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Senator Rosalyn H. Baker  
Hawaii State Capitol, Room 230  
415 South Beretania St.  
Honolulu, HI 96813

**Re: Religious Liberty Implications of Proposed Hawaii Marriage Equality Act of 2013**

Dear Senator Baker:

Aloha! Aware of the historic role played by your State in the national discussion on marriage equality, we recognize that it is highly likely that you and your colleagues in the Hawaiian State Legislature will enact legislation legalizing same-sex marriage. We write as professors of constitutional law to urge you to ensure that any bill legalizing same-sex marriage maintains respect for the religious liberty of individuals and organizations that have a traditional view of marriage. Providing religious protections in any same-sex marriage bill honors America's long and rich tradition of religious freedom.

With the possible exception of Mr. Trump, no mainlander needs to remind you that President Obama is a Hawaiian. At this moment in our history, however, it might be helpful for you to hear from law professors who have grown up in the mainland that our president spoke for all of us—the signatories are Democrats and Republicans, Protestants and Catholics—when he stated on the day the Supreme Court overturned the Defense of Marriage Act last June:

I've directed the Attorney General to work with other members of my Cabinet to review all relevant federal statutes to ensure this decision, including its implications for Federal benefits and obligations, is implemented swiftly and smoothly. On an issue as sensitive as this, knowing that Americans hold a wide range of views based on deeply held beliefs, maintaining our nation's commitment to religious freedom is also vital. How religious institutions define and consecrate marriage has always been up to those institutions. Nothing about this decision – which applies only to civil marriages – changes that.

We echo President Obama's view that it is possible to achieve marriage equality without violating our nation's vital commitment to religious freedom. In this letter we urge you to consider our view that the current version of the Hawaii Marriage Equality Act of 2013 comes up short in this regard. And we offer you a friendly amendment that can turn this moment into a win-win situation for all Hawaiians, of all faiths and none.

The contentious debate in Maryland, New York, Delaware, 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.<sup>1</sup>

This letter analyzes the potential effects of same-sex marriage on religious conscience in Hawaii and proposes a solution to address the conflicts: a specific religious liberty amendment that should be an integral part of any legislation. This proposed amendment 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 Hawaii. Rather, our aim is to define a “middle way” to address the needs of same-sex couples while honoring and respecting religious liberty.<sup>2</sup>

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 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 Hawaii State Legislature to take the time and care to ensure that the legalization of same-sex marriage does not restrict the inalienable right of religious liberty. Doing so is entirely consistent with the text of the Hawaii State Constitution that each member of the State Legislature has sworn to uphold and protect. Since its adoption in 1950 and ratification in 1959, the Hawaii Constitution has always protected religious freedom in the strongest of terms.<sup>3</sup>

Part A of this letter proposes a specific religious conscience amendment 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 the proposed Hawaii Marriage Equality Act of 2013.

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<sup>1</sup> Appendix A below summarizes the core religious liberty protections afforded by jurisdictions that currently recognize same-sex marriage by legislation.

<sup>2</sup> 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.

<sup>3</sup> *See* HAW. CONST. art. 1, § 4 (“No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof[.]”); HAW. CONST. art. 1, § 5 (“No person shall be . . . denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.”).

### A. Proposed Religious Conscience Protection

The conflicts between same-sex marriage and religious liberty are avoidable.<sup>4</sup> But they are avoidable only if the Hawaii State Legislature 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.<sup>5</sup>

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 Hawaii’s nondiscrimination laws, which provide important but limited religious liberty protections.<sup>6</sup> The “marriage conscience protection” we propose is as follows:

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<sup>4</sup> 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).

<sup>5</sup> 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](http://www.nytimes.com/2009/02/22/opinion/22rauch.html?_r=1) (arguing for recognition of same-sex unions together with religious conscience protections). Though conscience protections should also extend to existing civil unions, we do not address civil unions here.

