



May 2, 2013

BY EMAIL

Re: H.F. No. 1054: Religious Liberty Implications of Legalizing Same-Sex Marriage

Dear Representative:

We write you as five legal scholars whose focus of teaching and study is religious liberty. We write to urge the Minnesota Legislature to strengthen religious liberty protections in the current proposed bills legalizing same-sex marriage, so as to ensure that legalization does not infringe the religious liberty of organizations and individuals who, for religious reasons, conscientiously object to providing services that facilitate same-sex marriages. Providing strong protections in any same-sex marriage enactment honors Minnesota's, and America's, long and rich tradition of religious freedom and tolerance.¹

We appreciate that the proposed bills already contain and incorporate religious liberty protections. We write to identify specific ways in which the current provisions leave important conscientious objections unprotected. This means that some religious individuals will still be forced to choose between violating the law or engaging in conduct that violates their deepest religious beliefs, and some religious organizations will be constrained in crucial aspects of their religious exercise. We write to identify specific ways to protect those objectors' liberty without undercutting the ability of same-sex couples to receive services. We write not to oppose, or support, same-sex marriage in Minnesota.² Rather, our aim is to define a "middle way" to address the needs of same-sex couples while honoring and respecting religious liberty.

INTRODUCTION AND SUMMARY

This letter analyzes the religious liberty provisions in Minnesota's same-sex-marriage bills and identifies four specific areas that are unaddressed or need improved protection:

1. Broadening the definition of a protected religious or religious educational organization;
2. Protecting religious objectors from municipal liability and penalties;

¹ Academic and organizational affiliation is indicated at the end of this letter for identification purposes only. The universities and organizations that employ the signers take no position on this or any other bill.

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

3. Protecting objecting religious organizations more consistently from penalties through the withdrawal of government benefits such as tax exemption or government contracts; and
4. Protecting individuals in sole proprietorships and very small businesses who object to providing personal services directly facilitating a marriage.

We address these needs with two kinds of proposals. **First**, Part A below makes specific proposals to address each need above by amending sections of the current bills. **Second**, Part B proposes and briefly explains an alternative solution: a model religious liberty section that would set forth such protections more comprehensively.

Vigorously protecting religious liberty is consistent with the text of the Minnesota Constitution that each member of the Legislature has sworn to uphold and protect. From its adoption in 1857 to the present text, the Minnesota Constitution has protected religious freedom in the strongest terms: “The right of every man to worship God according to the dictates of his own conscience shall never be infringed. . . . [N]or shall any control of or interference with the rights of conscience be permitted” (Minn. Const. art. 1, § 16). As the Minnesota Supreme Court has observed in *State v. Hershberger*:

Religious liberty is a precious right. The Preamble to the Constitution of the State of Minnesota states:

We, the people of the state of Minnesota, grateful to God for our civil *and religious liberty*, and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution.

Minn. Const. preamble (emphasis added). The framers thus acknowledged religious liberty as coequal with civil liberty. . . . This history supports a broad protection for religious freedom in Minnesota.³

The Court stated that even when the value competing with religious freedom is public safety, the fact that “this state has traditionally revered” religious freedom calls for a balancing aimed at achieving both values.⁴ We believe that the Legislature can do that here—and continue Minnesota’s tradition of modeling policy for other states—by expanding the religious liberty protections so as to respect both the civil rights of same-sex couples and the religious liberty of conscientious objectors.

³ *State v. Hershberger*, 462 N.W.2d 393, 398 (Minn. 1990).

⁴ *Id.* at 399.

ANALYSIS

In the only book-length comprehensive scholarly work on same-sex marriage and religious liberty,⁵ 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 of change in American law” and will “reverberate across the legal and religious landscape.”⁶ Without strong protections for religious liberty, the scholars agree, many religious organizations and individuals will face conflicts of conscience, and society will face numerous conflicts many of which will lead to litigation.

H.F. No. 1054 and S.F. No. 925, the bills to enact same-sex marriage, provide protections for religious liberty, as virtually every other state to recognize same-sex marriage has done.⁷ But the provisions (the same in the two bills) leave some important issues unaddressed.

