THOMAS MORE SOCIETY
A National Public Interest Law Firm

Pending Illinois Same-Sex Marriage Bill Would Be Worst in US in Protecting Religious Liberty

May 29, 2013

Dear Representative:

We strongly encourage you to oppose Senate Bill 10, creating "same-sex marriage" in Illinois, because – in addition to other fatal flaws – the bill utterly fails to protect the religious liberty of Illinoisans. Law professors on both sides of the marriage issue agree that **Senate Bill 10 provides the worst religious liberty protection of any same-sex marriage bill in the country.**

Senate Bill 10 represents an unprecedented restriction of religious liberty rights. Other states that allow same-sex marriage, including Connecticut, District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington, recognize the importance of protecting religious freedom in connection with creating same-sex marriage. As the attached letter from a group of legal scholars shows, these states' same-sex marriage laws include numerous forms of protection for their citizens from having "to provide services, accommodations, advantages, facilities, goods, or privileges . . . related to the solemnization of a marriage." (p. 5). SB 10 provides no such protection.

Under Senate Bill 10, religious individuals or organizations may be designated as "discriminators" and stripped of their government benefits or subject to penalty because they honor their faith commitments. Religious obligations go far beyond to the "solemnizing" of marriage at formal ceremonies. Religious individuals and organizations also provide medical care, education, and social services, but SB 10 is silent as to these individuals and organizations. What of the hospital run by religious sisters that does not provide same-sex spousal benefits? Will the sisters be denied government contracts or tax exemptions – or will injunctions be entered to force the sisters to disavow their faith? Will religious colleges that refuse to acknowledge the validity of same-sex marriages have their accreditation revoked? Will private adoption agencies, already forbidden from receiving government funding, be forced to place children with same-sex couples or shut down entirely? While the answers to these questions may be unclear, what is clear is that SB 10 will force religious people and organizations into years of legal fights, likely against the Illinois government, to defend their right to practice their faith.

Senate Bill 10 provides no protection to religious organizations and schools against those who seek to force their facilities to hold same-sex marriage-related events and to hire employees in same-sex marriages. SB 10 includes a section protecting churches from being forced to use a parish hall for a same-sex wedding, but it is silent as to whether the Knights of Columbus or similar groups will be forced to open their facilities to same-sex weddings. Indeed, in New Jersey, when a Methodist organization refused to host same-sex unions on their property, they lost their tax-exempt status and were fined $20,000!

Senate Bill 10 may force individuals to surrender their livelihoods in order to follow their consciences. SB 10 provides no protections for individuals who make their living by providing goods and services for the celebration of weddings, such as cake bakers, florists, and venue owners. Under SB 10, people of faith running these businesses would be faced with the choice of either closing their business or facilitating a ceremony that violates their religious beliefs. Already, a downstate bed & breakfast owner has been dragged before the Illinois Human Rights Commission to defend its decision not to host same-sex civil unions. In New Mexico, a Christian photographer has been forced to appeal to the New Mexico Supreme Court for expressing her religious liberty to decline to participate in a lesbian commitment ceremony. SB 10 is also silent on the plight of professionals such as doctors, social workers, and counselors who object to same-sex marriage – will they be forced to violate their consciences or have their licenses revoked?

Senate Bill 10 leaves religious individuals with less protection under the law than their religious leaders. Under SB 10, ***only*** an individual "acting as a representative of a religious denomination" is protected from participating in the solemnization of a same-sex wedding. SB 10 provides no protection for those who hold deep religious convictions but are not official representatives of their respective religions. If our laws fail to protect religious believers in the practice of their religion, then their purported respect for religion is a sham and meaningless.

A "yes" vote is a vote *against equal rights* for people of faith. As our prior memo to you showed, same-sex couples were granted every legal right available under state law by Illinois' civil union statute. Instead of being a "Religious Freedom" bill, SB 10 will devastate the liberties of individuals, businesses, religious organizations, and religious charities all across our State of Illinois.

We urge you to vote "no" on Senate Bill 10.

Very truly yours,

Thomas Brejcha
President & ~~Chief~~ Counsel

Peter Breen
Vice President & Senior Counsel

Enclosures: 1. Thomas More Society Response to "Illinois Unites for Marriage"
2. Bipartisan Law Professors' Letter of February 25, 2013

RESPONSE TO "ILLINOIS UNITES FOR MARRIAGE"

"Illinois Unites for Marriage," the major proponent of homosexual marriage, has sought to prove their case by putting forward a list of six bullet points (see attached) which they allege show that Illinois' current civil union law does not adequately protect the private interests of homosexual couples. We believe their six "examples" are at best misleading, if not false, and are wholly irrelevant to the debate over the homosexual marriage bill pending in the General Assembly.

1. "The share of an employee's benefits (family health insurance, etc.) that is paid by the employer is not taxable for a married couple; civil union partners have to pay taxes on those benefits."

Misleading. These are issues of ***federal law*** and federal taxation. The Congress has to change those laws – even if the Illinois General Assembly creates homosexual marriage, federal law will not change without an act of Congress. Illinois law already gives civil union couples "the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois" to married couples. (750 ILCS 75/20)

2. "There are 1,138 benefits, protections and obligations that federal law prohibits civil union couples from receiving (including Social Security survivor benefits, family leave, and veterans' benefits)."

Misleading. Again, federal law prohibits these 1,138 benefits from all those in homosexual unions, whether those unions are called "domestic partnerships," "civil unions," or "marriages." Even if the Illinois General Assembly creates homosexual marriage, homosexual couples don't get any one of these 1,138 benefits without an act of Congress.

3. "In emergency situations, hospitals, law enforcement, doctors, nurses and others recognize the rights of married spouses when dealing with healthcare decision-making. Civil union partners, on the other hand, are not consistently recognized as family and have been blocked from visiting their own children in hospital rooms."

