



MEMORANDUM

DATE: January 9, 2013

RE: Legal Analysis – Absence of Appropriate Protections in H 5015

Rhode Island Bill 5015 (H 5015)—the proposed legislation to redefine marriage in Rhode Island—contains provisions that affirm some religious freedoms for a small handful of Rhode Island’s citizens. And while we offer no analysis in this memo on the policy implications of redefining marriage, we note herein that H 5015 fails to provide sufficient safeguards for the religious liberties of all citizens of Rhode Island.

The absence of these safeguards, in addition to raising constitutional concerns, is curiously inequitable when it is considered that same-sex couples, where same-sex unions are legal, are able to obtain what they require to solemnize and celebrate their unions. Our country has a longstanding tradition of respect for the viewpoints of all Americans. Thus, if H 5015 is to be adopted, it should be amended to protect all citizens. Constitutional safeguards are especially important when making significant policy shifts, like redefining marriage—the full consequences of which will not be known for some time.

First, § 15-3-6.1 of H 5015,¹ while purporting to provide certain protections, adds no additional substantive safeguards for religious freedom. No existing law requires that religious officials who are authorized to solemnize marriages preside over every legal union, let alone ceremonies that are inconsistent with their religious beliefs. Section 15-3-6.1 merely codifies the already established constitutional right of ministers, clergy, and religious institutions under the Free Exercise Clause of the United States Constitution to conduct themselves by their own religious doctrine, policy, and teachings. This includes their right to solemnize relationships consistent with their sincerely held religious beliefs.²

And though put forth as an instrument to protect religious freedom, § 15-3-6.1 is incomplete because it directly undermines the religious freedom of other persons authorized under Rhode

¹ “Consistent with the guarantees of freedom of religion set forth by both the [F]irst [A]mendment to the United States [C]onstitution and article I, section 3 of the Rhode Island [C]onstitution, each religious institution has exclusive control over its own religious doctrine, policy, and teachings regarding who may marry within their faith, and on what terms, as long as such policies are consistent with sections 15-1-2, 15-1-3 and 15-1-4. No court or other state or local governmental body, entity, agency or commission shall compel, prevent, or interfere in any way with any religious institution’s decisions about marriage eligibility within that particular faith’s tradition ... [N]o regularly licensed or ordained clergyperson, minister, elder, priest, imam, rabbi, or similar official of any church or religious denomination as described and authorized in sections 15-3-5 and 15-3-6 of the general laws to officiate at a civil marriage is required to solemnize any marriage ... [and] shall be immune from any civil claim or cause of action based on a refusal to solemnize any marriage under this chapter.” H 5015, Section 15-3-6.1.

² See *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).



Island law to solemnize marriages—such as justices, judges, or court commissioners.³ Yet the same First Amendment that protects clergy applies to all citizens. Thus, the disparate treatment exhibited by § 15-3-6.1 strongly indicates that those expressly excluded—including justices, judges, and court commissioners—can or should be forced to violate their conscience and religious beliefs where conflicts may arise. And while the proposed legislation expressly invokes “the [F]irst [A]mendment to the United States [C]onstitution and article I, section 3 of the Rhode Island [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 solemnize their new legal unions, wherever they may occur. In Rhode Island, the vocal support of faith leaders around the state virtually guarantees all same-sex couples will have clergy available to solemnize their unions if H 5015 is enacted.⁴ This has certainly been the case in the states of Maine,⁵ Maryland,⁶ and Washington,⁷ all of whom recently enacted same-sex marriage, as well as the handful of other states that have adopted same-sex marriage. Viewed in this context, the omissions identified in § 15-3-6.1 pose a direct threat to the religious freedom of those persons authorized to solemnize marriages in Rhode Island, but who fall outside the scope of this bill’s proposed religious exemptions.

Second, the last sentence of § 15-3-6.1⁸ is impermissibly narrow in that it only bars the government from “penalize[ing], withhold[ing] benefits from, or refus[ing] to contract” with a “church or religious denomination” that refuses to “solemnize a marriage.” Again, the First Amendment is not limited to only “church[es] or religious denomination[s],” but applies to all Americans, including corporations.⁹ Section 15-3-6.1 thus fails to account for individuals or businesses that possess sincere religious beliefs about marriage. Consequently, § 15-3-6.1 would leave them unprotected from government discrimination should they choose to “solemnize” only select domestic unions based on a sincerely held religious belief. And because same-sex couples have not historically experienced trouble in finding places to solemnize their unions, from churches to town halls, the omissions in this part of § 15-3-6.1 are unnecessary. The recent same-sex marriage experiences in Maine,¹⁰ Maryland,¹¹ and Washington¹² show that there is no shortage of

³ R.I. GEN. LAWS § 15-3-5 (2004).

⁴ See, e.g., [http://www.marriageequalityri.org/blog/post/rhode_island_faith_leaders_reaffirm_commitment_to_marriage_equality/#Rhode Island Faith Leaders Reaffirm Commitment to Marriage Equality](http://www.marriageequalityri.org/blog/post/rhode_island_faith_leaders_reaffirm_commitment_to_marriage_equality/#Rhode%20Island%20Faith%20Leaders%20Reaffirm%20Commitment%20to%20Marriage%20Equality) (last visited Jan. 9, 2013).

⁵ See, e.g., <http://equalitymaine.org/lgbt-resources-maine-faith-organizations> (last visited Jan. 9, 2013).

⁶ See, e.g., <http://www.equalitymaryland.org/uploads/5020/original/clergy.pdf> (list of Maryland clergy directly volunteering their services to solemnize ceremonies for same-sex couples) (last visited Jan. 9, 2013).

