

May 1, 2013

BY EMAIL

Senator F. Gary Simpson
Delaware Senate Executive Committee

Re: Religious Liberty Implications of Legalizing Same-Sex Marriage, House Bill No. 75

Dear Senator Simpson:

We write to urge the Delaware General Assembly to ensure that any bill legalizing same-sex marriage does not infringe the religious liberty of organizations and individuals who have a traditional view of marriage. Providing religious protections in any same-sex marriage bill honors America's, and Delaware's, long and rich tradition of religious freedom and tolerance. Pending House Bill No. 75 by its title and some terms claims to protect religious liberty, but it surely does not—or not very much.

If the General Assembly legalizes same-sex marriage, it is possible to do so without infringing on religious liberty. The contentious debate in Maryland, New York, Washington, and elsewhere surrounding same-sex marriage proves the wisdom of constructive, good-faith attempts both to grant legal recognition to same-sex marriage *and* to protect religious liberty for conscientious objectors.¹

This letter analyzes the potential effects of same-sex marriage on religious conscience in Delaware and proposes a solution to address the conflicts: a specific religious liberty protection that should be an integral part of any proposed legislation. This proposal clarifies that individuals and organizations may refuse to provide services for a wedding if doing so would violate deeply held beliefs, while ensuring that the refusal creates no undue hardship for the couple seeking the service. We write not to support or oppose same-sex marriage in Delaware. Rather, our aim is to define a “middle way” to address the needs of same-sex couples while honoring and respecting religious liberty.²

As this letter details, the conflicts between same-sex marriage and religious conscience will be both certain and considerable if adequate protections are not provided. Without adequate safeguards, many religious individuals will be forced to engage in conduct that violates their deepest religious beliefs, and religious organizations will be constrained in crucial aspects of their religious exercise. We urge the Delaware General Assembly to take the time and care to ensure that the legalization of same-sex marriage does not restrict the inalienable right of

¹ An Appendix is attached summarizing the core religious liberty protections afforded by jurisdictions that currently recognize same-sex marriage by legislation.

² While we have a range of views on the underlying issue of same-sex marriage, we wholeheartedly share the belief that when same-sex marriage is recognized, it should be accompanied by corresponding protections for religious liberty.

religious liberty. Doing so is entirely consistent with the text of the Delaware State Constitution that each member of the State General Assembly has sworn to uphold and protect. Since its adoption in 1897, the Delaware Constitution has always protected religious freedom in the strongest of terms.³

Part A of this letter proposes a specific religious conscience protection that will defuse the vast majority of conflicts between same-sex marriage and religious liberty. Part B provides examples of precedent for the protection we propose. Part C details the sorts of legal conflicts that will arise if same-sex marriage is legalized without reasonable protections for religious liberty. Finally, Part D explains the need for robust religious liberty protections, now lacking in House Bill No. 75.

A. Proposed Religious Conscience Protection

The many potential conflicts between same-sex marriage and religious liberty are avoidable.⁴ But they are avoidable only if the Delaware General Assembly takes the time and effort to craft the “robust religious-conscience exceptions” to same-sex marriage that leading voices on both sides of the public debate over same-sex marriage are calling for.⁵ The juncture for balancing religious liberty and legal recognition of same-sex marriage is now.⁶

Any proposed marriage bill can provide reasonable, carefully tailored protections for religious conscience by including a simple “marriage conscience protection” modeled, in part, on existing conscience protections in Delaware’s nondiscrimination laws, which provide religious liberty protections, as well as exemptions for small employers.⁷ The “marriage conscience protection” would provide as follows:

³ See DEL. CONST. art. I, §1 (“Although it is the duty of all persons frequently to assemble together for the public worship of Almighty God; and piety and morality, on which the prosperity of communities depends, are hereby promoted; yet no person shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his or her own free will and consent; and no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship, nor a preference given by law to any religious societies, denominations, or modes of worship.”).

⁴ See, e.g., Douglas Laycock, *Afterword* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds. 191-97 (Rowman & Littlefield 2008) [hereinafter Laycock] (detailing the scope of “avoidable” and “unavoidable” conflicts).

⁵ See David Blankenhorn & Jonathan Rauch, *A Reconciliation on Gay Marriage*, N.Y. TIMES, Feb. 22, 2009, at WK11, available at http://www.nytimes.com/2009/02/22/opinion/22rauch.html?_r=1 (arguing for recognition of same-sex unions together with religious conscience protections).

⁶ Though conscience protections should also extend to existing civil unions, we do not address civil unions here.

⁷ See, e.g., DEL. CODE ANN. tit. 19, § 710 (2013) (“The term ‘employer’ with respect to discriminatory practices based upon sexual orientation does not include religious corporations, associations or societies

Section ____

(a) Religious organizations protected.

Notwithstanding any other provision of law, no religious or denominational organization, no organization operated for charitable or educational purposes which is supervised or controlled by or in connection with a religious organization, and no individual employed by any of the foregoing organizations, while acting in the scope of that employment, shall be required to

- (1) provide services, accommodations, advantages, facilities, goods, or privileges for a purpose related to the solemnization or celebration of any marriage; or
- (2) solemnize any marriage; or
- (3) treat as valid any marriage

if such providing, solemnizing, or treating as valid would cause such organizations or individuals to violate their sincerely held religious beliefs. This section shall not permit a religious organization engaged in the provision of health care, or its individual employees, to refuse to treat a state-recognized marriage as valid for purposes of a spouse's rights to visitation or to surrogate health care decisionmaking.

(b) Individuals and small businesses protected.

whether supported, in whole or in part, by government appropriations, except where the duties of the employment or employment opportunity pertain solely to activities of the organization that generate unrelated business taxable income subject to taxation under § 511(a) of the Internal Revenue Code of 1986.”); *id.* (“‘Employer’ means any person employing 4 or more employees within the State at the time of the alleged violation, including the State or any political subdivision or board, department, commission or school district thereof..”); DEL. CODE ANN. tit. 6, § 4607 (a)-(b) contained in the Delaware Fair Housing Act (2013) (“(a) Nothing in this chapter shall prohibit 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 limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color or national origin. (b) Nothing in this chapter shall prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members, unless membership in such private club is restricted on account of race, color or national origin.”).