Misleading. Illinois law provides that civil union partners have the same substantive legal rights as spouses. According to the 2010 US Census, fewer than 1% of Illinois households are headed by homosexual couples. Due to the rarity of civil unions – and the fact that homosexual unions generally did not exist in Illinois law prior to 2011 – it is understandable that there may have been instances where medical and law enforcement agency personnel were unaware of how to handle civil union couples. However, one can reasonably assume that each of these isolated instances resulted in the lawyers of the Illinois ACLU and Lambda Legal issuing stern legal letters, followed by immediate compliance by the relevant agencies. Education on current law is the answer to this issue, not redefining marriage.

4. "When family members are sick and hospitalized, married partners are understood to be family, and their visiting rights are respected. Civil union partners, on the other hand, are not consistently recognized as family and have been blocked from visiting their own children in hospital rooms."

Misleading. Again, the idea of homosexual unions is new to Illinois. These isolated instances of medical personnel not knowing that Illinois law recognizes homosexual unions are not a reason to change the law again, this time redefining marriage for the entire state.

5. "When traveling outside Illinois, couples in civil unions have found their family status and rights as parents misunderstood or denied in critical situations, unless they travel with complete sets of legal papers and court documents."

Misleading. The large majority of states do not recognize homosexual unions at all, whether those unions are called "domestic partnerships," "civil unions," or "marriages." The General Assembly cannot change this. Even in Illinois, if civil union partners are not the parents or legal guardians of a child, they have little or no rights over that child, nor should they, any more than a stepparent would.

6. "In many jurisdictions outside Illinois, civil unions have no legal recognition or protections whatsoever."

Misleading. Again, most states – in union with the federal government – do not recognize homosexual unions, whether called "domestic partnerships," "civil unions," or "marriages." No matter whether the General Assembly redefines marriage or not, other states' laws will not change.

The U.S. Supreme Court is currently considering two cases dealing with the issue of homosexual unions in light of the U.S. Constitution. With decisions expected in June, the Supreme Court is expected to give guidance to legislators on the contours of federal law in relation to homosexual unions. If the General Assembly were to decide wait for that June guidance before legislating, that decision would not in any way harm homosexual couples.

Marriage v. Civil Unions

In spite of granting basic state-level legal recognition to committed same-sex relationships, civil unions constitute a second-class status when compared with civil marriage. Below are just some examples of the differences:

- The share of an employee's benefits (family health insurance, etc.) that is paid by the employer is not taxable for a married couple; civil union partners have to pay taxes on those benefits.
- There are 1,138 benefits, protections and obligations that federal law prohibits civil union couples from receiving (including Social Security survivor benefits, family leave, and veterans' benefits.)
- In emergency situations, hospitals, law enforcement, doctors, nurses and others recognize the rights of married spouses when dealing with healthcare decision-making. Civil union partner rights remain misunderstood and often require separate review and documentation in emergency situations.
- When family members are sick and hospitalized, married partners are understood to be family, and their visiting rights are respected. Civil union partners, on the other hand, are not consistently recognized as family and have been blocked from visiting their own children in hospital rooms.
- When traveling outside Illinois, couples in civil unions have found their family status and rights as parents misunderstood or denied in critical situations, unless they travel with complete sets of legal papers and court documents.
- In many jurisdictions outside Illinois, civil unions have no legal recognition or protections whatsoever.

Civil unions were intended to provide basic state-level legal protections to couples in committed relationships but aren't recognized in many other states or by federal law. While everyone understands and honors marriage, civil union families are not treated with the same respect and often, in critical situations, must provide additional proof of status.

The U.S. Supreme Court has taken up a case that is widely expected to extend recognition under federal law to same-sex couples who are legally married. Should this happen, Illinois residents in civil unions would be ineligible for benefits under federal law that are available to married same-sex couples; they would also continue to occupy a second-class legal status.

While married families could enjoy the ability to file joint tax returns, participate in spousal Social Security and veterans' benefits, naturalization of spouses etc., Illinois families in civil unions may find themselves left out.

And while these legal rights are important for healthcare, financial planning and protection of children, they are not the main reasons that Illinois same-sex couples want the freedom to marry. Lesbian and gay couples want to marry for the same reasons as everybody else. They want to pledge their commitment and fidelity before friends and family, to show their love for each other, and to build stable, nurturing families while contributing to their neighborhoods, their communities and their state.

The Religious Freedom and Marriage Fairness Act, which is pending before the Illinois General Assembly, protects the freedom of religion and would not require any faith institution to perform a union with which it disagrees.

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February 25, 2013

BY TELECOPY AND EMAIL

The Honorable Daniel J. Burke
House Executive Committee, Chairperson
District 23
233-E Stratton Office Building
Springfield, IL 62706

Re: Religious Liberty Implications of Engrossed Senate Bill 0010

Dear Representative Burke:

We wrote to you on January 23, 2013 regarding the religious liberty implications of Engrossed Senate Bill 0010 (our original letter is attached). On February 12, 2013, the Senate approved two Senate amendments, now contained in Engrossed Senate Bill 0010. While better than the religious liberty protections initially included in the bill, the Amendments in Engrossed Senate Bill 0010 fall well short of providing robust religious liberty protections, as we explain below. Indeed, every other state has provided greater religious liberty protections than Engrossed Senate Bill 0010.

This becomes apparent from a simple reading of the text. In the initial draft, Section 15 provided:

> Section 15. Religious freedom. Nothing in this Act shall interfere with or regulate the religious practice of any religious denomination or Indian Nation or Tribe or Native Group. Any religious denomination or Indian Nation or Tribe or Native Group is free to choose which marriages it will solemnize or celebrate.

After amendment, Engrossed Senate Bill 10 now further provides:

> (a-5) Nothing in this Act shall be construed to require any religious denomination or Indian Nation or Tribe or Native Group, or any minister, clergy, or officiant acting as a representative of a religious denomination or Indian Nation or Tribe or Native Group, to solemnize any marriage. Instead, any religious denomination or Indian Nation or Tribe or Native Group, or any minister, clergy, or officiant acting as a representative of a religious denomination or Indian Nation or Tribe or Native Group is free to choose which marriages it will solemnize.

