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SAME-SEX COUPLES AND MARRIAGE

Model Legislation

for Allowing Same-Sex Couples to Marry
or All Couples to Form a Civil Union

By Jennifer C. Pizer and Sheila James Kuehl

August 2012

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About the Williams Institute

The Williams Institute is dedicated to conducting rigorous, independent research on sexual orientation and gender identity law and public policy. A national think tank at UCLA School of Law, the Williams Institute produces high-quality research with real-world relevance and disseminates it to judges, legislators, policymakers, media and the public.

Reviewers

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INTRODUCTION

Marriage and other relationship protections for same-sex couples and their families are becoming increasingly common in the United States. While more state legislatures are amending their state statutes to allow same-sex couples to access the protections and obligations of marriage, the approaches taken vary from state to state. The inconsistency of state laws is confusing and creates complications for same-sex couples and their families, businesses, and state and local governments. The Model Marriage Code and Model Civil Union Code presented here are designed to improve consistency by offering model bill language for states wishing to offer comprehensive state-law protections and obligations to same-sex couples, and analysis that places these Codes in a social science and policy context.

As of the fall of 2012, four states and the District of Columbia have enacted legislation to permit two people to enter into a valid marriage regardless of each one's sex and sexual orientation, so long as they meet all other requirements. Two more states allow same-sex couples to marry following decisions of the state's high court.¹ Together, these seven jurisdictions represent 14 percent of the U.S. population, and 11 percent of the same-sex couples living in the United States.²

¹ See Connecticut: Act of Apr. 23, 2009, 2009 Conn. Pub. Acts 78 (codified in scattered sections of CONN. GEN. STAT. (2010)); District of Columbia: Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D.C. Reg. 1833 (Mar. 5, 2010) (codified in scattered sections of D.C. CODE (2011)); Iowa: *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); Massachusetts: *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003); New Hampshire: Act of June 3, 2009, 2009 N.H. Laws 60 (codified in scattered sections of N.H. REV. STAT. ANN. (2010)); New York: Act of June 24, 2011, 2011 N.Y. Laws 95 (codified in scattered sections of N.Y. DOM. REL. LAW (2011)); Vermont: Act of Apr. 10, 2009, 2009 Vt. Acts & Resolves 33 (codified in scattered sections of VT. STAT. ANN. (2010)).

² Data gathered in the 2010 U.S. Census showing population by state is available from the U.S. Census Bureau at <http://2010.census.gov/2010census/>. Based on those data, Williams Institute scholars have

New laws in Washington State and Maryland, which were signed by the governors of those states in February and March 2012 respectively, will take effect if not rejected by voters through measures on November 2012 state ballots.³ Voters in Maine will consider an initiative that would authorize marriage for same-sex couples by overturning the 2009 ballot measure that blocked the marriage bill signed by Maine’s governor in May 2009.⁴ And the Ninth U.S. Circuit Court of Appeals has ruled that California’s constitutional amendment eliminating same-sex couples’ right to marry in that state (called “Proposition 8”) violates the U.S. Constitution.⁵ If these efforts to open marriage succeed, an additional 16.5 percent of the U.S. population will live in states with this option.

Moreover, as of this date, at least fifteen states have enacted statutory structures to provide same-sex couples and, in some cases different-sex couples, an alternative to marriage. In some states, this is called civil union, which requires a license and solemnization ceremony and carries all or most of the same rights and responsibilities as marriage in those states.⁶ At least ten states and the District of Columbia have established a form of registry, most often called a registry of domestic partnerships, which provides a variety of rights and responsibilities. Some registry systems are robust, as in California, Nevada, Oregon and Washington, providing all or nearly all of the rights and responsibilities of marriage.⁷ Others — such as in Colorado,

compiled same-sex-couple population data by state. See Gary J. Gates and Abigail M. Cooke, UNITED STATES CENSUS SNAPSHOT: 2010 (Williams Institute, September 2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf>. Separate reports with additional data about same-sex-couples in each state are available on the lower portion of the home page of the Williams Institute website. See <http://williamsinstitute.law.ucla.edu/>.

³ The Maryland marriage bill was House Bill 438, which became Chapter 2, 2012 Laws of Maryland. Washington State’s marriage bill was Substitute Senate Bill 6239, which became Chapter 3, Laws of 2012. For information concerning the ballot measures, see [http://www.ballotpedia.com/wiki/index.php/Maryland_Same-Sex_Marriage_Referendum,_Question_6_\(2012\)](http://www.ballotpedia.com/wiki/index.php/Maryland_Same-Sex_Marriage_Referendum,_Question_6_(2012)); [http://www.ballotpedia.com/wiki/index.php/Washington_Same-Sex_Marriage_Referendum_\(2012\)](http://www.ballotpedia.com/wiki/index.php/Washington_Same-Sex_Marriage_Referendum_(2012)).

⁴ Maine’s 2009 marriage law was Public Law Chapter 82, of the 124th Maine Legislature. For 2012 and 2009 ballot information, see [http://www.ballotpedia.com/wiki/index.php/Maine_Same-Sex_Marriage_Question,_Question_1_\(2012\)](http://www.ballotpedia.com/wiki/index.php/Maine_Same-Sex_Marriage_Question,_Question_1_(2012)); [http://www.ballotpedia.com/wiki/index.php/Maine_Same-Sex_Marriage_People%27s_Veto,_Question_1_\(2009\)](http://www.ballotpedia.com/wiki/index.php/Maine_Same-Sex_Marriage_People%27s_Veto,_Question_1_(2009)).

⁵ *Perry v. Brown*, 671 F.3d 1052 (9th Cir. Feb. 7, 2012).

⁶ See Delaware: Civil Union and Equality Act of 2011, 78 Del. Laws 22 (2011) (codified at DEL. CODE ANN. tit. 13, §§ 201-217 (2011)); Hawaii: Act of Feb. 24, 2011, 2011 Haw. Sess. Laws 1 (codified at HAW. REV. STAT. ch. 572B) and Act of July 6, 2012, 2012 Haw. Sess. Laws 267 (codified at various places in the Hawaii Revised Statutes); Illinois: Illinois Religious Freedom Protection and Civil Union Act, 2011 Ill. Laws 096-1513 (codified at 750 ILL. COMP. STAT. 75/1 – /90 (2011)); New Jersey: Act of Dec. 21, 2006, 2006 N.J. Laws 975 (codified at N.J. REV. STAT. §§ 37:1-1– 37:1-34 (2007)); Rhode Island: Act of July 2, 2011, 2011 R.I. Pub. Laws 198 (codified at R.I. GEN. LAWS §§ 15-3.1-1 – 15-3.1-11 (2011)).

⁷ See California: California Domestic Partner Rights and Responsibilities Act of 2003, 2003 Cal. Stat. 3081 (codified at CAL. FAM. CODE §§ 297 – 299.6 (2004)); District of Columbia: Domestic Partnership Equality Amendment Act of 2006, 53 D.C. Reg. 3338 (codified in scattered sections of D.C. CODE, D.C. MUN. REGS. (2006)); Nevada: Nevada Domestic Partnership Act, 2011 Nev. Stat. 2183 (codified at NEV. REV. STAT. §§

Maine and Wisconsin — delineate a more limited set of rights and responsibilities.⁸ The registry systems generally require completion and filing of a registration form but not a formal solemnization ceremony. Statewide domestic partnership registries which provide different mixtures of state-level rights differ from local registries, which can offer only limited legal rights, and from employer-provided domestic partnership benefit plans.

Some states offer more than one option to same-sex couples, and some offer multiple options to different-sex couples. For example, in Hawaii, same-sex couples can enter into a civil union or register as reciprocal beneficiaries. In Illinois and Hawaii, different-sex couples can enter into a civil union or marry, and in Nevada, they can either marry or register as domestic partners. The District of Columbia offers both marriage and domestic partnership equally to same-sex and to different-sex couples. Taken together, the nineteen states and the District of Columbia that offer same-sex couples either marriage or a non-marriage, alternative status – or both – are home to 41.6 percent of the U.S. population and 48.6 percent of same-sex couples.

As of 2010, an estimated 140,000 same-sex couples living in the United States had entered a non-marital, state-recognized relationship status, and 50,000 were legally married.⁹ According to data gathered by the U.S. Census Bureau in that year, same-sex couples live throughout the United States in every congressional district, are racially, ethnically and socioeconomically diverse, and are raising more than 200,000 children.¹⁰ When they can marry, they do so in significant numbers, and many travel to other states for that opportunity.¹¹ According to available data in states that offer a legal status to same-sex couples, the dissolution

122A.010 – 122A.510 (2011)); Oregon: Oregon Family Fairness Act, 2007 Or. Laws 425 (codified at OR. REV. STAT. §§ 106.010 – 106.990 (2008)); Washington: Domestic Partnership Law, 2009 Wash. Sess. Laws 3065 (codified at WASH. REV. CODE §§ 26.60.010 – 26.60.901 (2010)).

⁸ See Colorado: Act of July 1, 2009, 2009 Colo. Sess. Laws 428 (codified at COLO. REV. STAT. §§ 15-22-101 – 15-22-112 (2010)) (registry of designated beneficiaries); Hawaii: Act of July 8, 1997, 1997 Haw. Sess. Laws 1121 (codified at HAW. REV. STAT. § 572C (1998)) (registry of reciprocal beneficiaries); Maine: Act of Apr. 28, 2004, 2004 Me. Laws 2126 (codified in scattered sections of ME. REV. STAT. ANN. (2005)) (registry of domestic partnerships); Maryland: Act of May 22, 2008, 2008 Md. Laws 4597 (codified in scattered sections of MD. CODE ANN. (2009)) (registry of domestic partnerships); New Jersey: Domestic Partnership Act, 2003 N.J. Laws 1675 (codified in scattered sections of N.J. STAT. ANN. (2004)) (registry of domestic partnerships); Wisconsin: Domestic Partnership Law, 2009 Wis. Sess. Laws 782 (codified at WIS. STAT. §§ 770.001 – 770.18 (2010)) (registry of domestic partnerships); Vermont: Act of Apr. 26, 2000, 2000 Vt. Acts & Resolves 72 (codified at VT. STAT. ANN. tit. 15, § 1301 – 1306 (2001)) (registry of reciprocal beneficiaries). Nine percent of the U.S. population and 9 percent of U.S. same-sex couples reside in these states.

⁹ M.V. Lee Badgett and Jody L. Herman, *Patterns of Relationship Recognition by Same-Sex Couples in the United States*, pages 1, 5-6 (Williams Institute, Nov. 2011) (“*Patterns of Recognition*”), available at <http://williamsinstitute.law.ucla.edu/headlines/latest-data-married-registered-same-sex-couples>.

¹⁰ Gates, *U.S. Census Snapshot: 2010*; Gary J. Gates, *Same-Sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey* (Williams Institute, October 2006), available at <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/same-sex-couples-and-the-gay-lesbian-bisexual-population-new-estimates-from-the-american-community-survey/>.

¹¹ Badgett, et al., *Patterns of Recognition*, at 1-2, 4-6.

rate for same-sex couples who have taken advantage of these legal options is similar to, and may be slightly lower than, that of married different-sex couples.¹²

With all the state family law activity and variety, the national map of state laws has become a complex patchwork. Its inconsistency is confusing and creates complications for same-sex couples and their families, businesses, and state and local governments. For couples and families whose rights are at stake, the incompleteness of the protections provided—for example, by the current regimes in Colorado, Maine and Wisconsin—can leave families confused about which rights they have, and vulnerable due both to their confusion and their lack of key protections.¹³ The confusion may be greatest when they move from state to state or travel. A status entered in their original home state may neither exist nor receive legal recognition in their new home state. That can leave couples both without legal protections and benefits, and unable to dissolve their status if the relationship fails.¹⁴ Or, they may find that a legal status with the same name has vastly different, and perhaps unclear, significance in the second state. For example, couples who register as domestic partners within the limited systems in Maine or Wisconsin are authorized to make medical decisions for each other but acquire no automatic rights to financial support or joint property ownership.¹⁵ In contrast, for couples who register in California or Nevada, the domestic partnership status includes community property, potential responsibility for spousal support upon dissolution, and parentage presumptions.¹⁶ In addition, while marriage and civil union usually entail the same or very similar benefits and obligations, it sometimes has been unclear whether one state will respect a legal status entered in another state when the two states use these different systems.¹⁷

¹² *Id.* at 1, 18-19.

¹³ In Colorado, for example, same-sex couples who register as designated beneficiaries are authorized to petition the court and have priority for appointment as each other's conservator, guardian or personal representative, but the state's family courts do not have jurisdiction to resolve their disputes. COLO. REV. STAT. §§ 15-22-101 – 15-22-112.

¹⁴ *See, e.g., In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 2010 Tex. App. LEXIS 7127 (Aug. 31, 2010) (holding that Texas courts lacked jurisdiction to hear divorce petition concerning married same-sex couple who had moved from Massachusetts).

¹⁵ *See* 2004 Me. Laws 2126; WIS. STAT. §§ 770.001 – 770.18.

¹⁶ Cal. Fam. Code §§ 297 – 299.6; NEV. REV. STAT. §§ 122A.010 – 122A.510.

¹⁷ *Compare, e.g., Elia-Warnken v. Elia*. 463 Mass. 29; 2012 Mass. LEXIS 678 (2012) (recognizing a Vermont civil union under Massachusetts law and finding invalid a man's later marriage under Massachusetts law where the prior civil union with a different person had not been dissolved before the marriage) and *Debra H. v Janice R.*, 14 N.Y.3d 576, 904 N.Y.S.2d 263, 930 N.E.2d 184 (2010) (in parenting dispute following break-up of lesbian couple, recognizing parental rights of non-biological mother under New York law based in part on couple's Vermont civil union) with *Langan v St. Vincent's Hosp. of N.Y.*, 25 A.D.3d 90, 802 N.Y.S.2d 476 [2d Dept 2005], *rev'g* 196 Misc. 2d 440, 765 N.Y.S.2d 411 [Sup. Ct., Nassau County 2003]) (finding that survivor of same-sex couple lacked standing for wrongful death action in New York despite couple's Vermont civil union, reversing lower court ruling that civil union "spouse" under Vermont law

The variation among family law statuses for same-sex couples, and sometimes for different-sex couples, also creates burdens for businesses and for state and local governments. For example, given the multiple legal systems for recognizing employees' family members in some states, and the differences among states, employers and employees alike may have difficulty knowing the legal and financial consequences of a proposed job transfer. In addition, due to variation in state rules governing insurance, taxation and other matters, administration of employee benefit plans has become more complex for businesses, especially those that operate nationally. State and local government officials face similar challenges when the couples with whom they interact are entitled to legal recognition according to separate systems under state law, with separate nomenclature and often with divergent rights and obligations, and sometimes implicating the laws of other states.

Achieving greater consistency, predictability, and comprehensiveness among state laws offering protections to same-sex couples, and reducing the instances in which separate rules govern same-sex and different-sex couples, would benefit families, employers, businesses and government. Courts can benefit as well when judges need not use multiple systems for addressing family law issues within a given state, and can be guided by decisions of other courts, including those of other states, leading to clearer, more consistent rules of law. The useful consequence of consistency, predictability, and comprehensiveness may be seen in the improved ability of lawyers and others to advise, and of couples to plan. More and better planning can mean greater stability and security for couples, and also greater fairness between them when family relationships fail.

Accordingly, the Model Marriage Code that follows is designed to reduce confusion and to encourage completeness of protections within states for couples and their dependents, regardless of sex and sexual orientation, by offering model bill language for states wishing to provide equality in marriage for same-sex and different-sex couples. For states where that is

could be recognized as a "spouse" under New York law) and *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170, 184 (Conn. App. Ct.) (denying recognition to Vermont civil union for purposes of dissolving that status in Connecticut), *appeal dismissed as moot*, 261 Conn. 936, 806 A.2d 1066 (Conn. 2002).

California's broad domestic partnership law initially provided for recognition of legal unions same-sex couples had entered in other states, but not their marriages. Stats. 2003, ch. 421, § 9 (Assem. Bill No. 205, adding a new Section 299.2 to the Family Code). Following litigation, passage of Proposition 8 (the state constitutional amendment restricting marriage), and further litigation, the California legislature provided that same-sex couples who married in other jurisdictions shall have the same rights and responsibilities as spouses under California law, either recognized as spouses or not depending on whether the couple married before or after amendment's passage. Stats. 2009, ch. 625 (Sen. Bill No. 54). See also Report of the Senate Judiciary Committee on SB 54 for Sept. 8, 2009 hearing (setting forth history of California marriage litigation, legislative approval of marriage bills and subsequent vetoes, passage of Proposition 8, and subsequent litigation), available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0051-0100/sb_54_cfa_20090908_110009_sen_comm.html. As in California, Washington State's domestic partnership law also provided for recognition of same-sex couples' non-marital legal unions from other states, but denied recognition to their marriages. Chapter 6, Laws of 2008 (Second Subst. HB 3104, Part XI – Reciprocity, adding Section 1101, amending RCW 26.60).

not possible, the Model Civil Union Code provides bill language addressing similar goals by allowing all couples to form a civil union. Both model codes also are designed to improve state-to-state consistency.

The accompanying analyses place these model codes in a social science and policy context, including summaries of key research findings and selected reference materials. These findings address areas frequently considered by policymakers, such as basic demographic information about the affected population, and the economic impact of legal recognition on same-sex couples and their families, government, and the private sector. In addition, public health and other social science research documents the range of adverse health effects of antigay stigma due to denial of marriage and to other discrimination, and the ameliorative effects of more equal laws and policies.

The Model Marriage Code, which immediately follows the legal and policy research discussion, begins with model legislative declarations and findings, including language requiring the state to treat equally all marriages and all married persons. It offers language to require that gender-specific terms be construed as gender-neutral, as may be reasonable and necessary to accomplish the purposes of the bill, and to require that public officials prepare and issue forms and other documents as may be necessary to accomplish the changes provided for by the bill.

This Model Code also offers language to establish the rights and responsibilities of same-sex spouses to each other, their children and third parties, and to clarify that rules setting obligations and prohibiting discrimination should apply to all married persons regardless of sex and sexual orientation. It includes model language to recognize and honor marriages and other statuses couples have entered in other states and countries, as well as alternative provisions by which couples in civil unions and domestic partnerships may marry, convert their non-marriage status into a marriage, or elect to remain in their current status, and by which the state may retain multiple statuses or eliminate the non-marriage status.

In addition, public discussions about allowing same-sex couples to marry frequently have raised questions about appropriate protections of religious freedom for those who support marriage equality and other protections for same-sex couples, and those who do not. Accordingly, both the Model Marriage Code and the Model Civil Union Code that follows include recommended language to confirm explicitly the constitutionally protected freedom of clergy and religious organizations to determine which relationships they will or will not solemnize, and to do so without penalty. It also offers language to permit religious organizations, without penalty, to withhold goods, services and/or use of facilities in connection with weddings that are inconsistent with their religious tenets so long as the organization does not offer such goods, services or facilities to the general public in ways covered by the state's public accommodations nondiscrimination law.

Both model codes provide bill language confirming that state and public employees acting in a public role must not discriminate in licensing or performing marriages or civil union

ceremonies. The codes also offer language clarifying how state law should be interpreted when state law refers to or relies upon a rule of federal law. Lastly, the model codes include language permitting the courts of a state to exercise jurisdiction for divorce or dissolution proceedings of non-resident same-sex couples who married or formed a civil union in the state if both spouses live in states that do not recognize the marriage or civil union for divorce or dissolution purposes.

The Model Marriage Code has been framed recognizing that all states have laws governing marriage, and that legislators more often may amend their existing laws rather than enacting the Model Code in its entirety. Nonetheless, the issues and potential problems addressed by the model provisions can guide, simplify, and allow for a more complete amendment process. Commentary following some of the model provisions offers alternative language and/or explanation toward that same end. In contrast, a legislature intending to create a new civil union system will need provisions to establish that separate status and the protections and obligations it entails. And in both codes, the model bill language is designed to provide a checklist of issues that can arise from inconsistency between state and federal law.

At present, eleven state legislatures could open marriage to same-sex couples by amending their marriage statutes.¹⁸ Thirty states as of this writing have amended their constitutions to preclude marriage for same-sex couples. However, the amendments of ten of them retained the legislature's power to offer same-sex couples comprehensive protections and obligations through civil union or a broad registration system.¹⁹ The Model Civil Union Code proposed here for those states contains some provisions nearly identical to those in the Model Marriage Code and many similar ones with similar accompanying commentary. Unlike the Model Marriage Code, however, the Model Civil Union Code also identifies, in Section 101, a policy choice for state lawmakers whether to make this new, distinct relationship status

¹⁸ These are: Delaware, Hawaii, Illinois, Indiana, Minnesota, New Jersey, New Mexico, Pennsylvania, Rhode Island, West Virginia, and Wyoming. Recall also that the legislatures of Maryland and Washington already have passed marriage equality bills, both of which face referendum votes in November 2012. The Maine legislature did as well in 2009, which was blocked by voters that year, but voters will be asked to reconsider the question in November 2012. In addition, as noted below, Minnesota voters will decide whether to amend their constitution to limit marriage to different-sex couples, also in November 2012.

¹⁹ For current lists of state restrictions on marriage and other relationship protections for same-sex couples, see Movement Advancement Project, *Marriage & Relationship Recognition Laws: Negative Laws*, available at http://www.lgbtmap.org/equality-maps/marriage_relationship_laws ("MAP, *Negative Laws*"). Hawaii voters changed that state's constitution in 1998 to prevent the Hawaii courts from ordering that same-sex couples be permitted to marry, but retained the legislature's authority to decide marriage eligibility. HI CONST., art. I, § 23. Minnesota voters will decide in November 2012 whether to amend their constitution to provide that "only a union of one man and one woman shall be valid or recognized as a marriage in Minnesota," which, if approved, would leave the legislature empowered to offer same-sex couples an alternative status such as civil unions. See [http://www.ballotpedia.com/wiki/index.php/Minnesota_Same-Sex_Marriage_Amendment_\(2012\)](http://www.ballotpedia.com/wiki/index.php/Minnesota_Same-Sex_Marriage_Amendment_(2012)).

available in their state to all adult couples regardless of sex and sexual orientation,²⁰ only to same-sex couples,²¹ or to same-sex couples and a subset of different-sex couples, such as those in which at least one partner is at least 62.²² The recommended model allows adult couples to form a civil union regardless of sex and sexual orientation, however, alternate language is provided for lawmakers wishing to limit eligibility just to same-sex couples, or to same-sex couples and a subset of different-sex couples according to age.²³

Other than the eligibility criteria and certain related legislative findings and statements of intent, the model codes present largely parallel frameworks with respect to many key provisions, such as those concerning consanguinity, age of consent, and the limitation to two persons; interstate recognition of substantially similar relationships through comity; authority concerning official forms and administration; protections against discrimination; protections for religious freedom; the relationship between state and federal law; and jurisdiction for divorce, dissolution or termination proceedings by nonresidents. The research findings and analysis that follow focus primarily on marriage for same-sex couples because there has been more research on marriage than on civil unions. However, most of this research will be useful whether a state is considering allowing same-sex couples to marry or to access the protections and obligations of marriage by forming a civil union.

²⁰ Hawaii and Illinois have taken this approach. HAW. REV. STAT. § 572; 750 ILL. COMP. STAT. 75/1 – /90. Nevada and the District of Columbia have done so in their respective registered domestic partnership systems. Domestic Partnership Equality Amendment Act of 2006, 53 D.C. Reg. 3338 (codified in scattered sections of D.C. CODE, D.C. MUN. REGS.); NEV. REV. STAT. §§ 122A.010 – 122A.510.

²¹ New Jersey, Delaware and Rhode Island have taken this approach, as has Oregon in its registered domestic partnership system. N.J. REV. STAT. §§ 37:1-1– 37:1-34; DEL. CODE ANN. tit. 13, §§ 201-217; R.I. Gen. Laws §§ 15-3.1-1 – 15-3.1-11; OR. REV. STAT. §§ 106.010 – 106.990. Connecticut, New Hampshire, and Vermont all had same-sex-only civil union systems before opening marriage to same-sex couples.

²² The registered domestic partnership laws of California and Washington State have permitted different-sex senior couples to register, noting the incidence of different-sex older couples who do not marry due to concerns about Social Security pension rates and that an alternative form of relationship recognition can assist couples, family members, medical and nursing care facilities, and others by providing clarity, for example, about medical, financial, and other decision-making authority. CAL. FAM. CODE §§ 297 – 299.6; RCW §§ 26.60.010 – 26.60.901.

²³ A non-marriage status may have been created primarily for same-sex couples who are not permitted to marry but also made available to different-sex senior couples, as in California and Washington State. When the marriage law is changed to allow same-sex couples also to marry, the non-marriage status may be retained in order to meet other needs. The Washington State marriage law (which is subject to a referendum vote in November 2012) does so, but changes eligibility to allow participation by same- and different-sex couples according to similar rules. Specifically, it retains domestic partnership for same-sex and different-sex couples in which at least one partner is at least 62, stating the legislature’s intention to support these family relationships and to assist in times of crisis when senior couples – regardless of sex and sexual orientation – do not marry due to concerns about pensions or for other reasons. See Section 8, Substitute Senate Bill 6239, Chapter 3, Laws of 2012, amending RCW 26.60.010 and 2007 c 156 s 1.