- (1) Except as provided in paragraph (b)(2), no individual, sole proprietor, or small business shall be required to
 - (A) provide goods or services that assist or promote the solemnization or celebration of any marriage, or provide counseling or other services that directly facilitate the perpetuation of any marriage; or
 - (B) provide benefits to any spouse of an employee; or
 - (C) provide housing to any married couple

if providing such goods, services, benefits, or housing would cause such individuals or sole proprietors, or owners of such small businesses, to violate their sincerely held religious beliefs.

- (2) Paragraph (b)(1) shall not apply if
 - (A) a party to the marriage is unable to obtain any similar good or services, employment benefits, or housing elsewhere without substantial hardship; or
 - (B) in the case of an individual who is a government employee or official, if another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay; *provided that* no judicial officer authorized to solemnize marriages shall be required to solemnize any marriage if to do so would violate the judicial officer's sincerely held religious beliefs.
- (3) A "small business" within the meaning of paragraph (b)(1) is a legal entity other than a natural person
 - (A) that provides services which are primarily performed by an owner of the business; or
 - (B) that has five or fewer employees; or
 - (C) in the case of a legal entity that offers housing for rent, that owns five or fewer units of housing.

(c) No civil cause of action or other penalties.

No refusal to provide services, accommodations, advantages, facilities, goods, or privileges protected by this section shall

- (1) result in a civil claim or cause of action challenging such refusal; or
- (2) result in any action by the State or any of its subdivisions to penalize or withhold benefits from any protected entity or individual, under any laws of this State or its subdivisions, including but not limited to laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status.⁸

This proposed legislation has several important benefits. First, this text parallels existing protections in Delaware’s nondiscrimination laws for small employers and for “a religious corporation, association, educational institution, or society with respect to the employment of individuals of its religion to perform work connected with the carrying on of its activities,”⁹ as well as federal nondiscrimination laws.¹⁰ The text also significantly mirrors, in part, the express protections provided in the Connecticut, District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington same-sex marriage laws for religious organizations. Many of these laws protect, among other things, the conscientious refusal “to provide services, accommodations, advantages, facilities, goods, or privileges . . . related to the solemnization of a marriage.”¹¹

⁸ Some have expressed concern that the proposed text would permit objections to interracial marriage. Although such objections are likely to be rare, if not non-existent, this concern is readily addressed by a simple proviso that would read: “Notwithstanding any of the foregoing provisions, this section does not change any provision of law with respect to discrimination on the basis of race.”

⁹ See note 7 above.

¹⁰ Title VII of the Civil Rights Act of 1964, for example, prohibits discrimination in employment on the basis of race, color, sex, national origin, or religion. However, Title VII exempts any “religious corporation, association, educational institution, or society.” 42 U.S.C. § 2000e-1(a). Thus, for example, a religious organization—unlike a nonreligious organization—is permitted to hire, fire, and promote employees on the basis of religion.

¹¹ See CONN. PUBLIC ACT NO. 09-13 (2009) §§ 17-19, available at <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm> (exempting religious organizations from “provid[ing] services, accommodations, advantages, facilities, goods, or privileges . . . related to” the “solemnization” or “celebration” of a marriage, and providing separate exemptions for religious adoption agencies and fraternal benefit societies); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. LAW NO. L18-0110 (enacted Dec. 18, 2009, effective Mar. 3, 2010.), available at <http://www.dccouncil.washington.dc.us/lims/legislation.aspx?LegNo=B18-0482> (exempting religious societies and religiously affiliated non-profits from providing “accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a same-sex marriage, or the promotion of same-sex marriage through religious programs, counseling, courses, or retreats...”); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) § 2-3 (exempting religious organizations from the “solemnization of a marriage or celebration of a marriage that is in violation of the entity’s religious beliefs” or “the promotion of marriage through any social or

Second, this model provision lists the primary areas of Delaware law where the refusal to treat a marriage as valid is likely to result in liability, penalty, or denial of government benefits (“laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status”).

Third, this text provides protection only when providing services related to a marriage, solemnizing a marriage, or being forced to treat a marriage as valid would “violate . . . sincerely held religious beliefs.” This phrase is drawn from numerous court cases discussing the First Amendment to the U.S. Constitution and ensures that the religious conscience protections will apply only to a “violation” of “sincere” beliefs that are “religious”—not to situations that merely make religious people uncomfortable, not to insincere beliefs asserted as a pretext for discrimination, and not to non-religious moral beliefs.

Fourth, this text provides vital protections in subsection (b) for individuals of religiously informed conscience who own sole proprietorships and small businesses. We explain the need for such protection in Parts C and D below.

Finally, this model provision recognizes that religious accommodations might not be without cost for same-sex couples, such as the need to find a different wedding photographer or caterer if their original choice must decline for reasons of conscience. In order to address this issue, subsection (b)(2) ensures that a same-sex couple can obtain the service, even from conscientious objectors, when the inability to find a similar service elsewhere would impose a substantial hardship on the couple. But because this hardship exception could force organizations or individuals to violate their religious beliefs, it should be available only in cases of substantial hardship, not mere inconvenience or symbolic harm. Subsection (b)(2)(B) also ensures that no government employee or official (such as a county clerk) may act as a choke point on the path to marriage. So, for example, no government employee can refuse on grounds of conscience to issue a marriage license unless another government employee is promptly available and willing to do so. These sorts of override protections are common in other laws protecting the right of conscientious objection, especially in the health care context.¹²

religious programs or services, in violation of the entity's religious beliefs”); N.H. REV. STAT. § 457:37 (exempting religious organizations from “provid[ing] services, accommodations, advantages, facilities, goods, or privileges . . . related to” the “solemnization,” “celebration,” or “promotion” of a marriage); N.Y. DOM. REL. LAW § 10-b (1) (2011) (“a religious entity . . . benevolent [order] . . . or a not-for-profit corporation operated, supervised, or controlled by a religious corporation . . . shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage”); 9 VT. STAT. ANN. § 4502(1) (2009) (exempting religious organizations from “provid[ing] services, accommodations, advantages, facilities, goods, or privileges . . . related to” the “solemnization” or “celebration” of a marriage); WASH. REV. CODE § 26.04.010(2)(5) (providing that religious organizations need not “provide accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage”).

