

May 17, 2011

**BY EMAIL AND POST**

**The Honorable Dean G. Skelos  
State of New York  
188 State Street  
Legislative Office Building Room 909  
Albany, NY 12247**

**Re: Religious Liberty Implications of Legalizing Same-Sex Marriage**

Dear Senator Skelos:

We write to urge the New York State Legislature 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. Providing religious protections in any same-sex marriage bill honors America's long and rich tradition of religious freedom and tolerance.

If the Legislature legalizes same-sex marriage, it is possible to do so without infringing on religious liberty. The contentious debate in Maine, California, Maryland 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.

This letter analyzes the potential effects of same-sex marriage on religious conscience in New York and proposes a solution to address the conflicts: a specific religious liberty protection that should be an integral part of any proposed legislation, clarifying 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 substantial hardship for the couple seeking the service. We write not to support or oppose same-sex marriage in New York. Rather, our aim is to define a "middle way" to address the needs of same-sex couples while honoring and respecting religious liberty.<sup>1</sup>

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 New York State Legislature to take the time and care 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 New York State Constitution

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<sup>1</sup> 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.

that each member of the Legislature has sworn to uphold and protect. From its first constitution in 1777 to the present text, the New York Constitution has always protected religious freedom.<sup>2</sup>

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.<sup>3</sup> But they are avoidable only if the New York State Legislature 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.<sup>4</sup> The juncture for balancing religious liberty and legal recognition of same-sex unions is now.<sup>5</sup>

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 New York’s nondiscrimination laws.<sup>6</sup> The “marriage conscience protection” would provide as follows:

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<sup>2</sup> See N.Y. CONST., art. 1, sec. 3.

<sup>3</sup> See, e.g., Douglas Laycock, University of Virginia School of Law, *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) [hereinafter Laycock] (detailing the scope of “avoidable” and “unavoidable” conflicts).

<sup>4</sup> 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](http://www.nytimes.com/2009/02/22/opinion/22rauch.html?_r=1) (arguing for recognition of same-sex unions together with religious conscience protections).

<sup>5</sup> 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.

<sup>6</sup> See, e.g., N.Y. Exec. Law § 296(11) (“Nothing contained in this section shall be construed to bar 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 limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.”).

**Section \_\_\_\_**

**(a) Religious organizations protected.**

No religious or denominational organization, no organization operated for charitable or educational purposes which is supervised or controlled by or in connection with a religious organization, and no individual employed by any of the foregoing organizations, while acting in the scope of that employment, shall be required to

- (1) provide services, accommodations, advantages, facilities, goods, or privileges for a purpose related to the solemnization or celebration of any marriage; or
- (2) solemnize any marriage; or
- (3) treat as valid any marriage

if such providing, solemnizing, or treating as valid would cause such organizations or individuals to violate their sincerely held religious beliefs.

**(b) Individuals and small businesses protected.**

- (1) Except as provided in paragraph (b)(2), no individual, sole proprietor, or small business shall be required to
  - (A) provide goods or services that assist or promote the solemnization or celebration of any marriage, or provide counseling or other services that directly facilitate the perpetuation of any marriage; or
  - (B) provide benefits to any spouse of an employee; or
  - (C) provide housing to any married couple

if providing such goods, services, benefits, or housing would cause such individuals or sole proprietors, or owners of such small businesses, to violate their sincerely held religious beliefs.

- (2) Paragraph (b)(1) shall not apply if

- (A) a party to the marriage is unable to obtain any similar good or services, employment benefits, or housing elsewhere without substantial hardship; or

- (B) in the case of an individual who is a government employee or official, if another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay; *provided that* no judicial officer authorized to solemnize marriages shall be required to solemnize any marriage if to do so would violate the judicial officer's sincerely held religious beliefs.
- (3) A "small business" within the meaning of paragraph (b)(1) is a legal entity other than a natural person
  - (A) that provides services which are primarily performed by an owner of the business; or
  - (B) that has five or fewer employees; or
  - (C) in the case of a legal entity that offers housing for rent, that owns five or fewer units of housing.

