

May 1, 2009

BY EMAIL AND FEDERAL EXPRESS

The Honorable Governor John Baldacci
Office of the Governor
#1 State House Station
Augusta, ME 04333-0001
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Re: Religious liberty implications of S.P. 384

Dear Governor Baldacci:

We write to provide you with an analysis of the effects of S.P. 384 on religious liberty. Those effects would be widespread and profound. If S.P. 384 is passed in its current form—without adequate religious-conscience protections—many religious organizations and individuals will be forced to engage in conduct that violates their deepest religious beliefs, and religious organizations would be limited in crucial aspects of their religious exercise. Instead of passing S.P. 384 in its current form, the Legislature should take the time and care necessary to ensure that the legalization of same-sex marriage does not constrain the fundamental right of religious liberty.

Wide-ranging conflicts recognized by legal scholars

In the only comprehensive scholarly work on same-sex marriage and religious liberty to date,¹ legal scholars on both sides of the same-sex marriage debate agreed that codifying same-sex marriage *without* providing robust religious accommodations will create widespread and unnecessary legal conflict—conflict that will work a “sea change in American law” and will “reverberate across the legal and religious landscape.”² The conflicts between religious liberty and same-sex marriage generally take one of two forms. First, if same-sex marriage is legalized without appropriate religious accommodations, religious organizations or individuals that object to same-sex marriage will face

¹ SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, Douglas Laycock, Anthony R. Picarello, Jr. and Robin Fretwell Wilson, eds. (Rowman & Littlefield 2008) (including contributions from both supporters and opponents of same-sex marriage).

² *Id.*, Marc Stern, Assistant Executive Director, American Jewish Congress, *Same-Sex Marriage and the Churches* at 1 (“Stern”). *See also id.*, Douglas Laycock, University of Michigan Law School, *Afterword* at 191-97 (“Laycock”) (detailing the scope of “avoidable” and “unavoidable” conflicts).

a wave of new lawsuits under state anti-discrimination and other laws. So will many small businesses, which are owned by individual conscientious objectors. Likely lawsuits include claims that:

- A religious college that offers special housing for married students can be sued under housing discrimination laws for offering that housing to opposite-sex, but not same-sex, married couples.³
- A religious school or university that has a code of conduct prohibiting same-sex sexual relationships can be sued under anti-discrimination laws for refusing to admit students (or children of parents) in a same-sex marriage.⁴
- Religious individuals who run a business, such as wedding photographers, florists, banquet halls, or bed and breakfasts, can be sued under public accommodations laws for refusing to offer their services in connection with a same-sex marriage ceremony.⁵
- Religious camps, day cares, retreat centers, counseling centers, or adoption agencies can be sued under public accommodations laws for refusing to offer their services to members of a same-sex marriage.⁶

³ Stern at 33, 48 (“[A] rule allowing only heterosexual couples into married housing will be illegal if same-sex marriage becomes legal.”); *Issues Brief: Same-Sex Marriage and State Anti-Discrimination Laws* at 3-5, 14-15, available at <http://www.becketfund.org/files/34a97.pdf> (“Issues Brief”).

⁴ Stern at 31-33 (stating that “[t]he issue of church-school admission policies regarding children with parents in same-sex marriages will also arise,” and noting that “Orthodox Jewish schools in New York have been grappling with whether to admit children of single mothers who conceived with assisted reproductive technology”).

⁵ Stern at 37-39; *see also* Issues Brief at 3-5, 22-23; *Elane Photography v. Willock*, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. Ct) (filed Jul. 1, 2008) (New Mexico photographer fined for refusing on religious grounds to photograph a same-sex commitment ceremony); *Bernstein v. Ocean Grove Camp Meeting Ass’n*, No. PN34XB-03008 (N.J. Dep’t. of Law and Public Safety, Notice of Probable Cause issued Dec. 29, 2008) (finding that a religious organization likely violated public accommodations laws by denying a same-sex couple use of its wedding pavilion).

⁶ Stern at 37-39; *see also* *Butler v. Adoption Media*, 486 F.Supp.2d 1022 (N.D. Cal. 2007) (administrators of Arizona adoption facilitation website found subject to California’s public accommodations statute because they refused to post profiles of same-sex couples as potential adoptive parents); Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 *BYU J. PUB. L.* 475 (2008) (describing clashes over same-sex adoption).

