

Nos. 12-144, 12-307

In the Supreme Court of the United States

DENNIS HOLLINGSWORTH, *ET AL.*, *Petitioners*,

v.

KRISTIN M. PERRY, *ET AL.*, *Respondents*.

UNITED STATES, *Petitioner*,

v.

EDITH SCHLAIN WINDSOR AND
BIPARTISAN LEGAL ADVISORY GROUP, *Respondents*.

*On Writs of Certiorari to the United States Courts of
Appeals for the Ninth and Second Circuits*

**BRIEF AMICUS CURIAE OF
THE BECKET FUND FOR RELIGIOUS LIBERTY
IN SUPPORT OF HOLLINGSWORTH AND THE
BIPARTISAN LEGAL ADVISORY GROUP
ADDRESSING THE MERITS**

ERIC RASSBACH
Counsel of Record
LORI HALSTEAD WINDHAM
ADÈLE AUXIER KEIM
*The Becket Fund for
Religious Liberty*
3000 K Street, N.W.
Washington, DC 20007
(202) 955-0095
erassbach@becketfund.org

Counsel for Amicus Curiae

QUESTIONS PRESENTED

1. Given the predictable conflict between same-sex marriage and religious liberty, was maintaining religious liberty a rational basis for People of the State of California and the United States Congress to define marriage as the union of a man and a woman?

2. Should the people have the opportunity in the first instance to work out solutions to the conflict between same-sex marriage and religious liberty?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iv
INTEREST OF THE <i>AMICUS</i>	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	2
ARGUMENT	6
I. According legal recognition to same-sex marriage without robust protections for religious liberty will result in wide-ranging church-state conflict.	6
A. Leading legal scholars on both sides of the marriage debate recognize the conflict between same-sex marriage and religious liberty and support legislative exemptions.	11
B. Religious people and institutions that object to same-sex marriage will face a wave of private civil litigation under anti-discrimination laws never intended for that purpose.....	15
C. Religious people and institutions that object to same-sex marriage will be penalized by state and local governments.....	21
1. Exclusion from government facilities and fora.	22
2. Loss of licenses or accreditation.	23

3. Disqualification from government grants and contracts.....	24
4. Loss of state or local tax exemptions.....	26
5. Loss of educational and employment opportunities.....	27
II. Given the threat to religious liberty, DOMA and Proposition 8 are rational responses to the threat to religious liberty posed by court decisions to adopt same-sex marriage without conscience protections.	28
III. American citizens and their legislatures are competent to decide on the legal definition of marriage through political processes.	30
A. Because many of the conflicts between same-sex marriage and religious liberty can be avoided—at least in part—by legislative exemptions, the judiciary should allow the legislatures to go first.....	31
B. Allowing the people to decide avoids a frozen conflict and facilitates their acceptance of whatever may be the ultimate result of their public debate.	33
CONCLUSION	38
APPENDIX	

TABLE OF AUTHORITIES

Cases

<i>Attorney Gen. v. Desilets</i> , 636 N.E.2d 233 (Mass. 1994)	19
<i>Baehr v. Lewin</i> , 852 P.2d 44 (Haw. 1993)	3, 4, 11, 15, 18, 28
<i>Baehr v. Miike</i> , 910 P.2d 112, 115 (Haw. 1996)	3
<i>Bernstein v. Ocean Grove Camp Meeting Ass’n</i> , Num. DCR PN34XB-03008 (N.J. Off. of Att’y Gen., Div. on Civil Rts., Oct. 23, 2012)	17
<i>Bob Jones Univ. v. United States</i> , 461 U.S. 574 (1983)	26
<i>Boy Scouts of America v. Wyman</i> , 335 F.3d 80 (2d Cir. 2003)	22
<i>Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000)	17, 22
<i>Boy Scouts of America v. Till</i> , 136 F. Supp. 2d 1295 (S.D. Fla. 2001)	22
<i>Brady v. Dean</i> , 790 A.2d 428 (Vt. 2001)	27
<i>Butler v. Adoption Media, LLC</i> , 486 F. Supp. 2d 1022 (N.D. Cal. 2007)	15, 17
<i>Catholic Charities of Maine, Inc. v. City of Portland</i> , 304 F. Supp. 2d 77 (D. Me. 2004)	26

<i>Catholic Charities of the Diocese of Springfield v. Illinois et al.</i> No. 2011-MR-254, 2011 WL 3655016 (Ill. Cir. Ct. Aug. 18, 2011).....	25
<i>Christian Legal Society v. Martinez</i> , 130 S.Ct. 2971 (2010)	10
<i>Collins v. City of Harker Heights, Tex.</i> , 503 U.S. 115 (1992)	31
<i>Cradle of Liberty Council, Inc. v. City of Philadelphia</i> , 851 F. Supp. 2d 936 (E.D. Pa. 2012).....	22
<i>Dale v. Boy Scouts of America</i> , 160 N.J. 562 (N.J. 1999)	17
<i>Dist. Attorney’s Office for the Third Judicial Dist. v. Osborne</i> , 557 U.S. 52 (2009)	31
<i>Elane Photography, LLC v. Willock</i> , 284 P.3d 428 (N.M. Ct. App. 2012).....	18
<i>Employment Div. v. Smith</i> , 494 U.S. 872 (1990)	29
<i>Evans v. City of Berkeley</i> , 129 P.3d 394 (Cal. 2006)	22
<i>Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.</i> , 536 A.2d 1 (D.C. 1987)	17
<i>Goodridge v. Dep’t of Publ. Health</i> , 798 N.E.2d 941 (Mass. 2003)	8, 31

<i>Grove City College v. Bell</i> , 465 U.S. 555 (1984)	25
<i>Harper ex rel. Harper v. Poway Unified School Dist.</i> , 549 U.S. 1262 (2007)	30
<i>Harper v. Poway Unified Sch. Dist.</i> , 445 F.3d 1166 (9th Cir. 2006)	30
<i>Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC</i> , 132 S. Ct. 694 (2012)	20
<i>In re Marriage Cases</i> , 183 P.3d 384 (Cal. 2008)	3, 4, 11, 18, 28
<i>Jackson v. Abercrombie</i> , No. 11-cv-734, 2012 WL 3255201 (D. Haw. Aug. 8, 2012)	30-31
<i>Kerrigan v. Comm’r of Pub. Health</i> , 957 A.2d 407 (Conn. 2008)	32
<i>Levin v. Yeshiva Univ.</i> , 96 N.Y. 2d 484 (N.Y. 2001)	19-20
<i>Martinez v. County of Monroe</i> , 850 N.Y.S.2d 740 (N.Y. App. Div. 2008)	15
<i>Massachusetts v. U.S. Dep’t of Health & Human Servs.</i> , 682 F.3d 1 (1st Cir. 2012)	3
<i>Parker v. Hurley</i> , 514 F.3d 87 (1st Cir. 2008)	30
<i>Perry v. Brown</i> , 671 F.3d 1052 (9th Cir. 2012)	passim

<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	34
<i>Roe v. Empire Blue Cross Blue Shield</i> , No. 12-cv-4788-PKC (S.D.N.Y.)	21
<i>Smith v. Fair Employment & Hous. Comm'n.</i> , 51 Cal. Rptr. 2d 700 (Cal. 1996)	19
<i>Spencer v. World Vision, Inc.</i> , 633 F.3d 723 (9th Cir. 2011)	20
<i>State by Cooper v. French</i> , 460 N.W.2d 2 (Minn. 1990)	19
<i>Swanner v. Anchorage Equal Rights Comm'n.</i> , 874 P.2d 274 (Alaska 1994)	19
<i>Thomas v. Anchorage Equal Rights Comm'n.</i> , 102 P.3d 937 (Alaska 2004)	19
<i>Varnum v. Brien</i> , 763 N.W.2d 862 (Iowa 2009)	31-32
<i>Walz v. Tax Commission</i> , 397 U.S. 664 (1970)	36
<i>Ward v. Polite</i> , 667 F.3d 727 (6th Cir. 2012)	24, 28, 29, 34
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)	31
<i>Windsor v. United States</i> , 699 F. 3d 169 (2d Cir. 2012)	passim

Constitutional Provisions

Preamble, *Declaration of Independence*..... 37

Other Authorities

AALS Handbook,
Interpretive Principles to Guide Religiously
Affiliated Member Schools (1993) 24

*A Festive Mood in Maine as Same-Sex Marriage
Becomes Legal*,
N.Y. Times, Dec. 30, 2012..... 36-37

Pam Belluck,
*Massachusetts Arrives at Moment for Same-Sex
Marriage*,
N.Y. Times, May 17, 2004..... 27

Vivian Berger *et al.*,
*Summary Judgment Benchmarks for Settling
Employment Discrimination Lawsuits*,
23 Hofstra Lab. & Emp. L.J. 45 (2005) 8

Isaiah Berlin,
Two Concepts of Liberty,
in Four Essays on Liberty (Oxford 1969)..... 35

David Blankenhorn & Jonathan Rauch,
A Reconciliation on Gay Marriage,
N.Y. Times, Feb. 21, 2009..... 14

Michelle Boorstein, <i>Citing same-sex marriage bill, Washington Archdiocese ends foster-care program,</i> Wash. Post, Feb. 17, 2010	25
<i>Sex, Marriage, and Family in World Religions</i> (Don S. Browning, M. Christian Green, & John Witte, Jr. eds., 2009)	7
John Hart Ely, <i>Democracy and Distrust</i> (1980)	34-35
Prof. Richard A. Epstein, <i>Same-Sex Union Dispute: Right Now Mirrors Left,</i> Wall St. J., July 28, 2004	26
William N. Eskridge, Jr., <i>A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Law,</i> 106 Yale L.J. 2411, 2456 (1997)	14
Amy Guttmann & Dennis Frank Thompson, <i>Democracy and Disagreement</i> (1996)	35
Robert Huckfeldt, Paul E. Johnson & John Sprague, <i>Political Disagreement</i> (2004)	35
Hutchinson, Kan. Human Relations Commission, <i>Definitions and FAQs Under Proposed Sexual Orientation and Gender Identity Protections</i>	16
InterVarsity Christian Fellowship/USA, <i>Campus Challenges</i>	10

Andrew Koppelman, <i>You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions</i> , 72 Brook. L. Rev. 125 (2006).....	14
<i>Same-Sex Marriage and Religious Liberty: Emerging Conflicts</i> (Douglas Laycock, Anthony R. Picarello Jr. & Robin Fretwell Wilson eds., 2008).....	passim
Adam Liptak, <i>Gay Vows, Repeated From State To State</i> , N.Y. Times, Apr. 12, 2009.....	34
Ira C. Lupu & Robert W. Tuttle, <i>Same-Sex Family Equality and Religious Freedom</i> , 5 Nw. J. L. & Soc. Pol'y 274 (2010).....	13
G. Jeffrey MacDonald, <i>Presbyterian church rejects same-sex marriage</i> , Christian Science Monitor, July 7, 2012.....	7
<i>Maine Rejects Same-Sex Marriage Law</i> , CNN.com, Nov. 4, 2009.....	36
Marriage and Religious Freedom, An Open Letter From Religious Leaders in the United States to All Americans (Jan. 12, 2012)	4
Marriage Law Project, World Religions and Same-Sex Marriage (2002)....	6
The Pew Forum on Religion & Public Life, Religious Groups' Official Positions on Same-Sex Marriage (Dec. 7, 2012).....	6

Bob Smietana, <i>Anti-bias policies drive some religious groups off campuses,</i> USA Today, Apr. 2, 2012	10
D. Smith, <i>Accreditation committee decides to keep religious exemption,</i> 33 Monitor on Psychology (Jan. 2002),.....	23
Melissa Walker, <i>YMCA rewrites rules for lesbian couples,</i> Des Moines Register, Aug. 6, 2007	17
William Wan, <i>Same-Sex Marriage Leads Catholic Charities to Adjust Benefits,</i> Wash. Post, March 2, 2010	21
Patricia Wen, <i>“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,</i> Boston Globe, June 25, 2006.....	23
Robin Fretwell Wilson, <i>A Matter of Conviction: Moral Clashes Over Same- Sex Adoption,</i> 22 BYU J. Pub. L. 475 (2008)	28

INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions.¹ It has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. It is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of all religious people to pursue their beliefs without excessive government interference.

The Becket Fund has also represented religious people and institutions with a wide variety of views about same-sex marriage and homosexuality, including religious people and institutions on all sides of the same-sex marriage debate, and including both non-LGBT and LGBT clients. As a religious liberty law firm, the Becket Fund does not take a position on same-sex marriage as such, but focuses instead on same-sex marriage only as it relates to religious liberty.

The Becket Fund has long sought to facilitate academic discussion of the impact that according legal recognition to same-sex marriage could have on religious liberty. In December 2005, it hosted a confer-

¹ Parties to both cases have consented to the filing of this brief and letters indicating their consent are on file with the Clerk. *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

ence of noted First Amendment scholars—representing the full spectrum of views on same-sex marriage—to assess the religious freedom implications of legally-recognized same-sex marriage. The conference resulted in the book *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Douglas Laycock, Anthony R. Picarello Jr. & Robin Fretwell Wilson eds., 2008) (“*Emerging Conflicts*”). To date, *Emerging Conflicts* remains the touchstone of scholarly discourse about the intersection of same-sex marriage and religious liberty.

Based on its expertise in the field of religious liberty generally, and the intersection of same-sex marriage and religious liberty specifically, the Becket Fund submits this brief to demonstrate that concerns about the potential conflict between same-sex marriage and religious liberty are both rational and well-founded in fact. In its view, this conflict is best resolved not by judicial decree, but by the legislative process, which is more adept at balancing competing societal interests, including religious liberty.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Religious liberty intersects with same-sex marriage in two important ways relevant to the cases before the Court.

The first intersection goes to the motivations behind DOMA and Proposition 8. DOMA and Proposition 8 were rational responses to court decisions that gave legal recognition to same-sex marriage without addressing the significant church-state conflicts that would result.

The second intersection concerns the effects of this Court's decision in these cases. Were the judicial branch to take the question of how to deal with conflicts between religious liberty and same-sex marriage away from the political process, it would likely result in perpetual struggle without prospect of a political resolution. The commitments are simply too great on both sides to impose a judicial resolution. And setting church and state permanently at odds would be bad for both.

Rational response. DOMA was passed largely in reaction to *Baehr v. Lewin*, which held—without mentioning religious liberty—that Hawaii's existing marriage laws were likely unconstitutional. 852 P.2d 44 (Haw. 1993) (plurality op.); see *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 6 (1st Cir. 2012). Proposition 8 was passed in response to *In re Marriage Cases*, in which the California Supreme Court asserted that religious freedom is unaffected by same-sex marriage because “no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.”² *In re Marriage Cases*, 183 P.3d 384, 451-52 (Cal. 2008)

By limiting religious freedom concerns to “forced solemnization,” the California Supreme Court allowed itself to be distracted by a red herring—albeit one that parties on opposing sides of the marriage

² The Hawaii Supreme Court later repeated the California court's error by stating that no clergy would be required to solemnize same-sex marriage and rejecting concerns about anti-discrimination lawsuits as “groundless.” *Baehr v. Miike*, 910 P.2d 112, 115 (Haw. 1996).

debate have been all too happy to indulge. Among scholars, “[n]o one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them.” Marc D. Stern, *Same-Sex Marriage and the Churches*, in *Emerging Conflicts* 1; see also Marriage and Religious Freedom, An Open Letter From Religious Leaders in the United States to All Americans (Jan. 12, 2012) (“the First Amendment creates a very high bar” for forced solemnizations).

But there are many other reasonably foreseeable—and potentially legislatively avoidable—conflicts between same-sex marriage and religious liberty that made it rational for Congress and the people of California to object to the judicial redefinition of marriage reflected in *Baehr* and *In re Marriage Cases*.

These conflicts fall into two broad categories. *First*, objecting religious institutions and individuals will face an increased risk of lawsuits under federal, state, and local anti-discrimination laws, subjecting religious organizations to substantial civil liability if they choose to continue practicing their religious beliefs. *Second*, religious institutions and individuals will face a range of penalties from federal, state and local governments, such as denial of access to public facilities, loss of accreditation and licensing, and the targeted withdrawal of government contracts and benefits.

These foreseeable conflicts implicate the fundamental First Amendment rights of religious institutions, including the rights to freedom of religion and freedom of association. *Amicus* cannot predict how these First Amendment issues will play out in every instance. But while *Windsor* ignored these concerns

and *Perry* dismissed them, the scholarly consensus is that the threat to religious liberty is real. This threat unquestionably provided a rational basis for Congress to proceed cautiously by enacting DOMA and for the people of California to return to the traditional definition of marriage by voting for Proposition 8.

The judicial role. This conclusion is reinforced by the fact that every state legislature to adopt same-sex marriage has included stronger conscience protections than the state and federal court decisions that invalidated DOMA and Proposition 8. In the sixteen years since DOMA was enacted, six states and the District of Columbia have adopted same-sex marriage laws through the democratic process. All of these laws have included conscience protections. If religious liberty concerns were, as *Perry* held, irrational, then these legislatures were acting irrationally. Even worse than this oblique judicial condemnation of religious accommodations is the effect of the decisions below; uncorrected they would cut off the debate over same-sex marriage and religious liberty just as it is starting in earnest.

As the most recent state-level votes on the issue demonstrate, that debate is vigorous, and it is safe to say that a public consensus is still in the process of forming. But if this Court were to invalidate DOMA and Proposition 8 on Equal Protection grounds, the debate would be short-circuited. Worse, the country would face a perpetual church-state conflict that might take decades to resolve, if ever. The better path is to allow the democratic process time to work.

ARGUMENT

I. According legal recognition to same-sex marriage without robust protections for religious liberty will result in wide-ranging church-state conflict.

Recognizing a constitutional right to same-sex marriage without simultaneously protecting conscience rights threatens the religious liberty of people and organizations who cannot, as a matter of conscience, treat same-sex unions as the moral equivalent of opposite-sex marriage. Without conscience protections, widespread and intractable church-state conflicts will result.

Why is this so?

Several factors are at work. First, there is the scope of the underlying theological dispute: an estimated 160 million Americans—97.6% of all religious adherents in the United States and more than half of the entire population—belong to religious bodies that affirm the traditional definition of marriage.³ This number has not changed significantly in the past ten years.⁴ For example, just this past summer, the Pres-

³ Marriage Law Project, World Religions and Same-Sex Marriage 4-5 & n.8 (2002).

