

October 5, 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: Balancing Recognition of Same-Sex Marriage with Religious Liberty

Dear Governor Baldacci:

We write again to urge you and members of the Maine Legislature to ensure that Maine's same-sex marriage law, Public Law 2009 Chapter 82, does not infringe on the religious liberty of organizations and individuals who have a traditional view of marriage. It is not only possible to legalize same-sex marriage without infringing on religious liberty, it is the wise course. The contentious debate surrounding Question 1 on the November 3rd ballot proves the wisdom of constructive, good-faith attempts to both legally recognize same-sex marriage *and* protect religious liberty for conscientious objectors.

Our letter of May 1, 2009, offered such a solution: a narrow religious liberty exemption to Maine's new same-sex marriage law that would clarify that people and organizations may refuse to provide services for same-sex weddings if doing so would violate deeply held beliefs, *provided* the refusal creates no hardship for the couple seeking the service. Our letter was written to encourage a concrete, legislative solution that avoids the inevitable conflicts between same-sex marriage laws and religious freedom. Our letter was never intended, however, as a contribution to the current political debate in Maine about the merits of same-sex marriage—although it unfortunately is being used by both supporters of Question 1 (in radio and TV ads) and opponents of Question 1 for that purpose.

As Maine outsiders, we have the luxury of standing back and critically appraising the likely conflicts raised by *any* same-sex marriage law that offers no explicit protection—or meaningless protection—for conscientious objectors. Indeed, we predicted sharp division among the people of Maine if both sides were not accommodated. While the four of us have a range of views on same-sex marriage, we wholeheartedly share the belief that when same-sex marriage is recognized, as it has been in Maine, it should be accompanied by robust protections for religious liberty.

A. The Need for Robust Religious Liberty Protection

At present, Public Law 2009 Chapter 82 offers no real protection to conscientious objectors. Section 3 provides that:

3. Affirmation of religious freedom. 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.

By its own terms, it confers on religious organizations only those protections already guaranteed by the U.S. and Maine Constitutions. Individual clergy who refuse to perform same-sex marriage receive ersatz protection, for they are already protected by the U.S. Constitution. To its credit, Section 3 extends the protection clergy have always received to other authorized celebrants.

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, other than clergy and authorized celebrants.
- It provides no protection to religious organizations from suit under Maine's anti-discrimination laws. As we explain more fully below, some of these laws contain narrow exemptions for "religious or fraternal corporations or associations" while others have no exemption at all. Yet laws banning sexual-orientation, gender, and marital-status discrimination have all been used to penalize objectors who, for religious reasons, cannot recognize or facilitate a same-sex marriage.

This letter first details these omissions in Maine's same-sex marriage law and then describes steps that may be taken now to close those gaps.

B. No Protection from Government Penalty

A good deal of misunderstanding surrounds religious liberty exemptions. Exemptions serve the important function of protecting conscientious objectors from suit, as the September 18, 2009 Memorandum to Members of Maine Media ("September 18th Memo") correctly observes. But exemptions also serve the purpose of insulating conscientious objectors from penalties at the hands of the government.¹ 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*,² 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. Outside Maine, the Salvation Army lost \$3.5 million in social service contracts with the City of San Francisco because it refused, on religious grounds, to

¹ Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS*, Douglas Laycock, Anthony R. Picarello, Jr. and Robin Fretwell Wilson, eds. (Rowman & Littlefield 2008), at 81.

² 304 F. Supp. 2d 77 (D. Me. 2004). See also 5 ME. REV. STAT. ANN § 784 (prohibiting discrimination by all entities contracting with the state).

provide benefits to the same-sex partners of its employees.³ 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.⁴

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 a Methodist Church, refused on religious grounds to host the same-sex civil union ceremonies of two lesbian couples in its beach-side pavilion.⁵ Local authorities stripped the group of their exemption from local property taxes, and billed them for \$20,000.⁶

These impacts on church-affiliated organizations, predicted by scholars,⁷ did not result from a statutory revocation of tax-exempt status in New Jersey's civil union legislation. Instead, these actions occurred because no explicit exemption in state law provided otherwise. These experiences, inside and outside Maine, drive home the need for explicit protection from penalties by the government.

