

October 22, 2009

Chairman Vincent C. Gray
Council of the District of Columbia
1350 Pennsylvania Ave. NW
Room 504
Washington, DC 20004

Re: Religious Liberty Implications of D.C.'s Same-Sex Marriage Bill (18-482)

Dear Chairman Gray:

We write to urge the D.C. Council to ensure that D.C.'s same-sex marriage bill¹—the “Religious Freedom and Civil Marriage Equality Amendment Act of 2009” (or “D.C. Marriage Bill”)—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 in Maine, California and elsewhere surrounding same-sex marriage proves the wisdom of constructive, good-faith attempts to both legally recognize same-sex marriage *and* protect religious liberty for conscientious objectors.

This letter analyzes the effects of same-sex marriage on religious conscience in D.C. and proposes a solution to address the conflicts: a specific religious liberty protection in D.C.'s same-sex marriage bill 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 undue hardship for the couple seeking the service. We write not to support or oppose same-sex marriage in D.C. Rather, our aim is to define a “middle way” where both equality in marriage and religious liberty can be honored and respected.²

As this letter details, the conflicts between same-sex marriage and religious conscience will be 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 D.C. Council to take the time and care to ensure that the legalization of same-sex marriage does not restrict the inalienable right of religious liberty.

¹ Bill 18-482, available at <http://www.dccouncil.washington.dc.us/images/00001/20091008141223.pdf>.

² While we have a range of views on the underlying issue of recognizing same-sex marriage, we wholeheartedly share the belief that when it is recognized it should be accompanied by corresponding protections for religious liberty.

Part A of this letter proposes a specific religious conscience protection that will diffuse the vast majority of potential 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 strong protections for religious liberty. And Parts D through G detail the serious deficiencies in the religious conscience language currently under consideration in the D.C. Marriage Bill.

A. Proposed Religious Conscience Protection

The many potential conflicts between same-sex marriage and religious liberty are avoidable.³ But they are avoidable only if the D.C. Council 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.⁴ The juncture for balancing religious liberty and legal recognition of same-sex unions is now.

The D.C. Marriage Bill can provide strong, specific protections for religious conscience with only very minor modifications to the current Bill. Specifically, we recommend replacing Section 2(b) of the Marriage Bill with the following provision (added as a new subsection (c) to D.C. Code § 46-406):

(c) Notwithstanding any other provision of law, a religious organization, association or society, or a nonprofit organization which is operated, supervised, or controlled by or in conjunction with a religious organization, association or society, or an individual, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for a purpose related to the solemnization or celebration of a marriage, for refusing to solemnize any marriage, or for refusing to 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. Any refusal to provide services, accommodations, advantages, facilities, goods, or privileges under this section shall not create any civil claim or cause of action, or result in any District action to penalize or withhold benefits from such entity, under any laws of the District, including but not limited to laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status. *Provided that*

³ 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. & Robin Fretwell Wilson, eds. 191-97 (Rowman & Littlefield 2008) (detailing the scope of “avoidable” and “unavoidable” conflicts).

⁴ See David Blankenhorn & Jonathan Rauch, *A Reconciliation on Gay Marriage*, N.Y. TIMES, Feb. 22, 2009, at WK11, available at http://www.nytimes.com/2009/02/22/opinion/22rauch.html?_r=1 (arguing for recognition of same-sex unions together with religious conscience protections).

- (1) 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
- (2) no government employee may refuse to assist in the solemnization of any marriage under this section if another government employee is not available and willing to do so.

This language has several important benefits. First, this language is modeled on existing protections in D.C. law for “any religious organization, association, or society or non-profit organization which is operated, supervised or controlled by or in conjunction with a religious organization, association or society.”⁵ This language also follows specific protections provided in the Vermont, Connecticut, and New Hampshire same-sex marriage laws. Those state laws protect, among other things, the conscientious refusal “to provide services, accommodations, advantages, facilities, goods, or privileges . . . related to the solemnization of a marriage.”⁶ And, unlike the D.C. Marriage Bill, those state laws do not withdraw protection when the services are offered to the public.⁷

Second, this language lists the primary areas of D.C. 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 language 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

⁵ D.C. CODE § 2-1401.03(d).