⁴ See Pew Forum on Religion & Public Life, Religious Groups' Official Positions on Same-Sex Marriage (Dec. 7, 2012), <http://www.pewforum.org/Gay-Marriage-and-Homosexuality/Religious-Groups-Official-Positions-on-Same-Sex-Marriage.aspx> (several mainline Protestant denominations now allow the blessing of same-sex unions while maintaining a distinction between same-sex unions and traditional marriage).

byterian Church (U.S.A.), which allows non-celibate gay clergy, rejected a redefinition of marriage.⁵

Until the 1990s, no larger religious group in the United States officially endorsed same-sex marriage, and only a handful do today.⁶ While of course not all individual believers agree with their religion's official position on marriage, many do, and religious organizations themselves are generally bound by official teaching.

Second, the religious commitments are deep ones. For the largest world religions present in the United States, the institution of opposite-sex marriage is central to their moral teaching about sexual relationships.⁷ For these groups, opposite-sex marriage holds special theological significance. As a result, programs and teaching are frequently organized around the distinction between married couples and couples who are not married: benefits such as marriage retreats,

⁵ See G. Jeffrey MacDonald, *Presbyterian church rejects same-sex marriage*, Christian Science Monitor, July 7, 2012.

⁶ See Pew Forum (noting that "Reform and Reconstructionist Jewish movements have supported gay and lesbian rights, including same-sex marriage, since the mid-1990s," and that "Unitarian Universalist Association of Congregations passed a resolution in support of same-sex marriage" in 1996). Some United Church of Christ congregations also conduct same-sex marriage ceremonies.

⁷ See, e.g., *Sex, Marriage, and Family in World Religions* xxii-xxvii (Don S. Browning, M. Christian Green, & John Witte, Jr. eds., 2009) (describing opposite-sex limitation on marriage in Buddhism, Christianity, Confucianism, Hinduism, Islam, and Judaism and the central role of sexual complementarity within marriage for world religions).

marriage counseling, and the use of religious property for private ceremonies are all offered to couples who are married and denied to those who are not.

Third, the relatively short history of same-sex marriage thus far indicates that there will be a great deal of litigation in the future. The first state to give civil recognition to same-sex marriage was Massachusetts, in 2003, and every other state to recognize same-sex marriage has done so within the last five years.⁸ Even so, litigation has already begun. Because litigation under anti-discrimination laws increases exponentially over time, a few lawsuits now are a strong indicator of many more lawsuits to come.⁹ Indeed, once this Court rules in the cases before it, perhaps the greatest disincentive to suing religious people and organizations over their objections same-sex marriage will disappear: namely, worries about what this Court might think of those lawsuits.

Fourth, the stakes are especially high in this Court. A ruling from this Court that objecting to same-sex marriage is always irrational, or that making distinctions regarding same-sex marriage consti-

⁸ *Goodridge v. Dep't of Publ. Health*, 798 N.E.2d 941 (Mass. 2003); Connecticut (2008); Iowa (2009); Vermont (2009); New Hampshire (2010); Washington, D.C. (2010); New York (2011); Washington (2012); Maine (2013); Maryland (2013).

⁹ 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% * * * .").

tutes discrimination against a quasi-suspect class, will have two major negative effects on religious objectors. One is that they will immediately be vulnerable to lawsuits under anti-discrimination laws never designed for that purpose. In the Appendix, we have set forth a non-exhaustive list of the many state laws prohibiting gender, marital status, and sexual orientation discrimination and identifying the religious exemptions, if any for each such law. These laws could be triggered by recognition of same-sex marriage. See Appendix 1a-101a.

The other negative effect is that this Court’s disapprobation would cast suspicion on religious objectors in a way that existing laws against sexual orientation discrimination do not. Were this Court to hold, as *Perry* did, that maintaining a distinction between opposite-sex marriage and other legal relationships “dishonor[s]” gays and lesbians—or concludes, as the Department of Justice has argued in DOMA litigation, that “defending traditional notions of morality * * * evidences * * * animus” towards gays and lesbians¹⁰—then these longstanding practices will suddenly become *prima facie* evidence of anti-gay discrimination, instead of what they are: expressions of

¹⁰ United States’ Superseding Br. 48, *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, No. 10-2204 (1st Cir. Sept. 22, 2011), ECF 5582082; *cf.* United States’ Br. 37-38, *Windsor*, Nos. 12-2335 & 12-2435 (2d Cir. Aug. 10, 2012), ECF 120 (making the same argument but substituting “disapproval” for “animus”); but see United States’ Br. 22-23, *Windsor*, No. 1:10-cv-08435 (S.D.N.Y. Aug. 19, 2011), ECF 71 (making the same argument using “animus”).

longstanding moral worldviews that put opposite-sex marriage at the center of human sexuality.¹¹

Perry was therefore wrong to dismiss—in response to *amicus*’s brief—religious liberty concerns as a rational basis for Proposition 8.¹² Redefining marriage affects many religious groups in ways that allowing same-sex domestic partnerships does not. By contrast, no legislation adopting same-sex marriage has ever branded the opposing view as irrational or animus-based; it has simply changed the law. Indeed, it is very likely that many Americans have voted in favor of legal recognition for same-sex marriage even though the practice runs contrary to their own religious beliefs—and they don’t view those beliefs as irrational.

Given these factors, it is not surprising that a scholarly consensus has emerged that giving legal

¹¹ The post-decision history of *Christian Legal Society v. Martinez*, 130 S.Ct. 2971 (2010) demonstrates the power of this Court’s perceived approval or disapproval. Although that case turned on a wayward stipulation and concerned public universities, it has subsequently been used as a justification for excluding Christian organizations from both public and private university campuses. See, e.g., Bob Smietana, *Anti-bias policies drive some religious groups off campuses*, USA Today, Apr. 2, 2012 (describing disputes around country and noting that the private Vanderbilt University cited *Martinez* in defense of its all-comers policy that applies to all groups except fraternities and sororities); Intervarsity Christian Fellowship/USA, *Campus Challenges*, <http://www.intervarsity.org/page/campus-challenges> (claiming 41 separate efforts to exclude Christian group since *Martinez* was decided).

¹² *Perry v. Brown*, 671 F.3d 1052, 1091 (9th Cir. 2012).

recognition to same-sex marriage will result in widespread, foreseeable, and to some extent legislatively avoidable church-state conflict. Some scholars argue that the rights of religious believers should nearly always give way to the right of gays and lesbians to be free from discrimination.¹³ Others support strong exemptions for objecting religious believers.¹⁴ But there is widespread scholarly agreement that the conflict is coming.

Since neither *Baehr* nor *In re Marriage Cases* even recognized these conflicts—let alone resolved them—it was entirely rational for Congress and the people of California to respond as they did. And given the certainty of those conflicts, it would be prudent for this Court to stay its hand and allow the political process an opportunity to mitigate those conflicts.

A. Leading legal scholars on both sides of the marriage debate recognize the conflict between same-sex marriage and religious liberty and support legislative exemptions.

As noted above, there is a clear consensus among leading legal scholars that conflicts between same-sex marriage and religious liberty are real and should be legislatively addressed. This scholarly consensus confirms that concerns over potential church-state conflict as a result of court decisions that found a constitutional right to same-sex marriage without discussing corresponding protections for religious believers

¹³ Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in *Emerging Conflicts* 123, 154.

¹⁴ Douglas Laycock, *Afterword*, in *Emerging Conflicts* 189, 197-201.

provided a rational basis for both DOMA and Proposition 8.

In the *Emerging Conflicts* book, seven prominent scholars of First Amendment law agreed that legal recognition of same-sex marriage, without more, would create widespread conflicts with religious liberty. See, e.g., Marc D. Stern, *Same-Sex Marriage and the Churches*, in *Emerging Conflicts* 1 (describing scope of anticipated conflicts). Professor Chai Feldblum of Georgetown University wrote from her own experience as a lesbian who had been raised in an Orthodox Jewish family, arguing that conscientious objections to same-sex marriage are legitimate:

I believe those who advocate for LGBT equality have downplayed the impact of such [anti-discrimination] laws on some people's religious beliefs and, equally, I believe those who have sought religious exemptions from such civil rights laws have downplayed the impact that such exemptions would have on LGBT people.

Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in *Emerging Conflicts* 123, 124-25. Feldblum went on to confirm the real threat to religious liberty that legal recognition of same-sex marriage presents, and treated the position of religious objectors as rational, though she ultimately concluded that religious claims should fail. See *id.* at 155-56.

Others, such as leading religious liberty scholar Douglas Laycock—who likewise supports giving legal recognition to same-sex marriage—argue that some conflicts between same-sex marriage and religious liberty are unavoidable, but some could be mitigated by providing conscience protections. See, e.g., Douglas Laycock, *Afterword*, in *Emerging Conflicts* 189, 197-

201. There is a consensus, however, that serious conflicts between same-sex marriage and religious liberty exist.

In addition to the scholarly consensus that there is a conflict, there is also a scholarly consensus that the conflict should be addressed by enacting legislative exemptions for conscientious objectors. Legal scholars have written a series of detailed open letters to legislators in states considering same-sex marriage legislation arguing that threats to religious liberty should be legislatively addressed. See Appendix at 102a (Letter from Prof. Robin Fretwell Wilson and others to the Governor of Illinois (Dec. 18, 2012); *id.* at 137a (Letter from Prof. Douglas Laycock and others to Members of the Illinois Senate (Dec. 24, 2012) (supporting both same-sex marriage and strong religious exemptions)).

In response, two other prominent First Amendment scholars—Professors Ira Lupu and Robert Tuttle of George Washington University—published a law review article disagreeing with some of the specific religious liberty accommodations recommended in the open letters, but agreeing that many conscience protections are indeed necessary and advisable if the threat to religious liberty is to be mitigated.¹⁵

Leading scholars within the gay rights movement also advocate legislative protections for religious objectors. Professor William Eskridge of Yale has written that “Gay rights advocates put [the religious ex-

¹⁵ See Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 Nw. J. L. & Soc. Pol’y 274 (2010).

emption] provision in ENDA, and it should be retained.”¹⁶ Professor Andrew Koppelman of Northwestern and Jonathan Rauch of the Brookings Institution have both advocated legislative accommodations as a solution to the conflict between same-sex marriage and religious liberty.¹⁷

There is thus a scholarly consensus that the conflicts between same-sex marriage and religious liberty are real, deeply rooted, and far-reaching. And, although they disagree about the details, scholars have reached a separate consensus that these conflicts can be significantly mitigated by carefully-crafted legislative exemptions.

These two consensus reinforce the common-sense conclusion that members of Congress and the people of California acted rationally when they rejected giving legal recognition to same-sex marriage without conscience protections. And they counsel judicial restraint in the cases before the Court.

¹⁶ William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Law*, 106 Yale L.J. 2411, 2456 (1997) (referring to proposed Employment Non-Discrimination Act).

¹⁷ See, e.g., Andrew Koppelman, *You Can’t Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 Brook. L. Rev. 125 (2006); David Blankenhorn & Jonathan Rauch, *A Reconciliation on Gay Marriage*, N.Y. Times, Feb. 21, 2009.

B. Religious people and institutions that object to same-sex marriage will face a wave of private civil litigation under anti-discrimination laws never intended for that purpose.

As the scholarly consensus indicates, religious institutions face significant new sources of civil liability if same-sex marriage is given legal recognition without concurrent protections for individuals and institutions with conscientious objections. Without strong conscience protections, giving legal recognition to same-sex marriage will enable same-sex spouses to bring suit against religious institutions under gender, marital status, and sexual orientation anti-discrimination laws, most of which were never designed to reach claims by members of same-sex marriages. See, *e.g.*, *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 743 (N.Y. App. Div. 2008) (refusal to provide benefits based on same-sex marriage contracted in Ontario violated New York’s prohibition on marital status discrimination); *Baehr*, 852 P.2d at 64 (limitation of marriage to opposite-sex couples was form of sex-based discrimination); *Butler v. Adoption Media, LLC*, 486 F.Supp.2d 1022, 1056 (N.D. Cal. 2007) (allowing marital status claim to go forward in dispute over adoption by same-sex couple).

To be sure, in some states—like California—existing laws regarding equal treatment of domestic partners result in similar conflicts. But granting legal recognition to same-sex marriage nationwide will automatically trigger a host of federal, state, and local statutes nationwide. See *e.g.*, Appendix at 1a-101a (listing state laws). And while some of these laws, especially those concerning sexual orientation discrimi-

nation, include religious exemptions, in most cases they do not, and the accommodations are also simply not designed to respond to judicial redefinition of civil marriage.

What follows is a non-exhaustive description of these potential conflicts.

Public accommodation laws. Religious institutions often provide a broad array of programs and facilities to their members and to the general public, such as hospitals, schools, adoption services, and marital counseling. Religious institutions have historically enjoyed wide latitude in choosing what religiously-motivated services and facilities they will provide, and to whom they will provide them. But giving legal recognition to same-sex marriage without robust conscience exemptions will restrict that freedom in at least two ways.

First, most states include gender, marital status, or sexual orientation as protected categories under public accommodations laws. See Appendix at 1a-101a (listing state laws). Second, religious institutions and their related ministries are facing increased risk of being declared places of public accommodation, and thus being subject to legal regimes designed to regulate secular businesses. For example, some laws require church halls be treated as public accommodations if they are rented to non-members. See, e.g., Hutchinson, Kan. Human Relations Commission, *Definitions and FAQs Under Proposed Sexual Orientation and Gender Identity Protections* 4 (2012).¹⁸ When coupled with legally-recognized same-

¹⁸ http://www.hutchgov.com/egov/docs/1332537777_170654.pdf.

sex marriage, these two facts create significant liability risk for religious objectors. Indeed, expansion of the definition of “public accommodation” is what precipitated the divisive *Boy Scouts v. Dale* litigation: unlike other states, New Jersey’s Supreme Court held that the Boy Scouts were a “place of public accommodation.”¹⁹

This risk is greatest for those religious organizations that serve people with different beliefs. Unfortunately, the more a religious organization seeks to minister to the general public (as opposed to just co-religionists), the greater the risk that the service will be regarded as a public accommodation giving rise to liability.

Some of the many religiously-motivated services that could be “public accommodations” are: health-care services, marriage counseling, family counseling, job training programs, child care, gyms and day camps,²⁰ life coaching, schooling,²¹ adoption services,²² and the use of wedding ceremony facilities.²³

¹⁹ *Dale v. Boy Scouts of America*, 160 N.J. 562, 602 (N.J. 1999), *reversed*, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

²⁰ See Melissa Walker, *YMCA rewrites rules for lesbian couples*, Des Moines Register, Aug. 6, 2007 (city forced YMCA to change its definition of “family” or lose grant).

²¹ See *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (en banc) (public accommodations statute required equivalent access to all university facilities.).

²² See *Butler*, 486 F.Supp.2d 1022 (Arizona adoption facilitation website was public accommodation under California law).

And religious business owners face the same risks: when New Mexico photographer Elaine Huguenin declined for religious reasons to photograph a same-sex commitment ceremony, she was sued under the New Mexico Human Rights Act and required to pay nearly \$7,000 on the basis that her business constituted a public accommodation. *Elane Photography, LLC v. Willock*, 284 P.3d 428, 433 (N.M. Ct. App. 2012), *cert. granted*, 2012-NMCERT-008 (N.M. Aug. 16, 2012).

Of the thousands of American religious organizations that minister to the public in one or more of the ways mentioned above, many simply want to avoid the appearance—and reality—of condoning or subsidizing same-sex marriage through their “family-based” services. Yet after *Baehr* and *In re Marriage Cases*, the law threatened to forbid these institutions from expressing and acting on their religious objections to same-sex marriage precisely because they seek to serve the broader public. DOMA and Proposition 8 were rational responses to that concern.

Housing discrimination laws. Religious colleges and universities frequently provide student housing and often give special treatment to married couples. Legally married same-sex couples could reasonably be expected to seek these benefits, but many religious educational institutions would conscientiously object to providing similar support for same-sex unions. Housing discrimination lawsuits would result.

²³ See *Bernstein v. Ocean Grove Camp Meeting Ass’n*, Num. DCR PN34XB-03008 (N.J. Off. of Att’y Gen., Div. on Civil Rts., Oct. 23, 2012) (Methodist organization violated public accommodations law by denying same-sex couples use of wedding pavilion because it opened pavilion for other weddings).

For example, under Federal law, gender discrimination in housing is prohibited. See 42 U.S.C. § 3604. There are some limited exemptions for religious institutions, see 42 U.S.C. § 3607, but they would not automatically cover all conflicts triggered by legal recognition of same-sex marriage—and determining their scope would require costly litigation. Similarly, state and local housing laws ban discrimination on the basis of gender, marital status, and sexual orientation—and the religious exemptions are also limited. See, *e.g.*, Cal. Gov't Code §§ 12955.4, 12995 (recognizing limited exemptions for certain religious organizations); 775 Ill. Comp. Stat. § 5/3-106 (recognizing limited exemptions for certain religious organizations); see Appendix at 1a-101a (collecting state housing discrimination laws).

In several states, courts have required landlords to facilitate the unmarried cohabitation of their tenants, over strong religious objections.²⁴ If unmarried couples cannot be discriminated against in housing due to marital status protections, legally married same-sex couples would have comparatively stronger

²⁴ See *Smith v. Fair Employment & Hous. Comm'n.*, 51 Cal. Rptr. 2d 700 (Cal. 1996) (no substantial burden on religion where landlord required to rent to unmarried couples despite sincere religious objections because landlord could avoid the burden by exiting the rental business). See also *Thomas v. Anchorage Equal Rights Comm'n.*, 102 P.3d 937, 939 (Alaska 2004); *Swanner v. Anchorage Equal Rights Comm'n.*, 874 P.2d 274 (Alaska 1994); *Attorney General v. Desilets*, 636 N.E.2d 233, 235 (Mass. 1994). But see *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (state constitutional protection of religious conscience exempted landlord from ban against marital status discrimination in housing).

protection, as public policy tends to favor and subsidize marriage as an institution. *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484 (N.Y. 2001) is an example. In *Levin*, the court held that two lesbian students had stated a valid disparate impact claim of sexual orientation discrimination after the university refused to provide married student housing benefits to unmarried couples. If same-sex marriage is adopted without religious protections, plaintiffs would not have to rely on sexual orientation discrimination claims—the much more common laws against marital status discrimination would suffice.

