



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 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.

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.

We realize that you may not share our view of equality in marriage. But we are confident you share our view of religious liberty. And we think it is important to enact the best possible religious liberty protections with respect to same-sex marriage now. Same-sex marriage is coming sooner or later; all the polling data show that the supporters of same-sex marriage are much younger than the opponents. Right now, the issue is close; supporters of same-sex marriage



may have to bargain to get their bill. But as their support increases, they will have less need to bargain, they will be freer to respond to the most aggressive members of their movement, and they will have the votes to enact same-sex marriage with even less protection for religious liberty than the current bill(s) give. The time to get the optimal legislation to protect religious conscience is now.

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.

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. Because expanding exemptions is better for both sides, it is better for Minnesota. We urge you to add the



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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 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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