

February 4, 2013

BY U.S. MAIL AND EMAIL

Senator Maryellen Goodwin
325 Smith Street
Providence, RI 02908

Re: Religious Liberty Implications of Legalizing Same-Sex Marriage, S 0038 and H 5015

Dear Senator Goodwin:

We write to urge the Rhode Island General Assembly to ensure that any bill legalizing same-sex marriage does not infringe the religious liberty of organizations and individuals who have a traditional view of marriage. Rhode Island's very founding was premised on religious tolerance as evidenced by the desire of its founder, Roger Williams, to establish a colony neutral to matters of faith. Providing religious protections in any same-sex marriage bill honors Rhode Island's long and rich tradition of religious freedom and tolerance.

If the General Assembly legalizes same-sex marriage, it is possible to do so without infringing on religious liberty. The contentious debate in Maryland, New York, Washington, and elsewhere surrounding same-sex marriage proves the wisdom of constructive, good-faith attempts both to grant legal recognition to same-sex marriage *and* to protect religious liberty for conscientious objectors.¹

This letter analyzes the potential effects of same-sex marriage on religious conscience in Rhode Island and proposes a solution to address the conflicts: a specific religious liberty protection that should be an integral part of any proposed legislation. This proposal clarifies that individuals and organizations may refuse to provide services for a wedding if doing so would violate deeply held beliefs, while ensuring that the refusal creates no undue hardship for the couple seeking the service. We write not to support or oppose same-sex marriage in Rhode Island. Rather, our aim is to define a "middle way" to address the needs of same-sex couples while honoring and respecting religious liberty.²

As this letter details, the conflicts between same-sex marriage and religious conscience will be both certain and considerable if adequate protections are not provided. Without adequate safeguards, many religious individuals will be forced to engage in conduct that violates their deepest religious beliefs, and religious organizations will be constrained in crucial aspects of their religious exercise. We urge the Rhode Island General Assembly to take the time and care

¹ An Appendix is attached summarizing the core religious liberty protections afforded by jurisdictions that currently recognize or recently considered enacting same-sex marriage.

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 corresponding protections for religious liberty.

to ensure that the legalization of same-sex marriage does not restrict the inalienable right of religious liberty. Doing so is entirely consistent with the text of the Rhode Island State Constitution that each member of the Legislature has sworn to uphold and protect. From its Royal Charter of 1663 to the present text of the Rhode Island Constitution, first written in 1842, Rhode Island has always protected religious freedom in the strongest terms.³

Part A of this letter proposes a specific religious conscience protection that will defuse the vast majority of conflicts between same-sex marriage and religious liberty. Part B provides examples of precedent for the protection we propose. Part C details the sorts of legal conflicts that will arise if same-sex marriage is legalized without reasonable protections for religious liberty.

A. Proposed Religious Conscience Protection

The many potential conflicts between same-sex marriage and religious liberty are avoidable.⁴ But they are avoidable only if the Rhode Island General Assembly takes the time and effort 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 are calling for.⁵ The juncture for balancing religious liberty and legal recognition of same-sex unions is now.⁶

³ See, e.g., R.I. CONST. art. I, §3 (“Freedom of religion. -- Whereas Almighty God hath created the mind free; and all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend to beget habits of hypocrisy and meanness; and whereas a principal object of our venerable ancestors, in their migration to this country and their settlement of this state, was, as they expressed it, to hold forth a lively experiment that a flourishing civil state may stand and be best maintained with full liberty in religious concernments; we, therefore, declare that no person shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of such person's voluntary contract; nor enforced, restrained, molested, or burdened in body or goods; nor disqualified from holding any office; nor otherwise suffer on account of such person's religious belief; and that every person shall be free to worship God according to the dictates of such person's conscience, and to profess and by argument to maintain such person's opinion in matters of religion; and that the same shall in no wise diminish, enlarge, or affect the civil capacity of any person.”).

⁴ See, e.g., Douglas Laycock, *Afterword* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds. 191-97 (Rowman & Littlefield 2008) (detailing the scope of “avoidable” and “unavoidable” conflicts).

⁵ See David Blankenhorn & Jonathan Rauch, *A Reconciliation on Gay Marriage*, N.Y. 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).

⁶ Though conscience protections should also extend to existing civil unions, we do not address civil unions here. We anticipate far fewer conflicts regarding civil unions since for many conscientious objectors civil unions bear less religious significance than marriage.