**(c) No civil cause of action or other penalties.**

No refusal to provide services, accommodations, advantages, facilities, goods, or privileges protected by this section shall

- (1) result in a civil claim or cause of action challenging such refusal; or
- (2) result in any action by the State or any of its subdivisions to penalize or withhold benefits from any protected entity or individual, under any laws of this State or its subdivisions, including but not limited to laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status.<sup>7</sup>

This proposed legislation has several important benefits. First, the language parallels existing protections in New York nondiscrimination law for any "religious or denominational

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<sup>7</sup> Some have expressed concern that the proposed text would permit objections to interracial marriage. Although such objections are likely to be rare, if not non-existent, this concern is readily addressed by a simple proviso that would read: "Notwithstanding any of the foregoing provisions, this section does not change any provision of law with respect to discrimination on the basis of race."

institution or organization.”<sup>8</sup> The language also significantly mirrors, in part, the express protections provided in the Vermont, Connecticut, New Hampshire, and District of Columbia 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.”<sup>9</sup>

Second, this proposed legislation lists the primary areas of New York 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 proposed legislation 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 proposed legislation 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 Parts C and F below.

Finally, this proposed legislation 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

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<sup>8</sup> N.Y. Exec. Law § 296(11).

<sup>9</sup> See 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); 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); 9 VT. STAT. ANN. § 4502(l) (2009) (exempting religious organizations from “provid[ing] services, accommodations, advantages, facilities, goods, or privileges . . . related to” the “solemnization” or “celebration” of a marriage). See also 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/lms/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...”).

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. The language in subsection (b)(2)(B) also ensures that no government employee or official (such as a county clerk) may act as a choke point on the path to marriage. So, for example, no government employee can refuse on grounds of conscience to issue a marriage license unless another government employee is promptly available and willing to do so. These sorts of override protections are common in other laws protecting the right of conscientious objection, especially in the health care context.<sup>10</sup>

## **B. Precedent for Religious Conscience Protections**

There is ample precedent for the type of conscience protection we have proposed. As noted above, Connecticut, Vermont, New Hampshire, and the District of Columbia have already enacted religious exemptions as part of their same-sex marriage implementation legislation.<sup>11</sup> Similarly, New York's existing nondiscrimination laws on employment provide exemptions for religious organizations in certain circumstances.<sup>12</sup> And federal nondiscrimination statutes provide protection for religious and conscientious objectors in many different contexts.<sup>13</sup> In short, protecting religious conscience is very much a part of America's, and New York's, tradition. We urge the New York State Legislature to continue that "middle way" accommodation of interests.

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<sup>10</sup> 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.").

<sup>11</sup> See note 9 above and pages 14-15 below.

<sup>12</sup> See N.Y. Exec. Law § 296(11) ("Nothing contained in this section shall be construed to bar 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 limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.").

<sup>13</sup> 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).

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 New York and U.S. law. And it represents the best in the American and New York 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,<sup>14</sup> legal scholars on both sides of the same-sex marriage debate agreed that codifying same-sex marriage *without* providing robust religious accommodations will create widespread and unnecessary legal conflicts—conflicts that will work a “sea change in American law” and will “reverberate across the legal and religious landscape.”<sup>15</sup> 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.<sup>16</sup>

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<sup>14</sup> SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds. (Rowman & Littlefield 2008) (including contributions 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).

<sup>15</sup> *Id.* Marc Stern, *Same-Sex Marriage and the Churches* at 1 [hereinafter “Stern”]. See also Laycock at 191-7 (detailing the scope of “avoidable” and “unavoidable” conflicts).

<sup>16</sup> See N.Y. Exec. Law § 296(11) (public accommodations law providing some protection for “charitable” organizations and “religious or denominational institutions,” but not private individuals); *Elane Photography v. Willock*, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. Ct.) (filed July 1, 2008) (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”].

- 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.<sup>17</sup>
- 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.<sup>18</sup>

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.<sup>19</sup>

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<sup>17</sup> *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 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).