> Notwithstanding any other law to the contrary, a refusal by a religious denomination or Indian Nation or Tribe or Native Group, or any minister, clergy, or officiant acting as a representative of a religious denomination or Indian Nation or Tribe or Native Group to solemnize any marriage under this Act shall not create or be the basis for any civil, administrative, or criminal penalty, claim, or cause of action.
>
> (a-10) No church, mosque, synagogue, temple, nondenominational ministry, interdenominational or ecumenical organization, mission organization, or other organization whose principal purpose is the study, practice, or advancement of religion is required to provide religious facilities for the solemnization ceremony or celebration associated with the solemnization ceremony of a marriage if the solemnization ceremony or celebration associated with the solemnization ceremony is in violation of its religious beliefs. An entity identified in this subsection (a-10) shall be immune from any civil, administrative, criminal penalty, claim, or cause of action based on its refusal to provide religious facilities for the solemnization ceremony or celebration associated with the solemnization ceremony of a marriage if the solemnization ceremony or celebration associated with the solemnization ceremony is in violation of its religious beliefs. As used in this subsection (a-10), "religious facilities" means sanctuaries, parish halls, fellowship halls, and similar facilities. "Religious facilities" does not include facilities such as businesses, health care facilities, educational facilities, or social service agencies.

The terms "solemnization" and "celebration" have temporal connotations, and presumably do not reach activities that would require a religious organization to "recognize" a couple's marriage long after the marriage's solemnization. For example, many churches routinely offer marriage counseling and marriage retreats for their members, either directly through the church or an affiliated organization—and many naturally will want to limit such services only to couples in marriages recognized by their faith tradition. Because Section (a-10) confines its protections to solemnization and celebration, will every church or church-affiliated group that attempts to sustain the marriages of its members then be open to suit under Illinois' nondiscrimination laws for doing so?

Section (a-10)'s "protection" against government penalty for refusing to <u>solemnize</u> a relationship likewise fails to avert predictable, but needless clashes over same-sex marriage. The real protection that religious organizations need from government penalty is for the decision not to <u>recognize</u> a marriage that violates the organization's own religious beliefs—not the decision not to solemnize it. Furthermore, the organizations in need of real protections are religiously affiliated nonprofits, not just "church[es], mosque[s], synagogue[s], temple[s], nondenominational ministr[ies]" and "other organization[s] whose principal purpose is the study, practice, or advancement of religion". We know this from experience. The city of San Francisco stripped $3.5 million in social services contracts from the Salvation Army when it refused, for religious reasons, to provide benefits to its employees' same-sex partners. In 2007, the administrators of an Arizona adoption facilitation website were found subject to California's

public accommodations statute because they refused to post profiles of same-sex couples as potential adoptive parents.

Even more problematic, it is unclear whether government penalty—like the loss of grants—would be encompassed by Sections (a-5) or (a-10). Section (a-5) provides that no covered refusal under the act shall "be the basis for any civil, administrative, or criminal penalty, claim, or cause of action." Under this construction, it is unclear whether "administrative" modifies the word "penalty" or "claim" or "cause of action." Likewise, Section (a-10) gives immunity from any "civil, administrative, criminal penalty, claim, or cause of action," which is equally unclear as to insulation from government penalty like the loss of grants.

Engrossed Senate Bill 0010 provides no protections whatsoever for ordinary individuals. Bakers, photographers, seamstresses, florists and B&B owners who, for religious reasons prefer to step aside from celebrating or facilitating same-sex marriages may be subject to suit under Illinois' nondiscrimination laws.

Every other state that has recognized same-sex marriage by legislation has provided more religious liberty protections than this. These laws expressly insulate religious organizations and individuals from needless clashes over same-sex marriages. They are as follows:

Core Religious Liberty Protections in Same-Sex Marriage Legislation[1]	
Core Religious Protections Enacted Elsewhere	**Engrossed Senate Bill 0010**
All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, 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); 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; 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); WASH. REV. CODE § 26.04.010(2)(4) (2012).	**Protected** in section (a-5).

[1] 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) *available at* http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1130&context=wlufac.

All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, 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; N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1); VT. STAT. ANN. tit. 8, § 4502(1); WASH. REV. CODE § 26.04.010(2)(5).	Section (a-10) protects such groups **only** as to refusals to provide **"religious facilities for the solemnization ceremony or celebration."**
All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington) **expressly** protect covered religious objectors from **private suit** for refusing 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) §§ 2-3; N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1); VT. STAT. ANN. tit. 8, § 4502(1); WASH. REV. CODE § 26.04.010(2)(6).	Section (a-5) protects religious denominations, clergy, and officiants **only** as to refusals to **"solemnize any marriage."** Section (a-10) protects covered religious organizations **only** as to refusals to **"provide religious facilities for the solemnization ceremony or celebration."**
Six jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, 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; N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1); WASH. REV. CODE § 26.04.010(2)(4).	It is **unclear** whether (a-5) and (a-10) protects from the loss of government grants, as explained above.

Three jurisdictions (Maryland, the District of Columbia and New Hampshire) **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). 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").	**No protection**
Two jurisdictions (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…").	**No protection**
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	**No protection**

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).	**No protection**
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.	Section (a-5) provides protection to officiants

Robust religious liberty protections constitute a middle path that allows the Legislature to achieve *both* of its stated goals in Engrossed Senate Bill 0010: extending the benefits of civil marriage to same-sex couples while not "abrogate[ing], limit[ing], or expand[ing] the ability of a religious denomination to exercise First Amendment rights protected by the United States Constitution or the Illinois Constitution."

Supporters of same-sex marriage should support this middle path for reasons of prudence as well as principle. Consider Maine's experience in 2009. There, legislators steadfastly refused to include the robust religious freedom protections embraced elsewhere, opting for hollow guarantees. Maine voters overturned Maine's law in a people's referendum by a narrow 52.9% to 47.1% margin. Fast forward to the 2012 election. When referendum supporters included religious liberty protections in Maine's law, Maine voters upheld the law 52% to 48%. Clearly, voters were swayed by the inclusion of live-and-let-live religious liberty protections.

We hope this analysis will assist you in evaluating Engrossed Senate Bill 0010.

Respectfully Yours,[*]

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[*] We write in our individual capacities and our employers take no position on this or any other bill.

