138. *See* KAN. STAT. ANN. § 60-5303(a) (clear and convincing evidence); KY. REV. STAT. ANN. § 446.350 (clear and convincing evidence).

139. *See supra* notes 3-4 and accompanying text; *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003).

140. *See* MASS. GEN. LAWS ch. 272, §§ 92A, 98 (2014); NEV. REV. STAT. §§ 233.010, 651.050-.070 (2014); WIS. STAT. § 106.52(3) (2014). All of these statutes include actual and perceived sexual orientation. *See* MASS. GEN. LAWS ch. 151, § 3(6) (2014); NEV. REV. STAT. § 651.050(4); WIS. STAT. § 111.32(13m (201420142014). However, only one of these statutes includes gender identity or expression. *See* NEV. REV. STAT. § 651.070. Each of the statutes identify numerous other protected classes. *See* MASS. GEN. LAWS ch. 272, §§ 92A, 98 (class, creed, denomination, sect, race, color, gender, nationality and disability); NEV. REV. STAT. § 651.070 (race, color, religion, national origin, and disability); WIS. STAT. § 106.52(3)(a)(1) (race, color, creed, religion, national origin, ancestry, and disability).

141. *See* ALASKA STAT. § 18.80.230(a)(1) (2015) (defining protected classes to include gender, disability, marital status, pregnancy, parenthood, race, religion, color, and national origin); MICH. COMP. LAWS § 37.2302(a) (2014) (defining protected classes to include race, color, religion, national origin, age, gender, and marital status); MONT. CODE ANN. § 49-2-304(1)(a) (2015) (defining protected classes to include gender, marital status, age, race, color, creed,

All of the Category Five statutes define "public accommodations," but these definitions vary. Seven states define "public accommodations" very broadly to include any establishment offering goods or services to the public.[142] Alaska, Massachusetts, Montana, and Nevada have lengthy lists of establishments considered to be "public accommodations."[143]

Category Five statutes also are similar to statutes in the other categories with respect to actions associated with denial of access to public accommodations. Seven Category Five statutes prohibit the publication, posting, circulation or other dissemination of written or electronic communications that the patronage of persons will be refused or denied or that persons are unwelcome, objectionable, or undesirable based upon their membership in a protected class,[144] and five statutes

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religion, disability, and national origin); N.D. CENT. CODE § 14-02.4-16 (2015) (defining protected classes to include gender, disability, age, marital status, race, religion, color, national origin, and receipt of public assistance); OHIO REV. CODE ANN. § 4112.02(G) (West 2015) (defining protected classes to include gender, disability, age, race, religion, color, national origin, ancestry, and military status); S.D. CODIFIED LAWS § 20-13-23 (2015) (defining protected classes to include gender, disability, race, color, creed, religion, national origin, and ancestry); W. VA. CODE § 5-11-9(6)(A) (2015) (defining protected classes to include gender, disability, age, race, color, religion, national origin, and ancestry); WYO. STAT. ANN. § 6-9-101(a) (2015) (defining protected classes to include gender, race, color, religion, and national origin).

142. *See* MICH. COMP. LAWS § 37.2301(a) (2014) ("a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public"); N.D. CENT. CODE § 14-02.4-02(14) (2015) ("every place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods to the general public for a fee, charge, or gratuity"); OHIO REV. CODE ANN. § 4112.01(A)(9) (West 2015) ("any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, other place for the sale of merchandise, or any other place of public accommodation or amusement of which the accommodations, advantages, facilities, or privileges are available to the public"); S.D. CODIFIED LAWS § 20-13-1(12) (2015) ("any place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods to the general public for a fee, charge, or gratuitously"); W. VA. CODE § 5-11-3(j) (2015) ("any establishment or person . . . which offers its services, goods, facilities or accommodations to the general public"); WIS. STAT. § 106.52(1)(e)(1) ("any place where accommodations, amusement, goods, or services are available either free or for a consideration"); WYO. STAT. ANN. § 6-9-101(a) ("all places or agencies which are public in nature, or which invite the patronage of the public").

143. *See* ALASKA STAT. § 18.80.300(16) (2015) ("a place that caters or offers its services, goods, or facilities to the general public" followed by a list of 25 types of establishments); MASS. GEN. LAWS ch. 272, § 92A ("any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public" followed by a list of 39 types of establishments); MONT. CODE ANN. § 49-2-101(20)(a) (2015) ("a place that caters or offers its services, goods, or facilities to the general public" followed by a list of 29 types of establishments); NEV. REV. STAT. § 651.050(3) (listing 70 separate types of establishments that are to be considered "public accommodations").

144. *See* ALASKA STAT. § 18.80.230(a)(2)(A) ("written or printed communication, notice, or advertisement"); MASS. GEN. LAWS ch. 272, § 92A ("any advertisement, circular, folder, book, pamphlet, written or painted or printed notice or sign"); MICH. COMP. LAWS § 37.2302(b)

expressly prohibit acts that aid or abet discrimination.[145] None of the Category Five statutes prohibit discrimination on the basis of association with members of a protected class.

Category Five statutes do not contain explicit religious exemptions, and there are no accompanying RFRAs. Faith-based objections to compliance with public accommodations statutes are not, however, without remedy. Compelled compliance in specific circumstances may violate state constitutional provisions recognizing and protecting religious liberty.[146] Additionally, any governmental actions purported to infringe on religious liberty in the context of ensuring equal access to public accommodations are likely to be subjected to rigorous

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("statement, advertisement, notice, or sign"); MONT. CODE ANN. § 49-2-304(1)(b) ("written or printed communication, notice, or advertisement"); N.D. CENT. CODE § 14-02.4-16 ((advertising or publicizing); W. VA. CODE § 5-11-9(6)(B) ("any written or printed communication, notice or advertisement"); WIS. STAT. § 106.52(3)(a)(3) ("any written communication").

145. *See* MASS. GEN. LAWS ch. 272, §§ 92A, 98 (indirect participation in unlawful discriminatory practices and aiding or inciting such practices); MICH. COMP. LAWS § 37.2701(b) (2014) (aiding, abetting, inciting, or compelling discriminatory practices); N.D. CENT. CODE § 14-02.4-01(2015) (aiding, abetting, or inducing discriminatory practices); OHIO REV. CODE ANN. § 4112.02(J) (aiding, abetting, inciting, or compelling discriminatory practices); W. VA. CODE § 5-11-9(7)(A) (aiding, abetting, inciting, or compelling discriminatory practices).

146. *See, e.g.*, ALASKA CONST. art. I, § 4 (providing that "[n]o law shall be made . . . prohibiting the free exercise [of religion]"); MASS. CONST. art. XVIII, § 1 (stating that "[n]o law shall be passed prohibiting the free exercise of religion"); MICH. CONST. art. I, § 4 (providing that "[e]very person shall be at liberty to worship God according to the dictates of his own conscience" and "[t]he civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief"); MONT. CONST. art. II, § 5 (providing that "[t]he state shall make no law . . . . prohibiting the free exercise [of religion]"); NEV. CONST. art. I, § 4 (stating that "[t]he free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State . . . [as long as such practices are not] inconsistent with the peace, or safety of this State"); N.D. CONST. art. I, § 3 (stating that "[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state . . . [as long as such practices are not] inconsistent with the peace or safety of this state"); OHIO CONST. art. I, § 7 (stating that "[a]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience" and prohibiting "any interference with the rights of conscience"); S.D. CONST. art. VI, § 3 (stating that "[t]he right to worship God according to the dictates of conscience shall never be infringed . . . . [and] [n]o person shall be denied any civil or political right, privilege or position on account of his religious opinions . . . [as long as the exercise of such liberty is not] inconsistent with the peace or safety of the state"); W. VA. CONST. art. III, § 15 (providing that no man shall be "restrained, molested or burdened, in his body or goods, or otherwise suffer, on account of his religious opinions or belief" and that "all men shall be free to profess and by argument, to maintain their opinions in matters of religion; and the same shall in nowise, affect, diminish or enlarge their civil capacities"); WIS. CONST. art. III, § 18 (stating that free exercise rights "shall never be infringed . . . nor shall any control of, or interference with, the rights of conscience be permitted"); WYO. CONST. art. I, § 18 (stating that "[t]he free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state . . . but the liberty of conscience hereby secured shall not be so construed as to . . . justify practices inconsistent with the peace or safety of the state").

constitutional scrutiny.[147]

G. *Category Six Statutes*

Alabama, Georgia, Mississippi, North Carolina and Texas have laws potentially applicable to public accommodations but lack specific statutes. Recognition of same-sex marriage was the result of judicial opinion in these states.[148] Alabama, Mississippi and Texas protect religious liberty through RFRAs.[149]

It is implicit that these states will comply with the public accommodation provisions contained within Title II of the Civil Rights Act of 1964.[150] Additionally, statutes in some of these states imply equal

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147. *See, e.g.*, Frank v. State, 604 P.2d 1068, 1073 (Alaska 1979) (holding that the fundamental issues in cases implicating religious conduct are whether there is a "very strong state interest" in compliance with the law in question and whether that interest, or any other, will "suffer if an exemption is granted to accommodate the religious practice at issue"); Commonwealth v. Nissenbaum, 536 N.E.2d 592, 596 (Mass. 1989) (requiring governmental intrusions upon religious liberty be supported by "an overriding governmental interest . . . and the practical impossibility of [serving such interest] and at the same time accommodating religious freedom"); Humphrey v. Lane, 728 N.E.2d 1039, 1045 (Ohio 2000) (applying the compelling state interest and least restrictive means tests to governmental regulations that purportedly violate religious liberties); Peace Lutheran Church & Acad. v. Vill. of Sussex, 631 N.W.2d 229, 235 (Wis. Ct. App. 2001) (applying the compelling state interest and least restrictive means tests to governmental regulations that purportedly violate religious liberties).

148. *See supra* notes 3-4 and accompanying text.

149. *See* MISS. CODE ANN. § 11-61-1 (2014); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012 (West 2011). Alabama's provisions with respect to religious liberty are set forth in the state constitution. ALA. CONST. art. I, § 3.01.

