Senate Committee on Judiciary and Labor, October 28, 2013
Hearing on Senate Bill 1, A Bill for an Act Relating to Equal Rights,
Legislature of Hawaii, Second Special Session of 2013

Executive Summary of Statement of William Bassett, Thomas Berg, Robert Destro, Carl Esbeck, Marie Failinger, Edward Gaffney, Richard Garnett, Michael McConnell, and Robin Wilson[1] on Religious Liberty Implications of Proposed Hawaii Marriage Equality Act of 2013

The State of Hawaii has played a historic role in the national discussion on marriage equality. In *Baehr v. Miike,* 74. Haw. 530, 852 P.2d 44 (1993), the Supreme Court clarified that the State Department of Health may not deny a marriage license to a same-sex couple solely on the basis of gender. And the Legislature subsequently extended to same-sex couples the right to enter into civil unions providing the same rights, benefits, protections, and responsibilities under state law as afforded to opposite-sex couples who marry. This Special Session focus on reassessing civil unions in the wake of *Windsor v. United States,* 133 S.Ct. 2675 (2013), in which the Supreme Court overturned section 3 of the Defense of Marriage Act. As S.B. 1 states, "The legislature has already extended to same-sex couples the right to enter into civil unions that provide the same rights, benefits, protections, and responsibilities under state law as afforded to opposite-sex couples who marry. However, these civil unions are not recognized by federal law and will not be treated equally to a marriage under federal law."

On the same day as the *Windsor* decision Barack Obama—the first Hawaiian to serve in the Presidency—directed Attorney General Holder to work with other members of his Cabinet "to review all relevant federal statutes to ensure this decision, including its implications for Federal benefits and obligations, is implemented swiftly and smoothly." President Obama also noted wisely:

> On an issue as sensitive as this, knowing that Americans hold a wide range of views based on deeply held beliefs, maintaining our nation's commitment to religious freedom is also vital. How religious institutions define and consecrate marriage has always been up to those institutions. Nothing about this decision – which applies only to civil marriages – changes that.

We echo President Obama's view that it is necessary to maintain the nation's vital commitment to religious freedom in all efforts to further the goal of marriage equality. Liberty and equality are not contradictory. They are complementary.

The current draft statute would provide less protection for religious liberty than every other state that has successfully enacted same-sex marriage legislation. Appendix A of our testimony sets forth the statutory protection for religious freedom that several States have already included in statutes recognizing same-sex marriage.

It is not only possible, but also necessary to protect both a new awareness of marriage equality and America's long and rich tradition of religious freedom. We strongly urge you to review the summary of the decisions taken by fellow legislators in sister States when they decided the same or closely similar issues that you address in this Special Session (Appendix A of attached Testimony). We also commend

[1] All who join this statement are professors of constitutional law. Our institutional affiliations—indicated in in the signature block below—are for identification purposes only. The universities that employ the signers take no position on this or any related bill. While we have a range of views on the underlying issue of same-sex marriage, all the signers wholeheartedly share the belief that when same-sex marriage is recognized, it should be accompanied by adequate protections for religious freedom.

to your close scrutiny the legislative testimony submitted by Douglas Laycock, Robert E. Scott Distinguished Professor of Law at the University of Virginia, and co-editor with Professor Robin Wilson of the leading volume on this matter, *Same-Sex Marriage and Religious Liberty* (2008).

The current draft of S.B. 1 acknowledges the intent of the Legislature to protect religious freedom by "ensuring that no clergy or other officer of any religious organization will be required to solemnize any marriage" and by "clarifying that unless a religious organization allows use of its facilities or grounds by the general public for weddings for a profit, such organization shall not be required to make its facilities or grounds available for solemnization of any marriage celebration."[2]

In our view, this statement of intent does not adequately address legitimate concerns of religious communities and religiously committed persons with deeply held understanding of marriage as a relationship between a man and a woman. In Part II of our testimony we offer a friendly amendment that can turn this moment into a win-win situation for all the people of Hawaii, of all faiths and none.

In some States (e.g., Maryland, New York, and Delaware), the debate was contentious, even at times rancorous. That need not be the case in Hawaii. If the spirit of Aloha prevails in this Special Session, it will offer to the several States that will be discussing legislation in the wake of the *Windsor* case a model of constructive, good-faith attempts both to grant legal recognition to same-sex marriage *and* to protect religious liberty for conscientious objectors.

