

# BACKGROUND

No. 2865 | JANUARY 30, 2014

## Religious Freedom and Marriage in Federal Law

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### Abstract

*Legal recognition of same-sex marriage will increase the potential for conflicts with religious freedom. The recent Supreme Court ruling in United States v. Windsor intensifies these concerns by characterizing traditional marriage policy as a form of irrational prejudice. Public policy should value, not condemn, those who uphold the ideal of a mother and father for children. Even public officials who support same-sex marriage, however, should support religious freedom. At the federal level, policy should protect religious freedom and rights of conscience in areas that include tax exemptions, deductions for charitable contributions, conditions attached to government programs, federal spending in educational and social service programs, and accreditation of higher education institutions.*

Legal recognition of same-sex marriage will increase the potential for conflicts with religious freedom. The majority opinion in the recent U.S. Supreme Court case *United States v. Windsor* intensifies these concerns by characterizing traditional marriage policy as a form of irrational prejudice.<sup>1</sup>

Public policy should value, not condemn, those who uphold the ideal of a mother and father for children. Public policy should not equate affirmation of the ideal of both a mother and a father with irrational prejudice.

Even individuals who support same-sex marriage, however, should support religious freedom and rights of conscience. As President Barack Obama acknowledged when his views on the subject

### KEY POINTS

- Legal recognition of same-sex marriage will increase the potential for conflicts with religious freedom. The ruling of the Supreme Court in *United States v. Windsor* intensifies such concerns by characterizing traditional marriage policy as a form of irrational prejudice.
- Policy at all levels of government should protect the freedom to live according to the belief that marriage is one man and one woman and that sexual relations are properly reserved to marriage.
- Protecting religious freedom does not reduce other freedoms. Individuals have the freedom to engage in same-sex relationships and to obtain whatever recognition and benefits governments offer to same-sex relationships.
- Those with traditional viewpoints on marriage should have the freedom to conduct their lives and operate their organizations according to their own beliefs, just as people who support same-sex marriage do.

This paper, in its entirety, can be found at <http://report.heritage.org/bg2865>

Produced by the Richard and Helen DeVos  
Center for Religion and Civil Society

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evolved in 2012, there are people of goodwill on both sides of the marriage issue.<sup>2</sup>

Policy at all levels of government should protect the freedom to live according to the belief that marriage is one man and one woman and that sexual relations are properly reserved to marriage. Federal policy should protect religious freedom and rights of conscience in areas that include tax exemptions, deductions for charitable contributions, conditions attached to government programs, federal spending in educational and social service programs, and accreditation of higher education institutions.

### Scope of Religious Freedom Protections

Conflicts between same-sex marriage and religious freedom arise as part of a broader range of issues involving sex, marriage, and family.

For example, when it comes to situations involving sex, marriage, and family, not all conflicts with religious freedom will involve the actual solemnizing or celebrating of a marriage or even marriage at all. A case involving a counseling student at Eastern Michigan University, for example, illustrates the issue of counseling services.<sup>3</sup> Cases involving faith-based adoption and foster care services raise the issue of same-sex adoption.<sup>4</sup> Another case involved two doctors who objected on religious grounds when asked to provide artificial reproduction services to a woman in a same-sex relationship.<sup>5</sup>

Similarly, some conflicts do not involve marriage but do involve arrangements such as domestic partnerships, civil unions, or even relationships with no official legal status. In one of the most well-known cases in this area, for example, a Christian-owned photography business in New Mexico faced legal proceedings because the owners objected on religious grounds to photographing a same-sex commitment ceremony.<sup>6</sup> In another well-known case, a Methodist camp meeting association in New Jersey faced legal action after declining to allow two women to hold a civil union ceremony in a pavilion located on the association's property.<sup>7</sup>

Along these same lines, some conflicts raise similar issues but focus on sexual relations between two unmarried people of the opposite sex. Some cases, for example, have involved nondiscrimination laws that would have required landlords to rent accommodations to unmarried individuals of the opposite sex.<sup>8</sup>