Employment discrimination laws. Religious organizations that object to same-sex marriage may also face private lawsuits when one of their employees enters into a civilly-recognized same-sex marriage. For many religious institutions, an employee’s entering a same-sex marriage would constitute a public repudiation of the institution’s core religious beliefs in a way that less public relationships do not. Some employers will respond by changing the terms of employment for those employees. These employees may then sue under laws prohibiting gender, sexual orientation, or marital status discrimination in employment. See Appendix 1a-101a (listing state anti-discrimination laws). If the employee is a “minister,” or the relevant statute includes an exemption, then the defendant religious employer could raise an affirmative defense. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011) *cert. denied*, 132 S. Ct. 96 (2011) (applying Title VII’s religious exemption). But where the employee does not qualify as a minister and no legislative exemption is in place, the em-

ployer will be exposed to liability for any alleged adverse employment action. See, *e.g.*, *Roe v. Empire Blue Cross Blue Shield*, No. 12-cv-4788-PKC (S.D.N.Y. filed June 19, 2012) (class action lawsuit filed after adoption of same-sex marriage in New York against Catholic medical center and its insurer seeking same-sex spousal benefits).

Moreover, if same-sex marriage is adopted without protections, religious employers may be automatically required to provide insurance to all legal spouses—both opposite-sex and same-sex—to comply with anti-discrimination laws. For example, after the District of Columbia passed a same-sex marriage law without strong conscience protections, the Catholic Archdiocese of Washington was forced to stop offering spousal benefits to any of its new employees.²⁵

C. Religious people and institutions that object to same-sex marriage will be penalized by state and local governments.

Adopting same-sex marriage also subjects religious organizations to the denial of generally available government benefits. Where same-sex marriage is adopted without religious protections, those who conscientiously object to such marriages can be labeled unlawful “discriminators” and thus denied access to otherwise generally available state and local government benefits.

The government benefits which are placed at risk in a judicial imposition of same-sex marriage fall into

²⁵ William Wan, *Same-Sex Marriage Leads Catholic Charities to Adjust Benefits*, Wash. Post, March 2, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/01/AR2010030103345.html>.

five categories: (1) access to government facilities and fora, (2) government licenses and accreditation, (3) government grants and contracts, (4) tax-exempt status, and (5) educational opportunities.

1. Exclusion from government facilities and fora.

Religious institutions that object to same-sex marriage will face challenges to their ability to access a diverse array of government facilities and fora. This is borne out in the reaction to the Boy Scouts' requirement that members believe in God and not advocate for, or engage in, homosexual conduct. Because of this belief, the Boy Scouts have had to fight to gain equal access to public after-school facilities.²⁶ They have lost leases to city campgrounds and parks,²⁷ a lease to a government building that served as their headquarters for 79 years,²⁸ and the right to participate in a state-facilitated charitable payroll deduction program.²⁹ All of this has happened despite this Court's decision in *Dale*. If same-sex marriage is adopted without robust protections for conscientious objectors, religious organizations that object to same-sex marriage would expect to face similar penalties

²⁶ *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (challenge to Boy Scouts' use of school facilities).

²⁷ *Evans v. City of Berkeley*, 129 P.3d 394 (Cal. 2006) (equal access to boat berths denied to Scouts).

²⁸ *Cradle of Liberty Council, Inc. v. City of Philadelphia*, 851 F. Supp. 2d 936, 939 (E.D. Pa. 2012).

²⁹ *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (Boy Scouts could be excluded from state's workplace charitable contributions campaign).

under these more-restrictive laws, notwithstanding any constitutional rights that they may have.

2. Loss of licenses or accreditation.

A related concern exists with respect to licensing and accreditation decisions. In Massachusetts, for example, the state threatened to revoke the adoption license of Boston Catholic Charities, a large and longstanding religious social-service organization, because it refused on religious grounds to place foster children with same-sex couples. Rather than violate its religious beliefs, Catholic Charities shut down its adoption services.³⁰ This sort of licensing conflict would only increase after judicial recognition of same-sex marriage, since many governments would require all civil marriages to be treated identically.

Similarly, religious colleges and universities have been threatened with the loss of accreditation because they object to sexual conduct outside of opposite-sex marriage. In 2001, for example, the American Psychological Association, the accrediting body for professional psychology programs, threatened to revoke the accreditation of religious colleges that prefer coreligionists, in large part because of concerns about “codes of conduct that prohibit sex outside of mar-

³⁰ 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 (Catholic Charities had to choose between following Church beliefs and continuing to offer social services); *cf.* 102 Mass. Code Regs. §§ 1.03(1), 5.04(1)(c); 110 Mass. Code Regs. § 1.09(2) (regulations requiring non-discrimination based upon marital status and sexual orientation).

riage and homosexual behavior.”³¹ Where same-sex marriage is adopted without strong religious protections, religious colleges and universities that oppose same-sex marriage will likely face similar threats.³² And the same issue will also affect licensed professionals.³³

3. Disqualification from government grants and contracts.

Religious universities, charities, hospitals, and social service organizations often serve secular government purposes through contracts and grants. For instance, religious colleges participate in state-funded financial aid programs, religious counseling services provide marital counseling and substance abuse treatment, and religious homeless shelters care for those in need.

Many contracts and grants require recipients to be organized “for the public good” and forbid recipients to act “contrary to public policy.” If same-sex mar-

³¹ D. Smith, *Accreditation committee decides to keep religious exemption*, 33 Monitor on Psychology 1 (Jan. 2002) (describing why APA ultimately abandoned proposal).

³² Religious law schools may be particularly vulnerable. The Association of American Law Schools’ (AALS) current guidance allows schools to regulate “conduct” that is “directly incompatible with their ”essential religious tenets,” but warns that if their beliefs include a “prohibition of all nonmarital sexual conduct, the school must, nevertheless, comply with” AALS bylaws on sexual orientation discrimination. AALS Handbook, Interpretive Principles to Guide Religiously Affiliated Member Schools (1993), http://www.aals.org/about_handbook_sgp_rel.php.

³³ See discussion of *Ward v. Polite*, *infra*.

riage is recognized without specific accommodations for religious organizations, those organizations that refuse to approve, subsidize, or perform same-sex marriages could be found to violate such standards, thus disqualifying them from participation in government contracts and grants.

For example, in *Grove City College v. Bell*, 465 U.S. 555 (1984), a religious college was denied *all* federal student financial aid for failing to comply, for religious reasons, with Title IX's anti-discrimination affirmation requirements; this even though there was no evidence of actual gender discrimination. In the marriage context, religious universities that oppose same-sex marriage could be denied access to government programs (such as scholarships, grants, or tax-exempt bonds) by governmental agencies that adopt an aggressive view of applicable anti-discrimination standards.

Religious organizations opposed to same-sex marriage also face the loss of government social service contracts. After the District of Columbia adopted same-sex marriage, Catholic Charities stopped providing foster care services for the city because it had to choose between continuing its program and violating its religious beliefs regarding the recognition of same-sex marriages.³⁴ And in Illinois, a state court held that Catholic Charities was required to place children for adoption with couples in civil unions or forgo its annual contracts with the state.

³⁴ Michelle Boorstein, *Citing same-sex marriage bill, Washington Archdiocese ends foster-care program*, Wash. Post, Feb. 17, 2010, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/16/AR2010021604899.html>.

Catholic Charities of the Diocese of Springfield v. Illinois et al., No. 2011-MR-254, 2011 WL 3655016 (Ill. Cir. Ct. Aug. 18, 2011). If same-sex marriage is given legal recognition without accommodation for religious objectors, many religious organizations will be forced either to extend benefits to same-sex spouses or to stop providing social services in partnership with government.³⁵

4. Loss of state or local tax exemptions.

Most religious institutions have charitable tax-exempt status under federal, state and local laws. But without conscience protections, that status could be stripped by state agencies and local governments based solely on that religious institution's conscientious objection to same-sex marriage.³⁶ Whether the First Amendment could provide an effective defense to this kind of penalty is an open question.³⁷

³⁵ See, e.g., *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004) (upholding ordinance forcing religious charity to either extend employee spousal benefit programs to registered same-sex couples, or lose access to all city housing and community development funds).

³⁶ “[P]rivate churches losing their tax exemptions for their opposition to homosexual marriages * * * are among the very dangers from the left against which I warned.” Prof. Richard A. Epstein, *Same-Sex Union Dispute: Right Now Mirrors Left*, Wall St. J., July 28, 2004, at A13.

³⁷ See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (rejecting Free Exercise Clause defense to IRS withdrawal of 501(c)(3) status based on religious belief against interracial dating and marriage). See also Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious*

5. Loss of educational and employment opportunities.

The conflict between same-sex marriage and religious liberty affects individual religious believers, too. Vermont has held that individual town clerks are may be fired if they seek to avoid issuing civil union licenses to same-sex couples for religious reasons, and at least twelve Massachusetts Justices of the Peace had to resign because they could not facilitate same-sex marriages.³⁸ The situation is particularly acute for state-employed professionals like social workers who face a difficult choice between their conscience and their livelihood.³⁹

Students at public universities face similarly stark choices. When Julea Ward, a Master's in Counseling student in her final semester at Eastern Michigan University, told her professors that she had no problem counseling individual gay and lesbian clients

Groups with Unpopular Practices, in Emerging Conflicts 59, 64-65 (supporting same-sex marriage but arguing that objectors' tax exemptions should not be stripped); Douglas Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion, in Emerging Conflicts* 103, 108-11 (arguing that *Bob Jones* should not apply to conscientious objectors to same-sex marriage).

³⁸ *Brady v. Dean*, 790 A.2d 428 (Vt. 2001) (Vermont clerks); Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. Times, May 17, 2004 (Massachusetts Justices of the Peace) .

³⁹ 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).

but could not in good conscience help them with their same-sex relationships, she was expelled for violating the school's anti-discrimination policy. *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012). If the Ninth Circuit's declaration that refusing to endorse same-sex marriage demonstrates "animosity" and "dislike" towards gays and lesbians is adopted by this Court, conflicts like these will be even more widespread as religious believers' long-held views on marriage suddenly become *prima facie* evidence of discriminatory animus under anti-discrimination laws.

II. Given the threat to religious liberty, DOMA and Proposition 8 are rational responses to the threat to religious liberty posed by court decisions to adopt same-sex marriage without conscience protections.

The foregoing examples are hardly exhaustive. They suffice to show, however, that the California Supreme Court's failure to provide any conscience protections in *In re Marriage Cases*—and the Hawaii Supreme Court's similar failure in *Baehr*—created a significant threat to the ability of religious people and institutions to live in accordance with their beliefs. Democratic action designed to eliminate that threat is not irrational.

Neither of the decisions under review grappled with the religious liberty concerns raised by court-ordered adoption of same-sex marriage. *Windsor* did not even acknowledge that they existed. Judge Reinhardt's opinion in *Perry* acknowledged the religious liberty concerns raised by *amicus*, 671 F.3d at 1091, but first mischaracterized them as concerns that "religious organizations would be penalized * * * for refusing to provide services to *families headed by same-*

sex spouses” and then dismissed them on the ostensible ground that “Proposition 8 did nothing to affect” California’s existing anti-discrimination laws. *Ibid.* (emphasis added).

But because so many major religious groups center their teachings regarding sexual morality around opposite-sex marriage, changing the definition of marriage itself—which is precisely what Proposition 8 was designed to address—triggers a distinct set of religious liberty concerns. See *supra* Section I. Moreover, being forced to call a same-sex relationship a “marriage” creates a conflict of conscience for many religious organizations where “civil union” or “domestic partnership” would not. *Perry* only aggravated this sort of church-state conflict by concluding that denying the title of marriage to same-sex couples shows “animosity” or “dislike” towards gays and lesbians, even if they are treated equally in every other respect.

Some have argued that these conflicts should be discounted because they supposedly arise from neutral and generally applicable laws. See Plf’s Resp. to *amicus* at 4-5, *Perry v. Schwarzenegger*, No. 3:09-cv-02292 (N.D. Cal. Feb. 26, 2010), Dkt. No. 607. Even if that were true—and it is not—that would neither eliminate the conflicts, nor make it irrational for voters to be concerned about them. To the contrary, the lack of Free Exercise protection would only increase voters’ rational concerns, since they would then have no way to avoid burdens imposed by these supposedly neutral, generally applicable laws. Since this Court has specifically invited states to consider protections for religious activity that go beyond what the Free Exercise Clause protects, it can hardly be irrational for California voters to take them up on the offer. See

Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (because First Amendment rights are not “banished from the political process” legislative religious protections are to be expected).⁴⁰

III. American citizens and their legislatures are competent to decide on the legal definition of marriage through political processes.

This Court should hesitate to strike down DOMA and Proposition 8 for another reason as well: doing so

⁴⁰ With respect to Proposition 8, it was also rational for voters to be concerned about the religious liberty of public school students and their parents. Voters could rationally be concerned about advancing restrictions on student speech objecting to same-sex marriage. See, e.g., *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007)) (student’s religious speech objecting to homosexuality could be banned under *Tinker* because it would “destroy the self-esteem” of LGBT students). Similarly, voters could rationally be concerned that adoption of same-sex marriage would reduce parents’ ability to find out what their children were taught about same-sex marriage. See *Parker v. Hurley*, 514 F.3d 87 (1st Cir.), *cert. denied*, 555 U.S. 815 (2008) (Massachusetts parents could not obtain notice of when their young children would be taught curriculum designed to celebrate same-sex marriage).

The Ninth Circuit responded to these concerns by stating that California schools have long “been prohibited from giving any instruction that discriminates on the basis of sexual orientation,” *Perry*, 671 F.3d at 1091, but this is beside the point. Adopting same-sex marriage without conscience protections necessarily weakens religious objectors’ claims. See, e.g., *Parker*, 514 F.3d at 95 (Massachusetts’ recognition of same-sex marriage weakened parents’ Free Exercise claim under *Smith*).

“would short-circuit” the work that state legislatures are already doing in this area. *Jackson v. Abercrombie*, No. 11-cv-734, 2012 WL 3255201 (D. Haw. Aug. 8, 2012) (quoting *Dist. Attorney’s Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72-73 (2009)). “By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). As a result, “[t]he doctrine of judicial self-restraint requires [this Court] to exercise the utmost care whenever we are asked to break new ground in this field.” *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). Six states have already enacted same-sex marriage laws, all of which provide greater protection for conscience rights than the court decisions which gave rise to DOMA and Proposition 8. See *infra* at 32-33 n.42. Striking down DOMA and Proposition 8 as Plaintiffs request risks turning a very active political debate into a dead end. It would also communicate a profound and, *amicus* believes, unjustified mistrust in the ability of Americans to debate and decide important political issues for themselves.

A. Because many of the conflicts between same-sex marriage and religious liberty can be avoided—at least in part—by legislative exemptions, the judiciary should allow the legislatures to go first.

Six states—Maine, Maryland, New Hampshire, New York, Washington, and Vermont—and the District of Columbia have adopted same-sex marriage by legislative action.⁴¹ Although their laws vary, and no

⁴¹ Massachusetts and Iowa have same-sex marriage by

state has provided complete protection to conscientious objectors, each of the six states and the District of Columbia has attempted to address the conflicts between same-sex marriage and religious liberty by providing accommodations for conscientious objectors.⁴²

judicial rulings. See *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). Connecticut's legislature adopted same-sex marriage legislation—with several religious exemptions—after its previous marriage/civil union system was struck down. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); see Conn. Gen. Stat. §§ 46b-35a, 46b-35b, 38a-624a (providing religious exemptions).

⁴² 2012 Me. Legis. Serv. § 1 (I.B. 3) (exempting clergy and religious organizations from “host[ing] any marriage in violation of” their religious beliefs and protecting them from lawsuits or loss of tax-exempt status for their failure to do so) (to be codified at Me. Rev. Stat. Ann. tit. 19-A, § 655); 2012 Md. Laws ch. 2 § 2-2, -3, -4 (exempting religious organizations from solemnizing or providing services or accommodations related to the solemnization and protecting their ability to offer religious programs consistent with their definition of marriage; permitting religious fraternal organizations to limit insurance coverage to spouses in opposite-sex marriages; and permitting religious adoption and foster care agencies which do not receive government funding to limit their placements to opposite-sex married couples) (to be codified at Md. Code Ann., Fam. Law §§ 2-201, 2-202, 2-406); 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 § 11(1) (exempting religious organizations from solemnizing or providing services or accommodations related to the solemnization of

The fact that every state legislature to address same-sex marriage has recognized the conflict with religious liberty is strong evidence that this concern is rational: if protecting religious liberty is irrational, then all of these legislatures have been acting irrationally. The truth, of course, is that the state legislatures and voters who have adopted these laws attempt to balance competing legitimate societal interests. And that is something that the political branches can do far more easily than the judicial branch.

B. Allowing the people to decide avoids a frozen conflict and facilitates their acceptance of whatever may be the ultimate result of their public debate.

If the history of the same-sex marriage debate in this country teaches anything, it is that the public discussion will continue long after this Court has issued its opinion. The only question is whether that discussion will become a frozen conflict—a political

marriages that they do not recognize; protecting religious organizations' ability to limit certain kinds of housing to opposite-sex spouses); Vt. Stat. Ann. 9 § 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 (2012) (exempting religious organizations from solemnizing or providing services or accommodations related to the solemnization of marriages that they do not recognize); D.C. Code § 46-406(e) (exempting religious organizations from providing "services, accommodations, facilities, or goods * * * related to" the "celebration," "solemnization," or "promotion" of a marriage).

debate without hope of political remedy—or whether it will be allowed to evolve as society changes.

Using the judicial power to end debate now will perpetuate the conflict, not end it. This Court’s role in reshaping American abortion laws provides an example of this dynamic in action: as Justice Ginsburg has observed, when *Roe v. Wade* was decided in 1973, “legislatures all over the United States were moving on [abortion],” and “[t]he law was in a state of flux.” Adam Liptak, *Gay Vows, Repeated From State To State*, N.Y. Times, Apr. 12, 2009. This Court’s decision to strike down nearly all existing abortion laws on a single day created “a perfect rallying point” for the pro-life cause, *ibid.*, and 40 years later *Roe* remains at the epicenter of the public conflict over abortion.