150. *See* 42 U.S.C. § 2000a(a) (2012) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."). "Public accommodations" are defined as:

> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests . . .
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station;
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
> (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of any such covered establishment.

access to certain facilities as a matter of state law in circumscribed circumstances. For example, Georgia requires an innkeeper who advertises himself as such as "bound to receive as guests . . . all persons of good character . . . who are willing to comply with his rules."[151] Texas conditions eligibility for participation in its information logo sign and tourist-oriented directional sign programs upon compliance with federal laws guaranteeing non-discriminatory access to certain facilities.[152] Additionally, permits to sell alcoholic beverages issued by the state of Texas are subject to suspension or cancellation if the permit holder has been convicted of "discrimination against an individual on the basis the individual's race, color, creed, or national origin" occurring "on the licensed premises or in connection with the operation of the permittee's business."[153] By contrast, Mississippi statutes appear to head in the opposite direction. Specifically, any so-called "public business, trade and profession" operating in the state are authorized to select persons with whom they transact business and "refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve."[154] Furthermore, public businesses, trades and professions are authorized to post notices that management reserves the right to refuse to sell to, wait upon or serve any person in its absolute discretion.[155] The continuing viability of these 1942 code sections are doubtful in light of the passage of Title II of the

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Id. § 2000a(b). The operations of establishments affecting commerce in a manner sufficient to trigger the Act's protections are circumscribed. For example, a food service establishment is within the scope of the Act only if "it serves or offers to serve interstate travelers or a substantial portion of the food which it serves or gasoline or other products which it sells, has moved in commerce." *Id.* § 2000a(c)(2). A place offering exhibitions and entertainment is covered only if it "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce." *Id.* § 2000a(c)(3). "Commerce" is defined as "travel, trade, traffic, commerce, transportation, or communication" among the states, among the states and the District of Columbia, or among the states or the District of Columbia and a foreign country, territory or possession. *Id.* § 2000a(c)(4). These requirements potentially exclude certain types of establishments that hold themselves out to the public but are more intimate and personal in the services that they provide. For example, establishments providing lodging to transient guests with five or fewer rooms for hire and in which the proprietor occupies as his residence are excluded from coverage. *Id.* § 2000a(b)(1).

151. GA. CODE ANN. § 43-21-3 (2015).

152. *See* TEX. TRANSP. CODE ANN. § 391.099(a)(1)(B) (West 20112015) (defining "eligible facility" for purposes of the tourist-oriented directional sign program as a facility that complies with laws relating to the "provision of public accommodation without regard to race, religion, color, age, sex, or national origin"); *see also* 43 TEX. ADMIN. CODE § 25.405(a)(5) (2011) (conditioning eligibility to have a commercial logo placed on informational signs upon compliance with "all applicable laws concerning the provision of public accommodations without regard to race, religion, color, sex, or national origin").

153. *See* TEX. ALCO. BEV. CODE ANN. § 11.611 (West 20112015).

154. MISS. CODE ANN. § 97-23-17(1) (2014).

155. *Id.* § 97-23-17(2).

Civil Rights Act twenty-two years later, but they nevertheless remain on the books.

Alabama, Mississippi and Texas protect religious liberty through RFRAs.[156] These RFRAs resemble their counterparts in Categories Three and Four states. Mississippi and Texas' RFRAs adopt the federal standard of prohibiting governmental actions that "substantially burden" the exercise of religion.[157] The Mississippi RFRA does not define "substantial burden." Texas defines the term "substantial burden" through case law.[158] Alabama prohibits governmental actions that merely burden the free exercise of religion.[159]

All three states define the exercise of religion but do so differently. Alabama and Mississippi define "exercise" by referencing the First Amendment to the U.S. Constitution or the religious protections provided in their state constitutions.[160] Texas defines the "free exercise of religion" as "an act or refusal to act that is substantially motivated by sincere religious belief" regardless of whether the act or refusal is central to such belief.[161] However, the parties that may exercise these religious freedoms remain vague as none of these states define affected "persons" or expressly extend religious exercise rights to organizations.

The remaining free exercise provisions in these RFRAs are homogenous. All three RFRAs include rules of general applicability and facially neutral laws within their scope.[162] Additionally, all of the RFRAs

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156. *See supra* note 149 and accompanying text. Faith-based objections to the application of state laws may violate constitutional provisions recognizing and protecting the free exercise of religion and religious liberty in Georgia and North Carolina. *See* GA. CONST. art. I, § 1, ¶¶ 3-4 (providing that "[e]ach person has the natural and inalienable right to worship God, each according to the dictates of that person's own conscience; and no human authority should, in any case, control or interfere with such right of conscience" and further that "[n]o inhabitant of this state shall be molested in person or property . . . on account of religious opinions"); N.C. CONST. art. I, § 13 ("All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.").

157. *See* MISS. CODE ANN. § 11-61-1(5)(a) (2014); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003(a) (West 2011).

158. *See* Barr v. City of Sinton, 295 S.W.2d 287, 289 (Tex. 2009) (addressing the impact of a zoning ordinance upon a pre-existing faith-based halfway house for recently released nonviolent offenders). The Texas Supreme Court required the burden on religion to be "real vs. merely perceived, and significant vs. trivial." *Id.* at 301. This determination is to be made on a case-by-case basis and is highly fact-specific. *Id.* at 302. The challenged governmental action does not need to be completely prohibitive in order to be substantial. *Id.* at 305. Rather, a "substantial burden" exists if "alternatives for the religious exercise are severely restricted." *Id.*

159. *See* ALA. CONST. art. I, § 3.01V(a).

160. ALA. CONST. art. I, § 3.01(IV)(2) (reference to the Alabama Constitution); MISS. CODE ANN. § 11-61-1(4)(c) (2014) (reference to the U.S. Constitution).

161. TEX. CIV. PRAC. & REM. CODE ANN. § 110.001(a)(1) (West_2011).

162. *See* ALA. CONST. art. I, § 3.01(II)(2), (V)(a); MISS. CODE ANN. § 11-61-1(2)(b), (5)()(a); TEX. CIV. PRAC. & REM. CODE ANN. § 110.002(c) (West 2011) (stating that the Texas RFRA is

reference the first prong of the *Sherbert* test: requiring that a burden upon the exercise of religion is justified only "in furtherance of a compelling governmental interest,"[163] and that the government utilizes the least restrictive means by which to further such interest.[164] None of the Category Six RFRAs define the government's evidentiary burden with respect to these requirements.

II. THE NEED FOR GREATER UNIFORMITY IN PUBLIC ACCOMMODATIONS LAW

A. *The Case for Greater Uniformity*

Public accommodation statutes vary widely in their scope, definitions of protected classes and prohibited conduct and exclusions. Such statutes and the public they are designed to serve and protect, as well as the judiciary entrusted with their interpretation and enforcement, would benefit from greater uniformity. This is not to propose a uniform statute, which would be unlikely to garner widespread support, or that states should not be left to make their own individual determinations. Rather, the contention is that the law, the public and the judiciary would benefit from some generally accepted principles with respect to the definitions of public accommodations, prohibited conduct and exemptions within the body of the statutes themselves or accompanying RFRAs.

Greater uniformity in the context of defining what accommodations are truly "public" may minimize future conflicts. A broad definition that includes all businesses providing goods and services to the general public serves the state's compelling interest in guaranteeing public access to the widest range of establishments including those operated, managed or funded by the state. Such a definition also properly places the burden of demonstrating that a particular establishment should not be considered a public accommodation upon the party advancing the exclusion argument. The same reasoning is applicable to arguments that a particular establishment, although public in nature, is subject to a religious exemption. Once again, the party advancing the argument properly bears the burden of demonstrating the applicability of the claimed exemption.[165] The result would be a uniform approach to resolving

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applicable to "each law of this state" unless otherwise expressly exempted without specific reference to rules of general applicability or facially neutral laws).

163. *See* ALA. CONST. art. I, § 3.01(V)(b)(1); MISS. CODE ANN. § 11-61-1(5)(b)(i); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003(bb)(1) (West 2011).

164. *See* ALA. CONST. art. I, § 3.01(V)(b)(2); MISS. CODE ANN. § 11-61-1(5)(b)(ii); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003(bb)(2).

165. *See* Lucien J. Dhooge, *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?*, 21 WM. & MARY J. WOMEN & L. 319,

competing claims of public accommodation, exclusions and exemptions.

Such an approach may also minimize disputes associated with the granting of religious exemptions. Greater uniformity may lessen "idiosyncratic coverage exclusions" among states which raise neutrality concerns when one set of religious beliefs is accommodated through an exemption but others are not treated similarly.[166] A more uniform legislative approach may also benefit future courts called upon to mediate between the right to access and religion. Greater consistency in the drafting of public accommodation statutes may lessen the possibility of conflicting judicial outcomes in what will ultimately prove to be a dilemma incapable of resolution to the satisfaction of all parties.[167] Difficult though it may be, it is a useful exercise to attempt to move the country forward to some rough degree of national consensus on the appropriate extent of accommodation to be granted to religion in the public sphere.[168]

Compromise is essential to reaching this "rough consensus." For supporters of unlimited public access, there is the need to acknowledge the value of religion and exercise the "virtue of graciousness" toward those who remain opposed to greater acceptance of the LGBT community on religious grounds.[169] Conversely, for religious believers, the dialogue

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358 (2015) (contending that a blanket exemption for religion "improperly places the burden of proof on potential customers who have been denied goods or service [and that] . . . . [t]he burden of proof of entitlement to any exemption should fall on the potential beneficiary and not the current victim").

166. *See* Lund, *supra* note 15, at 492; *see also* Ledewitz, *supra* note 15, at 57 (contending that "it is not clear that a state is acting neutrally with regard to a religious exemption request that it excludes from its RFRA when other religious claims are accommodated").

167. *See* RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 56 (2006) (describing the role of religion as posing the question of whether the United States should "be a religious nation, collectively committed to values of faith and worship, but with tolerance for religious minorities including nonbelievers . . . . [or] a nation committed to thoroughly secular government but with tolerance and accommodation for people of religious faith"); *see also* Ledewitz, *supra* note 15, at 92 (concluding that "[d]ecisions that fundamental cannot be made by the [U.S.] Supreme Court, then or now").

168. *See* Ledewitz, *supra* note 15, at 105 (predicting the reaching of a "rough consensus" that will ultimately affect every jurisdiction).