### Threats to Religious Freedom Involving Same-Sex Marriage and Related Issues

Conflicts over religious freedom and rights of conscience that involve issues such as sex, family, and marriage can arise in a variety of contexts. Conflicts presenting issues for federal policy include:

1. *United States v. Windsor*, 133 S. Ct. 2695 (2013); Ryan T. Anderson, "The Supreme Court and the Future of Marriage," Heritage Foundation Issue Brief No. 4009, August 7, 2013 (providing quote from dissenting opinion by Justice Scalia), <http://www.heritage.org/research/reports/2013/08/the-supreme-court-and-the-future-of-marriage>.
2. Ryan T. Anderson, "Civility, Bullying and Same-Sex Marriage," Heritage Foundation Commentary, July 15, 2013, <http://www.heritage.org/research/commentary/2013/7/civility-bullying-and-same-sex-marriage>.
3. *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), <http://www.adfmedia.org/files/WardAppellateDecision.pdf> (accessed November 4, 2013); News release, "EMU Student Achieves Final Victory After Court Rules 'Tolerance Is a Two-Way Street,'" Alliance Defending Freedom, December 10, 2012, <http://www.alliancedefendingfreedom.org/News/PRDetail/141> (accessed November 4, 2013).
4. Thomas M. Messner, "Another Christian Adoption Agency Burdened by State-Sponsored Intolerance," The Heritage Foundation, The Foundry, May 23, 2011, <http://blog.heritage.org/2011/05/23/another-christian-adoption-agency-burdened-by-state-sponsored-intolerance/>.
5. Thomas M. Messner, "Same-Sex Marriage and the Threat to Religious Liberty," Heritage Foundation Backgrounder No. 2201, October 30, 2008, <http://www.heritage.org/research/reports/2008/10/same-sex-marriage-and-the-threat-to-religious-liberty>. The California Supreme Court noted a factual dispute about whether the religious objection was based on the woman's unmarried status or sexual orientation. See *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court*, 189 P.3d 959, 963 n.1 (Cal. 2008).
6. See, e.g., "*Elane Photography v. Willock*," Alliance Defending Freedom, August 22, 2013, <http://www.adfmedia.org/news/prdetail/5537> (accessed November 4, 2013).
7. Respondent's Brief in Support of Motion for Summary Decision at 1-20, *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. CRT 6145-09 (N.J. 2010) (providing extensive factual background), <http://oldsite.alliancedefensefund.org/userdocs/OceanGroveSummaryDecisionBrief.pdf> (accessed November 4, 2013); Jill P. Capuzzo, "Group Loses Tax Break over Gay Union Issue," *The New York Times*, September 18, 2007, [http://www.nytimes.com/2007/09/18/nyregion/18grove.html?\\_r=2&oref=slogin&](http://www.nytimes.com/2007/09/18/nyregion/18grove.html?_r=2&oref=slogin&) (accessed November 4, 2013).
8. Douglas Laycock, "Sex, Atheism, and the Free Exercise of Religion," 88 *U. Det. Mercy L. Rev.* 407, 412 (2011) (discussing cases).

- Exemptions from taxation and tax deductions for charitable contributions;
- Adoption or foster care services receiving federal funds;
- Conditions attached to government contracts, programs, or approvals;
- Discrimination by public colleges and universities receiving federal funds; and
- The accreditation process for institutions and programs of higher education.

In many of these areas, conflicts have already created a growing body of cases.

**Tax Exemptions.** Legal experts have warned about the potential use of tax law to coerce groups that support the traditional understanding of marriage. In 2006, for example, the Becket Fund for Religious Liberty co-published a book on emerging conflicts between same-sex marriage and religious freedom. At least three chapters in that book, each authored by a different law professor, discuss the tax exemption issue.<sup>9</sup> Other legal experts have also addressed this issue.<sup>10</sup>

Several incidents of activism or proposed policy illustrate these concerns.