⁷ See, e.g., http://equalityfederation.salsalabs.com/o/35037/p/salsa/web/common/public/content?content_item_KEY=117 (last visited Jan. 9, 2013).

⁸ “No state agency or local government may base a decision to penalize to solemnize a marriage under this chapter.” H 5015, Section 15-3-6.1.

⁹ See *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹⁰ See Kelley Bouchard, *44 couples obtain marriage licenses*, Portland Press Herald, available at <http://www.pressherald.com/news/Maine-same-sex-couples-begin-license-process-at-1201-am.html> (same-sex couples exchanged vows in public parks, city council chambers, city halls, clerks’ offices, and in private ceremonies) (last visited Jan. 9, 2013).



venues, faith-based or secular, for same-sex couples to celebrate their new legal unions. Even the National Cathedral in Washington, D.C. has opened its doors for the solemnization of same-sex unions.¹³

Lastly, § 15-3-6.1 is substantially limited by its own terms because it applies only regarding a “refusal . . . to solemnize a marriage.” But domestic ceremonies and celebrations, whether they be same-sex or opposite-sex, oftentimes involve much more than mere solemnizations. Section 15-3-6.1 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 § 15-3-6.1’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. Regrettably, this type of unnecessary discrimination occurred in Illinois, Massachusetts, and the District of Columbia soon after those jurisdictions extended legal recognition to same-sex couples.¹⁴ And since some adoption or child-welfare agencies in Rhode Island are already committed to serving same-sex couples,¹⁵ any legislation that does not safeguard the organizational values of all adoption or child-welfare agencies fails to exhibit tolerance.

Furthermore, § 15-3-6.1 fails to protect many others, including pastors or counselors that provide pre- or post-marriage counseling to couples in accordance with their deeply held religious beliefs. Others left unprotected by H 5015 include wedding-venue owners,¹⁶ clerks,¹⁷ bed-and-

¹¹ See Associated Press, *Many weddings as gay marriage becomes legal in Md.*, USA Today, available at <http://www.usatoday.com/story/news/nation/2013/01/01/same-sex-marriage-maryland/1801917/> (same-sex couples exchanged vows at City Hall in Baltimore) (last visited Jan. 9, 2013).

¹² See Caterina Orloff, *LOOK: Wedding album: same-sex marriages on a historic day*, MSNBC.com, available at <http://tv.msnbc.com/2012/12/10/gay-and-lesbian-couples-wed-in-washington-state/> (same-sex couples exchanged vows at the First Baptist Church of Seattle, city halls, wedding chapels, and the historic Paramount Theatre in downtown Seattle) (last visited Jan. 9, 2013).

¹³ See Ben Brumfield, *Washington National Cathedral to wed same-sex couples*, CNN.com, available at <http://www.cnn.com/2013/01/09/us/us-same-sex-weddings/index.html> (last visited Jan. 9, 2013).

¹⁴ 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. 8, 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.”); 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. 8, 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.”).

¹⁵ See, e.g., Adoption Rhode Island (<http://adoptionri.org/who-we-are/mission-values>) (last visited Jan. 9, 2013).

¹⁶ See, e.g., *Berstein et al v. Ocean Grove Camp Meeting Ass’n*, Dkt. No. PN34XB-03008 (DCR Oct. 23, 2012). (Case involved a threat to a Christian ministry’s “First Amendment rights of free speech, freedom of expressive association, and free exercise of religion” for choosing to act according to its sincerely held religious beliefs.)



breakfast establishments,¹⁸ bakeries,¹⁹ photographers,²⁰ caterers,²¹ deejays, and perhaps others. If H 5015 is enacted without amendment, legal actions against these organizations and individuals will likely occur in Rhode Island, as they have already occurred across the country. 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 § 15-3-6.1 are glaring. The legislature should account for the rights of all Rhode Islanders.

In conclusion, § 15-3-6.1 of H 5015 fails to protect the fundamental freedom of religion, safeguarded in both the United States and Rhode Island Constitutions. The 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 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.”²²

To ensure all Rhode Islanders are treated properly under the law, if it is to be enacted, H 5015 must first be amended to rectify its disparate treatment of certain individuals. Affording protections that will safeguard the constitutionally-protected religious freedoms of all citizens of Rhode Island should always be a legislative priority.

¹⁷ R.I. GEN. LAWS § 15-2-1.1 (2004) (authorizing town or city clerks to issue marriage 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 (last visited Jan. 8, 2013) (town clerk legally challenged for declining to issue marriage license to same-sex couple, though couple obtained marriage license from another clerk).

¹⁸ *See, e.g.*, Anne-Marie Dorning, *ACLU: Wildflower Inn Sued Over Refusal to Host Gay Wedding*, ABCNews.com, Jul. 20, 2011, available at <http://abcnews.go.com/US/vermont-inn-sued-refusal-host-gay-couples-wedding/story?id=14110076> (last visited Jan. 8, 2013) (small, family-owned and –operated business subjected to an investigation by a state agency for communicating its sincerely held religious beliefs).

¹⁹ *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 (last visited Jan. 7, 2013) (Colorado-based bakery whose owner believes that marriage is the union of one man and one woman legally targeted by same-sex couple).

²⁰ *See, e.g.*, *Elane Photography v. Willock*, 2012-NMCA-086, 284 P.3d 428 (wedding photographer sued by same-sex couple for declining an invitation to photograph the same-sex couple’s commitment ceremony).

²¹ *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/ (last visited Jan. 7, 2013) (A same-sex couple sued a New York City restaurant for declining to cater their same-sex ceremony.).

²² *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012).