ATTACHMENT:

Letter to Representative Burke, dated January 23, 2013

January 23, 2013

BY FEDEX

The Honorable Daniel J. Burke
District 23
233-E Stratton Office Building
Springfield, IL 62706

Re: Religious Liberty Implications of Legalizing Same-Sex Marriage

Dear Representative Burke:

We write to urge the Illinois General Assembly to ensure that any bill legalizing same-sex marriage does not infringe the religious liberty of organizations and individuals who, for religious reasons, conscientiously object to facilitating same-sex marriages. Providing religious protections in any same-sex marriage bill honors America's long and rich tradition of religious freedom and tolerance.

If the Legislature legalizes same-sex marriage, it is possible to do so without infringing on religious liberty. The contentious debate in New York, Washington, Maryland and elsewhere surrounding same-sex marriage proves the wisdom of constructive, good-faith attempts both to grant legal recognition to same-sex marriage *and* to protect religious liberty for conscientious objectors.[2]

This letter analyzes the potential effects of same-sex marriage on religious conscience in Illinois and proposes a solution to address the conflicts: a specific religious liberty protection that should be an integral part of any proposed legislation. This proposal clarifies that individuals and organizations may refuse to provide services for a wedding if doing so would violate deeply held beliefs, while ensuring that the refusal creates no substantial hardship for the couple seeking the service. We write not to support or oppose same-sex marriage in Illinois. Rather, our aim is to define a "middle way" to address the needs of same-sex couples while honoring and respecting religious liberty.[3]

As this letter details, the conflicts between same-sex marriage and religious conscience will be both certain and considerable if adequate protections are not provided. Without adequate safeguards, many religious individuals will be forced to engage in conduct that violates their deepest religious beliefs, and religious organizations will be constrained in crucial aspects of their religious exercise. We urge the Illinois General Assembly to take the time and care to ensure that the legalization of same-sex marriage does not restrict the inalienable right of

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[2] An Appendix is attached summarizing the core religious liberty protections afforded by jurisdictions that currently recognize or recently considered enacting same-sex marriage.

[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.

religious liberty. Doing so is entirely consistent with the text of the Illinois State Constitution that each member of the General Assembly has sworn to uphold and protect. Since its adoption in 1818 to the present text, the Illinois Constitution protects religious freedom in the strongest of terms.[4]

Part A of this letter proposes a specific religious conscience protection that will defuse the vast majority of conflicts between same-sex marriage and religious liberty. Part B provides examples of precedent for the protection we propose. Part C details the sorts of legal conflicts that will arise if same-sex marriage is legalized without reasonable protections for religious liberty.

A. Proposed Religious Conscience Protection

The many potential conflicts between same-sex marriage and religious liberty are avoidable.[5] But they are avoidable only if the Illinois General Assembly 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 call for.[6] The juncture for balancing religious liberty and legal recognition of same-sex unions is now.[7]

Any proposed marriage bill can provide reasonable, carefully tailored protections for religious conscience by including a simple "marriage conscience protection" modeled, in part, on existing conscience protections in Illinois' nondiscrimination laws, which provide religious protections in the strongest of terms.[8] The "marriage conscience protection" would provide as follows:

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[4] *See* ILL. CONST., art. 1, sec. 3 ("The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed[.]").

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

[6] *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).

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

[8] *See, e.g.,* 775 ILL. COMP. STAT. 5/5-102.(1)(b) (2012) ("With respect to a place of public accommodation defined in paragraph (11) of Section 5-101, the exercise of free speech, free expression, free exercise of religion or expression of religiously based views by any individual or group of individuals that is protected under the First Amendment to the United States Constitution or under Section 3 of Article I, or Section 4 of Article I, of the Illinois Constitution, shall not be a civil rights violation.")

Section ___

(a) Religious organizations protected.

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

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

(2) solemnize any marriage; or

(3) treat as valid any marriage

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

(b) Individuals and small businesses protected.

(1) Except as provided in paragraph (b)(2), no individual, sole proprietor, or small business shall be required to

(A) provide goods or services that assist or promote the solemnization or celebration of any marriage, or provide counseling or other services that directly facilitate the perpetuation of any marriage; or

(B) provide benefits to any spouse of an employee; or

(C) provide housing to any married couple

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

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

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

(B) in the case of an individual who is a government employee or official, if another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay; *provided that* no judicial officer authorized to solemnize marriages

shall be required to solemnize any marriage if to do so would violate the judicial officer's sincerely held religious beliefs.

(3) A "small business" within the meaning of paragraph (b)(1) is a legal entity other than a natural person

(A) that provides services which are primarily performed by an owner of the business; or

(B) that has five or fewer employees; or

(C) in the case of a legal entity that offers housing for rent, that owns five or fewer units of housing.

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

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

(1) result in a civil claim or cause of action challenging such refusal; or

(2) result in any action by the State or any of its subdivisions to penalize or withhold benefits from any protected entity or individual, under any laws of this State or its subdivisions, including but not limited to laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status.[9]

This proposed legislation has several important features. First, the language parallels existing protections in Illinois nondiscrimination law which articulates that "the exercise of free speech, free expression, free exercise of religion or expression of religiously based views by any individual or group of individuals that is protected under the First Amendment to the United States Constitution or under Section 3 of Article I, or Section 4 of Article I, of the Illinois Constitution, shall not be a civil rights violation."[10] The language also significantly mirrors, in

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

[10] 775 ILL. COMP. STAT. 5/5-102.1(b) (2012) ("With respect to a place of public accommodation defined in paragraph (11) of Section 5-101, the exercise of free speech, free expression, free exercise of religion or expression of religiously based views by any individual or group of individuals that is protected under the First Amendment to the United States Constitution or under Section 3 of Article I, or Section 4 of Article I, of the Illinois Constitution, shall not be a civil rights violation.); 775 ILL. COMP. STAT. 5/5-103 (2012) (Excluding any "private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the establishment are made available to

part, the express protections provided in the Connecticut, District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington same-sex marriage laws for religious organizations. Many of these laws protect, among other things, the conscientious refusal "to provide services, accommodations, advantages, facilities, goods, or privileges . . . related to the solemnization of a marriage."[11]

Second, this proposed legislation lists the primary areas of Illinois law where the refusal to treat a marriage as valid is likely to result in liability, penalty, or denial of government benefits ("laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status").