C. No Protection for Individual Objectors

Maine law extends to religious organizations a number of protections in certain contexts, as the September 18th Memo states. What is most notable about those limited protections

³ See Don Lattin, *Charities Balk at Domestic Partner, Open Meeting Laws*, S.F. CHRON., July 10, 1998, at A-1.

⁴ 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).

As the September 18th Memo explains, these results are possible because of the United States Supreme Court's decision in *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). The result goes to prove our point: that legislative relief is needed to protect religious conscience.

⁵ 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*).

⁶ See Bill Bowman, *\$20G due in tax on boardwalk pavilion: Exemption lifted in rights dispute*, APP.COM (February 23, 2008), <http://www.app.com/apps/pbcs.dll/article?AID=/20080223/NEWS/80223002/1004/NEWS01> (last visited April 12, 2008).

⁷ 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).

is what the September 18th Memo does not discuss. It does not acknowledge that legal recognition of same-sex marriage can place a real burden on individuals whose objection arises not from anti-gay animus, but from a sincere religious belief in traditional marriage.

Section 3 does 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.⁸ The failure to protect such individuals puts the individual to a cruel choice: your conscience or your livelihood.⁹

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, non-discrimination statutes enacted years before Public Law 2009 Chapter 82 now take on a whole new level of significance, with a much greater need for religious exemptions. Because Section 3 provides no protection to individual objectors (other than authorized celebrants), a refusal to assist with same-sex wedding ceremonies opens these individuals to suit, whether framed as sexual-orientation discrimination, sex discrimination, or, where applicable, marital-status discrimination.¹⁰

⁸ Maine's anti-discrimination statutes provide no exemptions for individuals. See 5 ME. REV. STAT. ANN § 784 (prohibiting discrimination by all entities contracting with the state).

Outside Maine, individual objectors have been fined for refusing on religious grounds to assist with same-sex commitment ceremonies. 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).

⁹ 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).

¹⁰ See *infra* note 18 (describing Ninth Circuit suits over refusals to recognize same-sex marriages brought under state gender discrimination laws).

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 thus 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 suits. This data is not available, however, and so cannot be empirically studied. There do not need to be many conflicts for there to be a major problem. Each conflict is a profound violation of religious conscience. The Sept. 18th Memo suggests there are few conflicts, but if true then fewer same-sex couples are affected by the religious exemptions we recommend.

A federal statutory provision exempts the Amish from paying social security,¹¹ contrary to the September 18th Memo. This shows that once again when a group of people has a clash of religious conscience, the common legislative response is an exemption.

Of course, accommodating individual objectors might not be without cost for same-sex couples. Thus, we argue only for “hardship exemptions”—individuals who act as choke point on the path to marriage, such as a clerk in the state licensure office, may refuse to provide a service only if another willing clerk is unavailable.

D. No Robust and Uniform Protection for Religious Organizations

Maine law prohibits discrimination based on sexual orientation, gender, and marital status, among other grounds. The obvious quandaries that bans on sexual-orientation discrimination would pose for religious organizations prompted the Maine Legislature to include specific exemptions for religious institutions in Maine’s sexual-orientation non-discrimination law. But these exemptions have significant holes in them; and other relevant non-discrimination laws seriously threaten religious freedom because they have no exemptions at all.