- A church or religious non-profit that fires an employee, such as an organist or secretary, for entering a same-sex marriage can be sued under employment discrimination laws that prohibit discrimination on the basis of marital status.⁷

Second, religious organizations and individuals (or the small businesses that they own) that conscientiously object to same-sex marriage will be labeled as unlawful “discriminators” under state law and thus face a range of penalties at the hands of state agencies and local governments, such as the withdrawal of government benefits or exclusion from government facilities. For example:

- A religious university, hospital, or social service organization that refuses to provide its employees with same-sex spousal benefits can be denied access to government contracts or grants on the ground that it is engaged in discrimination that contravenes public policy.⁸
- A religious charity or fraternal organization that opposes same-sex marriage can be denied access to government facilities, such as a lease on government property or participation in a government-sponsored charitable campaign.⁹
- Doctors, psychologists, social workers, counselors and other professionals who conscientiously object to same-sex marriage can have their licenses revoked.¹⁰

⁷ Stern at 48-52; Issues Brief at 3-5, 22-23.

⁸ See 5 ME. REV. STAT. ANN § 784 (prohibiting discrimination by all entities contracting with the state); see also *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).

⁹ See *Evans v. City of Berkeley*, 38 Cal.4th 1 (Cal. 2006) (affirming revocation of a boat berth subsidy at public marina due to Boy Scouts’ exclusion of atheist and openly gay members); *Cradle of Liberty Council v. City of Philadelphia*, 2008 WL 4399025 (E.D. Pa. Sept. 25, 2008) (city terminated a lease with the Boy Scouts based on the Boy Scouts’ policies regarding homosexual conduct); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2nd Cir. 2003) (holding that the Boy Scouts may be excluded from the state’s workplace charitable contributions campaign for denying membership to openly gay individuals).

¹⁰ 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

- Religious fraternal organizations or non-profits that object to same-sex marriage can be denied food service licenses, child-care licenses, or liquor licenses on the ground that they are engaged in unlawful discrimination.¹¹
- Religious universities or professional schools can have their accreditation revoked for refusing to recognize the validity of same-sex marriages.¹²
- Church-affiliated organizations can have their tax exempt status stripped because of their conscientious objections to same-sex marriage.¹³

All of these conflicts either did not exist before, or will be significantly intensified after, the legalization of same-sex marriage. It is, of course, impossible to predict the outcome of future litigation over these conflicts, and religious liberty advocates will litigate these claims vigorously under any protections available under state and federal

Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families, BOSTON GLOBE, June 25, 2006, at A1 (explaining how Massachusetts threatened to revoke the adoption license of Catholic Charities for refusing on religious grounds to place foster children with same-sex couples); Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 BYU J. PUB. L. 475 (2008) (describing dismissals and resignations of social services workers where conscience protections were not provided).

¹¹ Stern at 19-22 (noting that many state regulators condition licenses on nondiscrimination requirements).

¹² 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>.

¹³ Jill P. Capuzzo, *Group Loses Tax Break Over Gay Union Issue*, N.Y. TIMES, Sept. 18, 2007 (describing the case of *Bernstein v. Ocean Grove Camp Meeting Ass'n*, in which the state of New Jersey revoked the property tax exemption of a beach-side pavilion owned and operated by a Methodist Church, because the Church refused on religious grounds to host a same-sex civil union ceremony); Douglas W. Kmiec, Pepperdine Law School, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 107-121 (describing attacks on tax exemptions for religious organizations with objections to same-sex marriage); Jonathan Turley, George Washington University Law School, *An Unholy Union* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 59-76 (arguing for same-sex marriage but against withdrawal of tax exemptions for religious organizations with conscientious objections).

law. At a minimum, however, the volume of new litigation will be immense. And religious liberty advocates can also be expected to sue state and local governments for implementing, or even considering implementing, policies that harm conscientious objectors. Thus, two things are certain: S.P. 384, in its current form, will have numerous unintended and detrimental effects on religious organizations and individuals. And it will spawn years of costly litigation, not only for religious organizations and individuals, but for small businesses owned by conscientious objectors across the state.