The amendment offered in our testimony is grounded in the Hawaii experience and in the Hawaii Constitution. Confident that others will adequately address the either/or issue of whether to support or oppose same-sex marriage in Hawaii, we focus in our testimony on the wisdom of a "middle way" to address the needs of same-sex couples after *Windsor*, while honoring and respecting religious liberty in a manner that clarifies that individuals and organizations may refuse to provide services for a wedding if doing so would violate deeply held beliefs.[3]

Conflicts between same-sex marriage and religious conscience are reasonably foreseeable and for that very reason are unnecessary when a prudent Legislature acts decisively to protect complementary human values—liberty and equality—by adopting language that enables both interests to be protected realistically. Without such legislative 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. Hence the Legislature should take care to ensure that the legalization of same-sex marriage does not restrict the inalienable right of religious liberty. This is entirely consistent with the Hawaii State Constitution that each member of the State Legislature has sworn to uphold and protect. Since its adoption in 1950 and ratification in 1959, the Hawaii Constitution has always protected religious freedom in the strongest of terms.[4]

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[2] S.B. 1, Section 1 (3)(A) & (B) (expressing intent of the Legislature); see also S.B. 1, § 572(E) (Refusal to solemnize a marriage) and § 572(F) (Religious organizations and facilities; liability exemption under certain circumstances).

[3] 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.

[4] *See* HAW. CONST. art. 1, § 4 ("No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof[.]"); HAW. CONST. art. 1, § 5 ("No person shall be . . . denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.").

Statement of William Bassett, Thomas Berg, Robert Destro, Carl Esbeck, Marie Failinger, Edward Gaffney, Richard Garnett, Michael McConnell, and Robin Wilson)[5] on Religious Freedom Implications of Proposed Hawaii Marriage Equality Act of 2013

Introduction

The current draft of S.B. 1 acknowledges the intent of the Legislature to protect religious freedom by "ensuring that no clergy or other officer of any religious organization will be required to solemnize any marriage" and by "clarifying that unless a religious organization allows use of its facilities or grounds by the general public for weddings for a profit, such organization shall not be required to make its facilities or grounds available for solemnization of any marriage celebration."[6] In our view, however, the current draft does not adequately address legitimate concerns of religious communities and religiously committed persons with deeply held understanding of marriage as a relationship between a man and a woman.

Part I discusses the current version of S.B. 1, and concludes that it does not provide adequate protection for religious believers whose sincerely held convictions that may lead them to decline to participate in a same-sex wedding.

Part II offers a friendly amendment that can strengthen the proposed legislation by turning this historic moment into a win-win situation for all the people of Hawaii, of all faiths and none. Our proposed amendment also takes into account the practical needs of persons for various services for weddings and suggests ways of accommodating both persons of the same sex who wish to be married and persons who routinely provide such services (e.g., florists, bakers, photographers) but do not wish to participate in a same-sex wedding. This sort of legislative compromise is grounded both in the Hawaii experience of diversity, and is entirely consistent with the text of the Hawaii State Constitution, which since its adoption in 1950 and ratification in 1959, has always protected religious freedom in the strongest of terms.[7]

Part III offers several reasons why our proposed amendment—or language similar to it—is both necessary and desirable for the common good of all the people of Hawaii. These reasons are enhanced by reflection on the deliberative process in several States that have already adopted statutes recognizing same-sex marriage (See Appendix A).

I. The Current Draft of S.B. 1 Does Not Adequately Protect the Freedom of Sincerely Motivated Religious Dissenters from Participating in a Same-Sex Wedding.

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[5] Names and institutional affiliations of the professors joining in this statement are included in the signature block below. Academic affiliation is indicated for identification purposes only. The universities employing the signers take no position on this or any related bill. The signers have a range of views on the underlying issue of same-sex marriage, but all of us wholeheartedly share the conviction that when same-sex marriage is recognized, it should be accompanied by adequate protections for religious freedom.

[6] S.B. 1, Section 1 (3)(A) & (B) (expressing intent of the Legislature); see also § 572(E) (Refusal to solemnize a marriage) and § 572(F) (Religious organizations and facilities; liability exemption under certain circumstances), discussed below in Part I.

[7] *See* HAW. CONST. art. 1, § 4 ("No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof[.]"); HAW. CONST. art. 1, § 5 ("No person shall be . . . denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.").

S.B. 1 seeks to enact same-sex marriage in Hawaii. Sections 572-E and 572-F of the proposed law would provide protections for religious conscience. The current version of S.B. 1, made public on October 22, contains two provisions relating to religious freedom:

> **§572-E Refusal to solemnize a marriage.** Nothing in this chapter shall be construed to require any clergy, minister, priest, rabbi, officer of any religious denomination or society, or religious society not having clergy but providing solemnizations that is authorized to perform solemnization pursuant to this chapter to solemnize any marriage. No such person who fails or refuses to solemnize any marriage under this section for any reason shall be subject to any fine, penalty, injunction, administrative proceeding, or other civil liability for the failure or refusal.
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> **§572-F Religious organizations and facilities; liability exemption under certain circumstances.** Notwithstanding any other law to the contrary, no religious organization shall be subject to any fine, penalty, injunction, administrative proceeding, or civil liability for refusing to make its facilities or grounds available for solemnization of any marriage celebration under this chapter; provided that the religious organization does not make its facilities or grounds available to the general public for solemnization of any marriage celebration for a profit.
> For purposes of this section, a religious organization accepting donations from the public, providing religious services to the public, or otherwise permitting the public to enter the religious organization's premises shall not constitute "for a profit."