Third, this proposed legislation provides protection only when providing services related to a marriage, solemnizing a marriage, or being forced to treat a marriage as valid would "violate . . . sincerely held religious beliefs." This phrase is drawn from numerous court cases discussing the First Amendment to the U.S. Constitution and ensures that the religious conscience protections will apply only to a "violation" of "sincere" beliefs that are "religious"—not to

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the customers or patrons of another establishment that is a place of public accommodation" from the definition of a public accomodation).

[11] *See* 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); 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…"); 2012 Md. Laws ch. 2 § 3 (to be codified at Md. Code Ann., Fam. Law §§ 2-201–2-202) (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") (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. § 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"); 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").

situations that merely make religious people uncomfortable, not to insincere beliefs asserted as a pretext for discrimination, and not to non-religious moral beliefs.

Fourth, this proposed legislation provides vital protections in subsection (b) for individuals of religiously informed conscience who own sole proprietorships and small businesses. We explain the need for such protection in Parts C and D below.

Finally, this proposed legislation recognizes that religious accommodations might not be without cost for same-sex couples, such as the need to find a different wedding photographer or caterer if their original choice must decline for reasons of conscience. In order to address this issue, subsection (b)(2) ensures that a same-sex couple can obtain the service, even from conscientious objectors, when the inability to find a similar service elsewhere would impose a substantial hardship on the couple. But because this hardship exception could force organizations or individuals to violate their religious beliefs, it should be available only in cases of substantial hardship, not mere inconvenience or symbolic harm. The language in subsection (b)(2)(B) also ensures that no government employee or official (such as a county clerk) may act as a choke point on the path to marriage. So, for example, no government employee can refuse on grounds of conscience to issue a marriage license unless another government employee is promptly available and willing to do so. These sorts of override protections are common in other laws protecting the right of conscientious objection, especially in the health care context.[12]

B. Precedent for Religious Conscience Protections

There is ample precedent for the type of conscience protection we have proposed. As noted above, Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington have already enacted religious exemptions as part of their legislation implementing same-sex marriage.[13] Similarly, Illinois' existing nondiscrimination laws on employment provide a categorical exemption for religious organizations.[14] And federal

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[12] *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)).

[13] *See* note 11 above and pages 14-15 below.

[14] *See* 775 ILL. COMP. STAT. 5/2-101 (exempting "any religious corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious denomination with respect to the employment of individuals of a

nondiscrimination statutes provide protection for religious and conscientious objectors in many different contexts.[15] In short, protecting religious conscience is very much a tradition of both America and Illinois. We urge the Illinois General Assembly to continue that "middle way" accommodation 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 of treatment and respect for same-sex marriages. It has ample precedent in both Illinois and U.S. law. And it represents the best in the American and Illinois constitutional tradition of protecting the inalienable right of conscience.

C. Conflicts Between Same-Sex Marriage and Religious Liberty

In the only book-length comprehensive scholarly work on same-sex marriage and religious liberty,[16] 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 of change in American law" and will "reverberate across the legal and religious landscape."[17] The conflicts between religious conscience and same-sex marriage generally take one of two forms. First, if same-sex marriage is legalized without appropriate statutory accommodations, religious organizations and individuals that object to same-sex marriage will face new lawsuits under the state nondiscrimination act and other similar laws. So will many small businesses, which are owned by individual conscientious objectors. Likely lawsuits include claims where:

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particular religion to perform work connected with the carrying on by such corporation, association, educational institution, society or non-profit nursing institution of its activities.").

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

[16] SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds. (Rowman & Littlefield 2008) (including contributions from both supporters and opponents of same-sex marriage). *See also* Thomas Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206 (2010); Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, 5 NW. J. L. & SOC. POL'Y 307 (2010); Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 Nw. J. L. & Soc. Pol'y 318 (2010).

[17] *Id.* Marc Stern, *Same-Sex Marriage and the Churches* at 1 [hereinafter "Stern"]. *See also* Laycock at 191-7 (detailing the scope of "avoidable" and "unavoidable" conflicts); Robin Fretwell Wilson, Washington and Lee University School of Law, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes between Religion and the State*, 53 B.C. L. REV. 1417 (2012) *available at* http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1130&context=wlufac.

- 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.[18]

- Religious summer camps, day care centers, retreat centers, counseling centers, meeting halls, or adoption agencies can be sued under public accommodations laws for refusing to offer their facilities or services to members of a same-sex marriage.[19]

- 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.[20]

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

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[18] *See* 775 ILL. COMP. STAT. 5/2-101 (exempting "any religious corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious denomination with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, society or non-profit nursing institution of its activities."); *Elane Photography v. Willock*, 284 P.3d 428, N.M.App., May 31 , 2012 cert. granted, 2012-NMCERT-008 Aug. 16, 2012. (New Mexico photographer fined for refusing on religious grounds to photograph a same-sex commitment ceremony); Stern at 37-39; *see also Issues Brief: Same-Sex Marriage and State Anti-Discrimination Laws* at 3-5, *available at* http://www.becketfund.org/files/34a97.pdf_ [hereinafter "Issues Brief"].

[19] *Bernstein v. Ocean Grove Camp Meeting Ass'n*, Num.. CRT 6145-09 (Off. of Admin. Law decision issued January 12, 2012. Available at http://www.adfmedia.org/files/OGCMA-BernsteinRuling.pdf) (finding that a Methodist organization likely violated public accommodations law by denying same-sex couples use of its wedding pavilion); *Butler v. Adoption Media*, 486 F. Supp.2d 1022 (N.D. Cal. 2007) (administrators of Arizona adoption facilitation website found subject to California's public accommodations statute because they refused to post profiles of same-sex couples as potential adoptive parents); *see also* Stern at 37-39; Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 BYU J. PUB. L. 475 (2008) (describing clashes over adoptions by same-sex couples).

