

April 20, 2009

BY FEDERAL EXPRESS

Hon. Christopher G. Donovan
Speaker of the House
Legislative Office Building, Room 4106
300 Capitol Avenue
Hartford, CT 06106-1591
Christopher.Donovan@cga.ct.gov

Re: Religious liberty implications of Raised Bill 899

Dear Mr. Speaker:

We write to provide you with an analysis of the effects of Raised Bill 899 on religious liberty. Those effects would be widespread and devastating. If Raised Bill 899 is passed in its current form—without religious-conscience protections—many religious organizations and individuals will be forced to engage in conduct that violates their deepest religious beliefs, and religious organizations would be limited in crucial aspects of their religious exercise. Instead of passing Raised Bill 899 in its current form, the General Assembly should take the time and care necessary to ensure that Connecticut law not only fully implements the Supreme Court’s decision in *Kerrigan v. Commissioner of Public Health*, but also does so in a way that protects the fundamental right of religious liberty.

Wide-ranging conflicts recognized by legal scholars

In the only comprehensive scholarly work on same-sex marriage and religious liberty to date,¹ 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 conflict—conflict that will work a “sea change in American law” and will “reverberate across the legal and religious landscape.”² The conflicts between religious liberty and same-sex marriage generally take one of two forms. First, if same-sex marriage is legalized without appropriate religious accommodations, religious organizations or individuals that object to same-sex marriage will face

¹ SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, Douglas Laycock, Anthony R. Picarello, Jr. and Robin Fretwell Wilson, eds. (Rowman & Littlefield 2008) (including contributions from both supporters and opponents of same-sex marriage).

² *Id.*, Marc Stern, Assistant Executive Director, American Jewish Congress, *Same-Sex Marriage and the Churches* at 1 (“Stern”). See also *id.*, Douglas Laycock, University of Michigan Law School, *Afterword* at 191-97 (“Laycock”) (detailing the scope of “avoidable” and “unavoidable” conflicts).

a wave of new lawsuits under state anti-discrimination and other laws. So will many small businesses, which are owned by individual conscientious objectors. Likely lawsuits include claims that:

- A religious college that offers special housing for married students can be sued under housing discrimination laws for offering that housing to opposite-sex, but not same-sex, married couples.³
- A religious school or university that has a code of conduct prohibiting same-sex sexual relationships can be sued under anti-discrimination laws for refusing to admit students (or children of parents) in a same-sex marriage.⁴
- Religious individuals who run a business, such as wedding photographers, florists, banquet halls, or bed and breakfasts, can be sued under public accommodations laws for refusing to offer their services in connection with a same-sex marriage ceremony.⁵
- Religious camps, day cares, retreat centers, counseling centers, or adoption agencies can be sued under public accommodations laws for refusing to offer their services to members of a same-sex marriage.⁶

³ Stern at 33, 48 (“[A] rule allowing only heterosexual couples into married housing will be illegal if same-sex marriage becomes legal.”); *Issues Brief: Same-Sex Marriage and State Anti-Discrimination Laws* at 3-5, 14-15 (available at <http://www.becketfund.org/files/82f67.pdf?PHPSESSID=fe35cf2fae49afb82646283a831e03ee>) (“Issues Brief”)

⁴ Stern at 31-33 (stating that “[t]he issue of church-school admission policies regarding children with parents in same-sex marriages will also arise,” and noting that “Orthodox Jewish schools in New York have been grappling with whether to admit children of single mothers who conceived with assisted reproductive technology”).

⁵ Stern at 37-39; *see also* Issues Brief at 3-5, 14-15; *Elane Photography v. Willock*, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. Ct) (filed June 30, 2008) (New Mexico photographer fined for refusing on religious grounds to photograph a same-sex marriage ceremony); *Bernstein v. Ocean Grove Camp Meeting Ass’n*, No. PN34XB-03008 (N.J. Dep’t. of Law and Public Safety, Notice of Probable Cause issued Dec. 29, 2008) (finding that religious organization likely violated public accommodations laws by denying same-sex couple use of wedding pavilion).