RESEARCH FOUNDATIONS FOR LEGAL AND POLICY DECISIONS CONCERNING MARRIAGE OR CIVIL UNION PROTECTIONS FOR SAME-SEX COUPLES

The Social Context

Same-Sex Couples in the United States

According to the 2010 U.S. Census, there are 646,464 same-sex couples living in the United States, of whom 51 percent are female couples, and 49 percent are male couples.²⁴ Of that total, 131,729 couples identified as spouses (suggesting that they either are married or think of themselves as married) and 514,735 identified as “unmarried partners.”²⁵ Female couples and male couples identified as spouses at the same rate as they make up the total same-sex-couple population, that is to say, 51 percent of those who identified as married were female, and 49 percent were male.²⁶

Same-sex couples live throughout the United States²⁷ and are racially and ethnically diverse.²⁸ The 2010 Census data show similar racial/ethnic distribution patterns for same-sex

²⁴ Gates, et al., *UNITED STATES Census Snapshot: 2010*. Separate reports with same-sex-couple figures for each state are available by clicking on the individual states in the State Resource Map on the lower half of the home page of the Williams Institute website. See <http://williamsinstitute.law.ucla.edu/#mapwrap>.

²⁵ *Id.* The number of couples who identify as spouses does not indicate the number who actually are legally married. Some couples who are married under state law or the law of another country do not identify as such to the U.S. Census because they believe the federal “Defense of Marriage Act” precludes the Census recognizing them as married; others who are not legally married may consider themselves married because they have entered another state status (such as a civil union), because they have had a religious marriage ceremony, because they have made personal commitments and consider themselves married but cannot enter a state status, or for other reasons. See Gary J. Gates, *Same-Sex Couples in the 2008 American Community Survey*, at page 2 (Williams Institute, September 2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-ACS-2008-Webpost-Sept-2009.pdf>. As noted above, according to Williams Institute analysis, data available in 2010 indicated that nearly 50,000 same-sex couples had entered into legal marriages in the United States, and more than 140,000 same-sex couples had formalized their relationships under state law. Badgett, et al., *Patterns of Recognition*, at 1, 5-6.

²⁶ *Id.*

²⁷ Gates, *UNITED STATES Census Snapshot 2010*; State Resource Map, available at <http://williamsinstitute.law.ucla.edu/#mapwrap>. 2010 Census reports are available for each state by clicking on that state in the State Resource Map. Each state report shows the number of same-sex couples for each state, the percentage raising children, and distribution by county in each state. Clicking on a state also provides a list of other reports and resources pertaining to issues in that state.

²⁸ Gary J. Gates, *Same-sex Couples in Census 2010: Race and Ethnicity*, Figure 2, page 2 (Williams Institute, April 2012), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-CouplesRaceEthnicity-April-2012.pdf>.

couples and for different-sex married couples, and a larger proportion of racial/ethnic minorities among different-sex unmarried couples.²⁹ In particular, approximately 80 percent of both same-sex couples and different-sex married couples are White, as compared with 74 percent of different-sex unmarried partners.³⁰ Compared with different-sex married couples, same-sex couples have slightly higher proportions of African American householders and slightly smaller proportions of Asian American householders.³¹ Among different-sex married couples and same-sex couples, the proportion of Latino/a householders was the same (12 percent).³² In addition, compared with different-sex married and unmarried couples, same-sex couples are the most likely to be interracial or interethnic.³³

Same-sex couples are socioeconomically diverse as well, with individual income levels varying as a function of age, education, race, sex, and geographic location as is the case for other individuals.³⁴ However, notwithstanding the common stereotype that gay people in America are wealthy,³⁵ the first detailed study of poor and low-income lesbian, gay, and bisexual people found clear evidence that poverty is at least as common in this population as among heterosexual people and their families.³⁶ U.S. Census Bureau data show that the approximately 4.5 million lesbian and bisexual women in America face a persistent wage gap.³⁷ In addition, a

²⁹ Gates, *Same-sex Couples in Census 2010: Race and Ethnicity*, Figure 2, page 2.

³⁰ *Id.*

³¹ *Id.* The householder is “Person 1” on the Census form and usually is the person in whose name the home is either owned or rented.

³² *Id.* Unlike the 2010 Census, the 2008 General Social Survey did collect data on the sexual orientation of individuals. Gary J. Gates, *Sexual Minorities in the 2008 General Social Survey: Coming Out and Demographic Characteristics*, Figure 12, page 8 (Williams Institute, October 2010), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Sexual-Minorities-2008-GSS-Oct-2010.pdf>. It found that, approximately 70 percent of respondents who identified as heterosexual, lesbian or gay were White. Among heterosexuals, twelve percent were African American and nearly fourteen percent were Latino. Of lesbian and gay respondents, approximately 19 percent were African American and 5 percent were Latino. Respondents who identified as bisexual were much more likely to be a racial or ethnic minority, with just under 50 percent of them White, 23 percent African American, and 18 percent Latino.

³³ Gates, *Same-sex Couples in Census 2010: Race and Ethnicity*, Figure 5, page 4. More than one in five same-sex couples (20.6 percent) are interracial or interethnic compared to 18.3 percent of different-sex unmarried couples and just 9.5 percent of different-sex unmarried couples. *Id.*

³⁴ See generally M.V.L. Badgett, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN 1-19, 21-22, 33-37, 47-50 and especially Table 2 (2001).

³⁵ *Id.* at 1-19.

³⁶ Randy Albelda, M.V. Lee Badgett, Gary J. Gates, Alyssa Schneebaum, *Poverty in the Lesbian, Gay, and Bisexual Community*, pages ii-iii, 2, 4-6 (Williams Institute, March 2009) (“Albelda, *Poverty in the LGB Community*”), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf>.

³⁷ Brad Sears and Lee Badgett, *Beyond Stereotypes: Poverty in the LGBT Community*, TIDES | Momentum, Issue 4: LGBT in America (June 2012) (“Sears & Badgett, *Beyond Stereotypes*”),

greater percentage of them live in poverty (24 percent), compared with only 19 percent of heterosexual women.³⁸ Census data also show that LGBT people of color are more likely to live in poverty.³⁹ For example, African-American same-sex couples are significantly more likely to be poor than their African-American married heterosexual counterparts and are approximately three times more likely to live in poverty than White same-sex couples.⁴⁰

Same-Sex Couples Raising Children

Of the total number of same-sex couples, 17 percent nationally are raising more than 220,000 children.⁴¹ The percentage raising children is higher among those who identify as spouses: 31 percent of the more than 130,000 couples who so identified in Census 2010 are raising more than 80,000 children. Among the more than 500,000 couples who identified as unmarried partners, 14 percent are raising nearly 140,000 children.⁴²

Other national surveys provide more detailed information about the rates at which lesbians and gay men are having and raising children. According to data reported in the 2002 National Survey of Family Growth, one third of self-identified lesbians and one in six self-identified gay men reported that they have had children.⁴³ And data gathered in the 2008 General Social Survey indicate that approximately half of lesbians and bisexual women, and nearly 20 percent of gay and bisexual men report having had a child.⁴⁴

Same-sex couples raising children and their families are even more racially, ethnically and socioeconomically diverse than the same-sex couple population overall. Of members of same-sex couples raising children, 28 percent are non-White and 22 percent are Latino/a.⁴⁵ Data

available at <http://momentum.tides.org/beyond-the-stereotypes-poverty-in-the-lgbt-community/>. See also Albelda, *Poverty in the LGB Community*, pages ii, 2, 4-6.

³⁸ Albelda, *Poverty in the LGB Community*, page ii, 2. Gay and bisexual men live in poverty as well, but the rates are roughly equal (13 percent) to those of heterosexual men (15 percent versus 13 percent). *Id.*

³⁹ *Id.*

⁴⁰ Sears & Badgett, *Beyond Stereotypes*. See also Albelda, *Poverty in the LGB Community*, Table 6, page 9.

⁴¹ *Id.*

⁴² See also Movement Advancement Project, Family Equality Council and Center for American Progress, *All Children Matter: How Legal and Social Inequalities Hurt LGBT Families* (October 2011), available at <http://www.children-matter.org/>.

⁴³ See Gary J. Gates, M.V. Lee Badgett, Kate Chambers, Jennifer Macomber, *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, at page 5 (Williams Institute, March 2007), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-Macomber-Chambers-Final-Adoption-Report-Mar-2007.pdf>. Many thousands more are serving as foster parents.

⁴⁴ Gary J. Gates, *Family formation and raising children among same-sex couples*, FAMILY FOCUS, at page F1 (published by The National Council on Family Relations, Winter 2011) ("*Family formation and raising children*"), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf>.

⁴⁵ Gates, *Same-sex Couples in Census 2010: Race and Ethnicity*, Figure 3, page 3.

from the 2009 American Community Survey show that, among individuals in same-sex couples, African Americans, Latinos and Latinas, and Native Americans/Alaskan Natives are raising children at substantially higher rates than Whites.⁴⁶ Overall, 51 percent of children of same-sex couples are non-White, of which 12 percent are African American, 25 percent are Latino/a, 3 percent Asian and Pacific Islander, and 1 percent and Native Americans/Alaskan Natives.⁴⁷

Moreover, as for childless same-sex couples, U.S. Census Bureau data show that there are significant income gaps along sexual orientation lines for same-sex couples raising children. For example, the median household income for different-sex married couples with children is \$77,000, as compared with a median household income of \$67,000 for same-sex couples with children.⁴⁸ Moreover, not only do same-sex-couple-headed families with children earn less than married heterosexual couples' families with children, more of them live in poverty and receive public assistance. According to the Williams Institute's study of poverty among lesbian, gay, and bisexual people, 21 percent of male same-sex couples raising children and 20 percent of female same-sex couples raising children were living in poverty.⁴⁹ The comparable figure for married heterosexual couples was 9.4 percent.⁵⁰

Economic and Financial Burdens for Couples and Families

Denying legal recognition to same-sex couples and their families has economic consequences for those families. For same-sex couples, denial of marriage (and other family protections) means denial of access to economically valuable benefits under state law and often from private businesses as well. These can include health insurance and other family benefits in employment; better access to and rates for insurance acquired outside the employment context (such as life, auto and home-owners insurance); and preferred treatment under state tax laws (such as property transfer tax exemptions and non-taxability of employer-provided family health

⁴⁶ Gates, *Family formation and raising children*, at page F3. African Americans in same-sex couples are 2.4 times more likely than their White counterparts to be raising children (40 percent versus 16 percent, respectively). Latinos and Latinas in same-sex couples are 1.7 times more likely than Whites to be raising children (28 percent versus 16 percent), and American Indians/Alaska Natives are 1.5 times more likely (24 percent versus 16 percent). This pattern is true for different-sex couples as well, but the differences in parenting rates across race and ethnicity, especially as between Whites and African Americans, are smaller for individuals in heterosexual couples. For heterosexual couples, African Americans are only 1.3 times more likely than Whites to be raising children (51 percent versus 40 percent, respectively). Of different-sex Latino couples, 67 percent are raising children. Among American Indians/Alaska Natives different-sex couples, the figure is 52 percent, and for Asian American and Pacific Islander couples, the figure is 55 percent.

⁴⁷ Analysis of 2010 American Community Survey data by Dr. Gary Gates, The Williams Distinguished Scholar, The Williams Institute at UCLA School of Law.

⁴⁸ Analysis by Dr. Gary Gates, The Williams Distinguished Scholar, The Williams Institute at UCLA School of Law.

⁴⁹ Albelda, *Poverty in the LGB Community*, page 6.

⁵⁰ *Id.* See also Gates, *Family formation and raising children*, at page F3.

insurance). Standing to pursue tort claims for wrongful death or loss of consortium, victim or survivor compensation, or unemployment compensation when one's spouse must relocate all can provide essential financial support following a crisis or during a transition. As between spouses or partners who have formalized their relationship under state law, legal presumptions that certain property is owned jointly, that the parties have mutual duties of support and shared obligations to their children, and that the state's family courts will entertain petitions to enforce obligations upon breakup, all can provide critical protections should the relationship fail, especially if one party is more vulnerable than the other economically.⁵¹

A recent Williams Institute study found that in states tracking dissolutions of same-sex couples the dissolution rate for same-sex couples who had formalized their relationship is similar to, and may be slightly lower than, that of married different-sex couples.⁵² Regardless of whether this slightly lower breakup rate continues over time or in other states, the legal protections that facilitate sharing of financial resources and parental rights and duties upon dissolution are important and serve the same purposes for couples regardless of their sexual orientation.⁵³

Adverse Effects on Mental and Physical Health From Discrimination and Stigma

Research has consistently shown that marriage is associated with positive health effects for heterosexual couples.⁵⁴ Whatever range of factors may explain that association, recent research shows additional factors affecting the mental and physical health of same-sex couples.⁵⁵ In particular, research shows that exclusion of same-sex couples from marriage has

⁵¹ See generally M.V.L. Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 *DRAKE L. REV.* 1081 (2010).

⁵² Badgett, *et al.*, *Patterns of Recognition*, at 18-19.

⁵³ See Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States, A Social Science Perspective*, 61 *AMERICAN PSYCHOLOGIST* 607-621 (Sept. 2006) ("*Social Science Perspective on Legal Recognition*"). See generally Denis Clifford, *et al.*, *A LEGAL GUIDE FOR LESBIAN & GAY COUPLES* (NOLO Press, 16th ed., 2012); Frederick Hertz, *et al.*, *MAKING IT LEGAL: A GUIDE TO SAME-SEX MARRIAGE, DOMESTIC PARTNERSHIPS & CIVIL UNIONS* (NOLO Press, 2nd ed., 2011). See also the ABA Resolution calling for equal treatment of same-sex couples with respect to marriage, as approved on August 10, 2010, available at http://www.abajournal.com/files/RResolution_111.pdf.

⁵⁴ Herek, *Social Science Perspective on Legal Recognition*, at pages 8-9; Holning Lau and Charles Q. Strohm, *The Effects of Legally Recognizing Same-Sex Unions on Health and Well-Being*, 29 *LAW & INEQ.* 107 (Winter 2011).

⁵⁵ Gilbert Herdt and Robert Kertzner, *I Do, but I Can't: The Impact of Marriage Denial on the Mental Health and Sexual Citizenship of Lesbians and Gay Men in the United States*, *SEXUALITY RESEARCH AND SOCIAL POLICY*, Vol. 3, No. 1, pp. 33-49 (March 2006) (Journal of the National Sexuality Research Center, ISSN 1553-6610, available from <http://nsrc.sfsu.edu>). See also Gregory M. Herek, *Sexual Stigma and Sexual Prejudice in The United States: A Conceptual Framework*, in *CONTEMPORARY PERSPECTIVES ON LESBIAN, GAY AND BISEXUAL IDENTITIES: THE 54TH NEBRASKA SYMPOSIUM ON MOTIVATION* 67 (D. A. Hope, ed., 2009).

negative consequences for LGB people, as do antigay campaigns and public debates concerning whether or not same-sex couples should be allowed to marry.⁵⁶ The stress that comes from social exclusion and stigma can lead to adverse health outcomes such as depression, anxiety, substance use disorders, and suicide attempts.⁵⁷ Based on this body of research, the major medical and mental health organizations in the United States have adopted policy positions calling for equal treatment of same-sex couples under state family laws, including marriage laws.⁵⁸

In addition to the research concerning the negative effects of discriminatory laws and policies and the resulting exclusion and social stigma,⁵⁹ studies suggest that lesbian, gay and bisexual people in legal relationships report more positive mental health and greater life

⁵⁶ Herek, *Social Science Perspective on Legal Recognition*, at 9-11; M.V. Lee Badgett, et al., *Written Testimony: S.598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families*, pages 10-12 (Williams Institute, 2011) (“DOMA Testimony”), available at <http://williamsinstitute.law.ucla.edu/research/marriage-and-couples-rights/written-testimony-s-598-the-respect-for-marriage-act-assessing-the-impact-of-doma-on-american-families/>; Sharon S. Rostosky, *JOURNAL OF COUNSELING PSYCHOLOGY*, Vol. 56, No. 1 (Jan. 2009) (exposure to negative conversations and media messages about marriage for same-sex couples creates harmful environment for the LGBT population that appears to affect health and well-being; in national survey of LGB adults, respondents from the 25 states with marriage bans had highest reports of minority stress and general psychological distress, with increased stress correlated to negative campaigning). See also Testimony of Dr. Ilan Meyer, *Perry v. Schwarzenegger*, Vol. 4, pages 806-985 (Jan. 14, 2010), available at <http://www.afer.org/wp-content/uploads/2010/01/Perry-Vol-4-1-14-10.pdf>.

⁵⁷ *DOMA Testimony*, at 10-11; Ilan H. Meyer, *Prejudice, social stress, and mental health in lesbian, gay, and bisexual populations: Conceptual issues and research evidence*, Vol. 129, No. 5 *PSYCHOLOGICAL BULLETIN*, pages 674-97 (2003) (doi:10.1037/0033-2909.129.5.674); Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 *J. OF HEALTH & SOC. BEHAV.* 38 (1995).

⁵⁸ For example, the American Medical Association's policy supporting marriage equality as an important step toward reducing antigay stigma and related health disparities is at <https://ssl3.ama-assn.org/apps/ecommm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fresources%2fdoc%2fPolicyFinder%2fpolicyfiles%2fHnE%2fH-65.973.HTM>. The American Psychiatric Association took a similar position in 2005: “Position Statement on Support of Legal Recognition of Same-Sex Civil Marriage,” which is available at <http://www.psychiatry.org/advocacy--newsroom>. The American Psychological Association's 2011 “Resolution on marriage equality for same-sex couples” is at <http://www.apa.org/about/policy/same-sex.pdf>. And the amicus brief of mental health professional associations to the Ninth Circuit Court of Appeals in *Perry v. Brown*, which surveys the research data and confirms the expert testimony on which J. Walker relied in rejecting antigay arguments in support of Prop 8, is at <http://www.afer.org/wp-content/uploads/2010/10/2010-10-25-Amicus-of-American-Psychological-Association-et-al.-ISO-Plaintiffs.pdf>.

⁵⁹ See, e.g., Mark L. Hatzenbuehler, *Social Factors as Determinants of Mental Health Disparities in LGB Populations: Implications for Public Policy*, 4 *SOCIAL ISSUES & POLICY REV.* 31-62 (2010) (assessing a range of reasons why anti-gay laws and social policies are associated with negative psychological outcomes); Mark L. Hatzenbuehler, et al., *State-level policies and psychiatric morbidity in LGB populations*, 99 *AM. J. PUB. HEALTH* 2275–2281 (2009).

satisfaction.⁶⁰ Among key findings are that same-sex couples gain social support from their families and a greater level of commitment to each other when they can marry.⁶¹ Although other forms of legal recognition for one's same-sex relationship have been shown to have positive health effects, being legally married appears to boost emotional health to a greater extent than being in a legally recognized domestic partnership or civil union.⁶² Moreover, in a study of adolescents and young adults with lesbian, gay, and bisexual parents who were surveyed about how they perceived themselves and their families as being affected by exclusion from marriage, the respondents overwhelmingly said that they would like marriage to be available to same-sex couples, identifying harms both from the failure to have access to legal benefits as well as from denials of symbolic benefits.⁶³

Fiscal Considerations for State and Local Government

For state and local governments, the exclusion of same-sex couples from recognition as a domestic unit can lead to increased public benefit costs. For example, more than a dozen Williams Institute studies consistently have shown that state public benefit costs are likely to be higher when state law does not consider the assets of a same-sex partner when determining eligibility of low-income individuals for means-tested benefit programs.⁶⁴ In contrast, as the many Williams Institute analyses document, the provision of marriage or a broad state-law alternative usually means net positive fiscal effects and increased economic activity in the private sector. These effects generally include: (i) net savings for public benefit programs; (ii) increased fees for marriage or other relationship licenses; (iii) increased sales tax revenues related to celebrations of marriages, civil unions, or partnerships, including related tourism

⁶⁰ Ellen D. B. Riggle, Sharon S. Rostosky and Sharon G. Horne, *Psychological Distress, Well-Being, and Legal Recognition in Same-Sex Couple Relationships*, 24 J. OF FAMILY PSYCHOLOGY 82-86 (2010) (in internet survey of self-identified lesbian, gay and bisexual people, those in legal relationships reported lower levels of stress and internalized homophobia, fewer depressive symptoms, and more meaning in life than those simply in committed relationships).

⁶¹ M. V. Lee Badgett, *Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands*, J. SOCIAL ISSUES, Vol. 67, No. 2, pp. 316-334 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Social-Inclusion-Jul-2011.pdf>; Christopher Ramos, Naomi G. Goldberg, M.V. Lee Badgett, *The Effects of Marriage Equality in Massachusetts: A Survey of the Experiences and Impact of Marriage on Same-Sex Couples* (Williams Institute, May 2009), available at <http://williamsinstitute.law.ucla.edu/research/marriage-and-couples-rights/effects-marriage-equality-masurvey/>.

⁶² Richard G. Wight, et al., *Stress and Mental Health Among Midlife and Older Gay-Identified Men*, 102 AM. J. PUBLIC HEALTH 503 (March 2012).

⁶³ Abbie E. Goldberg, Katherine A. Kavalanka, *Marriage (In)equality: The Perspectives of Adolescents and Emerging Adults With Lesbian, Gay, and Bisexual Parents*, 74 J. OF MARRIAGE & FAMILY 34-52 (Feb. 2012), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Goldberg-Kavalanka-JMF-Feb-2012.pdf>.

⁶⁴ These state "economic impact" reports are available on the Williams Institute website at <http://williamsinstitute.law.ucla.edu/category/research/economic-impact-reports/>.

services; and sometimes (iv) increased state income tax revenues from allowing same-sex couples to file as married.

On the expense side, there may be small increases in public costs related to implementation of a change in the law, and in costs for businesses from the requirement or social pressure to offer equal benefits to their employees with a same-sex partner. These usually have proven to be de minimus, however, and the net fiscal impact on states of allowing same-sex couples to marry is generally positive.⁶⁵

Arguments Against Allowing Same-Sex Couples to Marry

Drawing on twenty years of debate about the public interests implicated by state law on whether same-sex couples should be able to marry, one can distill the following core arguments in defense of an exclusion:

- 1) That the essential features of marriage have been stable across cultures and throughout the generations, and that ending the exclusion of same-sex couples from marriage would be a radical and destabilizing change;
- 2) That a core function of marriage is to bind males and females in distinct, complementary gender roles;
- 3) That marriage, if sufficiently exclusive and privileged, encourages heterosexual couples to commit to each other and remain together, which is important for the children they may produce, especially those who are unplanned, and that heterosexual couples will be less encouraged to marry and raise their children within marriage if same-sex couples also may marry;
- 4) That children are most likely to thrive when raised by their different-gender biological parents, who are motivated by biology to care for them and from whom they learn about both genders and develop their own gender-appropriate identity and behavior.

These claims have been authoritatively rebutted, however, by social science and legal scholarship regarding marriage, as well as social science research regarding child development.

With respect to the first claim, scholars writing on the history of marriage commonly reject the notion that the main rules of marriage have been stable over time and that allowing same-sex couples to marry would be a large, destabilizing change. In reality, there have been

⁶⁵ Delaware has been the lone exception, with the Williams Institute projecting a modest increase in overall state costs because—unlike most states—Delaware did not already offer health insurance for state employees' domestic partners. J.L. Herman, *et al.*, *The Impact of Creating Civil Unions for Same-Sex Couples on Delaware's Budget* (Williams Institute, March 2011) (concluding that the net increase would be "a tiny fraction—on average a mere one hundredth of one percent—of Delaware's annual \$3.3 billion budget over three years"), available at <http://williamsinstitute.law.ucla.edu/research/economic-impact-reports/impact-creating-civil-unions-for-same-sex-couples-on-de-budget/>.

profound changes over time, including adoption of prohibitions against polygamy, elimination of rules against interracial marriage, and the general acceptance of divorce, followed by no-fault divorce.⁶⁶ An institution historically intended to manage ownership of property, confirm paternity for children, and ensure financial support of women and children, has evolved into one that is focused significantly on meeting emotional needs.

The second claim set out above—that the regulation of “complementary” roles of women and men, as determined by gender, is an essential function of marriage—ignores that the institution of marriage has experienced profound changes. Historians note that gender-based distinctions within the laws of marriage, which previously assigned different rights and responsibilities to wives and husbands according to these distinct roles, have largely been eliminated as a legal matter, with the exception of the different-gender requirement for entering the institution.⁶⁷

The third and fourth assertions on behalf of different-sex-only marriage are premised on the claim that children will be disadvantaged in some way if same-sex couples are allowed to marry. The third claim contends that limiting marriage to heterosexual couples will result in more responsible behavior by those couples toward their children. The fourth asserts that genetic ties and gender-role modeling are predominant factors in children’s development and well-being.