<sup>6</sup> See, e.g., HAW. CONST. art. 1, § 5 (“No person shall be . . . denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.”); HAW. REV. STAT. § 378-3(5) (2012) (“Nothing in this part [governing employment practices] shall be deemed to . . . [p]rohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised or controlled by or in connection with a religious organization, from giving preference to individuals of the same religion or from making a selection calculated to promote the religious principles for which the organization is established or maintained[.]”); HAW. REV. STAT. § 515-8 (2012) (“It is not a discriminatory practice for a religious institution or organization or a charitable or educational organization operated, supervised, or controlled by a religious institution or organization to give preference to members of the same religion in a real property transaction, unless membership in such religion is restricted on account of race, color, or ancestry.”). Haw. Rev. Stat. § 515-4 (b) “Nothing in section 515-3 shall be deemed to prohibit refusal, because of sex, including gender identity or expression, sexual orientation, or marital status, to rent or lease housing accommodations: (1) Owned or operated by a religious institution and used for church purposes as that term is used in applying exemptions for real property taxes; or (2) Which are part of a religiously affiliated institution of higher education housing program which is operated on property that the institution owns or controls, or which is operated for its students pursuant to Title IX of the Higher Education Act of 1972.”). For analysis of why these exemptions are insufficient to address the full range of developing conflicts over marriage, see *infra* pp. 19-20.

**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 subsection 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 decision making.

**(b) Individuals and small businesses protected.**

- (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.<sup>7</sup>

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<sup>7</sup> 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."

This proposed amendment has several important benefits. First, this text parallels existing protections in Hawaii’s nondiscrimination laws for a “religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised or controlled by or in connection with a religious organization.”<sup>8</sup> The text also significantly mirrors, in part, the express protections provided in the Connecticut, Delaware, District of Columbia, Maryland, Minnesota, New Hampshire, New York, Rhode Island, 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.”<sup>9</sup>

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<sup>8</sup> See HAW. REV. STAT. § 378-3(5) (2012) (“Nothing in this part shall be deemed to . . . [p]rohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised or controlled by or in connection with a religious organization, from giving preference to individuals of the same religion or from making a selection calculated to promote the religious principles for which the organization is established or maintained[.]”). See also HAW. REV. STAT. § 515-8 (2012) (“It is not a discriminatory practice for a religious institution or organization or a charitable or educational organization operated, supervised, or controlled by a religious institution or organization to give preference to members of the same religion in a real property transaction, unless membership in such religion is restricted on account of race, color, or ancestry.”).

<sup>9</sup> 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); 79 DEL. LAWS 2013, ch. 19, § 8 (“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 1 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.”; see DEL. CODE ANN. tit. 13, § 106 (West 2012); 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 religious programs or services, in violation of the entity’s religious beliefs”); MINN. STAT. ANN. § 363A.26 (West 2013) (providing that a religious organization need not take “any action with respect to the provision of goods, services, facilities, or accommodations directly related to the solemnization or celebration of a civil marriage that is in violation of its 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,

Second, this model provision addresses the primary areas of Hawaii 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, paragraph (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. Paragraph (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.<sup>10</sup>

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accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage”); R.I. GEN. LAWS ANN. § 15-3-6.1 (West 2013) (exempting religious organizations from “provid[ing] services, accommodations, advantages, facilities, goods, or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods, or privileges is related to [t]he solemnization of a marriage or the celebration of a marriage, and such solemnization or celebration is in violation of its religious beliefs and faith; or . . . the promotion of marriage rough any social or religious programs or services, which violates the religious doctrine or teachings of religious organization, association or society”); 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”).

<sup>10</sup> 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

## **B. Precedent for Religious Conscience Protections**

There is ample precedent for the type of conscience protection we propose. As noted above, Connecticut, District of Columbia, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington have already enacted religious exemptions as part of their legislation recognizing same-sex marriage.<sup>11</sup> Similarly, Hawaii's existing nondiscrimination laws on employment and housing provide a categorical exemption for religious organizations in certain circumstances.<sup>12</sup> And federal nondiscrimination statutes provide protection for religious and conscientious objectors in many different contexts.<sup>13</sup> In short, protecting religious conscience is very much a part of America's and Hawaii's tradition. We urge the Hawaii State Legislature to continue its historic commitment to a "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 equality of treatment and respect for same-sex marriages. It has ample precedent in both Hawaiian and federal law. And it represents the best in the American and Hawaiian constitutional tradition of protecting the inalienable right of conscience.