⁶ Stern at 37-39; *see also* *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); Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22(2) *BYU JOURNAL OF PUBLIC LAW* 475 (2008) (describing clashes over same-sex adoption).

- A church or religious non-profit that fires an employee, such as an organist or secretary, for entering a same-sex marriage can be sued under employment discrimination laws that prohibit discrimination on the basis of marital status.⁷

Second, religious organizations and individuals (or the small businesses that they own) that conscientiously object to same-sex marriage will be labeled as unlawful “discriminators” under state law and thus face a range of penalties at the hands of state agencies and local governments, such as the withdrawal of government benefits or exclusion from government facilities. For example:

- A religious university, hospital, or social service organization that refuses to provide same-sex spousal benefits can be denied access to government contracts or grants on the ground that it is engaged in discrimination that contravenes public policy.⁸
- 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 charitable campaign.⁹

⁷ Stern at 48-52; Issues Brief at 3-5, 14-15.

⁸ See CONN. GEN. STAT. ANN. § 46a-71(b) (“No . . . state agency [may] become a party to any agreement, arrangement or plan which has the effect of sanctioning discrimination.”); see also *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).

⁹ See CONN. GEN. STAT. ANN. § 46a-71(b) (“No state facility may be used in the furtherance of any discrimination”); see also *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); *Cradle of Liberty Council v. City of Philadelphia*, 2008 WL 4399025 (E.D. Pa. Sept. 25, 2008) (city terminated a lease with the Boy Scouts based on the Boy Scouts’ policies regarding homosexual conduct); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2nd 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).

- Doctors, psychologists, social workers, counselors and other professionals who conscientiously object to same-sex marriage can have their licenses revoked.¹⁰
- Religious fraternal organizations or non-profits that object to same-sex marriage can be denied food service licenses, child-care licenses, or liquor licenses on the ground that they are engaged in unlawful discrimination.¹¹
- Religious universities or professional schools can have their accreditation revoked for refusing to recognize the validity of same-sex marriages.¹²
- Church-affiliated organizations can have their tax exempt status stripped because of their conscientious objections to same-sex marriage.¹³

¹⁰ 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(2) *BYU JOURNAL OF PUBLIC LAW* 475 (2008) (describing dismissals and resignations of social services workers where conscience protections were not provided).

¹¹ Stern at 19-22 (noting that many state regulators condition licenses on nondiscrimination requirements).

¹² 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>.

¹³ 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 the state of New Jersey revoked the property tax exemption of a beach-side pavilion owned and operated by a Methodist Church, because the Church refused on religious grounds to host a same-sex civil union ceremony). Douglas W. Kmiec, Pepperdine Law School, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion* in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 107-121 (describing attacks on tax exemptions for religious organizations with objections to same-sex marriage); Jonathan Turley, George Washington University Law School, *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).

All of these conflicts either did not exist before, or will be significantly intensified after, the legalization of same-sex marriage. It is, of course, impossible to predict the outcome of future litigation over these conflicts, and religious liberty advocates will litigate these claims vigorously under any protections available under state and federal law. At a minimum, however, the volume of new litigation will be immense. And religious liberty advocates can also be expected to sue state and local governments for implementing, or even considering implementing, policies that harm conscientious objectors.¹⁴ Thus, two things are certain: Raised Bill 899, in its current form, will have numerous unintended and detrimental effects on religious organizations and individuals. And it will spawn years of costly litigation, not only for religious organizations and individuals, but for small businesses owned by conscientious objectors across the state.

Examples of conflicts in Connecticut

To take just one specific example of conflict, many universities in Connecticut, including religious universities, provide married student housing to their students. Enacting Raised Bill 899 without providing religious-conscience protections would force those universities either to extend married student housing benefits to same-sex couples, thus violating their religious beliefs, or to eliminate the housing benefit altogether.¹⁵ That would not be good for education or for Connecticut.