⁶See 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); 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).

⁷ See pages 14-15 below (explaining deficiencies in the language of the D.C. Marriage Bill when compared with other states).

First Amendment to the U.S. Constitution and ensures that the religious conscience protections 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.

Fourth, this language 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, the *proviso* in the proposed language 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 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 *proviso* language also ensures that no government employee (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 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.⁸

Lastly, this language provides vital protections for individuals of religiously informed conscience who own sole proprietorships and small businesses.

B. Precedent for Religious Conscience Protections

There is ample precedent for the type of conscience protection we have proposed. As noted above, Connecticut, Vermont, and New Hampshire have already enacted religious exemptions as part of their same-sex marriage implementation legislation.⁹ Similarly, D.C.’s existing anti-discrimination laws provide precedent for accommodating religious organizations in certain circumstances when their actions serve a religious purpose.¹⁰ And federal anti-discrimination statutes provide protection for religious and conscientious objectors in many

⁸ 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.”).

⁹ See note 6 above and pages 14-15 below.

¹⁰ See D.C. CODE § 2-1401.03(b); D.C. CODE § 2-1401.03(d); D.C. CODE § 2-1402.41(3).

different contexts.¹¹ In short, protecting religious conscience is very much a part of the American, and the District's, tradition. We urge the D.C. Council to continue that "middle way" balancing of interests.

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

C. Conflicts Between Same-Sex Marriage and Religious Liberty

In the only comprehensive scholarly work on same-sex marriage and religious liberty,¹² 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.”¹³ 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 anti-discrimination act and other similar laws. So will many small businesses, which are owned by individual conscientious objectors. Likely lawsuits include claims where:

- A religious college not affiliated with a church or denomination, which offers special housing for married students, can be sued under housing discrimination laws for offering that same housing to opposite-sex, but not same-sex, married couples.¹⁴

¹¹ 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 government-created burdens on religious exercise).

¹² 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).

¹³ *Id.*, Marc Stern, Assistant Executive Director, American Jewish Congress, *Same-Sex Marriage and the Churches* at 1 [hereinafter “Stern”]. See also *id.*, Douglas Laycock, University of Michigan Law School, *Afterword* at 191-97 [hereinafter “Laycock”] (detailing the scope of “avoidable” and “unavoidable” conflicts).

¹⁴ 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, 35-36, available at <http://www.becketfund.org/files/34a97.pdf> [hereinafter “Issues Brief”].

- A religious school or college 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.¹⁵
- 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.¹⁶
- Religious summer camps, day care centers, retreat centers, counseling centers, 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.¹⁷
- 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.¹⁸

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

¹⁵ 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”).

¹⁶ See Stern at 37-39; see also Issues Brief at 3-5, 35-36; *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); *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).

¹⁷ 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 adoptions by same-sex couples).

¹⁸ Stern at 48-52; Issues Brief at 3-5, 35-36.

contracts or grants on the ground that it is engaging in discrimination that contravenes public policy.¹⁹

- 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.²⁰
- Doctors, psychologists, social workers, counselors, and other professionals who conscientiously object to same-sex marriage can have their licenses revoked.²¹
- Religious fraternal organizations or other nonprofits 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.²²
- Religious colleges or professional schools can have their accreditation revoked for refusing to recognize the validity of same-sex marriages.²³

¹⁹ See D.C. CODE § 2-305.08 (relieving D.C. of some of its contractual obligations when a government contractor “willfully fails to comply with the nondiscrimination provisions” of the D.C. Code); 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).