169. *See id.* at 114 (contending that "[a] perspective of common ground" requires respect for "traditional religions" and "generosity toward assertions of religious exemption"); *see also* Martha C. Nussbaum, *A Plea for Difficulty, in* IS MULTICULTURALISM BAD FOR WOMEN? 105, 106 (Joshua Cohen et al. eds., 1999) (contending that religion is worthy of value due to "its role in people's search for the ultimate meaning of life; in consoling people for the deaths of loved ones and in helping them face their own mortality; in transmitting moral values; in giving people a sense of community and civic dignity; [and] in giving them imaginative and emotional fulfillment"); Megan Pearson, *Religious Claims vs. Non-Discrimination Rights: Another Plea for Difficulty,* 15 RUTGERS J. L. & RELIGION 47, 50 (2013) (concluding that "[f]reedom of religion, including the protection of individual religious conduct, is . . . a right worthy of significant protection"); E.J. Dionne, Jr., Opinion, *Don't Wreck Religious Liberty's Brand,* WASH. POST (Apr.

must move away from questions of "exclusive truth" and toward adjustment of views when religion enters the public square.[170] This includes recognition that discriminatory practices negatively affect "equal citizenship" which acts as a restraint upon government actions and occasionally requires government to prevent discrimination by private parties.[171] In addition to ensuring equal access to goods and services, "equal citizenship" implicates other compelling state interests, including removal of economic, political and social barriers that hinder advancement of disadvantaged groups and broader civic and economic participation in society.[172] "Equal citizenship" also implies governmental recognition and protection of individual dignity, which may be negatively impacted by discrimination.[173]

The question is where does the path to compromise lie? Utilizing provisions of the above-categorized statutes, this Article advocates a separationist approach to questions arising from the intersection of public accommodation law and religion. The government must forbear in cases involving the establishment, internal operation of and participation in strictly religious institutions. Personal religious freedom exercised through group activity is potentially impaired when the government does not leave strictly religious institutions alone to make their own determinations and govern themselves.[174] The institutions also suffer to the extent they are compelled or coerced into forfeiting or compromising traditional beliefs in order to conform to contemporary social norms.[175] The secular state must render "unto God the things which be God's" in

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1, 2015) (urging supporters of LGBT rights to consider "the virtue of graciousness" toward those opposed to equality for the good of social peace).

170. Ledewitz, *supra* note 15, at 114.

171. Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 35 (1977) (contending that "equal citizenship" "implies access to all those activities and places, whether managed directly by government or not, that are normally open to the public at large"); *see also* Pearson, *supra* note 169, at 52.

172. *See* Sara A. Gelsinger, Comment, *Right to Exclude or Forced to Include? Creating a Better Balancing Test for Sexual Orientation Discrimination Cases*, 116 PENN ST. L. REV. 1155, 1177 (2012).

173. *See* United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) (describing the conferral of dignity and status upon the LGBT community as of "immense import"); *see also* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 262 (2011) (defining dignity to include public respect and recognition by the community which validates an individual's private choices). *But see* Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 277 (2014) (expressing doubt about the government's authority to grant moral dignity to its citizens and whether such dignity must be recognized across state boundaries).

174. *See, e.g.*, Leilani N. Fisher, Comment, *Institutional Religious Exemptions: A Balancing Approach*, 2014 BYU L. REV. 415, 422 (2014) (noting that individual religious exercise often occurs through group activities).

175. *Id.* at 423.

such cases.[176]

That said, religious institutions and persons must "[r]ender . . . unto Caesar the things which be Caesar's."[177] These "things" include setting fair terms for the operation of the marketplace. An outcome that recognizes the rights of everyone to full and equal participation in the marketplace free from the harmful effects of discrimination based upon innate physical characteristics or public perceptions thereof is a fair term. Thus, in the area of public accommodations, any purported conflict between religious liberty asserted by for-profit businesses and access to goods and services must be resolved in favor of the government's compelling interest in guaranteeing full and non-discriminatory access for all persons.

B. *Defining Public Accommodations and Discriminatory Practices*

Greater uniformity starts with the definition of public accommodations. One possible approach is a broad definition of public accommodations, which captures all types of commercial and business activities with narrowly drawn religious exemptions. This approach provides that public accommodations include any establishment offering goods or services to the public. Precedent for such a definition may be found in sixteen existing statutes, which constitute the majority of states that define public accommodations.[178] Allegedly comprehensive lists as utilized in fourteen states create the risk of omission of types of businesses and specific establishments and may be cumbersome to read and interpret.[179] It is far simpler to classify every establishment offering goods or services to the general public as a public accommodation, unless proven otherwise or subject to a designated exemption.

States should also resist the temptation to conform their definitions of public accommodations to those contained within Title II of the Civil Rights Act of 1964.[180] Public accommodations in locations as diverse as Alabama, Georgia, Maryland, Missouri, Nebraska, North Carolina, and Texas expressly or implicitly utilize such a definition.[181] Although a historic milestone, the Act is timid by modern standards in its adherence

176. *Luke* 20:25 (King James).

177. *Id.*

178. *See supra* notes 37, 51, 99, 142 and accompanying text (discussing definitions of public accommodations in Connecticut, Delaware, Iowa, Kentucky, Michigan, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Utah, Vermont, West Virginia, Wisconsin and Wyoming).

179. *See supra* notes 38, 52, 100, 143 and accompanying text (discussing definitions of public accommodations in Alaska, Colorado, Hawaii, Illinois, Kansas, Maine, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New York, Rhode Island and Washington).

180. 42 U.S.C. § 2000a(b) (2012).

181. *See supra* notes 39, 53, 69, 150 and accompanying text.

to the narrow nineteenth century iteration of covered accommodations.[182] Additionally, the operations of establishments affecting commerce in a manner sufficient to trigger the Act's protections were circumscribed.[183] It should pass without argument that the backwards-looking example set by Mississippi with respect to "public business[es], trade[s]. . . [and] profession[s]" operating within the state should be roundly rejected.[184]

Explicit or implicit government-sanctioned discrimination in public accommodations should also be prohibited by including such facilities within this broad definition.[185] For example, establishments operated or managed by state and local governments should be deemed public accommodations. Although far too narrow in its overall definition, Nebraska's inclusion of facilities owned, operated, or managed by the state or any agency or subdivision thereof is a good starting point.[186] Establishments receiving government funds and subsidies for operations should also be deemed public accommodations. Such is the case in states as diverse as Maryland and Iowa.[187] An approach that limits public accommodations to government-permitted establishments, such as in South Carolina, is contrary to the desired outcome of expanding the definition and covered locations.[188]

Another area ripe for greater uniformity is the definition of discriminatory practices. While an explicit refusal to serve a person on the basis of his or her membership in a protected class is clearly discriminatory, damages the dignitary interests of the affected individual,

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182. *See supra* note 150 and accompanying text; *see also* Justin Muehlmeyer, *Toward a New Age of Consumer Access Rights: Creating Space in the Public Accommodation for the LGBT Community*, 19 CARDOZO J.L. & GENDER 781, 789 (2013) (criticizing Title II for its close adherence to the "Nineteenth Century Interpretation" of public accommodations); *but see* Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1243-44 (2014) (contending that Title II of the Civil Rights Act is adequate as drafted):

> [T]he worm has unfortunately turned, as people have lost sight of the evils that a public accommodations law should combat. The new application of the next generation of human rights law has the exact opposite orientation: may the state force small and isolated businesses, often with Christian beliefs, to violate their bona fide religious beliefs in order to provide services in highly competitive market segments?

Id.

183. *See supra* note 150 and accompanying text.

184. *See supra* notes 154-55 and accompanying text.

185. *See supra* note 70 and accompanying text (discussing Florida's statute which sanctions state discrimination in public accommodations by explicitly omitting facilities owned, operated, or managed by the state or any agency or subdivision thereof).

186. *See supra* note 53 and accompanying text.

187. *See supra* notes 35, 51 and accompanying text.

188. *See supra* note 71 and accompanying text.

and most likely constitutes a violation of applicable law, it is not the only means by which discrimination occurs and injury is inflicted. Discrimination and injury are also apparent in the publication, posting and circulation of communications that the patronage of certain persons will be refused or that such persons are unwelcome, a practice which is expressly prohibited in seventeen states and the District of Columbia.[189] Although it is unlikely that states without such prohibitions would follow the lead of Mississippi, which permits the posting of such notifications, it is nevertheless better practice to recognize that such communications are a form of discrimination that should be prevented through express prohibitions.[190] A combination of multiple state statutes prohibiting the publication, posting, circulation or other dissemination of any written, typewritten, mimeographed, printed, visual or electronic notice, sign, advertisement, statement circular, folder, book, or pamphlet stating that the patronage of certain persons will be refused or that such persons are unwelcome, objectionable or undesirable is preferable in this regard.[191]

Discriminatory acts may not only be directed at members of a protected class but also toward persons who associate with or are perceived to associate with such class members. However, despite the injury that a person who associates with protected class members may suffer from a denial of service, only one state, California, specifically prohibits discrimination against such third persons.[192] The recognition of such discrimination and inclusion of a prohibition in the statutes of other states is the better practice and is consistent with broadening the definitions of public accommodations and discriminatory practices.

Acts of third parties may also result in discrimination and injury to protected persons. However, complicity in discriminatory acts is expressly prohibited in only seventeen states and the District of Columbia.[193] These statutes prohibit a wide range of behavior from aiding and abetting to assisting, coercing or compelling discriminatory acts. Perhaps the best prohibition is that which is the broadest given that all of the forms of indirect participation may result in injury. Thus, a combination of various statutes prohibiting actions aiding, abetting, inciting, inducing, compelling or coercing discriminatory practices by others is preferable.[194]

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189. *See supra* notes 44, 55, 72, 144 and accompanying text.

190. *See supra* note 155 and accompanying text.

191. Statutes in Colorado, Delaware, Louisiana and Massachusetts are particularly comprehensive and thus instructive in this regard. *See supra* notes 44, 55, 72, 144 and accompanying text.

192. *See supra* note 56 and accompanying text.

193. *See supra* notes 43, 54, 73, 145 and accompanying text.

194. This proposed standard is a combination of prohibitions contained in the Nebraska and North Dakota statutes. *See supra* notes 54, 145 and accompanying text.

Greater uniformity could be advantageous in those states extending anti-discrimination protection in public accommodations to the LGBT community. Those states that have added sexual orientation to their definitions of protected classes have been uniform with respect to inclusion of heterosexuality, homosexuality and bisexuality.[195] Gaps exist however with respect to discriminatory actions based upon perceived orientation where two states may lack coverage[196] and in gender identity which is included in only twelve statutes.[197] While the impact of recent developments with respect to LGBT rights on public accommodation statutes remains to be determined, those states choosing to extend protection on the basis of sexual orientation would be well-served to revisit their statutes and determine if amendment is desirable.