## **C. Conflicts Between Same-Sex Marriage and Religious Liberty**

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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 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).

<sup>11</sup> See note 9 above and Appendix A below.

<sup>12</sup> See HAW. REV. STAT. § 378-3 (1998) ("Nothing in this part shall be deemed to . . . [p]rohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised or controlled by or in connection with a religious organization, from giving preference to individuals of the same religion or from making a selection calculated to promote the religious principles for which the organization is established or maintained[.]"); HAW. REV. STAT. § 515-8 (2012) ("It is not a discriminatory practice for a religious institution or organization or a charitable or educational organization operated, supervised, or controlled by a religious institution or organization to give preference to members of the same religion in a real property transaction, unless membership in such religion is restricted on account of race, color, or ancestry.").

<sup>13</sup> 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).

In the only book-length comprehensive scholarly work on same-sex marriage and religious liberty,<sup>14</sup> legal scholars on both sides of the same-sex marriage debate agreed that codifying same-sex marriage *without* providing robust religious accommodations will create widespread and unnecessary legal conflicts—conflicts that will work a “sea change in American law” and will “reverberate across the legal and religious landscape.”<sup>15</sup> 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 existing state nondiscrimination acts and other similar laws. So will many small businesses 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.<sup>16</sup>

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<sup>14</sup> 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 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).

<sup>15</sup> 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>.

<sup>16</sup> See HAW. REV. STAT. § 489-3 (2012) (“Unfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability are prohibited.”); *Elane Photography LLC v. Willock*, 309 P.3d 53 (N.M. Aug. 22, 2013) (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/>.

- Religious day care centers, counseling centers, meeting halls, and adoption agencies could be sued under public accommodations laws for refusing to offer their facilities or services to members of a same-sex marriage.<sup>17</sup>
- A church or other religious nonprofit that dismisses an employee for entering into a same-sex marriage can be sued under employment discrimination laws that prohibit discrimination on the basis of marital status.<sup>18</sup>

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.<sup>19</sup>
- 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.<sup>20</sup>

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<sup>17</sup> *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 adoption by same-sex couples).

<sup>18</sup> *See* HAW. REV. STAT. § 378-2(a)(1)(2012) (“It shall be an unlawful discriminatory practice . . . [b]ecause of race, sex, including gender identity or expression, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, or domestic or sexual violence victim status if the domestic or sexual violence victim provides notice to the victim’s employer of such status or the employer has actual knowledge of such status[.]”); Stern at 48-52; Issues Brief at 3-5.

<sup>19</sup> *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).

<sup>20</sup> *See Evans v. City of Berkeley*, 38 Cal.4th 1 (Cal. App. 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*

- Doctors, psychologists, social workers, counselors, and other professionals who conscientiously object to same-sex marriage can have their licenses revoked.<sup>21</sup>
- 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.<sup>22</sup>
- Religious colleges and professional schools can have their accreditation revoked for refusing to recognize the validity of same-sex marriages.<sup>23</sup>
- Church-affiliated organizations can have their tax exempt status stripped because of their conscientious objection to same-sex marriage.<sup>24</sup>

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*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).

<sup>21</sup> 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 BYU J. PUB. L. 475 (2008) (describing dismissals and resignations of social services workers where conscience protections were not available).

<sup>22</sup> See 489 Haw. Atty. Gen. Opinion No. 91-01 (Jan. 3, 1991), 1991 WL 489765 (responding that a holder of a class 5 liquor license ("Dispensers' licenses, which authorize licensees to sell specified liquors for consumption on the premises") is subject to Haw. Stat. Ann. § 489's nondiscrimination provisions "since establishments holding class 5 licenses are explicitly included in the definition of the term 'place of public accommodation'"); Stern at 19-22 (noting that many state regulators condition licenses on compliance with nondiscrimination requirements).