In our view, these provisions are inadequate. Section 572-E purports to confer immunity on "clergy" (broadly understood to mean "minister, priest, rabbi, or other officer of any religious denomination or society, or [member of a] religious society not having clergy but providing [authorized] solemnizations." But this merely repeats the barest constitutional minimum and does little to resolve actual conflicts. If any State were to attempt to compel the clergy to perform an act in violation of their religious beliefs and modes of worship, such a law would clearly violate the First Amendment to the Constitution of the United States. See, e.g., *Watson v. Jones,* 80 U.S. 679 (1871); *Presbyterian Church in the United States v. Mary Elizabeth Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); and see Douglas Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy," 81 Colum.L.Rev. 1373 (1981). Thus, with or without this statutory language, "[n]o one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them."[8] Focusing on the issue of "forced officiating" is a straw-man argument distracting the uninformed from real situations where religious conscience is actually at risk.

Like the protection received by individual clergy, religious organizations receive very narrow and largely illusory protection. For the same reason that clergy may not be forced to speak they do not believe, no religious community may constitutionally be compelled to use their houses of worship in a manner that violates their deeply held religious convictions. The same cases cited above are clearly applicable to a wildly hypothetical statute that does not describe the actual legislation of any State in the Union, including the Aloha State. Thus, it is equally illusory to regard § 572-F as conferring statutory "immunity" for religious organizations in its free exercise of their own facilities. By definition, all of

[8] Marc Stern, *Same-Sex Marriage and the Churches in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds. (Rowman & Littlefield 2008) at 1.

these religious communities are "not-for-profit" organizations under Section 501(c)(3) of the federal tax code. And for the same reason their houses of worship are exempt from property taxes under the Tax Code of Hawaii and all 49 other States and all federal territories.[9] It is a distraction to speak of them as both "not-for-profit" in the main provisions of the Hawaii Tax Code, and as "mak[ing] … facilities or grounds available to the general public for solemnization of any marriage celebration for a profit" in the proposed legislation. We know of no religious community in Hawaii that does so. Even if this hypothetical were to ripen into actuality, the more appropriate analogy from tax law would be a tax on the unrelated business income of the religious community derived from for-profit rental of its facilities for solemnization of weddings.

In short, the current version of the Hawaii Marriage Equality Act of 2013 does not provide any meaningful accommodation of religion. What the proposed legislation *omits,* moreover, is considerable:

- It provides no protection to religious organizations from the loss of government benefits for refusing to recognize a same-sex marriage.

- It provides no protection for individual objectors other than a minister, priest, or other officer of a religious denomination or society.

- It provides no protection to religious organizations from private lawsuits brought under Hawaii's nondiscrimination laws other than for refusal to solemnize a marriage.

The proposed bill in Hawaii to legalize same-sex marriage provides *considerably less* protection than most *every other jurisdiction* where the legislature has considered the issue.[10] Connecticut, the District of Columbia, Maryland, Minnesota New Hampshire, New York, Rhode Island, Vermont, and Washington have all enacted same-sex marriage laws, and all provide much more protection for religious liberty than Hawaii's proposed legislation.[11] 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.[12] Although the protections in Connecticut, the District of Columbia, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington also fall short in key areas,[13] they still provide far more protection than Hawaii's proposed same-sex marriage legislation. Hence we urge the Legislature to consider provisions in the laws enacting same-sex marriage in all the other states that have adopted such legislation (see Appendix A).

We offer analysis of two related points about the inadequacy of the current draft: its failure to protect religious communities and religious believers from needless penalties imposed upon them for acting in accordance with sincerely and deeply held religious beliefs.

A. The Current Draft of the Statute Does Not Adequately Protect Religious Communities from Government Penalties, Including Loss of Grants for Performing a Valid Secular Function.

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[9] *See Walz v. Tax Commission of the City of New York,* 397 U.S. 664 (1970).

[10] *See* Appendix A below. Delaware is the odd exception.

[11] *See* Appendix A below.

[12] *See* Appendix A below.

[13] *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).

A good deal of misunderstanding surrounds religious liberty accommodations. Accommodations serve the important function of protecting conscientious objectors from private lawsuits. But accommodations also serve the purpose of insulating conscientious objectors from penalties at the hands of the government.[14]

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.[15] 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.[16] 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.[17]

In another example, Catholic adoption agencies in Illinois recently lost contracts with the state because they refused to place children in the homes of unmarried cohabitating couples.[18] The state claimed that the Catholic adoption agencies had violated the state's newly enacted civil union law.[19] That law contained no exemption for religious social service agencies and thus provided no protection against government penalties for conscientious objectors. Although this case implicated a civil union law, the consequences for a religious organization in Hawaii would be indistinguishable under a same-sex marriage law that omits important accommodations that we recommend.

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

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[14] Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS at 81; Michael W. McConnell, *Accommodation of Religion*, 1985 SUPREME COURT REV. 1; McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

[15] 304 F. Supp. 2d 77 (D. Me. 2004).

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

[17] *See Evans v. City of Berkeley*, 38 Cal.4th 1 (Cal. App. 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 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.