- In 2006, Catholic Charities leaders in Massachusetts explained that Catholic adoption services would not place children with same-sex couples. The head of the Massachusetts chapter of Americans United for the Separation of Church and State reportedly stated that, if the Catholic bishops wanted to adopt that policy, “they need to give up their tax exemption.”<sup>11</sup>
- Also in 2006, the campus newspaper at Harvard University published an op-ed stating that Catholic adoption agencies not wishing to place children with same-sex couples “would be perfectly free to put their money where their mouth is, so to speak, and forgo special tax treatment.”<sup>12</sup>
- More recently, in 2013, lawmakers in California advanced legislation that would have stripped certain state-level tax exemptions from the Boy Scouts of America (BSA) for adhering to traditional moral viewpoints in BSA membership standards.<sup>13</sup> Similar anti-BSA legislation was introduced in New York.<sup>14</sup>

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9. See Jonathan Turley, “An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices,” in *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008), pp. 62-69; Robin Fretwell Wilson, “Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context,” in *Same-Sex Marriage and Religious Liberty*, pp. 86-91; Douglas W. Kmiec, “Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion,” in *Same-Sex Marriage and Religious Liberty*, pp. 103-11.

10. See Letter from Law Professors Edward McGlynn Gaggney, Jr., Thomas C. Berg, Carl H. Esbeck, Richard Garnett, and Robin Fretwell Wilson to Senator Rosalyn H. Baker, October 17, 2013, pp. 11, 15-16 & nn. 24, 36-37, 39; see also Brief *Amicus Curiae* of The Becket Fund for Religious Liberty, *Hollingsworth v. Perry*, 570 U.S. \_\_\_\_ (2013) (Nos. 12-144, 12-307), p. 26 & nn. 36-37, [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v2/12-144-12-307\\_becket\\_fund.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-144-12-307_becket_fund.authcheckdam.pdf) (accessed November 5, 2013).

11. Kathleen A. Shaw, “Activist Says Adoption Policy Should Affect Bishops’ Tax Status,” *Telegram*, March 15, 2006, <http://www.telegram.com/article/20060315/NEWS/603150498/1052> (accessed November 4, 2013); see also Daniel Avila, “Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals,” *Children’s Legal Rights Journal*, Vol. 27, No. 3 (Fall 2007), p. 13, [http://www.law2.byu.edu/page/categories/marriage\\_family/past\\_conferences/mar2007/drafts/07-Avila%20Adoption%20Article%20CLJ.pdf](http://www.law2.byu.edu/page/categories/marriage_family/past_conferences/mar2007/drafts/07-Avila%20Adoption%20Article%20CLJ.pdf) (accessed November 4, 2013).

12. Jonah M. Knobler, “Mass. Should Revoke Church’s Tax-Exempt Status,” *The Harvard Crimson*, March 17, 2006, <http://www.thecrimson.com/article/2006/3/17/mass-should-revoke-churchs-tax-exempt-status/> (accessed November 4, 2013).

13. S. B. 323 (Cal. 2013), <http://legiscan.com/CA/text/SB323/2013> (accessed November 4, 2013). The national public interest law firm Alliance Defending Freedom has also analyzed this bill. News release, “Should Calif. Punish Boy Scouts with Loss of Tax-Exempt Status?” Alliance Defending Freedom, April 5, 2013, <http://www.adfmedia.org/News/PRDetail/8090> (accessed November 4, 2013).

14. See S. 5170-2013, Reg. Sess. (NY 2013), <http://open.nysenate.gov/legislation/bill/S5170-2013> (accessed October 18, 2013); David Badash, “NY State Senator Introduces Bill to Strip Boy Scouts of Tax-Exempt Status,” *The New Civil Rights Movement*, May 24, 2013, <http://thenewcivilrightsmovement.com/ny-state-senator-introduces-bill-to-strip-boy-scouts-of-tax-exempt-status/politics/2013/05/24/67479> (accessed November 4, 2013).