¹² See, e.g., IOWA CODE § 146.1 (2005) (“An individual who may lawfully perform, assist, or participate in medical procedures which will result in an abortion shall not be required against that individual’s religious beliefs or moral convictions to perform, assist, or participate in such procedures. . . . Abortion does not include medical care which has as its primary purpose the treatment of a serious physical

B. Precedent for Religious Conscience Protections

There is ample precedent for the type of conscience protection we have proposed. As noted above, Connecticut, District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington have already enacted religious exemptions as part of their legislation recognizing same-sex marriage.¹³ Similarly, Delaware's existing nondiscrimination laws on employment and housing provide a categorical exemption for religious organizations and small employers in certain circumstances.¹⁴ And federal nondiscrimination statutes provide protection for religious and conscientious objectors in many different contexts.¹⁵ In short, protecting religious conscience is very much a part of America's and Delaware's tradition. We urge the Delaware General Assembly to continue that "middle way" accommodation of interests.

The religious conscience protection that we have proposed would alleviate the vast majority of the conflicts between same-sex marriage and religious liberty, while still allowing for full equality of treatment and respect for same-sex marriages. It has ample precedent in both Delaware and U.S. law. And it represents the best in the American and Delawarean constitutional tradition of protecting the inalienable right of conscience.

C. Conflicts Between Same-Sex Marriage and Religious Liberty

In the only book-length comprehensive scholarly work on same-sex marriage and religious liberty,¹⁶ legal scholars on both sides of the same-sex marriage debate agreed that codifying same-sex marriage *without* providing robust religious accommodations will create

condition requiring emergency medical treatment necessary to save the life of a mother."); S.C. CODE ANN. § 44-41-40 (2002) ("No private or non-governmental hospital or clinic shall be required . . . to permit their facilities to be utilized for the performance of abortions; *provided*, that no hospital or clinic shall refuse an emergency admittance."); TEX. OCC. CODE ANN. § 103.004 (Vernon 2004) ("A private hospital or private health care facility is not required to make its facilities available for the performance of abortion *unless* a physician determines that the life of the mother is immediately endangered.") (emphasis added).

¹³ See note 11 above and Appendix A below.

¹⁴ See note 7 above.

¹⁵ See, e.g., 32 C.F.R. § 1630.11 (accommodating conscientious objectors to military service); 42 U.S.C. § 300a-7 (accommodating health care professionals who conscientiously object to participating in medical procedures such as abortion or sterilization); 42 U.S.C. § 2000bb *et seq.* (Religious Freedom Restoration Act lifts federal-created burdens on religious exercise).

¹⁶ SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds. (Rowman & Littlefield 2008) (including contributions from both supporters and opponents of same-sex marriage). See also Thomas Berg, *What Same-Sex Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206 (2010); Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, 5 NW. J. L. & SOC. POL'Y 307 (2010); Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J. L. & Soc. Pol'y 318 (2010).

widespread and unnecessary legal conflicts—conflicts that will work a “sea change in American law” and will “reverberate across the legal and religious landscape.”¹⁷ The conflicts between religious conscience and same-sex marriage generally take one of two forms. First, if same-sex marriage is legalized without appropriate statutory accommodations, religious organizations and individuals that object to same-sex marriage will face new lawsuits under the state nondiscrimination act and other similar laws. So will many small businesses, which are owned by individual conscientious objectors. Likely lawsuits include claims where:

- Individuals of conscience, who run a small business, such as wedding photographers, florists, banquet halls, or making wedding cakes in one’s home, can be sued under public accommodations laws for refusing to offer their services in connection with a same-sex marriage ceremony.¹⁸
- Religious summer camps, day care centers, retreat centers, counseling centers, meeting halls, or adoption agencies can be sued under public accommodations laws for refusing to offer their facilities or services to members of a same-sex marriage.¹⁹

¹⁷ Marc Stern, *Same-Sex Marriage and the Churches in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS*, Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds. (Rowman & Littlefield 2008) at 1 [hereinafter “Stern”]. See also Laycock at 191-7 (detailing the scope of “avoidable” and “unavoidable” conflicts); Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes between Religion and the State*, 53 B.C. L. REV. 1417 (2012) available at <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1130&context=wlufac>.

¹⁸ See DEL. CODE ANN. tit. 6, §§ 4504, 4502 (2013) (“(a) No person being the owner, lessee, proprietor, manager, director, supervisor, superintendent, agent or employee of any place of public accommodation, shall directly or indirectly refuse, withhold from or deny to any person, on account of race, age, marital status, creed, color, sex, disability, sexual orientation or national origin, any of the accommodations, facilities, advantages or privileges thereof” but exempting “the sale or rental of houses, housing units, apartments, rooming houses or other dwellings, [and] tourist homes with less than 10 rental units catering to the transient public”). See also *Elane Photography v. Willock*, 284 P.3d 428, N.M.App., May 31, 2012 cert. granted, 2012-NMCERT-008 Aug. 16, 2012 (New Mexico photographer fined for refusing on religious grounds to photograph a same-sex commitment ceremony); Stern at 37-39; see also *Issues Brief: Same-Sex Marriage and State Anti-Discrimination Laws* at 3-5, available at <http://www.becketfund.org/files/34a97.pdf> [hereinafter “Issues Brief”]; Alyssa Newcomb, *Bakery Denies Same-Sex Couple Wedding Cake*, ABC NEWS Feb. 2, 2013 available at <http://abcnews.go.com/blogs/business/2013/02/bakery-denies-same-sex-couple-wedding-cake/>.

¹⁹ *Bernstein v. Ocean Grove Camp Meeting Ass’n*, Num. OAL Dkt. No. CRT 6145-09 (Off. of Admin. Law decision issued January 12, 2012.) available at <http://www.adfmedia.org/files/OGCMA-BernsteinRuling.pdf> (finding that a Methodist organization likely violated public accommodations law by denying same-sex couples use of its wedding pavilion); *Butler v. Adoption Media*, 486 F. Supp.2d 1022 (N.D. Cal. 2007) (administrators of Arizona adoption facilitation website found subject to California’s public accommodations statute because they refused to post profiles of same-sex couples as potential adoptive parents); see also Stern at 37-39; Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 BYU J. PUB. L. 475 (2008) (describing clashes over adoptions by same-sex couples).