Striking down DOMA and Proposition 8 would result in the same kind of self-perpetuating conflict that emerged after *Roe*. Nearly any rationale for striking down these two laws will throw the marriage laws of all fifty states into doubt. As with the abortion conflict, judicial preemption of the deliberative process would reduce the political discussion to two sides shouting at each other endlessly with no constructive result—the political equivalent of trench warfare.

That conflict would be exacerbated by the inevitable perception that overturning DOMA and Proposition 8 was anti-democratic. It would be seen, rightly or wrongly, as the Court overruling both Congress and the voters. And it would also send the message that Americans and their representatives are not competent to decide thorny issues.

John Hart Ely famously said that “constitutional law appropriately exists for those situations where

representative government cannot be trusted, not those where we know it can.” *Democracy and Distrust* 183 (1980). This is a situation where representative government *can* be trusted. That many people disagree strongly is simply a sign that the debate is not over. Indeed, democracy without disagreement is not worthy of the name. See, *e.g.*, Isaiah Berlin, *Two Concepts of Liberty, in Four Essays on Liberty* 118 (Oxford 1969); Robert Huckfeldt, Paul E. Johnson & John Sprague, *Political Disagreement* (2004) (“* * * a democracy without conflict and disagreement is not a democracy. Democratic institutions are not designed to eliminate conflict and disagreement, but only to manage disagreement in a productive manner.”). And citizens reasoning through those disagreements—the very process of deliberation—ensures the vitality of our democratic system by accepting, rather than suppressing, disagreement and dissent:

If citizens do not try to deliberate about issues such as sexual harassment, homosexual rights, or racial justice, they may never learn how to do so responsibly. Sexist, homophobic, and racist messages will not thereby disappear from American politics; they will retreat between the lines.

Amy Guttmann & Dennis Frank Thompson, *Democracy and Disagreement* 109 (1996).

Moreover, using the judicial power to strike DOMA and Proposition 8 down will also prevent legislatures from arriving at workable compromises regarding religious liberty. Although many have argued in the press or elsewhere that the debate over same-sex marriage is a winner-take-all battle, there is po-

tential middle ground. Professor Laycock has explained that:

unavoidable conflict [between the interests of same-sex couples and the interests of conscientious objectors] does not necessarily mean unmanageable conflict. For the most part, ***these conflicts are not zero-sum games***, in which every gain for one side produces an equal and opposite loss for the other side. If legislators and judges will treat both sides with respect, harm to each side can be minimized. Of course that is a huge “if.”

Douglas Laycock, *Afterword, in Emerging Conflicts* 196 (emphasis added). Managing these conflicts will require detailed exploration and balancing of all of the societal interests at stake. That is a job that legislatures can undertake far more easily than the judiciary. In Justice Brennan’s view, “government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities”—but those exemptions can only be granted, and pluralism protected, through political, not judicial processes.⁴³

Finally, if this Court declines to freeze the debate, voters are free to revisit their decisions. That is what happened in Maine: in 2009, voters rejected a same-sex marriage law in a statewide referendum, but in 2012, they adopted a same-sex marriage law—including religious exemptions—in a second statewide referendum. *Maine Rejects Same-Sex Mar-*

⁴³ *Walz v. Tax Commission*, 397 U.S. 664, 692 (1970) (Brennan, J., concurring).

riage Law, CNN.com, Nov. 4, 2009⁴⁴; *A Festive Mood in Maine as Same-Sex Marriage Becomes Legal*, N.Y. Times, Dec. 30, 2012, at A20.⁴⁵ By contrast, were the question removed from ordinary political processes, such reconsideration and fine-tuning would be all but impossible.

* * *

At this juncture in our Nation's political life, same-sex marriage and religious liberty stand in conflict. Given that conflict—acknowledged by scholars and legislatures alike—it is not irrational for voters, or Congress, or the courts to act to protect the rights of conscience. Indeed, it is the political philosophy of the United States that governments are formed solely to protect a set of pre-existing rights that includes religious freedom. *Declaration of Independence*, preamble. Since court decisions left Americans with an all-or-nothing choice between same-sex marriage and full protection for the rights of conscience, DOMA and Proposition 8 were entirely rational responses to the threat to religious liberty.

The wide-ranging nature of the conflict also implicates the judicial role. DOMA and Proposition 8 both present multi-dimensional social issues. Yet because courts are limited to resolving cases and controversies, they are forced to address these complex issues in a binary way. That structural limitation, taken together with the prospect of legislative solutions and

⁴⁴ http://articles.cnn.com/2009-11-04/politics/maine.same.sex.1.marriage-maine-john-baldacci-same-sex?_s=PM:POLITICS.

⁴⁵ <http://www.nytimes.com/2012/12/30/us/same-sex-marriage-becomes-legal-in-maine.html>.

the high value our country puts on religious freedom, counsels judicial restraint in the cases before the Court.

CONCLUSION

For the foregoing reasons, the Court should reverse the lower courts and uphold the constitutionality of both DOMA and Proposition 8.

39

Respectfully submitted.

ERIC RASSBACH
Counsel of Record
LORI HALSTEAD WINDHAM
ADÈLE AUXIER KEIM
The Becket Fund for
Religious Liberty
3000 K Street, N.W.
Washington, DC 20007
(202) 955-0095
erassbach@becketfund.org

Counsel for Amicus Curiae

JANUARY 2013

APPENDIX

TABLE OF CONTENTS

Selected Anti-Discrimination Statutory Provisions and Marriage-Relevant Exceptions by State	1a
Letter from Prof. Robin Fretwell Wilson and others to Hon. Pat Quinn, Governor of Illinois (Dec. 18, 2012)	102a
Letter from Prof. Douglas Laycock and others to Members of the Illinois Senate (Dec. 24, 2012)	137a

Selected Anti-Discrimination Statutory Provisions
and Marriage-Relevant Exceptions by State

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
ALABAMA	
Gender	Housing: ALA. CODE 1975 § 24-8-4
ALASKA	
Gender	Employment: ALASKA STAT. § 18.80.220
Gender	Public Accommodations: ALASKA STAT. § 18.80.230
Gender	<p>Housing: ALASKA STAT. § 18.80.240</p> <p>Exception: “The activities of a nonprofit and noncommercial organization on a nonremunerative basis in aiding minority group members to obtain housing opportunities so as to further the purpose of this chapter are not considered a violation....”</p> <p>ALASKA STAT. § 18.80.215</p>
Marital Status	Employment: ALASKA STAT. § 18.80.220
Marital Status	Public Accommodations: ALASKA STAT. § 18.80.230
Marital Status	Housing: ALASKA STAT. § 18.80.240

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	Exception: “The activities of a nonprofit and noncommercial organization on a nonremunerative basis in aiding minority group members to obtain housing opportunities so as to further the purpose of this chapter are not considered a violation....” ALASKA STAT. § 18.80.215
ARIZONA	
Gender	Employment: ARIZ. REV. STAT. § 41-1463, 1464 Exception for religious institutions: “This article does not apply to . . . a religious corporation, association, educational institution or society 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 or society of its activities.” ARIZ. REV. STAT. § 41- 1462.
Gender	Public Accommodations: ARIZ. REV. STAT. § 41-1442
Gender	Housing: ARIZ. REV. STAT. § 41-1491.14, 41-1491.20
Gender	Government Contracts: ARIZ. REV.

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	STAT. § 41-3751 (religious institutions contracting with government may not discriminate on basis of gender against individuals receiving contracted services)
ARKANSAS	
Gender	Housing: ARK. CODE ANN. § 16-123-107; ARK. CODE ANN. § 16-123-204; ARK. CODE ANN. § 16-123-206
Gender	Employment: ARK. CODE ANN. § 16-123-107
Gender	Public accommodations: ARK. CODE ANN. § 16-123-107
Gender	Mental health services: ARK. CODE ANN. § 20-47-220
CALIFORNIA	
Sexual Orientation	Public Accommodations/Commerce: CAL. CIV. CODE § 51; CAL. CIV. CODE § 51.5
Sexual Orientation	Education: CAL. EDUC. CODE § 200, 220 Exception: “This article shall not apply to an educational institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization.” CAL. EDUC. CODE

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	§ 221
Sexual Orientation	<p>Education: CAL. EDUC. CODE § 66270 (postsecondary education)</p> <p>Exception: “This chapter shall not apply to an educational institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization.” CAL. EDUC. CODE § 66271</p>
Sexual Orientation	<p>Employment: CAL. GOV. CODE § 12940</p> <p>Exception: “Notwithstanding any other provision of this part, an employer that is a religious corporation may restrict eligibility for employment in any position involving the performance of religious duties to adherents of the religion for which the corporation is organized.” CAL GOV. CODE § 12922</p> <p>Exception: “‘Employer’ does not include a religious association or corporation not organized for private profit.” CAL. GOV. CODE § 12926(d).</p> <p>Exception: “(c) Notwithstanding subdivision (d) of Section 12926</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>and except as otherwise provided in subdivision (d) of this section, ‘employer’ includes a religious corporation or association with respect to persons employed by the religious association or corporation to perform duties, other than religious duties, at a health care facility operated by the religious association or corporation for the provision of health care that is not restricted to adherents of the religion that established the association or corporation.</p> <p>‘Employer’ does not include a religious corporation with respect to either the employment, including promotion, of an individual of a particular religion, or the application of the employer’s religious doctrines, tenets, or teachings, in any work connected with the provision of health care.</p> <p>(e) Notwithstanding subdivision (d) of Section 12926, “employer” does not include a nonprofit public benefit corporation incorporated to provide health care on behalf of a religious organization under Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>Corporations Code, with respect to employment, including promotion, of an individual of a particular religion in an executive or pastoral-care position connected with the provision of health care.</p> <p>“(f)(1) Notwithstanding any other provision of law, a nonprofit public benefit corporation formed by, or affiliated with, a particular religion and that operates an educational institution as its sole or primary activity, may restrict employment, including promotion, in any or all employment categories to individuals of a particular religion.” CAL. GOV. CODE § 12926.2.</p>
Sexual Orientation	<p>Housing/Real Estate: CAL. GOV. CODE § 12955; CAL. CIV. CODE § 53; CAL. CIV. CODE § 782.5</p> <p>Exception: This section does not “[p]rohibit any postsecondary educational institution, whether private or public, from providing housing accommodations reserved for either male or female students so long as no individual person is denied equal access to housing accommodations, or from providing separate housing</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	accommodations reserved primarily for married students or for students with minor dependents who reside with them.” CAL. GOV. CODE § 12995.
Sexual Orientation	Commerce: CAL. CIV. CODE § 51.5
Sexual Orientation	Programs receiving state funding: CAL. GOV. CODE § 11135; CAL. PUB. CON. CODE § 6108(g)(9) (government contracts)
Gender & gender identity	Public Accommodations: CAL. CIV. CODE § 51; CAL. CIV. CODE § 51.5 (commerce-based law)
Gender & gender identity	<p>Education: CAL. EDUC. CODE §§ 200, 220, 230</p> <p>Exception: “This article shall not apply to an educational institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization.” CAL. EDUC. CODE § 221</p> <p>Exception: “This chapter shall not apply to the membership practices of the Young Men's Christian Association, Young Women's Christian Association, girl scouts, boy scouts, Camp Fire, or voluntary</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	youth service organizations which are exempt from taxation under subdivision (a) of Section 501 of the federal Internal Revenue Code of 1954, whose membership has traditionally been limited to persons of one sex, and principally to persons of less than 19 years of age.” CAL. EDUC. CODE § 223.
Gender & gender identity	Education: CAL. EDUC. CODE § 66270 (postsecondary education) Exception: “This chapter shall not apply to an educational institution that is controlled by a religious organization if the application would not be consistent with the religious tenets of that organization.” CAL. EDUC. CODE § 66271.
Gender & gender identity	Employment: CAL. GOV. CODE § 12940 Exception: “Notwithstanding any other provision of this part, an employer that is a religious corporation may restrict eligibility for employment in any position involving the performance of religious duties to adherents of the religion for which the corporation is organized.” CAL.

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>GOV. CODE § 12922</p> <p>Exception: “Employer’ does not include a religious association or corporation not organized for private profit.”</p> <p>CAL. GOV. CODE § 12926(d).</p> <p>Exception: “(c) Notwithstanding subdivision (d) of Section 12926 and except as otherwise provided in subdivision (d) of this section, ‘employer’ includes a religious corporation or association with respect to persons employed by the religious association or corporation to perform duties, other than religious duties, at a health care facility operated by the religious association or corporation for the provision of health care that is not restricted to adherents of the religion that established the association or corporation.</p> <p>“(d) ‘Employer’ does not include a religious corporation with respect to either the employment, including promotion, of an individual of a particular religion, or the application of the employer's religious doctrines, tenets, or teachings, in any work</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>connected with the provision of health care.</p> <p>“(e) Notwithstanding subdivision (d) of Section 12926, ‘employer’ does not include a nonprofit public benefit corporation incorporated to provide health care on behalf of a religious organization under Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code, with respect to employment, including promotion, of an individual of a particular religion in an executive or pastoral-care position connected with the provision of health care.</p> <p>“(f)(1) Notwithstanding any other provision of law, a nonprofit public benefit corporation formed by, or affiliated with, a particular religion and that operates an educational institution as its sole or primary activity, may restrict employment, including promotion, in any or all employment categories to individuals of a particular religion.” CAL. GOV. CODE § 12926.2.</p>
Gender & gender	Housing/Real Estate: CAL. GOV. CODE § 12955; CAL. CIV. CODE § 53;

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
identity	CAL. CIV. CODE § 782.5 Exception: This section does not “[p]rohibit any postsecondary educational institution, whether private or public, from providing housing accommodations reserved for either male or female students so long as no individual person is denied equal access to housing accommodations, or from providing separate housing accommodations reserved primarily for married students or for students with minor dependents who reside with them.” CAL. GOV. CODE § 12995(a)(2).
	Programs receiving state funding: CAL. GOV. CODE § 11135; CAL. PUB. CON. CODE § 6108(g)(9) (government contracts)
Gender & gender identity	Commerce: CAL. BUS. & PROF. CODE § 16721; CAL. CIV. CODE § 51.5; CAL. REV. & TAX CODE §§ 6361, 6361.1 (tax exemption for certain fundraising sales)
Marital Status	Public Accommodations: CAL. CIV. CODE § 51; CAL. CIV. CODE § 51.5 (commerce-based law)
Marital Status	Employment: CAL. GOV. CODE § 12940

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>Exception: “Notwithstanding any other provision of this part, an employer that is a religious corporation may restrict eligibility for employment in any position involving the performance of religious duties to adherents of the religion for which the corporation is organized.” CAL. GOV. CODE § 12922.</p> <p>Exception: “Employer” does not include a religious association or corporation not organized for private profit.” CAL. GOV. CODE § 12926(d).</p> <p>Exception: “(c) Notwithstanding subdivision (d) of Section 12926 and except as otherwise provided in subdivision (d) of this section, "employer" includes a religious corporation or association with respect to persons employed by the religious association or corporation to perform duties, other than religious duties, at a health care facility operated by the religious association or corporation for the provision of health care that is not restricted to adherents of the religion that</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>established the association or corporation.</p> <p>“(d) ‘Employer’ does not include a religious corporation with respect to either the employment, including promotion, of an individual of a particular religion, or the application of the employer's religious doctrines, tenets, or teachings, in any work connected with the provision of health care.</p> <p>“(e) Notwithstanding subdivision (d) of Section 12926, ‘employer’ does not include a nonprofit public benefit corporation incorporated to provide health care on behalf of a religious organization under Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code, with respect to employment, including promotion, of an individual of a particular religion in an executive or pastoral-care position connected with the provision of health care.</p> <p>“(f)(1) Notwithstanding any other provision of law, a nonprofit public benefit corporation formed by, or affiliated with, a particular religion and that operates an</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	educational institution as its sole or primary activity, may restrict employment, including promotion, in any or all employment categories to individuals of a particular religion.” CAL. GOV. CODE § 12926.2
Marital Status	<p>Housing/Real Estate: CAL. GOV. CODE § 12955; CAL. CIV. CODE § 53; CAL. CIV. CODE § 782.5.</p> <p>Exception: This section does not “[p]rohibit any postsecondary educational institution, whether private or public, from providing housing accommodations reserved for either male or female students so long as no individual person is denied equal access to housing accommodations, or from providing separate housing accommodations reserved primarily for married students or for students with minor dependents who reside with them.” CAL GOV. CODE 12995(a)(2).</p>
Marital Status	Commerce: CAL.CIV.CODE § 51.5
Marital Status	Government contracts: CAL. PUB. CONT. CODE § 6108(g)(9)

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
COLORADO	
Sexual Orientation	<p>Employment: COLO. REV. STAT. § 24-34-402</p> <p>Exception: “Employer’... does not mean religious organizations or associations, except such organizations or associations supported in whole or in part by money raised by taxation or public borrowing.” COLO. REV. STAT. § 24-34-401</p>
Sexual Orientation	<p>Public Accommodation: COLO. REV. STAT. ANN § 24-34-601</p> <p>Exception: “Place of public accommodation” shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes..” COLO. REV. STAT. § 24-34-601</p>
Sexual Orientation	Housing: COLO. REV. STAT. § 24-34-502
Sexual Orientation	<p>Housing/tax exemption: COLO. REV. STAT. ANN. § 39-3-112 (some residential charitable housing not tax exempt if it discriminates)</p> <p>Exception: “[H]owever, if the owner or sponsoring organization is a religious denomination, said owners or operators may give</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	preference to members of that denomination.” <i>Id.</i>
Gender	<p>Employment: COLO. REV. STAT. § 24-34-402</p> <p>Exception: “Employer’... does not mean religious organizations or associations, except such organizations or associations supported in whole or in part by money raised by taxation or public borrowing.” COLO. REV. STAT. § 24-34-401</p>
Gender	Housing: COLO. REV. STAT. § 24-34-502
Gender	<p>Public Accommodation: COLO. REV. STAT. ANN. § 24-34-601</p> <p>Exception: “Place of public accommodation” shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes.” COLO. REV. STAT. § 24-34-601</p>
Gender	<p>Housing/tax exemption: COLO. REV. STAT. ANN. § 39-3-112 (some residential charitable housing not tax exempt if it discriminates)</p> <p>Exception: “[H]owever, if the owner or sponsoring organization is a religious denomination, said</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	owners or operators may give preference to members of that denomination.” <i>Id.</i>
Marital Status	Housing: COLO. REV. STAT. § 24-34-502
Marital Status	Public Accommodation: COLO. REV. STAT. ANN. § 24-34-601 Exception: “Place of public accommodation” shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes.” COLO. REV. STAT. § 24-34-601.
Marital Status	Housing/tax exemption: COLO. REV. STAT. ANN. § 39-3-112 (some residential charitable housing not tax exempt if it discriminates) Exception: “[H]owever, if the owner or sponsoring organization is a religious denomination, said owners or operators may give preference to members of that denomination.” <i>Id.</i>
CONNECTICUT	
Sexual Orientation	Employment: CONN. GEN. STAT. § 46a-81c*
Sexual Orientation	Public Accommodations: CONN. GEN. STAT. § 46a-81d*
Sexual	Housing: CONN. GEN. STAT.