On top of these examples, recent revelations have shined light on alleged discrimination by the U.S. Internal Revenue Service against conservative organizations seeking tax-exempt status.<sup>15</sup> According to an interim update issued on September 17, 2013, by the Majority Staff of the Committee on Oversight and Government Reform of the U.S. House of Representatives, “discovery efforts are ongoing,” but “it is apparent from material already available to the Committee that the IRS engaged in inappropriate and disparate treatment of conservative-oriented applicants for tax exempt status.”<sup>16</sup>

In addition, the pro-traditional marriage National Organization for Marriage (NOM) has alleged that the IRS illegally disclosed a copy of NOM’s confidential tax return information and that this information was in turn widely published on the Internet.<sup>17</sup> In a statement announcing a lawsuit that it filed against the IRS, NOM asserts that “the confidential information contained in the illegally leaked documents included the identity of dozens of our major donors” and that this “confidential donor information [was used] to harass our donors.”<sup>18</sup>

Ongoing investigations such as these reinforce concerns about hostile public officials discriminating, in the determination of tax-exempt status or

otherwise, against groups that support marriage as one man and one woman.

**Faith-Based Adoption and Foster Care Services.** In some states, faith-based charities have stopped providing adoption or foster care services or both because of government regulations forcing every provider to place children with same-sex couples. Faith-based charities have been forced to stop providing services in Illinois, Washington, D.C., and Massachusetts.<sup>19</sup>

Forcing faith-based charities out of the social service sector because they will not provide services that contradict their faith produces the absurd result of decreasing services through a policy purportedly designed to increase them.

**Conditions Attached to Government Programs and Approvals.** Conditions attached to government contracts, programs, or approvals can impose undue burdens on conscience for organizations that support marriage as one man and one woman.<sup>20</sup> Three cases involving social service agencies illustrate this broader threat.

- In the above-cited situation in Massachusetts, Catholic Charities in Boston stopped providing adoption services because regulations “force[d]

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15. See Hans A. von Spakovsky, “Protecting the First Amendment from the IRS,” Heritage Foundation *Legal Memorandum* No. 104, October 2, 2013, <http://www.heritage.org/research/reports/2013/10/protecting-the-first-amendment-from-the-irs>.

16. “Interim Update on the Committee’s Investigation of the Internal Revenue Service’s Inappropriate Treatment of Certain Tax-Exempt Applicants,” Committee on Oversight & Government Reform, U.S. House of Representatives, 113th Cong., 1st Sess., September 17, 2013, <http://oversight.house.gov/wp-content/uploads/2013/09/2013-09-17-Interim-update-on-IRS-Investigation-of-tax-exempt-applicants1.pdf> (accessed November 4, 2013).

17. News release, “The National Organization for Marriage Files Lawsuit Against the IRS Over Illegal Leak of Organization’s Confidential Tax Return to Marriage Opponents,” National Organization for Marriage, October 3, 2013, <http://www.nomblog.com/38136> (accessed November 4, 2013). See also Verified Complaint, *National Organization for Marriage v. U.S., IRS* (No. 1:13-cv-01225) (E.D. Va. filed Oct. 3, 2013), <http://www.actrightlegal.org/NOM-v-IRS/> (accessed November 4, 2013). NOM alleges that “individuals employed by the IRS” leaked NOM’s confidential tax information “to one or more third parties, including NOM’s ideological opponent, the Human Rights Campaign (“HRC”), and to one or more employees, agents, or volunteers of HRC.” Verified Complaint, ¶ 2. The IRS has admitted that an IRS employee “inadvertently” disclosed NOM’s confidential tax information “to one third party” and denied that the disclosure was to the Human Rights Campaign. Answer, *National Organization for Marriage v. U.S.* (No. 1:13-cv-01225) (E.D. Va. filed December 2, 2013), ¶¶ 78-79, 82-89, 106-108.

18. News release, “The National Organization for Marriage Files Lawsuit.”

19. Sarah Torre, “Civil Union Law Forces Catholic Charities to Drop Adoption Service,” The Heritage Foundation, The Foundry, June 1, 2011, <http://blog.heritage.org/2011/06/01/civil-union-law-forces-catholic-charities-to-drop-adoption-service/>; Charles Pope, “The Initial Impact Has Begun. Catholic Charities Forced out of Foster Care and Adoption by DC Council Same-sex ‘Marriage’ Bill,” Archdiocese of Washington, February 17, 2010, <http://blog.adw.org/2010/02/the-initial-impact-has-begun-catholic-charities-forced-out-of-foster-care-and-adoption-by-dc-council-same-sex-marriage-bill/> (accessed November 4, 2013); Thomas M. Messner, “Another Christian Adoption Agency Burdened by State-Sponsored Intolerance,” The Heritage Foundation, The Foundry, May 23, 2011, <http://blog.heritage.org/2011/05/23/another-christian-adoption-agency-burdened-by-state-sponsored-intolerance/>.