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

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

[20] *See* Jill P. Capuzzo, Group Loses Tax Break Over Gay Union Issue, N.Y. TIMES, Sept. 18, 2007 (describing the case of *Bernstein v. Ocean Grove Camp Meeting Ass'n*).

property taxes on the pavilion, and billed them for $20,000, because the pavilion no longer complied with a state public lands program to which the exemption was tied.[21]

The Camp Meeting Association was also investigated by the New Jersey Department of Civil Rights for an alleged violation of the New Jersey Law Against Discrimination. 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.[22]

These impacts on church-affiliated organizations, predicted by scholars,[23] did not result from statutory revocations of tax-exempt status in marriage legislation. Instead, these actions occurred because state laws never anticipated the problem and offered an explicit exemption. These experiences drive home the need for explicit protection from penalties by the government.[24]

B. The Current Draft Does Nothing to Protect Religious Exercise by Individual Objectors to the Proposed Legislation, Even When A Less Burdensome Alternative Is Readily Available.

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 proposed legislation does not protect individuals who for sincerely held religious reasons prefer no role in a same-sex marriage ceremony. Thus, a religious individual who runs a small business, e.g., a

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[21] *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 can governments strip a tax exemption because it concludes that an organization's conscientious objection to same-sex marriage violates nondiscrimination laws or "public policy" more generally. Second, when the Camp 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.

[22] As the United States Court of Appeals for the Third Circuit explained, "The federal complaint arose out of the [New Jersey Department of Civil Right's] investigation into whether the Association's refusal to permit couples to use the Boardwalk 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 (3d Cir. 2009); *See also Catholic Charities of the Diocese of Springfield v. State*, 2011 WL 3655016 (2011).

[23] Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 107-21 (describing attacks on tax exemptions for religious organizations with objections to same-sex marriage); Jonathan Turley, *An Unholy Union* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 59-76 (arguing for same-sex marriage but against withdrawal of tax exemptions for religious organizations with conscientious objections).

[24] Unlike many other states, Hawaii has not enacted a state Religious Freedom Restoration Act. *See, e.g.,* Eugene Volokh, *RFRA State Map available at* http://www.law.ucla.edu/volokh/relmap.pdf (last visited Sept. 3, 2010) (reporting states with state constitutional amendments, statutory RFRAs, and state constitutional free exercise clauses interpreted to require strict scrutiny).

baker who makes wedding cakes; a wedding photographer; a caterer; a florist; a reception hall owner; or a seamstress or a tailor, receives *no protection at all* from the current draft.[25] The failure to protect such individuals puts them to a cruel choice: their conscience or their livelihood.[26] Enacting protections for individual objectors is not only necessary, but also consistent with the existing public policy in Hawaii's statutory treatment of nondiscrimination.[27]

The Aloha State can be welcoming both to same-sex couples and to citizens of your State who object to providing goods or services to these couples, not because they are gays but because of the religious basis for their understanding of marriage. Such persons reach their decisions in good conscience for a positive reason, not a negative one. They view marriage as a religious institution and the wedding ceremony as a religious sacrament. For them, assisting with a marriage ceremony has religious significance that commercial services, like serving food or driving taxis, simply do not. They have no objection generally to providing services to same-sex couples, but they object to directly facilitating a marriage.

In short, nondiscrimination statutes enacted years ago by Congress and by many States—including Hawaii—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 vulnerable to a lawsuit, whether framed as sexual orientation discrimination, sex discrimination, or, where applicable, marital-status discrimination.[28]

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[25] *See Elane Photography LLC v. Willock,* 309 P.3d 53 (N.M. Aug. 22, 2013) (fining New Mexico photographer for refusing on religious grounds to photograph a same-sex commitment ceremony); *see also Gay Couple Sues Illinois Bed and Breakfast For Refusing to Host Civil Union Ceremony*, HUFFINGTON POST, Feb. 23, 2011.

[26] 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); *see also* Robert A. Destro, *You Have the Right to Remain Silent*: *Does the U.S. Constitution Require Public Affirmation of Same-Sex Marriage?,* 27 BYU J. PUB. L. 397 (2013) (discussing the problem of compelled affirmation in the marriage debate).

[27] HAW. REV. STAT. § 378-3 (1998) ((“Nothing in this part shall be deemed to . . . [p]rohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised or controlled by or in connection with a religious organization, from giving preference to individuals of the same religion or from making a selection calculated to promote the religious principles for which the organization is established or maintained[.]”); HAW. REV. STAT. § 515-8 (1992) (“It is not a discriminatory practice for a religious institution or organization or a charitable or educational organization operated, supervised, or controlled by a religious institution or organization to give preference to members of the same religion in a real property transaction, unless membership in such religion is restricted on account of race, color, or ancestry.”)