Maine’s exemptions permit religious institutions to limit employment to persons of the same faith and to require employees to conform to their tenets,¹² as the September 18th Memo notes. In addition, the section on sexual-orientation discrimination, Section 4553(10), exempts “religious corporation[s], association[s] or organization[s]” that do “not receive public funds” from the rules governing sexual-orientation discrimination in employment, housing, and educational opportunity—but not from laws prohibiting sexual-orientation discrimination in public accommodation or credit.¹³

The first two exemptions above are limited because they leave a religiously affiliated employer exposed to suit if it chooses to employ persons of other faiths (e.g., a Methodist employer is willing to hire an active Catholic, but not a lapsed Methodist still retaining church membership), or does not enforce its religious tenets in a manner that seems consistent to a judge or human-rights commission lawyer. The sexual-orientation exemptions do very little for religiously affiliated social-service providers that receive public funds. The September 18th Memo is notably silent on whether a nonprofit social service organization, like 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—because the hospital could be.

¹¹ Perhaps the September 18th Memo was confusing this situation with the fact that the Amish are not exempt from social security taxes when assessed on behalf of their employees. *U.S. v. Lee*, 455 U.S. 252 (1982).

¹² 5 ME. REV. STAT. ANN. § 4573-A(2) (religious association may employ individuals of the “same religion to perform work connected with the carrying on” of its activities, and may require its employees to “conform to the religious tenets” of the association); 5 ME. REV. STAT. ANN. § 4553(4) (definition of “employer” excludes non-profit “religious ... corporation or association ... with respect to employment of its members of the same religion”).

¹³ 5 ME. REV. STAT. ANN. § 4553(10)(G), which incorporates both § 4553(4), *supra*, concerning employment, and 5 ME. REV. STAT. ANN. § 4602(4) (exempting from the education provisions “any education facility owned, controlled or operated by a bona fide religious corporation, association or society”).

The lack of any exemptions for a public accommodation engaging in sexual-orientation discrimination is especially problematic.¹⁴ The statute defines “public accommodations” very broadly to include private schools, from nursery schools to colleges; virtually any private “social service center establishment”; and “any establishment that in fact caters to, or offers its goods, facilities or services to, or solicits or accepts patronage from, the general public.”¹⁵ This provision could not only allow suit against the small wedding photographer who declined to participate in a same-sex marriage ceremony. It could also allow suit, as we suggested in our first letter, against a nonprofit religiously affiliated counseling service that declined to counsel same-sex couples. It could allow suit against a religiously affiliated college for declining to extend married-student housing to same-sex couples.¹⁶ (It is entirely inadequate to dismiss this threat, as the September 18th Memo does, by pointing to one particular religious college that has not yet chosen to provide married-student housing.) In addition, Maine’s prohibition on discrimination by all entities contracting with the state provides no exemption for sexual-orientation discrimination.¹⁷

Moreover, Maine’s exemptions are mostly limited to claims of sexual-orientation discrimination and do not protect against claims of sex discrimination that might be made in this context. (For example, the educational-institution exemption in Section 4602(4) applies only to the educational-discrimination “provisions . . . relating to sexual orientation,” not to the separate sex-discrimination prohibition in Section 4602(1).) 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*,¹⁸ the court found an employer’s denial of coverage for an em-

¹⁴ See 5 ME. REV. STAT. ANN. §§ 4591, 4592; *id.* § 4553(10)(G) (including no exemption for sexual-orientation discrimination in public accommodations).

¹⁵ 5 ME. REV. STAT. ANN. § 4553(8)(J), (K), (N) (defining “place of public accommodation” to include any “public or private” “nursery, elementary, secondary, undergraduate or postgraduate school or other place of education,” or any “day-care center, senior citizen center, homeless shelter, food bank, adoption agency or other social service center establishment,” as well as establishments serving the “general public” as quoted in the text). The statute also defines discrimination by a place of public accommodation broadly to prohibit any denial of “the full and equal enjoyment” of any “advantages, facilities, goods, services or privileges.” *Id.* § 4592.

¹⁶ The exemption in § 4602(4) by its terms applies only to claims brought under “the provisions of this sub-section,” that is, to claims of discrimination in educational opportunity, not discrimination in public accommodations.

¹⁷ 5 ME. REV. STAT. ANN. § 784.