Moreover, legal recognition of same-sex marriage would create entire new classes of litigation activity. For example, Connecticut's sexual orientation discrimination statute contains a number of exemptions for religious organizations.¹⁶ But with the codification of same-sex marriage, a plaintiff could bring the exact same claim under

¹⁴ For example, Section 17 of Raised Bill 899 would allow Connecticut to initiate affirmative action programs or quotas favoring homosexuality or bisexuality. Even beyond the religious liberty context, such programs would inevitably spawn reverse discrimination lawsuits by heterosexuals claiming a violation of their rights under the Connecticut or federal equal protection provisions. *See, e.g., Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (rejecting application of a racial quota for admission to medical school).

¹⁵ Compare Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22(2) *BYU JOURNAL OF PUBLIC LAW* 475 (2008) (providing numerous examples of organizations that have exited the market when put to the choice of serving everyone, including same-sex couples, or serving no one); 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 (Catholic Charities, Massachusetts' largest adoption agency, stopped providing adoption services altogether due to conscientious objection).

¹⁶ CONN. GEN. STAT. § 46(a)-81(p) (protecting activities of religious organizations from sexual orientation discrimination claims).

Connecticut's gender discrimination¹⁷ or marital status discrimination laws,¹⁸ none of which include religious accommodations. At a minimum, changes to the marital status and gender discrimination statutes should be made as "part of a legislative package" with the codification of *Kerrigan*.¹⁹

Raised Bill 899 would also unleash a torrent of penalties against religious groups in their interactions with state and local governments. As just one example, Section 46a-71(b) of the Connecticut General Statutes provides that "[n]o state facility may be used in the furtherance of any discrimination, nor may any state agency become a party to any agreement, arrangement or plan which has the effect of sanctioning discrimination." Now that *Kerrigan* has declared the refusal to recognize same-sex marriage a form of unlawful discrimination, any organization that opposes same-sex marriage can be denied access to government grants, contracts, or facilities on the ground that contracting with such a group would have "the effect of sanctioning discrimination." Any religious university, hospital, and social service organization in the state, then, could lose access to government scholarship funds, grants, and social service contracts.

Some may argue that Raised Bill 899 provides sufficient religious protection because Section 7 of the Bill provides that "[n]o member of the clergy . . . shall be required to solemnize any marriage in violation of his or her right to the free exercise of religion."²⁰ But with or without Section 7, "[n]o one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them."²¹ Such blatant interference with the internal operations of a church would clearly violate the First Amendment. The issue of "forced solemnization," then, is a distraction from the real issues of religious liberty that the General Assembly should address.

Precedent for providing religious accommodations

This wave of conflict between same-sex marriage and religious liberty is avoidable.²² But it is avoidable only if the General Assembly takes the time and effort re-

¹⁷ CONN. GEN. STAT. § 46(a)-60(a) (employment); § 46(a)-64(c) (housing), § 8-2g (low-income housing developments); § 46a-64 (public accommodations); § 4a-60 (government contractors); § 46a-59 (professional organizations); § 46a-71 (state facilities).

¹⁸ CONN. GEN. STAT. § 46(a)-60(a) (employment); § 46(a)-64(c) (housing), § 8-2g (low-income housing developments); § 46a-64 (public accommodations); § 4a-60 (government contractors); § 46a-71 (state facilities).

¹⁹ Stern at 57.

²⁰ S.B. 899 at § 7.

²¹ Stern at 1.

²² See, e.g., Laycock at 192-194 (describing "avoidable conflicts").

quired 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 have called for.²³

Nor would Connecticut break new ground by providing religious accommodations. Other states dealing with the same issue have provided religious accommodations broader than those contemplated by Raised Bill 899. In Vermont, for example, the Legislature created some religious-conscience protections for religious organizations (though they did not cover many of the foreseeable conflicts listed above).²⁴ Federal statutes already provide conscience protections for religious and conscientious objectors in many different contexts.²⁵ And Connecticut law already provides for religious-conscience protections in its sexual orientation discrimination laws.²⁶ Protecting conscience is very much part of the American, and Connecticut, tradition. The General Assembly should make the effort to continue that tradition.