Examples of conflicts in Maine

To take just one specific example of conflict, many universities in Maine, including religious institutions such as Saint Joseph's College, can choose to provide special married student housing to their students. Enacting S.P. 384 with inadequate religious-conscience protections, however, would force religious universities either to extend married student housing benefits to same-sex couples, thus violating their religious beliefs, or to eliminate the housing benefit altogether.¹⁴ That would benefit neither education nor the state.

Moreover, legal recognition of same-sex marriage would create entirely new classes of litigation activity. For example, Maine's sexual orientation discrimination statutes contain accommodations for certain religious organizations.¹⁵ But with the codification of same-sex marriage, a plaintiff could bring the exact same claim under Maine's gender discrimination or marital status discrimination laws,¹⁶ none of which include religious accommodations. At a minimum, changes to the marital status and

¹⁴ See 5 ME. REV. STAT. ANN. § 4602 (making it unlawful for educational institutions to “[a]pply any rule concerning the actual or potential family or marital status of a person”); see also Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22(2) *BYU JOURNAL OF PUBLIC LAW* 475 (2008) (providing numerous examples of organizations that have exited the market when put to the choice of serving everyone, including same-sex couples, or serving no one); 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 (Catholic Charities, Massachusetts’ largest adoption agency, stopped providing adoption services altogether due to conscientious objection).

¹⁵ 5 ME. REV. STAT. ANN. § 4553 (“a religious corporation, association or organization that does not receive public funds is exempt from this provision with respect to: (1) Employment, as is more fully set forth in section 4553, subsection 4 and section 4573-A; (2) Housing, as is more fully set forth in section 4553, subsection 6, paragraph C; and (3) Educational opportunity, as is more fully set forth in section 4602, subsection 4.”); 5 ME. REV. STAT. ANN. § 4602(4) (“The provisions in this subsection relating to sexual orientation do not apply to any education facility owned, controlled or operated by a bona fide religious corporation, association or society.”).

¹⁶ 5 ME. REV. STAT. ANN. §§ 4571, 4572 (employment); §§ 4581, 4582 (housing); §§ 4591, 4592 (public accommodations); §§ 4601, 4602 (education).

gender discrimination statutes should be made as “part of a legislative package” with same-sex marriage.¹⁷

Precedent for providing religious accommodations

This wave of conflict between same-sex marriage and religious liberty is avoidable.¹⁸ But it is avoidable only if the Legislature takes the time and effort required to craft the “robust religious-conscience exceptions” to same-sex marriage that leading voices on both sides of the public debate over same-sex marriage have called for.¹⁹

Maine would not be breaking any new ground by providing religious accommodations. Other states have already provided religious accommodations in their same-sex marriage legislation. In Vermont, for example, the same sex marriage bill includes protections for religious organizations that refuse to provide “services, accommodations, advantages, facilities, goods, or privileges” related to the solemnization or celebration of a marriage.²⁰ And in Connecticut, the same-sex marriage bill includes protection from “state action to penalize or withhold benefits” from religious organizations,²¹ and protections for religious organizations that provide “adoption, foster care or social services.”²²

Although Vermont’s and Connecticut’s protections are important, they leave out a number of the foreseeable collisions between same-sex marriage and religious liberty described above. In Connecticut, for example, a Catholic university that offers married-student housing would have to offer housing to married same-sex couples or risk violating state law. Similarly—and sadly—neither state protects individuals or small businesses. So, for example, wedding advisors, photographers, bakers, and caterers

¹⁷ Stern at 57.

¹⁸ See, e.g., Laycock at 192-194 (describing “avoidable conflicts”).

¹⁹ David Blankenhorn and Jonathan Rauch, *A Reconciliation on Gay Marriage*, NEW YORK TIMES, Feb. 22, 2009, at WK11, available at http://www.nytimes.com/2009/02/22/opinion/22rauch.html?_r=1 (arguing for recognition of same-sex unions together with religious-conscience protections).

²⁰ See 18 VT. STAT. ANN. § 5144(b) (clergy solemnization); 8 VT. STAT. ANN. § 4501(b) (fraternal benefit societies); 9 VT. STAT. ANN. § 4502(l) (public accommodations laws not applied to accommodations related to the celebration or solemnization of marriage), available at <http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf>.