¹⁸ 560 F.3d 1145 (9th Cir. 2009). 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 spouses raised difficult constitutional questions regarding sex discrimination and sexual-orientation dis-

ployee's same-sex partner under the company's employment benefits plan to be sex discrimination. Absent explicit protection, an objector who refuses for religious reasons to recognize a same-sex marriage may be sued for gender or marital-status discrimination because the objector treated same-sex spouses differently than opposite-sex spouses.¹⁹

The threat of suits under local anti-discrimination ordinances poses an additional risk to religious conscience. For example, a City of Portland ordinance permits couples to create domestic partnerships and vests the partnerships with certain rights.²⁰ Although most of the responsibilities for compliance fall on the municipality, Section 13.6-34 is applicable to "any organization that accepts [certain] funds from the City." The ordinance contains no exemption for religious organizations. Thus, the receipt of a public benefit to do charitable services can be lost if the social service provider fails to meet all the obligations toward domestic partners that the municipality has imposed on itself. This, of course, is the ordinance enforced against a religious organization and previously referenced in *Catholic Charities of Maine v. City of Portland*.²¹ The free-exercise defenses raised by Catholic Charities predictably failed in this post-*Smith*²² era—reinforcing our point that legislative relieve is needed from the Maine Legislature.

Consider the City of Bangor, which prohibits discrimination based on sexual orientation with respect to employment; housing; public accommodations including K-12 schools, day care centers, hospitals, homeless shelters, food banks, and adoption agencies; credit extension; and education.²³ Bangor also prohibits discrimination on the basis of marital status with respect to credit and education.²⁴ Of course, marital status would now include those in same-sex marriages. While a provision of the ordinance exempts religious organizations from all these nondiscrimination requirements,²⁵ there is no religious exemption for individuals of conscience, sole proprietors, or for-profit corporations however small or closely held. Similarly, the City of Portland prohibits discrimination on the basis of sexual orientation in employment; housing; public accommodations; and credit extension.²⁶ There is an exemption from all these nondi-

crimination); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality op.) (discrimination by state against same-sex marriage was form of sex-based discrimination); *In re Marriage Cases*, 183 P.3d 384, 436-40 (Cal. 2008) (evaluating but ultimately rejecting claim of gender discrimination); cf. WIS. STAT. § 111.36(1)(d) (defining sexual-orientation discrimination as a form of gender discrimination).

¹⁹ We are not suggesting that such claims will win in every case, but they can plausibly be raised in a lawsuit and may win some of the time.

²⁰ Portland Code of Ordinances §§ 13.6-21 to 13.6-34.

²¹ 304 F. Supp.2d 77 (D. Me. 2004).

²² *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).

²³ Bangor City Code §§ 195-1 to 195-12.

²⁴ *Id.* at §§ 195-8, 195-9(C).

²⁵ *Id.* at § 195-12(B).

²⁶ Portland Code of Ordinances §§ 13.5-21 to 13.5-34.

scrimination requirements for religious organizations,²⁷ but no protection for individuals of conscience, sole proprietors, or for-profit corporations however small or closely held.

This hodge-podge, patchwork of narrow protections in some laws, and no protections in others, underscores the need for systematic, thoughtful exemptions that cover the range of predictable collisions over same-sex marriage. Those accommodations that are being extended are insufficient and haphazard. We are proposing a comprehensive, and in fact simplified and clearer, approach to the challenge of striking the right balance.

As the next section notes, changes to the sexual-orientation discrimination, sex discrimination, and other non-discrimination statutes can still be “part of the legislative package” with same-sex marriage.²⁸

E. Quelling Mounting Fears About Religious Liberty Concerns

The juncture for balancing religious liberty and legal recognition of same-sex unions in the text of Public Law 2009 Chapter 82 itself has passed. But this should not dissuade you and members of the Maine Legislature from acting now to quell mounting concerns about the impact of same-sex marriage on religious liberty.