- A church or other religious nonprofit that dismisses an employee, such as an organist or secretary, for entering into a same-sex marriage can be sued under employment discrimination laws that prohibit discrimination on the basis of marital status.²⁰

The second form of conflict involving religious organizations and individuals (or the small businesses that they own) that conscientiously object to same-sex marriage is that they will be labeled unlawful “discriminators” under state or municipal laws and thus face a range of penalties at the hand of state agencies and local governments, such as the withdrawal of government contracts or exclusion from government facilities. For example:

- A religious college, hospital, or social service organization that refuses to provide its employees with same-sex spousal benefits can be denied access to government contracts or grants on the ground that it is engaging in discrimination that contravenes public policy.²¹
- A religious charity or fraternal organization that opposes same-sex marriage can be denied access to government facilities, such as a lease on government property or participation in a government-sponsored employee charitable campaign.²²
- Doctors, psychologists, social workers, counselors, and other professionals who conscientiously object to same-sex marriage can have their licenses revoked.²³

²⁰ See DEL. CODE ANN. tit. 19, § 711 (2013) (“(a) It shall be an unlawful employment practice for an employer to: (1) Fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, marital status, genetic information, color, age, religion, sex, sexual orientation, or national origin[.]”); Stern at 48-52; Issues Brief at 3-5.

²¹ See *Catholic Charities of Maine v. City of Portland*, 304 F. Supp.2d 77 (D. Me. 2004) (upholding ordinance forcing religious charity either to extend employee spousal benefit programs to registered same-sex couples, or to lose access to all city housing and community development funds); Don Lattin, *Charities Balk at Domestic Partner, Open Meeting Laws*, S.F. CHRON., July 10, 1998, at A-1 (describing how the Salvation Army lost \$3.5 million in social service contracts with the City of San Francisco because it refused, on religious grounds, to provide benefits to the same-sex partners of its employees).

²² See *Evans v. City of Berkeley*, 38 Cal.4th 1 (Cal. 2006) (affirming revocation of a boat berth subsidy at public marina due to Boy Scouts' exclusion of atheist and openly gay members); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (holding that the Boy Scouts may be excluded from the state's employee charitable contributions campaign for denying membership to openly gay individuals).

²³ See Stern at 22-24 (noting that a refusal to provide counseling services to same-sex couples could be “considered a breach of professional standards and therefore grounds for the loss of a professional license”); see also Patricia Wen, “*They Cared for the Children*”: *Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families*, BOSTON GLOBE, June 25, 2006, at A1 (explaining how Massachusetts threatened to revoke the adoption license of Catholic Charities for refusing on religious grounds to place foster children with same-sex couples); Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22

- Religious fraternal organizations or other nonprofits that object to same-sex marriage can be denied food service licenses, adoption agency licenses, child care licenses, or liquor licenses on the ground that they are engaged in unlawful discrimination.²⁴
- Religious colleges or professional schools can have their accreditation revoked for refusing to recognize the validity of same-sex marriages.²⁵
- Church-affiliated organizations can have their tax exempt status stripped because of their conscientious objection to same-sex marriage.²⁶

All of these conflicts either did not exist before, or will significantly intensify after, the legalization of same-sex marriage. Thus, legalizing same-sex marriage without adequate protections for religious liberty will have at least two unintended consequences: It will harm religious organizations and individuals of conscience, *and it will spawn costly, unnecessary conflicts, many of which will lead to litigation.*²⁷

BYU J. PUB. L. 475 (2008) (describing dismissals and resignations of social services workers where conscience protections were not available).

²⁴ See Stern at 19-22 (noting that many state regulators condition licenses on compliance with nondiscrimination requirements).

²⁵ See Stern at 23 (describing how religiously affiliated law schools have unsuccessfully challenged diversity standards imposed by the American Bar Association as a condition of accreditation); D. Smith, *Accreditation Committee Decides to Keep Religious Exemption*, 33 MONITOR ON PSYCHOLOGY 1 (Jan. 2002) (describing a proposal of the American Psychology Association to revoke the accreditation of religious colleges and universities that have codes of conduct forbidding homosexual behavior), available at <http://www.apa.org/monitor/jan02/exemption.html>.

²⁶ See Jill P. Capuzzo, *Group Loses Tax Break Over Gay Union Issue*, N.Y. TIMES, Sept. 18, 2007 (describing the case of *Bernstein v. Ocean Grove Camp Meeting Ass'n*, in which New Jersey revoked the property tax exemption of a beach-side pavilion controlled by an historic Methodist organization, because it refused on religious grounds to host a same-sex civil union ceremony); Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 107-21 (describing attacks on tax exemptions for religious organizations with objections to same-sex marriage); Jonathan Turley, *An Unholy Union* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 59-76 (arguing for same-sex marriage but against withdrawal of tax exemptions for religious organizations with conscientious objections).

²⁷ Filed lawsuits are often just the tip of the iceberg with respect to conflicts over a given law and a claimed right. Most conflicts get resolved before a suit is filed and comes to the attention of the public. Some employers will back down when suit is threatened. Others will pay a settlement and walk away. Some employers will be quietly “chilled” even though they would prefer another course of action. What matters is the number of conflicts rather than the number of lawsuits. This data is not available, however, and so cannot be empirically studied. Nonetheless, there need only be a few conflicts for there to be a crisis of conscience. Each conflict is a profound violation of religious liberty. Moreover, even assuming that there are a small number of actual conflicts (as some critics claim), then there will be a correspondingly few number of same-sex couples affected by the religious exemptions we recommend. Finally, discrimination lawsuits often increase dramatically over time, so an

D. The Need for Robust Religious Liberty Protection

In 2013, House Bill No. 75, An Act to Amend Title 13 of the Delaware Code Relating to Domestic relations to Provide for Same-Gender Civil Marriage and to Convert Existing Civil Unions to Civil Marriages, was introduced in the Delaware General Assembly to enact same-sex marriage. This bill fails to provide sufficient protections for religious conscience. Section 1 of the Bill seeks to amend § 106, Title 13 of the Delaware Code to include the following:

(e) Other than as provided in this subsection, nothing in this section shall be construed to require any person (including any clergyperson or minister of any religion) authorized to solemnize a marriage to solemnize any marriage, and no such authorized person who fails or refuses for any reason to solemnize a marriage shall be subject to any fine or other penalty for such failure or refusal. Notwithstanding the preceding sentence, a clerk of the peace who issues a marriage license, or a deputy thereof, shall be required to perform a solemnization of such marriage if requested by the applicants for such license.²⁸

Section 8 of the Bill includes the following text:

Religious Freedom. Nothing in this Act is intended to, nor shall this Act be construed in a manner that would, violate any person's rights under the First Amendment to the United States Constitution or §§1, 2 or 5 of Article I of the Constitution of this State, including protected rights of freedom of religion thereunder. Nothing in this Act shall interfere with or regulate the religious practice of any religious society. Any religious society is free to choose which marriages it will solemnize.

