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BY E-MAIL and OVERNIGHT

Gov. John Baldacci
#1 State House Station
Augusta, ME 04333-0001

Re: Religious liberty implications of SP 0384, LD 1020

Dear Gov. Baldacci:

I urge you to insist that SP 0384, LD 1020, on same-sex marriage, be amended to provide robust and specific protections for religious liberty. I have studied and written about the law of religious liberty for many years, and I have written about how to protect both sexual liberty and religious liberty in my co-edited book, *Same-Sex Marriage and Religious Liberty* (2008). I write in my personal capacity, and of course the University of Michigan takes no position on these issues.

I heartily endorse amendments on the lines proposed in the separate letter that Professors Thomas C. Berg, Carl H. Esbeck, Richard W. Garnett, and Robin Fretwell Wilson are sending you. I have not signed their letter, because I come to these issues from a rather different perspective, 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.

I support same-sex marriage. I think the pending bill 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.

Nor is it in the interest of the gay and lesbian community to create religious martyrs in the enforcement of this bill. To impose legal penalties or civil liabilities on a wedding planner who refuses to do a same-sex wedding, or on a religious counseling agency that refuses to provide marriage counseling to same-sex couples, will simply ensure that conservative religious opinion on this issue can repeatedly be aroused to fever pitch. Every such case will be in the news repeatedly, and every such story will further inflame the opponents of same-sex marriage.

Refusing exemptions to such religious dissenters will politically empower the most demagogic opponents of same-sex marriage. It will ensure that the issue remains alive, bitter, and deeply divisive.

It is far better to respect the liberty of both sides and let same-sex marriage be implemented with a minimum of confrontation. Put religious exemptions in the bill, and at a stroke, you take away one of the opponents' strongest arguments. Let the people of Maine see happy, loving, same-sex marriages in their midst; let them see (this cannot be helped) that some of those marriages fail, just as many opposite-sex marriages fail; let them see that these same-sex marriages, good and bad, have no effect on opposite-sex marriages. Let the market respond to the obvious economic incentives; same-sex couples will pay good money just like opposite-sex couples. Let same-sex marriage become familiar to the people, and do these things without oppressing religious dissenters in the process. Same-sex marriage will be backed by law, backed by the state, and backed by a large and growing number of private institutions. Much of the dissent will gradually fade away, and nearly all the rest will go silent, succumbing to the live-and-let-live traditions of the American people. The number of people who assert their right to conscientious objection will be small in the beginning, and it will gradually decline to insignificance if deprived of the chance to rally around a series of martyrs.

Exemptions for religious conscientious objectors will rarely burden same-sex couples. Few same-sex couples in Maine will have to go far to find merchants, professionals, counseling agencies, or any other desired service providers who will cheerfully meet their needs and wants. And same-sex couples will generally be far happier working with a provider who contentedly desires to serve them than with one who believes them to be engaged in mortal sin, and grudgingly serves them only because of the coercive power of the law. Religious exemptions could also be drafted to exclude the rare cases where these suppositions are not true, such as a same-sex couple in a rural area that has reasonably convenient access to only one provider of some secular service. Such cases are no reason to withhold religious exemptions in the more urban areas where most of the people – and most of the same-sex couples – actually live.

Section 5 of the pending bill attempts to protect religious liberty, but it addresses only part of the problem. The first sentence arguably protects only what is already constitutionally guaranteed, and what is constitutionally guaranteed will inevitably be litigated. Apart from that problem, the first sentence protects religious marriages but it does not unambiguously provide that religious institutions need not recognize same-sex civil marriages. Must a religious counseling service counsel same-sex couples? Must a religious adoption agency place children with same-sex couples? There is no reason for the state to intrude into these religious institutions, or to force them to litigate over ambiguous protections. But the first sentence of Section 5 is unclear. The second sentence of Section 5 is clear, but it protects only those who officiate at marriages and only with respect to the choice whether to officiate.

Moreover, the bill offers no protection for individuals who facilitate weddings or provide professional services to help sustain marriages. This is an omission that threatens serious harm to a religious minority while conferring no real benefits on same-sex couples, who will nearly always be able to readily obtain such services from others who are happy to serve them.

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 sexual liberty of same-sex couples and the religious liberty of religious dissenters. It 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 Maine.

I am available to discuss these issues further if that would be of any benefit.

Very truly yours,

Douglas Laycock