It can do so by adopting a simple “marriage conscience protection” modeled on the existing conscience protections in Connecticut’s sexual orientation discrimination laws. The “marriage conscience protection” would provide that:

No individual and no religious corporation, entity, association, educational institution, or society shall be penalized or denied benefits under the laws of this state or any subdivision of this state, including but not limited to laws regarding employment discrimination, housing, public

²³ David Blankenhorn and Jonathan Rauch, *A Reconciliation on Gay Marriage*, NEW YORK TIMES, Feb. 22, 2009, Page 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).

²⁴ See 18 VT. STAT. ANN. § 5144(b) (clergy solemnization); 8 VT. STAT. ANN. § 4501(b) (fraternal benefit societies); 9 VT. STAT. ANN. § 4502(l) (public accommodations laws not applied to accommodations related to the celebration or solemnization of marriage), available at <http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf>.

²⁵ 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 government-created burdens on religious exercise).

²⁶ CONN. GEN. STAT. § 46(a)-81(p) (“The provisions of sections 4a-60a and 46a-81a to 46a-81o, inclusive [involving sexual orientation discrimination], shall not apply to a religious corporation, entity, association, educational institution or society with respect to the employment of individuals to perform work connected with the carrying on by such corporation, entity, association, educational institution or society of its activities, or with respect to matters of discipline, faith, internal organization or ecclesiastical rule, custom or law which are established by such corporation, entity, association, educational institution or society.”).

accommodations, licensing, government grants or contracts, or tax-exempt status, for refusing to provide services, accommodations, advantages, facilities, goods, or privileges related to the solemnization of any marriage, for refusing to solemnize any marriage, or for refusing to treat as valid any marriage, where such providing, solemnizing, or treating as valid would cause that individual or religious corporation, entity association, educational institution, or society to violate their sincerely held religious beliefs.

This language has several important benefits. First, as noted above, it is modeled on existing protections in Connecticut law for any “religious corporation, entity, association, educational institution or society.”²⁷ It is also modeled on the protections that Vermont recently enacted in its same-sex marriage bill, which protects the conscientious refusal “to provide services, accommodations, advantages, facilities, goods, or privileges . . . related to the solemnization of a marriage.”²⁸ Second, it lists the primary areas of law where the refusal to treat a marriage as valid is likely to result in a penalty or denial of benefits (“laws regarding employment discrimination, housing, public accommodations, licensing, government grants or contracts, or tax-exempt status”). Finally, it provides protection only where 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 protection will apply only to a “violation” of “sincere” and “religious” beliefs—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.

This “marriage conscience protection” would alleviate the vast majority of conflict between same-sex marriage and religious liberty, while still fully implementing the Supreme Court’s decision in *Kerrigan v. Commissioner of Public Health*. It has ample precedent in both federal and Connecticut law. And it represents the best in the American and Connecticut tradition of protecting freedom of conscience.

Conclusion

Enacting Raised Bill 899 without robust religious accommodations will lead to damaging, widespread, and unnecessary conflict between same-sex marriage and religious liberty. The General Assembly should avoid that conflict by crafting an appropriate religious accommodation provision. On that note, we would welcome any opportunity to provide further information, analysis or testimony to the General Assembly.

²⁷ CONN. GEN. STAT. § 46(a)-81(p).

²⁸ 9 VT. STAT. ANN. § 4502(1) (2009), available at <http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf>.

Very truly yours,²⁹

Thomas C. Berg
St. Ives Professor
University of St. Thomas
School of Law (Minnesota)

Carl H. Esbeck
Professor of Law
University of Missouri

Robin Fretwell Wilson
Professor of Law
Washington & Lee University
School of Law

Richard W. Garnett
Professor of Law
University of Notre Dame
Law School

²⁹ Academic affiliation is indicated for identification purposes only. The universities that employ the signers take no position on this or any other bill.