Extensive social science research has been devoted to understanding those factors that actually affect the stability of relationships, parenting behaviors of heterosexual couples, and healthy child development, and whether the sexual orientation and gender of parents are important factors.⁶⁸

⁶⁶ See generally Nancy F. Cott, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2002); Stephanie Coontz, *MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE* (2006). See also Testimony of Professor Nancy Cott in *Perry v. Schwarzenegger*, Case No. C 09-2292-VRW, U.S. District Court for the Northern District of California, Vol. 1, pages 182-211 (Jan. 11, 2010), available at <http://www.afer.org/wp-content/uploads/2010/01/Perry-Vol-1-1-11-10.pdf>, and Vol. 2, pages 214-354 (Jan. 12, 2010), available at <http://www.afer.org/wp-content/uploads/2010/01/Perry-Vol-2-1-12-10.pdf>.

⁶⁷ See Testimony of Professor Cott, in *Perry v. Schwarzenegger*, Vol. 2, pages 240-247 (Jan. 12, 2010), available at <http://www.afer.org/wp-content/uploads/2010/01/Perry-Vol-2-1-12-10.pdf>.

⁶⁸ See, e.g., Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment*, Vol. 16, No. 2, *APPLIED DEVELOPMENTAL SCIENCE*, pages 98-111 (2012) (“Lamb, *Mothers, Fathers, Families, and Circumstances*”), available at <http://dx.doi.org/10.1080/10888691.2012.667344>; American Psychological Assoc., *LESBIAN & GAY PARENTING* (2005) (surveying decades of social science research findings), available at <http://www.apa.org/pi/lgbt/resources/parenting-full.pdf>; Ellen C. Perrin & the Committee on Psychosocial Aspects of Child and Family Health, *Technical report: Coparent or second-parent adoption by same-sex parents*, 109 *PEDIATRICS* 341-344 (2002); Judith Stacey & Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter?, 65 *AM. SOC. REV.* 159-183 (2001) (“Stacey & Biblarz, (How) Does the Sexual Orientation of Parents Matter?”).

As to the first claim, no evidence supports the proposition that allowing same-sex couples to marry will affect the quality of parenting by different-sex couples or the decisions by heterosexual couples about whether to marry.⁶⁹

Secondly, children are not harmed by having lesbian or gay parents.⁷⁰ Rather, when children are being raised by two parents, regardless of sex and sexual orientation, what matters to their development is stability and harmony of the relationship between their parents, and whether their parents' relationships with their children are stable and supportive.⁷¹ The sex and sexual orientation of parents are not predictors of positive developmental outcomes for children.⁷²

⁶⁹ See Testimony of Professor Anne Peplau in *Perry v. Schwarzenegger*, Vol. 3, pages 596-597 (Jan. 13, 2010), available at <http://www.afer.org/wp-content/uploads/2010/01/Perry-Vol-3-1-13-10.pdf>.

⁷⁰ See Loes van Gelderen, Henny Bos, Nanette Gartrell, Jo Hermanns, Ellen C. Perrin, *Quality of Life of Adolescents Raised From Birth by Lesbian Mothers*, J. OF DEV. & BEHAVIORAL PEDIATRICS, Vol. 33, No. 1, pages 1-7 (Jan. 2012) ("van Gelderen, *Quality of Life of Adolescents*"), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Loes-Bos-Gartrell-Hermanns-Perrin-Article-Jan-2012.pdf>; Nanette Gartrell and Henny Bos, *US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, PEDIATRICS, Vol. 126, No. 1, (July 2010) ("Gartrell, *Psychological Adjustment of 17-Year-Old Adolescents*"), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gartrell-Bos-NLLFS-Peds-Jun-2010.pdf>; Rachel H. Farr, Stephen L. Forssell, Charlotte J. Patterson, *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, APPLIED DEVELOPMENTAL SCIENCE, Vol. 14, No. 3, pages 164-178 (July 2010), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Patterson-Farr-Forssell-AppliedDevScience-Jul-2010.pdf>; Charlotte Patterson, *Children of Lesbian and Gay Parents: Psychology, Law, and Policy*, Am. Psychologist, 725-736 (Nov. 2009). See also Abbie Goldberg, *LESBIAN AND GAY PARENTS AND THEIR CHILDREN: RESEARCH ON THE FAMILY LIFE CYCLE* (Washington, DC: Amer. Psych. Assoc., 2010) (providing a comprehensive overview of the research on same-sex parenthood, integrating both qualitative and quantitative research from multiple disciplines including psychology, sociology, sexuality/gender studies, and human development).

⁷¹ Lamb, *Mothers, Fathers, Families, and Circumstances*, pages 98-111; Henny M.W. Bos, Frank van Balen, Dymphna C. van den Boom, *Child Adjustment and Parenting in Planned Lesbian-Parent Families*, Vol. 77, No. 1, AM. J. ORTHOPSYCHIATRY, pages 38-48 (2007) (a journal of the American Psychological Association) (finding that child adjustment is not associated with sexual orientation of parents, but is predicted by the parenting style of both parents and by the parents' satisfaction with their adult partner as a coparent); Jennifer L. Wainright, Stephen T. Russell, and Charlotte J. Patterson, *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents With Same-Sex Parents*, Vol. 75, No. 6, CHILD DEVELOPMENT, pages 1886 - 1898 (Nov./Dec. 2004) (finding children's positive adjustment most closely associated with closer relationships with their parents and between their parents, and not with whether the parents were of the same or different sexes). See also Testimony of Dr. Michael Lamb in *Perry v. Schwarzenegger*, Vol. 5, pages 1010-1015 (Jan. 15, 2010), available at <http://www.afer.org/wp-content/uploads/2010/01/Perry-Vol-3-1-13-10.pdf>.

⁷² American Psychological Assoc., *LESBIAN & GAY PARENTING* (2005) (surveying decades of social science research findings), available at <http://www.apa.org/pi/lgbt/resources/parenting-full.pdf>. See also Henny Bos, Naomi Goldberg, Loes Van Gelderen and Nanette Gartrell, *Role Models, Gender Role Traits, and Psychological Adjustment Adolescents of the U.S. National Longitudinal Lesbian Family Study: Male Role Models, Gender Role Traits, and Psychological Adjustment*, *Gender & Society* (published online 1 June 2012), available at <http://gas.sagepub.com/content/early/2012/05/30/0891243212445465>.

In contrast, children who have same-sex parents are harmed by denial of legal protections for their parents and their family, denial of financial benefits which have been limited to those in a recognized legal status, and the social stigma that results from denial of legal equality, including the right to marry.⁷³ At the same time, while discrimination and social stigma that affect lesbian and gay parents can have detrimental effects on children, children learn to cope with that stigma through close relationships with supportive parents.⁷⁴

Lastly, research studies have found differences in child adjustment associated with parental discord and divorce,⁷⁵ family instability,⁷⁶ and limited resources.⁷⁷ While most children

As Professor Lamb explains, “the adjustment of children and adolescents is best accounted for by variations in the quality of the relationships with their parents, the quality of the relationship between the parents or significant adults in the children’s and adolescent’s lives, and the availability of economic and socio-economic resources. These process factors, rather than family structure, affect adjustment in both traditional and nontraditional families. The parents’ sex and sexual orientation, like other characteristics of family structure, do not affect either the capacity to be good parents or their children’s healthy development. There is also no empirical support for the notion that the presence of both male and female role models in the home promotes children’s adjustment or well-being.”). Lamb, *Mothers, Fathers, Families, and Circumstances*, at page 106.

⁷³ Lamb, *Mothers, Fathers, Families, and Circumstances*, at page 106 (“Policies and practices that discriminate against individuals and families on their basis of their gender, marital status, or sexual orientation thus risk harming the individuals and families concerned.”). See also Loes van Gelderen, Nanette Gartrell, Henny M.W. Bos, Floor B. van Rooij and Jo M.A. Hermanns, *Stigmatization Associated With Growing Up in a Lesbian-parented Family: What Do Adolescents Experience and How Do They Deal With It?*, CHILDREN & YOUTH SERVS. REV., Vol. 34, Issue 5, pages 999-1006 (March 2012), available at <http://www.sciencedirect.com/science/article/pii/S0190740912000734>; Nanette K. Gartrell and Henny M. W. Bos, *Adolescents of the USA National Longitudinal Lesbian Family Study: Can Family Characteristics Counteract the Negative Effects of Stigmatization?*, FAMILY PROCESS, Vol. 49, No. 4, 559–572 (Dec. 2010), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Bos-NLLFS-Adolescents-Counteract-Stigmatization-Dec-2010.pdf>; American Psychological Assoc., LESBIAN & GAY PARENTING (2005), available at <http://www.apa.org/pi/lgbt/resources/parenting-full.pdf>.

⁷⁴ van Gelderen, et al., *Stigmatization Associated With Growing Up in a Lesbian-parented Family*, at pages 999-1006; Gartrell, et al., *Adolescents of the USA NLLFS*, at pages 559–572.

⁷⁵ Lamb, *Mothers, Fathers, Families, and Circumstances*, at pages 101-102; W.V. Fabricius, S.L. Braver, P. Diaz, & C.E. Velez, *Custody and parenting time: Links to family relationships and well-being after divorce*, in M.E. Lamb (Ed.), THE ROLE OF THE FATHER IN CHILD DEVELOPMENT, pp. 201–240 (5th ed., Wiley, Hoboken, NJ, 2010); J.R. Johnston, V. Roseby & K. Kuehnle, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE (Springer, New York, 2009); M.K. Pruett, T.Y. Williams, G. Insabella & T.D. Little, *Family and legal indicators of child adjustment to divorce among families with young children*, 17 J. FAMILY PSYCH. 169–180 (2003) (DOI: 10.1037=0893-3200.17.2.169).

⁷⁶ A.J. Cherlin, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND FAMILY IN AMERICA TODAY (Knopf, New York, 2009)(research clearly shows that instability in parents’ lives is harmful to children); A. Booth & P.R. Amato, *Parental predivorce relations and offspring postdivorce well-being*, 63 J. MARRIAGE & FAMILY 197–212 (2001) (DOI: 10.1111=j.1741-3737.2001.00197.x).

⁷⁷ M. Carlson & M.E. Corcoran, *Family structure and children’s behavioral and cognitive outcomes*, 63 J. MARRIAGE & FAMILY 779–792 (2001) (DOI: 10.1111=j.1741-3737.2001.00779.x); T.J. Biblarz & G. Gottainer, *Family structure and children’s success: A comparison of widowed and divorced single-mother families*, 62

raised by just one of their biological parents are well adjusted, maladjustment is approximately twice as common for children whose parents have divorced and/or who are being raised by a single parent.⁷⁸ These studies of course do not predict individual outcomes, but do support proposals to accord same-sex couples the same opportunities as other parents to strengthen their commitment, including through marriage.

A great many studies compare children raised by single parents or divorced parents with children raised by married, heterosexual parents.⁷⁹ Most of these, however, do not test for differences that may be correlated with parental sexual orientation. To examine whether there are such differences, a study would have to assess relative child outcomes by comparing children raised by comparably stable couples with similar resources and minimal other differences, so parental sexual orientation is the tested variable. A paper that did not do so prompted controversy during the summer of 2012 about whether any sound research findings show an association between having had a lesbian or gay parent and adverse outcomes of adult children.⁸⁰ Following widespread public discussion of appropriate methodology for considering this issue, the American Psychological Association reaffirmed its position as follows:

J. MARRIAGE & FAMILY 533–548 (2000) (DOI: 10.1111=j.1741-3737.2000.00533.x); S.S. McLanahan & G. Sandefur, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* (Harvard University Press, Cambridge, MA, 1994) (“McLanahan & Sandefur, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS*”).

⁷⁸ Lamb, *Mothers, Fathers, Families, and Circumstances*, at page 103 (emphasizing that only a minority of these children are maladjusted); P. Amato & C. Dorius, *Fathers, children, and divorce*, in M. E. Lamb (Ed.), *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT*, pages 177–200 (5th ed., Wiley, Hoboken, NJ, 2010).

⁷⁹ Stacey & Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, at pages 159, 162 & n.2 (reviewing 21 empirical studies and faulting those who “extrapolate (inappropriately) from research on single-mother families to portray children of lesbians as more vulnerable to everything from delinquency, substance abuse, violence, and crime, to teen pregnancy, school dropout, suicide, and even poverty,” and explaining that “the extrapolation is ‘inappropriate’ because lesbigay-parent families have never been a comparison group in the family structure literature on which these authors rely.”). See also M.E. Lamb & C. Lewis, *The Role of Parent-Child Relationships in Child Development*, in *DEVELOPMENTAL SCIENCE: AN ADVANCED TEXTBOOK* 429-68 (M.H. Bornstein & M.E. Lamb eds., 5th ed. 2005); S. Golombok, *PARENTING: WHAT REALLY COUNTS?* (2002); P.R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis*, 15 *J. FAM. PSYCHOL.* 355 (2001); McLanahan & Sandefur, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS*.

⁸⁰ See, e.g., Stephanie Pappas, *Study Questioning Same-Sex Parenting Draws Fire; Critics say the research is deeply flawed and does not measure the effect of same-sex parenting at all*, *DISCOVERY NEWS* (June 12, 2012), available at <http://news.discovery.com/human/same-sex-parents-study-120612.html>; Amy Davidson, *A Faulty “Gay Parenting” Study*, *THE NEW YORKER* (June 12, 2012), available at www.newyorker.com/online/blogs/closerread/2012/06/a-faulty-gay-parenting-study.html; Benedict Carey, *Debate on a Study Examining Gay Parents*, *NEW YORK TIMES* (June 11, 2012), available at <http://www.nytimes.com/2012/06/12/health/study-examines-effect-of-having-a-gay-parent.html? r=1>.

These articles critique a paper authored by Mark Regnerus entitled *How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study*. The Regnerus paper is published in Volume 41 of the journal *SOCIAL SCIENCE RESEARCH*, and is available at http://ac.els-cdn.com/S0049089X12000610/1-s2.0-S0049089X12000610-main.pdf? tid=c5849cfc0c189da3cb945c70e13abba4&acdnat=1340175380_0ba2f60f5b9a9b3618c0d987bcccec4f.

“On the basis of a remarkably consistent body of research on lesbian and gay parents and their children, the American Psychological Association (APA) and other health professional and scientific organizations have concluded that there is no scientific evidence that parenting effectiveness is related to parental sexual orientation. That is, lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children. This body of research has shown that the adjustment, development and psychological well-being of children are unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish.”⁸¹

Based on this body of research, the APA has taken formal positions in favor of allowing lesbians and gay men to secure their relationships with their children legally, to serve as adoptive and foster parents, and to marry.⁸² The leading national health, mental health, and child welfare associations have done so as well.⁸³

Following its publication, many scholars in related fields sent a joint letter to the journal expressing concerns about the paper’s methodology and the journal’s review process. The journal then conducted an internal audit that concluded its peer-review process had failed to identify disqualifying problems. Tom Bartlett, *Controversial Gay-Parenting Study Is Severely Flawed, Journal’s Audit Finds*, CHRONICLE OF HIGHER EDUCATION (July 26, 2012) (reporting that the journal’s audit, to be published in its November issue, determined that its “peer-review process [had] failed to identify significant, disqualifying problems” with the Regnerus study), available at <http://chronicle.com/blogs/percolator/controversial-gay-parenting-study-is-severely-flawed-journals-audit-finds/30255>.

⁸¹ APA on Children Raised by Gay and Lesbian Parents, *How do these children fare?* (June 11, 2012), available at <http://www.apa.org/news/press/response/gay-parents.aspx>.

⁸² The American Psychological Association's policy supporting marriage for same-sex couples is at <http://www.apa.org/about/policy/same-sex.pdf>. See also R.U. Paige, *Proceedings of the American Psychological Association, Incorporated*, for the legislative year 2004: Minutes of the annual meeting of the Council of Representatives, 60 AM. PSYCHOLOGIST 436–511 (2005) (doi:10.1037/0003-066X.60.5.436) (recording resolution “that the APA shall take a leadership role in opposing all discrimination based on sexual orientation in matters of adoption, child custody and visitation, foster care, and reproductive health services”), available at <http://www.apa.org/about/policy/parenting.pdf>.

⁸³ For example, see American Academy of Child and Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement* (Oct. 2008, rev. 2009), available at http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement; American Academy of Pediatrics, *Coparent or Second-Parent Adoption by Same-Sex Parents* (Feb. 2002), available at <http://aappolicy.aappublications.org/cgi/content/full/pediatrics>; American Medical Association, *H-60.940 Partner Co-Adoption and D-65.995 Health Disparities Among Gay, Lesbian, Bisexual and Transgender Families*, available at <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-t-advisory-committee/ama-policy-regarding-sexual-orientation.page?>; American Psychiatric Association, *Position Statement on Support of Legal Recognition of Same-Sex Civil Marriage* (approved by Trustees, July 2005, and APA Assembly, May 2005) (“These obstacles occur even though no research has shown that the children raised by lesbians and gay men are less well-adjusted than those reared within heterosexual relationships. ... APA has also supported ... the right of same-sex couples to adopt and co-parent children.”), available at <http://www.psychiatry.org/advocacy--newsroom>; Child Welfare League of America, *Position Statement*

Marriage or an Alternate for Same-Sex Couples?

The findings of state government commissions and a growing body of research support that providing marriage to same-sex couples promotes equality and states' interests in legal and social recognition of families more than providing an alternative status such as domestic partnership or civil union. For example, when the Hawaii Supreme Court gave a green light to a case challenging the exclusion of same-sex couples from marriage in that state,⁸⁴ the Hawaii legislature established a commission to examine how state law treated same-sex couples and to make recommendations for possible legislative changes. The Commission on Sexual Orientation and the Law identified the major protections and benefits provided to married different-sex couples and not to same-sex couples, assessed the arguments for and against providing the same treatment to same-sex couples, and concluded that all protections and benefits should be offered.⁸⁵ It then considered what action to recommend to the legislature, having been presented with a range of options including: to offer limited or comprehensive domestic partnership; to separate religious and civil marriage; to allow same-sex couples to marry; to abolish marriage and substitute a civil registration system for all couples; to abolish marriage and its benefits; to amend the state constitution to approve marriage for different-sex couples only and moot the litigation; to restructure the family law rules in various ways throughout the Hawaii Revised Statutes.⁸⁶

The Commission issued its report in December 1995 recommending that the Legislature end the exclusion of same-sex couples from marriage.⁸⁷ Doing so, the Commission determined, "would necessarily extend all the benefits currently enjoyed by opposite-sex couples."⁸⁸ Allowing access to such benefits through marriage was required, the Commission found, because the Hawaii Constitution "clearly states that all persons in Hawaii are entitled to equal protection under the law, including the right to enjoy their inherent and inalienable rights to life,

on Parenting of Children by Lesbian, Gay, and Bisexual Adults (2007), available at <http://www.cwla.org/programs/culture/glbtqposition.htm>.

⁸⁴ *Baehr v. Lewin*, 74 Haw. 530 (1993).

⁸⁵ Chapter 1, "Major Legal and Economic Benefits Extended to Married Opposite-Gender Couples, But Not to Same-Gender Couples," and Chapter 2, "Substantial Public Policy Reasons to Extend or Not to Extend Such Benefits in Part or in Total to Same-Gender Couples," available at <http://hawaii.gov/lrb/rpts95/sol/soldoc.html>.

⁸⁶ Chapter 3, "Appropriate Action Which May Be Taken By the Legislature To Extend Such Benefits to Same-Sex Couples," available at <http://hawaii.gov/lrb/rpts95/sol/soldoc.html>.

⁸⁷ Chapter 4, "Findings and Recommendations," available at <http://hawaii.gov/lrb/rpts95/sol/soldoc.html>.

⁸⁸ Chapter 3, "Appropriate Action Which May Be Taken By the Legislature To Extend Such Benefits to Same-Sex Couples," available at <http://hawaii.gov/lrb/rpts95/sol/soldoc.html>.

liberty and pursuit of happiness, and be free from illegal discrimination or the denial of basic rights on the basis of gender.”⁸⁹

The Commission recommended against providing such benefits through a domestic partnership system instead of allowing same-sex couples to marry, finding that an alternate system “would not grant equal protection under the law.”⁹⁰ However, because the Commission concluded that allowing same-sex couples to marry “may not be a legislative alternative at this time,”⁹¹ and a partnership system could provide many benefits to couples, the Commission prepared a sample partnership bill for the legislature. The Commission noted, however, that such an approach “would create a new status in addition to marriage, and the results of such an act are uncertain”⁹² and further observed that “it would have to be open to different-gender couples.”⁹³

The New Jersey legislature enacted a civil union law in 2006, after the state Supreme Court held that the New Jersey Constitution required the State to provide same-sex couples equal rights, benefits, and protections under state law, but stopped short of requiring that these protections be provided through marriage. The New Jersey Civil Union Commission held evidentiary hearings about the law’s effectiveness and issued its report two years later.⁹⁴ Summarizing the testimony and other evidence presented to it, the Commission identified a series of inadequacies in the civil union system: (1) the separate legal structure is not justified legally; (2) the word marriage “conveys a universally understood and powerful meaning”; (3) a benefit is withheld from children when they are denied society’s recognition that their parents are married; and (4) there is uncertainty about the recognition of civil unions in other states. Accordingly, the Commission made specific findings about harms inflicted on same-sex couples and their families by being relegated to civil unions rather than marriage, including economic harms; challenges to equal health care access; and psychological harms. The Commission then concluded that allowing same-sex couples to marry would alleviate these harms and have various positive effects.

⁸⁹ *Id.*, Chapter 4, “Findings and Recommendations,” available at <http://hawaii.gov/lrb/rpts95/sol/soldoc.html>.

⁹⁰ *Id.*

⁹¹ *Id.*, Chapter 4, “Findings and Recommendations,” available at <http://hawaii.gov/lrb/rpts95/sol/soldoc.html>.

⁹² *Id.*, Chapter 3.

⁹³ *Id.* See also Chapter 4 (“In the event that same-gender marriage under chapter 572, Hawaii Revised Statutes, is not a legislative alternative, the Commission recommends a universal comprehensive domestic partnership act that confers all the possible benefits and obligations of marriage for two people regardless of gender.”) The reciprocal beneficiary act passed in 1997 was neither comprehensive nor open to all couples equally. Instead, it permits registration by two persons who are ineligible to marry. See 1997 Haw. Sess. Laws 1121 (codified at HAW. REV. STAT. § 572C (1998)).

⁹⁴ N.J. Civ. Union Rev. Comm., *The Legal, Medical, Economic, & Social Consequences of New Jersey’s Civil Union Law 27* (Dec. 10, 2008), available at <http://www.state.nj.us/lps/dcr/downloads/CURC-Final-Report-.pdf>.

Economics professor Lee Badgett, Research Director of the Williams Institute, studied the differences between marriage and registered partnership from the perspective of same-sex couples in one of the few places where both options have been available to same-sex couples for years—the Netherlands. In *WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE*,⁹⁵ she reports that the Dutch couples she interviewed saw registered partnership as a less valuable status because it lacked the rich social and emotional meaning of marriage.⁹⁶ Although registered partnerships had practical value, the term sounded like a business arrangement.⁹⁷ Many also said they perceived being offered registered partnerships while still being denied the right to marry as a marker of second-class citizenship.⁹⁸ Studies of same-sex couples in France, Sweden, and the United States have reported similar feelings.⁹⁹ Based on her study, Professor Badgett concludes:

As a deeply rooted social and cultural institution, marriage is powerful in ways that we might not always appreciate and in ways that we certainly cannot control ... [The act of marrying has] ... profound meaning and value ... for many people other than the two getting married. Far from building a wall around the two people marrying, marriage is an experience that connects the couple to other people in their social circles – whether the couple wants it or not. Ironically, at a time when many demographers take for granted the “deinstitutionalization” of marriage for heterosexual couples, that is, the fading away of the social and legal meanings of marriage that structure how married people live their lives, the experiences of gay and lesbian couples suggest that marriage has a continuing relevance and meaning.¹⁰⁰

In a manner consistent with Professor Badgett’s research findings, a growing number of courts in the United States have concluded that a separate, lesser status, adopted to avoid allowing same-sex couples to participate in marriage, does not provide equal treatment, even when the protections and responsibilities conveyed through that status are the same as those provided to spouses through marriage.¹⁰¹ These judicial proceedings considered evidence

⁹⁵ M.V.L. Badgett, *WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE* (NYU Press, 2009).

⁹⁶ *Id.* at 58–60.

⁹⁷ *Id.* at 57.

⁹⁸ *Id.* at 58–63.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 4.