C. *Defining and Granting Religious Exemptions*

Minimizing future conflicts also requires greater uniformity with respect to defining and granting religious exemptions. A starting point in this regard is addressing the "famously intractable task" of defining religion.[198] Despite this alleged difficulty, such a definition is necessary for at least two reasons. First, it is necessary to define religion if its exercise is to be granted exemptions from the operation of the law in certain circumstances. Every objection, moral or otherwise, becomes the exercise of religion without some general parameters. Religion cannot simply be "any set of answers to religious questions, including the negative and skeptical answers of atheists, agnostics, and secularists" in this context without the definition swallowing the law from which it seeks an exemption.[199] Closely related to this issue is the need to ensure sincerity of belief, once again without which, every objection becomes religious and subject to shielding.[200]

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195. *See supra* notes 40-41, 48 and accompanying text.

196. *See supra* note 41 and accompanying text (discussing the absence of explicit protection on the basis of perceived orientation in Delaware and Vermont).

197. *See supra* notes 42, 49 and accompanying text.

198. Mark L. Rienzi, *The Case for Religious Exemptions - Whether Religion is Special or Not,* 127 HARV. L. REV. 1395, 1401 (2014) (book review).

199. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 326 (1996).

200. *See* Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 757 (2014) (contending that exemptions such as medical conscience legislation encourages those without strong moral or religious objections to refuse service due to the absence of a sincerity of belief requirement); *see also* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 41-43 (1994) (contending that "[t]he threat of cumulative exemptions comes not only from other sincere religious objectors, but from other persons who could feign the same objection to get the benefits of exemption"). *But see* Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 132-33 (2006) (contending that sham claims would be discouraged by a

Despite its intractability, commentators and courts have reached similar conclusions in their definitional efforts. For example, Leiter identifies three characteristics of all religions, specifically, categorical adherence to specific teachings irrespective of internal desires and outside demands; insulation for "ordinary standards of evidence and rational justification;" and "existential consolation" to believers coping with the challenges presented by life.[201] Similarly, courts have described religion as comprehensive belief systems dictating adherents' conduct and addressing "fundamental and ultimate questions having to do with deep and imponderable matters."[202] These traits are not exclusive of any one religion but are a shared "family resemblance" across all religions.[203] As a result, courts "almost never have any difficulty in determining whether something is a religion or not."[204]

Two public accommodation statutes defining religion and its exercise track these broad definitions. The District of Columbia's ordinance focuses upon belief and worship of "a divine ruling power" or "supernatural power" which controls individual destiny as well as devotion, fidelity, faithfulness, conscientiousness, or affection for principles associated with such belief and worship.[205] Kansas further requires that beliefs be sincerely-held and exercised by acts or refusals to act substantially motivated by such beliefs regardless of their compulsory nature or centrality to the religion in question.[206] Other legislative efforts to define religion and its exercise fail to adequately address aspects of religious belief or require sincerity in its exercise.[207] The definitions

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combination of "common sense costs," lack of seriousness of purpose, the risk of ill will directed at those asserting such claims, and the absence of material advantages associated with the receipt of an exemption).

201. BRIAN LEITER, WHY TOLERATE RELIGION? 34, 52 (2013).

202. Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3d Cir. 1981).

203. ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 128 (2013).

204. *Id.* at 7. *But see* Joshua Bauers, *The Price of Citizenship: An Analysis of Anti-Discrimination Laws and Religious Freedoms in Elane Photograph, LLC v. Willock*, 15 RUTGERS J.L. & RELIGION 588, 602 (2014) (stating that "[t]he government is not permitted to regulate what constitutes 'practicing' a particular religion just as it will not validate or invalidate any particular religious belief"). However, courts have not shied away from examining beliefs in order to determine whether an application of the law particular to religion was justified. *See, e.g.*, Knight v. Comm'r, 92 T.C. 199-200, 205 (1989) (examining the ecclesiastical functions of a licentiate of the Presbyterian Church in order to determine if he was a minister within the meaning of the Internal Revenue Code); Silverman v. Comm'r, 57 T.C. 727, 732 (1972) (examining the ecclesiastical functions of a cantor of the Jewish faith in order to determine if he was a minister within the meaning of the Internal Revenue Code); Salkov v. Comm'r, 46 T.C. 190, 197 (1966) (examining the ecclesiastical functions of a cantor of the Jewish faith in order to determine if he was a minister within the meaning of the Internal Revenue Code).

205. D.C. CODE § 46-406 (20142014).

206. KAN. STAT. ANN. § 60-5302 (2015).

207. For example, New York's effort to define religion is woefully short as it merely references "divine worship" without expanding further upon the beliefs underlying such worship

contained within the District of Columbia ordinance and Kansas RFRA offer religious beliefs broad protection without requiring extensive government intrusion into matters of faith while simultaneously ensuring that their practice, which may qualify for an exemption, is sincere, properly motivated and not intended solely as an attempt to avoid legal obligations. Such a result is consistent with constitutional principles encouraging absolute protection for religious beliefs but recognizing limitations upon their practice when they conflict with laws adopted to meet a compelling state interest.

Any definition of religion should be accompanied by a definition of religious facilities. Facilities devoted exclusively to religious purposes should be protected from the reach of public accommodations statutes to the same extent as the exercise of faith occurring therein. The small number of public accommodation statutes that have addressed this issue are for the most part overbroad and unworkably vague. Exclusions or exemptions granted to places of worship such as churches, mosques, and synagogues present easy cases. However, Colorado's statute for example extends to other locations "principally used for religious purposes."[208] The statute thus seems to require a determination and comparison of the percentages of usage for religious and non-religious purposes. It is unclear whether the requirement of "principal" usage means a scant majority or larger amount of usage nor whether this determination is based upon the number of events, the amount of time associated with each event, or some other measure. Similarly, Oregon's statute includes facilities "closely connected with or related to the primary purposes" of a religious organization without further elaboration upon the meanings of "close connections" or "relations."[209] Other statutes appear to suffer from overbreadth by granting blanket exemptions to facilities associated with or operated, supervised or controlled by a religious organization, association or society.[210]

A preferable approach is to separate facilities strictly utilized for religious purposes from those more closely associated with secular activities. Illinois' statute provides some guidance in this regard through its exclusion of "facilities such as businesses" from its religious exemption.[211] It may be presumed that this omission is applicable to

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and seems to require attendance at meetings or services in order to be deemed religious. *See supra* note 32 and accompanying text. Illinois' and New Mexico's statutes do not require purported exercises of religion be motivated by sincerely-held beliefs. *See supra* notes 127-28 and accompanying text.

208. COLO. REV. STAT. § 24-34-601(2015). *See also supra* note 57 and accompanying text.

209. OR. REV. STAT. § 659A.006(3) (2014). *See also supra* note 58 and accompanying text.

210. *See supra* note 114 and accompanying text (discussing exemptions in Connecticut and Rhode Island).

211. 750 ILL. COMP. STAT. 5/209 (2015).

facilities owned or operated by religious organizations, associations or societies and affiliated organizations which are otherwise made available to members of the general public without faith-based distinctions and on a for-profit basis. Unfortunately, the Illinois statute does not elaborate upon this omission. However, guidance in drafting a uniform provision separating religious and secular facilities may be found in the Minnesota and Oregon statutes. Minnesota' statute expressly excludes secular business activities from its religious facilities exemption.[212] Oregon's statute is even more explicit in its exclusion of facilities connected with commercial or business activities of religious organizations.[213] Oregon's exclusion appears broader due to its requirement that the commercial or business activity in question have no necessary relationship to the religious purposes of the organization, whereas Minnesota requires the activity to be wholly unrelated to the purposes for which the religious association was organized.[214] This difference in language is important as an association's commercial activity loosely related to the purposes for which it was formed may be sufficient to include the activity within Minnesota's religious facilities exemption. This same activity most likely would not qualify as exempt pursuant to Oregon's statute as it was not necessary to the religious purposes of the organization. Oregon's approach is preferable as it recognizes the extraordinary nature of exemptions by narrowing them to those which are necessary to the fulfillment of the missions of religious organizations.

Defining religion and religious facilities does not alter exemptions granted to religious personnel, the so-called "ministerial exemption." Numerous state statutes, including all of those that recognize same-sex marriage legislatively, contain exemptions for clergy with respect to solemnization of marriages in contravention of the teachings of their respective religious orders.[215] These statutes vary slightly with respect to their wording but, as a general matter, permit individuals of any religious association, organization or society who are authorized to solemnize or celebrate marriages to refuse to do so on religious grounds. Any variations among definitions is easily resolvable if the applicable statutes made reference to the definition contained in the U.S. Internal Revenue Code as does the Connecticut statute.[216] The definition is largely

212. *See supra* note 36 and accompanying text.

213. *See supra* note 58 and accompanying text.

214. *See supra* notes 36, 58 and accompanying text.

215. *See supra* notes 27, 113 and accompanying text.

216. *See supra* note 113 and accompanying text; *see also* Treas. Reg. § 1.1402(c)-5(a) (as amended by T.D. 6978, 33 Fed. Reg. 15,937 (Oct. 30, 1968)) (requiring an individual to be a "duly ordained, commissioned, or licensed minister of a church" in order to qualify for special tax provisions available to the ministry). The regulation is disjunctive and intended to deny benefits to self-appointed ministers rather than limit benefits accruing to the ordained. *See* Salkov, 46 T.C. at 197. Services performed by clergy in the exercise of his or her ministry include

irrelevant in any event due to the absence of any genuine legal dispute with regard to forcing clergy to officiate at weddings of which their respective religions disapprove or requiring purely religious facilities to accommodate such weddings.[217]

A separation of secular and religious beliefs and activities is crucial to drawing distinctions between the public and private realms.[218] Public institutions provide "socially important goods and services, including commercial goods and services, directly to both religious and non-religious individuals" in an inclusive manner.[219] As noted by Justice Ginsburg in her dissent in *Hobby Lobby*, public institutions such as for-profit corporations do not exist to "foster the interests of persons subscribing to the same religious faith" nor do they "exist to serve a community of believers."[220] By contrast, private institutions are self-sustaining, function without government aid or interaction with outsiders, and serve the interests of select groups of individuals.[221] Religious organizations functioning as private institutions are entitled to greater degree of self-autonomy which includes greater freedom from generally applicable laws.[222]

Religious organizations acting in the manner of public institutions have chosen to enmesh themselves in the secular world and thus surrender some degree of self-governance.[223] The autonomy argument

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performance of sacerdotal functions, the conduct of religious worship, the control, conduct and maintenance of religious organizations, and the performance of teaching and administrative duties at theological seminaries. *See* Treas. Reg. § 1.107-1 (as amended by T.D. 6691, 28 Fed. Reg. 12,817 (Dec. 3, 1963)); *see also* Treas. Reg. § 1.1402(c)-5 (as amended by T.D. 6978, 33 Fed. Reg. 15,937 (Oct. 30, 1968)).