A. The Need for Additional Religious Liberty Protection

Section 5(2) of each bill states that a religious organization retains “exclusive control over its own theological doctrine . . . regarding who may marry within that faith,” and that “[a] licensed or ordained member of the clergy . . . is not subject to any fine, penalty, or civil liability for failing or refusing to solemnize a marriage for any reason.” This provision, while helpful and legally correct, is just a starting point for proper religious accommodations. In themselves they do nothing to resolve any real conflicts. A religious organization or individual clergy member that refused to perform a marriage would already unquestionably be protected by the First Amendment and the Minnesota 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.”⁸

⁵ DOUGLAS LAYCOCK ET AL., EDS., *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* (Rowman & Littlefield 2008) (hereinafter “LAYCOCK ET AL.”).

⁶ Marc D. Stern, *Same-Sex Marriage and the Churches*, in LAYCOCK ET AL., *supra*, at 1 [hereinafter “Stern”]. See also Douglas Laycock, *Afterword*, in LAYCOCK ET AL., *supra*, at 191-97 (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>.

⁷ Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington have already enacted religious exemptions as part of their legislation implementing same-sex marriage. An Appendix is attached summarizing the core religious liberty protections afforded by jurisdictions that currently recognize or recently considered enacting same-sex marriage. The collection is drawn from Wilson, 53 B.C. L. REV. at 1509-11 App. A.

⁸ Stern, *supra*, at 1.

The actual conflicts affect religious objectors other than houses of worship—especially, although not solely, religious organizations providing educational, social, or healthcare services. The real conflicts involve, for example, the traditionalist religious college that objects to opening its married-student housing to same-sex couples; the adoption service that objects to placing children with same-sex couples; or the religious family camp, retreat center, or marriage-counseling ministry that objects to opening its services or facilities to same-sex couples.⁹ Such organizations seek to maintain their religious understanding of marriage in their charitable and educational activities. But in seeking to do so, these organizations can come in conflict with laws prohibiting discrimination in employment, facilities, and services. Some such laws impose civil liability; others threaten to withdraw important government benefits such as social-service contracts or tax exemptions. Same-sex marriage will increase these conflicts.

The current bills, to their credit, do provide additional protections for objecting religious organizations, through two sections deemed “rules of construction.” The first, section 6(a) of each bill, incorporates the existing language of Minn. Rev. Stat. 363A.26, which exempts religious organizations from civil liability for sexual-orientation discrimination as follows:

Nothing in this chapter prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for educational purposes that is operated, supervised, or controlled by a religious association, religious corporation, or religious society that is not organized for private profit, from: . . .

(2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. This clause shall not apply to secular business activities engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized.¹⁰

The other provision, section 6(b), states:

This chapter must not be construed to affect the manner in which a religious association, religious corporation, or religious society that is not organized for private profit, or an institution organized for educational purposes that is operated, supervised, or controlled by a religious association, religious corporation, or

⁹ On religious-college housing, cf., e.g., *Levin v. Yeshiva University*, 96 N.Y.2d 484, 754 N.E.2d 1099 (2001) (suit by lesbian student based on Orthodox Jewish university’s refusal to allow her and her partner to live in married-student apartment). On adoptions, see, e.g., *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 adoptions by same-sex couples).

¹⁰ Section 6(a) of each marriage bill states that the bill “does not alter or affect the protections or exemptions provided in chapter 363A for a religious association.”

religious society that is not organized for private profit, provides adoption, foster care, or social services, if that association, corporation, society, or educational institution does not receive public funds for that specific program or purpose.

Despite the protections these provisions provide, they leave unaddressed the four important areas listed above (see p. 1):

1. Definition of Exempted Religious Organization and Religious Educational Institution

To protect religious liberty, the bills rely heavily (although not exclusively) on incorporating the existing exemption in the state Human Rights Act, Minn. Stat. 363A.26. That exemption gives relatively broad protection for religious organizations' decisions based on sexual orientation. But the section's definition of a religious organization or a religious educational institution could leave unprotected some institutions that are clearly religious. For example, a religiously affiliated educational institution is protected only if it is "operated, supervised, or controlled by a religious association, religious corporation, or religious society." It is not clear that this language would cover, for example, Northwestern College, a deeply evangelical Protestant school but one that is not controlled by any religious denomination or society. **We therefore urge that the definition of religious organization or religious educational institution applicable throughout the bill be amended to protect any religious or denominational organization and any "organization operated for charitable or educational purposes which operated, supervised or, controlled by or in connection with a religious organization."** The addition of "in connection with" should cover significantly religious organizations not operated, supervised, or controlled by a religious denomination or other religious body. (Similar language appears in section (a) of our "model provision," p. 10 below.)