¹⁰¹ See, e.g., *Perry v. Brown*, 2012 U.S. App. LEXIS 2328 (9th Cir. Feb. 7, 2012) (comparing the rules governing marriage and registered domestic partnership in California), *affirming on different grounds Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal., 2010); *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa Supreme Ct. 2009); *Kerrigan v. Comm’r of Pub. Health*, 289 Conn. 135, 151, 957 A.2d 407, 417 (2008); *In re Marriage Cases*, 43 Cal. 4th 757, 76 Cal. Rptr. 3d 683 (2008); *Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N.E.2d 565 (2004).

similar to that presented to the New Jersey Commission, and the court rulings echo the Commission's key findings. First, creation of a separate status for same-sex couples to avoid allowing them to marry sends a stigmatizing message socially that lesbian, gay and bisexual people are different from heterosexual people and do not deserve the same respect and legal protections. In addition, the less familiar terminology of civil unions, domestic partnerships, and other alternate statuses is confusing. That confusion can lead to denial of rights or benefits as a practical matter, even when the letter of state law promises otherwise. Knowledge on these points continues to increase as more states create new frameworks for same-sex couples and as same-sex couples participate in them for longer periods of time. The evidence to date indicates, however, that these alternate statuses do not provide socially recognized equality or practical security for same-sex couples to the same extent as equal access to marriage.

As noted above, social science research studies support that consigning same-sex couples to a lesser legal and social status creates and perpetuates harmful stigma. Consistently with those studies, data indicate that same-sex couples in fact do avail themselves of the legal equality and preferred social status of marriage at a higher rate than they choose to enter the alternate statuses of domestic partnership and civil union, even when the legal protections and responsibilities are comparable.¹⁰² An average of 30 percent of same-sex couples married in the first year that their state allowed them to marry, while only 18 percent entered into a civil union or broad domestic partnership in the first year their states offered these statuses.¹⁰³

Notwithstanding the preference for marriage demonstrated by the take-up patterns, non-marital statuses remain vitally important in the current legal environment. While eleven state legislatures currently can act to allow same-sex couples to marry,¹⁰⁴ thirty states have adopted constitutional amendments that prevent state legislatures from doing so.¹⁰⁵ Ten of these amendments did not preempt the legislatures' ability to frame an alternative system through which same-sex – and other – couples can access comprehensive protections and obligations.¹⁰⁶ The Model Civil Union Code is prepared for those states.

¹⁰² Badgett, et al., *Patterns of Recognition*, at 1-2, 10-15. Accord Anthony Pignataro, *Looking at Civil Unions Six Months After They Became Legal in Hawaii*, MAUI TIME (June 20, 2012) (reporting local officials' surprise at low uptake rate for civil unions under law effective January 1, 2012), available at <http://www.mauitime.com/Articles-News-i-2012-06-21-76819.113117-Looking-at-Civil-Unions-Six-Months-After-They-Became-Legal-in-Hawaii.html>. Available data to this point indicate that different-sex couples have the same preference and are much more likely to marry when offered multiple options. Badgett, et al., *Patterns of Recognition*, at 16-18.

¹⁰³ *Id.*

¹⁰⁴ Again, these are Delaware, Hawaii, Illinois, Indiana, Minnesota, New Jersey, New Mexico, Pennsylvania, Rhode Island, West Virginia, and Wyoming (see MAP, *Negative Laws*, available at http://www.lgbtmap.org/equality-maps/marriage_relationship_laws, with Maine, Maryland and Washington already having acted legislatively and having ballot votes in November 2012).

¹⁰⁵ MAP, *Negative Laws*, available at http://www.lgbtmap.org/equality-maps/marriage_relationship_laws.

¹⁰⁶ *Id.* California, Nevada and Oregon already have enacted a comprehensive non-marriage system. The other states that can do so are Alaska, Arizona, Colorado, Mississippi, Missouri, Montana, and Tennessee.

CONCLUSION

The freedom to marry has been considered a constitutionally protected, fundamental personal right for many decades.¹⁰⁷ Whether lesbian and gay people should be free to exercise that right continues to be much discussed, with public support having grown to a majority position nationally according to a growing number of respected polls.¹⁰⁸ With the shift in public support, more state legislatures are acting to offer legal protections to same-sex couples and their families. As of summer 2012, nearly fifty percent of same-sex couples in the United States may either marry or enter an alternate status in their home state; these nineteen states and the District of Columbia account for more than forty percent of the U.S. population. But to date, the approaches chosen by these jurisdictions – to end the different-sex-only restriction on marriage,

Again, recall that Hawaii voters retained the legislature's authority to decide marriage eligibility when amending their constitution in 1998, and Minnesota voters will decide in November 2012 whether to limit marriage by constitutional amendment.

¹⁰⁷ See, e.g., *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right" and marriage is an "expression of emotional support and public commitment."); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("The right to marry is of fundamental importance for all individuals."); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.").

¹⁰⁸ According to a Washington Post-Kaiser Family Foundation poll conducted between July 25 and August 5, 2012 and published on August 18, 2012, 53 percent of Americans nationally believe it should be legal for lesbian and gay couples to marry, with 42 percent disagreeing. Washington Post, WP POLITICS, available at http://www.washingtonpost.com/politics/polling/illegal-lesbian-couples-married/2012/08/18/acd4f866-e984-11e1-9739-eef99c5fb285_page.html. The full poll results are available at http://www.washingtonpost.com/wp-srv/politics/polls/postkaiserpoll_20120805.html. A Washington Post/ ABC News poll conducted in March 2012 similarly had found 52 percent support nationally for allowing lesbian and gay couples to marry, with 43 percent opposed. Washington Post, POST POLITICS, available at http://www.washingtonpost.com/wp-srv/politics/polls/postabcpoll_031012.html. See also CNN, POLLINGCENTER—ISSUES (May 20, 2012) (finding support for marriage equality in May 3-6, 2012 national poll at 50%, with 48% against), available at <http://edition.cnn.com/POLITICS/pollingcenter/issues/index.html>; David Lauter, *Poll: Support for gay marriage continues to rise*, LOS ANGELES TIMES (November 3, 2011) (discussing Pew Research Center finding that approval of marriage for same-sex couples has been growing at "an accelerating pace," with support having risen by nine points in the prior two years and the country now divided evenly), available at <http://articles.latimes.com/2011/nov/03/news/la-pn-pew-same-sex-marriage-20111103>; Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUPPOLITICS.COM (May 20, 2011) (Gallup poll found that of Americans surveyed nationally, 53 percent supported legal marriage for same-sex couples, and 45 percent opposed), available at <http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx>.

to provide for civil unions as a new status, or to create a more limited system – have varied considerably in nomenclature, scope, and implementing details from state to state. The year-to-year evolution within some states, and the patchwork landscape nationally, pose challenges for same-sex couples attempting to plan for the future, and additional challenges for those who travel. The multiplicity of systems within states, and the inconsistency among states, also burdens state and local governments and businesses.

Achieving greater simplicity and consistency among state family law systems will yield significant benefits for the families most directly affected, and also for public and private institutions. The Model Marriage Code is designed for this task. It intends to serve as a checklist of issues to be considered, while also providing model bill language and commentary explaining options. In those states where the legislature cannot lift the restriction on marriage for same-sex couples, the Model Civil Union Code can serve the same checklist function, while also providing model bill language and commentary.

MODEL MARRIAGE CODE

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**AN ACT CONCERNING EQUALITY IN MARRIAGE,
EQUAL TREATMENT OF THOSE ENTERING INTO A VALID
MARRIAGE, AND PROTECTION OF RELIGIOUS FREEDOM**

Be it enacted by the Legislature of the State of ABC that Title XXX is amended to include a new

Article 123, which reads as follows:

**ARTICLE 123
ESTABLISHMENT OF EQUALITY IN MARRIAGE AND
PROTECTION OF RELIGIOUS FREEDOM CONCERNING MARRIAGE**

Section 101. Purpose and Intent.

(1) The purpose of this Article is to establish equality in this State's marriage laws and to protect the religious freedom of clergy and religious organizations, associations and societies with regard to the solemnization of civil marriages.

(2) It is the intent of this Legislature to affirm the right of two individuals desiring to marry and who otherwise meet the eligibility requirements of this Article to enjoy the protections, responsibilities, rights, obligations and benefits of marriage and to have the right to have their marriage solemnized in a ceremony in accordance with the provisions of this Article and the laws of this State.

(3) It is the intent of this Legislature that same-sex couples have the same access as others to the protections, responsibilities, rights, obligations and benefits of marriage, including those pertaining to children and other dependent family members; that persons who previously have been married and whose marriages have ended through death, separation or dissolution have the same protections, responsibilities, rights, obligations and benefits of marriage regardless of sex or sexual orientation; and that the children and other dependent family members of same-sex couples receive treatment equal to that of the children of different-sex couples.

(4) Any omission from this Act of changes to other provisions of law shall not be construed as a legislative intent to preserve any legal distinction between same-sex couples and different-sex couples with respect to marriage, to having been married, or to having a good faith belief that one is or was married. The Legislature intends that all provisions of law regarding marriage be equally applied.

Commentary

This Model Code is designed to facilitate consistent statutory development with respect to equality in marriage for same-sex and different-sex couples among the States and the District

of Columbia. The enactment of similar provisions by as many jurisdictions as possible will, among other things, reduce confusion for families and burdens on the private sector and government from inconsistent laws within states and among states based on the sexual orientation of couples, and from state law rules that reference federal law. The purpose and intentions in this section draw from findings made by legislatures that have held hearings and compiled records concerning the needs of same-sex couples and their families, and from decisions of courts that have considered evidence and applied state and federal constitutional guarantees. Note especially the explicit provisions about the children of same-sex couples. This model legislation is designed to allow couples regardless of sexual orientation to safeguard all members of their families within the protections of state law, to secure their legal ties with any children they may have regardless of how the children may have entered the families, and to confirm the rights and obligations of all family members both during and after marriage.

Most state legislatures that have acted to end the exclusion of same-sex couples from marriage also have found it important to prohibit discrimination against married same-sex couples and to address concerns about the religious freedom of those who disagree. An explicit prohibition of discrimination will confirm that protections against sexual orientation discrimination apply to couples as well as to individuals. Provisions addressing discrimination and religious freedom also will reinforce the distinction between civil marriage and its secular rules under state law, and the particular role of clergy as officiants. Due to the role clergy play as state agents when solemnizing marriages, some states have reaffirmed that clergy remain free to determine which marriages they will solemnize. Similarly, some states have exempted religious institutions explicitly from participating in solemnization of marriages to a greater or lesser extent under their public accommodations nondiscrimination laws. Because provisions addressing these issues are commonly included in marriage bills and their scope has varied considerably, we include model language for these purposes in this Model Code.

Section 102. Legislative Declarations and Findings Regarding Discrimination in the Marriage Laws.

The Legislature hereby finds, determines and declares that:

- (1) The freedom to marry is a fundamental human right and a protected liberty under the United States Constitution and the Constitution of this State.
- (2) Marriage is a legal institution recognized by the State to promote stable family relationships and to establish the rights and responsibilities of people in those relationships, their children and other dependent family members.
- (3) The marriage laws of this State currently discriminate against same-sex couples, denying them and their families numerous protections and responsibilities, including the rights created and recognized by this State for people who enter into a valid marriage.
- (4) The State has an interest in encouraging stable family relationships regardless of the sex and sexual orientation of the people in those relationships. The entire community benefits when couples undertake the mutual obligations of marriage.

(5) Despite long-standing discrimination against lesbian, gay, bisexual, and transgender residents of the State, many have formed lasting, committed, and caring relationships with a person of the same sex. These couples share lives together, participate in their communities together, and often raise children and care for dependent family members together. Permitting same-sex couples to marry would further the State's interest in promoting family relationships and in protecting family members during life crises.

(6) The State's exclusion of same-sex couples from marriage serves no legitimate government purpose and is contrary to the public interest.

(7) Equal protection of the laws requires that same-sex couples be permitted to marry on the same terms as heterosexual couples.

(8) The discrimination and harm caused by this exclusion cannot be remedied except by permitting same-sex couples to marry.

(9) For many religious faiths, solemnization of marriage is an important ritual performed by clergy. The State authorizes clergy to act for the State in performing this function as long as the religious rituals do not conflict with the laws of this State. Because religious rules concerning eligibility to marry differ, constitutional guarantees of equal protection and neutrality among religions require that the State not prefer one religious view over others; instead, eligibility rules must be based on legitimate secular purposes.

Commentary

Detailed legislative findings along the lines offered here can be of great assistance to courts, government officials and others who must construe and follow the law, especially when novel issues arise due to unique circumstances same-sex couples often face because the rules governing their family relationships are evolving. The findings proposed here draw from court decisions addressing the applicable constitutional principles, state interests advanced either in defense of laws restricting marriage to different-sex couples or in support of ending that restriction, and the consequences for same-sex couples and their families of the restriction.¹⁰⁹ These findings also draw from marriage bills considered and/or enacted by state legislatures, and from the social science research surveyed in the narrative preceding this Model Code.

The freedom to marry long has been recognized as a fundamental right of all individuals.¹¹⁰ And when considering a law that restricts the freedom of a historically disfavored

¹⁰⁹ See, e.g., *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 957 A.2d 407 (2008); *In re Marriage Cases*, 43 Cal. 4th 757, 76 Cal. Rptr. 3d 683 (2008); *Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N.E.2d 565 (2004); *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). See also *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd on different grounds sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

¹¹⁰ See, e.g., *Turner v. Safley*, 482 U.S. at 95 ("[T]he decision to marry is a fundamental right" and marriage is an "expression of emotional support and public commitment."); *Zablocki v. Redhail*, 434 U.S. at 384 ("The right to marry is of fundamental importance for all individuals."); *Cleveland Board of Education v. LaFleur*, 414 U.S. at 639-40 ("This Court has long recognized that freedom of personal choice in matters of

group to exercise a fundamental right, due process and equal protection principles apply in an interwoven manner.¹¹¹ Regardless of the standard of review, denying persons in same-sex relationships the same freedom to marry as persons in different-sex relationships without adequate governmental reasons violates equal protection.¹¹²

For many people, there is an association between marriage and religion because marriage has played an important role in many religions. This association can cause confusion about the differing roles of the state with respect to civil marriage as opposed to religious marriage, and this confusion can cause controversy about appropriate rules for the civil institution. State legislatures have addressed this in marriage bills, making explicit that a decision by the government to allow same-sex couples to exercise their freedom to marry does not put at risk the religious freedom of those who believe for religious or moral reasons that only different-sex couples should be able to marry.

For many religious faiths, solemnization of marriage is an important ritual performed by clergy. The State authorizes clergy to act for the State in performing this function as long as the religious rituals do not conflict with the laws of this State.¹¹³ Religious rules concerning eligibility to marry differ greatly. Constitutional guarantees of equal protection and neutrality among religions require that the State not prefer one religious view over others; instead, eligibility rules for civil marriage must be based on legitimate secular purposes.¹¹⁴ While the state may set minimum standards for a marriage that will be valid under its laws (such as for age to form a

marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Loving v. Virginia*, 388 U.S. at 12 (the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Griswold v. Connecticut*, 381 U.S. at 486 ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.").

¹¹¹ *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). Compare *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

¹¹² No matter what the standard of review, every law at least must do more than disadvantage or otherwise harm an unpopular group. *Romer v. Evans*, 517 U.S. 620, 634-635 (1996); *United States Department of Agriculture v Moreno*, 413 U.S. 528, 534 (1973). Having considered government-proffered reasons along the lines examined in the prior section (at pages 16-26) for denying marriage to same-sex couples, numerous courts have concluded that couples must be free to marry without regard to sex and sexual orientation. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 957 A.2d 407 (2008); *In re Marriage Cases*, 43 Cal. 4th 757, 76 Cal. Rptr. 3d 683 (2008); *Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N.E.2d 565 (2004); *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). See also *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd on different grounds sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

¹¹³ See, e.g., *Employment Division v. Smith*, 494 U.S. 872 (1990) (holding that criminal prohibitions against use of peyote were enforceable despite desire of Native Americans to consume it during traditional religious ritual).

¹¹⁴ See *Lawrence v. Texas*, 539 U.S. 558 (2003) (state may not use lawmaking power to enforce one preferred moral code absent legitimate, secular governmental purpose); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (state may not use regulatory power to target disfavored religious group or practice).

binding contract and minimum degree of relatedness), government may not interfere with the additional eligibility rules or practices required by a particular faith tradition or sectarian group as long as they do not violate state law.¹¹⁵

Section 103. Definition of Marriage.

(1) "Marriage" means the legal union of two persons.

(2) Any person may enter into a marriage with another person under the laws of this State, regardless of each person's sex and sexual orientation, if both persons are:

(a) Not a party to another marriage, or a relationship that provides substantially the same rights, benefits, and responsibilities as a marriage, entered into in this State or another state or jurisdiction, unless the parties to the marriage will be the same as the parties to such other marriage or relationship;

(b) Except as provided in any other section of this Code, at least [xxx] years of age;

(c) Except as provided in any other section of this Code, not under the supervision or control of a conservator; and

(d) Not prohibited from entering into a marriage pursuant to any other sections of this Code.

(3) Terms relating to the marital relationship or other familial relationships shall be construed consistently with this section for all purposes throughout the law, whether in the context of statute, administrative or court rule, policy, common law, or any other source of law.

Commentary

The use of non-gendered language in Subsection (1) eliminates the requirement that intended spouses must be of different genders, thus opening marriage to same-sex couples. Similarly, Subsection (3) is a general rule of construction that provides, among other things, that

¹¹⁵ See, e.g., *Varnum v. Brien*, 763 N.W.2d at 906 ("religious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views. A religious denomination can still define marriage as a union between a man and a woman, and a marriage ceremony performed by a minister, priest, rabbi, or other person ordained or designated as a leader of the person's religious faith does not lose its meaning as a sacrament or other religious institution"); *In re Marriage Cases*, 43 Cal. 4th at 855, 76 Cal. Rptr. 3d at 763 ("affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; 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"); *Goodridge*, 798 N.E.2d at 965 n.29 ("Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage"). See generally Eric Alan Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, 8 STAN. J.C.R. & C.L. 123 (April 2012).

gendered terms such as husband, wife, widower, and widow should be read in an inclusive, gender-neutral manner wherever they appear in state law. Note that Section 106, below, also requires a gender-neutral reading of gendered terms in state law and addresses that issue more specifically.

Subsection (2)(a) concerns remarriage of an already-married couple. Some states permit issuance of a marriage license only when both applicants are unmarried, which means that married couples may not remarry. This section makes clear that a married couple may remarry each other. It is intended in particular to address the fact that same-sex couples who have married in other jurisdictions may wish to remarry to resolve questions that might arise about whether, due to differences between the marriage laws of the various jurisdictions, they will be recognized as married. Section 108(1), below, addresses that issue for couples who do not wish to remarry by confirming that the state will recognize a same-sex couple's marriage from another jurisdiction if the couple could marry in the state or elsewhere within the United States.

Subsection (2)(b) requires insertion of the minimum age for consenting to marriage under current state law. The Model Code intends that the minimum age be the same regardless of whether the intended spouses are of the same or different sexes.

Section 104. Equal Treatment of All Marriages and All Married Persons.

(1) A marriage that otherwise is or was valid shall be recognized as valid regardless of the sex or sexual orientation of the parties to the marriage.

(2) No government treatment or legal status, effect, protection, benefit, right, responsibility, or obligation relating to marriage, parties to a marriage, or children of a marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been the same sex rather than different sexes, or being or having been different sexes rather than the same sex.

(3) Any protections against discrimination based on marital status shall be applied regardless of the sex and sexual orientation of the person or persons claiming the protection, and such protections shall include protection against discrimination based on a married person having a spouse of the same sex or a married couple being of the same sex, or having a spouse of a different sex or a married couple being of different sexes.

Commentary

This section prohibits discrimination against an individual based on the sex or sexual orientation of his or her intended, current or former spouse, or based on both members of the couple being the same sex or different sexes. This section also means that a marriage of a different-sex couple does not become invalid or subject to challenge because either spouse transitions to the other sex such that they become a same-sex couple. Likewise, a marriage of a different-sex couple in which one spouse had transitioned before the marriage is not invalid or subject to challenge on the ground that the transition is not recognized and the spouses are of the same sex. These provisions would prevent a marriage from being challenged, for example,

by third parties, as in the context of employment benefits, intestacy, or tort claims based on a marriage,¹¹⁶ or by either spouse, as in disputes concerning spousal support or parental rights and responsibilities concerning children of the marriage.¹¹⁷

Section 105. Marriages Prohibited.

No person may marry his or her parent, grandparent, child, grandchild, sibling, parent's sibling, sibling's child, stepparent or stepchild. Any marriage within these degrees is void.

Commentary

This subsection likely will parallel an existing prohibition in state law that is written in gendered terms (e.g., a man may not marry his niece; a woman may not marry her stepson). It is designed to replace the gendered language with gender-neutral phrasing, not to change the state's determinations concerning prohibited degrees of consanguinity.

Section 106. Gender-Specific Terms Construed as Gender-Neutral.

(1) Where necessary to implement the rights and responsibilities relating to the marital relationship or familial relationships, gender-specific terms shall be construed to be gender neutral for all purposes throughout the law, whether in the context of statute, administrative or court rule, policy, common law, or any other source of law.

(2) The parentage presumptions established or relied upon by statute, administrative or court rule, policy, common law, or any other source of law, including the spousal presumption of

¹¹⁶ See, e.g., *Radtke v. Misc. Drivers & Helpers Union Local #638 Health, Welfare, Eye & Dental Fund*, Civil File No. 10-4175 (MJD/JJG), 2012 U.S. Dist. LEXIS 46093, *30-33, 114 Fair Empl. Prac. Cas. (BNA) 1126 (D. Minn., April 2, 2012) (holding that Fund wrongfully had terminated insurance coverage for male employee's wife, who had transitioned before marriage, where marriage was valid under state law and Fund had no grounds to deem it otherwise); *In re Estate of Gardiner*, 273 Kan. 191, 42 P.3d 120, 135 (Kan.), cert. denied, 537 U.S. 825 (2002) (adult son successfully disinherited deceased father's widow, arguing that Kansas would consider father's marriage to a post-transition transgender woman an invalid marriage of two men because her gender transition would not be recognized); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Texas App. 1999) (holding that surviving wife, a post-transition transsexual woman, could not bring medical malpractice claim against doctor for the wrongful death of her husband because their years-ago Kentucky marriage was a void marriage of two men).

¹¹⁷ See, e.g., *M.T. v. J.T.*, 140 N.J. Super. 77, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (affirming validity of marriage of man and post-transition transsexual woman for purpose of spousal support); *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. App. 2004) (ruling that post-operative transsexual man should be considered still legally female and his marriage to a non-transgender woman therefore was void, which voided the presumption that he was a legal parent to the two children born to his wife with medical assistance during the marriage); *Vecchione v. Vecchione*, CA Civ. No. 96D003769 (Cal. Super. Ct., Orange County, filed Nov. 26, 1997) (rejecting wife's claim that marriage was invalid due to alleged fraud by husband concerning his gender transition prior to marriage, and allowing husband standing in custody dispute concerning children of marriage).

parentage, shall be applied without regard to the sex or sexual orientation of those who may be presumed to be parents

Commentary

Section 106(1) is consistent with and reinforces the rule of construction provided by Section 103(3) by providing explicitly that gender-specific terms such as wife and husband are to be construed in a gender neutral manner. Together with Section 106(2), these provisions are intended in particular to eliminate potential confusion about whether the full range of parentage presumptions—including those based on a marriage, and intended marriage, or other conduct by members of a couple with respect to parenting—are to apply similarly to same-sex as well as to different-sex couples. Confusion along these lines has prompted litigation concerning, among other issues, the naming of both intended parents on a child’s birth certificate (in Iowa); parental rights following dissolution of the parents’ relationship (in Vermont and Virginia, and in New York); and child support obligations (in California).¹¹⁸

Section 107. Forms, Documents, and Applications.

The secretary of state shall develop forms, documents and applications related to marriages in this State, which shall conform to this Act.

Section 108. Recognition of Marriage, or Relationship Substantially Similar to Marriage, Licensed and Certified in Another Jurisdiction.

(1) A marriage validly licensed and certified outside this State that could be contracted in this State or another state or tribal authority within the United States is valid in this State.

(2)(a) Except as provided in subsection (b) of this section, a civil union or other relationship that provides substantially the same rights, benefits, and responsibilities as a marriage, between two persons entered into in another state or jurisdiction and recognized as valid by such other state or jurisdiction shall be treated as a valid marriage in this State, provided such marriage or other relationship is not expressly deemed void by the laws of this State.

¹¹⁸ See, e.g., *Debra H v. Janice R.*, 14 N.Y.3d 576, 930 N.E.2d 184, 904 N.Y.S.2d 263 (2010) (finding non-biological mother had standing to claim parental rights based on presumption flowing from the former couple’s Vermont civil union); *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 637 S.E.2d 330 (2006) (finding that although Virginia would not recognize the civil union entered by former lesbian couple, or parental rights existing under Vermont law as a result, Virginia lacked jurisdiction to consider biological mother’s sole custody claims where Vermont court was exercising jurisdiction based on non-biological mother’s parental rights flowing from the civil union); *Gartner v. Iowa Dep’t of Public Health*, Case No. CE 67807, Iowa District Court for Polk County (Jan. 4, 2012) (requiring inclusion of both mothers’ names on infant’s birth certificate based on spousal presumption of parentage), available at http://www.lambdalegal.org/sites/default/files/gartner_ia_20110104_ruling-on-petition-for-judicial-review.pdf.