217. *See* Sepper, *supra* note 200, at 713 (contending that "no genuine legal dispute" exists as "[i]n no instance would legalization of same-sex marriage force clergy to officiate weddings of which their religion disapproves or require houses of worship to open their doors to such weddings"); *see also* Marc D. Stern, *Same-Sex Marriage and the Churches*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1, 1 (Douglas Laycock et al. eds., 20082008) (stating that "[n]o one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them").

218. *See* Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274, 280-82 (2010) (contending that distinctions between the public and private realms is useful in separating meritorious religious exemptions from unmeritorious exemptions).

219. *See* Fisher, *supra* note 174, at 432.

220. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2795-96 (2014) (Ginsburg, J., dissenting).

221. Fisher, *supra* note 174, at 433.

222. *Id.*

223. *Id.* at 433 (contending that self-governance is eroded when a religious organization "forgoes life on an island in order to interact with outsiders . . . [and] invites the public into its sphere"). *See also* LESLIE A. CAROTHERS, THE PUBLIC ACCOMMODATIONS LAW OF 1964: ARGUMENTS, ISSUES AND ATTITUDES IN A LEGAL DEBATE 11 (1968) (stating that businesses are legitimately subject to regulation as they operate in the public realm and that "when a man chooses

underlying exemptions granted to religious organizations under ordinary circumstances are weakened when the organization acts as "a very inclusive commercial institution that opens its doors to the public."[224] Self-governance whereby religious believers and their communities unilaterally make decisions regarding the provision of goods and services cannot be fully indulged in such circumstances.[225] Such organizations thus have a diminished entitlement to and most likely diminished expectation of exemptions.[226] This is the price of doing business.[227] To conclude otherwise inadvisably injects morality determinations into the public accommodation arena, an area which operates free from moral judgments by separating issues of discrimination from moral or social acceptance.[228] The injection of morality into the marketplace in such

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to go into business . . . . he loses part of his freedom of action because his capacity to injure others has increased").

224. *See* Bell v. Maryland, 378 U.S. 226, 314 (1964) (Goldberg, J., concurring) (stating that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it" (quoting Marsh v. Alabama, 326 U.S. 501, 506 (1946)). *See also* Fisher, *supra* note 174174, at 438.

225. *See, e.g.*, Ledewitz, *supra* note 15, at 103–04 (noting that "the logic of a separate religious realm cannot work in a modern society . . . . [and that] [t]he religious believer and the religious community cannot be left alone to decide about religious exemptions"); Sepper, *supra* note 200, at 719 (stating that "commercial transactions of a business, despite any perceived religious mission, bring it within the rubric of a public accommodation subject to antidiscrimination laws").

226. *See* United States v. Lee, 455 U.S. 252, 261 (1982) (holding that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity").

227. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 284 (1964) (Douglas, J., concurring) (stating that "one who employ[s] his private property for purposes of commercial gain by offering goods or services to the public must stick to his bargain"); *see also* Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 119 (2006) (stating that "[o]nce individuals choose to enter the stream of economic commerce by opening commercial establishments, I believe it is legitimate to require that they play by certain rules"); Garrett Epps, *What Makes Indiana's Religious-Freedom Law Different?*, THE ATLANTIC (Mar. 30, 2015), http://www.the atlantic.com/politics/archive/2015/03/what-makes-indianas-religious-freedom-law-different/388997/ (concluding that "[b]eing required to serve those we dislike is a painful price to pay for the privilege of running a business").

228. *See* Romer v. Evans, 517 U.S. 620, 634 (1996) (concluding that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest" (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)); *see also* Dhooge, *supra* note 165, at 364 (stating that "[p]ermitting religious carve-outs injects individuals, businesses and governments into a polarizing and unnecessary debate by equating equal treatment with moral acceptance"); Ledewitz, *supra* note 15, at 105 (stating that "the extension of political differences into commercial conduct is not something to be celebrated"); Pearson, *supra* note 169, at 59 (contending that not all accommodation of the LGBT community is morally culpable due to the absence of proximity in time and place or relative insignificance of the act); Sepper, *supra* note

circumstances invites "'conscience creep' in which all resistance to regulation becomes acceptable . . . . [and] every citizen . . . become[s] a law unto himself."[229]

Blurring differences between public and private institutions is further harmful to the extent it facilitates discrimination resulting in a denial of goods and services. Such facilitation places the existing anti-discrimination framework at risk.[230] Blurring also trivializes professions

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200, at 743 (contending that "virtually all objections" to accommodation of the LGBT community by businesses in the context of same-sex marriage "founder on the requirements of causal and proximate responsibility"). *But see* Jennifer Ann Abodeely, Comment, *Thou Shall Not Discriminate: A Proposal for Limiting First Amendment Defenses to Discrimination in Public Accommodations*, 12 SAINT MARY'S L. REV. MINORITY ISSUES 585, 601 (2010) (discussing the view of Christian advocacy groups that "any legislation benefitting LGBT people as a class stands in direct conflict with others' right to freely exercise their religion" and that "[s]ince these groups' interpretation of religious text informs them that homosexuality is immoral, they believe that, based on their religious beliefs, they should be able to refuse service, medical treatment, employment, and other accommodations to LGBT people"); BECKET FUND FOR RELIGIOUS LIBERTY, SAME-SEX MARRIAGE AND STATE ANTI-DISCRIMINATION LAWS 2 (2009) (contending that any facilitation of same-sex marriages by religious objectors is a violation of conscience and thus exempts such objectors from hiring persons in same-sex marriages, extending benefits to same-sex spouses, making "property or services available for same-sex marriage ceremonies" and providing housing to same-sex couples).

229. Sepper, *supra* note 200, at 741. *See also* W. Cole Durham, Jr., *State RFRAs and the Scope of Free Exercise Protection*, 32 U.C. DAVIS L. REV. 665, 676–77 (1999) (cautioning against excessive religious freedom claims because if such claims "sweep too broadly, it is virtually impossible to avoid situations where most reasonable people would agree that secular concerns trump arguably religious claims" and that there are "many situations where it is reasonable to expect religious groups to respect and be willing to accommodate the needs of surrounding society"). Professor Brownstein summarized the need for acceptance of some limitations upon free exercise as follows:

> Broadly defined rights cannot always receive rigorous protection because doing so would unreasonably interfere with the government's ability to further the public good. No democratic society will surrender its power to pursue interests that conflict with rights so completely and irrevocably. Insistence on a rigid commitment to rigorous review risks an obvious response: the scope of the right will be limited to only those situations in which it does not conflict with any interests the society values or cares about.

Brownstein, *supra* note 200, at 82.

230. *See* Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1231 (2012) (arguing that "the application of the religious exemption to secular actors in the stream of commerce threatens to cut back existing antidiscrimination protections in a much more sweeping fashion"); *see also* Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 180 (2012) (contending that the facilitation of discrimination against the LGBT community in public accommodations on the basis of religious liberty undermines not only public accommodation statutes but other antidiscrimination laws which have enhanced "equality" and "practical liberty").

and acts of faith engaged in for truly spiritual purposes by equating such acts with those engaged in solely out of bigotry and transparently discriminatory motives.[231]

There are several other equally important reasons for adopting this approach in public accommodation law. Blurring the distinction between public and private institutions creates the risk that broad and ill-conceived religious exemptions with potentially deleterious consequences become a permanent part of the legal landscape.[232] Religious exemptions have the

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231. *See, e.g.*, NeJaime, *supra* note 230, at 1196, 1200. NeJaime describes religious opposition to marriage equality as follows:

> Marriage equality represents merely one instantiation of relationship-based sexual orientation equality. And objections to marriage equality serve largely as a subset of broader religious objections to sexual orientation equality . . . . Religious objections are rooted most often not in marriage alone, but in the facilitation and recognition of same-sex relationships. In other words, the objection animating opposition to same-sex marriage relates primarily to the enactment of sexual orientation itself rather than the form such enactment takes.

Id. See also Dhooge, *supra* note 165, at 363 (contending that "[e]ither exemptions are intended to apply to all religious beliefs, thereby permitting discrimination under any circumstance in which such beliefs are offended, or they are limited to homosexuality, thereby expressing an underlying purpose opposed to gay equality and liberty rather than for the purpose of securing religious freedom"); James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 145-46 (2015) (contending that persons seeking religious exemptions with respect to same-sex marriage are motivated by anti-LGBT animus as "no state has ever exempted commercial business owners from the obligation to provide equal services for interracial marriages, interfaith marriages, or marriages involving divorced individuals - even though major religious traditions in America have opposed each type of marriage"); Frank Bruni, Opinion, *Your God and My Dignity*, N.Y. TIMES (Jan. 10, 2015), http://www.nytimes.com/2015/01/11/opinion/sunday/frank-bruni-religious-liberty-bigotry-and-gays.html (questioning the stated motives of those claiming that serving members of the LGBT community violates their religious freedom by noting that such persons are "routinely interacting with customers who behave in ways they deem sinful"); Stephen Stromberg, *Yes, Indiana's 'religious freedom' law could promote discrimination*, WASH. POST (Mar. 30, 2015), http://www.washingtonpost.com/blogs/post-partisan/wp/2015/03/30/yes-indianas-religious-freedom-law-could-promote-discrimination (questioning the stated intent of the Indiana RFRA on the basis of its potential to entrench legal discrimination against the LGBT community).

232. *See* Lund, *supra* note 15, at 494-95 (recognizing the possibility that state governments cannot or will not eliminate or narrow previously-granted religious exemptions for political reasons or because any such modifications may not be deemed neutral or generally applicable); *see also* Sepper, *supra* note 200, at 756 (questioning the assumption that exemptions would be repealed even if the public no longer supports them and acceptance of the LGBT community grows). *But see* Kelly Catherine Chapman, *Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 GEO. L.J. 1783, 1804 (2012) (contending that religious exemptions would undergo "incremental narrowing . . . as time goes on and public or legal opinion shifts"); Rienzi, *supra* note 198, at 1415 (stating that "[i]f a time arrives when [religious] exemptions do threaten the common good, presumably legislatures

potential to cause harm to the LGBT community, a community that has been subjected to a historic pattern of widespread, pervasive and purposeful discrimination and unequal treatment at the federal and state levels.[233] In a related vein, adding moral objections in the form of a religious exemption to generally applicable statutes such as those relating to public accommodations imposes unnecessary financial and time costs as well as significant dignitary and psychological damage on the targeted community.[234] Discrimination in public accommodations is also contrary to "the cherished American ideals of justice and equality under the law."[235] Limitations upon the parties eligible for an exemption, such as small businesses,[236] or based upon the type of goods or service at issue

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will no longer offer them").