2. Protection Against Municipal Anti-Discrimination Laws

A second consequence of the bills' heavy reliance on incorporating the existing state-law nondiscrimination exemption is that the bills only protects religious organizations from liability or penalties under state law, not under municipal ordinances. Both Minneapolis and St. Paul, for example, prohibit sexual-orientation and marital-status discrimination in the whole range of situations: employment, education, housing, public accommodations, contracts with the city, and so forth.¹¹ However, both exempt religious organizations only in limited circumstances: in Minneapolis, for preferring persons of one religion in employment, "when religion shall count as a bona fide occupational qualification for employment";¹² and in St. Paul, for preferring persons of one religion in educational admissions.¹³

¹¹ Minneapolis Code of Ordinances, ch. 139.40, 139.50; St. Paul Code of Ordinances, chs. 183, 185.

¹² Minneapolis Code of Ordinances, ch. 139.30(a)(2) (exempting "[a]ny religious corporation, association or society with respect to the hiring or employment of individuals of a particular religion, when religion shall be a bona fide occupational qualification for employment"); St. Paul Code of Ordinances, leg. ch. 183.031(a)(2) (exempting "[a] religious or fraternal corporation, association or society, with respect to

Therefore, we urge that the bill be amended to state that the protections it provides apply to municipal laws as well as state laws. If the state recognizes same-sex marriage without providing accommodations from these provisions, it will increase the conflicts that may occur under the provisions—perhaps significantly, given the size of the cities and of their gay and lesbian populations.¹⁴ Moreover, the Twin Cities metro area “offers an infrastructure to support GLBT quality of life,” including many businesses with gay-friendly policies;¹⁵ it therefore seems especially unlikely that gay and lesbian couples will face hardships in receiving services if religious conscientious objectors are protected from the expanded municipal liability they would face.

3. Protection Against Penalties Through Withdrawal of Benefits

A third consequence of relying heavily on the existing exemption in 363A.26 is that the bills provide religious organizations only limited protection from a different kind of penalty: the withdrawal of important government benefits. Chapter 363A focuses on civil nondiscrimination actions by the state and by private parties (see Minn. Rev. Stat. 363A.33). However, government can pressure organizations and individuals’ conscience by withdrawing any of a host of benefits, including government contracts or grants, tax-exempt status, government-employee charitable campaigns, licenses, or accreditation.¹⁶ Meaningful protection of religious liberty must include meaningful protection from such penalties.

qualifications based on religion, when religion shall be a bona fide occupational qualification for employment”).

¹³ St. Paul Code of Ordinances, leg. ch. 183.051(a) (“It is not an unfair discriminatory practice for a religious or denominational institution to limit admission or give preference to applicants of the same religion.”).

¹⁴ See, e.g., Kim Palmer, *Gayest City? Magazine Says It’s Minneapolis*, MINN. STAR-TRIB., Jan. 15, 2011 (noting that “Minneapolis has the fourth-highest gay population, 12.5 percent, of major cities, according to U.S. Census Data”), available at <http://www.startribune.com/lifestyle/113618049.html?refer=y>.

¹⁵ *Id.* (quoting Dot Beltstler, executive director of Twin Cities Pride).