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
Orientation	§ 46a-81e*
Sexual Orientation	Government contractors: CONN. GEN. STAT. ANN. § 4a-60a;* CONN. GEN. STAT. ANN. § 46a-81i Exception: “The state, foster and adoption agencies are not required to place children with homosexual or bisexual parents.” CONN. GEN. STAT. ANN. § 45a-726a.
Sexual Orientation	Professional organizations: CONN. GEN. STAT. ANN. § 46a-59, 81b*
Gender & gender identity	Employment: CONN. GEN. STAT. § 46a-60a
Gender & gender identity	Housing: CONN. GEN. STAT. § 46a-64c
Gender & gender identity	Public accommodations: CONN. GEN. STAT. ANN. § 46a-64
Gender & gender identity	Government contractors: CONN. GEN. STAT. ANN. § 4a-60
Gender & gender identity	Professional organizations: CONN. GEN. STAT. ANN. § 46a-59
Gender & gender identity	State facilities/contracts: CONN. GEN. STAT. ANN. § 46a-71

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
Marital Status	Employment: CONN. GEN. STAT. § 46a-60a
Marital Status	<p>Housing: CONN. GEN. STAT. § 46a-64c</p> <p>Exception: “The provisions of this section with respect to the prohibition of discrimination on the basis of marital status shall not be construed to prohibit the denial of a dwelling to a man or a woman who are both unrelated by blood and not married to each other.”</p>
	<p>* General Exception: “The provisions of sections 4a-60a and 46a-81a to 46a-81o, inclusive, shall not apply to a religious corporation, entity, association, educational institution or society with respect to the employment of individuals to perform work connected with the carrying on by such corporation, entity, association, educational institution or society of its activities, or with respect to matters of discipline, faith, internal organization or ecclesiastical rule, custom or law which are established</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	by such corporation, entity, association, educational institution or society.” CONN. GEN. STAT. § 46a-81p.
DELAWARE	
Sexual Orientation	Housing: DEL. CODE ANN. tit. vi, §§ 4601-06, 4619
Sexual Orientation	Public Accommodations: DEL. CODE ANN. tit. vi, §§ 4501-04
Sexual Orientation	Employment: DEL CODE ANN. tit. xix, § 711 Exception: “It shall not be an unlawful employment practice for a school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled or managed by a particular religion or by a particular religious corporation, association or society or if the curriculum of such school, college, university or other educational institution or institution of learning is directed toward the propagation of a

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	particular religion.” <i>Id.</i>
Gender	Housing: DEL CODE ANN. tit. vi, §§ 4601-06, 4619
Gender	Public Accommodations: DEL CODE ANN. tit. vi, §§ 4501-04
Gender	<p>Employment: DEL CODE ANN. tit. xix, § 711</p> <p>Exception: “It shall not be an unlawful employment practice for a school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled or managed by a particular religion or by a particular religious corporation, association or society or if the curriculum of such school, college, university or other educational institution or institution of learning is directed toward the propagation of a particular religion.” <i>Id.</i></p>
Gender	Government contractors: DEL. CODE ANN. tit. xxix, § 6519A
Marital	Public Accommodations: DEL.

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
Status	CODE ANN. tit. vi, §§ 4501-04
Marital Status	Housing: DEL. CODE ANN. tit. vi, §§ 4601-06, 4619
Marital Status	<p>Employment: DEL. CODE ANN. tit. xix, § 711</p> <p>Exception: “It shall not be an unlawful employment practice for a school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled or managed by a particular religion or by a particular religious corporation, association or society or if the curriculum of such school, college, university or other educational institution or institution of learning is directed toward the propagation of a particular religion.” <i>Id.</i></p>
FLORIDA	
Gender	General: FLA. STAT. ANN. § 760.01
Gender	Employment: FLA. STAT. ANN. § 760.10

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>Exception: “This section shall not apply to any religious corporation, association, educational institution, or society which conditions opportunities in the area of employment or public accommodation to members of that religious corporation, association, educational institution, or society or to persons who subscribe to its tenets or beliefs. This section shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporations, associations, educational institutions, or societies of its various activities.” <i>Id.</i></p>
Gender	<p>Public Accommodation: FLA. STAT. ANN. § 760.08; § 760.60 (large private clubs)</p> <p>Exception: “This section shall not apply to any religious corporation, association, educational institution, or society which conditions opportunities in the area of employment or public</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	accommodation to members of that religious corporation, association, educational institution, or society <i>or</i> to persons who subscribe to its tenets or beliefs. This section shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporations, associations, educational institutions, or societies of its various activities.” FLA. STAT. ANN. § 760.10(d)(9).
Gender	State employees’ charitable campaign: FLA. STAT. ANN. § 110.181
Gender	Housing: FLA. STAT. ANN. § 760.23
Marital Status	General: FLA. STAT. ANN. § 760.01
Marital Status	Employment: FLA. STAT. ANN. § 760.10
Marital Status	Public accommodations: FLA. STAT. ANN. § 760.08, § 760.60 (large private clubs) Exception: “This section shall not

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>apply to any religious corporation, association, educational institution, or society which conditions opportunities in the area of employment or public accommodation to members of that religious corporation, association, educational institution, or society <i>or</i> to persons who subscribe to its tenets or beliefs. This section shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporations, associations, educational institutions, or societies of its various activities.”</p> <p>FLA. STAT. ANN. § 760.10(d)(9)</p>
GEORGIA	
Gender	Housing: GA. CODE ANN. § 8-3-202
HAWAII	
Sexual Orientation	Public accommodation: HAW. REV. STAT. § 489-3
Sexual	Housing: HAW. REV. STAT. § 515-

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
Orientation	<p style="text-align: center;">3</p> <p>Exception: “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:</p> <p>(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.” HAW. REV. STAT. § 515-4</p>
Gender & gender identity	Public accommodation: HAW. REV. STAT. § 489-3
Gender & gender identity	<p>Housing: HAW. REV. STAT. § 515-3</p> <p>Exception: “Nothing in section 515-3 shall be deemed to prohibit refusal, because of sex, including gender identity or expression,</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>sexual orientation, or marital status, to rent or lease housing accommodations:</p> <p>(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</p> <p>(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.” HAW. REV. STAT. § 515-4</p>
Gender	Users of public lands: HAW. REV. STAT. § 171-64
Gender	Education: HAW. REV. STAT. § 302A-1001 (education and recreation using state facilities or funds)
Marital Status	<p>Housing: HAW. REV. STAT. § 515-3</p> <p>Exception: “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</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>accommodations:</p> <p>(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</p> <p>(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.” HAW. REV. STAT. § 515-4</p>
IDAHO	
Gender	Public Accommodation: IDAHO CODE ANN. § 18-7301(2), IDAHO CODE ANN. § 18-7303 (criminal penalty)
Gender	Employment: IDAHO CODE ANN. § 18-7301(1); IDAHO CODE ANN. § 18-7303 (criminal penalty)
Gender	Employment: IDAHO CODE ANN. § 67-5909
Gender	<p>Public Accommodation: IDAHO CODE ANN. § 67-5909</p> <p>Exception: “[U]nless such criteria can be shown to be necessary for the provision of the goods, services,</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	facilities, privileges, advantages or accommodations being offered.” <i>Id.</i>
Gender	Education: IDAHO CODE ANN. § 67-5909
Gender	Housing: IDAHO CODE ANN. § 67-5909
Gender	Employment and Health Services: IDAHO CODE ANN. § 16-2402(5)(i)
ILLINOIS	
Sexual Orientation	Employment: 775 ILL. COMP. STAT. 5/2-102 Exception: “Employer’ does not include 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.” 775 ILL. COMP. STAT.

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	5/2-101
Sexual Orientation	Public accommodations: 775 ILL. COMP. STAT. 5/5-102 Exception: “sectarian” schools are not a “public accommodation.” 775 ILL. COMP. STAT. 5/5-101(a)(11)
Sexual Orientation	Housing: 775 ILL. COMP. STAT. 5/3-102 Exception: The act does not prohibit “[a] religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of a dwelling which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.” 775 ILL. COMP. STAT. 5/3-106(E)
Sexual Orientation	Government contracts: 775 ILL. COMP. STAT. 5/2-105; 775 ILL. COMP. STAT. 10/1

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
Gender	<p>Employment: 775 ILL. COMP. STAT. 5/2-102</p> <p>Exception: “Employer’ does not include 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.” 775 ILL. COMP. STAT. 5/2-101</p>
Gender	<p>Public accommodations: 775 ILL. COMP. STAT. 5/5-102</p> <p>Exception: “sectarian” schools are not a “public accommodation.” 775 ILL. COMP. STAT. 5/5-101(a)(11)</p>
Gender	<p>Housing: 775 ILL. COMP. STAT. 5/3-102</p> <p>Exception: The act does not prohibit “[a] religious organization, association, or society, or any nonprofit</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of a dwelling which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.”</p> <p>775 ILL. COMP. STAT. 5/3-106(E)</p>
Gender	<p>Government contracts: 775 ILL. COMP. STAT. 5/2-105; 775 ILL. COMP. STAT. 10/1</p>
Marital Status	<p>Employment: 775 ILL. COMP. STAT. 5/2-102</p> <p>Exception: “‘Employer’ does not include 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</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	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 ILL. COMP. STAT. 5/2-101
Marital Status	Public accommodations: 775 ILL. COMP. STAT. 5/5-102 Exception: “sectarian” schools are not a “public accommodation.” 775 ILL. COMP. STAT. 5/5-101(a)(11)
Marital Status	Housing: 775 ILL. COMP. STAT. 5/3-102 Exception: The act does not prohibit “[a] religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of a dwelling which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	of race, color, or national origin.” 775 ILL. COMP. STAT. 5/3-106(E)
Marital Status	Government contracts: 775 ILL. COMP. STAT. 5/2-105; 775 ILL. COMP. STAT. 10/1
INDIANA	
Gender	Housing: IND. CODE ANN. §§ 22-9.5-5-1 to 22-9.5-5-4, §§ 22-9.5-5-6 to 22-9.5-5-8
Gender	Housing: IND. CODE ANN. § 22-9-1-2 (implementation through commissions)
Gender	Education: IND. CODE ANN. § 22-9-1-2 (implementation through commissions) Exception: “[I]t shall not be a discriminatory practice for a private or religious educational institution to continue to maintain and enforce a policy of admitting students of one (1) sex only.” IND. CODE ANN. § 22-9-1-3(q)(3).
Gender	Employment: IND. CODE ANN. § 22-9-1-2 (implementation through commissions)
Gender	Public Accommodation: IND. CODE ANN. § 22-9-1-2 (implementation through commissions)

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
Gender	Government contractors: IND. CODE ANN. § 22-9-1-10
IOWA	
Sexual Orientation	Employment: IOWA CODE § 216.6 Exception: “Any bona fide religious institution or its educational facility, association, corporation, or society with respect to any qualifications for employment based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose. A religious qualification for instructional personnel or an administrative officer, serving in a supervisory capacity of a bona fide religious educational facility or religious institution, shall be presumed to be a bona fide occupational qualification.” IOWA CODE § 216.6(6)(d).
Sexual orientation	Public accommodations: IOWA CODE § 216.7 Exception: “Any bona fide religious institution with respect to any qualifications the institution may impose based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	purpose.” IOWA CODE § 216.7(2)(a)
Sexual orientation	<p>Housing: IOWA CODE §§ 216.8, 216.8A</p> <p>Exception: “Any bona fide religious institution with respect to any qualifications it may impose based on religion, sexual orientation, or gender identity, when the qualifications are related to a bona fide religious purpose unless the religious institution owns or operates property for a commercial purpose or membership in the religion is restricted on account of race, color, or national origin.” IOWA CODE § 216.12 (1)(a)</p>
Sexual orientation	<p>Education: IOWA CODE § 216.9</p> <p>Exception: “Nothing in this section shall be construed as prohibiting any bona fide religious institution from imposing qualifications based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose or any institution from admitting students of only one sex.” IOWA CODE § 216.9(d)(2)</p>
Gender	Employment: IOWA CODE § 216.6; IOWA CODE ANN § 729.4 (criminal

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	penalty)
Gender	Public accommodations: IOWA CODE § 216.7
Gender	Housing: IOWA CODE §§ 216.8, 216.8A
Gender	Education: IOWA CODE § 216.9
Gender identity	<p>Employment: IOWA CODE § 216.6</p> <p>Exception: “Any bona fide religious institution or its educational facility, association, corporation, or society with respect to any qualifications for employment based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose. A religious qualification for instructional personnel or an administrative officer, serving in a supervisory capacity of a bona fide religious educational facility or religious institution, shall be presumed to be a bona fide occupational qualification.” IOWA CODE § 216.6(6)(d).</p>
Gender identity	<p>Public accommodations: IOWA CODE § 216.7</p> <p>Exception: “Any bona fide religious institution with respect to any qualifications the institution may</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	impose based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose.” IOWA CODE § 216.7(2)(a)
Gender identity	<p>Housing: IOWA CODE §§ 216.8, 216.8A</p> <p>Exception: “Any bona fide religious institution with respect to any qualifications it may impose based on religion, sexual orientation, or gender identity, when the qualifications are related to a bona fide religious purpose unless the religious institution owns or operates property for a commercial purpose or membership in the religion is restricted on account of race, color, or national origin.”IOWA CODE § 216.12 (1)(a)</p>
Gender identity	<p>Education: IOWA CODE § 216.9</p> <p>Exception: “Nothing in this section shall be construed as prohibiting any bona fide religious institution from imposing qualifications based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose or any institution from admitting</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	students of only one sex.” IOWA CODE § 216.9(d)(2)
KANSAS	
Gender	<p>Employment: KAN. STAT. ANN. § 44-1009</p> <p>Exception: “Employer’ includes any person in this state employing four or more persons and any person acting directly or indirectly for an employer, labor organizations, nonsectarian corporations, organizations engaged in social service work and the state of Kansas and all political and municipal subdivisions thereof, but shall not include a nonprofit fraternal or social association or corporation.” KAN. STAT. ANN. § 44-1002</p>
Gender	Housing/Sale of Property: KAN. STAT. ANN. §§ 44-1016, 44-1017
Gender	<p>Public accommodations: KAN. STAT. ANN. §§ 44-1001, 44-1009(c)</p> <p>Exceptions: “Public accommodations do not include a religious or nonprofit fraternal or social association or corporation.”</p> <p>“This term [“unlawful discriminatory practice”] shall not apply to a religious or private</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	fraternal and benevolent association or corporation.” KAN. STAT. ANN. § 44-1002.
KENTUCKY	
Gender	Government contractors: KY. REV. STAT. ANN. § 45.570
Gender	Education: KY. REV. STAT. ANN. § 344.555 Exception: “This section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of the organization.” <i>Id.</i>
Gender	Employment: KY. REV. STAT. ANN. § 344.040
Gender	Housing: KY. REV. STAT. ANN. § 344.360 Exception: The provision does not apply to “The YMCA, YWCA, and similar type single sex dormitory rental properties, including, but not limited to, those dormitories operated by institutions of higher education; (2) A landlord who refused to rent to an unmarried couple of opposite sex[.]” KY. REV.

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	STAT. ANN. § 344.362.
LOUISIANA	
Gender	Public accommodations: LA. REV. STAT. ANN. § 49:146; LA. REV. STAT. ANN. § 51:2247
Gender	<p>Employment: LA. REV. STAT. ANN. § 23:332</p> <p>Exception: “(2) A school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of the school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.” LA. REV. STAT. ANN. § 23:332 (H)(2).</p> <p>(b) “Employment of an individual by a private educational or religious institution or any nonprofit corporation, or the</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	employment by a school, college, university, or other educational institution or institution of learning of persons having a particular religion if the school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of the school, college, university, other educational institution, or institution of learning is directed toward the propagation of a particular religion.” LA. REV. STAT. ANN. § 23:302
Gender	Housing: LA. REV. STAT. ANN. §§ 51:2602; 51:2606; 51:2607
MAINE	
Sexual orientation	Employment: ME. REV. STAT. ANN. tit v, §§ 4571, 4572 Exception: “Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of that organization.” ME. REV.

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	STAT. ANN. tit v, § 4573-A
Sexual orientation	Housing: ME. REV. STAT. ANN. tit v, §§ 4581, 4581-A Exception: “[A] religious corporation, association or organization that does not receive public funds is exempt from this provision” ME. REV. STAT. ANN. tit v, § 4553
Sexual orientation	Public Accommodations: ME. REV. STAT. ANN. tit v, §§ 4591, 4592
Sexual orientation	Education: ME. REV. STAT. ANN. tit v, §§ 4601, 4602 Exception: “The provisions in this subsection relating to sexual orientation do not apply to any education facility owned, controlled or operated by a bona fide religious corporation, association or society.” ME. REV. STAT. ANN. tit v, § 4602(4).
Gender	Public contractors: ME. REV. STAT. Ann. tit. v § 784
Gender	Employment: ME. REV. STAT. ANN. tit v, §§ 4571, 4572
Gender	Housing: ME. REV. STAT. ANN tit. v, §§ 4581, 4581-A
Gender	Public Accommodations: ME.

