



Re: H.F. 1054 and S.F. 925
Religious liberty implications of same-sex marriage

Dear Representative:

H.F. 1054 and S.F. 925 provide for same-sex marriage in Minnesota. We urge that you amend H.F. 1054 to expand the protections for religious liberty — and then that you pass the bill.

All the signers of this letter have studied and written about the law of religious liberty for many years. One of us edited and contributed to the leading book on protecting both marriage equality and religious liberty, *Same-Sex Marriage and Religious Liberty* (2008). Two of us have recently advocated for protecting both rights in an essay in the *Virginia Law Review in Brief*, [“Protecting Same Sex Marriage and Religious Liberty.”](#) and in a brief filed in the marriage cases now before the U.S. Supreme Court.

The Minnesota bills include religious liberty protections, but they leave unaddressed several conflicts between religious liberty and same-sex marriage. Those conflicts are identified in the separate letter you have received from a group of scholars including Professor Robin Fretwell Wilson. We come to these issues from a rather different perspective from the Wilson et al. group. But their analysis of remaining legal conflicts is accurate, and their proposals for addressing them will make the legislation more fair and just to all sides.

We support same-sex marriage. We think the pending bills can be a great advance for human liberty. But without amendments, the bills will leave significant issues for the religious liberty of those believers who cannot conscientiously participate in implementing the new regime. The net effect for human liberty will be no better than a wash if same-sex couples now oppress religious dissenters in the same way that those dissenters, when they had the power to do so, used to oppress same-sex couples. The bills already reflect a recognition that religious exemptions are the right policy—and right politically. Putting genuine religious exemptions in a bill takes away one of the strongest arguments of opponents. Strengthening those exemptions may give fence-sitters the impetus to vote for the bills.

Marriage is both a legal relationship and a religious relationship. The profound religious significance of marriage means that many religious organizations and individual believers experience marriage equality as reaching deep into a fundamentally religious institution. The challenge for any bill is to equalize civil marriage while preserving religious control over religious marriage. The Minnesota bills could do more to accomplish this task.



I. Religious Organizations

The Minnesota bills rely heavily, although not exclusively, on incorporating the existing exemption from civil liability in Minnesota's nondiscrimination law. This exemption covers many situations for both churches and religiously affiliated charitable and educational organizations, but by its nature it cannot cover important issues such as the effect of municipal liability. Even with the additional religious liberty sections in the current bills, some conflicts remain unaddressed. The Wilson et al. letter identifies these conflicts and proposes proper solutions. At the least, the suggestions for specific amendments concerning protection of religious organizations should be adopted. Alternatively, the model provision they offer at the end of the letter covers the whole range of issues and addresses them with care.

II. Individuals

The pending bills provide no protection for individuals who provide services to help celebrate weddings or professional services to help sustain marriages. This omission threatens serious harm to a religious minority while conferring no real benefits on same-sex couples. Same-sex couples will rarely if ever actually want such personalized services from providers who fundamentally disapprove of their relationship, and they will nearly always be able to readily obtain these services from others who are happy to serve them.

The Wilson et al. letter offers carefully crafted language that would address this problem in a way that is fair to both sides. It would protect only individuals and very small businesses that are essentially personal extensions of the individual owner, and only when some other business is reasonably available to provide the same service.

It is not in the interest of the gay and lesbian community to create religious martyrs when enforcing the right to same-sex marriage. To impose legal penalties or civil liabilities on a wedding planner who refuses to do a same-sex wedding, or on an individual marriage counselor who refuses to provide marriage counseling to same-sex couples, will simply ensure that conservative religious opinion on this issue can repeatedly be aroused to fever pitch. Every such case will be in the news repeatedly, and every such story will further inflame the opponents of same-sex marriage. Refusing exemptions to such religious dissenters will politically empower the most demagogic opponents of same-sex marriage. It will ensure that the issue remains alive, bitter, and deeply divisive.

It is far better to respect the liberty of both sides and let same-sex marriage be implemented with a minimum of confrontation. Let the people of Minnesota see happy, loving, committed same-sex marriages in their midst; let them see (this cannot be helped) that some of those marriages fail, just as many opposite-sex marriages fail; let them see that these same-sex marriages, good and bad, have no effect on opposite-sex marriages. Let the market respond to the



obvious economic incentives; same-sex couples will pay good money just like opposite-sex couples. Let same-sex marriage become familiar to the people, and do these things without oppressing religious dissenters in the process. Same-sex marriage will be backed by law, backed by the state, and backed by a large and growing number of private institutions. The number of dissenters will continue to decline, as minds continue to change and as others acquiesce in the new circumstances and in the live-and-let-live traditions of the American people. The number of individuals in business or professional settings who assert their right to conscientious objection will be small in the beginning, and it will plunge still further over time if deprived of the chance to rally around a series of martyrs.

Exemptions for religious conscientious objectors will rarely burden same-sex couples. Few same-sex couples in Minnesota will have to go far to find merchants, professionals, counseling agencies, or any other desired service providers who will cheerfully meet their needs and wants. And same-sex couples will generally be far happier working with a provider who contentedly desires to serve them than with one who believes them to be engaged in mortal sin, and who grudgingly serves them only because of the coercive power of the law. The proposed exemptions in the Wilson et al. letter are drafted to exclude the rare cases where these suppositions are not true, such as a same-sex couple in a rural area that has reasonably convenient access to only one provider of some secular service. Such cases are no reason to withhold religious exemptions in the more urban areas, such as the Twin Cities metro, where most of the people – and most of the same-sex couples – actually live.

III. Conclusion

Enacting the right to same-sex marriage with generous exemptions for religious dissenters is the right thing to do. The current bills acknowledge this, but expanding the exemptions would cure several specific, important remaining problems. Expansion would better respect the right of conscience for all sides: the sexual liberty of same-sex couples and the religious liberty of religious dissenters. It is obviously better for the traditional religious believers. On a few moments' reflection, it is also better for the same-sex couples – among other things because it may quell the fears of a few legislators in the middle whose votes may be crucial. Because expanding exemptions is better for both sides, it is better for Minnesota. We urge you to add the provisions proposed in the Wilson et al. letter: at the very least, the specific provisions concerning protection of religious organizations, or alternatively the broader model religious liberty proposal.

Each of us joins this letter in our individual capacities; none of our employers takes a position on the issues we address. We are available to discuss these issues further if that would



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be of any benefit. If you need another copy of the Wilson et al. letter, call or e-mail Professor Berg.

Very truly yours,

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