233. At the federal level, the LGBT community is protected by the Equal Protection Clause of the Fourteenth Amendment. *See Romer*, 517 U.S. at 635-36. However, sexual orientation is not included as a protected class in numerous federal anti-discrimination statutes. *See* 15 U.S.C. §§ 1691-1691f (2012) (Equal Credit Opportunity Act); 42 U.S.C. §§ 3601-3619 (201219) (Fair Housing Act); 42 U.S.C. §§ 2000a(a), 2000e-2(a) (2012) (Civil Rights Act of 1964). At the state level, only thirty-one states extended private or public employment protection to the LGBT community at the time of the preparation of this article. *See supra* note 7 and accompanying text. Discrimination also was not prohibited by the common law which adopted the view that businesses had "an absolute right to choose their customers and to exclude anyone from their businesses for any reason unless limited by a civil rights statute [or other law such as those applicable to innkeepers and common carriers]." Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U.L. REV. 1283, 1291 (1996).

234. *See* Sepper, *supra* note 200, at 759 (discussing potential burdens placed upon the LGBT community as a result of religious exemptions to public accommodations statutes including additional time and money spent locating substitute providers of goods and services, dignitary and psychological damage associated with scrutiny that is not normally a part of a commercial transaction, and loss of trust in public and private institutions); *see also* Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984) (in which the Court concluded discrimination is harmful to society by depriving it of "the benefits of wide participation in political, economic, and cultural life"). These burdens and harms may be exacerbated given limitations upon judicial inquiry into the actions of religious institutions and individuals. *See* Fisher, *supra* note 174, at 429 (stating that "[w]hereas courts are allowed to scrupulously analyze the mistakes of tortfeasors in ordinary discrimination or malpractice situations, institutional exemptions preclude judicial inquiry into the wrongdoing of religious groups in certain areas of law"). *But see* Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws*, 22 J.L. & POL'Y 705, 707 (2014) (describing the burdens and damages to the LGBT community as a "mere inconvenience and mild sense of offense").

235. Abodeely, *supra* note 228, at 600; *see also* Curtis, *supra* note 230, at 184-92 (analogizing discrimination on the basis of sexual orientation with race and gender discrimination as group membership is based upon unalterable biological factors, each group has a long history of persecution and discrimination in employment, housing, access to health care, family issues (such as marriage and adoption) and public accommodations which persecution often had roots in religious beliefs, and each group suffered economic and dignitary harms).

236. *See, e.g.*, Thomas C. Berg, *What Same-Sex Marriage and Religious Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206, 227 (2010) (contending that "[s]mall businesses that provide personal services tend to be direct embodiments of the owner's identity"); Chapman, *supra* note 232, at 1810 (stating that "[o]nce an entity reaches a critical mass, the justification for

are unworkable.[237] Rather, the government has compelling interests in the protection of human dignity and equal exercise of the rights of citizenship through prohibitions upon discrimination, including guaranteeing access to public establishments.[238] Religious exemptions from legal requirements for public institutions sends a message contrary to these interests.[239]

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an owner's feeling that his or her religious freedoms have been infringed upon through a personal identification with his or her business, or through in-person interactions with same-sex individuals, becomes less credible"). *But see* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2797 n.19 (2014) (Ginsburg, J., dissenting) (noting that small businesses may in fact be quite large with sizable revenue and numbers of employees, that the reasoning of the majority opinion extends free exercise rights to "corporations of any size, public or private" and that the majority's assurance that it is "improbable" that large publicly traded companies will avail themselves of their free exercise rights is speculative); *see also* Oleske, *supra* note 231, at 138 (noting that there are approximately 3.6 million businesses in the United States consisting of four or fewer employees).

237. One such proposed limitation is for vital services. *See, e.g.*, Chapman, *supra* note 232, at 1815 (proposing a religious exemption except in cases involving "the health, life, or material pecuniary interest of an individual"). *But see* Dhooge, *supra* note 165, at 356-57 (contending that a "vital services" limitation is unworkable due to likely omissions and lack of specificity in identifying providers and the diverse range of services identified by state laws as "vital"). Another often-proposed limitation is based upon hardship and provides that a business would be permitted to refuse service on the basis of sexual orientation unless it was the only one capable of providing the good or service in question and the burden upon the potential customer would be heavy. *See, e.g.*, Berg, *supra* note 236, at 208. *But see* Chapman, *supra* note 232, at 1814-15 (criticizing proposed hardship limitations as requiring burdensome cataloguing of competitors and market entries and exits and unfair in depriving business owners of their religious rights "because he or she happens to have the only business of its type in town"). *See also* Dhooge, *supra* note 165, at 358 (criticizing hardship limitations as improperly placing the burden of proof with respect to the application of an exemption on potential customers); Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace*, 5 NW. J.L. & SOC. POL'Y 236, 238 (2010) (noting that "in a clash between a seller's asserted rights or beliefs and her provision of services to a willing buyer, the burden should fall on the seller who has placed herself in the public marketplace").

238. *See Roberts*, 468 U.S. at 626, 628 (stating that public accommodation laws reflect "the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups" and further noting that these interests are compelling); *see also* Muehlmeyer, *supra* note 182, at 785 (contending that equal access to public establishments brings "individuals into central social dynamics that are a part of citizenship"); Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1634 (2001) (contending that citizenship "is not purely a creature of the state . . . . Implicitly, the law has recognized that markets have a role in constituting citizenship . . . . [P]ublic accommodation laws constitute one example of that acknowledgement"); Lauren J. Rosenblum, *Equal Access or Free Speech: The Constitutionality of Public Accommodation Laws*, 72 N.Y.U. L. REV. 1243, 1243 (1997) (describing the underlying purpose of public accommodation statutes as "ensur[ing] that all members of society have equal access to goods and services").

239. *See* Curtis, *supra* note 230, at 202-03 (stating that "[t]he message sent by allowing religious exemptions is that discrimination is wrong and illegal except when it is right and legal").

D. *The RFRA Debate*

Related to the question of defining and granting religious exemptions to public accommodations statutes is the necessity and scope of RFRAs. Such legislation is based upon the assumption that there is a credible threat to religious liberty which must be addressed through adoption of heightened protections. RFRA supporters claim that the expansion of protected classes and places in public accommodation statutes have created "an environment of potentially widespread First Amendment violations" by exceeding the narrow historical purpose of public accommodation law as expressed in its common law origins, specifically, guaranteeing access to "quasi-public" services such as inns, restaurants, and common carriers.[240] This expansion presents an imminent threat to religious liberty through actual or threatened litigation to enforce equal access which may violate religious principles. Those individuals and institutions seeking to uphold religious principles will have no choice but to expend time and money in their defense or compromise their beliefs.[241] Increasing societal acceptance of the LGBT community as evidenced by the inclusion of sexual orientation as a protected class in an increasing number of public accommodation statutes is of particular concern in this regard due to the widespread condemnation of homosexuality in religious teachings.[242]

Assuming the existence of a threat posed by public accommodation statutes in general and the inclusion of sexual orientation as a protected class in particular, RFRAs have proven to be an ineffective method by which to protect religious liberty.[243] RFRA claims are rare and, to the

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240. Susan Nabet, Note, *For Sale: The Threat of State Public Accommodation Laws to the First Amendment Rights of Artistic Businesses*, 77 BROOK. L. REV. 1515, 1515-16 (2012); *see also supra* note 150 and accompanying text.

241. *See* Roger Severino, *Or For Poorer: How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939, 979 (2007); *see also* Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125, 134 (2006) (contending that "[a]ntigay discrimination is now sufficiently stigmatized that a business that openly discriminates is likely to pay an economic price for doing so"). *But see* Chapman, *supra* note 232, at 1820-21 (stating that "market participants that are focused on the bottom line . . . may overlook their personal prejudices against employees, business owners, and customers if they can assist in maximizing profits").

242. *See, e.g.*, J. Brady Brammer, Comment, *Religious Groups and the Gay Rights Movement: Recognizing Common Ground*, 2006 BYU L. REV. 995, 1004 (2006) (contending that changing social attitudes towards the LGBT community and concomitant increasing legal protections will have the effect of placing religious practices and speech in the "societal closet"). *But see* Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 566 (1999) (contending that conflicts between religious liberty and public accommodation statutes are generally fact-specific rather than broad-based attacks upon free exercise).

243. *See* Lund, *supra* note 15, at 468 (concluding that RFRAs "simply have not translated

extent they are filed, are largely unsuccessful due to the absence of a substantial burden upon free exercise or the presence of a compelling governmental interest.[244] The absence of widespread threats to free exercise and the resultant dearth of claims have led some commentators to conclude that the true purpose underlying their continued enactment is an objection to the increased secularization of society.[245] The increased focus on RFRAs, especially in those states where sexual orientation is not deemed a protected class and in anticipation of the U.S. Supreme Court's opinion in *Obergefell v. Hodges*, reinforces the conclusion that RFRAs are a cover for continued and future sexual orientation discrimination.[246] In transforming religious liberty claims into a rationale for discrimination, RFRA proponents have weakened their own cause in the eyes of the general public.[247]

Assuming the necessity for the widespread adoption of RFRAs, there remains an issue regarding what form they should take. Unfortunately, existing RFRAs are divergent with many suffering from overbreadth and vagueness. Just as with respect to the separation of religious exercise and business practices discussed above, RFRAs and those impacted by their adoption and enforcement would benefit from greater uniformity. Greater uniformity would be particularly beneficial in several discreet areas.

First, existing RFRAs should define religion. Defining religion makes legislative sense as it is essential to clearly establish that freedom which RFRAs purport to "restore." A closely related issue is the need to ensure sincerity of belief without which every objection potentially becomes religious and the basis for a challenge to state and local laws.[248] The

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into a dependable source of protection for religious liberty at the state level").

244. *See, e.g.*, Ledewitz, *supra* note 15, at 75–76 (describing RFRA claims as "exceedingly rare," "rarely successful" and failing to play "the full role of protecting religious exemption claims that their drafters expected and hoped for"); Lund, *supra* note 15, at 479 (contending that there is "reason to doubt that state RFRAs provide meaningful protection for religious observance" given the almost complete absence of litigated claims).