It is not necessary to allow these fears to go unaddressed. As the Governor, you have the ability today to file a Bill Request to be considered in the next Legislative Session, which convenes on January 6, 2010.²⁹

We believe this step is warranted, whatever happens with Question 1. That is,

- If Public Law 2009 Chapter 82 is **approved** at referendum by the people of Maine, this Bill Request allows the Legislature to provide meaningful, much-needed protections for conscientious objectors at the earliest opportunity after the people of Maine have weighed in.
- If Public Law 2009 Chapter 82 is **rejected** at referendum by the people of Maine, this Bill Request will serve as a vehicle for new legislation that balances legal recognition of same-sex unions with robust religious liberty protections.

The Bill Request would provide “marriage conscience protection” as follows:

²⁷ *Id.* at § 13.5-34.

²⁸ Marc Stern, Assistant Executive Director, American Jewish Congress, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, Douglas Laycock, Anthony R. Picarello, Jr. and Robin Fretwell Wilson, eds. (Rowman & Littlefield 2008), at 57.

²⁹ Article IV, Part Third, Section 1 (limiting the business of the second regular session to legislation in the Governor’s call, among other things).

No individual, no religious corporation, association or organization, and no non-profit 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 advantages, as we noted in our letter to you of May 1, 2009. 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."³⁰ Second, it protects the conscientious refusal "to provide services, accommodations, advantages, facilities, goods, or privileges . . . related to the solemnization of a marriage,"³¹ as other states have done. Third, it lists 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, it 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." Finally, it recognizes that religious accommodations might not be without cost for same-sex couples. Thus, it ensures that a same-sex couple can obtain services, even from conscientious objectors, when the inability to find a similar service elsewhere would impose an undue hardship on the couple.

Maine would not be breaking new ground by providing religious liberty accommodations. Other states have provided religious accommodations in their same-sex marriage legislation. Vermont's and New Hampshire's same-sex marriage laws, for example, both include protections for religious organizations that refuse to provide "services, accommodations, advantag-

³⁰ See 5 ME. REV. STAT. ANN. § 4553; 5 ME. REV. STAT. ANN. § 4602(4).

³¹ 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>.

es, facilities, goods, or privileges" related to the solemnization or celebration of a marriage.³² And in Connecticut, the same-sex marriage bill includes protection from "state action to penalize or withhold benefits" from religious organizations,³³ and protections for religious organizations that provide "adoption, foster care or social services."³⁴

Although the cloture date for filing bills by individual legislators has passed, any member of the Maine Legislature is free to signal to you, and to the public, their support for the marriage conscience protection provision. Members can also file their own Bill Request, identical in substance to yours, despite the cloture date pursuant to Joint Rule 205.

Your resolute commitment, and the commitment of the Maine Legislature, to robust religious liberty accommodations would alleviate the vast majority of "avoidable" conflicts between same-sex marriage and religious conscience,³⁵ while still allowing for full recognition of same-sex marriages.

Conclusion

Crafting robust religious liberty accommodations to Maine's same-sex marriage law will ensure that same-sex marriage does not constrain the fundamental right of religious liberty. It would also go a long way to bringing much needed civil discourse to the debate over Question 1.

³² 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>; New Hampshire House Bill 73 § 2.

³³ See CONN. PUBLIC ACT 09-13 § 501, available at <http://www.cga.ct.gov/2009/AMD/S/2009SB-00899-R00SA-AMD.htm>.

³⁴ See CONN. PUBLIC ACT 09-13 § 503, available at <http://www.cga.ct.gov/2009/AMD/S/2009SB-00899-R00SC-AMD.htm>.

³⁵ See, e.g., Douglas Laycock, University of Michigan Law School, *Afterword*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, Douglas Laycock, Anthony R. Picarello, Jr. and Robin Fretwell Wilson, eds. (Rowman & Littlefield 2008), at 192-194 (describing "avoidable conflicts").

We would welcome any opportunity to provide further information, analysis, or testimony to the Legislature or to your staff. We write in our personal capacities, and the universities that employ us take no position on these issues.

Very truly yours,³⁶

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³⁶ Academic affiliation is indicated for identification purposes only.