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	REV. STAT. ANN tit. v, §§ 4591, 4592
Gender	Education: ME. REV. STAT. ANN. tit. v, §§ 4601, 4602
Marital status	Education: ME. REV. STAT. ANN. tit. v, § 4602
MARYLAND	
Sexual orientation	<p>Employment: MD. CODE ANN. §§ 20-602, -604, -606</p> <p>Exception: this title does not apply to “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion or sexual orientation to perform work connected with the activities of the religious entity.” MD. CODE ANN. § 20-604.</p> <p>Exception: “[T]his subtitle does not prohibit . . . a school, college, university, or other educational institution from hiring and employing employees of a particular religion, if: (i) the institution is wholly or substantially owned, supported, controlled, or managed by a particular religion or by a</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	particular religious corporation, association, or society; or (ii) the curriculum of the institution is directed toward the propagation of a particular religion[.]” MD. CODE ANN. § 20-605.
Sexual orientation	Housing: MD. CODE ANN. §§ 20-702, -705
Sexual orientation	Public Accommodations: MD. CODE ANN. § 20-304
Sexual orientation	Government contractors: MD. CODE ANN., STATE FIN. & PROC. § 19-114
Sexual orientation	Commerce: MD. CODE ANN., Art. § 20-402 (licensed businesses)
Sexual orientation	Licensed social workers: MD. CODE ANN., HEALTH OCC. § 19-311
Gender	Employment: MD. CODE ANN. §§ 20-602, -604, -606 Exception: this title does not apply to “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion or sexual orientation to perform work connected with the activities of the religious entity.” MD. CODE

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>ANN. § 20-604.</p> <p>Exception: “[T]his subtitle does not prohibit . . . a school, college, university, or other educational institution from hiring and employing employees of a particular religion, if: (i) the institution is wholly or substantially owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society; or (ii) the curriculum of the institution is directed toward the propagation of a particular religion[.]” MD. CODE ANN. § 20-605.</p>
Gender	Housing: MD. CODE ANN. §§ 20-702, -705
Gender	Public Accommodations: MD. CODE ANN. § 20-304
Gender	Government contractors: MD. CODE ANN., STATE FIN. & PROC. § 19-114
Gender	Commerce: MD. CODE ANN., Art. § 20-402 (licensed businesses)
Gender	Licensed social workers: MD. CODE ANN., HEALTH OCC. § 19-311
Marital status	Employment: MD. CODE ANN.

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>§§ 20-602, -604, -606</p> <p>Exception: this title does not apply to “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion or sexual orientation to perform work connected with the activities of the religious entity.” MD. CODE ANN. § 20-604.</p> <p>Exception: “[T]his subtitle does not prohibit . . . a school, college, university, or other educational institution from hiring and employing employees of a particular religion, if: (i) the institution is wholly or substantially owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society; or (ii) the curriculum of the institution is directed toward the propagation of a particular religion[.]” MD. CODE ANN. § 20-605.</p>
Marital status	Housing: MD. CODE ANN. §§ 20-702, -705
Marital	Public Accommodations: MD.

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
status	CODE ANN.§ 20-304
Marital status	Government contractors: MD. CODE ANN., STATE FIN. & PROC. § 19-114
Marital status	Commerce: MD. CODE ANN., Art. § 20-402 (licensed businesses)
MASSACHUSETTS	
Sexual orientation	Public Accommodations: MASS. ANN. LAWS ch. 272, § 92A; MASS. ANN. LAWS ch. 272, § 98 (criminal penalties)
Sexual orientation	MASS. ANN. LAWS ch. 151B, § 4 Exception: “Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule,

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.” <i>Id.</i>
Sexual orientation	<p>Employment: MASS. ANN. LAWS ch. 151B, § 4</p> <p>Exception: “Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.” <i>Id.</i></p>
Gender	Housing: MASS. ANN. LAWS ch.

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>151B, § 4</p> <p>Exception: “Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.” <i>Id.</i></p>
	<p>Employment: MASS. ANN. LAWS ch. 151B, § 4</p> <p>Exception: “Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.” <i>Id.</i>
Gender	Public Accommodations: MASS. ANN. LAWS ch. 272, § 92A; MASS. ANN. LAWS ch. 272, § 98 (criminal penalties)
Marital status	Housing: MASS. ANN. LAWS ch. 151B, § 4 Exception: “Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.” <i>Id.</i>
MICHIGAN	
Gender	Employment: MICH. COMP. LAWS ANN. 37.2202
Gender	Government Contractors: MICH. COMP. LAWS ANN. 37.2209
Gender	Housing: MICH. COMP. LAWS ANN. 37.2502
Gender	Education: MICH. COMP. LAWS ANN. 37.2402; MICH. COMP. LAWS ANN. 390.933 (colleges receiving state loans)
Marital status	Employment: MICH. COMP. LAWS ANN. 37.2202
Marital	Government Contractors: MICH.

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
status	COMP. LAWS ANN. 37.2209
Marital status	Housing: MICH. COMP. LAWS ANN. 37.2502
Marital status	Education: MICH. COMP. LAWS ANN. 37.2402
MINNESOTA	
Sexual orientation	<p>Employment: MINN. STAT. § 363A.02(1)(a)(1); MINN. STAT. § 363A.08</p> <p>Exceptions: “The provisions of section 363A.08 shall not apply to a religious or fraternal corporation, association, or society, with respect to qualifications based on religion or sexual orientation, when religion or sexual orientation shall be a bona fide occupational qualification for employment.”</p> <p>MINN. STAT. § 363A.20(2)</p> <p>“Nothing in this chapter prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for educational purposes that is operated, supervised, or controlled by a religious association, religious corporation,</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>or religious society that is not organized for private profit, from:</p> <p>(1) limiting admission to or giving preference to persons of the same religion or denomination; or</p> <p>(2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. This clause shall not apply to secular business activities engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized.” MINN. STAT. § 363A.26.</p>
Sexual orientation	<p>Housing: MINN. STAT. § 363A.02(1)(a)(2); MINN. STAT. § 363A.09</p> <p>Exception: “Nothing in this chapter prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for educational purposes that is operated, supervised, or</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>controlled by a religious association, religious corporation, or religious society that is not organized for private profit, from:</p> <p>(1) limiting admission to or giving preference to persons of the same religion or denomination; or</p> <p>(2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. This clause shall not apply to secular business activities engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized.” MINN. STAT. § 363A.26.</p>
Sexual orientation	<p>Public Accommodations: MINN. STAT. § 363A.02(1)(a)(3); MINN. STAT. § 363A.11</p> <p>Exception: “Nothing in this chapter prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for educational purposes that is</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>operated, supervised, or controlled by a religious association, religious corporation, or religious society that is not organized for private profit, from:</p> <p>(1) limiting admission to or giving preference to persons of the same religion or denomination; or</p> <p>(2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. This clause shall not apply to secular business activities engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized.” MINN. STAT. § 363A.26.</p>
Sexual orientation	<p>Education: MINN. STAT. § 363A.02(1)(a)(5); MINN. STAT. § 363A.13.</p> <p>Exception: “Nothing in this chapter prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>educational purposes that is operated, supervised, or controlled by a religious association, religious corporation, or religious society that is not organized for private profit, from:</p> <p>(1) limiting admission to or giving preference to persons of the same religion or denomination; or</p> <p>(2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. This clause shall not apply to secular business activities engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized.” MINN. STAT. § 363A.26.</p>
Sexual orientation	<p>Business relations: MINN. STAT. § 363A.17</p> <p>Exception: “Nothing in this chapter prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>educational purposes that is operated, supervised, or controlled by a religious association, religious corporation, or religious society that is not organized for private profit, from:</p> <p>(1) limiting admission to or giving preference to persons of the same religion or denomination; or</p> <p>(2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. This clause shall not apply to secular business activities engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized.” MINN. STAT. § 363A.26.</p>
Gender	<p>Employment: MINN. STAT. § 363A.02(1)(a)(1); MINN. STAT. § 363A.08</p>
Gender	<p>Housing: MINN. STAT. § 363A.02(1)(a)(2); MINN. STAT. § 363A.09</p> <p>Exception: “The provisions of section 363A.09 shall not apply to...</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	rooms in a temporary or permanent residence home run by a nonprofit organization, if the discrimination is by sex.” MINN. STAT. ANN. § 363A.21
Gender	Public Accommodations: MINN. STAT. § 363A.02(1)(a)(3); MINN. STAT. § 363A.11
Gender	Education: MINN. STAT. § 363A.02(1)(a)(5); MINN. STAT. § 363A.13.
Gender	Business relations: MINN. STAT. § 363A.17
Marital status	Employment: MINN. STAT. § 363A.02(1)(a)(1); MINN. STAT. § 363A.08
Marital status	Housing: MINN. STAT. §§ 363A.02(1)(a)(2); 363A.09
Marital status	Public Accommodations: MINN. STAT. § 363A.11
Marital status	Education: MINN. STAT. § 363A.02(1)(a)(5); MINN. STAT. § 363A.13
Marital status	Business relations: MINN. STAT. § 363A.17
MISSISSIPPI	
Gender	Social services: MISS. CODE ANN. § 41-99-5 (hospitals receiving

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	public grants)
Gender	Business: MISS. CODE ANN. § 57-10-519; MISS. CODE ANN. § 57-71-19; MISS. CODE ANN. § 57-77-27
MISSOURI	
Gender	Housing: MO. REV. STAT. § 213.040
Gender	Employment: MO. REV. STAT. § 213.055 Exception: “[E]mployer . . .” does not include does not include corporations and associations owned and operated by religious or sectarian groups.” MO. REV. STAT. § 213.010(7)
Gender	Education: MO. REV. STAT. 173.1102
Gender	Public Accommodations: MO. REV. STAT. § 213.065. Exception: “The provisions of this section shall not apply to a private club, a place of accommodation owned by or operated on behalf of a religious corporation, association or society, or other establishment which is not in fact open to the public, unless the facilities of such establishments are made available to the customers or

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	patrons of a place of public accommodation as defined in section 213.010 and this section.” MO. REV. STAT. § 213.065(3).
MONTANA	
Gender	Employment: MONT. CODE ANN. § 49-2-303, MONT. CODE ANN. § 49-1-102
Gender	Public accommodation: MONT. CODE ANN. § 49-2-304; MONT. CODE ANN. § 49-1-102 Exception (social services): “Consideration of religious factors by a licensed child-placing agency that is affiliated with a particular religious faith is not arbitrary consideration of religion within the meaning of this section.” <i>Id.</i>
Gender	Housing: MONT. CODE ANN. § 49-2-305
Gender	Education: MONT. CODE ANN. § 49-2-307
Marital status	Education: MONT. CODE ANN. § 49-2-307
Marital status	Employment: MONT. CODE ANN. § 49-2-303
Marital status	Public accommodation: MONT. CODE ANN. § 49-2-304

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
Marital status	Housing: MONT. CODE ANN. § 49-2-305
NEBRASKA	
Gender	Public accommodations: NEB. REV. ST. § 20-132, § 20-134; NEB. REV. ST. § 20- 124 (criminal penalty)
Gender	Housing: NEB. REV. ST. § 20-318
Gender	Employment: NEB. REV. STAT. § 48-1104
Gender	Government contractors: NEB. REV. ST. § 48-1122
Marital status	Employment: NEB. REV. STAT. ANN. § 48-1104
NEVADA	
Sexual orientation	Employment: NEV. REV. STAT. ANN. § 613.330
Gender & gender identity	Employment: NEV. REV. STAT. ANN. § 613.330
NEW HAMPSHIRE	
Sexual orientation	Employment: N.H. Rev. Stat. Ann. § 354-A:6-7 Exceptions: “Employer’ does not include ... a fraternal or religious association or corporation, if such club, association, or corporation is not organized for private

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>profit" N.H. Rev. Stat. Ann. § 354-A:2.</p> <p>"Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." N.H. Rev. Stat. Ann. § 354-A: 18</p>
Sexual orientation	<p>Housing: N.H. Rev. Stat. Ann. § 354-A:8-10</p> <p>Exception: "Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.” N.H. Rev. Stat. Ann. § 354-A: 18
Sexual orientation	Public Accommodation: N.H. Rev. Stat. Ann. § 354-A:16-17 Exception: “Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.” N.H. Rev. Stat. Ann. § 354-A: 18
Gender	Employment: N.H. Rev. Stat.

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>Ann. § 354-A:6-7</p> <p>Exceptions: “Employer’ does not include ... a fraternal or religious association or corporation, if such club, association, or corporation is not organized for private profit” N.H. Rev. Stat. Ann. § 354-A:2.</p> <p>“Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.” N.H. Rev. Stat. Ann. § 354-A: 18</p>
Gender	<p>Housing: N.H. Rev. Stat. Ann. § 354-A:8-10</p> <p>Exception: “Nothing contained in this chapter shall be construed to bar any religious or</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.” N.H. Rev. Stat. Ann. § 354-A: 18</p>
Gender	<p>Public Accommodation: N.H. Rev. Stat. Ann. § 354-A:16-17</p> <p>Exception: “Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.” N.H. Rev. Stat. Ann. § 354-A: 18
Marital status	<p>Employment: N.H. Rev. Stat. Ann. § 354-A:6-7</p> <p>Exceptions: “Employer’ does not include ... a fraternal or religious association or corporation, if such club, association, or corporation is not organized for private profit” N.H. Rev. Stat. Ann. § 354-A:2.</p> <p>“Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.” N.H.</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	Rev. Stat. Ann. § 354-A: 18
Marital status	<p>Housing: N.H. Rev. Stat. Ann. § 354-A:8-10</p> <p>Exception: “Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.” N.H. Rev. Stat. Ann. § 354-A: 18</p>
Marital status	<p>Public Accommodation: N.H. Rev. Stat. Ann. § 354-A:16-17</p> <p>Exception: “Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.” N.H. Rev. Stat. Ann. § 354-A: 18</p>
NEW JERSEY	
Sexual orientation	<p>Employment: N.J. REV. STAT. § 10:5-12</p> <p>Exception: “[I]t shall not be an unlawful employment practice . . . for a religious association or organization to utilize religious affiliation as a uniform qualification in the employment of clergy, religious teachers or other employees engaged in the religious activities of the association or organization, or in following the tenets of its religion in establishing and utilizing criteria for employment of an employee;” <i>Id.</i></p>
Sexual orientation	<p>Public Accommodations: N.J. REV. STAT. § 10:5-12</p> <p>Exception: “... nor shall anything</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution" N.J. REV. STAT. § 10:5-5(l).
Sexual orientation	Housing: N.J. REV. STAT. § 10:5-12 Exception: "Nothing herein contained shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, in the sale, lease or rental of real property, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." N.J. REV. STAT. § 10-5-5(n).
Sexual orientation	Government contracts: N.J. STAT. ANN. 10:2-1
Gender	Social services: N.J. STAT. ANN. 9:3-40 (adoption agencies)

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
Gender	Government contractors: N.J. STAT. ANN. 10:2-1
Gender	<p>Employment: N.J. REV. STAT. § 10:5-12</p> <p>Exception: “[I]t shall not be an unlawful employment practice . . . for a religious association or organization to utilize religious affiliation as a uniform qualification in the employment of clergy, religious teachers or other employees engaged in the religious activities of the association or organization, or in following the tenets of its religion in establishing and utilizing criteria for employment of an employee” <i>Id.</i></p>
Gender	<p>Public Accommodations: N.J. REV. STAT. § 10:5-12; N.J. STAT. ANN. 10:1-2, 1-3</p> <p>Exception: “... nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution ...” N.J. REV. STAT. § 10:5-5(l).</p>
Gender	<p>Housing: N.J. REV. STAT. § 10:5-12</p> <p>Exception: “Nothing herein contained shall be construed to</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, in the sale, lease or rental of real property, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.” N.J. REV. STAT. § 10-5-5(n).
Marital status	Social services: N.J. STAT. ANN. 9:3-40 (adoption agencies)
Marital status	Public accommodations: N.J. STAT. ANN. 10:1-2, 1-3
Marital status	Government contractors: N.J. STAT. ANN. 10:2-1
Marital status	Employment: N.J. REV. STAT. § 10:5-12 Exception: “[I]t shall not be an unlawful employment practice . . . for a religious association or organization to utilize religious affiliation as a uniform

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	qualification in the employment of clergy, religious teachers or other employees engaged in the religious activities of the association or organization, or in following the tenets of its religion in establishing and utilizing criteria for employment of an employee;" <i>Id.</i>
Marital status	Public Accommodations: N.J. REV. STAT. § 10:5-12 Exception: "... nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution" N.J. REV. STAT. § 10:5-5(l).
Marital status	Housing: N.J. REV. STAT. § 10:5-12 Exception: "Nothing herein contained shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, in the sale, lease or rental of real property, from limiting admission to or giving preference to persons of the same religion or denomination or from

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.” N.J. REV. STAT. § 10-5-5(n).
NEW MEXICO*	
Sexual orientation	Employment: N.M. STAT. ANN. § 28-1-7
Sexual orientation	Housing: N.M. STAT. ANN. § 28-1-7
Sexual orientation	Public Accommodation: N.M. STAT. ANN. § 28-1-7
Gender & gender identity	Employment: N.M. STAT. ANN. § 28-1-7
Gender & gender identity	Housing: N.M. STAT. ANN. § 28-1-7
Gender & gender identity	Public Accommodation: N.M. STAT. ANN. § 28-1-7
Marital status	Employment: N.M. STAT. ANN. § 28-1-7
Marital status	Housing: N.M. STAT. ANN. § 28-1-7
Marital	Public Accommodation: N.M.