[28] Refusals to provide benefits to same-sex partners have been invalidated as a form of gender or sex discrimination. *See 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). Similar cases have occurred elsewhere. 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

Hawaii's law prohibits discrimination based on, among other things, marital status, sex, and sexual orientation. Such discrimination is prohibited in a variety of areas—including employment,[29] housing,[30] and public accommodations[31]—with only a few limited exemptions for religious organizations. The current exemptions are inadequate to address the wide range of foreseeable issues, identified in part C, concerning same-sex marriage and religious objectors. One exemption protects only a religious organization's decision to favor members of the same faith in "real property transaction[s]."[32] Another applies only to employment—not provisions of services, housing, and other issues—and although it permits an organization to make decisions "calculated to promote the religious principles for which the organization is established or maintained," the scope of that language is unclear.[33] And by stating that a given law does not "prohibit" certain actions by a religious organization, the exemptions may do nothing to protect against other governmental penalties such as withdrawal of licensure or tax-exempt status or withdrawal of government contracts.

We understand that accommodation is not a one-way street. Specifically, we recognize that accommodating individual religious objectors, in some rare instances, may impose a serious burden for same-sex couples. Thus, we argue only for "hardship exemptions," available for same-sex couples only when there genuinely experience undue difficulty in getting services relating to a same-sex marriage. By adopting a reasonable provision accommodating the needs of same-sex couples experiencing such

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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 the United States Court of Appeals for the Ninth Circuit's benefits policy to include same-sex spouses because denial of benefits to 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).

[29] HAW. STAT. ANN. § 378-2 (2012) (making it unlawful "[f]or any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment" because of "race, sex, including gender identity or expression, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, or domestic or sexual violence victim status").

[30] HAW. STAT. ANN. § 515-3 (2012) (making it "a discriminatory practice for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesperson, because of race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection").

[31] HAW. STAT. ANN. § 489-3 (2012) ("Unfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability are prohibited.").

[32] HAW. REV. STAT. § 515-8 (2012) ("It is not a discriminatory practice for a religious institution or organization or a charitable or educational organization operated, supervised, or controlled by a religious institution or organization to give preference to members of the same religion in a real property transaction, unless membership in such religion is restricted on account of race, color, or ancestry.").

[33] HAW. REV. STAT. § 378-3(5) (2012) ("Nothing in this part [governing employment practices] shall be deemed to . . . [p]rohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised or controlled by or in connection with a religious organization, from giving preference to individuals of the same religion or from making a selection calculated to promote the religious principles for which the organization is established or maintained[.]")

genuine hardship, the Legislature can and should avoid costly litigation. Hawaii may read its Constitution to require something akin to "less restrictive alternative" analysis.[34]

Once the bill is passed, those opposed to *any* exceptions for religious communities will give the narrowest possible interpretation to all exemptions. For this reason, the legislature ought to take enough time to write legislation consonant with President Obama's sage counsel: "On an issue as sensitive as this, knowing that Americans hold a wide range of views based on deeply held beliefs, maintaining our nation's commitment to religious freedom is also vital." To clarify the sort of legal protection that should surround religious life in this country, and to foster and address a whole range of developing conflicts, further reflection on refining this legislation is imperative.

II. A Friendly Amendment to Secure More Adequately the Religious Freedom of All Americans

Conflicts between same-sex marriage and religious conscience are reasonably foreseeable[35] and thus avoidable.[36] But dubious battles of this sort can be avoided only when a prudent Legislature acts decisively to protect complementary human values—liberty and equality—by adopting language that enables both interests to be protected realistically. Without such legislative 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.

Does the Legislature really want to invite its constituents in the Aloha State to engage in protracted and costly litigation solely because the law you draft fails to provide careful safeguards for religious freedom? We doubt that you want that result at this historic moment, and we urge your careful consideration of "robust religious-conscience exceptions" to same-sex marriage that leading voices on both sides of the public debate over same-sex marriage have been calling for.[37]

Any proposed marriage bill can provide reasonable, carefully tailored protections for religious conscience by including a simple, but comprehensive section affording suitable protection for deeply held religious convictions relating to marriage. After studying existing protections of religious

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[34] *See, e,g., Sherbert v. Verner*, 374 U.S. 398 (1963).

[35] In Section C of a letter to each Senator and Representative of the Hawaii Legislature dated October 17, 2013, Professors Berg, Esbeck, Gaffney, Garnett, and Wilson set forth many examples of *actual, not hypothetical, conflicts* that have arisen because of pressure on religious objectors to directly facilitate same-sex unions and celebrations. These conflicts that are already increasing and intensifying with state recognition of same-sex marriage. In our view, many of these conflicts arose because of the entirely foreseeable tendency of interest groups—especially of an aggrieved minority—to absolutize rights to which they are entitled, but which exist in healthy tension with other rights. As early as the late eighteenth century, James Madison referred to this phenomenon as "factions." See Federalist Paper No. 10. At this stage of the development of constitutional values, this Legislature is entirely free to move past grid-lock recently experienced in the federal Congress by showing realistic awareness of the flaws of factions and zero-sum games, and careful attentiveness to achieving win-win solutions for all members of the Aloha State, gays and straights, believers and non-believers.