<sup>18</sup> Stern at 48-52; Issues Brief at 3-5. New York’s scant religious exemption from employment discrimination laws does not cover every possible situation. *See* N.Y. Exec. Law § 296 (11) (“Nothing contained in this section shall be construed to bar any religious or denominational institution or organization . . . from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.”).

<sup>19</sup> *See* N.Y. Exec. Law § 312 (prohibiting discrimination by all state contractors); *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).



- 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.<sup>20</sup>
- Doctors, psychologists, social workers, counselors, and other professionals who conscientiously object to same-sex marriage can have their licenses revoked.<sup>21</sup>
- 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.<sup>22</sup>
- Religious colleges or professional schools can have their accreditation revoked for refusing to recognize the validity of same-sex marriages.<sup>23</sup>
- Church-affiliated organizations can have their tax exempt status stripped because of their conscientious objection to same-sex marriage.<sup>24</sup>

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<sup>20</sup> 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. Wymann*, 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).

<sup>21</sup> 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).

<sup>22</sup> See, e.g., N.Y. Comp. Codes R. & Regs. tit. 18, § 421.16 (H) (2011) (forbidding adoption agencies from discriminating in the selection of adoptive parents on the basis of sexual orientation or marital status); see also Stern at 19-22 (noting that many state regulators condition licenses on compliance with nondiscrimination requirements).

<sup>23</sup> 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>.

<sup>24</sup> 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, Pepperdine University

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.*<sup>25</sup>

#### **D. The Need for Robust Religious Liberty Protection**

In 2009, the New York State Legislature considered A07732 and S04401. These bills failed to provide sufficient protections for religious conscience. Section 4 of the bills stated, “no clergyman, minister or Society for Ethical Culture leader shall be required to solemnize any marriage.”<sup>26</sup> Those bills offered *no protection* to those with conscientious religious objections to same-sex marriage.

As explained below, *this provision would have provided less protection for religious liberty than every other state that has successfully enacted same-sex marriage legislation.* The bills conferred on religious organizations only that protection already guaranteed by the U.S. Constitution and New York Constitution. Individual clergy or religious organizations that 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

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School of Law, *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, 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).

<sup>25</sup> 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 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% . . .”).

<sup>26</sup> Assembly Bill A07732 §4 (2009) and Senate Bill S04401 §4 (2009).

will be forced, or even asked, to perform marriages that are anathema to them.”<sup>27</sup> Focusing on the issue of “forced officiating” is a straw-man argument calculated to distract the uninformed from real situations where religious conscience is at risk.

What the proposed legislation left out was 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 New York’s nondiscrimination laws.

This proposed legislation was grossly lacking as the following Parts explain in more detail.

#### **E. No Protection from Government Penalty**

A good deal of misunderstanding surrounds religious liberty exemptions. Exemptions serve the important function of protecting conscientious objectors from private lawsuits. But exemptions also serve the purpose of insulating conscientious objectors from penalties at the hands of the government.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

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<sup>27</sup> Stern at 1.

<sup>28</sup> 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.

<sup>29</sup> 304 F. Supp. 2d 77 (D. Me. 2004); *see also* footnote 17 above.

<sup>30</sup> *See* Don Lattin, *Charities Balk at Domestic Partner, Open Meeting Laws*, S.F. CHRON., July 10, 1998, at A-1.

<sup>31</sup> *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*

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.<sup>32</sup> Local authorities stripped the group of their exemption from local property taxes on the pavilion, and billed them for \$20,000.<sup>33</sup>

The Camp Meeting Association did not just lose its tax exemption from taxes on the pavilion. 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.<sup>34</sup>

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*Council v. City of Philadelphia*, 2008 WL 4399025 (E.D. Pa. Sept. 25, 2008) (dismissing breach of contract complaints arising from city's termination of 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).

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.

<sup>32</sup> 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*).

<sup>33</sup> See Bill Bowman, *\$20G Due in Tax on Boardwalk Pavilion: Exemption Lifted in Rights Dispute*, ASBURY PARK PRESS, Feb. 23, 2008.

Some exemption opponents 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 governments can 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 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.