20. See Brief *Amicus Curiae* of The Becket Fund for Religious Liberty at 24-26, *Hollingsworth v. Perry*, 570 U.S. \_\_\_ (2013) (Nos. 12-144, 12-307), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v2/12-144-12-307\\_becket\\_fund.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-144-12-307_becket_fund.authcheckdam.pdf) (accessed November 4, 2013).

all private entities to participate in same-sex adoptions as a condition of the adoption *license*.<sup>21</sup>

- In San Francisco, the Salvation Army reportedly stopped accepting city money to provide social services because of a requirement that entities receiving city *contracts* must provide same-sex partner benefits if they provided spousal benefits.<sup>22</sup>
- In New York, *contract extensions* offered to two faith-based social service agencies included LGBT provisions that the agencies challenged in a lawsuit.<sup>23</sup>

These cases involve social service agencies. However, similar conflicts with religious freedom can occur any time government conditions contracts, grants, approvals, licenses, assistance, or other programs on recipients' adhering to policies that violate their religious and moral beliefs.<sup>24</sup> At the federal level, for example, some policymakers advocate conditioning federal contracts on complying with sexual orientation nondiscrimination policies.<sup>25</sup>

**Campus Life.** Programs of higher education present another situation where individuals with traditional moral viewpoints can face ideological coercion. For instance:

- A public university in Michigan expelled a graduate student from a counseling program after she objected to providing counseling that would involve affirming a same-sex relationship.<sup>26</sup> The student explained that she was willing to counsel gay and lesbian clients but conscientiously objected to counseling a client on how to improve a same-sex relationship.<sup>27</sup>
- A public university in Missouri charged a student with a Level 3 Grievance, "the most serious charge possible" according to her attorneys, because she refused to write a letter to the Missouri legislature expressing support for same-sex adoption.<sup>28</sup>
- In Washington, D.C., "a congressionally established university for deaf and hard of hearing students reportedly placed its 'chief diversity officer' on administrative leave [for approximately three

21. Daniel Avila, "Same-Sex Adoption in Massachusetts," p. 14 (emphasis added).

22. Manny Fernandez and April Lynch, "Salvation Army Cuts S.F. Programs/Charity Spurns City's Domestic Partner Law," *SFGate*, June 4, 1998, <http://www.sfgate.com/news/article/Salvation-Army-Cuts-S-F-Programs-Charity-3004997.php> (accessed November 4, 2013).

23. See *Under 21 v. City of New York*, 481 N.Y.S.2d 632, 634 (N.Y. Sup. Ct. 1984) (describing clash between religious beliefs of Roman Catholic and Salvation Army charities and contract extensions offered by state that "contained provisions requiring [the charities] not to discriminate in employment on the basis of 'sexual orientation' and 'affectional preference', i.e., homosexuality").

24. See Marc D. Stern, "Same-Sex Marriage and the Churches," in *Same-Sex Marriage and Religious Liberty*, pp. 19-24 (discussing potential conflicts involving commercial and professional licenses); Thomas M. Messner, "New California Law Illustrates How Nondiscrimination Mandates Can Burden Conscience," The Heritage Foundation, The Foundry, September 15, 2011, <http://blog.heritage.org/2011/09/15/new-california-law-illustrates-how-nondiscrimination-mandates-can-burden-conscience/>.

25. See, e.g., "ENDA Executive Order on the Way?" Institutional Religious Freedom Alliance, April 1, 2013, <http://archive.constantcontact.com/fs102/1102433538532/archive/1112942874061.html#LETTER.BLOCK32> (accessed November 4, 2013) (reporting that several lawmakers are pressuring the President to adopt an executive order imposing sexual orientation and gender identity nondiscrimination requirements on recipients of federal contracts).