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

[37] *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). Though conscience protections should also extend to existing civil unions, we do not address civil unions here.

conscience in Hawaii's Constitution and nondiscrimination laws,[38] we propose the following amendment, which may be described as a section for "marriage conscience protection."

* * * * *

Section ___. Marriage Conscience Protection.

(A) Protection of Religious Conscience of Religious Organizations.
Notwithstanding any other provision of law, no religious or denominational organization, no organization operated for charitable or educational purposes which is supervised or controlled by or in connection with a religious organization, and no individual employed by any of the foregoing organizations, while acting in the scope of that employment, shall be required to

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

if such providing, solemnizing, or treating as valid would cause such organizations or individuals to violate their sincerely held religious beliefs. This subsection shall not permit a religious organization engaged in the provision of health care, or its individual employees, to refuse to treat a state-recognized marriage as valid for purposes of a spouse's rights to visitation or to surrogate health care decision making.

(B) Protection of Religious Conscience of Individuals and Small Businesses.

(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.

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[38] *See, e.g.,* HAW. CONST. art. 1, § 5 ("No person shall be . . . denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."); HAW. REV. STAT. § 378-3(5) (2012) ("Nothing in this part [governing employment practices] shall be deemed to . . . [p]rohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised or controlled by or in connection with a religious organization, from giving preference to individuals of the same religion or from making a selection calculated to promote the religious principles for which the organization is established or maintained[.]"); HAW. REV. STAT. § 515-8 (2012) ("It is not a discriminatory practice for a religious institution or organization or a charitable or educational organization operated, supervised, or controlled by a religious institution or organization to give preference to members of the same religion in a real property transaction, unless membership in such religion is restricted on account of race, color, or ancestry."). Haw. Rev. Stat. § 515-4 (b) "Nothing in section 515-3 shall be deemed to prohibit refusal, because of sex, including gender identity or expression, sexual orientation, or marital status, to rent or lease housing accommodations: (1) Owned or operated by a religious institution and used for church purposes as that term is used in applying exemptions for real property taxes; or (2) Which are part of a religiously affiliated institution of higher education housing program which is operated on property that the institution owns or controls, or which is operated for its students pursuant to Title IX of the Higher Education Act of 1972.").

(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.[39]

III. Reasons in Support of Adopting Our Proposed Amendment or Language Similar to It.

We offer several reasons why the Legislature should adopt our proposed amendment or language similar to it. First, our amendment is grounded in the Hawaii experience of diversity and the reflections of this Legislature in Hawaii's nondiscrimination laws for a "religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised or controlled by or in connection with a religious organization."[40]

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[39] Some have expressed concern that the proposed text would permit objections to interracial marriage. At this late stage in the development of race theory and the actual convictions of Americans nearly a half century after *Loving v. Virginia,* 388 U.S. 1 (1967), such objections are likely to be rare, if not non-existent, in the Aloha State, which is renowned for its diversity. If the Legislature deems this concern to be real rather than hypothetical, it 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." *See also* Robert A. Destro, *You Have the Right to Remain Silent*: *Does the U.S. Constitution Require Public Affirmation of Same-Sex Marriage?,* 27 BYU J. PUB. L. 397, 419-33 (2013) (discussing why racial animus is different from the debate over marriage).

[40] *See* HAW. REV. STAT. § 378-3(5) (2012) ("Nothing in this part shall be deemed to . . . [p]rohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised or controlled by or in connection with a religious organization, from giving preference to individuals of the same religion or from making a selection calculated to promote the religious principles for which the organization is established or maintained[.]"). *See also* HAW. REV. STAT. § 515-8 (2012) ("It is not a discriminatory practice for a religious institution or organization or a charitable or educational

Second, our amendment takes into account express protections of religious freedom expressly stated in same-sex marriage laws adopted by the States of Connecticut, Delaware, District of Columbia, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington. 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."[41]

Third, our amendment addresses the primary areas of Hawaii law where refusal to participate in a same-sex marriage 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").

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organization operated, supervised, or controlled by a religious institution or organization to give preference to members of the same religion in a real property transaction, unless membership in such religion is restricted on account of race, color, or ancestry.").