²⁰ See *Evans v. City of Berkeley*, 38 Cal.4th 1 (Cal. 2006) (affirming revocation of a boat berth subsidy at public marina due to Boy Scouts’ exclusion of atheist and openly gay members); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (holding that the Boy Scouts may be excluded from the state’s employee charitable contributions campaign for denying membership to openly gay individuals); *Cradle of Liberty Council v. City of Philadelphia*, 2008 WL 4399025 (E.D. Pa. Sept. 25, 2008) (dismissal of complaint denied in case where city terminated a lease with the Boy Scouts based on the Scouts’ policies regarding homosexual conduct).

²¹ 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).

²² Stern at 19-22 (noting that many state regulators condition licenses on compliance with anti-discrimination requirements).

- Church-affiliated organizations can have their tax exempt status stripped because of their conscientious objection to same-sex marriage.²⁴

All of these conflicts either did not exist before, or will be significantly intensified 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 of which many will lead to litigation.²⁵

D. The Need for Robust Religious Liberty Protection

At present, the D.C. Marriage Bill offers no significant protection to those with conscientious religious objections to same-sex marriage. Section 2(b) of the Bill would add the following three sections to D.C. Code § 46-406:

- (c) No priest, minister, imam, or rabbi of any religious denomination and no official of any nonprofit religious organization authorized to solemnize marriages, as defined in this section, shall be required to solemnize any marriage in violation

²³ 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>.

²⁴ 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 controlled by an historic Methodist organization, because it 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).

²⁵ 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. However, there do not need to be many conflicts for there to be a crisis of conscience. Each conflict is a profound violation of religious conscience. Moreover, even assuming that there are a small number of actual conflicts (as some critics claim), then there will be a corresponding fewer number of same-sex couples affected by the religious exemptions we recommend.

of his or her right to the free exercise of religion guaranteed by the First Amendment to the United States Constitution.

(d) Each religious organization, association, or society has exclusive control over its own religious doctrine, teachings, and beliefs regarding who may marry within that particular religious tradition's faith, as guaranteed by the First Amendment to the United States Constitution.

(e) Notwithstanding any other provision of law, a religious organization, association or society, or a nonprofit organization which is operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide services, accommodations, facilities or goods for a purpose related to the solemnization or celebration of a marriage, or the promotion of marriage, that is in violation of the entity's religious beliefs, unless the entity makes such services, accommodations, or goods available for purchase, rental, or use to members of the general public. Any refusal to provide services, accommodations, facilities or goods in accordance with this section shall not create any civil claim or cause of action, or result in any District action to penalize or withhold benefits from such entity, unless such entity makes such services, accommodations, facilities, or goods available for purchase, rental, or use to members of the general public.

D.C. Marriage Bill at 3:1-3:21.

By their own terms, sections (c) and (d) confer on religious organizations only those protections already guaranteed by the U.S. Constitution. Individual clergy who refuse to perform same-sex marriage receive ersatz protection, for they are already protected by the U.S. Constitution.²⁶ Similarly, what section (e) appears to give with one hand (protection from antidiscrimination laws relating to the provision of “services, accommodations, facilities, or goods”) it takes away with the other (by withdrawing the protection for any services, accommodations, facilities, or goods made available “to members of the general public”).²⁷ Sections (c), (d), and (e) thus prove illusory.

What these sections leave out is considerable:

- They provide no meaningful protection from the loss of government benefits for refusing to recognize a same-sex marriage.

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

²⁷ In the “unless” clause of Section 2(b), the D.C. Marriage Bill refers to only “services, accommodations, or goods” rather than “services, accommodations, facilities, and goods,” but later makes clear that there is also no conscience protection for “facilities” made available to the general public. *Compare* D.C. Marriage Bill at 3:14, 3:17-18, and 3:20 with D.C. Marriage Bill at 3:16.

- They provide no meaningful protection for individual objectors, other than clergy and authorized celebrants.
- They provide no meaningful protection to religious organizations from private lawsuits brought under D.C.'s anti-discrimination laws.