26. *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), <http://www.adfmedia.org/files/WardAppellateDecision.pdf> (accessed November 4, 2013).

27. See Principal Brief of Appellant/Cross-Appellee at n.7, *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (Nos. 10-2100/10-2145) (asserting as "undisputed facts" that the student "repeatedly stressed she would counsel a homosexual client on any issue that did not require her to affirm or validate homosexual relationships or behavior" and that the student's "religious beliefs apply equally to heterosexual and homosexual relationships, meaning she could not provide affirmative counsel regarding any extra-marital sexual relationship (whether heterosexual or homosexual)"), <http://www.adfmedia.org/files/WardAppellateBrief.pdf> (accessed November 4, 2013). The case eventually settled, see "Stipulation for Order of Dismissal with Prejudice" (E.D. Mich. 2012), <http://www.adfmedia.org/files/WardDismissalOrder.pdf> (accessed November 4, 2013), following a federal appellate court decision explaining that "[t]olerance is a two-way street," *Ward*, 667 F.3d at 735.

28. See news release, "Missouri State U. Quickly Settles Lawsuit with Student Punished for Opposing Homosexual Adoption," Alliance Defending Freedom, November 13, 2006, <http://www.adfmedia.org/News/PRDetail/1430> (accessed November 4, 2013). The case reportedly settled quickly. *Ibid.* Marc Stern discusses another case involving St. Cloud University School of Social Work. "Same-Sex Marriage and the Churches," pp. 22-23 & nn.110-13.

months] simply for signing a petition to allow Maryland voters to vote on the question of marriage directly.”<sup>29</sup>

- The University of Illinois allegedly fired a professor “for explaining the Roman Catholic Church’s position on human sexual behavior.”<sup>30</sup> The university took this action even though the professor offered the explanation during an “Introduction to Catholicism” class he was teaching.<sup>31</sup>

Citizens have an interest in encouraging respect for conscience at colleges and universities, especially public colleges and universities that receive federal financial assistance. Institutions of higher education contradict that interest when they penalize students, faculty, or staff for supporting traditional moral understandings of marriage and sexual conduct.

**Accreditation in Higher Education.** The accreditation process for institutions of higher education presents another area of potential ideological coercion.<sup>32</sup>

For example, according to the Becket Fund for Religious Liberty, in 2001, “the American Psychological Association, the accrediting body for professional psychology programs, threatened to revoke the accreditation of religious colleges that prefer coreligionists, in large part because of concerns about codes of conduct that prohibit sex outside of marriage and homosexual behavior.”<sup>33</sup> According to Becket Fund, “Where same-sex marriage is adopted without strong religious protections, religious colleges and universities that oppose same-sex marriage will likely face similar threats.”<sup>34</sup>

In the United States, the federal government does not directly accredit educational institutions and programs.<sup>35</sup> However, to participate in federal student financial assistance programs, educational institu-

29. *Amicus Curiae* Brief of Marriage Anti-Defamation Alliance in Support of Petitioners and Supporting Reversal at 24, *Hollingsworth v. Perry*, 570 U.S. \_\_\_ (2013) (Nos. 12-144, 12-307), <http://www.adfmedia.org/files/HollingsworthAmicusMADA.pdf> (accessed November 4, 2013) (emphasis removed). The employee was eventually reinstated, *ibid.*, and later filed a lawsuit against the university. See Complaint, *McCaskill v. Gallaudet University* (No. 1:13-cv-01498) (D.D.C. filed September 27, 2013); Bethany Monk, “Gallaudet School Official Sues University for Free Speech Discrimination,” *CitizenLink*, October 2, 2013, <http://www.citizenlink.com/2013/10/02/gallaudet-school-official-sues-university-for-free-speech-discrimination/> (accessed November 4, 2013).