As explained below, House Bill No. 75 would provide less protection for religious liberty than every other state that has successfully enacted same-sex marriage legislation.

Consider first the ersatz protection received by individual clergy. Individual clergy who refuse to perform same-sex marriage receive no meaningful protection because they are already protected by the U.S. Constitution. Indeed, with or without this language, “[n]o one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to

important question is how many lawsuits against conscientious objectors will be filed 20 years from now. *See, e.g., Vivian Berger et al., Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 45 (2005) (“The number of employment discrimination lawsuits rose continuously throughout the last three decades of the twentieth century. In the federal courts, such filings grew 2000% . . .”).

²⁸ *See* DEL. CODE ANN. tit. 13, § 106 (2013) (defining a person who is authorized to solemnize a marriages as “[a] clergyperson or minister of any religion, current and former Judges of this State's Supreme Court, Superior Court, Family Court, Court of Chancery, Court of Common Pleas, Justice of the Peace Court, federal Judges, federal Magistrates, clerks of the peace of various counties and current and former judges from other jurisdictions with written authorization by the clerk of the peace...”).

them.”²⁹ Focusing on the issue of “forced officiating” is a straw-man argument calculated to distract the uninformed from real situations where religious conscience is at risk.

Contrast that illusory protection with the meaningful protection under Section 1 for “current and former Judges of this State's Supreme Court, Superior Court, Family Court, Court of Chancery, Court of Common Pleas, Justice of the Peace Court, federal Judges, federal Magistrates” who may act as authorized celebrants in Delaware.³⁰ In a number of jurisdictions, judges and justices of the peace have been admonished to solemnize all weddings, regardless of the individual judge’s or justice’s religious convictions.³¹ A clerk of the peace, however, receives no protection under Section 1.

Like the ersatz protection received by individual clergy, religious organizations receive very narrow and largely illusory protection, receiving “protections” already present in the law: Specifically, Section 8 makes clear a principle already established in the law—namely, that a religious society may choose to refuse to solemnize a marriage. Again, this wholly unnecessary “protection” distracts from those real-life circumstances where religious conscience is at risk. Section 8 does provide that “Nothing in this Act shall interfere with or regulate the religious practice of any religious society,” but provides no guidance as to what counts as “interfere with or regulate” and thus may simply invite further litigation.

What the proposed legislation leaves out is considerable:

- It provides no protection to religious organizations from the loss of government benefits for refusing to recognize a same-sex marriage.
- It provides no protection for individual objectors other than authorized celebrants.
- It provides no protection to religious organizations from private lawsuits brought under Delaware’s nondiscrimination laws other than for refusal to solemnize a marriage.

This proposed legislation is grossly lacking as the following Parts explain in more detail.

a. No Protection from Government Penalty

A good deal of misunderstanding surrounds religious liberty accommodations. Accommodations serve the important function of protecting conscientious objectors from private

²⁹ Stern at 1.

³⁰ DEL. CODE ANN. tit. 13, § 106 (2013)

³¹ See, e.g., Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 Nw. J. L. & Soc. Pol’y 318, 326 (2010) (noting that the “[t]he Iowa Attorney General’s blanket refusal to allow government officials to step aside from facilitating same-sex marriages extends to judges as well.”)

lawsuits. But accommodations also serve the purpose of insulating conscientious objectors from penalties at the hands of the government.³² How might this occur?

An objector may be penalized by losing access to government grant programs or other state or local benefits. Thus, in *Catholic Charities of Maine v. City of Portland*, the district court upheld a Portland ordinance that forced a religious charity either to extend employee spousal benefits to registered same-sex couples, or to lose eligibility to all city housing and community development funds.³³ Similarly, the Salvation Army lost \$3.5 million in social service contracts with the City of San Francisco because it refused, on religious grounds, to provide benefits to the same-sex partners of its employees.³⁴ The Boy Scouts of America have litigated, *and lost*, numerous suits over a state's authority to deny them access to benefits that others receive, when the law was otherwise silent.³⁵

In another example, Catholic adoption agencies in Illinois recently lost contracts with the state because they refused to place children in the homes of unmarried cohabitating couples.³⁶ The state claimed that the Catholic adoption agencies had violated the state's newly enacted civil union law.³⁷ That law contains no exemption for religious social service agencies and thus provides no protection against government penalties for conscientious objectors. Although this case implicated a civil union law, the consequences for a religious organization in Delaware would be indistinguishable under a same-sex marriage law that omitted important accommodations that we recommend.

³² Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context* in SAME SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS at 81.

³³ 304 F. Supp. 2d 77 (D. Me. 2004); *see also* footnote 21 above.

³⁴ *See* Don Lattin, *Charities Balk at Domestic Partner, Open Meeting Laws*, S.F. CHRON., July 10, 1998, at A-1.

³⁵ *See Evans v. City of Berkeley*, 38 Cal.4th 1 (Cal. 2006) (affirming revocation of a boat berth subsidy at public marina due to Boy Scouts' exclusion of atheist and openly gay members); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (holding that the Boy Scouts may be excluded from the state's workplace charitable contributions campaign for denying membership to openly gay individuals).

These results are possible because of the United States Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990) (concluding that neutral and generally applicable laws do not violate the First Amendment no matter how much they burden an individual's or organization's exercise of religion). These outcomes demonstrate our point: legislative relief is needed to protect religious conscience.

³⁶ *Catholic Charities of the Diocese of Springfield v. State*, 2011 WL 3655016 (2011). In deciding a motion for summary judgment, the state trial judge held that Catholic Charities had no property right in their contracts from the state, and thus were not entitled to due process when the state decided not to extend the contract to the charities. *Id.* The judge expressly declined to address Catholic Charities' arguments that the state violated its rights under the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.*, the Illinois Religious Freedom Protection & Civil Union Act, 750 ILCS 75/1 *et seq.*, and the Illinois Religious Freedom Restoration Act, 775 ILCS 35/1 *et seq.* *Id.* at n. 1.