Any proposed marriage bill can provide reasonable, carefully tailored protections for religious conscience by including a simple “marriage conscience protection” modeled, in part, on existing conscience protections in Rhode Island’s nondiscrimination laws.⁷

The “marriage conscience protection” would provide as follows:

Section ____

(a) Religious organizations protected.

Notwithstanding any other provision of law, 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.

⁷ See, e.g., R.I. GEN. LAWS §28-5-6 (2012) contained in the Fair Employment Practices Act (exempting any “religious corporation, association, educational institution, or society with respect to the employment of individuals of its religion to perform work connected with the carrying on of its activities” from the prohibition on discrimination in employment); R.I. GEN. LAWS §34-37-4.2(a) contained in the Fair Housing Practices Act, (2012) (“Nothing in this chapter shall prohibit religious organization, association, or society or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society from limiting the sale, rental, or occupancy of a dwelling which it owns or operates for other than commercial purposes to persons of the same religion or from giving preference to those persons unless membership in the religion is restricted on account of sex, sexual orientation, gender identity or expression, race, color, or national origin or disability. Nor shall anything in this chapter prohibit a private club not in fact open to the public which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose from limiting the rental or occupancy of the lodgings to its members or from giving preference to its members.”).

(b) Individuals and small businesses protected.

(1) Except as provided in paragraph (b)(2), no individual, sole proprietor, or small business shall be required

(A) to 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) to provide benefits to any spouse of an employee; or

(C) to 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 legislation has several important benefits. First, this text parallels existing protections in Rhode Island’s nondiscrimination laws for “a religious corporation, association, educational institution, or society with respect to the employment of individuals of its religion to perform work connected with the carrying on of its activities,”⁸ as well as federal nondiscrimination laws.⁹ This text also significantly mirrors, in part, the specific protections provided in the Connecticut, District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington same-sex marriage laws for religious organizations. Many of these laws protect, among other things, the conscientious refusal “to provide services, accommodations, advantages, facilities, goods, or privileges . . . related to the solemnization of a marriage.”¹⁰

⁸ *Id.*

⁹ Title VII of the Civil Rights Act of 1964, for example, prohibits discrimination in employment on the basis of race, color, sex, national origin, or religion. However, Title VII specifically exempts any “religious corporation, association, educational institution, or society.” 42 U.S.C. § 2000e-1(a). Thus, religious organizations, associations, educational institutions, or societies—unlike nonreligious organizations—are permitted to hire and fire their employees on the basis of religion.

¹⁰ See CONN. PUBLIC ACT NO. 09-13 (2009) §§ 17-19, available at <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm> (exempting religious organizations from “provid[ing] services, accommodations, advantages, facilities, goods, or privileges . . . related to” the “solemnization” or “celebration” of a marriage, and providing separate exemptions for religious adoption agencies and fraternal benefit societies); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 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...”); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) § 2-3 (exempting religious organizations from the “solemnization of a marriage or celebration of a marriage

Second, this model provision lists the primary areas of Rhode Island law where the refusal to treat a marriage as valid is likely to result in liability, penalty, or denial of government benefits (“laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status”).

Third, this text provides protection only when 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 protections will apply only to a “violation” of “sincere” beliefs that are “religious”—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.

Fourth, this text provides vital protections in subsection (b) for individuals of religiously informed conscience who own sole proprietorships and small businesses. We explain the need for such protection in Part C and D below.

Finally, this model provision recognizes that religious accommodations might not be without cost for same-sex couples, such as the need to find a different wedding photographer or caterer if their original choice must decline for reasons of conscience. In order to address this issue, subsection (b)(2) ensures that a same-sex couple can obtain the service, even from conscientious objectors, 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 symbolic harm. 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

that is in violation of the entity's religious beliefs” or “the promotion of marriage through any social or religious programs or services, in violation of the entity's religious beliefs”); 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); N.Y. DOM. REL. LAW § 10-b (1) (2011) (“a religious entity . . . benevolent [order] . . . or a not-for-profit corporation operated, supervised, or controlled by a religious corporation . . . shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage”); 9 VT. STAT. ANN. § 4502(1) (2009) (exempting religious organizations from “provid[ing] services, accommodations, advantages, facilities, goods, or privileges . . . related to” the “solemnization” or “celebration” of a marriage); WASH. REV. CODE § 26.04.010(2)(5) (providing that religious organizations need not “provide accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage”).

available and willing to do so. These sorts of override protections are common in other laws protecting the right of conscientious objection, especially in the health care context.¹¹

B. Precedent for Religious Conscience Protections

There is ample precedent for the type of conscience protection we have proposed. As noted above, Connecticut, District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington have already enacted religious exemptions as part of their legislation recognizing same-sex marriage.¹² Similarly, Rhode Island's existing nondiscrimination laws on employment and housing provide a categorical exemption for religious organizations in certain circumstances.¹³ And federal nondiscrimination statutes provide protection for religious and conscientious objectors in many different contexts.¹⁴ In short, protecting religious conscience is very much a part of America's, and Rhode Island's, tradition. We urge the Rhode Island General Assembly to continue that "middle way" accommodation of interests.