245. *See, e.g.*, Mary Jean Dolan, *The Constitutional Flaws in the New Illinois Religious Freedom Restoration Act: Why RFRAs Don't Work*, 31 LOY. U. CHI. L.J. 153, 157 (2000) (contending that RFRAs do not "solve any actual, recognized problem of discrimination or burden on religious conduct. . . . [but were adopted] to institute a global protection of religiously motivated conduct whenever it conflicts with government regulation"); Claire McCusker, Comment, *When Church and State Collide: Averting Democratic Disaffection in a Post-Smith World*, 25 YALE L. & POL'Y REV. 391, 398 (2007) (noting that "traditionally religious individuals are more likely to find their religious practices in conflict with facially neutral laws than they would have a century ago when traditional religious moral notions were more widespread").

246. *See generally supra* notes 74-95, 119-38, 156-64 (discussing RFRAs in states that do not include sexual orientation as a protected class in their public accommodation statutes).

247. *See* Dionne, *supra* note 169 (concluding that "[b]y taking reasonable religious-liberty claims and then pushing and twisting them into a rationale for discrimination, opponents of gay marriage have picked a fight that will weaken religious-liberty arguments overall").

248. *See supra* note 200 and accompanying text.

definition should track that previously proposed with respect to granting exemptions to public accommodation statutes.[249] For the reasons previously noted, the definition of religion set forth in Kansas' RFRA is preferable.[250]

Closely related to defining religion is providing greater clarity with respect to persons subject to RFRA protection. Once again, Kansas' RFRA provides the best guidance in this regard through its explicit reference to "any legal person or entity" existing under federal or state law which explicitly includes for-profit organizations.[251] South Carolina's RFRA defining "person" to include "an individual, corporation, firm, partnership, association, or organization" is also satisfactory if not as all-encompassing as Kansas' definition of protected persons.[252] Louisiana and Pennsylvania's RFRAs are inadequate to the extent that their protections are limited to individuals and churches, associations of churches, and other religious orders, bodies, or institutions.[253] The confusing distinctions between "persons" and "providers" in Indiana's RFRA is perhaps a product of the haste in which it was amended after the nationwide uproar regarding its adoption.[254] The remaining RFRAs fall short by failing to define persons who may exercise religion, which leaves their application to for-profit organizations unclear.[255] Granted, courts in these states may choose to follow the U.S. Supreme Court's lead in *Burwell v. Hobby Lobby Stores, Inc.* and extend such rights to close corporations at the very least,[256] but greater specificity in the statutes themselves is a better approach.

A second area in need of greater clarity is the burden that may be placed upon the exercise of religion by state and local governments. Fourteen RFRAs utilize the "substantial burden" standard.[257] The burdens which may be placed upon the exercise of religion by governments in Alabama, Connecticut, Kansas, and Missouri remain unclear given the uncertainty of whether reference to "burdens" in these statutes means "substantial burdens" or were explicitly intended to broaden free exercise rights.[258] The lack of expressed legislative intent in this regard creates uncertainty for governments, individuals, and businesses and serves as a potential basis for future litigation. These RFRAs are also overbroad to the extent that they were intended to

249. *See supra* notes 201-04 and accompanying text.
250. *See supra* note 206 and accompanying text.
251. *See* KAN. STAT. ANN. § 60-5302(f) (2015).
252. S.C. CODE ANN. § 1-32-20(3) (2015).
253. *See supra* note 86 and accompanying text.
254. *Id.*
255. *See supra* notes 129, 160-61 and accompanying text.
256. Burwell v. Hobby Lobby Stores, Inc. 134 S. Ct. 2751 (2014).
257. *See supra* notes 75, 119, 157 and accompanying text.
258. *See supra* notes 76, 121-23, 159 and accompanying text.

prohibit any governmental burden on religious exercise. It is not hard to imagine that any statute or regulation, be it in the fields of public accommodation, contracts, employment, health care, licensing, or zoning, may have an impact upon the exercise of one or more religious beliefs. To make such impacts, no matter how incidental or tangential, the basis for striking down otherwise neutral laws hobbles the ability of the government to fulfill its obligation to act in the public interest and grants religious belief a preferred position with respect to and veto power over existing and future legislation and regulation.

Even broader and thus more problematic are New Mexico and Rhode Island's prohibitions upon governmental action that "restricts" free exercise.[259] Neither of these RFRAs defines impermissible restrictions thereby creating the possibility that any constraints or limitations no matter how slight or trivial could serve as a basis for invalidating a state statute or regulation. Indiana's RFRA is perhaps most problematic of all as it not only prohibits substantial burdens upon free exercise but also statutes and regulations that may potentially impose such burdens.[260] In so doing, litigants challenging state law would not need to demonstrate actual injury but only the possibility of injury. The utilization of this standard leaves unclear the degree to which the potential for injury must exist. Specifically, does a prospective challenger have to demonstrate a hypothetical potential for injury, a likelihood of injury, or some other standard? In any circumstance, Indiana's RFRA creates an inadvisably low burden for challengers. As previously stated, any law may have an impact upon the free exercise of religion. It takes even less creativity to conceive of potential impacts of legal obligations upon religious exercise regardless of whether such impacts and resultant injury have actually occurred.

Given these shortcomings, the better approach is utilization of the federal standard of "substantial burden" as adopted by two-thirds of the existing RFRAs.[261] This standard could be further improved through a uniform definition of "substantial burden." Only eight RFRAs purport to define burdens that impermissibly infringe upon free exercise.[262] Presumably the remaining statutes adopt the definition as determined by U.S. courts in interpreting the federal RFRA. Nevertheless, it would be beneficial to all affected individuals, organizations, governments, and courts if the substantial burden standard was legislatively established rather than subject to judicial guesswork as is the case in those states without a definition.

Pennsylvania's RFRA provides the most explicit and reasonable

259. *See supra* note 124 and accompanying text.
260. *See supra* note 77 and accompanying text.
261. *See supra* notes 75, 119, and accompanying text.
262. *See supra* notes 79-82, 120, and accompanying text.

statement of "substantially burden" among the existing RFRAs that contain a definition. "Substantially burden" under Pennsylvania law balances the interests of the government in fulfilling its obligation to act in the public interest and equal application of the law with the necessary respect due to religious beliefs and worship. Thus, conduct mandated by a sincerely-held religious belief is substantially burdened if it is significantly constrained or inhibited by government action.[263] An expression of adherence to a particular religious faith is substantially burdened if it is significantly curtailed by government action.[264] Other types of religious expression and conduct are substantially burdened if the government compels conduct or expressions in violation of specific tenets of one's religious beliefs, or denies an individual a reasonable opportunity to engage in activities fundamental to one's religious faith.[265] Prohibitions upon government action in these circumstances is not modified by the adjective "significant" and thus reflect greater respect for specific religious activities and beliefs, and less governmental latitude in these areas.[266] However, religious activities and expressions must be fundamental to an individual's religion or in violation of a specific tenet of one's religious beliefs. Fundamentality and specificity ensure that purported violations be predicated upon something other than trivial, technical, or de minimis infractions.

The remaining legislative definitions of "substantial burden" fail to attain the optimal balance present in the Pennsylvania RFRA. The RFRAs in Idaho, Oklahoma, Tennessee and Virginia unduly favor religion by defining substantial burdens as those that in any manner inhibit or curtail religiously motivated practices without consideration of the significance or reasonableness of the purported burden.[267] Similarly, Arizona's exclusion of "trivial, technical or de minimis infractions" from its definition invites judicial entanglement with religion as courts attempt to separate substantive violations from trivial infractions.[268] It also creates the impression, most likely unintentional, that all non-trivial or technical interferences are violations of Arizona's RFRA.

RFRAs would also benefit from greater clarity with respect to their

263. *See supra* note 80 and accompanying text; *see also* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (holding that religiously-motivated acts, as contrasted with beliefs, are "not totally free from legislative restrictions").

264. *See supra* note 80 and accompanying text.

265. *Id.*

266. *Id. See also Sherbert,* 374 U.S. at 402 (stating that "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs" and that the government "may neither compel affirmation of a repugnant belief . . . nor penalize or discriminate against individuals or groups because they hold religious beliefs abhorrent to the authorities" (citations omitted)).

267. *See supra* note 81 and accompanying text.

268. *See* ARIZ. REV. STAT. ANN. § 41-1493.01(E) (2015).

application to neutral laws. Eight RFRAs include facially neutral laws within their scope.[269] Only three RFRAs provide that neutral laws cannot serve as the basis for a RFRA violation.[270] The status of facially neutral laws is undetermined in the remaining ten RFRAs.[271]

Despite its minority status, the better approach is to expressly exclude facially neutral laws from serving as the basis for a RFRA violation. Such an approach is consistent with existing U.S. Supreme Court precedent applying the compelling interest test only when reviewing laws targeting specific religious practices.[272] To conclude otherwise creates a potential means by which to challenge every law that incidentally impinges upon religious practices and opens "the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[273] The impact of such an approach would "permit every citizen to become a law unto himself,"[274] invite anarchy and contradicts "constitutional tradition and common sense."[275] The government's ability to execute public policy would be significantly impaired as laws implementing such policies could not survive compelling interest scrutiny.[276]

Assuming that there is a potential for such a "parade of horribles," facially neutral laws should be excluded from the reach of state RFRAs.[277] However, the three RFRAs that exclude neutral laws take different approaches. Missouri's RFRA excludes neutral rules that do not discriminate against or among religions.[278] New Mexico's RFRA modifies this approach by exempting only those neutral laws that do not

269. *See supra* notes 89, 132, 163 and accompanying text.

270. *See supra* notes 89, 132 and accompanying text.

271. *Id.*

272. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (stating that "a law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice").

273. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879, 888-89 (1990) (refusing to excuse individuals from compliance with "a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)" and listing compulsory military service, the payment of taxes, health and safety regulations, compulsory vaccination requirements, drug laws, traffic laws, certain types of social welfare legislation, child labor laws, prohibitions upon animal cruelty, environmental protection laws, and laws prohibiting racial discrimination as requiring exemptions should the Court apply the compelling interest test to all actions believed to be religiously commanded).

274. *Id.* at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879)).

275. *Id.* at 885.

276. *Id.* at 888.

277. *Id.* at 902 (O'Connor, J., concurring) (describing Justice Scalia's list of laws requiring religious exemptions should the Court apply the compelling interest test to all religiously-inspired actions).