30. News release, “Fired U of I Professor Vindicated, Will Again Be Allowed to Teach Catholicism Class,” *Alliance Defending Freedom*, July 29, 2010, <http://www.adfmedia.org/news/prdetail/4113> (accessed November 4, 2013).

31. News release, “Ill. Prof. Fired for Teaching About Catholic Beliefs in Class on Catholicism,” *Alliance Defending Freedom*, July 12, 2010, <http://www.adfmedia.org/News/PRDetail/4449> (accessed November 4, 2013). The university later offered the professor the opportunity to teach again. News release, “Fired U of I Professor Vindicated.” For other examples, see *Petition for Writ of Certiorari, Dixon v. Univ. of Toledo*, 702 F.3d 269 (2012) (No. 12-3218) (asserting that university employee was fired for writing op-ed in local newspaper disagreeing with comparison of gay rights movement to civil rights movement for racial equality), <http://www.americanfreedomlawcenter.org/uploads/caseapps/2fefcb0f23d92ad3c776123b579a0526d154c95a.pdf> (accessed November 4, 2013), *petition denied*, 134 S. Ct. 119 (2013); Jennifer Marshall, “Case Closed at UT Austin: Regnerus Exonerated,” *The Heritage Foundation, The Foundry*, August 31, 2012, <http://blog.heritage.org/2012/08/31/case-closed-at-ut-austin-regnerus-exonerated/> (discussing “vitriolic attacks” on university professor who published study that “found some negative outcomes for children of parents who had same-sex relationships when compared to those in intact biological families”); news release, “Complaints Dismissed Against Maine Counselor Who Supported Marriage,” *Alliance Defending Freedom*, April 12, 2010, <http://www.adfmedia.org/News/PRDetail/3330> (accessed November 5, 2013) (discussing case involving complaints filed against public high school counselor after he appeared in television ads supporting traditional marriage position in upcoming ballot measure).

32. See, e.g., Marc D. Stern, “Same-Sex Marriage and the Churches,” pp. 3-4, 22-23; “Q&A with CCCU President Paul Corts,” *CCCU Advance*, Fall 2007, p. 2 (explaining that “[s]ome accreditation associations have considered putting into their standards a ‘diversity’ requirement” and expressing concerns about such requirements for Christian colleges and universities), [http://www.cccu.org/news/advance/advance\\_archives](http://www.cccu.org/news/advance/advance_archives) (accessed November 5, 2013).

33. Brief *Amicus Curiae* of The Becket Fund at 23-24 (internal quotation marks omitted).

34. *Ibid.*, p. 24.

35. See “The Database of Accredited Postsecondary Institutions and Programs,” U.S. Department of Education, <http://ope.ed.gov/accreditation/> (accessed November 5, 2013); “College Accreditation in the United States,” U.S. Department of Education, <http://www2.ed.gov/print/admins/finaid/accred/accreditation.html> (accessed November 5, 2013).

tions must receive accreditation from an accrediting agency that is recognized by the federal government.<sup>36</sup>

This regulatory framework puts accrediting agencies in a position to threaten the religious freedom of religious colleges and universities. “[O]nce accreditation agencies [become] the gatekeepers for federal funding, accreditors essentially gain regulatory control over colleges [and universities].”<sup>37</sup>

### Protecting Religious Freedom Does Not Reduce Other Freedoms

Same-sex marriage does not necessarily, by itself, burden religious freedom *so long as* people with traditional viewpoints remain free to live their lives and operate their organizations according to their beliefs.

Religious freedom does become an issue, however, when policy begins to force private citizens, even conscientious objectors, into going along with same-sex marriage or paying a price for not doing so. Religious freedom is at stake when same-sex couples and public officials use nondiscrimination policies to punish conscientious objectors for honoring traditional viewpoints on sex and marriage.<sup>38</sup>

Individuals have the freedom to engage in same-sex relationships and to obtain whatever recognition and benefits governments offer to same-sex relationships. Punishing private citizens who conscientiously object does not increase these freedoms, and protecting conscience does not decrease them. Religious freedom simply protects the freedom of other private citizens to live and operate according to their own beliefs.