[20] Stern at 48-52; Issues Brief at 3-5.

contracts or grants on the ground that it is engaging in discrimination that contravenes public policy.[21]

- 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.[22]

- Doctors, psychologists, social workers, counselors, and other professionals who conscientiously object to same-sex marriage can have their licenses revoked.[23]

- Religious fraternal organizations or other nonprofits that object to same-sex marriage can be denied food service licenses, adoption agency licenses, child care licenses, or liquor licenses on the ground that they are engaged in unlawful discrimination.[24]

- Religious colleges or professional schools can have their accreditation revoked for refusing to recognize the validity of same-sex marriages.[25]

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[21] *See 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).

[22] *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).

[23] *See* Stern at 22-24 (noting that a refusal to provide counseling services to same-sex couples could be "considered a breach of professional standards and therefore grounds for the loss of a professional license"); *see also* Patricia Wen, *"They Cared for the Children": Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families*, BOSTON GLOBE, June 25, 2006, at A1 (explaining how Massachusetts threatened to revoke the adoption license of Catholic Charities for refusing on religious grounds to place foster children with same-sex couples); Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes Over Same-Sex Adoption*, 22 BYU J. PUB. L. 475 (2008) (describing dismissals and resignations of social services workers where conscience protections were not available).

[24] *See, e.g.*, Stern at 19-22 (noting that many state regulators condition licenses on compliance with nondiscrimination requirements).

[25] 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

- Church-affiliated organizations can have their tax exempt status stripped because of their conscientious objection to same-sex marriage.[26]

All of these conflicts either did not exist before, or will significantly intensify after, the legalization of same-sex marriage. Thus, legalizing same-sex marriage without adequate protections for religious liberty will have at least two unintended consequences: It will harm religious organizations and individuals of conscience, *and it will spawn costly, unnecessary conflicts, many of which will lead to litigation*.[27]

D. The Need for Robust Religious Liberty Protection

In 2012, House Bill 5170 was introduced in the Illinois General Assembly to enact same-sex marriage. This bill failed to provide sufficient protections for religious conscience. Section 209(a) of the bills states "[n]othing in this Act shall be construed to

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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.

[26] Jill P. Capuzzo, *Group Loses Tax Break Over Gay Union Issue*, N.Y. TIMES, Sept. 18, 2007 (describing the case of *Bernstein v. Ocean Grove Camp Meeting Ass'n*, in which New Jersey revoked the property tax exemption of a beach-side pavilion controlled by an historic Methodist organization, because it refused on religious grounds to host a same-sex civil union ceremony); Douglas W. Kmiec, Pepperdine University School of Law, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 107-21 (describing attacks on tax exemptions for religious organizations with objections to same-sex marriage); Jonathan Turley, George Washington University Law School, *An Unholy Union* in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 59-76 (arguing for same-sex marriage but against withdrawal of tax exemptions for religious organizations with conscientious objections).

[27] Filed lawsuits are often just the tip of the iceberg with respect to conflicts over a given law and a claimed right. Most conflicts get resolved before a suit is filed and comes to the attention of the public. Some employers will back down when suit is threatened. Others will pay a settlement and walk away. Some employers will be quietly "chilled" even though they would prefer another course of action. What matters is the number of conflicts rather than the number of lawsuits. This data is not available, however, and so cannot be empirically studied. Nonetheless, there need only be a few conflicts for there to be a crisis of conscience. Each conflict is a profound violation of religious liberty. Moreover, even assuming that there are a small number of actual conflicts (as some critics claim), then there will be a correspondingly few number of same-sex couples affected by the religious exemptions we recommend. Finally, discrimination lawsuits often increase dramatically over time, so an important question is how many lawsuits against conscientious objectors will be filed 20 years from now. *See, e.g.*, Vivian Berger *et al.*, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 45 (2005) ("The number of employment discrimination lawsuits rose continuously throughout the last three decades of the twentieth century. In the federal courts, such filings grew 2000% . . . .").

require any religious denomination…or any officiant acting as a representative of a religious denomination…to solemnize any marriage."[28] This bill offers *no protection* to those with conscientious religious objections to same-sex marriage.

As explained below, *this provision would have provided less protection for religious liberty than every other state that has successfully enacted same-sex marriage legislation*. The bills conferred on religious organizations only that protection already guaranteed by the U.S. Constitution and Illinois Constitution. Individual clergy or religious organizations that refuse to perform same-sex marriage receive ersatz protection, for they are already protected by the U.S. Constitution. Indeed, with or without this language, "[n]o one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them."[29] Focusing on the issue of "forced officiating" is a straw-man argument calculated to distract the uninformed from real situations where religious conscience is at risk.

What the proposed legislation left out was considerable:

- It provides no protection from the loss of government benefits for refusing to recognize a same-sex marriage.
- It provides no protection for individual objectors.
- It provides no protection to religious organizations from private lawsuits brought under Illinois' nondiscrimination laws.

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

a. 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 hand of the government.[30] How might this occur?

An objector may be penalized by losing access to government grant programs or other state or local benefits. Thus, in *Catholic Charities of Maine v. City of Portland*, the district court upheld a Portland ordinance that forced a religious charity either to extend employee spousal

[28] House Bill 5170 (2012).

[29] Stern at 1.

[30] 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.

benefits to registered same-sex couples, or to lose eligibility to all city housing and community development funds.[31] 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.[32] 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.[33] Closer to home, Catholic adoption agencies in Illinois recently lost contracts with the state because they refused to place children in the homes of unmarried cohabitating couples.[34] The state claimed that the Catholic adoption agencies had violated the state's newly enacted civil union law.[35] That law contains no exemption for religious civil service agencies and thus provides no protection against government penalties for conscientious objectors. Although this case implicated a civil union law, the consequences for a religious organization in Illinois would be indistinguishable under the proposed same-sex marriage legislation without these important exemptions 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

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[31] 304 F. Supp. 2d 77 (D. Me. 2004); *see also* footnote 19 above.

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

[33] *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) (dismissing breach of contract complaints arising from city's termination of a lease with the Boy Scouts based on the Boy Scouts' policies regarding homosexual conduct); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (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.

[34] *Catholic Charities of the Diocese of Springfield v. State*, 2011 WL 3655016 (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.