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
status	STAT. ANN. § 28-1-7
	<p>* Exception applicable to each of the foregoing provisions:</p> <p>These provisions do not “bar any religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization from limiting admission to or giving preference to persons of the same religion or denomination or from making selections of buyers, lessees or tenants as are calculated by the organization or denomination to promote the religious or denominational principles for which it is established or maintained, unless membership in the religious or denominational organization is restricted on account of race, color, national origin or ancestry; [or] bar any religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization from imposing discriminatory</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>employment or renting practices that are based upon sexual orientation or gender identity; provided, that the provisions of the Human Rights Act [28-1-1 NMSA 1978] with respect to sexual orientation and gender identity shall apply to any other:</p> <p>(1) for-profit activities of a religious or denominational institution or religious organization subject to the provisions of Section 511(a) of the Internal Revenue Code of 1986, as amended; or</p> <p>(2) nonprofit activities of a religious or denominational institution or religious organization subject to the provisions of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended.” N.M. STAT. ANN. § 28-1-9(B)-(C).</p>
NEW YORK	
Sexual Orientation	Employment: NY Exec. Law § 296*
Sexual Orientation	Housing: NY Exec. Law § 296*
Sexual Orientation	Public Accommodation: NY Exec. Law § 296*

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
Sexual Orientation	Education: NY EDUC. LAW § 313**
Gender	Employment: NY Exec. Law § 296*
Gender	Housing: NY Exec. Law § 296*
Gender	Public Accommodation: NY Exec. Law § 296*
Gender	Government contractors: NY EXEC. LAW § 312
Gender	Education: NY EDUC. LAW § 313**
Marital Status	Employment: NY Exec. Law § 296*
Marital Status	Housing: NY Exec. Law § 296*
Marital Status	Public Accommodation: NY Exec. Law § 296*
Marital Status	Government contractors: NY EXEC. LAW § 312
Marital Status	Education: NY EDUC. LAW § 313**
	*Exception: “Nothing contained in [NY Exec. Law § 296] shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.” NY Exec. Law § 296.</p>
	<p>**Exception: Exception: “except that nothing in [NY EDUC. LAW § 313] shall be deemed to affect, in any way, the right of a religious or denominational educational institution to select its students exclusively or primarily from members of such religion or denomination or from giving preference in such selection to such members or to make such selection of its students as is calculated by such institution to promote the religious principles for which it is established or maintained.” NY EDUC. LAW § 313</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
NORTH CAROLINA	
Gender	Housing: N.C. GEN. STAT. § 41A-4
Gender	Government contractors: N.C. GEN. STAT. ANN. § 143-135.5
NORTH DAKOTA	
Gender	Employment: N.D. CENT. CODE §§ 14-02.4-03 to 14-02.4-09
Gender	Public accommodations: N.D. CENT. CODE §§ 14-02.4-14 to 14-02.4-16
Gender	Housing: N.D. CENT. CODE §§ 14-02.5-02 to 14-02.5-08
Gender	Licensing: N.D. CENT. CODE §§ 23-17.3-05
Marital Status	Employment: N.D. CENT. CODE §§ 14-02.4-03 to 14-02.4-09
Marital Status	Public accommodations: N.D. CENT. CODE §§ 14-02.4-14 to 14-02.4-16
Marital Status	Housing: N.D. CENT. CODE §§ 14-02.5-02 to 14-02.5-08
OHIO	
Gender	Housing: OHIO REV. CODE ANN. § 4112.02(H)
Gender	Public accommodation: OHIO

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	REV. CODE ANN. § 4112.02(G)
Gender	Employment: OHIO REV. CODE ANN. § 4112.02(A); OHIO REV. CODE ANN. § 3301.53(A)(3) (employment of preschool teachers)
Gender	Social services/Government Contractors: OHIO REV. CODE ANN. § 340.12 (contractor providing mental health or addiction services for the state); OHIO REV. CODE ANN. § 1751.18(A)(2) (health insurance or provider contracting with insurer); OHIO REV. CODE ANN. § 3701.046(A) (grant recipients for women's health care)
Marital Status	Social services: OHIO REV. CODE ANN. § 3701.046(A) (grant recipients for women's health care)
OKLAHOMA	
Gender	Employment: OKLA. STAT. tit. xxv, §§ 1302 to 1306
Gender	Housing: OKLA. STAT. tit xxv, §§ 1452, 1506.9
Gender	Social services: OKLA. STAT. tit iiiA § 301(E)(2) and (F) (amateur sports leagues); OKLA. STAT. ANN. tit. xlvii, § 1104.6(C)(2) (crisis pregnancy centers receiving state

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	funds)
Gender	Public accommodations: OKLA. STAT. ANN. tit. xxv, § 1402 (includes all recipients of government funds)
Marital status	Social services: OKLA. STAT. ANN. tit. xlvii, § 1104.6 (crisis pregnancy centers receiving state funds)
OREGON	
Sexual Orientation	Social services: OR. REV. STAT. § 418.648(10) (foster parents); OR. REV. STAT. § 443.739(19) (adult foster home residents); OR. REV. STAT. § 458.505(4)(h) (organizations receiving certain anti-poverty funds)
Sexual Orientation	Education: OR. REV. STAT. § 659.850(1)
Sexual Orientation	Public accommodations: OR. REV. STAT. § 659A.006; OR. REV. STAT. § 659A.403(1)
Sexual Orientation	Housing: OR. REV. STAT. § 659A.006; OR. REV. STAT. § 659A.421 Exception: “(3) It is not an unlawful practice for a bona fide church or other religious institution to take any action with respect to housing

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>or the use of facilities based on a bona fide religious belief about sexual orientation as long as the housing or the use of facilities is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the church or institution.”</p> <p>OR. REV. STAT. § 659A.006.</p>
Sexual Orientation	<p>Employment: OR. REV. STAT. § 659A.006; OR. REV. STAT. § 659A.030</p> <p>Exception: “(5) It is not an unlawful employment practice for a bona fide church or other religious institution to take any employment action based on a bona fide religious belief about sexual orientation: (a) In employment positions directly related to the operation of a church or other place of worship, such as clergy, religious instructors and support staff; (b) In employment positions in a nonprofit religious school, nonprofit religious camp, nonprofit religious day care center, nonprofit religious thrift</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	store, nonprofit religious bookstore, nonprofit religious radio station or nonprofit religious shelter; or (c) In other employment positions that involve religious activities, as long as the employment involved is closely connected with or related to the primary purposes of the church or institution and is not connected with a commercial or business activity that has no necessary relationship to the church or institution.” OR. REV. STAT. § 659A.006.
Gender	Education: OR. REV. STAT. § 659.850(1)
Gender	Housing: OR. REV. STAT. § 659A.006; OR. REV. STAT. § 659A.421
Gender	Employment: OR. REV. STAT. § 659A.006; OR. REV. STAT. § 659A.030
Gender	Public Accommodations: OR. REV. STAT. § 659A.403; OR. REV. STAT. § 659A.006
Marital Status	Social services: OR. REV. STAT. § 418.648 (foster parents); OR. REV. STAT. § 443.739 (adult foster home residents); OR. REV. STAT. §

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	458.505(4)(h) (organizations receiving certain anti-poverty funds)
Marital Status	Education: OR. REV. STAT. § 659.850(1)
Marital Status	Housing: OR. REV. STAT. § 659A.006; OR. REV. STAT. § 659A.421
Marital Status	Employment: OR. REV. STAT. § 659A.006; OR. REV. STAT. § 659A.030
Marital Status	Public Accommodations: OR. REV. STAT. § 659A.403; OR. REV. STAT. § 659A.006
PENNSYLVANIA	
Gender	<p>Employment: 43 PA. CONST. STAT. § 955</p> <p>Exception: “The term ‘employer’ ... does not include religious, fraternal, charitable or sectarian corporations or associations, except such corporations or associations supported, in whole or in part, by governmental appropriations. The term ‘employer’ with respect to discriminatory practices based on race, color, age, sex, national origin or non- job related handicap or disability, includes religious,</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	fraternal, charitable and sectarian corporations and associations employing four or more persons within the Commonwealth.” 43 PA. CONST. STAT. § 954(b).
Gender	<p>Housing: 43 PA. CONST. STAT. § 955</p> <p>Exception: “Nothing in this clause shall bar any religious or denominational institution or organization or any charitable or educational organization which is operated, supervised or controlled by or in connection with a religious organization or any bona fide private or fraternal organization from giving preference to persons of the same religion or denomination or to members of such private or fraternal organization or from making such selection as is calculated by such organization to promote the religious principles or the aims, purposes or fraternal principles for which it is established or maintained.” 43 PA. CONST. STAT. § 953(h)(10)</p>
Gender	Public Accommodation: 43 PA. CONST. STAT. § 955(h)

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
Gender	Education: 24 PA. CONST. STAT. §§ 5002, 5004
Gender	Social services: 35 PA. CONST. STAT. § 448.804(a) (licensed health care facility)
Gender	Insurance: 40 PA. CONST. STAT. § 1171.5(a)(7)(iii)
Marital status	Insurance: 40 PA. CONST. STAT. § 1171.5(a)(7)(iii)
RHODE ISLAND	
Sexual orientation	Public Accommodations: R.I. GEN. LAWS § 11-24-2
Sexual orientation	Employment: R.I. GEN. LAWS § 28-5-7; R.I. GEN. LAWS § 28-5-2 Exception: “Nothing in this subdivision shall be construed to apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of its religion to perform work connected with the carrying on of its activities.” R.I. GEN. LAWS § 28-5-6(7)(ii)
Sexual orientation	Commerce: R.I. GEN. LAWS § 28-5.1-14 (state-licensed corporations)
Gender & gender identity	Public Accommodations: R.I. GEN. LAWS § 11-24-2

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
Gender & gender identity	Employment: R.I. GEN. LAWS § 28-5-7; R.I. GEN. LAWS § 28-5-2 Exception: “Nothing in this subdivision shall be construed to apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of its religion to perform work connected with the carrying on of its activities.” R.I. GEN. LAWS § 28-5-6(7)(ii)
Gender	Housing: R.I. GEN. LAWS §§ 34-37-1—34-37-4
Gender & gender identity	Commerce: R.I. GEN. LAWS § 28-5.1-14 (state-licensed corporations)
Marital status	Housing: R.I. GEN. LAWS §§ 34-37-1 to 34-37-4
Marital status	Commerce: R.I. GEN. LAWS § 28-5.1-14 (state-licensed corporations)
SOUTH CAROLINA	
Gender	Employment: S.C. CODE ANN. § 1-13-80
Gender	Housing: S.C. CODE ANN. § 31-21-40
SOUTH DAKOTA	
Gender	Employment: S.D. CODIFIED

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>LAWS § 20-13-10</p> <p>Exception: “Sections 20-13-10 to 20-13-13, inclusive, shall not apply to any bona fide religious institution with respect to any qualifications for employment based on religion when such qualifications are related to a bona fide religious purpose.” S.D. CODIFIED LAWS § 20-13-18.</p>
Gender	Housing: S.D. CODIFIED LAWS § 20-13-20
Gender	<p>Education: S.D. CODIFIED LAWS § 20-13-22</p> <p>Exception: “This section does not apply to any bona fide religious institution which has a qualification based on religion if such qualification is related to a bona fide religious purpose.” <i>Id.</i></p>
Gender	Public accommodations: S.D. CODIFIED LAWS § 20-13-23
Gender	<p>Insurance: S.D. CODIFIED LAWS § 58-33-13.1</p> <p>Exception: “This section shall not affect the right of fraternal benefit societies to determine eligibility requirements for membership.” <i>Id.</i></p>
Marital	Insurance: S.D. CODIFIED LAWS §

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
Status	58-33-13.1 Exception: “This section shall not affect the right of fraternal benefit societies to determine eligibility requirements for membership.” <i>Id.</i>
TENNESSEE	
Gender	Employment: TENN. CODE ANN. § 4-21-401
Gender	Public Accommodation: TENN. CODE ANN. § 4-21-501
Gender	Housing: TENN. CODE ANN. § 4-21-601
Gender	Government contractors: TENN. CODE ANN. § 4-3-1412
Gender	Social services: TENN. CODE ANN. § 12-4-122(f) (religious organizations providing social services funded by the state)
TEXAS	
Gender	Housing: TEX. PROP. CODE ANN. § 301.021
Gender	Employment: TEX. LAB. CODE ANN. § 21.051
UTAH	
Gender	Public Accommodation: UTAH CODE ANN. §§ 13-7-1, 13-7-3 Exceptions: “but the term [public

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>accommodation] shall not apply to any institution, church, any apartment house, club, or place of accommodation which is in its nature distinctly private except to the extent that it is open to the public.” UTAH CODE ANN. § 13-7-2.</p> <p>Provision does not “deny any religious organization the right to regulate the operation and procedures of its establishments.” UTAH CODE ANN. § 13-7-3.</p>
Gender	<p>Employment: UTAH CODE ANN. § 34A-5-106</p> <p>Exception: “(ii) ‘Employer’ does not include: (A) a religious organization or association; (B) a religious corporation sole; or (C) any corporation or association constituting a wholly owned subsidiary or agency of any religious organization or association or religious corporation sole.” UTAH CODE ANN. § 34A-5-102(1)(h)(2)</p>
Gender	<p>Housing: UTAH CODE ANN. § 57-21-5</p> <p>Exceptions: “This chapter does not apply to a temporary or permanent residence facility</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>operated by a nonprofit or charitable organization, including any dormitory operated by a public or private educational institution, if the discrimination is by sex or familial status for reasons of personal modesty or privacy or in the furtherance of a religious institution's free exercise of religious rights under the First Amendment of the United States Constitution." UTAH CODE ANN. § 57-21-3(2)</p> <p>"This chapter does not prohibit any nonprofit educational institution from: (a) requiring its single students to live in housing approved, operated, or owned by the institution; (b) segregating housing that the institution approves, operates, or owns on the basis of sex or familial status or both for reasons of personal modesty or privacy, or in the furtherance of a religious institution's free exercise of religious rights under the First Amendment of the United States Constitution; or (c) otherwise assisting others in making sex-segregated housing available to students as may be permitted by</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>regulations implementing the federal Fair Housing Amendments Act of 1988 and Title IX of the Education Amendments of 1972.”</p> <p>UTAH CODE ANN. § 57-21-3(7)</p>
VERMONT	
Sexual orientation	<p>Employment: VT. STAT. ANN. tit. xxi, § 495; VT. STAT. ANN. tit. xxi, § 1621</p> <p>Exception: “The provisions of this section prohibiting discrimination on the basis of sexual orientation and gender identity shall not be construed to prohibit or prevent 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 giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment which is calculated by the organization to promote the religious principles for which it is established or maintained.” VT. STAT. ANN. tit. xxi, § 495 (e)</p>
Sexual	Housing: VT. STAT. ANN. tit. ix, §

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
orientation	4503
Sexual orientation	<p>Public Accommodation: VT. STAT. ANN. tit. ix, § 4502</p> <p>Exception: “(l) Notwithstanding any other provision of law, a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide 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 the solemnization of a marriage or celebration of a marriage. Any refusal to provide services, accommodations, advantages, facilities, goods, or privileges in accordance with this subsection shall not create any civil claim or cause of action. This subsection shall not be construed to limit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	with a religious organization from selectively providing services, accommodations, advantages, facilities, goods, or privileges to some individuals with respect to the solemnization or celebration of a marriage but not to others.” VT. STAT. ANN. tit. ix, § 4502(l)
Gender & gender identity	<p>Employment: VT. STAT. ANN. tit. xxi, § 495; VT. STAT. ANN. tit. xxi, § 1621</p> <p>Exception: “The provisions of this section prohibiting discrimination on the basis of sexual orientation and gender identity shall not be construed to prohibit or prevent 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 giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment which is calculated by the organization to promote the religious principles for which it is established or maintained.” VT. STAT. ANN. tit. xxi, § 495 (e).</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
Gender & gender identity	Housing: VT. STAT. ANN. tit. ix, § 4503
Gender & gender identity	<p>Public Accommodation: VT. STAT. ANN. tit. ix, § 4502</p> <p>Exception: “(l) Notwithstanding any other provision of law, a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide 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 the solemnization of a marriage or celebration of a marriage. Any refusal to provide services, accommodations, advantages, facilities, goods, or privileges in accordance with this subsection shall not create any civil claim or cause of action. This subsection shall not be construed to limit a religious organization, association, or society, or any nonprofit institution or</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	<p>organization operated, supervised, or controlled by or in conjunction with a religious organization from selectively providing services, accommodations, advantages, facilities, goods, or privileges to some individuals with respect to the solemnization or celebration of a marriage but not to others.”</p> <p>VT. STAT. ANN. tit. ix, § 4502(l)</p>
Marital status	Housing: VT. STAT. ANN. tit. ix, § 4503
Marital status	<p>Public Accommodation: VT. STAT. ANN. tit. ix, § 4502</p> <p>Exception: “(l) Notwithstanding any other provision of law, a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide 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 the solemnization of a marriage or celebration of a</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	marriage. Any refusal to provide services, accommodations, advantages, facilities, goods, or privileges in accordance with this subsection shall not create any civil claim or cause of action. This subsection shall not be construed to limit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization from selectively providing services, accommodations, advantages, facilities, goods, or privileges to some individuals with respect to the solemnization or celebration of a marriage but not to others.” VT. STAT. ANN. tit. ix, § 4502(1)
VIRGINIA	
Gender	Government Contracts: VA. CODE ANN. § 2.2-4201; VA. CODE ANN. § 2.2-4311
Gender	Employment: VA. CODE ANN. § 2.2-3903
Gender	Housing: VA. CODE ANN. § 36-96.3
WASHINGTON	
Sexual orientation	Housing: WASH. REV. CODE ANN. § 49.60. 222

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
Sexual orientation	<p>Employment: WASH. REV. CODE ANN. 49.60.180</p> <p>Exception: “Employer’ includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit” WASH. REV. CODE ANN. § 49.60.040(11)</p>
Sexual orientation	<p>Public Accommodation: WASH. REV. CODE ANN. 49.60.215</p> <p>Exception: “[P]ublic accommodation” does not “apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.” WASH. REV. CODE ANN. § 49.60.040(3)</p>
Gender	<p>Housing: WASH. REV. CODE ANN. § 49.60.222</p> <p>Exception: “Notwithstanding any other provision of this chapter, it shall not be an unfair practice or a denial of civil rights for any public or private educational institution to separate the sexes or give preference to or limit use of dormitories, residence halls, or</p>

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	other student housing to persons of one sex or to make distinctions on the basis of marital or families with children status.” WASH. REV. CODE ANN. § 49.60.222(3)
Gender	Employment: WASH. REV. CODE ANN. 49.60.180 Exception: “‘Employer’ includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.” WASH. REV. CODE ANN. § 49.60.040(11)
Gender	Public Accommodation: WASH. REV. CODE ANN. 49.60.215 Exception: “[P]ublic accommodation” does not “apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.” WASH. REV. CODE ANN. § 49.60.040(3).
Marital status	Housing: WASH. REV. CODE ANN. § 49.60. 222 Exception: “Notwithstanding any other provision of this chapter, it

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
	shall not be an unfair practice or a denial of civil rights for any public or private educational institution to separate the sexes or give preference to or limit use of dormitories, residence halls, or other student housing to persons of one sex or to make distinctions on the basis of marital or families with children status.” WASH. REV. CODE ANN. § 49.60.222(3)
Marital status	Employment: WASH. REV. CODE ANN. § 49.60.180 Exception: “Employer’ includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit” WASH. REV. CODE ANN. § 49.60.040(11)
WEST VIRGINIA	
Gender	Employment: W. VA. CODE § 5-11-9
Gender	Public Accommodations: W. VA. CODE § 5-11-9
Gender	Housing: W. VA. CODE § 5-11A-5
WISCONSIN	
Sexual	Employment: WIS. STAT. § 111.321; WIS. STAT. § 111.36

<u>Protected Category</u>	<u>Provisions and Exceptions</u>
Orientation	
Sexual Orientation	Government Contractors: WIS. STAT. § 16.765
Sexual Orientation	Housing: WIS. STAT. § 106.50
Sexual Orientation	Public Accommodation: WIS. STAT. § 106.52
Gender	Employment: WIS. STAT. § 111.321; WIS. STAT. § 111.36
Gender	Government Contractors: WIS. STAT. § 16.765
Gender	Government Contractors: WIS. STAT. § 16.765
Gender	Government Contractors: WIS. STAT. § 16.765
Marital Status	Employment: WIS. STAT. § 111.321
Marital Status	Housing: WIS. STAT. § 106.50
WYOMING	
Gender	Employment: WYO. STAT. ANN. § 27-9-105 Exception: The definition of an “employer” subject to non-discrimination requirements excludes “religious organizations or associations.” WYO. STAT. ANN. § 27-9-105
Gender	Public Accommodations: WYO. STAT. ANN. § 6-9-101

December 18, 2012

BY EMAIL

The Honorable Pat Quinn, Governor of Illinois
207 State Capitol Bldg.
Springfield, IL 62706

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

Dear Governor Quinn:

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.¹

¹ An Appendix is attached summarizing the core religious liberty protections afforded by jurisdictions that currently recognize or recently considered enacting same-sex marriage.

