



## MEMORANDUM

DATE: January 18, 2013

RE: Legal Analysis On Religious Discrimination Within SB 13-011

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Colorado Senate Bill 13-011 (SB 13-011)—the proposed legislation to extend specific legal recognition (Civil Unions) to same-sex couples in Colorado—contains provisions that affirm some religious freedoms for a small handful of Colorado’s citizens. And while we offer no analysis in this memo on the policy implications of creating Civil Unions for same-sex couples, we note herein that SB 13-011 fails to provide sufficient safeguards for the religious liberties of all Coloradans.

The absence of these safeguards, in addition to raising constitutional concerns, is inequitable because, where same-sex unions are legal, same-sex couples are able to obtain what they require to certify and celebrate their unions. Our country has a longstanding tradition of respect for the viewpoints of all Americans. Thus, if SB 13-011 is to be adopted, it should be amended to protect all citizens. Constitutional safeguards are especially important when making policy shifts, like granting formal legal recognition specifically to same-sex couples.

First, § 14-15-112(4) of SB 13-011,<sup>1</sup> while providing certain protections, adds no additional, substantive safeguards for religious freedom beyond what the U.S. Constitution already provides. No existing law requires that religious officials must preside over every legal union, let alone ceremonies that are inconsistent with their religious beliefs. Section 14-15-112(4) merely codifies the already established constitutional right of ministers, clergy, and religious institutions under the Free Exercise Clause of the United States Constitution to abide by their sincerely held religious beliefs.<sup>2</sup>

Moreover, § 14-15-112(4) is incomplete and proposes to directly undermine the religious freedom of other persons authorized to certify civil unions—such as a judge or magistrate.<sup>3</sup> Yet the same First Amendment that protects clergy applies to all citizens. Thus, the disparate treatment exhibited by § 14-15-112(4) strongly indicates that those expressly excluded—including judges or magistrates—can or should be forced to violate their conscience and religious beliefs where conflicts may arise. And while the proposed legislation expressly

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<sup>1</sup> “A priest, minister, rabbi, or other official of a religious institution or denomination or an Indian nation or tribe is not required to certify a civil union in violation of his or her right to the free exercise of religion guaranteed by the First Amendment to the United States [C]onstitution and by section 4 of article II of the state constitution.” S.B. 13-011, § 14-15-112(4), 69th Gen. Assem., Reg. Sess. (Colo. 2013).

<sup>2</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

<sup>3</sup> S.B. 13-011, § 14-15-112(1), 69th Gen. Assem., Reg. Sess. (Colo. 2013).



invokes “the First Amendment to the United States [C]onstitution and section 4 of article II of the [Colorado] [C]onstitution,” the substance of the legislation does not embody the protections provided by those constitutions.

Providing incomplete protections is unnecessary given that same-sex couples historically have not been denied the ability to certify their legal unions, wherever they may occur. This has certainly been the case in the states of California,<sup>4</sup> Delaware,<sup>5</sup> Hawai’i,<sup>6</sup> Illinois,<sup>7</sup> Nevada,<sup>8</sup> New Jersey,<sup>9</sup> Oregon,<sup>10</sup> Rhode Island,<sup>11</sup> and Wisconsin,<sup>12</sup> states that have already extended Civil Unions or Domestic Partnerships to same-sex couples. Viewed in this context, the omissions identified in § 14-15-112(4) pose a direct threat to the religious freedom of those individuals authorized to certify civil unions in Colorado, but who fall outside the scope of this bill’s religious protection.

Second, § 14-15-112(4) is impermissibly narrow in that it proposes nothing to ensure that the government does not penalize, withhold benefits from, or refuse to contract with clergy, a religious institution, or a religious organization, not to mention individuals and businesses that possess sincere religious beliefs about sexual unions and/or the importance of both mothers and fathers to families. Because the First Amendment applies to all Americans, including corporations,<sup>13</sup> and because the Colorado Constitution guarantees the “free exercise and enjoyment of religious profession and worship” and states that “no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion,”<sup>14</sup> these guarantees would be prudent additions to § 14-15-112(4), if the legislation is to be enacted.

Lastly, § 14-15-112(4) is substantially limited by its own terms because it applies only regarding “certify[ing] a civil union.” But civil union ceremonies and celebrations oftentimes involve much more than mere certifications. Section 14-15-112(4) thus fails to protect and preserve the rights of all to *recognize* or *participate in* those relationships and events consistent with their religious tenets, including the usage of property or facilities.

An example of § 14-15-112(4)’s limitation is that it would permit the state to penalize or refuse to contract with a faith-based child-welfare agency—like an adoption or foster agency—that, for religious reasons, strives to place children in homes with mothers and fathers.