[35] Illinois Religious Freedom Protection & Civil Union Act, 750 ILCS 75/1 *et seq.*

of two lesbian couples in its beach-side pavilion.[36] Local authorities stripped the group of their exemption from local property taxes on the pavilion, and billed them for $20,000.[37]

The Camp Meeting Association did not just lose its tax exemption from taxes on the pavilion. It was also investigated by the New Jersey Department of Civil Rights for an alleged violation of the New Jersey Law Against Discrimination. In fact, the Department of Civil Rights has determined that probable cause exists to find a violation. Thus, the case is not only about losing tax-exempt status, but also about being penalized for allegedly violating state nondiscrimination laws.[38]

These impacts on church-affiliated organizations, predicted by scholars,[39] did not result from statutory revocations of tax-exempt status in civil union legislation. Instead, these actions

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[36] *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*).

[37] *See* Bill Bowman, *$20G Due in Tax on Boardwalk Pavilion: Exemption Lifted in Rights Dispute*, ASBURY PARK PRESS, Feb. 23, 2008.

Some exemption opponents argue that *Ocean Grove* is irrelevant to the same-sex marriage debate because the tax exemption at issue was conditioned upon the Camp Meeting Association's willingness to open the property for the entire public. That argument, however, overlooks two points. First, while the tax exemption in *Ocean Grove* was based on an open-space requirement, nothing stops governments from conditioning tax exemptions on other things, such as compliance with state and local nondiscrimination laws or, more generally, being organized for the "public interest." *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983). Thus, just as governments can strip a tax exemption because an organization cannot in good conscience open its property to the entire public, so also governments can strip a tax exemption because it concludes that an organization's conscientious objection to same-sex marriage violates nondiscrimination laws or "public policy" more generally. Second, when the Camp Meeting Association agreed to open its property to the entire public, it likely never contemplated the legalization of civil unions or same-sex marriage, much less that it would be asked to facilitate such a marriage in violation of its religious beliefs. *Ocean Grove* thus illustrates the fact that legalizing same-sex marriage will create significant conflicts of conscience that were never contemplated before.

[38] As 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).

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

occurred because state law offered no explicit exemption providing otherwise. These experiences drive home the need for explicit protection from penalties by the government.

b. Needed Protection for Individual Objectors

Legal recognition of same-sex marriage can also place a real burden on *individuals* whose objection arises not from anti-gay animus, but from a sincere religious belief in traditional marriage.

Without exemptions for individuals who, for religious reasons, prefer to step aside from same-sex marriage ceremonies, a religious individual who runs a small business, e.g., a 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.[40] The failure to protect such individuals puts the individual to a cruel choice: their conscience or their livelihood.[41] Enacting protections for individual objectors *is not only necessary but also consistent with the existing public policy* in Illinois' antidiscrimination statutory scheme.[42]

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 food or driving taxis, simply do*

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for same-sex marriage but against withdrawal of tax exemptions for religious organizations with conscientious objections).

[40] *See Elane Photography v. Willock*, 284 P.3d 428, N.M.App., May 31 , 2012 cert. granted, 2012-NMCERT-008 Aug. 16, 2012. (New Mexico photographer fined 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.

[41] 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).

[42] Illinois' Human Rights Act contains an exemption in its laws regarding antidiscrimination in real estate transactions for individuals and owner-occupied rental housing accommodations. *See* 775 ILL. COMP. STAT. ANN. 5/3-106(A) (2011) (exempting the owner of a single family home from selling to a member of a protected class if: (a) The owner does not own or have a beneficial interest in more than three single family homes at the time of the sale; (b) The owner or a member of his or her family was the last current resident of the home; (c) The home is sold without the use…of the sales or rental facilities or services of any real estate broker or salesman…; (d) The home is sold without the publication, posting or mailing, after notice, of any advertisement or written notice"); *see also id.* at 5/106(H-1) (allowing "[t]he owner of an owner-occupied residential building with four or fewer units (including the unit in which the owner resides) [to make] decisions regarding whether to rent to a person based upon that person's sexual orientation" without fear of penalty).

not. They have no objection generally to providing services, but they object to directly facilitating a marriage.

In short, nondiscrimination statutes enacted years ago now take on a whole new level of significance, with a much greater need for religious exemptions. A Marriage Bill that provides no protection to individual objectors (other than authorized celebrants, who are already protected by the Constitution) would effectively leave any individual who refuses to assist with same-sex wedding ceremonies open to suit, whether framed as sexual orientation discrimination, sex discrimination, or, where applicable, marital-status discrimination.[43]

Of course, exempting individual objectors might not be without cost for same-sex couples. Thus, we argue only for "hardship exemptions"—exemptions that are available only when there is no substantial hardship on same-sex couples.[44]

c. No Robust and Uniform Protection for Religious Organizations

Illinois' existing laws provide additional precedent for religious conscience protection. For example, Illinois' Human Rights Act contains important exemptions for certain religious organizations.[45] Similarly, federal laws provide protections for religious and conscientious

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[43] Refusals to provide benefits to same-sex partners have been invalidated in other jurisdictions as a form of gender or sex discrimination. For instance, in *In re Levenson*, 560 F.3d 1145 (9th Cir. 2009) (Order of Reinhardt, J.), the court found an employer's denial of coverage for an employee's same-sex partner under the company's employment benefits plan to be sex discrimination. As Judge Reinhardt explained:

> There is no doubt that the denial of Levenson's request that Sears be made a beneficiary of his federal benefits violated the EDR Plan's prohibition on discrimination based on sex or sexual orientation. Levenson was unable to make his spouse a beneficiary of his federal benefits due solely to his spouse's sex. If Sears were female, or if Levenson himself were female, Levenson would be able to add Sears as a beneficiary. Thus, the denial of benefits at issue here was sex-based and can be understood as a violation of the EDR Plan's prohibition of sex discrimination.