(b) A civil union or other relationship that provides substantially the same rights, benefits and responsibilities as a marriage, between two persons entered into in another state or jurisdiction and recognized as valid by such other state or jurisdiction shall not be grounds to deny a marriage license, or solemnization and certification of a marriage, provided that the parties seeking to marry are otherwise eligible to marry under the laws of this State, the intended parties to the marriage are the same as the parties to the civil union or domestic partnership, and no petition or application to dissolve the civil union or to terminate the domestic partnership registration has been filed and is pending.

Commentary

Subsection (1) provides that those married in other states or outside the United States who move to or travel within this state will be recognized as validly married as long as the couple is eligible to marry somewhere within the United States. The provision may be especially important for couples who married in countries with laws different from those common in the United States and in circumstances that likely would have precluded marriage in some or all states in the United States. For example, if a same-sex couple married in the Netherlands before they could marry anywhere in the United States, this provision makes clear that their marriage will be considered valid because same-sex couples now may marry under the laws of multiple states. Similarly, if an under-age couple married in another country that permits marriage of individuals younger than is permitted by most states in the United States, this provision will permit the marriage to be treated as valid if both spouses now are of legal age in this state or are old enough to marry somewhere in the United States.

Subsection (2)(a) provides that a civil union or similar relationship status from another jurisdiction will be treated as a valid marriage without requiring that the couple take steps to secure that recognition upon arriving in or when traveling through the state. The provision also means that legal recognition will be assured for state residents who traveled to another jurisdiction to enter the civil union or similar relationship status. Such recognition can prevent problems like those illustrated by *Langan v. St. Vincent's Hospital* and *Rosengarten v. Downes*, in which New York and Connecticut respectively refused legal recognition to out-of-state civil unions their residents had entered in Vermont.¹¹⁹ In *Langan*, the survivor of a same-sex couple was denied standing to bring a wrongful death action in a New York court following the death of his civil union spouse, arguably due to malpractice. In *Rosengarten*, a civil union spouse petitioned a Connecticut court unsuccessfully for an order dissolving the civil union he had entered into in Vermont.

Subsection (2)(b) makes clear that a couple in a non-marriage status may marry if they wish (as also indicated by Section 103(a) and provided in Section 109 below), but only may

¹¹⁹ *Langan v St. Vincent's Hosp. of N.Y.*, 25 AD3d 90, 802 NYS2d 476 [2d Dept 2005], *rev'g* 196 Misc 2d 440, 765 NYS2d 411 [Sup Ct, Nassau County 2003] (finding that survivor of same-sex couple lacked standing for wrongful death action in New York despite couple's Vermont civil union, reversing lower court ruling that civil union "spouse" under Vermont law could be recognized as a "spouse" under New York law); *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170, 184 (Conn. App. Ct.) (denying recognition to Vermont civil union for purposes of dissolving that status in Connecticut), *appeal dismissed as moot*, 261 Conn. 936, 806 A.2d 1066 (Conn. 2002).

marry each other.¹²⁰ If a proceeding has been commenced to end the non-marriage status by either or both members of the couple, then they are not eligible to receive a marriage license while that proceeding is ongoing and their legal status is in question.

Section 109. Status of Civil Unions and Domestic Partnerships.

(1) Notwithstanding any other provisions in statute, two consenting persons who are parties to a valid civil union entered into or a domestic partnership registered in this State prior to the enactment of this Act may apply for, and receive without payment of an additional fee, a marriage license and have such marriage solemnized and certified provided that the parties are otherwise eligible to marry under the laws of this State, the intended parties to the marriage are the same as the parties to the civil union or domestic partnership, and no petition or application to dissolve the civil union or to terminate the domestic partnership registration has been filed and is pending.

(2) Such parties also may apply to the Secretary of State or to the clerk of the town, city or county in which their civil union or domestic partnership is recorded or registered to have their civil union or domestic partnership legally designated and recorded as a marriage, without any additional requirements of payment of marriage licensing or certification fees, or solemnization, provided that such parties' civil union or domestic partnership was not previously dissolved, terminated or annulled. Upon application, the parties shall be issued a marriage certificate, and such marriage certificate shall be recorded in accordance with the laws of the State.

(3) Marriage to each other of two consenting persons who are parties to a valid civil union or a domestic partnership registered in this State shall not dissolve or invalidate their civil union or domestic partnership.

Alternate Language For When Civil Union Will Dissolve Upon Marriage

(3) Any such civil union or domestic partnership shall be dissolved by operation of law by any marriage of the same parties to each other as of the date of the marriage stated in the certificate, and the date of the civil union or of registration of the domestic partnership shall be deemed the date of the marriage.

(4) Parties to a valid civil union entered into or a domestic partnership registered in this State who do not marry as provided in this section shall have the same protections, responsibilities, rights, obligations and benefits as married persons under the laws of this State.

Alternate Language For When Civil Union Protections and Obligations Remain Unchanged and Different From Those of Marriage

(4) Parties to a valid civil union entered into or a domestic partnership registered in this State who do not marry as provided in this section shall continue to have the same

¹²⁰ *Accord Elia-Warnken v. Elia*, 463 Mass. 29, 2012 Mass. LEXIS 678 (2012) (recognizing a Vermont civil union under Massachusetts law and finding invalid a man's later marriage to someone else under Massachusetts law where the prior civil union had not been dissolved before the marriage).

protections, responsibilities, rights, obligations and benefits provided by the laws of this State for that non-marriage status.

Commentary

States with a non-marriage status for same-sex couples may consider several options: (i) offering couples with that status a choice whether to marry or be deemed married if they take no affirmative step, and then eliminating or altering the non-marriage status; (ii) barring additional couples from entering the alternate status but allowing those who already have entered that status to remain in that status without being required to marry or being deemed married; (iii) maintaining and continuing the alternate status to allow couples the choice of which status to enter. If a state legislature decides to eliminate the non-marriage system entirely or to bar new couples from entering that status, bill language will be required to delete or change the relevant provisions of existing law. Model language is not provided for doing so because those provisions will be state-specific.

As of this writing, the more common practice when an alternate status provides the same or similar rights and responsibilities has been to eliminate the alternate status.¹²¹ When the alternate status is more limited, the more common choice has been to retain the alternate status as a vehicle for offering a more limited set of protections.¹²²

States that have eliminated or restricted access to the non-marriage status, and that dissolve a couple's civil union or domestic partnership when they marry, have done so to simplify their family law systems and to provide the same options to same-sex and different-sex couples. But states may choose instead to allow couples both to marry and to retain their civil union or broad domestic partnership; doing so may better protect couples that travel in states that do not respect their marriage but will honor the non-marriage status.

The two options in subsection (4) concern when the legal consequences of the marriage and non-marriage statuses are different. The options provided highlight the policy choice whether the non-marriage status should continue to have different legal consequences or whether the protections and benefits should become the same although the two statuses remain distinct. Note in addition that, if an existing non-marriage status is limited in scope and

¹²¹ See, e.g., Connecticut: Act of Apr. 23, 2009, 2009 Conn. Pub. Acts 78 (phasing out the same-sex-only civil union laws); New Hampshire: Act of June 3, 2009, 2009 N.H. Laws 60 (same); Washington: Substitute Senate Bill 6239, Chapter 3, Laws of 2012 (eliminating domestic partnership registration for non-senior same-sex couples in Washington). The District of Columbia's marriage equality law, in contrast, retained and did not change the eligibility rules of the comprehensive registered domestic partnership system, which remains open to both same-sex and different-sex couples. See Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D.C. Reg. 1833 (Mar. 5, 2010).

¹²² For example, Vermont's marriage equality law did not alter the state's reciprocal beneficiary registration system (Act of Apr. 10, 2009, 2009 Vt. Acts & Resolves 33). Hawaii's civil union law retained the existing reciprocal beneficiary registration system but provided that same-sex couples must terminate their registered status if they wish to form a civil union (Act of Feb. 24, 2011, 2011 Haw. Sess. Laws 1, codified at HAW. REV. STAT. ch. 572B). Neither Maine's marriage initiative nor Maryland's marriage bill addresses the pre-existing domestic partnership systems in those states. See [http://www.ballotpedia.com/wiki/index.php/Maine_Same-Sex_Marriage_Question, Question_1_\(2012\)](http://www.ballotpedia.com/wiki/index.php/Maine_Same-Sex_Marriage_Question, Question_1_(2012)) (providing Maine ballot text); [http://www.ballotpedia.com/wiki/index.php/Maryland_Same-Sex_Marriage_Referendum, Question_6_\(2012\)](http://www.ballotpedia.com/wiki/index.php/Maryland_Same-Sex_Marriage_Referendum, Question_6_(2012)) (providing ballot language of Maryland Senate Bill 241).

will continue, the proposed language in subsection (3) presents a related policy choice whether the broader rights and obligations of marriage shall be deemed to exist from the earlier date of the more limited status.

Finally, if the recommended language of subsection (3) is used, meaning that the marriage of parties in a civil union or registered domestic partnership does not dissolve or invalidate their existing non-marriage status, additional language may be added to the model text to provide that the earlier date of the civil union or domestic partnership registration may be deemed the date of the marriage. Such a provision can clarify that one date should be used—and which date is appropriate—to determine property ownership rights, support obligations, and other matters that accrue during the couple’s legally formalized relationship. The date of the marriage may be chosen instead. Prospective application of marital responsibilities—such as the potential duty to pay spousal support—may be considered appropriate if the domestic partnership law provides for only limited benefits and obligations.

Section 110. No Discrimination in Licensing or Performing Marriages by the State or Civil Employees of the State or any Subdivision.

(1) The State or any person employed to act on behalf of the State shall issue a marriage license to any persons eligible to marry under this chapter. No marriage license may be denied by the State or any person employed to act on behalf of the State to any persons eligible to marry in this State based on the sex or sexual orientation of either or both members of the couple applying for the license.

(2) No civil employee of the State, any subdivision of the State, or other government body authorized to join persons in marriage on behalf of this State shall refuse to perform a marriage based on the sex or sexual orientation of either or both members of the couple seeking to be married.

Commentary

Because public employees are agents of government, federal and state equal protection guarantees require that they not discriminate against members of the public based on sex or sexual orientation when performing the functions of their jobs.¹²³ Assertions that the duty Title VII imposes on employers to accommodate employees’ religious beliefs requires that employees be free to object on religious grounds to providing services to lesbian, gay, or bisexual individuals or those in a same-sex relationship, or otherwise to treating those individuals the same as others generally have not succeeded when the conduct of the religiously objecting employee constitutes discrimination against co-workers, customers, members of the public, or others. Forcing an employer to allow discrimination would be an improper burden on the employer.¹²⁴ To harmonize these provisions with other nondiscrimination provisions in state

¹²³ See, e.g., *Knight v. State of Connecticut Dep’t of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (public employee visiting nurse did not have a religious right to engage in anti-gay proselytizing to home-bound AIDS patient receiving services through public program).

¹²⁴ See, e.g., *Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir. 2004) (Christian supervisor did not have a religious right to harass lesbian subordinate); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir.

law, the text of both subsections may be amended to include race, religion, and other personal characteristics that appear in state statutes addressing discrimination, as long as doing so does not conflict with other provisions of this bill.

Section 111. Refusal to Solemnize a Marriage.

(1) No member of the clergy authorized to join persons in marriage pursuant to the laws of this State or of a tribal authority within this State and acting in a religious capacity shall be required to solemnize any marriage in violation of his or her right to the free exercise of religion guaranteed by the Constitution of this State and the United States Constitution.

(2) There shall be no claim cognizable under the law of this state against any such member of the clergy acting in a religious capacity who refuses to join persons in marriage on the basis of the free exercise of religion, nor shall that individual be subject to any fine or other penalty for such refusal.

Commentary

These provisions should be understood as codifying existing federal and state constitutional guarantees of free exercise of religion. Although a state may require all persons including clergy to refrain from engaging in conduct prohibited by law,¹²⁵ states may not require clergy to perform a religious ceremony.¹²⁶ This language makes clear that clergy will not have to

2004) (employee did not have a religious right to post anti-gay biblical messages intended to distress gay co-workers); *Chalmers v. Tulon*, 101 F.3d 1012, 1021 (4th Cir. 1996) (employer not required to accommodate employee's wish to write harassing letters to co-workers); *Wilson v. U.S. West Communications*, 58 F.3d 1337, 1342 (8th Cir. 1995) ("Title VII does not require an employer to allow an employee to impose . . . religious views on others").

¹²⁵ *Employment Division v. Smith*, 494 U.S. 872, 877-880 (1990) (prohibition against use of peyote could be enforced despite its longstanding and central role in a Native American religious ritual); *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940) (the First Amendment "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.").

¹²⁶ Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, 8 STAN. J.C.R. & C.L. at 144; Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274, 285 (Fall 2010) (explaining that "the state cannot commandeer the clergy in the state's efforts to gain social approval for a particular form of marriage, be it inter-faith, inter-racial, same-sex, or otherwise. In this context, as in many others, the First Amendment diffuses and separates powers, remitting the question of who may be entitled to religious marriage entirely to the judgment of clergy and the faith communities they represent"). See, e.g., *Varnum v. Brien*, 763 N.W.2d at 906; *In re Marriage Cases*, 43 Cal. 4th at 855, 76 Cal. Rptr. 3d at 763 *Goodridge*, 798 N.E.2d at 965 n.29. Cf. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012) (the First Amendment requires a ministerial exception to laws such as the Americans with Disabilities Act if such laws are invoked to interfere with a religious school's control over the selection of its ministers and those who teach its religious doctrine); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (same re Title VII); *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940) (the constitutional protection of free exercise of religion "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. . . . On the other hand, it safeguards the free exercise of the chosen form of religion.").

defend against what would be legally baseless claims or worry about what would be improper penalties. The proposed language is designed to avoid needless concern, let alone disputes, by reaffirming these constitutional protections.

Section 112. Refusal to Provide Goods or to Allow Use of Facilities.

(1) For purposes of this chapter, ‘religious organization’ includes, but is not limited to, churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and ecumenical organizations, mission organizations, faith-based social clubs, associations and societies, and other entities whose principal purpose is the study, practice, or advancement of religion.

(2) A religious organization shall not be required to provide services, goods, accommodations, or facilities for a purpose directly related to the solemnization or celebration of a marriage that is in violation of the organization’s religious beliefs, unless the organization offers such services, goods, accommodations, or facilities to the general public for purchase, rental, or use.

(3) Any refusal to provide services, goods, accommodations, facilities or goods in accordance with this section shall not create any civil claim or cause of action unless such entity offers such services, goods, accommodations, or facilities to the general public for purchase, rental, or use.

Commentary

The second subsection confirms protections for organizations engaged in religious practices, religious education, and religiously oriented social activities. The third subsection confirms that, although religious organizations are to be fully protected with respect to non-commercial activities in furtherance of their religious missions, a religious organization that chooses to engage in activities covered by a state public accommodations law may not discriminate in those activities. This is consistent with long-settled constitutional principles.¹²⁷

State public accommodations laws vary in their coverage. Some exempt religious organizations entirely and some permit such organizations to offer services, goods or use of facilities for a fee to members of their same faith and to refuse others.¹²⁸ When a state’s public

¹²⁷ *Employment Division v. Smith*, 494 U.S. at 877-880; *Cantwell v. Connecticut*, 310 U.S. at 303-304. See also, e.g., *Tony and Susan Alamo Foundation v. Sec’y of Labor*, 471 U.S. 290, 303-05 (1985) (holding that religious nonprofit corporation was required to pay minimum wage); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527 (2004), *cert. denied*, 543 U.S. 816 (2004) (holding that religiously affiliated social services agency had to comply with state law against sex discrimination in employment).

¹²⁸ See, e.g., COLO. REV. STAT. ANN. § 24-34-601(1) (exempting churches, synagogues, mosques, and other places principally used for religious purposes); K.S.A. 44-1009 9(c)(1) and 44-1018 (under Kansas law, religious organizations may limit sale or use of real property to persons of the same religion unless the religion restricts membership by race, color, national origin or ancestry); NEB. REV. STAT. 20-137 (religious organization operating place of public accommodation may prefer members of its own faith); N.H. REV. STAT. ANN. § 354-A:18 (religious organization may limit admission to persons of the same religion in a manner “calculated by such organization to promote the religious principles for which it is established or maintained”). See generally Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious*

accommodations law applies to religious organizations, it usually will require that organizations engaging in commerce with the general public not discriminate against customers or other members of the public notwithstanding any religious objections to the race, religion, or other protected personal traits (such as sex or sexual orientation) of the customers or the customer's spouse or partner.¹²⁹ The proposed model language is designed to protect the core aspects of religious liberty that are secured within these statutory provisions, while being consistent with existing prohibitions of religiously motivated discrimination under state public accommodations nondiscrimination laws.

The model language may need to be harmonized with the state's public accommodations law by revising either the proposed language or the existing law. The intent of the proposed language is to add sex and sexual orientation of the customer and his or her spouse or partner to the existing anti-discrimination framework if these terms are not already included. This suggestion is informed by the history in the United States of religiously motivated discrimination based on sex, marital status and race, and reduction of this discrimination through enforcement of federal and state nondiscrimination laws, and the resulting balance between religious freedom and guarantees against discrimination in the public or commercial arenas.¹³⁰

Exemptions, and the Production of Sexual Orientation Discrimination, 100 CAL. L. REV. 1169, 1189-1192 (2012) ("*NeJaime, Marriage Inequality*").

¹²⁹ See, e.g., Haw. Rev. Stat. 489-2 and 489-3 (prohibiting discrimination based on sexual orientation by public accommodations without exemption for religious organizations); 5 Me. Rev. Stat. sec. 4553 (8) and 5 Me. Rev. Stat. sec. 4592 (1) (same under Maine law); Mass. Gen. Laws, chap. 272, sec. 92A and 98 (same under Massachusetts law); NRS 233.101, 651.050 and 651.070 (same under Nevada law); ORS 659A.400 (same under Oregon law); RCW 49.60.040 (2) (under Washington law, defining place of public accommodation as not including "any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution"). See also CA Civ. Code § 51(a) (prohibiting discrimination by "business establishments" without exemption for religious organizations). But see *Doe v. Cal. Lutheran High Sch. Ass'n*, 170 Cal. App. 4th 828 (2009) (holding that private, religious school operated by religious organization was not a business establishment within the meaning of the law).

¹³⁰ See, e.g., *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (unequal health insurance benefits for female employees based on school's religious tenets held to violate Title VII); *Smith v. Fair Emp. & Housing Comm'n*, 12 Cal. 4th 1143 (1996) (refusal of rental housing because heterosexual couples was unmarried held to violate marital status nondiscrimination law); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 1994 Alas. LEXIS 40 (Alaska Supreme Ct., 1994) (same); *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 944-45 (D.S.C. 1966), *rev'd* 377 F.2d 433 (4th Cir. 1967) (district court had held erroneously that Title VI did not apply to some drive-in restaurants such that non-White guests could be refused based on race and color). See generally William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 664 (2011) (exploring the parallels between the religious objections made by White Christians against the push for equal treatment of African Americans, and the antigay religious arguments made today against equal treatment for gay people, including in marriage); David B. Cruz, Note, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176, 1221 (1994) (exemptions from sexual orientation nondiscrimination laws "would undermine the egalitarian public order that such laws seek to establish, creating precisely the access and dignitary harms that the Supreme Court held to be the legitimate concern of antidiscrimination laws.")

Among states in which the legislature has amended the marriage law to provide access to same-sex couples, the scope and language of religious exemptions has varied.¹³¹ For example, some laws that allow same-sex couples to marry or form a civil union have created new exemptions from applicable public accommodations laws to permit religious or religiously affiliated organizations engaging in activities otherwise covered by the nondiscrimination law to refuse goods, services, or facilities when requested in connection with solemnization or celebration of a marriage.¹³² Some laws also exempt religious organizations when the requested goods, services, or facilities are seen to involve “promotion” of a same-sex couple’s marriage or civil union through religious counseling, programs, retreats, or married-couple housing.¹³³

And some exemptions go further and permit religious organizations to refuse services or, when providing services, to not recognize a couple’s legal status as married or in a civil union.¹³⁴ This approach in particular has the potential to create problems of vagueness and discrimination.¹³⁵ Those at greatest risk of harm include persons who depend for necessary services on religiously affiliated hospitals, nursing homes, and homeless shelters, and to those interacting with religiously affiliated child welfare and other social services agencies. When services provided by such agencies are subject to state professional licensure for protection of those receiving services, or the agencies receive grants of public funds, those forms of public

¹³¹ Compare CONN. GEN. STAT. ANN. § 46b-35a and § 46b-35b; D.C. Code § 46-406(e)(1); N.H. REV. STAT. § 457:37(III) and (IV); N.Y. DOM. REL. LAW § 10-b; VT. STAT. ANN. tit. 9, § 4502(I).

¹³² See, e.g., CONN. GEN. STAT. ANN. § 46b-35a (“a religious organization ... shall not be required to provide services, accommodations, ... goods or privileges to an individual if the request for such services, accommodations, ... goods or privileges is related to the solemnization of a marriage or celebration of a marriage”); N.H. REV. STAT. § 457:37(III) (same); N.Y. DOM. REL. LAW § 10-b (same); VT. STAT. ANN. tit. 9, § 4502(I) (same); R.I. GEN. LAWS § 15-3.1-5 (same for civil union). See discussion in NeJaime, *Marriage Inequality*, at pages 1186-1188.

¹³³ See, e.g., N.H. REV. STAT. § 457:37(IV) (permitting religious organizations to refuse goods, services, or facilities related to the “promotion” of a marriage through religious counseling, retreats, programs, or married-couple housing); D.C. Code § 46-406(e)(1); MD H.B. 438 § 3(a)(2) (Feb. 2012) (same exemption for “promotion” of marriage through social or religious programs unless public funds are received for that program).

¹³⁴ For example, Connecticut’s marriage law provides that religious organizations may provide adoption, foster care or other social services unaffected by the change in the marriage law as long as they do not receive public funds in connection with those services. CONN. GEN. STAT. ANN. § 46b-35b. Rhode Island’s civil union law permits religious organizations—including hospitals, schools, and community centers—to refuse to “treat as valid any civil union.” R.I. GEN. LAWS § 15-3.1-5 (2011).

¹³⁵ NeJaime, *Marriage Inequality*, at pages 1125-1138; Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace*, 5 NW. J.L. & SOC. POL’Y 236, 241 (2010). See also Michael Kent Curtis, *A Unique Religious Exemption From Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173 (Spring 2012); David B. Cruz, Note, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176, 1221 (1994) (exemptions from sexual orientation nondiscrimination laws “undermine the egalitarian public order that such laws seek to establish, creating precisely the access and dignitary harms that the Supreme Court held to be the legitimate concern of antidiscrimination laws.”).

involvement constitute additional reasons not to broaden exemptions from anti-discrimination protections.¹³⁶

Note that the protections for religious organizations provided by these proposed subsections do not extend to individuals engaged in commercial activities who object personally on religious grounds to complying with applicable nondiscrimination laws. Individuals have sought such exemptions in litigation, generally without success.¹³⁷

Section 113. Reliance on Federal Law.

To the extent that provisions of the law of this State adopt, refer to, or rely upon, provisions of federal law in a way that otherwise would cause same-sex spouses to be treated differently than other spouses, same-sex spouses shall be treated by the law of this State as if federal law treated them in the same manner as the law of this State.

Commentary

This provision is important because federal law currently discriminates against same-sex spouses because of the “Defense of Marriage Act” (DOMA), 1 U.S.C. § 7. DOMA is currently being challenged in federal court in multiple cases, and the section that limits federal rights and recognition to different-sex spouses has been held unconstitutional by at least six federal courts, including the First Circuit.¹³⁸ This provision means that, in matters governed by state authority but that draw a substantive rule from federal law, the state should not import the discrimination in federal law for the state law purpose, and instead should treat same-sex spouses the same as different-sex spouses. An example would be in the context of state income tax, where state law commonly refers to federal rules in order to allow for consistency to the extent possible between taxpayers’ federal and state income tax returns. This approach does not and cannot accomplish equal treatment for same-sex couples with respect to federal taxation, however, which means that married same-sex couples cannot benefit from the federal rules permitting

¹³⁶ See, e.g., *Stormans v. Selecky*, 586 F.3d 1109, 1127-1137 (9th Cir. 2009) (explaining that the Free Exercise Clause does not exempt pharmacies from regulation requiring them to fill all prescriptions); *Knight v. State of Connecticut Dep’t of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (public employee visiting nurse did not have a religious right to engage in anti-gay proselytizing to home-bound AIDS patient receiving services through public program); *North Coast Women’s Care Medical Group, Inc. v. Superior Court*, 44 Cal.4th 1145, 81 Cal. Rptr. 3d 708 (2008).