<sup>23</sup> 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>.

<sup>24</sup> 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

All of these conflicts either did not exist before, or will intensify after, the legalization of same-sex marriage. Thus, legalizing same-sex marriage without new 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.*<sup>25</sup>

#### **D. The Need for Robust Religious Liberty Protection**

The Act known as the Hawaii Marriage Equality Act of 2013, most recently revised September 9, 2013, seeks to enact same-sex marriage in Hawaii. This bill fails to provide sufficient protections for religious conscience. Sections 572-F and G currently read as follows:

**§ 572-F Refusal to solemnize a marriage.** Nothing in this chapter shall be construed to require any minister, priest, officer of any religious denomination or society, or religious society not having clergy but providing solemnizations that is authorized to perform solemnizations pursuant to this chapter to solemnize any marriage, and no such minister, priest, officer of any religious denomination or society, or religious society not having clergy that fails or refuses for any reason to solemnize any marriage under this section shall be subject to fine, penalty, or other civil action for the failure or refusal.

**§ 572-G Religious organizations and facilities; liability exemption under certain circumstances.** (a) A religious organization shall not be required to make a religious facility owned or leased by the religious organization available for solemnization of a particular marriage; provided that: (1) The religious facility is regularly used by the religious organization for its religious purposes; (2) For solemnization of marriages pursuant to this chapter, the religious organization restricts use of the religious facility to its members; (3) The religious organization

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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).

<sup>25</sup> 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. These data are 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 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% . . .”).

does not operate the religious facility as a for-profit business. (b) A religious organization that refuses to make a religious facility available for solemnization of a marriage under subsection (a) shall not be subject to any fine, penalty, injunction, administrative proceeding, or civil liability for the refusal. (c) Nothing in this subsection shall be interpreted to exempt the owner or operator of any religious facility from the requirements of chapter 489 if the religious facility is a place of public accommodation as defined in section 489-2.

*As explained below, this proposed legislation 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 them.”<sup>26</sup> 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.

Like the ersatz protection received by individual clergy, religious organizations receive very narrow and largely illusory protection. Specifically, § 572-G exempts a religious organization from holding the wedding only if the organization “restricts use of the facility to its members.”<sup>27</sup> This provision could be read to mean generally or usually restricts, but it does not specifically include this limitation. It is not uncommon, however, for many religious organizations to open their facilities to weddings that include a non-member. Such facilities, then, would receive no protections.

Furthermore, § 572-G provides an exemption only if the facility is regularly used for religious purposes and not as a for-profit business. Finally, § 572-G removes any protection if the religious facility is a place of public accommodation. The latter introduces considerable uncertainty given the fact that the definition of public accommodation does not on its face appear to encompass the properties owned by churches or other religious organizations.<sup>28</sup> Moreover, in

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<sup>26</sup> Stern at 1.

<sup>27</sup> Hawaii Marriage Equality Act of 2013 § 572-G(2) (Haw. 2013) (proposed).

<sup>28</sup> HAW. REV. STAT. § 489-2 (West) (“‘Place of public accommodation’ means 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 general public as customers, clients, or visitors. By way of example, but not of limitation, place of public accommodation includes facilities of the following types: (1) A facility providing services relating to travel or transportation; (2) An inn, hotel, motel, or other establishment that provides lodging to transient guests; (3) A restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises of a retail establishment; (4) A shopping center or any establishment that sells goods or services at retail; (5) An establishment licensed under chapter 281 doing business under a class 4, 5, 7, 8, 9, 10, 11, or 12 license, as defined in section 281-31; (6) A motion picture theater, other theater, auditorium, convention center,

other jurisdictions, it is rare for a church to be considered a place of public accommodation.<sup>29</sup> If a religious facility is not a place of public accommodation, there is a good chance that no law applies to the religious facility—in which case the exemption for religious facilities is wholly illusory. In short, the proposed Hawaii Marriage Equality Act of 2013 lacks any meaningful accommodation as drafted.