The following sections detail these gaps in D.C.'s same-sex marriage bill.

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.²⁸ 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*,²⁹ the district court upheld a Portland ordinance that forced a religious charity either to extend employee spousal benefits to registered same-sex couples, or to lose eligibility to all city housing and community development funds.³⁰ Similarly, the Salvation Army lost \$3.5 million in social service contracts with the City of San Francisco because it refused, on religious grounds, to provide benefits to the same-sex partners of its employees.³¹ The Boy Scouts of America have litigated, and lost, numerous suits over a state's authority to deny them access to benefits that others receive, when the law was otherwise silent.³²

²⁸ 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.

²⁹ 304 F. Supp. 2d 77 (D. Me. 2004).

³⁰ See also D.C. CODE § 2-305.08 (relieving D.C. of some of its contractual obligations when a government contractor "willfully fails to comply with the nondiscrimination provisions" of the D.C. Code).

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

³² See *Evans v. City of Berkeley*, 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).

These results are possible because of the United States Supreme Court's decision in *Employment Divison v. Smith*, 494 U.S. 872 (1990) (concluding that neutral and generally applicable laws do not violate the

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.³³ Local authorities stripped the group of their exemption from local property taxes, and billed them for \$20,000.³⁴

These impacts on church-affiliated organizations, predicted by scholars,³⁵ 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.³⁶

F. No Protection for Individual Objectors

Although D.C. law in some contexts protects *religious organizations*, 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.

First Amendment no matter how much they burden an individual's or organization's exercise of religion). These outcomes demonstrate our point: legislative relief is needed to protect religious conscience.

³³ 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*).

³⁴ See Bill Bowman, \$20G due in tax on boardwalk pavilion: Exemption lifted in rights dispute, Asbury Park Press, Feb. 23, 2008.

³⁵ 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).

³⁶ The District is subject to the Religious Freedom Restoration Act (RFRA), a federal law relieving some religious objectors from some burdens imposed by governments. See 42 U.S.C. §§ 2000bb *et seq.* However, RFRA provides only uncertain protection for religious organizations. For example, in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, D.C.'s highest court held that D.C.'s antidiscrimination laws required a Catholic University to provide benefits to two student gay rights groups despite the fact that doing so violated the University's religious beliefs. 536 A.2d 1, 5 (D.C. 1987). Although the court evaluated the antidiscrimination laws under the same basic standard as RFRA, it concluded that the RFRA standard offered no protection because "the District of Columbia's compelling interest in the eradication of sexual orientation discrimination outweighs any burden imposed upon Georgetown's exercise of religion by the forced equal provision of tangible benefits." *Id.* Narrowly targeted exemptions in the same-sex marriage context offer much clearer and more secure protection to religious objectors than does RFRA.

The D.C. Marriage Bill 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.³⁷ The failure to protect such individuals puts the individual to a cruel choice: your conscience or your livelihood.³⁸

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 the D.C. Marriage Bill now take on a whole new level of significance, with a much greater need for religious exemptions. Because the Marriage Bill provides no protection to individual objectors (other than authorized celebrants, who are already protected by the Constitution), 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.³⁹

³⁷ D.C.'s anti-discrimination laws provide some narrow exemptions for religious organizations, but no exemptions at all for religious individuals. See D.C. CODE § 2-1401.03(b) (protecting religious organizations); D.C. CODE § 2-1401.03(d) (same); D.C. CODE § 2-1402.41(3) (protecting religious educational institutions). Outside D.C., individual religious 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).

³⁸ 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).

³⁹ 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.

Of course, accommodating individual objectors might not be without cost for same-sex couples. Thus, we argue only for “hardship exemptions”—exemptions that are available only when there is no undue hardship on same-sex couples.⁴⁰

G. No Robust and Uniform Protection for Religious Organizations

D.C. law prohibits discrimination based on, among other things, sexual orientation, gender, and marital status. Such discrimination is prohibited in a variety of areas—including employment, housing, educational institutions, and public accommodations⁴¹—with only very narrow, if any, exemptions for religious organizations.⁴²

As explained in Part C above, these nondiscrimination laws can prompt lawsuits against religious organizations which, 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.⁴³

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 discrimination); *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) (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).