¹³⁷ See, e.g., *Stormans*, 586 F.3d at 1127-1137; *North Coast Women’s Care Medical Group*, 44 Cal.4th at 1145; *Swanner*, 874 P.2d at 274; *Elane Photography, LLC v. Willock*, No. 30,203, 2012 N.M. App. LEXIS 53 (N.M. Ct. App. May 31, 2012).

¹³⁸ See, e.g., *Commonwealth of Mass. v. U.S. Dep’t of Health & Hum. Svcs.*, 2012 U.S. App. LEXIS 10950 (1st Cir. May 31, 2012) (petition to the U.S. Supreme Court pending as of this writing); *Windsor v. United States*, 10 Civ. 8435, 2012 U.S. Dist. LEXIS 79454 (S.D.N.Y. June 6, 2012) (petition for direct review in the U.S. Supreme Court pending as of this writing); *Dragovich v. United States Dep’t of the Treasury*, 2012 U.S. Dist. LEXIS 72745 (N.D. Cal., May 24, 2012); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 988 (N.D. Cal. 2012) (petition for direct review by the U.S. Supreme Court pending as of this writing).

different-sex married couples to file joint income tax returns and enjoy certain preferential treatment with respect to federal income and estate taxation.¹³⁹

Similarly, this state-law rule cannot make same-sex spouses eligible for spousal survivor pensions and other spousal protections within the federal Social Security benefit programs, for spousal benefits provided to veterans of the U.S. military, or for employment benefits offered to federal employees that are limited to federally recognized (that is, different-sex) spouses. Likewise, this provision would not entitle same-sex spouses to the spousal protections afforded within Medicaid, because the limited federal definition of spouse controls in that federal-state program.¹⁴⁰

Section 114. Jurisdiction over Divorce of Non-Resident Couples.

(1) Except as provided in subsection (2) of this section, jurisdiction over divorce or annulment of the marriage of a couple residing outside this State shall be the same as for all other married couples.

(2)(a) An action for divorce or annulment, even if neither party to the marriage is a bona fide resident of this State at the time the action is commenced, shall be maintainable if the following apply:

(i) The marriage was performed in this State; and

(ii) Neither party to the marriage resides in a jurisdiction that will maintain an action for divorce by this couple because of the sex or sexual orientation of the spouses.

(b) There shall exist a rebuttable presumption that a jurisdiction will not maintain an action for divorce if the jurisdiction does not recognize the marriage.

(c) Any action for divorce as provided by this subsection shall be adjudicated in accordance with the laws of this State and shall be initiated in the county where the couple married.

Commentary

Courts in numerous states have held that they lack jurisdiction to dissolve the marriages or civil unions of same-sex couples, despite the validity of those unions in the jurisdictions

¹³⁹ M.V. Lee Badgett, *et al.*, *Written Testimony: S.598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families*, pages 10-12 (Williams Institute, 2011), available at <http://williamsinstitute.law.ucla.edu/research/marriage-and-couples-rights/written-testimony-s-598-the-respect-for-marriage-act-assessing-the-impact-of-doma-on-american-families/>.

¹⁴⁰ The director of the Medicaid programs has advised that states may provide certain protections for same-sex spouses and partners in areas within the discretion of states, although not in the same manner as federal law protects different-sex spouses. Letter from Cindy Mann, Director of Center for Medicaid, CHIP and Survey Certification, to State Medicaid Directors (June 10, 2011), available at <http://www.cms.gov/smdl/downloads/SMD11-006.pdf>. See generally Pizer, *et al.*, *Extending Medicaid Long-Term Care Impoverishment Protections To Same-Sex Couples* (Williams Institute, 2012), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Medicaid-Overview.pdf>.

where they were celebrated, if the forum state does not offer or recognize that legal status.¹⁴¹ Because in-state residency commonly is required for divorce or dissolution jurisdiction, couples who have married or entered an alternative legal status and then moved to a state that will not entertain a dissolution petition, or who traveled out-of-state to marry and then returned to a state that does not recognize the marriage, can find themselves unable to resolve their mutual obligations conclusively and exit that legal status.

The model language offered here is modeled on legislation adopted in California, Delaware, and the District of Columbia. Discussion about making a similar change is underway in other states that permit same-sex couples to marry. In California, the registered domestic partnership law has provided for non-resident dissolution petitions since the state broadened its law's protection in 2003. Although some concerns were expressed at that time that the costs of non-residents' dissolution action might impose a burden on California's family courts, those concerns appear to have been unfounded.

¹⁴¹ See, e.g., *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 2010 Tex. App. LEXIS 7127 (Aug. 31, 2010); *Kern v. Taney*, 11 Pa. D. & C.5th 558, 576 (Ct. Com. Pl. 2010); *Chambers v. Ormiston*, 935 A.2d 956, 958, 967 (R.I. 2007); *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170, 184 (Conn. App. Ct.), *appeal dismissed as moot*, 261 Conn. 936, 806 A.2d 1066 (Conn. 2002).

MODEL CIVIL UNION CODE

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AN ACT CONCERNING CIVIL UNIONS, EQUAL TREATMENT OF THOSE IN A CIVIL UNION OR A VALID MARRIAGE, AND PROTECTION OF RELIGIOUS FREEDOM

Be it enacted by the Legislature of the State of ABC that Title XXX is amended to include a new

Article 123, which reads as follows:

ARTICLE 123 ESTABLISHMENT OF CIVIL UNIONS AND PROTECTION OF RELIGIOUS FREEDOM CONCERNING CIVIL UNIONS

Section 101. Purpose and Intent of Civil Unions

(1) The intent of this Act is to establish and recognize civil unions in the State of X, and to affirm that any and all parties to a civil union shall enjoy all the same protections, benefits, and rights, and shall be subject to all the same responsibilities, duties, and obligations, as married persons under the laws of the State of X. This Act shall be liberally construed and applied to promote these underlying purposes and to provide adequate procedures for the certification and registration of civil unions.

(2) By establishing the status of civil unions in the State of X, it is not the Legislature's intent to revise the definition or eligibility requirements of marriage under the laws of the State of X.

Commentary

This Model Civil Union Code establishes a system through which both same-sex and different-sex couples may form a civil union.¹⁴² The principle motivation state legislatures usually have for adopting such a system is a desire to provide comprehensive state-law protections to same-sex couples when it is not possible to do so by opening marriage to them due to a state constitutional amendment or other reasons. Although different-sex couples usually can access such protections through marriage, including them is consistent with the constitutional principle that all people should be seen as equal before the law and eligibility for

¹⁴² Illinois and Hawaii have taken this approach. See Illinois: Illinois Religious Freedom Protection and Civil Union Act, 2011 Ill. Laws 096-1513 (codified at 750 ILL. COMP. STAT. 75/1 – /90 (2011)); Hawaii: Act of Feb. 24, 2011, 2011 Haw. Sess. Laws 1 (to be codified at HAW. REV. STAT. § 572). The District of Columbia and Nevada did as well with their respective domestic partnership registration laws. See District of Columbia: Domestic Partnership Equality Amendment Act of 2006, 53 D.C. Reg. 3338 (codified in scattered sections of D.C. CODE, D.C. MUN. REGS. (2006)); Nevada: Nevada Domestic Partnership Act, 2011 Nev. Stat. 2183 (codified at NEV. REV. STAT. §§ 122A.010 – 122A.510 (2011)).

state-conferred protections and obligations should not be limited based on sex and sexual orientation. In addition, including different-sex couples may reduce the extent to which civil unions are seen a second-class status to which same-sex couples are consigned while being excluded from marriage. However, some states have established civil unions only for same-sex couples.¹⁴³ Others have established a statewide registry of domestic partnerships with eligibility limited to same-sex couples and those different-sex couples in which at least one partner is at least 62 years of age.¹⁴⁴ While creation of a legal status for adult couples with eligibility limited in these ways is not recommended, language is provided below that may be used in states where either of these approaches is desired. The approach chosen will determine which of the alternate provisions set forth in Sections 102 and 103, below, should be selected.

Section 102. Legislative Declarations and Findings Regarding Civil Unions

The Legislature hereby finds, determines and declares that:

(1) Promoting stable and durable family relationships as well as eliminating obstacles and hardships faced by couples who cannot or wish not to marry in this State is necessary and proper and consistent with the duty of this State to further the security and general welfare of all its citizens.

(2) The State has an interest in encouraging stable family relationships regardless of the sex and sexual orientation of the adult partners and the entire community benefits when adult couples undertake the mutual obligations set forth in this civil union law.

(3) Despite long-standing discrimination against lesbian, gay, bisexual, and transgender residents of the State, many have formed lasting, committed, and caring relationships with persons of the same sex. These couples share lives together, participate in their communities together, and many raise children and care for dependent family members together. Permitting same-sex couples to enter into civil unions would further the State's interest in promoting family relationships and in protecting family members during life crises.

(4) Fundamental fairness requires that same-sex couples be permitted to share on the same terms as different-sex couples in the protections, benefits, and responsibilities set forth by the State for qualified couples who wish to access these protections, benefits, and responsibilities in

¹⁴³ Delaware, New Jersey, and Rhode Island have done so. Delaware: Civil Union and Equality Act of 2011, 78 Del. Laws 22 (2011) (codified at DEL. CODE ANN. tit. 13, §§ 201-217 (2011)); New Jersey: Act of Dec. 21, 2006, 2006 N.J. Laws 975 (codified at N.J. REV. STAT. §§ 37:1-1– 37:1-34 (2007)); Rhode Island: Act of July 2, 2011, 2011 R.I. Pub. Laws 198 (codified at R.I. GEN. LAWS §§ 15-3.1-1 – 15-3.1-11 (2011)). Connecticut and Vermont did so as well, but those laws have been superseded by the marriage equality law. And Oregon took this approach in its domestic partnership registration law. See Oregon Family Fairness Act, 2007 Or. Laws 425 (codified at OR. REV. STAT. §§ 106.010 – 106.990 (2008)).

¹⁴⁴ California and Washington State have taken this approach due to the number of older couples who do not marry out of concern for the potential effects on pensions and other financial supports, and for other reasons. See California Domestic Partner Rights and Responsibilities Act of 2003, 2003 Cal. Stat. 3081 (codified at CAL. FAM. CODE §§ 297 – 299.6 (2004)); Domestic Partnership Law, 2009 Wash. Sess. Laws 3065 (codified at WASH. REV. CODE §§ 26.60.010 – 26.60.901 (2010)).

order better to care for each other and any children or other dependent family members they may have.

(5) The State's inclusion of both same-sex couples and different-sex couples in the protections, benefits, and responsibilities of civil unions serves the State's interest in encouraging stable family relationships regardless of the sex and sexual orientation of adult partners.

Alternate Language For Civil Unions Open Only to Same-Sex Couples

(5) The State's exclusion of same-sex couples from the protections, benefits, and responsibilities offered to other adult couples serves no legitimate government purpose and is contrary to the State's interests in encouraging stable family relationships and reducing discrimination based on sex and sexual orientation.

Additional Language For Civil Unions Open to Different-Sex Senior Couples as well as Same-Sex Couples

(6) The State has an interest in encouraging stable relationships for residents 62 years of age and older, whose caretaking, healthcare, and economic needs may be better met within a committed relationship, and the entire community benefits when couples that include at least one member who is at least 62 years of age undertake the mutual obligations set forth in this civil union law.

Section 103. Definition and Requirements of Civil Union

(1) "Civil union" means the legal union of two individuals, as defined in this Act.

Alternate Language For Same-Sex Civil Unions

(1) "Civil union" means the legal union of two persons of the same sex, as defined in this Act.

Alternate Language For Civil Unions of Same-Sex Couples and Different-Sex Senior Couples

(1) "Civil union" means the legal union of two individuals of the same sex, or of two individuals of different sexes where at least one of the individuals entering into the civil union is at least 62 years of age, as defined in this Act.

(2) "Certificate of civil union" means a document that certifies that the persons named on the certificate have established a civil union in compliance with this chapter.

(3) "Party to a civil union" means a person who has established a civil union pursuant to this chapter.

(4) Any person may enter into a civil union with another person, if such person is:

Alternate Language For Same-Sex Civil Unions

(4) Any person may enter into a civil union with another person of the same sex, if such person is:

Alternate Language For Civil Unions of Same-Sex Couples and Different-Sex Senior Couples

(4) Any person may enter into a civil union with another person of the same sex, or with a person of the same or different sex if at least one of the two persons is at least 62, if such person is:

(a) Not a party to a marriage or other relationship that provides substantially the same rights, benefits and responsibilities as a marriage or civil union, entered into in this state or another state or jurisdiction, unless the parties to the civil union will be the same as the parties to such other marriage or relationship;

(b) At least xxx years of age;

Alternate Language For Civil Unions of Different-Sex Senior Couples

(b) At least xxx years of age and, in the case of individuals of different sexes, except as provided in any other section of this Code, at least 62 years of age or entering into a civil union with a person 62 or older;

(c) Except as provided in any other section of this Code, not under the supervision or control of a conservator; and

(d) Not prohibited from entering into a civil union pursuant to any other sections of this Code.

(5) Terms relating to familial relationships shall be construed consistently with this Chapter for all purposes throughout the law, without reference to specific gender terms, whether in the context of statute, administrative or court rule, policy, common law, or any other source of civil law.

Commentary

Subsection 4(a) is intended to provide that a couple that already is married or in another status with similar rights and obligations may enter a civil union in this State, but may not do so if either or both are in such a relationship with other person that has not been terminated. Given the variation among states in the respect afforded to the legal statuses same-sex couples enter in other states, it can benefit same-sex couples who travel to formalize their relationships under the laws of more than one state and to retain multiple statuses, as long as these legal unions bind the same two persons and the legal requirements of each are not inconsistent.

Subsection 4(b) is intended to provide that the age of consent to form a civil union shall be the same as the age for consenting to marriage.

Section 104. Rights and Responsibilities of Civil Unions

(1) Parties to a civil union lawfully entered into or otherwise recognized pursuant to this chapter shall have all the same protections, benefits, and rights, and shall be subject to the same responsibilities, obligations, and duties under the laws of this State, whether derived from statutes, administrative rules or regulations, court rules, governmental policies, common law, court decisions, or any other provisions or sources of law, including in equity, as are granted to, enjoyed by, or imposed upon married spouses.

(2) Former parties to a civil union lawfully entered into or otherwise recognized pursuant to this chapter shall have the same protections, benefits, and rights, and shall be subject to the same responsibilities, obligations, and duties under the laws of this State, whether derived from statutes, administrative rules or regulations, court rules, governmental policies, common law, court decisions, or any other provisions or sources of law, including in equity, as are granted to, enjoyed by or imposed upon former married spouses.

(3) A surviving party to a civil union lawfully entered into or otherwise recognized pursuant to this chapter, following the death of the other party to the civil union, shall have the same protections, benefits, and rights, and shall be subject to the same responsibilities, obligations and duties under the laws of this State, whether derived from statutes, administrative rules or regulations, court rules, governmental policies, common law, court decisions, or any other provisions or sources of law, including in equity, as are granted to, enjoyed by or imposed upon a widow or widower.

(4) To the extent that provisions of the laws of this State, whether derived from statutes, administrative rules or regulations, court rules, governmental policies, common law, court decisions, or any other provisions or sources of law, including in equity, adopt, refer to, or rely upon in any manner, provisions of United States federal law that would have the effect of parties to a civil union being treated differently than married spouses, parties to a civil union shall be treated in all respects by the laws of this State as if United States federal law recognizes a civil union in the same manner as the laws of this State.

(5) The laws of domestic relations, including annulment, premarital agreements, separation, dissolution, child custody and support, property division and maintenance, and post-relationship spousal support, shall apply to the parties to a civil union.

(6) The parties to a civil union may modify the terms and conditions of their civil union in the same manner and to the same extent as married persons who execute a premarital agreement or other agreement recognized and enforceable under the laws of this State, setting forth particular understandings with respect to their union.

(7) The following list of legal protections, benefits, and responsibilities of spouses shall apply in like manner to the parties to a civil union, but shall not be construed to be an exclusive list of such protections, benefits, and responsibilities:

- a. Laws relating to title, tenure, descent, and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership or transfer, inter vivos or at death, of real or personal property, including but not limited to eligibility to hold real and personal property as tenants by the entirety;
- b. Causes of action related to or dependent upon spousal status, including an action for wrongful death, emotional distress, loss of consortium, or other torts or actions under contracts reciting, related to, or dependent upon, spousal status;
- c. Probate law and procedures, including nonprobate transfer;
- d. Adoption law and procedures;
- e. Laws relating to insurance, health and pension benefits;
- f. Domestic violence protections;
- g. Prohibitions against discrimination based upon marital status;
- h. Victim's compensation benefits, including but not limited to compensation to spouse, children, and relatives of homicide victims;
- i. Workers' compensation benefits, including but not limited to survivors' benefits and payment of back wages;
- j. Laws relating to emergency and nonemergency medical care and treatment, hospital visitation and notification, and any rights guaranteed to a hospital patient or a nursing home resident;
- k. Advance directives for health care and designation as a health care representative;
- l. Family leave benefits;
- m. Public assistance benefits under State law, including, but not limited to: (list of current state benefits accorded to spouses);
- n. Laws relating to taxes imposed by the State or a municipality, including but not limited to, homestead rebate tax allowances, tax deductions based on marital status and exemptions from realty transfer tax based on marital status;
- o. Laws relating to immunity from compelled testimony and the marital communication privilege;
- p. The home ownership rights of a surviving spouse;
- q. The right of a spouse to a surname change without petitioning the court;

- r. Laws relating to the making of, revoking, and objecting to anatomical gifts;
- s. State pay for military service;
- t. Application for absentee ballots;
- u. Legal requirements for assignment of wages;
- v. Laws related to tuition assistance for higher education for surviving spouses or children.

Commentary

Subsection 104(4) is important because federal law currently does not recognize couples in any state-formalized status other than a different-sex marriage – whether parties in a civil union, registered domestic partners, or a same-sex married couple – for the range of federal law purposes.¹⁴⁵ This provision means that, in matters governed by state authority but that draw a substantive rule from federal law, the state should not import the lack of recognition in federal law for the state law purpose, and instead should treat parties in a civil union the same as different-sex spouses. An example would be in the context of state income tax, where state law commonly refers to federal rules in order to allow for consistency to the extent possible between taxpayers' federal and state income tax returns. This approach does not and cannot accomplish equal treatment for civil union couples with respect to federal taxation, however, which means that such couples cannot benefit from the federal rules permitting different-sex married couples to file joint income tax returns and enjoy certain preferential treatment with respect to federal income and estate taxation.¹⁴⁶

Similarly, this state-law rule cannot make parties in a civil union eligible for spousal survivor pensions and other spousal protections within the federal Social Security benefit programs, for spousal benefits provided to veterans of the U.S. military, or for employment

¹⁴⁵ Cf. *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006) (holding that registered domestic partnership is different from marriage and registered partners do not have standing to seek federal benefits by challenging the “Defense of Marriage Act” (DOMA), 1 U.S.C. § 7, which defines “spouse” for federal purposes as a person of the other sex and allows federal recognition only of the marriages of different-sex couples). *But see Dragovich v. United States Dep’t of the Treasury*, 2012 U.S. Dist. LEXIS 72745 (N.D. Cal., May 24, 2012) (holding that state employees in registered domestic partnerships may challenge the denial to them of long-term care benefits based on DOMA, and holding that denial unconstitutional). DOMA is currently being challenged in additional cases, and the section that limits federal recognition to different-sex spouses has been held unconstitutional in at least five federal cases in addition to *Dragovich*, including one decided by the First Circuit. See, e.g., *Commonwealth of Mass. v. U.S. Dep’t of Health & Hum. Svcs.*, 2012 U.S. App. LEXIS 10950 (1st Cir. May 31, 2012); *Windsor v. United States*, 10 Civ. 8435, 2012 U.S. Dist. LEXIS 79454 (S.D.N.Y. June 6, 2012); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 988 (N.D. Cal. 2012) (Ninth Circuit appeal pending as of this writing).

¹⁴⁶ M.V. Lee Badgett, et al., *Written Testimony: S.598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families*, pages 10-12 (Williams Institute, 2011), available at <http://williamsinstitute.law.ucla.edu/research/marriage-and-couples-rights/written-testimony-s-598-the-respect-for-marriage-act-assessing-the-impact-of-doma-on-american-families/>.

benefits offered to federal employees that are limited to federally recognized (that is, different-sex) spouses. Likewise, this provision would not entitle parties in a civil union to the spousal protections afforded within Medicaid because the limited federal definition of spouse controls in that federal-state program.¹⁴⁷

Section 105. Civil Unions Prohibited

No person may enter into a civil union with such person's parent, grandparent, child, grandchild, sibling, parent's sibling, sibling's child, stepparent or stepchild. Any civil union within these degrees is void.

Commentary

This subsection likely will parallel an existing prohibition in the state's marriage law that is written in gendered terms (e.g., a man may not marry his niece; a woman may not marry her stepson). It is designed to recommend gender-neutral language rather than gendered language, not to propose a consanguinity rule for civil unions that may be different from the state's consanguinity rule for marriages.

Section 106. Gender-Specific Terms Construed as Gender-Neutral.

Where necessary to implement the protections, benefits, rights and responsibilities relating to civil unions or familial relationships related to a civil union, gender-specific terms shall be construed to be gender neutral for all purposes throughout the law, whether in the context of statute, administrative or court rule, policy, common law, or any other source of civil law.

Section 107. Forms, Documents, and Applications.

The secretary of state shall develop forms, documents, and applications related to civil unions in this State, which shall conform to this Act.

¹⁴⁷ The director of the Medicaid programs has advised that states may provide certain protections for same-sex spouses and partners in areas within the discretion of states, although not in the same manner as federal law protects different-sex spouses. Letter from Cindy Mann, Director of Center for Medicaid, CHIP and Survey Certification, to State Medicaid Directors (June 10, 2011), *available at* <http://www.cms.gov/smdl/downloads/SMD11-006.pdf>. See generally Pizer, *et al*, *Extending Medicaid Long-Term Care Impoverishment Protections To Same-Sex Couples* (Williams Institute, 2012), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Medicaid-Overview.pdf>.

Section 108. Recognition of Civil Union, or Relationship Substantially Similar to Civil Union, Solemnized and Certified in Another Jurisdiction.

(1) A civil union, lawfully entered into outside this state, that would be valid by the laws of the jurisdiction in which the civil union was contracted, is valid in this state.

(2) A relationship that provides substantially the same protections, benefits, rights and responsibilities as a civil union, between two persons entered into in another state or jurisdiction and recognized as valid by such other state or jurisdiction shall be recognized as a valid civil union in this state, provided such civil union is not expressly prohibited by statute in this state.

Commentary

Subsection (1) parallels the interstate recognition provisions commonly adopted by states to ensure recognition of valid out-of-state marriages in a manner that secures family relationships and facilitates interstate travel. Subsection (2) provides that a similar legal status from another jurisdiction will not be denied recognition due to its different nomenclature despite its similar legal substance. In particular, if state law prohibits recognition of their marriage and their status as spouses as such, the provision permits a married same-sex couple to be treated as if in a civil union, and thus subject to the same obligations and protections under state law as those who are in a civil union or married.

In addition, states with an existing legal status for recognition of same-sex couples or other pairs of individuals may wish to offer couples with that status who would be eligible to form a civil union the opportunity to do so without requiring payment of additional fees, or to transform their existing status into a civil union without requiring either a formal solemnization ceremony or payment of additional fees. The following model provisions may be used to offer these options. These provisions use the language of domestic partnership but may be modified to pertain to any state-level relationship registration system. If this section is included, the sections following should be renumbered accordingly.

Additional Provisions For States Wishing to Enhance an Existing Relationship Recognition Status

Section xxx. Domestic Partnerships Converted to Civil Unions.

(1) Notwithstanding any other provisions in statute, two consenting persons who are parties to a domestic partnership validly registered in this State prior to the enactment of this Act may apply for, and receive without payment of an additional fee, a license to enter into a civil union and have such civil union solemnized and certified provided that the parties are otherwise eligible to enter into a civil union under the laws of this State, the intended parties to the civil union are the same as the parties to the domestic partnership, and no application or petition to terminate or dissolve the parties' domestic partnership has been filed and is pending.

(2) Such parties may also apply to the Secretary of State or to the clerk of the town, city or county in which their domestic partnership is registered or recorded to have their

domestic partnership legally designated and recorded as a civil union, without any additional requirements of payment of licensing or certification fees, or solemnization, provided that no application or petition to terminate or dissolve the parties' domestic partnership has been filed and is pending. Upon application, the parties shall be issued a certificate of civil union, and such civil union certificate shall be recorded in accordance with the laws of the State.

(3) Such civil union shall not affect the validity of the parties' existing registered domestic partnership, and the parties shall continue to have the protections, benefits, rights, responsibilities, and obligations of registered domestic partners, as well as those of civil union partners, under the laws of this State.