The religious conscience protection that we have proposed would alleviate the vast majority of the conflicts between same-sex marriage and religious liberty, while still allowing for full equality of treatment and respect for same-sex marriages. It has ample precedent in both Rhode Island and U.S. law. And it represents the best in the American and Rhode Island tradition of protecting the inalienable right of conscience.

C. Conflicts Between Same-Sex Marriage and Religious Liberty

In the only book-length comprehensive scholarly work on same-sex marriage and religious liberty,¹⁵ legal scholars on both sides of the same-sex marriage debate agreed that

¹¹ See, e.g., IOWA CODE § 146.1 (2005) ("An individual who may lawfully perform, assist, or participate in medical procedures which will result in an abortion shall not be required against that individual's religious beliefs or moral convictions to perform, assist, or participate in such procedures. . . . Abortion does not include medical care which has as its primary purpose the treatment of a serious physical condition requiring emergency medical treatment necessary to save the life of a mother."); S.C. CODE ANN. §§ 44-41-40, -50 (2002) ("No private or non-governmental hospital or clinic shall be required . . . to permit their facilities to be utilized for the performance of abortions; *provided*, that no hospital or clinic shall refuse an emergency admittance."); TEX. OCC. CODE ANN. § 103.004 (Vernon 2004) ("A private hospital or private health care facility is not required to make its facilities available for the performance of abortion *unless* a physician determines that the life of the mother is immediately endangered." (emphasis added)).

¹² See note **Error! Bookmark not defined.** above and Appendix A below.

¹³ See note **Error! Bookmark not defined.** above.

¹⁴ See, e.g., 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 federal-created burdens on religious exercise).

¹⁵ SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds. (Rowman & Littlefield 2008) (including contributions

codifying same-sex marriage *without* providing robust religious accommodations will create widespread and unnecessary legal conflicts—conflicts that will work a “sea change in American law” and will “reverberate across the legal and religious landscape.”¹⁶ The conflicts between religious conscience and same-sex marriage generally take one of two forms. First, if same-sex marriage is legalized without appropriate statutory accommodations, religious organizations and individuals that object to same-sex marriage will face new lawsuits under the state nondiscrimination act and other similar laws. So will many small businesses, which are owned by individual conscientious objectors. Likely lawsuits include claims where:

- Individuals of conscience, who run a small business, such as wedding photographers, florists, banquet halls, or making wedding cakes in one’s home, can be sued under public accommodations laws for refusing to offer their services in connection with a same-sex marriage ceremony.¹⁷
- Religious summer camps, day care centers, retreat centers, counseling centers, meeting halls, or adoption agencies can be sued under public accommodations laws for refusing to offer their facilities or services to members of a same-sex marriage.¹⁸

from both supporters and opponents of same-sex marriage). *See also* Thomas Berg, WHAT SAME-SEX-MARRIAGE AND RELIGIOUS-LIBERTY CLAIMS HAVE IN COMMON, 5 NW. J.L. & SOC. POL’Y 206 (2010); Marc D. Stern, *LIBERTY V. EQUALITY; EQUALITY V. LIBERTY*, 5 NW. J. L. & SOC. POL’Y 307 (2010); Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J. L. & Soc. Pol’y 318 (2010).

¹⁶ Marc Stern, *Same-Sex Marriage and the Churches* at 1 [hereinafter “Stern”]. *See also id.*, Douglas Laycock, *Afterword* at 191-97 [hereinafter “Laycock”] (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>.

¹⁷ *See* R.I. GEN. LAWS §11-21-1, et. seq (prohibiting the denial of services based on sexual orientation). *Elane Photography v. Willock*, 284 P.3d 428, N.M.App., May 31, 2012 *cert. granted*, 2012-NMCERT-008 Aug. 16, 2012. (New Mexico photographer fined for (New Mexico photographer fined for refusing on religious grounds to photograph a same-sex commitment ceremony); Stern at 37-39; *see also Issues Brief: Same-Sex Marriage and State Anti-Discrimination Laws* at 3-5, *available at* <http://www.becketfund.org/files/34a97.pdf> [hereinafter “Issues Brief”]; Alyssa Newcomb, *Bakery Denies Same-Sex Couple Wedding Cake*, ABC NEWS Feb. 2, 2013 *available at* <http://abcnews.go.com/blogs/business/2013/02/bakery-denies-same-sex-couple-wedding-cake/>.