¹⁶ On government contracts, see, e.g., *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). On tax-exempt status, see, e.g., Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in LAYCOCK ET AL., *supra* note 5, at 107-21 (describing attacks on tax exemptions for religious organizations with objections to same-sex marriage). On charitable campaigns, see, e.g., *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (holding that the Boy Scouts may be excluded from the state’s employee charitable contributions campaign for denying membership to openly gay individuals). On state licenses, see, e.g., 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). On accreditation, see, e.g., D. Smith, *Accreditation Committee Decides to Keep Religious Exemption*, 33 MONITOR ON PSYCHOLOGY

In this respect, we urge two improvements in the current bills. **First**, the patchwork of sections that do refer to state benefits do not cover all important services provided by religious organizations. Section 6(b) states that the bill must not affect the manner in which a religious organization “provides adoption, foster care, or social services.” But this does not clearly include several other services such as education, housing, or counseling. Thus, for example, an evangelical college that refuses to open married-student housing to same-sex couples is not protected from a loss of important benefits such as state tax exemption or general state funding. Nor is a traditionalist religious marriage-counseling service that declines to counsel same-sex couples. Moreover, under section 1(3) of the bill, even a religious organization “providing goods, services, facilities, or accommodations directly related to the solemnization or celebration of a marriage”—for example, a church or fraternal-order banquet hall that hosts receptions—is not necessarily protected from a withdrawal of benefits, since the chapter it amends (363A) focuses on civil liability. If not corrected, these shortcomings would make Minnesota less protective of religious liberty than several jurisdictions—for example, the District of Columbia, New Hampshire, and Washington—that have recognized same-sex marriage.¹⁷ **Therefore, we urge that section 1(3) be amended to add that a religious organization refusing to provide services, facilities, etc. “directly related to the solemnization or celebration of a marriage” is protected against the withdrawal of government benefits as well as against civil liability. We also urge that section 6(b) be amended to add “educational, housing, and counseling services” to the services that are protected.**

Second, section 6(b) protects “adoption, family, and social services” only when the religious organization “does not receive public funds for that specific program or purpose.” While this appears, properly, to protect an objecting organization against a withdrawal of benefits from its other programs, it does not address the most common conscientious objections. For example, Catholic adoption agencies in Illinois have lost contracts with the state because they refused to place children in the homes of unmarried cohabitating couples, and similar agencies in Boston and the District Columbia withdrew from performing adoptions when faced

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>.

¹⁷ D.C. Law No. L18-0110 (enacted Dec. 18, 2009, effective Mar. 3, 2010.), available at <http://www.dccouncil.washington.dc.us/limits/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...”) (emphasis added); 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) (emphasis added); WASH. REV. CODE § 26.04.010(5)-(6) (exempting religious organizations from “provid[ing] accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage,” and protecting religious organizations from penalty based on their refusal of any of the above accommodations);

with the loss of contracts or licenses.¹⁸ These results occurred even though numerous other agencies were willing to serve same-sex couples, and even though the Catholic charities had compiled a strong record of success in adoption placements, especially with difficult-to-place special-needs children.¹⁹ When a religious social service program is performing the basic goals for which it is funded, it is counterproductive and coercive to deny it funding on the basis of a conscientious objection when other providers are available. **Therefore, we urge that section 6(b) be amended to remove the exclusion of a “specific program or purpose” receiving funds and thereby ensure that such programs can continue to serve publicly funded purposes while maintaining their conscientious objection to facilitating same-sex marriages.**

4. Protection for Individual Objectors Providing Personal Services

Legal recognition of same-sex marriage can also place a real burden on individuals whose objection arises from a sincere religious belief in traditional marriage. Because the current bills incorporate only protections for nonprofit religious organizations, they do nothing for individuals running small businesses who, for religious reasons, decline to provide direct, personal services for a same-sex marriage ceremony: e.g., a wedding photographer, a florist, a wedding planner, or a baker who makes wedding cakes.²⁰ The failure to protect such individuals puts the individual to a cruel choice: their conscience or their livelihood. For example, in a recent case an Albuquerque, NM, wedding photographer operating her own business was assessed more than \$6,600, in an action under public accommodations law, for declining to photograph a lesbian couple’s commitment ceremony, even though there was no showing that the couple had difficulty or delay finding services from another provider.²¹

In Minnesota, in particular, legislative enactment of same-sex marriage could greatly affect the protection of conscientious objectors, because case law treats such enactments as relevant to the strength of the state’s interests in limiting religious freedom. In *State by Cooper v. French*,²² the Minnesota Supreme Court held that the law against marital-status discrimination

¹⁸ *Catholic Charities of the Diocese of Springfield v. State*, 2011 WL 3655016 (2011).

¹⁹ See, e.g., *Wen*, *supra* note 15, at A1 (explaining how Massachusetts threatened to revoke the adoption license of Catholic Charities).