Alternate Provision For When the Existing Domestic Partnership Will Dissolve Upon Formation of Civil Union

(3) Any such domestic partnership shall be dissolved by operation of law by any civil union of the same parties to each other, as of the date of the civil union stated in the certificate, and the date of registration of the domestic partnership shall be deemed the date of the civil union.

(4) Parties to a domestic partnership validly registered in this State who do not enter a civil union as provided in this section shall continue to have the protections, benefits, rights, responsibilities, and obligations of registered domestic partners under the laws of this State.

Alternate Provision For States Wishing to Enhance the Rights and Responsibilities of the Existing Relationship Recognition Status

(4) Parties to a domestic partnership validly registered in this State who do not enter a civil union as provided in this section shall have the same protections, benefits, rights, responsibilities, and obligations as parties to a civil union under the laws of this State.

Commentary

States with a domestic partnership or other non-civil union status for same-sex couples may consider several options: (i) offering couples with that status a choice whether to enter a civil union or be deemed to be in a civil union if they take no affirmative step, and then eliminating or altering the prior status; (ii) barring additional couples from entering the prior status but allowing those who already have entered that status to remain in that status without being required to enter a civil union or be deemed in a civil union; (iii) maintaining and continuing the prior status to allow couples the choice of which status to enter. If a state legislature decides to eliminate the non-civil union status entirely or bar new couples from entering that status, bill language will be required to delete or alter the relevant provisions of existing law. Model language is not provided for doing so because those provisions will be state-specific.

In addition, there may be a question whether the protections and responsibilities afforded to those in a registered domestic partnership or other

preexisting status should be enhanced to those provided by the civil union law, or whether, if the protections and responsibilities of the preexisting status are more limited, they should be retained with their more limited scope. It can be helpful for couples to have a choice among multiple options with differing legal consequences because a more limited status may better match their needs. Further, some couples may find it helpful to be in multiple, consistent statuses simultaneously because some states will respect a more limited legal status for same-sex couples and not a more comprehensive one. Alternative language is provided above for these options.

The alternate language for subsection (3) calls for a decision whether the broader rights and obligations of civil union should be deemed to have existed from a couple's earlier domestic partnership registration date. It can reduce confusion for couples and third parties if the law makes clear which date should be used to determine property rights, support obligations, and other rights and duties that may accrue during a couple's legally formalized relationship. Couples who wanted comprehensive legal protections in the past, before the state made them available, are likely to prefer retroactive effect of their civil union status through deeming the date of their partnership registration to be the date of their civil union. But prospective application of marital responsibilities—such as the potential duty to pay spousal support—may be desired by those couples who, in the past, only wanted the limited benefits and obligations of the prior status. The legislature may direct that couples should be able to indicate their choice, for example on the civil union license application form, between retroactive and prospective application of the enhanced protections and obligations.

The two options in subsection (4) also concern when the legal consequences of the civil union and the prior legal status are different. The options provided highlight the policy choice whether the prior status should continue to have more limited legal consequences or whether the protections and obligations should become the same as those of civil union although the two statuses remain distinct. As with subsection (3), if the existing status will continue but with the enhanced rights and obligations of civil union, it will be helpful to indicate whether the broader rights and obligations shall be deemed to exist retroactively based on the earlier date of the more limited status or prospectively from the date of the civil union law.

Section 109. No Discrimination in Issuing Licenses or Performing Solemnizations of Civil Unions by the State or Civil Employees of the State or Any Subdivision.

(1) The State or any person employed to act on behalf of the State with respect to issuance of licenses to enter a civil union shall issue such a license to any persons eligible to enter into a civil union in this State. No license to enter a civil union may be denied by the State or any person employed to act on behalf of the State with respect to issuance of licenses to enter a civil union based on the sex or sexual orientation of either or both members of the couple applying for the license.

(2) No civil employee of the State, any subdivision of the State, or other government body authorized to solemnize a civil union on behalf of the State shall refuse to solemnize a civil union

based on the sex or sexual orientation of either or both members of the couple seeking to form the civil union.

Alternate Language For Same-Sex Civil Unions and For Civil Unions of Same-Sex Couples and Different-Sex Senior Couples

(1) The State or any person employed to act on behalf of the State with respect to issuance of licenses to enter a civil union shall issue such a license to any persons eligible to enter into a civil union in this State.

(2) No civil employee of the State, any subdivision of the State, or other government body authorized to solemnize a civil union on behalf of the State shall refuse to solemnize a civil union if both members of the couple seeking to form the civil union are eligible to form the civil union with each other.

Commentary

Because public employees are agents of government, federal and state equal protection guarantees require that they not discriminate against members of the public based on sex or sexual orientation when performing the functions of their jobs.¹⁴⁸ Assertions that the duty Title VII imposes on employers to accommodate employees' religious beliefs requires that employees be free to object on religious grounds to providing services to members of the public based on their sex or sexual orientation, or otherwise to treating those individuals the same as others generally have not succeeded when the conduct of the religiously objecting employee constitutes discrimination against co-workers, customers, members of the public, or others. Forcing an employer to allow discrimination would be an improper burden on the employer.¹⁴⁹ To harmonize these provisions with other nondiscrimination provisions in state law, the text of both recommended subsections may be amended to specify that discrimination is prohibited based on sex, sexual orientation, race, religion, and other personal characteristics that appear in state nondiscrimination statutes, as long as doing so does not conflict with other provisions of this bill. The alternate subsections omit the references to sex and sexual orientation because the alternate frameworks limit eligibility based on those characteristics.

Section 110. Licenses for Civil Unions.

Licenses for civil unions shall be issued under the same auspices as licenses to marry.

¹⁴⁸ See, e.g., *Knight v. State of Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (public employee visiting nurse did not have a religious right to engage in anti-gay proselytizing to home-bound AIDS patient receiving services through public program).

¹⁴⁹ See, e.g., *Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir. 2004) (Christian supervisor did not have a religious right to harass lesbian subordinate); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (employee did not have a religious right to post anti-gay biblical messages intended to distress gay co-workers); *Chalmers v. Tulon*, 101 F.3d 1012, 1021 (4th Cir. 1996) (employer not required to accommodate employee's wish to write harassing letters to co-workers); *Wilson v. U.S. West Communications*, 58 F.3d 1337, 1342 (8th Cir. 1995) ("Title VII does not require an employer to allow an employee to impose . . . religious views on others").

Section 111. Who May Solemnize a Civil Union.

(1) Any person authorized to perform a marriage in this State is authorized to solemnize a civil union, provided that the parties to be joined in the civil union present a valid license.

(2) The certification form completed by the person solemnizing a civil union shall be filed in the same manner and in the same place as forms required to certify marriages.

Section 112. Refusal to Solemnize a Civil Union.

(1) No member of the clergy authorized to join persons in a civil union pursuant to the laws of this State or of a tribal authority within this State and acting in a religious capacity shall be required to solemnize any civil union in violation of his or her right to the free exercise of religion guaranteed by the Constitution of this State and the United States Constitution.

(2) There shall be no claim cognizable under the laws of this State against any such member of the clergy acting in a religious capacity who refuses to solemnize a civil union on the basis of the free exercise of religion, nor shall that individual be subject to any fine or other penalty for such refusal.

Commentary

These provisions should be understood as codifying existing federal and state constitutional guarantees of free exercise of religion. Although a state may require all persons including clergy to refrain from engaging in conduct prohibited by law,¹⁵⁰ states may not require clergy to perform a religious ceremony.¹⁵¹ This language makes clear that clergy will not have to

¹⁵⁰ *Employment Division v. Smith*, 494 U.S. 872, 877-880 (1990) (prohibition against use of peyote could be enforced despite its longstanding and central role in a Native American religious ritual); *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940) (the First Amendment “embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.”).

¹⁵¹ Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, 8 STAN. J.C.R. & C.L. at 144; Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & Soc. POL’Y 274, 285 (Fall 2010) (explaining that “the state cannot commandeer the clergy in the state’s efforts to gain social approval for a particular form of marriage, be it inter-faith, inter-racial, same-sex, or otherwise. In this context, as in many others, the First Amendment diffuses and separates powers, remitting the question of who may be entitled to religious marriage entirely to the judgment of clergy and the faith communities they represent”). See, e.g., *Varnum v. Brien*, 763 N.W.2d at 906; *In re Marriage Cases*, 43 Cal. 4th at 855, 76 Cal. Rptr. 3d at 763 *Goodridge*, 798 N.E.2d at 965 n.29. Cf. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012) (the First Amendment requires a ministerial exception to laws such as the Americans with Disabilities Act if such laws are invoked to interfere with a religious school’s control over the selection of its ministers and those who teach its religious doctrine); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (same re Title VII); *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940) (the constitutional protection of free exercise of religion

defend against what would be legally baseless claims or worry about what would be improper penalties. The proposed language is designed to avoid needless concern, let alone disputes, by reaffirming these constitutional protections.

Section 113. Refusal to Provide Goods or to Allow Use of Facilities.

(1) For purposes of this chapter, ‘religious organization’ includes, but is not limited to, churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and ecumenical organizations, mission organizations, faith-based social clubs, associations and societies, and other entities whose principal purpose is the study, practice, or advancement of religion.

(2) A religious organization shall not be required to provide services, goods, accommodations, or facilities for a purpose directly related to the solemnization or celebration of a civil union that is in violation of the organization’s religious beliefs, unless the organization offers such services, goods, accommodations, or facilities to the general public for purchase, rental, or use.

(3) Any refusal to provide services, good, accommodations, or facilities in accordance with this section shall not create any civil claim or cause of action unless such organization offers such services, goods, accommodations, or facilities, to the general public for purchase, rental, or use.

Commentary

The second subsection confirms protections for organizations engaged in religious practices, religious education, and religiously oriented social activities. The third subsection confirms that, although religious organizations are to be fully protected with respect to non-commercial activities in furtherance of their religious missions, a religious organization that chooses to engage in activities covered by a state public accommodations law may not discriminate in those activities. This is consistent with long-settled constitutional principles.¹⁵²

State public accommodations laws vary in their coverage. Some exempt religious organizations entirely and some permit such organizations to offer services, goods or use of facilities for a fee to members of their same faith and to refuse others.¹⁵³ When a state’s public

“forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. ... On the other hand, it safeguards the free exercise of the chosen form of religion.”).

¹⁵² *Employment Division v. Smith*, 494 U.S. at 877-880; *Cantwell v. Connecticut*, 310 U.S. at 303-304. See also, e.g., *Tony and Susan Alamo Foundation v. Sec’y of Labor*, 471 U.S. 290, 303-05 (1985) (holding that religious nonprofit corporation was required to pay minimum wage); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527 (2004), *cert. denied*, 543 U.S. 816 (2004) (holding that religiously affiliated social services agency had to comply with state law against sex discrimination in employment).

¹⁵³ See, e.g., COLO. REV. STAT. ANN. § 24-34-601(1) (exempting churches, synagogues, mosques, and other places principally used for religious purposes); K.S.A. 44-1009 9(c)(1) and 44-1018 (under Kansas law, religious organizations may limit sale or use of real property to persons of the same religion unless the religion restricts membership by race, color, national origin or ancestry); NEB. REV. STAT. 20-137 (religious organization operating place of public accommodation may prefer members of its own faith); N.H. REV. STAT. ANN. § 354-A:18 (religious organization may limit admission to persons of the same religion in a

accommodations law applies to religious organizations, it usually will require that organizations engaging in commerce with the general public not discriminate against customers or other members of the public notwithstanding any religious objections to the race, religion, or other protected personal traits (such as sex or sexual orientation) of the customers or the customers' spouse or partner.¹⁵⁴ The proposed model language is designed to protect the core aspects of religious liberty that are secured within these statutory provisions, while being consistent with existing prohibitions of religiously motivated discrimination under state public accommodations nondiscrimination laws.

The model language may need to be harmonized with the state's public accommodations law by revising either the proposed language or the existing law. The intent of the proposed language is to add sex and sexual orientation of the customer and his or her spouse or partner to the existing anti-discrimination framework if these terms are not already included. This suggestion is informed by the history in the United States of religiously motivated discrimination based on sex, marital status and race, and reduction of this discrimination through enforcement of federal and state nondiscrimination laws, and the resulting balance between religious freedom and guarantees against discrimination in the public or commercial arenas.¹⁵⁵

manner "calculated by such organization to promote the religious principles for which it is established or maintained"). See generally Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1189-1192 (2012) ("NeJaime, *Marriage Inequality*").

¹⁵⁴ See, e.g., HAW. REV. STAT. 489-2 and 489-3 (prohibiting discrimination based on sexual orientation by public accommodations without exemption for religious organizations); 5 ME. REV. STAT. sec. 4553 (8) and 5 ME. REV. STAT. sec. 4592 (1) (same under Maine law); MASS. GEN. LAWS, chap. 272, sec. 92A and 98 (same under Massachusetts law); N.R.S. 233.101, 651.050 and 651.070 (same under Nevada law); O.R.S. 659A.400 (same under Oregon law); R.C.W. 49.60.040 (2) (under Washington law, defining place of public accommodation as not including "any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution"). See also CA CIV. CODE § 51(a) (prohibiting discrimination by "business establishments" without exemption for religious organizations). But see *Doe v. Cal. Lutheran High Sch. Ass'n*, 170 Cal. App. 4th 828 (2009) (holding that private, religious school operated by religious organization was not a business establishment within the meaning of the law).

¹⁵⁵ See, e.g., *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (unequal health insurance benefits for female employees based on school's religious tenets held to violate Title VII); *Smith v. Fair Emp. & Housing Comm'n*, 12 Cal. 4th 1143 (1996) (refusal of rental housing because heterosexual couples was unmarried held to violate marital status nondiscrimination law); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 1994 Alas. LEXIS 40 (Alaska Supreme Ct., 1994) (same); *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 944-45 (D.S.C. 1966), *rev'd* 377 F.2d 433 (4th Cir. 1967) (district court had held erroneously that Title VI did not apply to some drive-in restaurants such that non-White guests could be refused based on race and color). See generally William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 664 (2011) (exploring the parallels between the religious objections made by White Christians against the push for equal treatment of African Americans, and the antigay religious arguments made today against equal treatment for gay people, including in marriage); David B. Cruz, Note, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176, 1221 (1994) (exemptions from sexual orientation nondiscrimination laws "would undermine

Among states in which the legislature has amended the marriage law to allow same-sex couples to marry or created civil unions to provide protections through an alternate system, the scope and language of religious exemptions has varied. For example, some laws that allow same-sex couples to marry or form a civil union have created new exemptions from applicable public accommodations laws to permit religious or religiously affiliated organizations engaging in activities otherwise covered by the nondiscrimination law to refuse goods, services, or facilities when requested in connection with solemnization or celebration of a marriage.¹⁵⁶ Some laws also exempt religious organizations when the requested goods, services, or facilities are seen to involve “promotion” of a same-sex couple’s marriage or civil union through religious counseling, programs, retreats, or married-couple housing.¹⁵⁷

And some exemptions go further and permit religious organizations to refuse services or, when providing services, to not recognize a couple’s legal status as married or in a civil union.¹⁵⁸ This approach in particular has the potential to create problems of vagueness and discrimination.¹⁵⁹ Those at greatest risk of harm include persons who depend for necessary

the egalitarian public order that such laws seek to establish, creating precisely the access and dignitary harms that the Supreme Court held to be the legitimate concern of antidiscrimination laws.”)

¹⁵⁶ See, e.g., DEL. CODE ANN. tit. 13, §§ 205(c) (providing that persons authorized to solemnize marriages or civil unions may not be required to solemnize a civil union, with the exception of a clerk of the peace or clerk’s deputy who are prohibited from discriminating); HAW. REV. STAT. ch. 572B-4(c) and 572B-B (providing that persons authorized to perform solemnizations may not be required to solemnize a civil union, and also providing that religious organizations are not required to make their facilities available for solemnizations of civil unions as long as the facilities are used regularly for religious purposes, are restricted to members of the faith, and are not used as a for-profit business, and confirming that the public accommodations law still applies if the facility is used in manner covered by the nondiscrimination statute); 750 ILL. COMP. STAT. 75/15 (stating that the civil union act shall not “interfere with ... the religious practice of any religious body” and that religious bodies are “free to choose whether or not to solemnize or officiate a civil union”); R.I. GEN. LAWS § 15-3.1-5 (a)(1) (religious organizations need not provide goods, services or facilities related to solemnization or celebration of a civil union). See also CONN. GEN. STAT. ANN. § 46b-35a (“a religious organization ... shall not be required to provide services, accommodations, ... goods or privileges to an individual if the request for such services, accommodations, ... goods or privileges is related to the solemnization of a marriage or celebration of a marriage”); N.H. REV. STAT. § 457:37(III) (same); N.Y. DOM. REL. LAW § 10-b (same); VT. STAT. ANN. tit. 9, § 4502(l) (same). See discussion in NeJaime, *Marriage Inequality*, at pages 1186-1188.

¹⁵⁷ See, e.g., N.H. REV. STAT. § 457:37(IV) (permitting religious organizations to refuse goods, services, or facilities related to the “promotion” of a marriage through religious counseling, retreats, programs, or married-couple housing); D.C. Code § 46-406(e)(1); MD H.B. 438 § 3 (Feb. 2012).

¹⁵⁸ For example, Rhode Island’s civil union law permits religious organizations—including hospitals, schools, and community centers—to refuse to “treat as valid any civil union.” R.I. GEN. LAWS § 15-3.1-5 (a)(3). Connecticut’s marriage law provides that religious organizations may provide adoption, foster care or other social services unaffected by the change in the marriage law as long as they do not receive public funds in connection with those services. CONN. GEN. STAT. ANN. § 46b-35b.

¹⁵⁹ NeJaime, *Marriage Inequality*, at pages 1125-1138; Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace*, 5 NW. J.L. & SOC. POL’Y 236, 241 (2010). See also Michael Kent Curtis, *A Unique Religious Exemption From Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those*

services on religiously affiliated hospitals, nursing homes, and homeless shelters, and to those interacting with religiously affiliated child welfare and other social services agencies. When services provided by such agencies are subject to state professional licensure for protection of those receiving services, or the agencies receive grants of public funds, those forms of public involvement constitute additional reasons not to broaden exemptions from anti-discrimination protections.¹⁶⁰

Note that the protections for religious organizations provided by these proposed subsections do not extend to individuals engaged in commercial activities who object personally on religious grounds to complying with applicable nondiscrimination laws. Individuals have sought such exemptions in litigation, generally without success.¹⁶¹

Section 114. Jurisdiction over Dissolution of Non-Resident Civil Union Couples.

(1) Except as provided in subsection (2) of this section, jurisdiction over dissolution or annulment of the civil union of a couple residing outside this State shall be the same as for married couples.

(2)(a) An action for dissolution or annulment of the civil union, even if neither party to the civil union is a bona fide resident of this State at the time the action is commenced, shall be maintainable if the following apply:

(i) The civil union was entered into in this State; and

(ii) Neither party to the civil union resides in a jurisdiction that will maintain an action for dissolution by this couple.

(b) There shall exist a rebuttable presumption that a jurisdiction will not maintain an action for dissolution of the civil union if the jurisdiction does not recognize the civil union.

Who Discriminate Against Married or Marrying Gays in Context, 47 WAKE FOREST L. REV. 173 (Spring 2012); David B. Cruz, Note, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176, 1221 (1994) (exemptions from sexual orientation nondiscrimination laws “undermine the egalitarian public order that such laws seek to establish, creating precisely the access and dignitary harms that the Supreme Court held to be the legitimate concern of antidiscrimination laws.”).

¹⁶⁰ See, e.g., *Stormans v. Selecky*, 586 F.3d 1109, 1127-1137 (9th Cir. 2009) (explaining that the Free Exercise Clause does not exempt pharmacies from regulation requiring them to fill all prescriptions); *Knight v. State of Connecticut Dep’t of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (public employee visiting nurse did not have a religious right to engage in anti-gay proselytizing to home-bound AIDS patient receiving services through public program); *North Coast Women’s Care Medical Group, Inc. v. Superior Court*, 44 Cal.4th 1145, 81 Cal. Rptr. 3d 708 (2008).

¹⁶¹ See, e.g., *Stormans*, 586 F.3d at 1127-1137; *North Coast Women’s Care Medical Group*, 44 Cal.4th at 1145; *Swanner*, 874 P.2d at 274; *Elane Photography, LLC v. Willock*, No. 30,203, 2012 N.M. App. LEXIS 53 (N.M. Ct. App. May 31, 2012).

(c) Any action for dissolution as provided by this subsection shall be adjudicated in accordance with the laws of this State.

Commentary

Courts in numerous states have held that they lack jurisdiction to dissolve civil unions or marriages of same-sex couples, despite the validity of those unions in the jurisdictions where they were licensed and solemnized, if the forum state does not offer or recognize that legal status.¹⁶² Because in-state residency commonly is required for divorce or dissolution jurisdiction, couples who have entered a civil union or married and then moved to a state that will not entertain a dissolution petition, or who traveled out-of-state to enter the civil union or to marry and then returned to a state that does not recognize their union, can find themselves unable to resolve their mutual obligations conclusively and exit that legal status.

The model language offered here is modeled on legislation adopted in California and the District of Columbia for divorce or dissolution of married same-sex couples, and in Delaware for dissolution of a civil union. Discussion about making a similar change is underway in other states. In California, the registered domestic partnership law has provided for non-resident dissolution petitions since the state broadened its law's protection in 2003. Although some concerns were expressed at that time that the costs of non-residents' dissolution actions might impose a burden on California's family courts, those concerns appear to have been unfounded.

¹⁶² See, e.g., *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 2010 Tex. App. LEXIS 7127 (Aug. 31, 2010); *Kern v. Taney*, 11 Pa. D. & C.5th 558, 576 (Ct. Com. Pl. 2010); *Chambers v. Ormiston*, 935 A.2d 956, 958, 967 (R.I. 2007); *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170, 184 (Conn. App. Ct.), *appeal dismissed as moot*, 261 Conn. 936, 806 A.2d 1066 (Conn. 2002).

APPENDIX A: MODEL MARRIAGE CODE

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**AN ACT CONCERNING EQUALITY IN MARRIAGE,
EQUAL TREATMENT OF THOSE ENTERING INTO A VALID
MARRIAGE, AND PROTECTION OF RELIGIOUS FREEDOM**

Be it enacted by the Legislature of the State of ABC that Title XXX is amended to include a new Article 123, which reads as follows:

**ARTICLE 123
ESTABLISHMENT OF EQUALITY IN MARRIAGE AND
PROTECTION OF RELIGIOUS FREEDOM CONCERNING MARRIAGE**

Section 101. Purpose and Intent.

(1) The purpose of this Article is to establish equality in this State's marriage laws and to protect the religious freedom of clergy and religious organizations, associations and societies with regard to the solemnization of civil marriages.

(2) It is the intent of this Legislature to affirm the right of two individuals desiring to marry and who otherwise meet the eligibility requirements of this Article to enjoy the protections, responsibilities, rights, obligations and benefits of marriage and to have the right to have their marriage solemnized in a ceremony in accordance with the provisions of this Article and the laws of this State.

(3) It is the intent of this Legislature that same-sex couples have the same access as others to the protections, responsibilities, rights, obligations and benefits of marriage, including those pertaining to children and other dependent family members; that persons who previously have been married and whose marriages have ended through death, separation or dissolution have the same protections, responsibilities, rights, obligations and benefits of marriage regardless of sex or sexual orientation; and that the children and other dependent family members of same-sex couples receive treatment equal to that of the children of different-sex couples.

(4) Any omission from this Act of changes to other provisions of law shall not be construed as a legislative intent to preserve any legal distinction between same-sex couples and different-sex couples with respect to marriage, to having been married, or to having a good faith belief that one is or was married. The Legislature intends that all provisions of law regarding marriage be equally applied.

Section 102. Legislative Declarations and Findings Regarding Discrimination in the Marriage Laws.

The Legislature hereby finds, determines and declares that:

(1) The freedom to marry is a fundamental human right and a protected liberty under the United States Constitution and the Constitution of this State.

(2) Marriage is a legal institution recognized by the State to promote stable family relationships and to establish the rights and responsibilities of people in those relationships, their children and other dependent family members.

(3) The marriage laws of this State currently discriminate against same-sex couples, denying them and their families numerous protections and responsibilities, including the rights created and recognized by this State for people who enter into a valid marriage.

(4) The State has an interest in encouraging stable family relationships regardless of the sex and sexual orientation of the people in those relationships. The entire community benefits when couples undertake the mutual obligations of marriage.

(5) Despite long-standing discrimination against lesbian, gay, bisexual, and transgender residents of the State, many have formed lasting, committed, and caring relationships with a person of the same sex. These couples share lives together, participate in their communities together, and often raise children and care for dependent family members together. Permitting same-sex couples to marry would further the State's interest in promoting family relationships and in protecting family members during life crises.

(6) The State's exclusion of same-sex couples from marriage serves no legitimate government purpose and is contrary to the public interest.