⁴⁰ *See* Part A, above.

⁴¹ *See* D.C. CODE § 2-1402.11 (employment); § 2-1402.21 (housing); § 2-1402.41 (educational institutions); § 2-1402.31 (public accommodations).

⁴² *See* D.C. CODE § 2-1401.03(b) (permitting religious organizations to hire, grant admission, or give preference to persons of the same faith); D.C. CODE § 2-1401.03(d) (permitting religious organizations that operate nonprofit housing units to give preference to persons of the same faith); D.C. CODE § 2-1402.41(3) (permitting religious educational institutions to deny funds, services, facilities, benefits, or approval to any person or group that promotes, encourages, or condones homosexuality); *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 43 (D.C. 1987) (Newman, J., concurring) (concluding that D.C.’s religious exemption “permits religious organizations to discriminate in favor of co-religionists” but does not permit discrimination on grounds other than religion).

⁴³ *See, e.g.*, footnotes 17-19, above.

The D.C. Marriage Bill offers no meaningful protection in such situations. On first glance, the Bill appears to protect religious organizations from any obligation “to provide services, accommodations, facilities or goods for a purpose related to the solemnization or celebration of a marriage, or the promotion of marriage, that is in violation of the entity’s religious beliefs.”⁴⁴ Such a provision would not protect religious organizations in their decisions about employment or related benefits—such as a Catholic hospital’s decision about spousal benefits—but it would go a long way toward alleviating other conflicts between legalized same-sex marriage and religious organizations.

But the D.C. Marriage Bill then takes away that protection later in the same sentence, eliminating protection for any religious organization that “makes such services, accommodations, or goods available for purchase, rental, or use to members of the general public.”⁴⁵ In other words, a low-cost religious day care center would be protected, but only if day care services were not offered to the public; a church’s counseling service would be protected, but only if counseling services were not offered to the public; an adoption agency would be protected, but only if adoption services were not offered to the public. Under this language, if a church offered its reception hall for use by members of the general public, it could be forced to allow use of its reception hall for a same-sex wedding ceremony in violation of its religious beliefs. Only those religious groups who refuse to reach out to or interact with others would receive any protection. The Marriage Bill thus exposes religious organizations to significant legal conflict stemming from the legalization of same-sex marriage.

The D.C. Marriage Bill also provides *much less* protection than the comparable marriage laws of other jurisdictions. Connecticut, New Hampshire, and Vermont have all enacted same-sex marriage laws, and all provide much more protection for religious liberty than does D.C.⁴⁶ Like D.C., each of those states protects religious organizations from being forced to offer “services, accommodations, facilities, or goods” related to a marriage when doing so would violate their religious beliefs; but unlike D.C., none of those states then *withdraws* protection when the religious organization offers its services to the public.⁴⁷ Moreover, Connecticut, New

⁴⁴ See Section 2(b) (quoted at pages 8-9 above).

⁴⁵ *Id.*

⁴⁶ 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); 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(1) (2009) (exempting religious organizations from “provid[ing] services, accommodations, advantages, facilities, goods, or privileges ... related to” the “solemnization” or “celebration” of a marriage).

⁴⁷ *Id.*

Hampshire, and Vermont also protect religious organizations from having to give “advantages” or “privileges” related to marriage, while the D.C. Marriage Bill omits these protections entirely. Thus, while the protections in Connecticut, New Hampshire, and Vermont also fall short in key areas,⁴⁸ they still provide far more protection than the D.C. Marriage Bill.

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 D.C. Council 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 Council.

Respectfully yours,⁴⁹

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⁴⁸ 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).

⁴⁹ 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.