See also In re Golinski, 2009 WL 2222884 at *3 (9th Cir. Jan. 13, 2009) (Order of Kozinski, C.J.) (construing Ninth Circuit benefits policy to include same-sex spouses because denial of benefits to same-sex marriage was form of sex-based discrimination); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality op.) (discrimination by state against same-sex spouses raised difficult constitutional questions regarding sex discrimination and sexual orientation discrimination); *In re Marriage Cases*, 183 P.3d 384, 436-40 (Cal. 2008) (same-sex marriage proponents pursued gender discrimination claims ultimately rejected by court); *cf.* WIS. STAT. § 111.36(1)(d) (defining sexual orientation discrimination as a form of gender discrimination).

[44] *See* Part A above.

[45] 775 IL. COMP. STAT. ANN. 5/2-101(B)(2) (in employment nondiscrimination provisions, definition of "employer" "does not include any religious corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who rely upon

objectors in many different contexts.[46] In short, protecting conscience is very much part of the American and Illinois State tradition. The Legislature should make the effort to continue that tradition.

As explained in Part C above, these nondiscrimination laws can prompt lawsuits against religious organizations that, for religious reasons, cannot recognize or facilitate a same-sex marriage. For example, a nonprofit social service organization, like a Catholic hospital, could be sued for refusing to provide its employees with same-sex spousal benefits in violation of its religious beliefs; religious day care centers, retreat centers, counseling centers, or adoption agencies could be punished under public accommodations laws for refusing to offer their facilities or services to members of a same-sex marriage; or a religious organization that dismisses an employee, such as a youth counselor, for entering into a same-sex marriage can be sued under employment discrimination laws that prohibit discrimination on the basis of marital status.[47]

The proposed bill in Illinois to legalize same-sex marriage provides *considerably less* protection than *every other jurisdiction* where the legislature has considered the issue.[48] Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington have all enacted same-sex marriage laws, and all provide much more protection for religious liberty than the current Illinois bill.[49] Each of those states protects religious

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treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious denomination with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, society or non-profit nursing institution of its activities."); 775 IL. COMP. STAT. ANN. 5/3-106(b) (Illinois' fair housing law allows religious organizations to give preference to individuals of the same religion in the "sale, rental or occupancy of a dwelling which it owns or operates for other than a commercial purpose," unless membership in the religion is discriminatory on the basis of another protected category).

[46] 32 C.F.R. § 1630.11 (accommodating conscientious objectors to military service); 42 U.S.C. § 300a-7 (accommodating health care professionals who conscientiously object to participating in medical procedures such as abortion or sterilization); 42 U.S.C. § 2000bb *et seq.* (Religious Freedom Restoration Act lifts government-created burdens on religious exercise).

[47] *See, e.g.*, footnotes 16-27 above.

[48] *See* footnote 11 above and footnote 49 below.

[49] 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); 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. H.B. 438 § 4(a) (2011) (enacted Mar. 1, 2012) (allowing religiously

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.[50] Although the protections in Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington also fall short in key areas,[51] they still provide far more protection than Illinois' proposed same-sex marriage legislation.

Conclusion

Without adequate safeguards for religious liberty of the sort proposed in this letter, the recognition of same-sex marriage will lead to socially divisive and entirely unnecessary conflicts between the exercise of rights pursuant to the same-sex marriage law and religious liberty. That is a needless and destructive path where both sides lose. There is a balanced "middle way." The Illinois General Assembly 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 Illinois General Assembly.

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affiliated fraternal organizations, like the Knights of Columbus, expressly to limit insurance coverage to spouses in heterosexual marriages); 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. § 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"); 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(5)-(6) (exempting religious organizations from "provid[ing] accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage," and protecting religious organizations from penalty based on their refusal of any of the above accommodations);

[50] *See* footnote 47.

[51] *See* Letter to Iowa Legislators, *available at* http://mirrorofjustice.blogs.com/files/2009-07-12-iowa-letter-final.doc, at 6-7 (letter from the undersigned describing shortcomings of Connecticut, Vermont, and New Hampshire conscience protections).

Respectfully yours,[52]

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APPENDIX A: CORE LEGISLATIVE RELIGIOUS LIBERTY PROTECTIONS[52] **Core Religious Liberty Protections in Same-Sex Marriage Legislation**
All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, 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); D.C. Code § 46-406(c) (2010); 2012 Md. Laws ch. 2 § 2 (to be codified at Md. Code Ann., Fam. Law §§ 2-201–2-202, 2-406); 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); Wash. Rev. Code § 26.04.010(2)(4) (2012).
All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, 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); 2012 Md. Laws ch. 2 § 3 (to be codified at Md. Code Ann., Fam. Law §§ 2-201–2-202); N.H. REV. STAT. ANN. § 457:37(III); N.Y. Dom. Rel. Law § 10-b(1); Vt. Stat. Ann. tit. 8, § 4502(1); Wash. Rev. Code § 26.04.010(2)(5).
All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington) **expressly** protect covered religious objectors from **private suit.** *See* Conn. Gen. Stat. § 46b-150d; D.C. Code § 46-406(e); 2012 Md. Laws ch. 2 § 3 (to be codified at Md. Code Ann., Fam. Law §§ 2-201–2-202); N.H. REV. STAT. ANN. § 457:37(III); N.Y. Dom. Rel. Law § 10-b(1); Vt. Stat. Ann. tit. 8, § 4502(1); Wash. Rev. Code § 26.04.010(2)(6).
Six jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, 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); 2012 Md. Laws ch. 2 § 4 (to be codified at Md. Code Ann., Fam. Law §§ 2-201–2-202); N.H. REV. STAT. ANN. § 457:37(III); N.Y. Dom. Rel. Law § 10-b(1); Wash. Rev. Code § 26.04.010(2)(4).

[52] 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) *available at* http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1130&context=wlufac.

Three jurisdictions (Maryland, the District of Columbia and New Hampshire) **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., FAM. LAW § 202-3(a)(2) (provided **so long as the program receives no government funding). New York** may protect this. *See* N.Y. Dom. Rel. § 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").
Two jurisdictions (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. § 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…").
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., FAM. LAW § 202-4.
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., FAM. LAW § 202-3(a)(2).
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. § 10-b (1). *See also* N.H. Rev. Stat. Ann. § 457:37(III); MD. CODE ANN., FAM. LAW § 202-3(b).

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.").