(7) Equal protection of the laws requires that same-sex couples be permitted to marry on the same terms as heterosexual couples.

(8) The discrimination and harm caused by this exclusion cannot be remedied except by permitting same-sex couples to marry.

(9) For many religious faiths, solemnization of marriage is an important ritual performed by clergy. The State authorizes clergy to act for the State in performing this function as long as the religious rituals do not conflict with the laws of this State. Because religious rules concerning eligibility to marry differ, constitutional guarantees of equal protection and neutrality among religions require that the State not prefer one religious view over others; instead, eligibility rules must be based on legitimate secular purposes.

Section 103. Definition of Marriage.

(1) "Marriage" means the legal union of two persons.

(2) Any person may enter into a marriage with another person under the laws of this State, regardless of each person's sex and sexual orientation, if both persons are:

(a) Not a party to another marriage, or a relationship that provides substantially the same rights, benefits, and responsibilities as a marriage, entered into in this State or another state or jurisdiction, unless the parties to the marriage will be the same as the parties to such other marriage or relationship;

(b) Except as provided in any other section of this Code, at least [xxx] years of age;

(c) Except as provided in any other section of this Code, not under the supervision or control of a conservator; and

(d) Not prohibited from entering into a marriage pursuant to any other sections of this Code.

(3) Terms relating to the marital relationship or other familial relationships shall be construed consistently with this section for all purposes throughout the law, whether in the context of statute, administrative or court rule, policy, common law, or any other source of law.

Section 104. Equal Treatment of All Marriages and All Married Persons.

(1) A marriage that otherwise is or was valid shall be recognized as valid regardless of the sex or sexual orientation of the parties to the marriage.

(2) No government treatment or legal status, effect, protection, benefit, right, responsibility, or obligation relating to marriage, parties to a marriage, or children of a marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been the same sex rather than different sexes, or being or having been different sexes rather than the same sex.

(3) Any protections against discrimination based on marital status shall be applied regardless of the sex and sexual orientation of the person or persons claiming the protection, and such protections shall include protection against discrimination based on a married person having a spouse of the same sex or a married couple being of the same sex, or having a spouse of a different sex or a married couple being of different sexes.

Section 105. Marriages Prohibited.

No person may marry his or her parent, grandparent, child, grandchild, sibling, parent's sibling, sibling's child, stepparent or stepchild. Any marriage within these degrees is void.

Section 106. Gender-Specific Terms Construed as Gender-Neutral.

(1) Where necessary to implement the rights and responsibilities relating to the marital relationship or familial relationships, gender-specific terms shall be construed to be gender neutral for all purposes throughout the law, whether in the context of statute, administrative or court rule, policy, common law, or any other source of law.

(2) The parentage presumptions established or relied upon by statute, administrative or court rule, policy, common law, or any other source of law, including the spousal presumption of parentage, shall be applied without regard to the sex or sexual orientation of those who may be presumed to be parents

Section 107. Forms, Documents, and Applications.

The secretary of state shall develop forms, documents and applications related to marriages in this State, which shall conform to this Act.

Section 108. Recognition of Marriage, or Relationship Substantially Similar to Marriage, Licensed and Certified in Another Jurisdiction.

(1) A marriage validly licensed and certified outside this State that could be contracted in this State or another state or tribal authority within the United States is valid in this State.

(2)(a) Except as provided in subsection (b) of this section, a civil union or other relationship that provides substantially the same rights, benefits, and responsibilities as a marriage, between two persons entered into in another state or jurisdiction and recognized as valid by such other state or jurisdiction shall be treated as a valid marriage in this State, provided such marriage or other relationship is not expressly deemed void by the laws of this State.

(b) A civil union or other relationship that provides substantially the same rights, benefits and responsibilities as a marriage, between two persons entered into in another state or jurisdiction and recognized as valid by such other state or jurisdiction shall not be grounds to deny a marriage license, or solemnization and certification of a marriage, provided that the parties seeking to marry are otherwise eligible to marry under the laws of this State, the intended parties to the marriage are the same as the parties to the civil union or domestic partnership, and no petition or application to dissolve the civil union or to terminate the domestic partnership registration has been filed and is pending.

Section 109. Status of Civil Unions and Domestic Partnerships.

(1) Notwithstanding any other provisions in statute, two consenting persons who are parties to a valid civil union entered into or a domestic partnership registered in this State prior to the enactment of this Act may apply for, and receive without payment of an additional fee, a marriage license and have such marriage solemnized and certified provided that the parties are otherwise eligible to marry under the laws of this State, the intended parties to the marriage are the same as the parties to the civil union or domestic partnership, and no petition or application to dissolve the civil union or to terminate the domestic partnership registration has been filed and is pending.

(2) Such parties also may apply to the Secretary of State or to the clerk of the town, city or county in which their civil union or domestic partnership is recorded or registered to have their civil union or domestic partnership legally designated and recorded as a marriage, without any additional requirements of payment of marriage licensing or certification fees, or solemnization, provided that such parties' civil union or domestic partnership was not previously dissolved, terminated or annulled. Upon application, the parties shall be issued a marriage certificate, and such marriage certificate shall be recorded in accordance with the laws of the State.

(3) Marriage to each other of two consenting persons who are parties to a valid civil union or a domestic partnership registered in this State shall not dissolve or invalidate their civil union or domestic partnership.

Alternate Language For When Civil Union Will Dissolve Upon Marriage

(3) Any such civil union or domestic partnership shall be dissolved by operation of law by any marriage of the same parties to each other as of the date of the marriage stated

in the certificate, and the date of the civil union or of registration of the domestic partnership shall be deemed the date of the marriage.

(4) Parties to a valid civil union entered into or a domestic partnership registered in this State who do not marry as provided in this section shall have the same protections, responsibilities, rights, obligations and benefits as married persons under the laws of this State.

Alternate Language For When Civil Union Protections and Obligations Remain Unchanged and Different From Those of Marriage

(4) Parties to a valid civil union entered into or a domestic partnership registered in this State who do not marry as provided in this section shall continue to have the same protections, responsibilities, rights, obligations and benefits provided by the laws of this State for that non-marriage status.

Section 110. No Discrimination in Licensing or Performing Marriages by the State or Civil Employees of the State or any Subdivision.

(1) The State or any person employed to act on behalf of the State shall issue a marriage license to any persons eligible to marry under this chapter. No marriage license may be denied by the State or any person employed to act on behalf of the State to any persons eligible to marry in this State based on the sex or sexual orientation of either or both members of the couple applying for the license.

(2) No civil employee of the State, any subdivision of the State, or other government body authorized to join persons in marriage on behalf of this State shall refuse to perform a marriage based on the sex or sexual orientation of either or both members of the couple seeking to be married.

Section 111. Refusal to Solemnize a Marriage.

(1) No member of the clergy authorized to join persons in marriage pursuant to the laws of this State or of a tribal authority within this State and acting in a religious capacity shall be required to solemnize any marriage in violation of his or her right to the free exercise of religion guaranteed by the Constitution of this State and the United States Constitution.

(2) There shall be no claim cognizable under the law of this state against any such member of the clergy acting in a religious capacity who refuses to join persons in marriage on the basis of the free exercise of religion, nor shall that individual be subject to any fine or other penalty for such refusal.

Section 112. Refusal to Provide Goods or to Allow Use of Facilities.

(1) For purposes of this chapter, 'religious organization' includes, but is not limited to, churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and ecumenical organizations, mission organizations, faith-based social clubs, associations and

societies, and other entities whose principal purpose is the study, practice, or advancement of religion.

(2) A religious organization shall not be required to provide services, goods, accommodations, or facilities for a purpose directly related to the solemnization or celebration of a marriage that is in violation of the organization's religious beliefs, unless the organization offers such services, goods, accommodations, or facilities to the general public for purchase, rental, or use.

(3) Any refusal to provide services, goods, accommodations, facilities or goods in accordance with this section shall not create any civil claim or cause of action unless such entity offers such services, goods, accommodations, or facilities to the general public for purchase, rental, or use.

Section 113. Reliance on Federal Law.

To the extent that provisions of the law of this State adopt, refer to, or rely upon, provisions of federal law in a way that otherwise would cause same-sex spouses to be treated differently than other spouses, same-sex spouses shall be treated by the law of this State as if federal law treated them in the same manner as the law of this State.

Section 114. Jurisdiction over Divorce of Non-Resident Couples.

(1) Except as provided in subsection (2) of this section, jurisdiction over divorce or annulment of the marriage of a couple residing outside this State shall be the same as for all other married couples.

(2)(a) An action for divorce or annulment, even if neither party to the marriage is a bona fide resident of this State at the time the action is commenced, shall be maintainable if the following apply:

(i) The marriage was performed in this State; and

(ii) Neither party to the marriage resides in a jurisdiction that will maintain an action for divorce by this couple because of the sex or sexual orientation of the spouses.

(b) There shall exist a rebuttable presumption that a jurisdiction will not maintain an action for divorce if the jurisdiction does not recognize the marriage.

(c) Any action for divorce as provided by this subsection shall be adjudicated in accordance with the laws of this State and shall be initiated in the county where the couple married.

APPENDIX B: MODEL CIVIL UNION CODE

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AN ACT CONCERNING CIVIL UNIONS, EQUAL TREATMENT OF THOSE IN A CIVIL UNION OR A VALID MARRIAGE, AND PROTECTION OF RELIGIOUS FREEDOM

Be it enacted by the Legislature of the State of ABC that Title XXX is amended to include a new Article 123, which reads as follows:

ARTICLE 123 ESTABLISHMENT OF CIVIL UNIONS AND PROTECTION OF RELIGIOUS FREEDOM CONCERNING CIVIL UNIONS

Section 101. Purpose and Intent of Civil Unions

(1) The intent of this Act is to establish and recognize civil unions in the State of X, and to affirm that any and all parties to a civil union shall enjoy all the same protections, benefits, and rights, and shall be subject to all the same responsibilities, duties, and obligations, as married persons under the laws of the State of X. This Act shall be liberally construed and applied to promote these underlying purposes and to provide adequate procedures for the certification and registration of civil unions.

(2) By establishing the status of civil unions in the State of X, it is not the Legislature's intent to revise the definition or eligibility requirements of marriage under the laws of the State of X.

Section 102. Legislative Declarations and Findings Regarding Civil Unions

The Legislature hereby finds, determines and declares that:

(1) Promoting stable and durable family relationships as well as eliminating obstacles and hardships faced by couples who cannot or wish not to marry in this State is consistent with the duty of this State to further the security and general welfare of all its citizens.

(2) The State has an interest in encouraging stable family relationships regardless of the sex and sexual orientation of the adult partners and the entire community benefits when adult couples undertake the mutual obligations set forth in this civil union law.

(3) Despite long-standing discrimination against lesbian, gay, bisexual, and transgender residents of the State, many have formed lasting, committed, and caring relationships with persons of the same sex. These couples share lives together, participate in their communities together, and many raise children and care for dependent family members together. Permitting same-sex couples to enter into civil unions would further the State's interest in promoting family relationships and in protecting family members during life crises.

(4) Fundamental fairness requires that same-sex couples be permitted to share on the same terms as different-sex couples in the protections, benefits, and responsibilities set forth by the

State for qualified couples who wish to access these protections, benefits, and responsibilities in order better to care for each other and any children or other dependent family members they may have.

(5) The State's inclusion of both same-sex couples and different-sex couples in the protections, benefits, and responsibilities of civil unions serves the State's interest in encouraging stable family relationships regardless of the sex and sexual orientation of adult partners.

Alternate Language For Civil Unions Open Only to Same-Sex Couples

(5) The State's exclusion of same-sex couples from the protections, benefits, and responsibilities offered to other adult couples serves no legitimate government purpose and is contrary to the State's interests in encouraging stable family relationships and reducing discrimination based on sex and sexual orientation.

Additional Language For Civil Unions Open to Different-Sex Senior Couples as well as Same-Sex Couples

(6) The State has an interest in encouraging stable relationships for residents 62 years of age and older, whose caretaking, healthcare, and economic needs may be better met within a committed relationship, and the entire community benefits when couples that include at least one member who is at least 62 years of age undertake the mutual obligations set forth in this civil union law.

Section 103. Definition and Requirements of Civil Union

(1) "Civil union" means the legal union of two individuals, as defined in this Act.

Alternate Language For Same-Sex Civil Unions

(1) "Civil union" means the legal union of two persons of the same sex, as defined in this Act.

Alternate Language For Civil Unions of Same-Sex Couples and Different-Sex Senior Couples

(1) "Civil union" means the legal union of two individuals of the same sex, or of two individuals of different sexes where at least one of the individuals entering into the civil union is at least 62 years of age, as defined in this Act.

(2) "Certificate of civil union" means a document that certifies that the persons named on the certificate have established a civil union in compliance with this chapter.

(3) "Party to a civil union" means a person who has established a civil union pursuant to this chapter.

(4) Any person may enter into a civil union with another person, if such person is:

Alternate Language For Same-Sex Civil Unions

(4) Any person may enter into a civil union with another person of the same sex, if such person is:

Alternate Language For Civil Unions of Same-Sex Couples and Different-Sex Senior Couples

(4) Any person may enter into a civil union with another person of the same sex, or with a person of the same or different sex if at least one of the two persons is at least 62, if such person is:

(a) Not a party to a marriage or other relationship that provides substantially the same rights, benefits and responsibilities as a marriage or civil union, entered into in this state or another state or jurisdiction, unless the parties to the civil union will be the same as the parties to such other marriage or relationship;

(b) At least xxx years of age;

Alternate Language For Civil Unions of Different-Sex Senior Couples

(b) At least xxx years of age and, in the case of individuals of different sexes, except as provided in any other section of this Code, at least 62 years of age or entering into a civil union with a person 62 or older;

(c) Except as provided in any other section of this Code, not under the supervision or control of a conservator; and

(d) Not prohibited from entering into a civil union pursuant to any other sections of this Code.

(5) Terms relating to familial relationships shall be construed consistently with this Chapter for all purposes throughout the law, without reference to specific gender terms, whether in the context of statute, administrative or court rule, policy, common law, or any other source of civil law.

Section 104. Rights and Responsibilities of Civil Unions

(1) Parties to a civil union lawfully entered into or otherwise recognized pursuant to this chapter shall have all the same protections, benefits, and rights, and shall be subject to the same responsibilities, obligations, and duties under the laws of this State, whether derived from statutes, administrative rules or regulations, court rules, governmental policies, common law, court decisions, or any other provisions or sources of law, including in equity, as are granted to, enjoyed by, or imposed upon married spouses.

(2) Former parties to a civil union lawfully entered into or otherwise recognized pursuant to this chapter shall have the same protections, benefits, and rights, and shall be subject to the same responsibilities, obligations, and duties under the laws of this State, whether derived from statutes, administrative rules or regulations, court rules, governmental policies, common law, court decisions, or any other provisions or sources of law, including in equity, as are granted to, enjoyed by or imposed upon former married spouses.

(3) A surviving party to a civil union lawfully entered into or otherwise recognized pursuant to this chapter, following the death of the other party to the civil union, shall have the same protections, benefits, and rights, and shall be subject to the same responsibilities, obligations and duties under the laws of this State, whether derived from statutes, administrative rules or

regulations, court rules, governmental policies, common law, court decisions, or any other provisions or sources of law, including in equity, as are granted to, enjoyed by or imposed upon a widow or widower.

(4) To the extent that provisions of the laws of this State, whether derived from statutes, administrative rules or regulations, court rules, governmental policies, common law, court decisions, or any other provisions or sources of law, including in equity, adopt, refer to, or rely upon in any manner, provisions of United States federal law that would have the effect of parties to a civil union being treated differently than married spouses, parties to a civil union shall be treated in all respects by the laws of this State as if United States federal law recognizes a civil union in the same manner as the laws of this State.

(5) The laws of domestic relations, including annulment, premarital agreements, separation, dissolution, child custody and support, property division and maintenance, and post-relationship spousal support, shall apply to the parties to a civil union.

(6) The parties to a civil union may modify the terms and conditions of their civil union in the same manner and to the same extent as married persons who execute a premarital agreement or other agreement recognized and enforceable under the laws of this State, setting forth particular understandings with respect to their union.

(7) The following list of legal protections, benefits, and responsibilities of spouses shall apply in like manner to the parties to a civil union, but shall not be construed to be an exclusive list of such protections, benefits, and responsibilities:

a. Laws relating to title, tenure, descent, and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership or transfer, inter vivos or at death, of real or personal property, including but not limited to eligibility to hold real and personal property as tenants by the entirety;

b. Causes of action related to or dependent upon spousal status, including an action for wrongful death, emotional distress, loss of consortium, or other torts or actions under contracts reciting, related to, or dependent upon, spousal status;

c. Probate law and procedures, including nonprobate transfer;

d. Adoption law and procedures;

e. Laws relating to insurance, health and pension benefits;

f. Domestic violence protections;

g. Prohibitions against discrimination based upon marital status;

h. Victim's compensation benefits, including but not limited to compensation to spouse, children, and relatives of homicide victims;

i. Workers' compensation benefits, including but not limited to survivors' benefits and payment of back wages;

j. Laws relating to emergency and nonemergency medical care and treatment, hospital visitation and notification, and any rights guaranteed to a hospital patient or a nursing home resident;

k. Advance directives for health care and designation as a health care representative;

l. Family leave benefits;

m. Public assistance benefits under State law, including, but not limited to: (list of current state benefits accorded to spouses);

n. Laws relating to taxes imposed by the State or a municipality, including but not limited to, homestead rebate tax allowances, tax deductions based on marital status and exemptions from realty transfer tax based on marital status;

o. Laws relating to immunity from compelled testimony and the marital communication privilege;

p. The home ownership rights of a surviving spouse;

q. The right of a spouse to a surname change without petitioning the court;

r. Laws relating to the making of, revoking, and objecting to anatomical gifts;

s. State pay for military service;

t. Application for absentee ballots;

u. Legal requirements for assignment of wages;

v. Laws related to tuition assistance for higher education for surviving spouses or children.

Section 105. Civil Unions Prohibited

No person may enter into a civil union with such person's parent, grandparent, child, grandchild, sibling, parent's sibling, sibling's child, stepparent or stepchild. Any civil union within these degrees is void.

Section 106. Gender-Specific Terms Construed as Gender-Neutral.

Where necessary to implement the protections, benefits, rights and responsibilities relating to civil unions or familial relationships related to a civil union, gender-specific terms shall be construed to be gender neutral for all purposes throughout the law, whether in the context of statute, administrative or court rule, policy, common law, or any other source of civil law.

Section 107. Forms, Documents, and Applications.

The secretary of state shall develop forms, documents, and applications related to civil unions in this State, which shall conform to this Act.

Section 108. Recognition of Civil Union, or Relationship Substantially Similar to Civil Union, Solemnized and Certified in Another Jurisdiction.

(1) A civil union, lawfully entered into outside this state, that would be valid by the laws of the jurisdiction in which the civil union was contracted, is valid in this state.

(2) A relationship that provides substantially the same protections, benefits, rights and responsibilities as a civil union, between two persons entered into in another state or jurisdiction and recognized as valid by such other state or jurisdiction shall be recognized as a valid civil union in this state, provided such civil union is not expressly prohibited by statute in this state.

Additional Provisions For States Wishing to Enhance an Existing Relationship Recognition Status

Section xxx. Domestic Partnerships Converted to Civil Unions.

(1) Notwithstanding any other provisions in statute, two consenting persons who are parties to a domestic partnership validly registered in this State prior to the enactment of this Act may apply for, and receive without payment of an additional fee, a license to enter into a civil union and have such civil union solemnized and certified provided that the parties are otherwise eligible to enter into a civil union under the laws of this State, the intended parties to the civil union are the same as the parties to the domestic partnership, and no application or petition to terminate or dissolve the parties' domestic partnership has been filed and is pending.

(2) Such parties may also apply to the Secretary of State or to the clerk of the town, city or county in which their domestic partnership is registered or recorded to have their domestic partnership legally designated and recorded as a civil union, without any additional requirements of payment of licensing or certification fees, or solemnization, provided that no application or petition to terminate or dissolve the parties' domestic partnership has been filed and is pending. Upon application, the parties shall be issued a certificate of civil union, and such civil union certificate shall be recorded in accordance with the laws of the State.

(3) Such civil union shall not affect the validity of the parties' existing registered domestic partnership, and the parties shall continue to have the protections, benefits, rights, responsibilities, and obligations of registered domestic partners, as well as those of civil union partners, under the laws of this State.

Alternate Provision For When the Existing Domestic Partnership Will Dissolve Upon Formation of Civil Union

(3) Any such domestic partnership shall be dissolved by operation of law by any civil union of the same parties to each other, as of the date of the civil union stated in the certificate, and the date of registration of the domestic partnership shall be deemed the date of the civil union.

(4) Parties to a domestic partnership validly registered in this State who do not enter a civil union as provided in this section shall continue to have the protections, benefits, rights, responsibilities, and obligations of registered domestic partners under the laws of this State.

Alternate Provision For States Wishing to Enhance the Rights and Responsibilities of the Existing Relationship Recognition Status

(4) Parties to a domestic partnership validly registered in this State who do not enter a civil union as provided in this section shall have the same protections,

benefits, rights, responsibilities, and obligations as parties to a civil union under the laws of this State.

Section 109. No Discrimination in Issuing Licenses or Performing Solemnizations of Civil Unions by the State or Civil Employees of the State or Any Subdivision.

(1) The State or any person employed to act on behalf of the State with respect to issuance of licenses to enter a civil union shall issue such a license to any persons eligible to enter into a civil union in this State. No license to enter a civil union may be denied by the State or any person employed to act on behalf of the State with respect to issuance of licenses to enter a civil union based on the sex or sexual orientation of either or both members of the couple applying for the license.

(2) No civil employee of the State, any subdivision of the State, or other government body authorized to solemnize a civil union on behalf of the State shall refuse to solemnize a civil union based on the sex or sexual orientation of either or both members of the couple seeking to form the civil union.

Alternative Language For Same-Sex Civil Unions and for Civil Unions of Same-Sex Couples and Different-Sex Senior Couples

(1) The State or any person employed to act on behalf of the State with respect to issuance of licenses to enter a civil union shall issue such a license to any persons eligible to enter into a civil union in this State.

(2) No civil employee of the State, any subdivision of the State, or other government body authorized to solemnize a civil union on behalf of the State shall refuse to solemnize a civil union if both members of the couple seeking to form the civil union are eligible to form the civil union with each other.

Section 110. Licenses for Civil Unions.

Licenses for civil unions shall be issued under the same auspices as licenses to marry.

Section 111. Who May Solemnize a Civil Union.

(1) Any person authorized to perform a marriage in this State is authorized to solemnize a civil union, provided that the parties to be joined in the civil union present a valid license.

(2) The certification form completed by the person solemnizing a civil union shall be filed in the same manner and in the same place as forms required to certify marriages.

Section 112. Refusal to Solemnize a Civil Union.

(1) No member of the clergy authorized to join persons in a civil union pursuant to the laws of this State or of a tribal authority within this State and acting in a religious capacity shall be

required to solemnize any civil union in violation of his or her right to the free exercise of religion guaranteed by the Constitution of this State and the United States Constitution.

(2) There shall be no claim cognizable under the laws of this State against any such member of the clergy acting in a religious capacity who refuses to solemnize a civil union on the basis of the free exercise of religion, nor shall that individual be subject to any fine or other penalty for such refusal.

Section 113. Refusal to Provide Goods or to Allow Use of Facilities.

(1) For purposes of this chapter, 'religious organization' includes, but is not limited to, churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and ecumenical organizations, mission organizations, faith-based social clubs, associations and societies, and other entities whose principal purpose is the study, practice, or advancement of religion.

(2) A religious organization shall not be required to provide services, goods, accommodations, or facilities for a purpose directly related to the solemnization or celebration of a civil union that is in violation of the organization's religious beliefs, unless the organization offers such services, goods, accommodations, or facilities to the general public for purchase, rental, or use.

(3) Any refusal to provide services, good, accommodations, or facilities in accordance with this section shall not create any civil claim or cause of action unless such organization offers such services, goods, accommodations, or facilities, to the general public for purchase, rental, or use.

Section 114. Jurisdiction over Dissolution of Non-Resident Civil Union Couples.

(1) Except as provided in subsection (2) of this section, jurisdiction over dissolution or annulment of the civil union of a couple residing outside this State shall be the same as for married couples.

(2)(a) An action for dissolution or annulment of the civil union, even if neither party to the civil union is a bona fide resident of this State at the time the action is commenced, shall be maintainable if the following apply:

(i) The civil union was entered into in this State; and

(ii) Neither party to the civil union resides in a jurisdiction that will maintain an action for dissolution by this couple.

(b) There shall exist a rebuttable presumption that a jurisdiction will not maintain an action for dissolution of the civil union if the jurisdiction does not recognize the civil union.

(c) Any action for dissolution as provided by this subsection shall be adjudicated in accordance with the laws of this State.