May 1, 2009

BY EMAIL AND FEDERAL EXPRESS

The Hon. John Lynch
Office of the Governor
State House
25 Capitol Street
Concord, NH 03301
governorlynch@nh.gov

Re: Religious liberty implications of H.B. 436

Dear Governor Lynch:

We write to provide you with an analysis of the effects of H.B. 436 on religious liberty. Those effects would be widespread and profound. If H.B. 436 is enacted in its current form—without meaningful 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 H.B. 436 in its current form, the General Court should take the time and care necessary to ensure that the legalization of same-sex marriage does not constrain 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:

- 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.[3]

- 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.[4]

- 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.[5]

- 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.[6]

---

[3] Stern at 37-39; *see also* Issues Brief at 3-5, 30-31; *Elane Photography* v. *Willock*, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. Ct) (filed Jul. 1, 2008) (New Mexico photographer fined for refusing on religious grounds to photograph a same-sex commitment 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 a religious organization likely violated public accommodations laws by denying a same-sex couple use of its wedding pavilion).

[4] 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 BYU J. PUB. L. 475 (2008) (describing clashes over same-sex adoption).

[5] 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, 30-31, available at http://www.becketfund.org/files/34a97.pdf ("Issues Brief").

[6] 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").

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 employees with 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.[7]

- 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.[8]

- Doctors, psychologists, social workers, counselors and other professionals who conscientiously object to same-sex marriage can have their licenses revoked.[9]

---

[7] *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).

[8] *See Evans* v. *City of Berkeley*, 38 Cal.4th 1 (Cal. 2006) (affirming revocation of a boat berth subsidy at public marina due to Boy Scouts' exclusion of atheist and openly gay members); *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).

[9] 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 provided).

- 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.[10]

- Religious universities or professional schools can have their accreditation revoked for refusing to recognize the validity of same-sex marriages.[11]

- Church-affiliated organizations can have their tax exempt status stripped because of their conscientious objections to same-sex marriage.[12]

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. Thus, two things are certain: H.B. 436, 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.

---

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

[11] 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.

[12] 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).

Inadequacy of the Current Language

Some may argue that H.B. 436 provides sufficient protection for religious conscience because it was amended it to add a section entitled "Affirmation of Freedom of Religion in Marriage." That section (now Section 4 of the Bill) provides that members of the clergy "shall not be obligated or otherwise required by law to officiate at any particular civil marriage or religious rite of marriage in violation of their right to free exercise of religion . . . ."[13] In other words, no clergy member can be forced to officiate at a same-sex marriage.

But with or without Section 4, "[n]o one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them."[14] Such blatant interference with the internal operations of a church would clearly violate the First Amendment. Section 4, then—along with the issue of "forced officiating" that it addresses—is completely unnecessary. It is merely a distraction from the real issues of religious liberty that the General Court should address.

Precedent for providing religious accommodations

This wave of conflict between same-sex marriage and religious liberty is avoidable.[15] But it is avoidable only if the General Court takes the time and effort required 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.[16]

New Hampshire would not be breaking any new ground by providing religious accommodations. Other states dealing with the same issue have provided religious accommodations broader than those in Section 4 of H.B. 436. In Vermont, for example, when the Legislature recently enacted a same-sex marriage bill, it included several religious-conscience protections, including protections for religious organizations that refuse to provide "services, accommodations, advantages, facilities, goods, or privileges" related to the solemnization or celebration of a marriage.[17] When Connecticut passed

---

[13] H.B. 436 § 4, available at http://www.gencourt.state.nh.us/legislation/2009/hb0436.html.

[14] Stern at 1.

[15] *See, e.g.*, Laycock at 192-194 (describing "avoidable conflicts").

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

[17] *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.

its same-sex marriage bill a few weeks later, it provided additional conscience protections, including protection from "state action to penalize or withhold benefits" from religious organizations,[18] and specific protections for religious organizations that provide "adoption, foster care or social services."[19]

Although Vermont and Connecticut's protections are important, they leave out a number of the foreseeable collisions between same-sex marriage and religious liberty described above. In Connecticut, for example, a Catholic university that offers married-student housing would have to offer housing to married same-sex couples or risk violating state law. Similarly—and sadly—neither state protects individuals or small businesses. So, for example, wedding advisors, photographers, bakers, and caterers who prefer to step aside from same-sex ceremonies for religious reasons receive no protection. Despite these shortcomings, however, the fact that both Vermont and Connecticut adopted conscience protections in their same-sex marriage laws confirms an important principle: the conflicts between same-sex marriage and religious liberty are real, and they deserve legislative attention.

Additional precedent for religious accommodations is contained in New Hampshire's existing laws. For example, New Hampshire's general anti-discrimination laws, including its laws on sexual orientation discrimination, contain important religious-conscience protections for "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."[20] Similarly, federal statutes provide protections for religious and conscientious objectors in many different contexts.[21] In short, protecting conscience is very much part of the American, and New Hampshire, tradition. The General Court should make the effort to continue that tradition.

---

[18] *See* CONN. PUBLIC ACT 09-13 § 501, available at http://www.cga.ct.gov/2009/AMD/S/2009SB-00899-R00SA-AMD.htm.

[19] *See* CONN. PUBLIC ACT 09-13 § 503, available at http://www.cga.ct.gov/2009/AMD/S/2009SB-00899-R00SC-AMD.htm.

[20] N.H. REV. STAT. ANN. § 354-A:18 ("Nothing contained in this chapter shall be construed to bar 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 limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.").

[21] 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).

It can do so by adopting a simple "marriage conscience protection" modeled on the existing conscience protections in New Hampshire's sexual orientation discrimination laws. The "marriage conscience protection" would provide that:

> No individual and no institution or organization entitled to protection under R.S.A. § 354-A:18 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 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, institution, or organization to violate their sincerely held religious beliefs.

This language has several important benefits. First, as noted above, it is modeled on existing protections in New Hampshire law (§ 354-A:18) for 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."[22] It is also modeled on the protections that Vermont and Connecticut recently enacted in their same-sex marriage laws, which protect the conscientious refusal "to provide services, accommodations, advantages, facilities, goods, or privileges . . . related to the solemnization of a marriage."[23]

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 allowing for full recognition of same-sex marriages. It has ample precedent in both New Hampshire and

---

[22] N.H. REV. STAT. ANN. § 354-A:18.

[23] 9 VT. STAT. ANN. § 4502(l) (2009), available at http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf.

federal law. And it represents the best in the American and New Hampshire tradition of protecting freedom of conscience.

Conclusion

Enacting H.B. 436 without robust religious accommodations will lead to damaging, widespread, and unnecessary conflict between same-sex marriage and religious liberty. The General Court 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 Court.

Very truly yours,[24]

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 and Lee University
School of Law

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

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