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 a minister, priest, or other officer of a religious denomination or society.
- It provides no protection to religious organizations from private lawsuits brought under Hawaii's nondiscrimination laws other than for refusal to solemnize a marriage.

This proposed legislation is lacking as the following subparts explain in detail.

*a. No Protection from Government Penalty for Certain Actions*

A good deal of misunderstanding surrounds religious liberty accommodations. Accommodations serve the important function of protecting conscientious objectors from private lawsuits. But accommodations also serve the purpose of insulating conscientious objectors from penalties at the hands of the government.<sup>30</sup>

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lecture hall, concert hall, sports arena, stadium, or other place of exhibition or entertainment; (7) A barber shop, beauty shop, bathhouse, swimming pool, gymnasium, reducing or massage salon, or other establishment conducted to serve the health, appearance, or physical condition of persons; (8) A park, a campsite, or trailer facility, or other recreation facility; (9) A comfort station; or a dispensary, clinic, hospital, convalescent home, or other institution for the infirm; (10) A professional office of a health care provider, as defined in section 323D-2, or other similar service establishment; (11) A mortuary or undertaking establishment; and (12) An establishment that is physically located within the premises of an establishment otherwise covered by this definition, or within the premises of which is physically located a covered establishment, and which holds itself out as serving patrons of the covered establishment. No place of public accommodation defined in this section shall be requested to reconstruct any facility or part thereof to comply with this chapter.”)

<sup>29</sup> See, e.g., *Wazeerud-Din v. Goodwill Home & Missions, Inc.*, 737 A.2d 683 (N.J.Super.1999) (churches are not “places of public accommodation”); *Saillant v. City of Greenwood*, No. IPO1-1760, 2003 WL 24032987 (S.D.Ind. Apr.17, 2003) (a “church is not a place of public accommodation”).

<sup>30</sup> Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* at 81; Michael W. McConnell, *Accommodation of Religion*, 1985 SUPREME COURT REV. 1; McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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 cohabiting couples.<sup>34</sup> The state claimed that the Catholic adoption agencies had violated the state's newly enacted civil union law.<sup>35</sup> That law contained no exemption for religious social service agencies and thus provided no protection against government penalties for conscientious objectors. Although this case implicated a civil union law, the consequences for a religious organization in Hawaii would be indistinguishable under a same-sex marriage law that omits important accommodations that we recommend.

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

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<sup>31</sup> 304 F. Supp. 2d 77 (D. Me. 2004); *see also* footnote 19 above.

<sup>32</sup> *See* Don Lattin, *Charities Balk at Domestic Partner, Open Meeting Laws*, S.F. CHRON., July 10, 1998, at A-1.

<sup>33</sup> *See Evans v. City of Berkeley*, 38 Cal.4th 1 (Cal. App. 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.

<sup>34</sup> *Catholic Charities of the Diocese of Springfield v. State*, 2011 WL 3655016 (Ill. Dist. 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.

<sup>35</sup> Illinois Religious Freedom Protection & Civil Union Act, 750 ILL. COMP. STAT. 75/1 *et seq.*

of two lesbian couples in its beach-side pavilion.<sup>36</sup> Local authorities stripped the group of their exemption from local property taxes on the pavilion, and billed them for \$20,000, because the pavilion no longer complied with a state public lands program to which the exemption was tied.<sup>37</sup>

The Camp Meeting Association was also investigated by the New Jersey Department of Civil Rights for an alleged violation of the New Jersey Law Against Discrimination. 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.<sup>38</sup>

These impacts on church-affiliated organizations, predicted by scholars,<sup>39</sup> did not result from statutory revocations of tax-exempt status in marriage legislation. Instead, these actions occurred because state laws never anticipated the problem and offered an explicit exemption.

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<sup>36</sup> 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*).

<sup>37</sup> 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.

<sup>38</sup> 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).

<sup>39</sup> 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).

These experiences drive home the need for explicit protection from penalties by the government.<sup>40</sup>

*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.