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<sup>4</sup> See, e.g., <http://www.engaygedweddings.com/ca/officiants.html> (last visited Jan. 17, 2013).

<sup>5</sup> See, e.g., <http://www.engaygedweddings.com/delaware-gay-wedding/officiants-de.html> (last visited Jan. 17, 2013).

<sup>6</sup> See, e.g., <http://www.equalityhawaii.org/officiants> (last visited Jan. 17, 2013).

<sup>7</sup> See, e.g., <http://www.engaygedweddings.com/il/illinois-gay-wedding-officiants.html> (last visited Jan. 17, 2013).

<sup>8</sup> See, e.g., <http://www.engaygedweddings.com/nv/officiants-gay-weddings.html> (last visited Jan. 17, 2013).

<sup>9</sup> See, e.g., <http://www.engaygedweddings.com/nj/officiants-gay-weddings-nj.html> (last visited Jan. 17, 2013).

<sup>10</sup> See, e.g., <http://www.engaygedweddings.com/or/officiants-elopement.html> (last visited Jan. 17, 2013).

<sup>11</sup> See, e.g., [http://www.marriageequalityri.org/learn/civil\\_unions/](http://www.marriageequalityri.org/learn/civil_unions/) (last visited Jan. 17, 2013).

<sup>12</sup> See, e.g., <http://milwaukeeclergy.com/commitment.htm> (last visited Jan. 17, 2013).

<sup>13</sup> See *Citizens United v. FEC*, 558 U.S. 310, 883 (2010).

<sup>14</sup> Colo. Const. art. II, § 4.



Regrettably, this type of unnecessary discrimination occurred in Illinois, Massachusetts, and the District of Columbia soon after those jurisdictions extended legal recognition to the relationships of same-sex couples.<sup>15</sup> And since some adoption or child-welfare agencies in Colorado are already committed to serving same-sex couples,<sup>16</sup> any legislation that does not safeguard the organizational values of all adoption or child-welfare agencies inexplicably fails to exhibit tolerance.

Furthermore, § 14-15-112(4) fails to protect many others, including pastors or counselors that provide counseling to couples in accordance with their deeply held religious beliefs. Others left unprotected by SB 13-011 include wedding-venue owners,<sup>17</sup> clerks and recorders,<sup>18</sup> bed-and-breakfast establishments,<sup>19</sup> bakeries,<sup>20</sup> photographers,<sup>21</sup> caterers,<sup>22</sup> deejays, and perhaps others.

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<sup>15</sup> See, e.g., Laurie Goodstein, *Illinois Catholic Charities close over adoption rule*, The Boston Globe, available at <http://www.bostonglobe.com/news/nation/2011/12/29/illinois-catholic-charities-close-rather-than-allow-same-sex-couples-adopt-children/Km9RBLkpKzABNLJbUGhvJM/story.html> (last visited Jan. 17, 2013) (“[M]ost of the Catholic Charities affiliates in Illinois are closing down rather than comply with a new requirement that says they can no longer receive state money if they turn away same-sex couples as potential foster care and adoptive parents.”); Father Robert J. Carr, *Boston’s Catholic Charities to stop adoption service over same-sex law*, Catholic Online, available at [http://www.catholic.org/national/national\\_story.php?id=19017](http://www.catholic.org/national/national_story.php?id=19017) (last visited Jan. 17, 2013) (“Catholic Charities in Boston announced March 10 that it is getting out of the adoption business, over Massachusetts state law requiring that that the agency place children with same-sex couples.”); Julia Duin, *Catholics end D.C. foster-care program*, Washington Times, available at <http://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care/> (last visited Jan. 17, 2013) (“The Archdiocese of Washington’s decision to drop its foster care program is the first casualty of the District of Columbia’s . . . same-sex marriage law.”).

<sup>16</sup> See, e.g., <http://adoption-options.com/> and <http://adoptionpride.com/colorado-gay-adoption-resources.html> (last visited Jan. 17, 2013).

<sup>17</sup> See, e.g., *Berstein et al v. Ocean Grove Camp Meeting Ass’n*, Dkt. No. PN34XB-03008 (DCR Oct. 23, 2012). (Christian ministry sued for choosing to act according to its sincerely held religious beliefs in declining use of its pavilion for same-sex couple’s civil union).

<sup>18</sup> Section 14-15-111 of SB 13-011 (authorizing county clerk and recorder to issue civil union licenses); see, e.g., Thomas Kaplan, *Rights Collide as Town Clerk Sidesteps Role in Gay Marriages*, The New York Times, Sept. 27, 2011, available at [http://www.nytimes.com/2011/09/28/nyregion/rights-clash-as-town-clerk-rejects-her-role-in-gay-marriages.html?\\_r=0](http://www.nytimes.com/2011/09/28/nyregion/rights-clash-as-town-clerk-rejects-her-role-in-gay-marriages.html?_r=0) (last visited Jan. 17, 2013) (town clerk challenged for declining to issue marriage license to same-sex couple, though couple obtained marriage license from another clerk).