²⁰ See *Elane Photography v. Willock*, 284 P.3d 428 (N.M. Ct. App. 2012), *cert. granted*, 2012-NMCERT-008 (N.M. Aug. 16, 2012) (New Mexico photographer fined for refusing on religious grounds to photograph a same-sex commitment ceremony); see also Steven Nelson, *Washington State Sues Florist Who Refused Flowers for Same-Sex Wedding*, U.S. NEWS (April 10, 2013), <http://www.usnews.com/news/newsgram/articles/2013/04/10/washington-state-sues-florist-who-refused-flowers-for-gay-marriage>; *Gay Couple Sues Illinois Bed and Breakfast For Refusing to Host Civil Union Ceremony*, HUFFINGTON POST, (Feb. 23, 2011, 1:20 PM), http://www.huffingtonpost.com/2011/02/23/gay-couple-sues-illinois_n_827115.html.

²¹ *Elane Photography*, 284 P.3d 428.

²² 460 N.W.2d 2 (Minn. 1990).

did not cover a landlord who objected to renting a house to an unmarried, cohabiting male-female couple. The lead (plurality) opinion of the Court also relied on art. I, § 16, reasoning that the state had not shown the required “compelling interest” to override the landlord’s “cherished” right of religious freedom.²³ That opinion reasoned that the state could have no compelling interest when the conduct to which the landlord objected also violated the state’s anti-fornication statute (then still in existence although generally unenforced). As the opinion put it, “[h]ow can there be a compelling state interest in promoting fornication when there is a state statute on the books prohibiting it?”²⁴

Applying this reasoning today, legislative recognition of same-sex marriage in Minnesota would change its legal status and therefore could undercut protection that small landlords have received to avoid directly facilitating practices to which they conscientiously object. Societal values may have shifted in recent years (as the recognition of same-sex marriage would show). But if religious freedom for individual and small-business providers is to be preserved as it has existed since *French*, the Legislature should make the protection explicit at the same time it changes the legal status of same-sex relationships.

Therefore, we propose language in section (b) of our model statutory provision below (see Part B of this letter, pp. 10-11), which could be adopted alone or as part of the overall model provision. This tightly defined accommodation would protect individuals, sole proprietors, and very small businesses providing direct, personal services that are essentially an extension of the owner’s personality and skills.²⁵ The proposal also recognizes that religious accommodations may cause some cost for same-sex couples, such as the need to find a different wedding photographer or caterer if their first choice must decline for reasons of conscience. We therefore propose (section (b)(2), p. 11) that the provider’s objection be overridden 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 the symbolic harm simply from the denial itself.

The language in subsection (b)(2)(B) also ensures that no government employee or official (such as a county clerk) may act as a choke point on the path to marriage. So, for example, no government employee can refuse on grounds of conscience to issue a marriage license unless another government employee is promptly available and willing to do so.

²³ *Id.* at 8-9. One justice concurred in the result on statutory grounds. *Id.* at 11 (Simonett, J.).

²⁴ *Id.* at 10.

²⁵ In *State by McClure v. Sports and Health Club*, 370 N.W.2d 844 (Minn. 1985), the Minnesota Supreme Court rejected the assertion that a closely held corporation operating a chain of exercise clubs had the right to discriminate in employment based on religion and marital status. That holding is entirely consistent with our proposal concerning for-profit activities, which protects only individuals, sole proprietors, and entities with up to five employees—a group entirely different from the corporation in *McClure*, which employed 140 to 150 people and had 18,000 members. *Id.* at 846.

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 limousines, simply do not. They have no objection generally to providing services, but they object to directly facilitating a marriage. As a result, nondiscrimination statutes enacted years ago now take on a whole new level of significance, with a much greater need for religious exemptions.

Adding a carefully defined exemption for individuals, sole proprietors and small businesses would remove one of the most potent sources of conflict between same-sex marriage and traditionalist religious beliefs.

B. Model Religious Liberty Protection Provision

Although we have proposed specific amendments above to sections of the current bills, the most comprehensive and consistent approach to improving religious liberty protection would be to adopt a new and separate section. We offer the following language, which we have proposed (and has been adopted in part) in other states.