The proposed legislation does not protect individuals—other than those enumerated few—who, for religious reasons, prefer no role in a same-sex marriage ceremony. 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.<sup>41</sup> The failure to protect such individuals puts them to a cruel choice: their conscience or their livelihood.<sup>42</sup> Enacting protections for individual objectors is not only necessary but also consistent with the existing public policy in Hawaii’s nondiscrimination statutory scheme.<sup>43</sup>

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

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<sup>40</sup> Unlike many other states, Hawaii 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/relmap.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).

<sup>41</sup> *See Elane Photography LLC v. Willock*, 309 P.3d 53 (N.M. Aug. 22, 2013) (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.

<sup>42</sup> 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).

<sup>43</sup> HAW. REV. STAT. § 378-3 (1998) (“Nothing in this part shall be deemed to . . . [p]rohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised or controlled by or in connection with a religious organization, from giving preference to individuals of the same religion or from making a selection calculated to promote the religious principles for which the organization is established or maintained[.]”); HAW. REV. STAT. § 515-8 (1992) (“It is not a discriminatory practice for a religious institution or organization or a charitable or educational organization operated, supervised, or controlled by a religious institution or organization to give preference to members of the same religion in a real property transaction, unless membership in such religion is restricted on account of race, color, or ancestry.”)

not. They have no objection generally to providing services to same-sex couples, 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 vulnerable to a lawsuit, whether framed as sexual orientation discrimination, sex discrimination, or, where applicable, marital-status discrimination.<sup>44</sup>

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.<sup>45</sup>

*c. No Robust and Uniform Protection for Religious Organizations*

Hawaii’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,<sup>46</sup> housing,<sup>47</sup> and public accommodations<sup>48</sup>—with only a few limited exemptions for

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<sup>44</sup> Refusals to provide benefits to same-sex partners have been invalidated as a form of gender or sex discrimination. See *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). Similar cases have occurred elsewhere. 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.

See also *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); cf. WIS. STAT. § 111.36(1)(d) (defining sexual orientation discrimination as a form of gender discrimination).

<sup>45</sup> See Part A above.

<sup>46</sup> HAW. STAT. ANN. § 378-2 (2012) (making it unlawful “[f]or any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment” because of “race, sex, including gender identity or expression, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, or domestic or sexual violence victim status”).

religious organizations.<sup>49</sup> The current exemptions are inadequate to address the wide range of foreseeable issues, identified in part C, concerning same-sex marriage and religious objectors. One exemption protects only a religious organization's decision to favor members of the same faith in "real property transaction[s]."<sup>50</sup> Another applies only to employment—not provisions of services, housing, and other issues—and although it permits an organization to make decisions "calculated to promote the religious principles for which the organization is established or maintained," the scope of that language is unclear.<sup>51</sup> And by stating that a given law does not "prohibit" certain actions by a religious organization, the exemptions may do nothing to protect against other governmental penalties such as withdrawal of licensure or tax-exempt status or withdrawal of government contracts.

Once the bill is passed, those opposed to *any* exceptions for religious communities will give the narrowest possible interpretation to all exemptions. For this reason, the legislature ought to take enough time to write legislation consonant with President Obama's sage counsel: "On an issue as sensitive as this, knowing that Americans hold a wide range of views based on deeply held beliefs, maintaining our nation's commitment to religious freedom is also vital." To clarify the sort of legal protection that should surround religious life in this country, and to foster and address a whole range of developing conflicts, further reflection on refining this legislation is imperative.

The proposed bill in Hawaii to legalize same-sex marriage provides *considerably less* protection than most *every other jurisdiction* where the legislature has considered the issue.<sup>52</sup>

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<sup>47</sup> HAW. STAT. ANN. § 515-3 (2012) (making it "a discriminatory practice for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesperson, because of race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection").

<sup>48</sup> HAW. STAT. ANN. § 489-3 (2012) ("Unfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability are prohibited.").

<sup>49</sup> See footnote 6 above.