<sup>19</sup> See, e.g., *Gay Couple Sues Illinois Bed And Breakfast For Refusing To Host Civil Union Ceremony*, huffingtonpost.com, May 25, 2011, available at [http://www.huffingtonpost.com/2011/02/23/gay-couple-sues-illinois\\_n\\_827115.html](http://www.huffingtonpost.com/2011/02/23/gay-couple-sues-illinois_n_827115.html) (last visited Jan. 17, 2013) (same-sex couple “filed complaints with the Illinois Attorney General and the Illinois Department of Human Rights” against business that declined to host their civil union ceremony based on religious beliefs).

<sup>20</sup> See, e.g., *Masterpiece Cakeshop, Colorado Bakery, Allegedly Denies Wedding Cake To Local Gay Couple*, huffingtonpost.com, Jul. 23, 2012, available at [http://www.huffingtonpost.com/2012/07/23/masterpiece-cakeshop-colorado-bakery-gay-wedding-cake\\_n\\_1695386.html](http://www.huffingtonpost.com/2012/07/23/masterpiece-cakeshop-colorado-bakery-gay-wedding-cake_n_1695386.html) (last visited Jan. 17, 2013) (Colorado-based bakery whose owner believes that marriage is the union of one man and one woman legally targeted by same-sex couple).

<sup>21</sup> See, e.g., *Elane Photography v. Willock*, 284 P.3d 428 (N.M. Ct. App. 2012) (wedding photographer sued by same-sex couple for declining an invitation to photograph the same-sex couple’s commitment ceremony).

<sup>22</sup> See, e.g., *Gay couple sue caterer for canceling*, UPI.com, Sept. 18, 2012, available at [http://www.upi.com/Top\\_News/US/2012/09/18/Gay-couple-sue-caterer-for-canceling/UPI-30591347987934/](http://www.upi.com/Top_News/US/2012/09/18/Gay-couple-sue-caterer-for-canceling/UPI-30591347987934/) (last



If SB 13-011 is enacted without amendment, legal actions against these organizations and individuals will continue to occur, as they have already in Littleton, Colorado.<sup>23</sup> And since same-sex couples continue to successfully celebrate their legal unions, as well as find individuals and businesses eager to assist them with the ceremonies and details of their celebrations, the omissions in § 14-15-112(4) exist without reason. The legislature should account for the rights of all Coloradans.

In conclusion, SB 13-011 fails to protect the fundamental free exercise of religion of all Coloradans, safeguarded in both the United States and Colorado Constitutions. The so-called religious protections put forth in the proposed legislation are not only inadequate, but the extreme narrowness of those protections suggests intent to legislate prejudice toward individuals who possess deeply held religious beliefs about sexual unions or marriage. As the 6th Circuit recently stated in its opinion declaring that a university cannot compel a student to alter or violate her belief system, “Tolerance is a two-way street.”<sup>24</sup> And the Colorado Supreme Court made clear the extent to which the Constitution protects religious freedom: “The Constitution does not require complete separation of church and state: ‘[I]t affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the ‘callous indifference’ we have said was never intended by the Establishment Clause.’”<sup>25</sup>

To ensure all Colorado citizens are treated properly under the law, SB 13-011, if enacted, should rectify its disparate treatment of certain individuals and afford protections that will safeguard the constitutionally-protected religious freedoms of all Coloradans.

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visited Jan. 17, 2013) (same-sex couple sued a New York City restaurant for declining to cater their same-sex ceremony).

<sup>23</sup> See, e.g., *Masterpiece Cakeshop, Colorado Bakery, Allegedly Denies Wedding Cake To Local Gay Couple*, huffingtonpost.com, Jul. 23, 2012, available at [http://www.huffingtonpost.com/2012/07/23/masterpiece-cakeshop-colorado-bakery-gay-wedding-cake\\_n\\_1695386.html](http://www.huffingtonpost.com/2012/07/23/masterpiece-cakeshop-colorado-bakery-gay-wedding-cake_n_1695386.html) (last visited Jan. 17, 2013) (Colorado-based bakery whose owner believes that marriage is the union of one man and one woman legally targeted by same-sex couple).

<sup>24</sup> *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012).

<sup>25</sup> *State v. Freedom From Religion Foundation*, 898 P.2d 1013, 1020 (Colo. 1995), citing *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), citing *Zorach v. Clausen*, 343 U.S. 306, 313–14 (1952).