278. *See supra* note 88 and accompanying text.

directly discriminate against or among religions.[279] Rhode Island's RFRA utilizes yet another standard by removing neutral laws from its statute if they do not intentionally discriminate against or among religions.[280]

The broader approach adopted by the Missouri RFRA is preferable in this circumstance. The meaning of "direct discrimination" as utilized in the New Mexico RFRA is unclear. The New Mexico RFRA and the requirement of intentional discrimination in the Rhode Island RFRA fail to recognize that neutral laws may at times impinge upon religious liberty despite the absence of intent to discriminate. It is further improbable that any neutral law would violate the Rhode Island RFRA given the unlikely existence of an express intent to harm or establish a specific religion and the plausibility of more benign legislative motives. By contrast, the Missouri RFRA excludes neutral rules but also leaves open the possibility that some types of such rules, albeit rare, may be capable of interfering with religious practices absent "direct discrimination" or discriminatory intent.[281] This approach permits courts to strike "sensible balances between religious liberty and competing state interests" rather than speculate on the presence of direct discrimination or hunt for non-existent discriminatory intent.[282]

The test to be applied to state and local laws alleged to interfere with free exercise should be more clearly stated. Fourteen RFRAs provide that a burden on the exercise of religion is justified only in furtherance of a compelling governmental interest.[283] In so providing, these RFRAs are consistent with the federal RFRA and existing U.S. Supreme Court precedent.[284] However, seven RFRAs appear to set a higher standard by not only requiring a compelling interest but also placing the evidentiary burden upon the government to demonstrate that its actions are

279. *See supra* note 132 and accompanying text.

280. *Id.*

281. *See Smith*, 494 U.S. at 901 (O'Connor, J., concurring) (contending that neutral laws of general applicability were as capable of interfering with religious practices as laws expressly targeting religion).

282. *Id.* at 902.

283. *See supra* notes 90, 133, 163 and accompanying text.

284. *See* 42 U.S.C. § 2000bb-1(b)(1) (2012) (providing that the government may substantially burden a person's exercise of religion "only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest"); *see also* Sherbert v. Verner, 374 U.S. 398, 407 (1963) (holding that the religious practices of a member of the Seventh-Day Adventist Church, who lost her job due to her refusal to work on Saturdays and was consequently denied unemployment compensation, were unconstitutionally burdened due to the absence of a compelling state interest in preventing the filing of fraudulent claims by persons feigning religious objections and the effect of such claims upon the state unemployment fund and employers); Wisconsin v. Yoder, 406 U.S. 205, 222-29, 234 (1972) (overturning a state compulsory education statute as applied to Amish children due to the absence of a compelling state interest in preparing students for participation in the political system and protecting them from ignorance and exploitation by prospective employers).

"essential" to furthering this interest.[285] This additional requirement of essentiality may set a higher standard for burdens upon the exercise of religion in these states.[286]

The majority approach requiring proof of a compelling government interest without the additional requirement of essentiality is preferable. The description of "compelling government interests" in existing U.S. Supreme Court precedent sets a high bar for government actions in the context of religion. In *Sherbert,* the Court concluded that religiously-based conduct deemed subject to permissible government regulation "invariably posed some substantial threat to public safety, peace or order."[287] Such instances implicated "the gravest abuses, endangering paramount interests" and were thus deserving of designation as "compelling."[288] Similarly, in *Yoder,* the Court required a searching examination of the interests the government sought to promote and impediments to these objectives that would result from recognition of an exemption for religious freedom.[289] "Compelling government interests" were further described in *Smith* as those of "the highest order."[290] This language is sufficiently stringent if the Court's words are to be taken at their face value.[291] An additional requirement of "essentiality" heightens an already challenging standard for governments to attain, adds an additional, unnecessary layer of complication to such determinations, and invites inadvisable judicial second-guessing as to the necessity of the means selected by policymakers to address paramount public interests.[292] The standard by which government action with respect to religious beliefs and conduct is to be judged should be rigorous; it should not be unattainable.

Related to the compelling interest standard is the burden of proof to be met by the government in defending laws alleged to interfere with religious liberty. Four RFRAs provide that the government must satisfy

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285. *See supra* notes 91, 134 and accompanying text.

286. *See supra* note 92 and accompanying text.

287. *Sherbert,* 374 U.S. at 403 (citing Cleveland v. United States, 329 U.S. 14 (1946) (polygamy and bigamy); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (mandatory smallpox vaccination program); and Reynolds v. United States, 98 U.S. 145 (1878) (polygamy).

288. *Id.* at 406 (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)).

289. *See Yoder,* 406 U.S. at 235.

290. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 888 (1990).

291. *But see* Eric D. Yordy, *Fixing Free Exercise: A Compelling Need to Relieve the Current Burdens,* 36 HASTINGS CONST. L.Q. 191, 194 (2009) (criticizing the Court for its failure to specifically define the term "compelling interest").

292. *See Smith,* 494 U.S. at 885 (concluding that the government's ability to execute public policy, including enforcement of prohibitions upon conduct perceived to be harmful to society, could not depend on its effect on the spiritual development of religious objectors).

its evidentiary burden through clear and convincing evidence.[293] The Pennsylvania RFRA is the only one to utilize a preponderance of the evidence standard.[294] None of the remaining sixteen RFRAs or the federal RFRA set forth the burden of proof to be met by the government in establishing a compelling interest.

The approach requiring the government to produce clear and convincing evidence with respect to justifications for the imposition of burdens upon the exercise of religion is the preferable approach. The clear and convincing evidentiary standard is consistent with the government's heightened obligation to demonstrate not just an interest, but also a compelling interest, underlying its actions. The clear and convincing standard requires that the government demonstrate that the factual contentions underlying its purported interest are "highly probable" rather than simply more likely than not.[295] This standard also permits courts to balance the unique interests at stake, specifically, the religious belief or practice at issue versus the government's purported public policy reasons for the imposition of the challenged burden.[296] This balancing of interests appropriately recognizes that the government should bear the brunt of the risks associated with an erroneous decision. The harm associated with interference with sincerely-held religious beliefs and actions is "typically certain and immediate" whereas the consequences associated with alleged government interests may be "speculative and remote."[297] This disparity requires an enhanced standard of proof that permits courts to accommodate competing interests. Utilization of this standard is also consistent with other civil liberties cases implicating First Amendment rights such as free speech.[298] The free exercise of religion is no less

293. *See supra* notes 95, 138 and accompanying text.

294. *See supra* note 95 and accompanying text.

295. Colorado v. New Mexico, 467 U.S. 310, 316 (1984) (defining the clear and convincing evidentiary standard). The Tennessee Court of Appeals has defined the clear and convincing evidentiary standard in the context of the Tennessee RFRA as requiring the elimination of "any serious or substantial doubt about the correctness of the conclusions drawn from the evidence" and the production of "a firm belief or conviction regarding the truth of the facts sought to be established." Johnson v. Levy, No. M2009-02596-COA-R3-CV, 2010 Tenn. App. LEXIS 14, at *21-22 (Tenn. Ct. App. Jan. 14, 2010). *See also* Brown v. City of Pittsburgh, 586 F.3d 263, 285 (3d Cir. 2009) (defining "clear and convincing evidence" in the context of the Pennsylvania RFRA as "testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts at issue").

296. *Johnson*, 2010 Tenn. App. LEXIS 14, at *10.

297. *Colorado*, 467 U.S. at 316.

298. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964) (requiring "convincing clarity" with respect to proof of falsity and actual malice as elements of a defamation claim asserted by a public official). The Court subsequently described this standard as requiring "clear and convincing evidence." Gertz v. Robert Welch, Inc., 418 U.S. 323, 331-32 (1974). For a discussion of the use of the clear and convincing evidentiary standard in free speech cases, *see generally* Erwin Chemerinsky, *Silence is not Golden: Protecting Lawyer Speech Under the First*

worthy of protection through application of the clear and convincing evidence standard than other civil liberties including the free exercise of speech.

CONCLUSION

Clashes between the free exercise of religion and expanded protections for the LGBT community are likely to continue in the foreseeable future. Public accommodation laws are ill prepared to the extent that they are a part of this conflict. This is due in part to the many different forms they take throughout the country, including crucial differences in terminology, definitions (or the absence thereof), coverage, and prohibited practices. These differences have the potential to create uncertainty and disparate treatment for members of the LGBT community.

Some of the current difficulties and future conflicts may be minimized by greater uniformity among state laws, but there are no perfect solutions. Public accommodation statutes cannot be expected to "eliminate disagreement or craft perfect solutions . . . . [but can only be expected to]. . . set fair terms for the market."[299] Recognition of the right of everyone to full and equal participation in the marketplace for goods and services free from discrimination is such a fair term.

Policymakers must also recognize the proper role of religion and exercise care so as not to interfere with what people do and say "in their pews, homes and hearts."[300] However, any conflicts between religious liberty asserted by secular businesses and access to goods and services must be resolved in favor of the government's compelling interest in guaranteeing full and non-discriminatory access for all persons.[301] Such a result does not denigrate religion. Those opposed to homosexuality, in the same manner as those opposed to same-sex marriage, are entitled to "proper protection" guaranteed by the First Amendment.[302] Rather, such a result only recognizes that, in the public sphere, the government's interest in equal access outweighs those of enterprises seeking to

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Amendment, 47 EMORY L.J. 859, 885-86 (1998).

299. Answer Brief of Appellee-Respondent Vanessa Willock at 39, Elane Photography, L.L.C. v. Willock, 309 P.3d 53 (N.M. 2013) (No. 33,687).

300. Bruni, *supra* note 231.

301. *See* Eckholm, *supra* note 8, at A1 (quoting James D. Esseks, the director of gay rights issues at the American Civil Liberties Union, as stating that "[r]eligious liberty does not authorize discrimination . . . . It's profoundly harmful to walk into a business open to the public and be told, 'No, we don't actually serve your kind here' . . . . That's not how America works").

302. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015) (emphasizing that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned").

discriminate on the basis of religious beliefs.

Religion can undoubtedly be freely exercised without engaging in discriminatory practices in the commercial marketplace. To hold otherwise is to invite arbitrary, unpredictable, and discriminatory results and undermine the ongoing commitment to furthering the causes of fundamental fairness and equal protection under the law. Equal and non-discriminatory access to public accommodations and the free exercise of religion are more than just political and religious differences. They are human rights to which all are entitled to partake and enjoy. Policymakers would be wise to recognize that the intersection of sexual orientation, religious freedom and public accommodation laws do not present political or religious issues but more importantly concern "how we treat each other as human beings."[303]

303. Tim Cook, *Pro-discrimination 'religious freedom' laws are dangerous*, WASH. POST (Mar. 29, 2015), http://www.washingtonpost.com/opinions/pro-discrimination-religious-freedom-laws-are-dangerous.