<sup>34</sup> As the Third Circuit explained, "The federal complaint arose out of the [New Jersey Department of Civil Rights] investigation into whether the Association's refusal to permit couples to use the Boardwalk

These impacts on church-affiliated organizations, predicted by scholars,<sup>35</sup> 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.<sup>36</sup>

#### F. 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.

The two same-sex marriage legalization bills from 2009 did 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 making 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.<sup>37</sup> The failure to protect such individuals puts the individual to a cruel choice: your conscience or your livelihood.<sup>38</sup>

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Pavilion for civil unions violates the [New Jersey Law Against Discrimination]. 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).

<sup>35</sup> Douglas W. Kmiec, Pepperdine University School of Law, *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, 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).

<sup>36</sup> To make matters worse, New York is one of only a handful of states that have both interpreted their state constitutional religious freedom protections narrowly and have declined to pass a state Religious Freedom Restoration Act. See State Religious Freedom Map, available at <http://law.ucla.edu/volokh/religionmap.jpg> The New York Court of Appeals applies a mere weak intermediate scrutiny to religious exercise claims made under the New York Constitution. See *Catholic Charities v. Sepio*, 7 N.Y.3d 510, 525 (2006). Thus, religious objectors receive *de minimis* protections under state law beyond the narrow protections of the federal constitution under *Employment Division v. Smith*, 494 U.S. 872 (1990).

<sup>37</sup> See *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).

<sup>38</sup> 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).

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 burgers and 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.<sup>39</sup>

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 substantial hardship on same-sex couples.<sup>40</sup>

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<sup>39</sup> 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*, 2009 WL 2222884 at \*3 (9th Cir. Jan. 13, 2009) (Order of Kozinski, C.J.) (construing Ninth Circuit benefits policy to include same-sex spouses because denial of benefits to same-sex marriage was form of sex-based discrimination); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality op.) (discrimination by state against same-sex spouses raised difficult constitutional questions regarding sex discrimination and sexual-orientation 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).

<sup>40</sup> *See* Part A above.

### **G. No Robust and Uniform Protection for Religious Organizations**

New York's existing laws provide additional precedent for religious accommodations. For example, New York's Human Rights Law contains important accommodations for certain religious organizations.<sup>41</sup> Similarly, federal statutes provide protections for religious and conscientious objectors in many different contexts.<sup>42</sup> In short, protecting conscience is very much part of the American, and New York, tradition. The Legislature should make the effort to continue that tradition.

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.<sup>43</sup>

Past legislative attempts in New York to legalize same-sex marriage would have provided *much less* protection than *every other jurisdiction* where the legislature has considered the issue.<sup>44</sup> Connecticut, New Hampshire, Vermont, and the District of Columbia have all enacted same-sex marriage laws, and all provide much more protection for religious liberty than this.<sup>45</sup>

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<sup>41</sup> N.Y. Exec. Law § 296(11) (“Nothing contained in this section shall be construed to bar 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 limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.”)

<sup>42</sup> 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).

<sup>43</sup> *See, e.g.*, footnotes 16-18, above.

<sup>44</sup> *See* Part D above.

<sup>45</sup> 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 ...

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.<sup>46</sup> Although the protections in Connecticut, New Hampshire, Vermont, and the District of Columbia also fall short in key areas,<sup>47</sup> they still provide far more protection than New York’s previously proposed same-sex 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 same-sex marriage and religious liberty. That is a needless and destructive path where both sides lose. There is a balanced “middle way.” The New York State Legislature 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 Legislature.

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related to” the “solemnization” or “celebration” of a marriage, and providing separate exemptions for religious adoption agencies and fraternal benefit societies); 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); 9 VT. STAT. ANN. § 4502(l) (2009) (exempting religious organizations from “provid[ing] services, accommodations, advantages, facilities, goods, or privileges ... related to” the “solemnization” or “celebration” of a marriage).

<sup>46</sup> *Id.*

<sup>47</sup> 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,<sup>48</sup>

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<sup>48</sup> Academic and organizational affiliation is indicated for identification purposes only. The universities and organizations that employ the signers take no position on this or any other bill.