[41] *See* Appendix A below; see particularly 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); 79 DEL. LAWS 2013, ch. 19, § 8 ("Religious Freedom. Nothing in this Act is intended to, nor shall this Act be construed in a manner that would, violate any person's rights under the First Amendment to the United States Constitution or § 1, § 2, or § 5 of Article 1 of the Constitution of this State, including protected rights of freedom of religion thereunder. Nothing in this Act shall interfere with or regulate the religious practice of any religious society. Any religious society is free to choose which marriages it will solemnize."; see DEL. CODE ANN. tit. 13, § 106 (West 2012); 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/ lims/legisation.aspx?LegNo=B18-0482 (exempting religious societies and religiously affiliated non-profits from providing "accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a same-sex marriage, or the promotion of same-sex marriage through religious programs, counseling, courses, or retreats…"); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) § 2-3 (exempting religious organizations from the "solemnization of a marriage or celebration of a marriage that is in violation of the entity's religious beliefs" or "the promotion of marriage through any social or religious programs or services, in violation of the entity's religious beliefs"); MINN. STAT. ANN. § 363A.26 (West 2013) (providing that a religious organization need not take "any action with respect to the provision of goods, services, facilities, or accommodations directly related to the solemnization or celebration of a civil marriage that is in violation of its religious beliefs."); N.H. REV. STAT. § 457:37 (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges . . . related to" the "solemnization," "celebration," or "promotion" of a marriage); N.Y. DOM. REL. LAW § 10-b (1) (2011) ("a religious entity . . . benevolent [order] . . . or a not-for-profit corporation operated, supervised, or controlled by a religious corporation . . . shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage"); R.I. GEN. LAWS ANN. § 15-3-6.1 (West 2013)(exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges to an individual if the request for such services, accommodations, advantages, facilities, goods, or privileges is related to [t]he solemnization of a marriage or the celebration of a marriage, and such solemnization or celebration is in violation of its religious beliefs and faith; or … the promotion of marriage rough any social or religious programs or services, which violates the religious doctrine or teachings of religious organization, association or society"); 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); WASH. REV. CODE § 26.04.010(2)(5) (providing that religious organizations need not "provide accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage").

Fourth, our amendment 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.

Fifth, our amendment provides vital statutory protections for individuals of religiously informed conscience, who do not forfeit their right to free exercise of religion simply by owning a sole proprietorship or a small business.

Sixth, our amendment 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, we propose that a same-sex couple should be able such services even from conscientious objectors when the inability to find a similar service elsewhere would impose a *substantial hardship* on the couple, but not mere *inconvenience or symbolic harm*.

Seventh, our amendment also ensures that no government employee or official (such as a county clerk) may act as a choke point on the path to marriage. For example, no government employee may 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.[42]

[42] *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 (2002) ("No private or non-governmental hospital or clinic shall be required . . . to permit their facilities to be utilized for the performance of abortions; *provided*, that no hospital or clinic shall refuse an emergency admittance."); TEX. OCC. CODE ANN. § 103.004 (Vernon 2004) ("A private hospital or private health care facility is not required to make its facilities available for the performance of abortion *unless* a physician determines that the life of the mother is immediately endangered.") (emphasis added).

Conclusion

Without adequate safeguards for religious liberty of the sort proposed above, the recognition of same-sex marriage will lead to socially divisive and entirely unnecessary conflicts between the exercise of rights pursuant to the same-sex marriage law and religious liberty. That is a destructive path leading to needless loss by both sides. A balanced "middle way" leads to a win-win solution for both sides. The Hawaii State Legislature should avoid both extremes and be the wise peacemaker.

Respectfully submitted,

William Wood Bassett
Professor of Law Emeritus
University of San Francisco
San Francisco, CA 94117

Thomas C. Berg
James Oberstar Prof. of Law & Public Policy
University of St. Thomas School of Law
Minneapolis, MN 55403

Robert A. Destro
Professor of Law & Dir. of the Marriage Project
The Catholic University of America
Washington, DC 20064

Carl H. Esbeck
Isabell Wade & Paul C. Lyda Professor of Law
University of Missouri School of Law
Columbia, MO 65211

Marie A. Failinger, Professor of Law
Hamline University School of Law
St. Paul, MN 55104

Edward McGlynn Gaffney, Jr.
Professor of Law
Valparaiso University School of Law
Valparaiso, IN 46383
Edward.gaffney@valpo.edu

Richard W. Garnett
Professor of Law and Associate Dean
University of Notre Dame Law School
South Bend, IN 46556

Michael W. McConnell
Richard & Frances Mallery Professor of Law
Director, Constitutional Law Center
Stanford Law School
Stanford, CA 94305

Robin Fretwell Wilson
Roger & Stephany Joslin Professor of Law
University of Illinois College of Law
Champaign, IL 61820

APPENDIX A:

Core Religious Liberty Protections in Same-Sex Marriage Legislation

Table reprinted from Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes between Religion and the State*, 53 B.C. L. REV. 1417 (2012) http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1130&context=wlufac.

All jurisdictions that have enacted legislation (Connecticut, Delaware, the District of Columbia, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington) **expressly** exempt clergy from requirements to solemnize or celebrate marriages inconsistent with their religious faith. *See* CONN. GEN. STAT. §§ 46b-21, 46b-150d (2009); DEL. CODE ANN. tit. 13, § 106 (West 2012); D.C. CODE § 46-406(c) (2010); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202, 2-406 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) § 2; MINN. STAT. ANN. § 517.09 (West 2013); N.H. REV. STAT. ANN. § 457:37 (2011); N.Y. DOM. REL. LAW § 11(1) (McKinney 2011); VT. STAT. ANN. tit. 18, § 5144(b) (2010)**;** R.I. GEN. LAWS ANN. § 15-3-6.1 (West 2013); WASH. REV. CODE § 26.04.010(2)(4) (2012).