¹⁸ *Bernstein v. Ocean Grove Camp Meeting Ass’n*, Num. OAL Dkt. No. CRT 6145-09 (Off. of Admin. Law decision issued January 12, 2012.) *available at* <http://www.adfmedia.org/files/OGCMA-BernsteinRuling.pdf> (finding that a Methodist organization likely violated public accommodations law by denying same-sex couples use of its wedding pavilion); *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); *see also* Stern at 37-39; 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).

- A church or other religious nonprofit that dismisses an employee, such as an organist or secretary, for entering into a same-sex marriage can be sued under employment discrimination laws that prohibit discrimination on the basis of marital status.¹⁹

The second form of conflict involving religious organizations and individuals (or the small businesses that they own) that conscientiously object to same-sex marriage is that they will be labeled unlawful “discriminators” under state or municipal laws and thus face a range of penalties at the hand of state agencies and local governments, such as the withdrawal of government contracts or exclusion from government facilities. For example:

- A religious college, hospital, or social service organization that refuses to provide its employees with same-sex spousal benefits can be denied access to government contracts or grants on the ground that it is engaging in discrimination that contravenes public policy.²⁰
- 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 employee charitable campaign.²¹
- Doctors, psychologists, social workers, counselors, and other professionals who conscientiously object to same-sex marriage can have their licenses revoked.²²

¹⁹ Stern at 48-52; Issues Brief at 3-5.

²⁰ 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).

²¹ 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); *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).

²² See 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 available).

- Religious fraternal organizations or other nonprofits that object to same-sex marriage can be denied food service licenses, adoption agency licenses, child care licenses, or liquor licenses on the ground that they are engaged in unlawful discrimination.²³
- Religious colleges or professional schools can have their accreditation revoked for refusing to recognize the validity of same-sex marriages.²⁴
- Church-affiliated organizations can have their tax exempt status stripped because of their conscientious objection to same-sex marriage.²⁵

All of these conflicts either did not exist before, or will significantly intensify after, the legalization of same-sex marriage. Thus, legalizing same-sex marriage without adequate protections for religious liberty will have at least two unintended consequences: It will harm religious organizations and individuals of conscience, and it will spawn costly, unnecessary conflicts, many of which will lead to litigation.²⁶

²³ See, e.g., N.J. REV. STAT. § 9:3-40 (forbidding adoption agencies from discriminating in the selection of adoptive parents on the basis of sex or marital status); N.J. ADMIN. CODE § 10:122B-1.5 (forbidding foster care, or “resource care,” agencies from discriminating against a resource parent applicant on the basis of gender or sexual orientation); see also Stern at 19-22 (noting that many state regulators condition licenses on compliance with nondiscrimination requirements).

²⁴ See 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>.

²⁵ See 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 New Jersey revoked the property tax exemption of a beach-side pavilion controlled by an historic Methodist organization, because it refused on religious grounds to host a same-sex civil union ceremony); Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 107-21 (describing attacks on tax exemptions for religious organizations with objections to same-sex marriage); Jonathan Turley, *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).

²⁶ Filed lawsuits are often just the tip of the iceberg with respect to conflicts over a given law and a claimed right. Most conflicts get resolved before a suit is filed and comes to the attention of the public. Some employers will back down when suit is threatened. Others will pay a settlement and walk away. Some employers will be quietly “chilled” even though they would prefer another course of action. What matters is the number of conflicts rather than the number of lawsuits. This data is not available, however, and so cannot be empirically studied. Nonetheless, there need only be a few conflicts for there to be a crisis of conscience. Each conflict is a profound violation of religious liberty. Moreover, even assuming that there are a small number of actual conflicts (as some critics claim), then there will be a correspondingly few number of same-sex couples affected by the religious exemptions we recommend. Finally, discrimination lawsuits often increase dramatically over time, so an important question is how

D. The Need for Robust Religious Liberty Protection

In January 2013, S 0038 and H 5015—An Act Relating to Domestic Relations-Persons Eligible to Marry—were introduced into the Senate and House Judiciary Committees, respectively. This most recent attempt to legalize same-sex marriage offers *no protection* to those with conscientious religious objections to same-sex marriage—other than what is already provided by law. Section 3 of the bills contain the following provision:

15-3-6.1. Protection of freedom of religion in marriage. – (a) Consistent with the guarantees of freedom of religion set forth by both the First Amendment to the United States Constitution and Article I, Section 3 of the Rhode Island Constitution, each religious institution has exclusive control over its own religious doctrine, policy, and teachings regarding who may marry within their faith, and on what terms. No court or other state or local governmental body, entity, agency or commission shall compel, prevent, or interfere in any way with any religious institution’s decisions about marriage eligibility within that particular faith’s tradition.