³⁷ Illinois Religious Freedom Protection & Civil Union Act, 750 ILL. COMP. STAT. 75/1 *et seq.*

Church-affiliated organizations have lost their exemption from taxes as well. In New Jersey, the Ocean Grove Camp Meeting Association, a group owned and operated by an historic Methodist organization, refused on religious grounds to host the same-sex civil union ceremonies of two lesbian couples in its beach-side pavilion.³⁸ Local authorities stripped the group of their exemption from local property taxes on the pavilion, and billed them for \$20,000.³⁹

The Camp Meeting Association did not just lose its tax exemption from taxes on the pavilion. It was also investigated by the New Jersey Department of Civil Rights for an alleged violation of the New Jersey Law Against Discrimination. In fact, the Department of Civil Rights has determined that probable cause exists to find a violation. Thus, the case is not only about losing tax-exempt status, but also about being penalized for allegedly violating state nondiscrimination laws.⁴⁰

These impacts on church-affiliated organizations, predicted by scholars,⁴¹ did not result from statutory revocations of tax-exempt status in civil union legislation. Instead, these actions

³⁸ See Jill P. Capuzzo, Group Loses Tax Break Over Gay Union Issue, N.Y. TIMES, Sept. 18, 2007 (describing the case of *Bernstein v. Ocean Grove Camp Meeting Ass'n*).

³⁹ See Bill Bowman, \$20G Due in Tax on Boardwalk Pavilion: Exemption Lifted in Rights Dispute, ASBURY PARK PRESS, Feb. 23, 2008.

Some exemption opponents argue that *Ocean Grove* is irrelevant to the same-sex marriage debate because the tax exemption at issue was conditioned upon the Camp Meeting Association's willingness to open the property for the entire public. That argument, however, overlooks two points. First, while the tax exemption in *Ocean Grove* was based on an open-space requirement, nothing stops governments from conditioning tax exemptions on other things, such as compliance with state and local nondiscrimination laws or, more generally, being organized for the "public interest." *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983). Thus, just as governments can strip a tax exemption because an organization cannot in good conscience open its property to the entire public, so also can governments strip a tax exemption because it concludes that an organization's conscientious objection to same-sex marriage violates nondiscrimination laws or "public policy" more generally. Second, when the Camp Meeting Association agreed to open its property to the entire public, it likely never contemplated the legalization of civil unions or same-sex marriage, much less that it would be asked to facilitate such a marriage in violation of its religious beliefs. *Ocean Grove* thus illustrates the fact that legalizing same-sex marriage will create significant conflicts of conscience that were never contemplated before.

⁴⁰ As the United States Court of Appeals for the Third Circuit explained, "The federal complaint arose out of the [New Jersey Department of Civil Right's] investigation into whether the Association's refusal to permit couples to use the Boardwalk Pavilion for civil unions violates the [New Jersey Law Against Discrimination]. Clearly, therefore, New Jersey's interest in eliminating unlawful discrimination is at the center of this dispute." *Ocean Grove Camp Meeting Ass'n of United Methodist Church v. Vespa-Papaleo*, 339 Fed.Appx. 232, 238 (3d Cir. 2009); See also *Catholic Charities of the Diocese of Springfield v. State*, 2011 WL 3655016 (2011).

⁴¹ Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 107-21 (describing attacks on tax exemptions for religious organizations with objections to same-sex marriage); Jonathan

occurred because state law offered no explicit exemption providing otherwise. These experiences drive home the need for explicit protection from penalties by the government.⁴²

b. Needed Protection for Individual Objectors

Legal recognition of same-sex marriage can also place a real burden on *individuals* whose objection arises not from anti-gay animus, but from a sincere religious belief in traditional marriage.

House Bill No. 75 does not protect individuals—other than officiants—who, for religious reasons, prefer to step aside from same-sex marriage ceremonies. Thus, a religious individual who runs a small business, e.g., a baker who makes wedding cakes; a wedding photographer; a caterer; a florist; a reception hall owner; or a seamstress or a tailor, receives no protection at all.⁴³ The failure to protect such individuals puts those individuals to a cruel choice: their conscience or their livelihood.⁴⁴ Enacting protections for individual objectors is not only necessary but also consistent with the existing public policy in Delaware’s nondiscrimination statutory scheme.⁴⁵

Some assume that any religious objection to same-sex marriage must be an objection to providing goods or services to gays as such: in other words, that a refusal represents animus towards gay couples. Yet many people of good will view marriage as a religious institution and the wedding ceremony as a religious sacrament. For them, assisting with a marriage ceremony has religious significance that commercial services, like serving food or driving taxis, simply do

Turley, *An Unholy Union* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 59-76 (arguing for same-sex marriage but against withdrawal of tax exemptions for religious organizations with conscientious objections).

⁴² Unlike some other states, Delaware has not enacted a state Religious Freedom Restoration Act. *See, e.g.,* Eugene Volokh, *RFRA State Map* available at <http://www.law.ucla.edu/volokh/reldmap.pdf> (last visited Sept. 3, 2010) (reporting states with state constitutional amendments, statutory RFRA, and state constitutional free exercise clauses interpreted to require strict scrutiny).

⁴³ *See Elane Photography v. Willock*, 284 P.3d 428, N.M.App., May 31, 2012 *cert. granted*, 2012-NMCERT-008 Aug. 16, 2012 (fining New Mexico photographer for refusing on religious grounds to photograph a same-sex commitment ceremony); *see also Gay Couple Sues Illinois Bed and Breakfast For Refusing to Host Civil Union Ceremony*, HUFFINGTON POST, Feb. 23, 2011.

⁴⁴ Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 BYU J. PUB. L. 475 (2008) (describing dismissals and resignations of social service workers where conscience protections were not provided).

⁴⁵ DEL. CODE ANN. tit. 19, § 710 (West) (“[D]iscriminatory practices based upon sexual orientation do[] not include religious corporations, associations or societies whether supported, in whole or in part, by government appropriations, except where the duties of the employment or employment opportunity pertain solely to activities of the organization that generate unrelated business taxable income subject to taxation under § 511(a) of the Internal Revenue Code of 1986.”)

not. They have no objection generally to providing services, but they object to directly facilitating a marriage.