²¹ See CONN. PUBLIC ACT 09-13 § 501, available at <http://www.cga.ct.gov/2009/AMD/S/2009SB-00899-R00SA-AMD.htm>.

²² See CONN. PUBLIC ACT 09-13 § 503, available at <http://www.cga.ct.gov/2009/AMD/S/2009SB-00899-R00SC-AMD.htm>.

who prefer to step aside from same-sex ceremonies for religious reasons receive no protection. Despite these shortcomings, however, the fact that both Vermont and Connecticut adopted conscience protections in their same-sex marriage bills confirms an important principle: the conflicts between same-sex marriage and religious liberty are real, and they deserve legislative attention.

Maine's existing laws provide additional precedent for religious accommodations. For example, as noted above, Maine's sexual orientation discrimination statutes contain important accommodations for certain religious organizations.²³ Similarly, federal statutes provide protections for religious and conscientious objectors in many different contexts.²⁴ In short, protecting conscience is very much part of the American, and Maine, tradition. The Legislature should make the effort to continue that tradition.

Inadequacy of existing religious accommodations

Some may argue that Section 5 of S.P. 384 already provides sufficient protection for religious conscience. Section 5 provides:

This Part does not authorize any court or other state or local governmental body, entity, agency or commission to compel, prevent or interfere in any way with any religious institution's religious doctrine, policy, teaching or solemnization of marriage within that particular religious faith's tradition as guaranteed by the Maine Constitution, Article 1, Section 3 or the First Amendment of the United States Constitution. A person authorized to join persons in marriage and who fails or refuses to join persons in marriage is not subject to any fine or other penalty for such failure or refusal."²⁵

This provision is a good start, but it has several serious deficiencies. First it protects only "religious institution[s]." Unlike other Maine laws, it does not protect reli-

²³ 5 ME. REV. STAT. ANN. § 4553 ("a religious corporation, association or organization that does not receive public funds is exempt from this provision with respect to: (1) Employment, as is more fully set forth in section 4553, subsection 4 and section 4573-A; (2) Housing, as is more fully set forth in section 4553, subsection 6, paragraph C; and (3) Educational opportunity, as is more fully set forth in section 4602, subsection 4."); 5 ME. REV. STAT. ANN. § 4602(4) ("The provisions in this subsection relating to sexual orientation do not apply to any education facility owned, controlled or operated by a bona fide religious corporation, association or society.").

²⁴ 32 C.F.R. § 1630.11 (accommodating conscientious objectors to military service); 42 U.S.C. § 300a-7 (accommodating health care professionals who conscientiously object to participating in medical procedures such as abortion or sterilization); 42 U.S.C. § 2000bb *et seq.* (Religious Freedom Restoration Act lifts government-created burdens on religious exercise).

²⁵ S.P. 384 § 5, available at http://www.mainelegislature.org/legis/bills/bills_124th/billpdfs/SP038401.pdf.

gious individuals (including small business owners) and it does not clearly protect non-profit organizations that are controlled or operated by a religious institution. Thus, Section 5 notwithstanding, wedding advisors, photographers, bakers, and caterers can be forced to participate in a same-sex marriage ceremony in violation of their religious beliefs. Similarly, a nonprofit social service organization, such as Mercy Hospital, which is sponsored by the Roman Catholic Church, could be forced to provide its employees with same-sex spousal benefits in violation of its religious beliefs.

Second, Section 5 protects only a religious institution's "doctrine, policy, teaching or solemnization of marriage." Protections for "doctrine," "teaching," and "solemnization" are largely unnecessary because such blatant interference with the internal operations of a church would clearly violate the First Amendment.²⁶ The protection for "policy" is better, but quite vague. It unclear whether many, if any, of the conflicts mentioned above would fit the definition of a religious "policy."

Finally, Section 5 protects only those rights that are already "guaranteed by the Maine Constitution . . . or the First Amendment of the United States Constitution." This language renders Section 5 both superfluous and narrow. It is superfluous because, by its own terms, Section 5 provides only those rights that are already "guaranteed" by the United States Constitution. It is narrow because, under the Supreme Court's current interpretation of the Constitution, many of the religiously-motivated actions listed above will not qualify as rights "guaranteed by . . . the First Amendment," and will therefore be completely unprotected.²⁷

Proposed conscience protection

Because Section 5 is too vague and narrow to cover most of the conflicts listed above, stronger, more specific protection is needed. Maine can provide that protection by adopting a simple "marriage conscience protection" modeled on the existing language in Maine's sexual orientation discrimination laws. The "marriage conscience protection" would provide as follows:

²⁶ See Stern at 1 ("No one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them.").