(b) Consistent with the guarantees of freedom of religion set forth by both the first amendment to the United States Constitution and Article I, Section 3 of the Rhode Island Constitution, no regularly licensed or ordained clergyperson, minister, elder, priest, imam, rabbi, or similar official of any church or religious denomination as described and authorized in sections 15-3-5 and 15-3-6 of the general laws to officiate at a civil marriage, is required to solemnize any marriage. A regularly licensed or ordained clergyperson, minister, elder, priest, imam, rabbi, or similar official of any church or religious denomination shall be immune from any civil claim or cause of action based on a refusal to solemnize any marriage under this chapter. No state agency or local government may base a decision to penalize, withhold benefits from, or refuse to contract with any church or religious denomination on the refusal of a person associated with such church or religious denomination to solemnize a marriage under this chapter.²⁷

As explained below, *this provision would provide less protection for religious liberty than every other state that has successfully enacted same-sex marriage legislature.* By its own terms, Section 3 confers on religious organizations only those protections already guaranteed by the U.S. Constitution and Rhode Island Constitution. Individual clergy or religious organizations

many lawsuits against conscientious objectors will be filed 20 years from now. *See, e.g., Vivian Berger et al., Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 45 (2005) (“The number of employment discrimination lawsuits rose continuously throughout the last three decades of the twentieth century. In the federal courts, such filings grew 2000% . . .”).

²⁷ Senate Bill 0038, available at <http://webserver.rilin.state.ri.us/BillText13/SenateText13/S0038.pdf>. The House Bill contains slightly different proposed text. It inserts the words “, as long as such policies are consistent with sections 15-1-2, 15-1-3 and 15-1-4” in the 5th line of paragraph (a) after the words “on what terms.” *See* House Bill 5015 § 3, available at <http://webserver.rilin.state.ri.us/BillText13/HouseText13/H5015.pdf>.

who refuse to perform same-sex marriage receive ersatz protection, for they are already protected by the U.S. 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.”²⁸ Focusing on the issue of “forced officiating” is a strawman argument calculated to distract the uninformed from real situations where religious conscience is at risk.

What Section 3 leaves out is considerable:

- It provides no protection from the loss of government benefits for refusing to recognize a same-sex marriage.
- It provides no protection for individual objectors.
- It provides no protection to religious organizations from private lawsuits brought under Rhode Island’s nondiscrimination laws.

This legislation is grossly lacking, as the following Parts explain in more detail.

a. No Protection from Government Penalty

A good deal of misunderstanding surrounds religious liberty accommodations. Accommodations serve the important function of protecting conscientious objectors from private lawsuits. But accommodations also serve the purpose of insulating conscientious objectors from penalties at the hands of the government.²⁹ How might this occur?

An objector may be penalized by losing access to government grant programs or other state or local benefits. Thus, in *Catholic Charities of Maine v. City of Portland*, the district court upheld a Portland ordinance that forced a religious charity either to extend employee spousal benefits to registered same-sex couples, or to lose eligibility to all city housing and community development funds.³⁰ Similarly, 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.³¹ The Boy Scouts of America have litigated, *and lost*, numerous suits over a state’s authority to deny them access to benefits that others receive, when the law was otherwise silent.³²

²⁸ Stern at 1.

²⁹ Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context* in SAME SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS at 81.

³⁰ 304 F. Supp. 2d 77 (D. Me. 2004); *see also* footnote **Error! Bookmark not defined.** above.

³¹ *See* Don Lattin, *Charities Balk at Domestic Partner, Open Meeting Laws*, S.F. CHRON., July 10, 1998, at A-1.