In short, nondiscrimination statutes enacted years ago now take on a whole new level of significance, with a much greater need for religious exemptions. A marriage bill that provides no protection to individual objectors (other than authorized celebrants, who are already protected by the Constitution) would effectively leave any individual who refuses to assist with same-sex wedding ceremonies open to suit, whether framed as sexual orientation discrimination, sex discrimination, or, where applicable, marital-status discrimination.⁴⁶

Of course, accommodating individual objectors might not be without cost for same-sex couples. Thus, we argue only for “hardship exemptions”—exemptions that are available only when there is no undue hardship on same-sex couples.⁴⁷

c. No Robust and Uniform Protection for Religious Organizations

Delaware’s law prohibits discrimination based on, among other things, marital status, sex, and sexual orientation. Such discrimination is prohibited in a variety of areas—including employment,⁴⁸ housing,⁴⁹ and public accommodations⁵⁰—with only very narrow exemptions for religious organizations.⁵¹

⁴⁶ In *In re Levenson*, 560 F.3d 1145 (9th Cir. 2009) (Order of Reinhardt, J.), the court found an employer’s denial of coverage for an employee’s same-sex partner under the company’s employment benefits plan to be sex discrimination. As Judge Reinhardt explained:

There is no doubt that the denial of Levenson’s request that Sears be made a beneficiary of his federal benefits violated the EDR Plan’s prohibition on discrimination based on sex or sexual orientation. Levenson was unable to make his spouse a beneficiary of his federal benefits due solely to his spouse’s sex. If Sears were female, or if Levenson himself were female, Levenson would be able to add Sears as a beneficiary. Thus, the denial of benefits at issue here was sex-based and can be understood as a violation of the EDR Plan’s prohibition of sex discrimination.

Similar cases have occurred elsewhere. *See also Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality op.) (discrimination by state against same-sex spouses raised difficult constitutional questions regarding sex discrimination and sexual orientation discrimination); *In re Golinski*, 2009 WL 2222884 at *3 (9th Cir. Jan. 13, 2009) (Order of Kozinski, C.J.) (construing the United States Court of Appeals for the Ninth Circuit’s benefits policy to include same-sex spouses because denial of benefits to same-sex marriage was form of sex-based discrimination); *In re Marriage Cases*, 183 P.3d 384, 436-40 (Cal. 2008) (same-sex marriage proponents pursued gender discrimination claims ultimately rejected by court); Refusals to provide benefits to same-sex partners have been invalidated as a form of gender or sex discrimination. *cf.* WIS. STAT. § 111.36(1)(d) (defining sexual orientation discrimination as a form of gender discrimination).

⁴⁷ *See* Part A above.

⁴⁸ DEL. CODE ANN. tit. 19, § 711 (West) (making it unlawful to “[f]ail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of such individual’s race, marital status, genetic

As explained in Part C above, these nondiscrimination laws can prompt lawsuits against religious organizations that, for religious reasons, cannot recognize or facilitate a same-sex marriage. For example, a nonprofit social service organization, like a Catholic hospital, could be sued for refusing to provide its employees with same-sex spousal benefits in violation of its religious beliefs; religious day care centers, retreat centers, counseling centers, or adoption agencies could be punished under public accommodations laws for refusing to offer their facilities or services to members of a same-sex marriage; or a religious organization that dismisses an employee, such as a youth counselor, for entering into a same-sex marriage can be sued under employment discrimination laws that prohibit discrimination on the basis of marital status.⁵²

The proposed bill in Delaware to legalize same-sex marriage provides *considerably less* protection than *every other jurisdiction* where the state's legislature has considered the issue.⁵³ Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington have all enacted same-sex marriage laws, and all provide much more protection for religious liberty than House Bill No. 75.⁵⁴ Each of those states protects religious organizations

information, color, age, religion, sex, sexual orientation, or national origin; or (2) [l]imit, segregate or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect the individual's status as an employee because of such individual's race, marital status, genetic information, color, age, religion, sex, sexual orientation, or national origin”).

⁴⁹ DEL. CODE ANN. tit. 6, § 4603 (2013) (making it unlawful to “discriminate in the sale or rental, to refuse to sell or rent, to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, national origin, religion, creed, sex, marital status, familial status, age, sexual orientation or disability”).

⁵⁰ DEL. CODE ANN. tit. 6, § 4504 (2013) (making it unlawful for “any place of public accommodation, [to] directly or indirectly refuse, withhold from or deny to any person, on account of race, age, marital status, creed, color, sex, disability, sexual orientation or national origin, any of the accommodations, facilities, advantages or privileges thereof. For the purpose of training support animals to be used by persons with disabilities, all trainers and their support animals shall be included within those covered by this subsection).

⁵¹ See, e.g., DEL. CODE ANN. tit. 19, § 710 (West) (“The term ‘employer’ with respect to discriminatory practices based upon sexual orientation does not include religious corporations, associations or societies whether supported, in whole or in part, by government appropriations, except where the duties of the employment or employment opportunity pertain solely to activities of the organization that generate unrelated business taxable income subject to taxation under § 511(a) of the Internal Revenue Code of 1986.”).

⁵² See, e.g., footnotes 16-27 above.

⁵³ See footnote 11 above and footnote 54 below.

⁵⁴ CONN. PUBLIC ACT NO. 09-13 (2009) §§ 17-19, available at <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm> (exempting religious organizations from “provid[ing] services,

from being forced to offer “services, accommodations, advantages, facilities, goods, or privileges” related to a marriage when doing so would violate their religious beliefs.⁵⁵ Although the protections in Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington also fall short in key areas,⁵⁶ they still provide far more protection than Delaware’s proposed same-sex marriage legislation.