Nine jurisdictions (Connecticut, the District of Columbia, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington) **expressly** allow a religiously affiliated group to refuse to "provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage." *See* CONN. GEN. STAT. § 46b-150d; D.C. CODE § 46-406(e); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) § 3; MINN. STAT. ANN. § 363A.26 (West 2013); N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1); VT. STAT. ANN. tit. 9, § 4502(1)**;** R.I. GEN. LAWS ANN. § 15-3-6.1 (West 2013); WASH. REV. CODE § 26.04.010(2)(5).

Nine jurisdictions (Connecticut, the District of Columbia, Maryland, Minnesota New Hampshire, New York, Rhode Island, Vermont, and Washington) **expressly** protect covered religious objectors from **private suit.** *See* CONN. GEN. STAT. § 46b-150d; D.C. CODE § 46-406(e); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) §§ 2-3; MINN. STAT. ANN. § 517.09 (West 2013); N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1)**;** R.I. GEN. LAWS ANN. § 15-3-6.1 (West 2013); VT. STAT. ANN. tit. 9, § 4502(1); WASH. REV. CODE § 26.04.010(2)(6).

Eight jurisdictions (Connecticut, the District of Columbia, Maryland, Minnesota New Hampshire, New York, Rhode Island, and Washington) **expressly** protect religious objectors, including religiously affiliated **nonprofit organizations**, from being **"penalize[d]"** by the government for such refusals through, e.g., the loss of government grants. *See* CONN. GEN. STAT. § 46b-150d; D.C. Code § 46-406(e)(2); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) §§ 2-3; MINN. STAT. ANN. § 517.09 (West 2013); N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1)**;** R.I. GEN. LAWS ANN. § 15-3-6.1 (West 2013); WASH. REV. CODE § 26.04.010(2)(4).

Four jurisdictions (Maryland, the District of Columbia, New Hampshire and Rhode Island) **expressly** protect religious organizations from "the promotion of same-sex marriage through religious programs, counseling, courses, or retreats, that is in violation of the religious society's beliefs." *See* D.C. CODE § 46-406(e) (2011)). *See also* N.H. REV. STAT. ANN § 457:37(3) (exempting "the promotion of marriage through **religious counseling**, programs, courses, retreats, or housing designated for married individuals"); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) §§ 2-3. (provided **so long as the program receives no government funding);** R.I. GEN. LAWS ANN. § 15-3-6.1 (West 2013) (exempting the "promotion of marriage through any social or religious programs or service"). **New York** may protect this. *See* N.Y. DOM. REL. LAW § 10-b (2) ("… nothing in this article shall limit or diminish the right, … of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization … from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained").

Three jurisdictions (Minnesota, New Hampshire and New York) **expressly** protect religious organizations from "the promotion of marriage through **… housing** designated for married individuals." *See* N.H. REV. STAT. ANN. § 457:37(3). *See also* N.Y. DOM. REL. Law § 10-b (2) ("… [N]othing in this article shall limit or diminish the right, … of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization to limit employment or sales or **rental of housing accommodations** or admission to or give preference to persons of the same religion or denomination…"); MINN. STAT. ANN. § 363A.26 (West 2013)(providing that religious organization are not prohibited from "in matters relating to sexual orientation, taking any action with respect to … housing and real property).

Three states (Vermont, New Hampshire and Maryland) expressly allow religiously-affiliated fraternal organizations, like the Knights of Columbus, expressly to **limit insurance coverage** to spouses in heterosexual marriages. *See* VT. STAT. ANN. tit. 8 § 4501(b); N.H. REV. STAT. ANN. § 457:37(IV) (2009); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202, Note: MD INS. LAW § 8–402 (2012); 2012 Maryland Laws Ch. 2 (H.B. 438) § 4.

Two states (Connecticut and Maryland) **expressly** allow a religiously-affiliated **adoption or foster care agency** to place children only with heterosexual married couples so long as they don't receive any government funding. (Conn. Pub. Acts No. 09-13 § 19); *See* MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012).

Three states (Maryland, New Hampshire and New York) **expressly** exempt **individual employees** "being managed, directed, or supervised by or in conjunction with" a covered entity from celebrating same-sex marriages if doing so would violate "religious beliefs and faith." *See* N.Y. DOM. REL. Law. § 10-b (1). *See also* N.H. REV. STAT. ANN. § 457:37(III); MD. CODE ANN., Note: FAM. LAW §§ 2-201, 2-202 (2012), 2012 Maryland Laws Ch. 2 (H.B. 438) § 2.

Two states (Maryland and New York) include **non-severability clauses** in their legislation. *See* 2011 Sess. Law News of N.Y. Ch. 96 (A. 8520 §5-a) ("This act is to be construed as a whole, and all parts of it are to be read and construed together. If any part of this act shall be adjudged by any court of competent jurisdiction to be invalid, the remainder of this act shall be invalidated."); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012) (the "provisions of this Act are not severable, and if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, no other provision or application of this Act may be given effect and this Act shall be null and void").