³² *See Evans v. City of Berkeley*, 40 Cal.Rptr.3d 205 (Cal. 2006) (affirming revocation of a boat berth subsidy at public marina due to Boy Scouts’ exclusion of atheist and openly gay members); *Boy Scouts of*

In another example, Catholic adoption agencies in Illinois recently lost contracts with the state because they refused to place children in the homes of unmarried cohabitating couples.³³ The state claimed that the Catholic adoption agencies had violated the state's newly enacted civil union law.³⁴ That law contains no exemption for religious social service agencies and thus provides no protection against government penalties for conscientious objectors. Although this case implicated a civil union law, the consequences for a religious organization in Illinois would be indistinguishable under a same-sex marriage law that omitted important accommodations that we recommend.

Church-affiliated organizations have lost their exemption from taxes as well. In New Jersey, the Ocean Grove Camp Meeting Association, a group owned and operated by an historic Methodist organization, refused on religious grounds to host the same-sex civil union ceremonies of two lesbian couples in its beach-side pavilion.³⁵ Local authorities stripped the group of their exemption from local property taxes on the pavilion, and billed them for \$20,000.³⁶

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).

These results are possible because of the United States Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990) (concluding that neutral and generally applicable laws do not violate the First Amendment no matter how much they burden an individual's or organization's exercise of religion). These outcomes demonstrate our point: legislative relief is needed to protect religious conscience.

³³ *Catholic Charities of the Diocese of Springfield v. State*, 2011 WL 3655016 (2011). In deciding a motion for summary judgment, the state trial judge held that Catholic Charities had no property right in their contracts from the state, and thus were not entitled to due process when the state decided not to extend the contract to the charities. *Id.* The judge expressly declined to address Catholic Charities' arguments that the state violated its rights under the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.*, the Illinois Religious Freedom Protection & Civil Union Act, 750 ILCS 75/1 *et seq.*, and the Illinois Religious Freedom Restoration Act, 775 ILCS 35/1 *et seq.*

³⁴ Illinois Religious Freedom Protection & Civil Union Act, 750 ILL. COMP. STAT. 75/1 *et seq.*

³⁵ See 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*).

³⁶ See Bill Bowman, \$20G Due in Tax on Boardwalk Pavilion: Exemption Lifted in Rights Dispute, ASBURY PARK PRESS, Feb. 23, 2008.

Some opponents of accommodations argue that *Ocean Grove* is irrelevant to the same-sex marriage debate because the tax exemption at issue was conditioned upon the Camp Meeting Association's willingness to open the property for the entire public. That argument, however, overlooks two points. First, while the tax exemption in *Ocean Grove* was based on an open-space requirement, nothing stops governments from conditioning tax exemptions on other things, such as compliance with state and local nondiscrimination laws or, more generally, being organized for the "public interest." *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983). Thus, just as governments can strip a tax exemption because an organization cannot in good conscience open its property to the entire public, so also can governments strip a tax exemption because it concludes that an organization's conscientious objection to same-sex marriage violates nondiscrimination laws or "public policy" more generally. Second, when the Camp

The Camp Meeting Association did not just lose its tax exemption. It was also investigated by the New Jersey Department of Civil Rights for an alleged violation of the New Jersey Law Against Discrimination. In fact, the Department of Civil Rights has determined that probable cause exists to find a violation. Thus, the case is not only about losing tax exempt status, but also about being penalized for allegedly violating state nondiscrimination laws.³⁷

These impacts on church-affiliated organizations, predicted by scholars,³⁸ did not result from statutory revocations of tax-exempt status in civil union legislation. Instead, these actions occurred because state law offered no explicit exemption providing otherwise. These experiences drive home the need for explicit protection from penalties by the government.³⁹

b. Needed Protection for Individual Objectors

Legal recognition of same-sex marriage can also place a real burden on *individuals* whose objection arises not from anti-gay animus, but from a sincere religious belief in traditional marriage.

S 0038 and H 5015 do not protect individuals who, for religious reasons, prefer to step aside from same-sex marriage ceremonies. Thus, a religious individual who runs a small business, e.g., a baker who makes wedding cakes in her home, a wedding photographer, a caterer, a florist, a reception hall owner, a seamstress, or a tailor, receives no protection at all.⁴⁰

Meeting Association agreed to open its property to the entire public, it likely never contemplated the legalization of civil unions or same-sex marriage, much less that it would be asked to facilitate such a marriage in violation of its religious beliefs. *Ocean Grove* thus illustrates the fact that legalizing same-sex marriage will create significant conflicts of conscience that were never contemplated before.

³⁷ As the United State Court of Appeals for the Third Circuit explained, “The federal complaint arose out of the DCR’s investigation into whether the Association’s refusal to permit couples to use the Boardwalk Pavilion for civil unions violates the LAD. Clearly, therefore, New Jersey’s interest in eliminating unlawful discrimination is at the center of this dispute.” *Ocean Grove Camp Meeting Ass'n of United Methodist Church v. Vespa-Papaleo*, 339 Fed.Appx. 232, 238 (3rd Cir. 2009).