Conclusion

Without adequate safeguards for religious liberty of the sort proposed in this letter, the recognition of same-sex marriage will lead to socially divisive and entirely unnecessary conflicts between the exercise of rights pursuant to the same-sex marriage law and religious liberty. That is a needless and destructive path where both sides lose. There is a balanced “middle way.” The Delaware General Assembly should avoid either extreme and be the peacemaker. On that note, we would welcome any opportunity to provide further information, analysis, or testimony to the Delaware General Assembly.

accommodations, advantages, facilities, goods, or privileges ... related to” the “solemnization” or “celebration” of a marriage, and providing separate exemptions for religious adoption agencies and fraternal benefit societies); D.C. Law No. L18-0110 (enacted Dec. 18, 2009, effective Mar. 3, 2010), *available at* <http://www.dccouncil.washington.dc.us/lms/legislation.aspx?LegNo=B18-0482> (exempting religious societies and religiously affiliated non-profits from providing “accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a same-sex marriage, or the promotion of same-sex marriage through religious programs, counseling, courses, or retreats...”); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) § 4 (allowing religiously affiliated fraternal organizations, like the Knights of Columbus, expressly to limit insurance coverage to spouses in heterosexual marriages); N.H. REV. STAT. § 457:37 (exempting religious organizations from “provid[ing] services, accommodations, advantages, facilities, goods, or privileges ... related to” the “solemnization,” “celebration,” or “promotion” of a marriage); N.Y. DOM. REL. § 10-b (1) (2011) (“a religious entity . . . benevolent [order] . . . or a not-for-profit corporation operated, supervised, or controlled by a religious corporation . . . shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage”); 9 VT. STAT. ANN. § 4502(1) (2009) (exempting religious organizations from “provid[ing] services, accommodations, advantages, facilities, goods, or privileges ... related to” the “solemnization” or “celebration” of a marriage); WASH. REV. CODE § 26.04.010(5)-(6) (exempting religious organizations from “provid[ing] accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage,” and protecting religious organizations from penalty based on their refusal of any of the above accommodations); *see generally* Appendix A.

⁵⁵ *Id.*

⁵⁶ *See* Letter to Iowa Legislators, *available at* <http://mirrorofjustice.blogs.com/files/2009-07-12-iowa-letter-final.doc>, at 6-7 (letter from the undersigned describing shortcomings of Connecticut, Vermont, and New Hampshire conscience protections).

Respectfully yours,⁵⁷

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APPENDIX A:

Core Religious Liberty Protections in Same-Sex Marriage Legislation⁵⁸

All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington) **expressly** exempt clergy from requirements to solemnize or celebrate marriages inconsistent with their religious faith. *See* CONN. GEN. STAT. §§ 46b-21, 46b-150d (2009); D.C. CODE § 46-406(c) (2010); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202, 2-406 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) § 2; N.H. REV. STAT. ANN. § 457:37 (2011); N.Y. DOM. REL. LAW § 11(1) (McKinney 2011); VT. STAT. ANN. tit. 18, § 5144(b) (2010); WASH. REV. CODE § 26.04.010(2)(4) (2012).

All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington) **expressly** allow a religiously-affiliated group to refuse to “provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage.” *See* CONN. GEN. STAT. § 46b-150d; D.C. CODE § 46-406(e); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) § 3; N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1); VT. STAT. ANN. tit. 8, § 4502(1); WASH. REV. CODE § 26.04.010(2)(5).

All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington) **expressly** protect covered religious objectors from **private suit**. *See* CONN. GEN. STAT. § 46b-150d; D.C. CODE § 46-406(e); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) §§ 2-3; N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1); VT. STAT. ANN. tit. 8, § 4502(1); WASH. REV. CODE § 26.04.010(2)(6).

Six jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, and Washington) **expressly** protect religious objectors, including religiously

⁵⁸ Table reprinted from Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes between Religion and the State*, 53 B.C. L. REV. 1417 (2012) available at <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1130&context=wlufac>.

affiliated **nonprofit organizations**, from being “**penalize[d]**” by the government for such refusals through, e.g., the loss of government grants. *See* CONN. GEN. STAT. § 46b-150d; D.C. Code § 46-406(e)(2); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) §§ 2-3; N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1); WASH. REV. CODE § 26.04.010(2)(4).

Three jurisdictions (Maryland, the District of Columbia and New Hampshire) **expressly** protect religious organizations from "the promotion of same-sex marriage through religious programs, counseling, courses, or retreats, that is in violation of the religious society's beliefs." *See* D.C. CODE § 46-406(e) (2011)). *See also* N.H. REV. STAT. ANN § 457:37(3) (exempting "the promotion of marriage through **religious counseling**, programs, courses, retreats, or housing designated for married individuals"); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) §§ 2-3. (provided **so long as the program receives no government funding**). **New York** may protect this. *See* N.Y. DOM. REL. LAW § 10-b (2) (“... nothing in this article shall limit or diminish the right, ... of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization ... from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained”).

Two jurisdictions (New Hampshire and New York) **expressly** protect religious organizations from "the promotion of marriage through ... **housing** designated for married individuals." *See* N.H. REV. STAT. ANN. § 457:37(3). *See also* N.Y. DOM. REL. LAW § 10-b (2) (“... [N]othing in this article shall limit or diminish the right, ... of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization to limit employment or sales or **rental of housing accommodations** or admission to or give preference to persons of the same religion or denomination...”).

Three states (Vermont, New Hampshire and Maryland) expressly allow religiously-affiliated fraternal organizations, like the Knights of Columbus, expressly to **limit insurance coverage** to spouses in heterosexual marriages. *See* VT. STAT. ANN. tit. 8 § 4501(b); N.H. REV. STAT. ANN. § 457:37(IV) (2009); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202, Note: MD INS. LAW § 8-402 (2012); 2012 Maryland Laws Ch. 2 (H.B. 438) § 4.

Two states (Connecticut and Maryland) **expressly** allow a religiously-affiliated **adoption or foster care agency** to place children only with heterosexual married couples so long as they don't receive any government funding. (Conn. Pub. Acts No. 09-13 § 19); *See* MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012).

Three states (Maryland, New Hampshire and New York) **expressly** exempt **individual employees** "being managed, directed, or supervised by or in conjunction with" a covered entity from celebrating same-sex marriages if doing so would violate "religious beliefs and faith." *See* N.Y. DOM. REL. LAW. § 10-b (1). *See also* N.H. REV. STAT. ANN. § 457:37(III); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) § 2.

Two states (Maryland and New York) include **non-severability clauses** in their legislation. *See* 2011 Sess. Law News of N.Y. Ch. 96 (A. 8520 §5-a) ("This act is to be construed as a whole, and all parts of it are to be read and construed together. If any part of this act shall be adjudged by any court of competent jurisdiction to be invalid, the remainder of this act shall be invalidated."); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012) (the "provisions of this Act are not severable, and if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, no other provision or application of this Act may be given effect and this Act shall be null and void").