<sup>50</sup> HAW. REV. STAT. § 515-8 (2012) ("It is not a discriminatory practice for a religious institution or organization or a charitable or educational organization operated, supervised, or controlled by a religious institution or organization to give preference to members of the same religion in a real property transaction, unless membership in such religion is restricted on account of race, color, or ancestry.").

<sup>51</sup> HAW. REV. STAT. § 378-3(5) (2012) ("Nothing in this part [governing employment practices] shall be deemed to . . . [p]rohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised or controlled by or in connection with a religious organization, from giving preference to individuals of the same religion or from making a selection calculated to promote the religious principles for which the organization is established or maintained[.]")

<sup>52</sup> See Appendix A below. Delaware is the odd exception.

Connecticut, the District of Columbia, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington have all enacted same-sex marriage laws, and all provide much more protection for religious liberty than Hawaii's proposed legislation.<sup>53</sup> Each of those states protects religious organizations from being forced to offer "services, accommodations, advantages, facilities, goods, or privileges" related to a marriage when doing so would violate their religious beliefs.<sup>54</sup> Although the protections in Connecticut, the District of Columbia, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington also fall short in key areas,<sup>55</sup> they still provide far more protection than Hawaii'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 destructive path leading to needless loss by both sides. A balanced "middle way" leads to a win-win solution for both sides. The Hawaii State Legislature should avoid either extreme and be the wise peacemaker. On that note, we would welcome any opportunity to provide further information, analysis, or testimony to the Hawaii State Legislature.

Respectfully yours,<sup>56</sup>

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<sup>53</sup> See footnote 9 above; see generally Appendix A below.

<sup>54</sup> See footnote 47 above.

<sup>55</sup> 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).

<sup>56</sup> Academic affiliation is indicated for identification purposes only. The universities that employ the signers take no position on this or any related bill.

## APPENDIX A:

### Core Religious Liberty Protections in Same-Sex Marriage Legislation

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)  
<http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1130&context=wlufac>.

**All jurisdictions that have enacted legislation** (Connecticut, Delaware, the District of Columbia, Maryland, Minnesota, New Hampshire, New York, Rhode Island, 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); DEL. CODE ANN. tit. 13, § 106 (West 2012); 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; MINN. STAT. ANN. § 517.09 (West 2013); 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); R.I. GEN. LAWS ANN. § 15-3-6.1 (West 2013); WASH. REV. CODE § 26.04.010(2)(4) (2012).

**Nine jurisdictions** (Connecticut, the District of Columbia, Maryland, Minnesota, New Hampshire, New York, Rhode Island, 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; MINN. STAT. ANN. § 363A.26 (West 2013); N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1); VT. STAT. ANN. tit. 9, § 4502(1); R.I. GEN. LAWS ANN. § 15-3-6.1 (West 2013); WASH. REV. CODE § 26.04.010(2)(5).

**Nine jurisdictions** (Connecticut, the District of Columbia, Maryland, Minnesota, New Hampshire, New York, Rhode Island, 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; MINN. STAT. ANN. § 517.09 (West 2013); N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1); R.I. GEN. LAWS ANN. § 15-3-6.1 (West 2013); VT. STAT. ANN. tit. 9, § 4502(1); WASH. REV. CODE § 26.04.010(2)(6).

**Eight jurisdictions** (Connecticut, the District of Columbia, Maryland, Minnesota New Hampshire, New York, Rhode Island, and Washington) **expressly** protect religious objectors, including religiously 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; MINN. STAT. ANN. § 517.09 (West 2013); N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1); R.I. GEN. LAWS ANN. § 15-3-6.1 (West 2013); WASH. REV. CODE § 26.04.010(2)(4).

**Four jurisdictions** (Maryland, the District of Columbia, New Hampshire and Rhode Island) **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**); R.I. GEN. LAWS ANN. § 15-3-6.1 (West 2013) (exempting the “promotion of marriage through any social or religious programs or service”). **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”).

**Three jurisdictions** (Minnesota, 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...”); MINN. STAT. ANN. § 363A.26 (West 2013)(providing that religious organization are not prohibited from “in matters relating to sexual orientation, taking any action with respect to ... housing and real property).

**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”).