³⁸ Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 107-21 (describing attacks on tax exemptions for religious organizations with objections to same-sex marriage); Jonathan Turley, *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).

³⁹ In 1993, Rhode Island passed a state Religious Freedom Restoration Act. *See* R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (2010). However, this statute has yet to undergo judicial interpretation by any Rhode Island court.

⁴⁰ *See Elane Photography v. Willock*, 284 P.3d 428, N.M.App., May 31, 2012 *cert. granted*, 2012-NMCERT-008 Aug. 16, 2012 (New Mexico photographer fined for refusing on religious grounds to photograph a same-sex commitment ceremony); *see also Gay Couple Sues Illinois Bed and Breakfast For Refusing to Host Civil Union Ceremony*, HUFFINGTON POST, FEB. 23, 2011.

The failure to protect such individuals puts those individuals to a cruel choice: their conscience or their livelihood.⁴¹ Enacting protections for individual objectors is not only necessary, but also consistent with the existing public policy in Rhode Island's nondiscrimination statutory scheme.

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 taxis, simply do not. They have no objection generally to providing services, but they object to directly facilitating a marriage.

In short, nondiscrimination statutes enacted years ago now take on a whole new level of significance, with a much greater need for religious exemptions. A Marriage Bill that provides no protection to individual objectors (other than authorized celebrants, who are already protected by the Constitution) would effectively leave any individual who refuses to assist with same-sex wedding ceremonies open to suit, whether framed as sexual-orientation discrimination, sex discrimination, or, where applicable, marital-status discrimination.⁴²

⁴¹ 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 service workers where conscience protections were not provided).

⁴² Refusals to provide benefits to same-sex partners have been invalidated in other jurisdictions as a form of gender or sex discrimination. For instance, in *In re Levenson*, 560 F.3d 1145 (9th Cir. 2009) (Order of Reinhardt, J.), the court found an employer's denial of coverage for an employee's same-sex partner under the company's employment benefits plan to be sex discrimination. As Judge Reinhardt explained:

There is no doubt that the denial of Levenson's request that Sears be made a beneficiary of his federal benefits violated the EDR Plan's prohibition on discrimination based on sex or sexual orientation. Levenson was unable to make his spouse a beneficiary of his federal benefits due solely to his spouse's sex. If Sears were female, or if Levenson himself were female, Levenson would be able to add Sears as a beneficiary. Thus, the denial of benefits at issue here was sex-based and can be understood as a violation of the EDR Plan's prohibition of sex discrimination.

See also In re Golinski, 587 F.3d 901 (9th Cir. Jan. 13, 2009) (Order of Kozinski, C.J.) same-sex spouses raised difficult constitutional questions regarding sex discrimination and sexual-orientation discrimination); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality op.) (discrimination by state against same-sex spouses was form of sex-based discrimination); *In re Marriage Cases*, 183 P.3d 384, 436-40 (Cal. 2008) (same-sex marriage proponents pursued gender discrimination claims ultimately rejected by court); *cf.* WIS. STAT. § 111.36(1)(d) (defining sexual-orientation discrimination as a form of gender discrimination).

Of course, accommodating individual objectors might not be without cost for same-sex couples. Thus, we argue only for “hardship exemptions”—exemptions that are available only when there is no undue hardship on same-sex couples.⁴³

c. No Robust and Uniform Protection for Religious Organizations

Rhode Island law prohibits discrimination based on, among other things, marital status, sex, and sexual orientation. Such discrimination is prohibited in a variety of areas—including employment,⁴⁴ housing,⁴⁵ and public accommodations⁴⁶—with only very narrow exemptions for religious organizations.⁴⁷

As explained in Part C above, these nondiscrimination laws can prompt lawsuits against religious organizations that, for religious reasons, cannot recognize or facilitate a same-sex marriage. For example, a nonprofit social service organization, like a Catholic hospital, could be sued for refusing to provide its employees with same-sex spousal benefits in violation of its religious beliefs; religious day care centers, retreat centers, counseling centers, or adoption agencies could be punished under public accommodations laws for refusing to offer their facilities or services to members of a same-sex marriage; or a religious organization that dismisses an employee, such as a youth counselor, for entering into a same-sex marriage can be sued under employment discrimination laws that prohibit discrimination on the basis of marital status.⁴⁸

The proposed bill in Rhode Island to legalize same-sex marriage provides considerably *less* protection than *every other jurisdiction* where the legislature has considered the issue.⁴⁹

⁴³ See Part A above.