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.²

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 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

² 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.

Constitution protects religious freedom in the strongest of terms.³

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.⁴ 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.⁵ The juncture for

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

⁴ 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).

⁵ 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).

balancing religious liberty and legal recognition of same-sex unions is now.⁶

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.⁷ The “marriage conscience protection” would provide as follows:

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 re-

⁶ Though conscience protections should also extend to existing civil unions, we do not address civil unions here.

⁷ 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.”)

lated 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.⁸

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.”⁹ The language also significantly mirrors, in

⁸ 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.”

⁹ 775 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

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.”¹⁰

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 the customers or patrons of another establishment that is a place of public accommodation” from the definition of a public accom[m]odation).

¹⁰ See COMM. 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/legislation.aspx?LegNo=B18-0482> (exempting religious societies and religiously affiliated non-profits from providing “accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a same-sex marriage, or the promotion of same-sex marriage through religious programs, counseling, courses, or retreats...”); 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. §

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

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”).

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

Finally, this proposed legislation recognizes that religious accommodations might not be without cost for same-sex couples, such as the need to find a different wedding photographer or caterer if their original choice must decline for reasons of conscience. In order to address this issue, subsection (b)(2) ensures that a same-sex couple can obtain the service, even from conscientious objectors, when the inability to find a similar service elsewhere would impose a 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.¹¹

¹¹ 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

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.¹² Similarly, Illinois' existing nondiscrimination laws on employment provide a categorical exemption for religious organizations.¹³ And federal nondiscrimination statutes provide protection for religious and conscientious objectors in many different contexts.¹⁴

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)).

¹² See note 10 above and pages 14-15 below.

¹³ 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.”).

¹⁴ See, e.g., 32 C.F.R. § 1630.11 (accommodating conscientious objectors to military service); 42 U.S.C. § 300a-7 (accommodat-

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,¹⁵ legal scholars on both sides of the same-sex marriage

ing 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).

¹⁵ 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).

debate agreed that codifying same-sex marriage ***without*** providing robust religious accommodations will create widespread and unnecessary legal conflicts—conflicts that will work a “sea change in American law” and will “reverberate across the legal and religious landscape.”¹⁶ The conflicts between religious conscience and same-sex marriage generally take one of two forms. First, if same-sex marriage is legalized without appropriate statutory accommodations, religious organizations and individuals that object to same-sex marriage will face new lawsuits under the state nondiscrimination act and other similar laws. So will many small businesses, which are owned by individual conscientious objectors. Likely lawsuits include claims where:

- Individuals of conscience, who run a small business, such as wedding photographers, florists, banquet halls, or making wedding cakes in one’s home, can be sued under public accommodations laws for refusing to offer their services in connection with a same-sex marriage ceremony.¹⁷

¹⁶ *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>.

¹⁷ *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 par-

- 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.¹⁸
- 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.¹⁹

ticular 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”].

¹⁸ *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-Bernstein Ruling.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).

¹⁹ Stern at 48-52; Issues Brief at 3-5.

The second form of conflict involving religious organizations and individuals (or the small businesses that they own) that conscientiously object to same-sex marriage is that they will be labeled unlawful “discriminators” under state or municipal laws and thus face a range of penalties at the hand of state agencies and local governments, such as the withdrawal of government contracts or exclusion from government facilities. For example:

- A religious college, hospital, or social service organization that refuses to provide its employees with same-sex spousal benefits can be denied access to government contracts or grants on the ground that it is engaging in discrimination that contravenes public policy.²⁰
- 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.²¹

²⁰ 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).

²¹ See *Evans v. City of Berkeley*, 38 Cal.4th 1 (Cal. 2006) (affirming revocation of a boat berth subsidy at public marina due to

- Doctors, psychologists, social workers, counselors, and other professionals who conscientiously object to same-sex marriage can have their licenses revoked.²²
- Religious fraternal organizations or other non-profits 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.²³

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).

²² 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).

²³ See, e.g., Stern at 19-22 (noting that many state regulators condition licenses on compliance with nondiscrimination requirements).

- Religious colleges or professional schools can have their accreditation revoked for refusing to recognize the validity of same-sex marriages.²⁴
- Church-affiliated organizations can have their tax exempt status stripped because of their conscientious objection to same-sex marriage.²⁵

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

²⁴ Stern at 23 (describing how religiously affiliated law schools have unsuccessfully challenged diversity standards imposed by the American Bar Association as a condition of accreditation); D. Smith, *Accreditation Committee Decides to Keep Religious Exemption*, 33 MONITOR ON PSYCHOLOGY 1 (Jan. 2002) (describing a proposal of the American Psychology Association to revoke the accreditation of religious colleges and universities that have codes of conduct forbidding homosexual behavior), available at <http://www.apa.org/monitor/jan02/exemption.html>.

²⁵ 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).

will harm religious organizations and individuals of conscience, *and it will spawn costly, unnecessary conflicts, many of which will lead to litigation.*²⁶

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 require any religious denomination...or any officiant acting as a representative of a religious denomination...to

²⁶ 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% . . .”).

solemnize any marriage.”²⁷ 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.”²⁸ 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.

²⁷ House Bill 5170 (2012).

²⁸ Stern at 1.

- 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.²⁹ How might this occur?

An objector may be penalized by losing access to government grant programs or other state or local benefits. Thus, in *Catholic Charities of Maine v. City of Portland*, the district court upheld a Portland ordinance that forced a religious charity either to extend employee spousal benefits to registered same-sex couples, or to lose eligibility to all city housing and community development funds.³⁰ Similarly, the Salvation Army lost \$3.5 million in social service contracts with the City of San Francisco because it refused, on religious grounds, to provide benefits to the same-sex partners of its employees.³¹ The Boy Scouts

²⁹ 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.

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

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

of America have litigated, *and lost*, numerous suits over a state's authority to deny them access to benefits that others receive, when the law was otherwise silent.³² 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.³³ The state claimed that the Catholic adoption agencies had violated the

³² See *Evans v. City of Berkeley*, 38 Cal.4th 1 (Cal. 2006) (affirming revocation of a boat berth subsidy at public marina due to Boy Scouts' exclusion of atheist and openly gay members); *Cradle of Liberty Council v. City of Philadelphia*, 2008 WL 4399025 (E.D. Pa. Sept. 25, 2008) (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.

³³ *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.

state's newly enacted civil union law.³⁴ 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 of two lesbian couples in its beachside pavilion.³⁵ Local authorities stripped the group of their exemption from local property taxes on the pavilion, and billed them for \$20,000.³⁶

³⁴ Illinois Religious Freedom Protection & Civil Union Act, 750 ILCS 75/1 *et seq.*

³⁵ 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*).

³⁶ 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 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.³⁷

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.

³⁷ 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).

These impacts on church-affiliated organizations, predicted by scholars,³⁸ did not result from statutory revocations of tax-exempt status in civil union legislation. Instead, these actions occurred because state law offered no explicit exemption providing otherwise. These experiences drive home the need for explicit protection from penalties by the government.

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.³⁹ The failure to protect

³⁸ 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).

³⁹ 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

such individuals puts the individual to a cruel choice: their conscience or their livelihood.⁴⁰ Enacting protections for individual objectors *is not only necessary but also consistent with the existing public policy* in Illinois' antidiscrimination statutory scheme.⁴¹

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 ser-*

also Gay Couple Sues Illinois Bed and Breakfast For Refusing to Host Civil Union Ceremony, HUFFINGTON POST, FEB. 23, 2011.

⁴⁰ 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).

⁴¹ 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).

vices, like serving food or driving taxis, simply do not. They have no objection generally to providing services, but they object to directly facilitating a marriage.

In short, nondiscrimination statutes enacted years ago now take on a whole new level of significance, with a much greater need for religious exemptions. A Marriage Bill that provides no protection to individual objectors (other than authorized celebrants, who are already protected by the Constitution) would effectively leave any individual who refuses to assist with same-sex wedding ceremonies open to suit, whether framed as sexual orientation discrimination, sex discrimination, or, where applicable, marital-status discrimination.⁴²

⁴² 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);

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.⁴³

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.⁴⁴ Similarly,

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).

⁴³ See Part A above.

⁴⁴ 775 IL[L]. 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 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[L]. 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).

federal laws provide protections for religious and conscientious objectors in many different contexts.⁴⁵ 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.⁴⁶

The proposed bill in Illinois to legalize same-sex marriage provides *considerably less* protection than *every other jurisdiction* where the legislature has con-

⁴⁵ 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).

⁴⁶ See, e.g., footnotes 15-26 above.

sidered the issue.⁴⁷ 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.⁴⁸

⁴⁷ See footnote 10 above and footnote 48 below.

⁴⁸ CONN. PUB. 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/legislation.aspx?LegNo=B18-0482> (exempting religious societies and religiously affiliated non-profits from providing “accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a same-sex marriage, or the promotion of same-sex marriage through religious programs, counseling, courses, or retreats...”); MD. H.B. 438 § 4(a) (2011) (enacted Mar. 1, 2012) (allowing religiously 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 protect-

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.⁴⁹ Although the protections in Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington also fall short in key areas,⁵⁰ 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.

ing religious organizations from penalty based on their refusal of any of the above accommodations)[.]

⁴⁹ See footnote 47.

⁵⁰ 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,⁵¹

Robin Fretwell Wilson
Class of 1958 Law Alum-
ni Professor of Law
Washington and Lee
University School of
Law

Thomas C. Berg
James Oberstar Professor
of Law & Public Policy
University of St. Thomas
School of Law (Minne-
sota)

Carl H. Esbeck
Professor of Law
University of Missouri
School of Law

Richard W. Garnett
Professor of Law
University of Notre Dame
Law School

Edward McGlynn
Gaffney, Jr.
Professor of Law
Valparaiso University
School of Law

⁵¹ Academic and organizational affiliation is indicated for identification purposes only. The universities and organizations that employ the signers take no position on this or any other bill.

**APPENDIX A: CORE LEGISLATIVE RELIGIOUS
LIBERTY PROTECTIONS⁵²**

**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).

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>.

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).

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 educa-

tional 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.”).

Douglas Laycock
Robert E. Scott Distinguished Professor of Law
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903-1738

December 24, 2012

**Re: Religious liberty implications of same-sex
marriage**

Members of the Illinois Senate
Capitol Building
Springfield, IL 62706

Dear Senator:

We urge you to insist that any bill providing for same-sex marriage include robust and specific protections for religious liberty — and then that you pass the bill.

All the signers of this letter have studied and written about the law of religious liberty for many years. One of us edited and contributed to the leading book on protecting both religious liberty and equality in marriage, *Same-Sex Marriage and Religious Liberty* (2008).

Any bill on same-sex marriage should include religious liberty protections on the lines proposed in the separate letter that you recently received from a group of scholars led by Professor Robin Fretwell Wilson. We come to these issues from a rather different perspective from Professor Wilson's group, but their analysis of potential legal conflicts is accurate,

and their proposed statutory language is necessary to legislation that is fair and just to all sides.

We support same-sex marriage. We think equality in marriage can be a great advance for human liberty. But careless or overly aggressive drafting could create a whole new set of problems for the religious liberty of those religious believers who cannot conscientiously participate in implementing the new regime. The net effect for human liberty will be no better than a wash if same-sex couples now oppress religious dissenters in the same way that those dissenters, when they had the power to do so, used to oppress same-sex couples.

We realize that you may not share our view of equality in marriage. But we are confident you share our view of religious liberty. And we think it is critical to enact religious liberty protections with respect to same-sex marriage now, before it is too late. Same-sex marriage is coming sooner or later; all the polling data show that the supporters of same-sex marriage are much younger than the opponents. Right now, the issue is close; supporters of same-sex marriage may have to bargain to get their bill. But as their support increases, they will have less need to bargain, they will be freer to respond to the most aggressive members of their movement, and they will have the votes to enact same-sex marriage with no protection whatever for religious liberty. That is very close to what they are trying to do; the protections for religious liberty in last year's House Bill 5170 actually protected very little. But at least from our distant observation point, it is not yet clear that they have the votes. Someday they will, probably sooner rather than later. The time to get legislation to protect religious conscience is now.

It is not enough to protect the right of clergy not to perform same-sex weddings. It is also necessary to protect the churches and synagogues in their other functions, and to protect religious counseling services and religious adoption agencies. It is important to protect religious individuals who assist with weddings or provide professional services to help sustain marriages. The Wilson group's letter has specific statutory language that would accomplish these goals.

I. Religious Organizations

The Illinois Religious Freedom Protection and Civil Union Act addresses the issue in sweeping terms: "Nothing in this Act shall interfere with or regulate the religious practice of any religious body." 750 Ill. Comp. Stat. §75/15. This is a sound statement of principle. And if this is as much as the Assembly can agree on, then this is the provision that should be included in a marriage bill.

But the bare statement of principle leaves it to litigation to determine what is a "religious practice," what is a "religious body," what is interference or regulation, and whether the Assembly intended the full sweep of its language. Section 75/15 goes on to say that "Any religious body, Indian Nation or Tribe or Native Group is free to choose whether or not to solemnize or officiate a civil union." Some lawyers may argue that this more specific provision somehow limits the scope of the more general provision.

House Bill 5170, considered in the 2012 regular session, addressed only the solemnization issue, and omitted the broad statement of principle in the Civil Union Act. The solemnization issue is important, but it is only the most obvious part of the issue for reli-

gious organizations. A bill that addresses only solemnization would do less to protect religious liberty than any other state that has enacted same-sex marriage.

A religious organization, in the course of carrying out its religious functions, cannot in good conscience treat as married two persons whose relationship fundamentally violates the religious organization's understanding of marriage. Must the pastor provide pastoral counseling for a same-sex married couple? Must a religious college provide married-student housing for same-sex couples? A religious-liberty provision addressed only to solemnization neglects these and many similar issues.

We think the best solution is the more elaborate language proposed by Professor Wilson's group. It anticipates the range of issues likely to arise and addresses them with care. But at the very least, any bill on same-sex marriage should include the broad statement of principle from the Civil Union Act.

II. Individuals

Neither the Civil Union Act nor House Bill 5170 protected individuals who provide services to help celebrate weddings or professional services to help sustain marriages. This omission threatens serious harm to a religious minority while conferring no real benefits on same-sex couples. Same-sex couples will rarely if ever actually want such personalized services from providers who fundamentally disapprove of their relationship, and they will nearly always be able to readily obtain such services from others who are happy to serve them.

The Wilson group's letter offers carefully crafted language that would address this problem in a way that is fair to both sides. It would protect only indi-

viduals and very small businesses, and only when some other business is reasonably available to provide the same service. But it would help ensure that people committed to a traditional view of marriage are not driven from the field.

III. Conclusion

Enacting the right to same-sex marriage with generous exemptions for religious dissenters is the right thing to do. It respects the right of conscience for all sides. It protects the liberty of same-sex couples and the liberty of religious dissenters. Adding religious liberty protections is obviously better for the traditional religious believers; on a few moments' reflection, it is also better for the same-sex couples. Because it is better for both sides, it is better for Illinois. The language proposed in the Wilson group's letter would protect the liberty of both sides. We urge you to add it to any bill on same-sex marriage.

At the very least, the bills should incorporate the language of § 75/15 in the Religious Freedom Protection and Civil Union Act.

Each of us signs this letter in our individual capacities; none of our employers takes a position on the issues we address.

We are available to discuss these issues further if that would be of any benefit. There are rumors of a bill modeled on the New York statute; that statute has gaps and ambiguities that we would be happy to discuss. Professor Laycock will be traveling in early January, but can be reached at his e-mail, or by cell phone at [XXX-XXX-XXXX].

Very truly yours,

Thomas C. Berg James Oberstar Professor of Law & Public Policy University of St. Thomas (Minnesota) tcberg@stthomas.edu	Douglas Laycock Robert E. Scott Distinguished Professor of Law and Professor of Religious Studies University of Virginia dlaycock@virginia.edu
Bruce S. Ledewitz Professor of Law Duquesne University ledewitz@duz.edu	Christopher C. Lund Assistant Professor of Law Wayne State University lund@wayne.edu
Michael Perry Robert W. Woodruff Professor of Law Emory University mjperry@emory.edu	