Section ____

(a) Religious organizations protected.

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.

(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.

This proposed section addresses all of the outstanding issues we have identified. It defines "religious organization" broadly to include a charitable or educational organization operated "in connection" with a religious organization. It protects against increased municipal liability by preventing any "civil claim or cause of action" and any penalty "by the State or any of its subdivisions." Section (c)(2) protects against penalties through the withdrawal of benefits, and section (b) protects individuals, sole proprietorships, and a limited number of small

businesses while ensuring that same-sex couples do not face “substantial hardships” in obtaining services.²⁶

CONCLUSION

Both our specific proposed amendments and our proposed model provision offer means to strengthen religious liberty protections in any same-sex marriage enactment. By adopting either, the Minnesota Legislature would be a leader in pursuing the “middle way.” We welcome any opportunity to provide further information or analysis to members of the Legislature.

Respectfully yours,

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²⁶ 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.”

APPENDIX A: CORE LEGISLATIVE RELIGIOUS LIBERTY PROTECTIONS

Core Religious Liberty Protections in Same-Sex Marriage Legislation

All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington) **expressly** exempt clergy from requirements to solemnize or celebrate marriages inconsistent with their religious faith. *See* Conn. Gen. Stat. §§ 46b-21, 46b-150d (2009); D.C. Code § 46-406(c) (2010); 2012 Md. Laws ch. 2 § 2 (to be codified at Md. Code Ann., Fam. Law §§ 2-201–2-202, 2-406); N.H. REV. STAT. ANN. § 457:37 (2011); N.Y. Dom. Rel. Law § 11(1) (McKinney 2011); Vt. Stat. Ann. tit. 18, § 5144(b) (2010); Wash. Rev. Code § 26.04.010(2)(4) (2012).

All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington) **expressly** allow a religiously-affiliated group to refuse to “provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage.” *See* Conn. Gen. Stat. § 46b-150d; D.C. Code § 46-406(e); 2012 Md. Laws ch. 2 § 3 (to be codified at Md. Code Ann., Fam. Law §§ 2-201–2-202); N.H. REV. STAT. ANN. § 457:37(III); N.Y. Dom. Rel. Law § 10-b(1); Vt. Stat. Ann. tit. 8, § 4502(1); Wash. Rev. Code § 26.04.010(2)(5).

All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington) **expressly** protect covered religious objectors from **private suit**. *See* Conn. Gen. Stat. § 46b-150d; D.C. Code § 46-406(e); 2012 Md. Laws ch. 2 § 3 (to be codified at Md. Code Ann., Fam. Law §§ 2-201–2-202); N.H. REV. STAT. ANN. § 457:37(III); N.Y. Dom. Rel. Law § 10-b(1); Vt. Stat. Ann. tit. 8, § 4502(1); Wash. Rev. Code § 26.04.010(2)(6).

Six jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, and Washington) **expressly** protect religious objectors, including religiously 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); 2012 Md. Laws ch. 2 § 4 (to be codified at Md. Code Ann., Fam. Law §§ 2-201–2-202); N.H. REV. STAT. ANN. § 457:37(III); N.Y. Dom. Rel. Law § 10-b(1); Wash. Rev. Code § 26.04.010(2)(4).

Three jurisdictions (Maryland, the District of Columbia and New Hampshire) **expressly** protect religious organizations from “the promotion of same-sex marriage through religious programs, counseling, courses, or retreats, that is in violation of the religious society’s beliefs.” *See* D.C. Code § 46-406(e) (2011)). *See also* N.H. Rev. Stat. Ann § 457:37(3) (exempting “the

promotion of marriage through **religious counseling**, programs, courses, retreats, or housing designated for married individuals"); MD. CODE ANN., FAM. LAW § 202-3(a)(2) (provided **so long as the program receives no government funding**). **New York** may protect this. *See* N.Y. Dom. Rel. § 10-b (2) (“... nothing in this article shall limit or diminish the right, ... of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization ... from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained”).

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

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

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., FAM. LAW § 202-3(a)(2).

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. § 10-b (1). *See also* N.H. Rev. Stat. Ann. § 457:37(III); MD. CODE ANN., FAM. LAW § 202-3(b).

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.”).