²⁷ See *Employment Div., Dept. of Human Resources of Oregon 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).

No individual, no religious corporation, association or organization, and no nonprofit organization owned, controlled or operated by a bona fide religious corporation shall be penalized or denied benefits under the laws of this state or any subdivision of this state, including but not limited to laws regarding employment discrimination, housing, public accommodations, licensing, government grants or contracts, or tax-exempt status, for refusing to provide services, accommodations, advantages, facilities, goods, or privileges related to the solemnization of any marriage, for refusing to solemnize any marriage, or for refusing to treat as valid any marriage, where such providing, solemnizing, or treating as valid would cause that individual, corporation, association or organization to violate their sincerely held religious beliefs, *provided* that

- (a) a refusal to provide services, accommodations, advantages, facilities, goods, or privileges related to the solemnization of any marriage shall not be protected under this section where (i) a party to the marriage is unable to obtain any similar services, accommodations, advantages, facilities, goods, or privileges elsewhere and (ii) such inability to obtain similar services, accommodations, advantages, facilities, goods, or privileges elsewhere constitutes a substantial hardship; and
- (b) no government official may refuse to solemnize a marriage if another government official is not available and willing to do so.

This language has several important benefits. First, as noted above, it is modeled on existing protections in Maine law for any “religious corporation, association or organization” and for organizations “owned, controlled or operated by a bona fide religious corporation, association or society.”²⁸ This language also provides vital protections for religious individuals who own small businesses.

Second, unlike the vague protection for “policy” in Section 5 of S.P. 384, this language grants specific protections modeled on the Vermont and Connecticut same-sex marriage laws. Those laws protect the conscientious refusal “to provide services, accommodations, advantages, facilities, goods, or privileges . . . related to the solemnization of a marriage.”²⁹

²⁸ See 5 ME. REV. STAT. ANN. § 4553; 5 ME. REV. STAT. ANN. § 4602(4).

²⁹ 9 VT. STAT. ANN. § 4502(1) (2009), available at <http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf>; CONN. PUBLIC ACT 09-13 § 501, available at <http://www.cga.ct.gov/2009/AMD/S/2009SB-00899-R00SA-AMD.htm>.

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

Fourth, this language provides protection only where providing services related to a marriage, solemnizing a marriage, or being forced to treat a marriage as valid would “violate . . . sincerely held religious beliefs.” This phrase is drawn from numerous court cases discussing the First Amendment to the U.S. Constitution and ensures that the religious-conscience protection will apply only to a “violation” of “sincere” and “religious” beliefs—not to situations that merely make religious people uncomfortable, not to insincere beliefs asserted as a pretext for discrimination, and not to non-religious moral beliefs.

Finally, this language recognizes that religious accommodations might not be without cost for same-sex couples, such as the need to find a new wedding photographer or caterer if the original choice must step aside for reasons of conscience. In order to address this issue, the proposed language ensures that a same-sex couple can obtain service, even from conscientious objectors, when the inability to find similar service elsewhere would impose an undue 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. The language also ensures that no government employee (such as a court 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 available and willing to do so. These sorts of hardship protections are common in other laws protecting the right of conscientious objection.³⁰

In short, this “marriage conscience protection” would alleviate the vast majority of conflict between same-sex marriage and religious liberty, while still allowing for full recognition of same-sex marriages. It has ample precedent in both Maine and federal law. And it represents the best in the American and Maine tradition of protecting freedom of conscience.

³⁰ See, e.g., 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.”).

Conclusion

Enacting S.P. 384 without robust religious accommodations will lead to damaging, widespread, and unnecessary conflict between same-sex marriage and religious liberty. The Legislature should avoid that conflict by crafting an appropriate religious accommodation provision. On that note, we would welcome any opportunity to provide further information, analysis, or testimony to the Legislature.

Very truly yours,³¹

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