⁴⁴ R.I. GEN. LAWS § 28-5-7 (2012) (making it unlawful to “refuse to hire any applicant for employment because of his or her race or color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin”).

⁴⁵ R.I. GEN. LAWS § 34-37-1 (2012) (declaring that the policy of Rhode Island assures that “all individuals regardless of race, color, religion, sex, sexual orientation, gender identity or expression, marital status, country of ancestral origin, or disability, age, familial status, [and] housing status, [have] equal opportunity to live in decent, safe, sanitary, and healthful accommodations anywhere within the state”).

⁴⁶ R.I. GEN. LAWS § 11-24-2 (2012) (making it unlawful to deny to any person on account of “race or color, religion, country of ancestral origin, disability, age, sex, sexual orientation, gender identity or expression, any of the accommodations, advantages, facilities, or privileges of that public place”).

⁴⁷ See footnote **Error! Bookmark not defined.** above.

⁴⁸ See, e.g., footnotes **Error! Bookmark not defined.**-19 above.

⁴⁹ See footnote **Error! Bookmark not defined.** above and **Error! Bookmark not defined.** below.

Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington have all enacted same-sex marriage laws, and all provide much more protection for religious liberty than Rhode Island's proposed bill.⁵⁰ Each of those states protects religious organizations from being forced to offer "services, accommodations, advantages, facilities, goods, or privileges" related to a marriage when doing so would violate their religious beliefs.⁵¹ Although the protections in Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington also fall short in key areas,⁵² they still provide far more protection than Rhode Island's proposed same-sex marriage legislation.

Conclusion

Without adequate safeguards for religious liberty of the sort proposed in this letter, the recognition of same-sex marriage will lead to socially divisive and entirely unnecessary conflicts between the exercise of rights pursuant to the same-sex marriage law and religious liberty. That is a needless and destructive path where both sides lose. There is a balanced "middle way." The Rhode Island General Assembly should avoid either extreme and be the peacemaker. On that note, we would welcome any opportunity to provide further information, analysis, or testimony to the Rhode Island General Assembly.

⁵⁰ CONN. PUBLIC ACT NO. 09-13 (2009) §§ 17-19, *available at* <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm> (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges ... related to" the "solemnization" or "celebration" of a marriage, and providing separate exemptions for religious adoption agencies and fraternal benefit societies); D.C. Law No. L18-0110 (enacted Dec. 18, 2009, effective Mar. 3, 2010), *available at* <http://www.dccouncil.washington.dc.us/lims/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..."); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) § 4 (allowing religiously affiliated fraternal organizations, like the Knights of Columbus, expressly to limit insurance coverage to spouses in heterosexual marriages); 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); N.Y. DOM. REL. § 10-b (1) (2011) ("a religious entity . . . benevolent [order] . . . or a not-for-profit corporation operated, supervised, or controlled by a religious corporation . . . shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage"); 9 VT. STAT. ANN. § 4502(1) (2009) (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges ... related to" the "solemnization" or "celebration" of a marriage); 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). *See generally* Appendix A.

⁵¹ *Id.*

⁵² *See* Letter to Iowa Legislators, *available at* <http://mirrorofjustice.blogs.com/files/2009-07-12-iowa-letter-final.doc>, at 6-7 (letter from the undersigned describing shortcomings of Connecticut, Vermont, and New Hampshire conscience protections).

Respectfully yours,⁵³

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APPENDIX A:

Core Religious Liberty Protections in Same-Sex Marriage Legislation⁵⁴

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); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202, 2-406 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) § 2; 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); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) § 3; 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); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) §§ 2-3; 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); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) §§

⁵⁴ Table reprinted from 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>.

2-3; 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., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) §§ 2-3. (provided **so long as the program receives no government funding**). **New York** may protect this. *See* N.Y. DOM. REL. LAW § 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. LAW § 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., Note: FAM. LAW §§ 2-201, 2-202, Note: MD INS. LAW § 8-402 (2012); 2012 Maryland Laws Ch. 2 (H.B. 438) § 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., Note: FAM. LAW §§ 2-201, 2-202 (2012).

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. Law. § 10-b (1). *See also* N.H. REV. STAT. ANN. § 457:37(III); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) § 2.

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.”); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012) (the “provisions of this Act are not severable, and if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, no other provision or application of this Act may be given effect and this Act shall be null and void”).