### What Should Be Done

As a baseline position, policy should resolve these conflicts in favor of religious freedom. Specifically:

- 1. Give religious freedom protections appropriate scope.** Religious freedom protections, at both the state and federal levels of government, should extend beyond the issue of same-sex marriage and the very narrow context of solemnizing or celebrating a wedding. Conscience protection policies should address as full a range as possible of social conflicts involving the application of nondiscrimination policy in contexts such as marriage definition, family formation, and sexual ethics.
- 2. Prohibit discrimination by public officials in the determination of tax exemptions and deductions for charitable contributions.** Federal policy should prohibit the denial or revocation of any exemption from federal taxation on the ground that a person or group otherwise qualified for the exemption supports marriage as the union of one man and one woman. Federal policy should also establish that no deduction for an otherwise qualifying charitable contribution will be denied or revoked on the ground that the contribution was made to or for the benefit of a group that supports marriage as one man and one woman.<sup>39</sup>

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36. According to the U.S. Department of Education, “Accreditation by an accrediting agency recognized by the U.S. Department of Education is mandatory for the school’s students to be eligible to participate in any Federal student aid program.” “National Advisory Committee on Institutional Quality and Integrity: Frequently Asked Questions,” U.S. Department of Education, <http://www2.ed.gov/about/bdscomm/list/naciqi.html#faq> (accessed November 5, 2013). The Department of Education also states, “Most institutions attain eligibility for federal funds by holding accredited or preaccredited status with one of the accrediting agencies recognized by the Secretary, in addition to fulfilling other eligibility requirements. For example, accreditation by a nationally recognized institutional accrediting agency enables the institutions the agency accredits to establish eligibility to participate in the federal student financial assistance programs administered by the U.S. Department of Education (Department) under Title IV of the Higher Education Act of 1965, as amended.” “College Accreditation in the United States,” U.S. Department of Education.

37. Lindsey M. Burke and Stuart M. Butler, “Accreditation: Removing the Barrier to Higher Education Reform,” Heritage Foundation *Backgrounder* No. 2728, September 21, 2012, [http://www.heritage.org/research/reports/2012/09/accreditation-removing-the-barrier-to-higher-education-reform#\\_ftn58](http://www.heritage.org/research/reports/2012/09/accreditation-removing-the-barrier-to-higher-education-reform#_ftn58) (internal quotation marks omitted).

38. Though same-sex marriage does not necessarily, by itself, threaten religious freedom, same-sex marriage increases threats to religious freedom from nondiscrimination laws. See Thomas M. Messner, “Same-Sex Marriage and Religious Freedom: How Nondiscrimination Laws Factor In,” Heritage Foundation *Backgrounder* No. 2589, July 29, 2011, <http://www.heritage.org/research/reports/2011/07/same-sex-marriage-and-threats-to-religious-freedom-how-nondiscrimination-laws-factor-in>.

39. Jonathan Turley discusses the related issue of barring traditional groups from publicly funded charity sites. Jonathan Turley, “An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices,” in *Same-Sex Marriage and Religious Liberty*, pp. 69–72.

**3. Avoid government conditions that would unduly burden religious freedom.** Conflicts with religious freedom can arise when government imposes overly broad nondiscrimination mandates through conditions attached to government programs or approvals. Federal policy should avoid conditioning federal grants, contracts, programs, benefits, or approvals on a recipient's agreeing to violate religious beliefs about marriage as the union of one man and one woman.

**4. Promote respect for conscience in public institutions of higher education receiving federal financial assistance.** Academic diversity dims when students, faculty, or staff are forced to compromise religious or moral beliefs about marriage as one man and one woman in order to gain admission, complete a degree, or keep a job. Federal policy should promote greater respect for conscience in the context of higher education at public colleges and universities receiving federal financial assistance.

**5. Protect religious freedom in programs administering federal social service dollars.** Policy should encourage more, not fewer, charities to serve needy children. Federal policy should advance that goal by establishing commonsense principles of respect for religious freedom in social service programs and activities receiving federal financial assistance.

**6. Protect religious freedom in the accreditation process for higher education.** So long as the federal government puts accreditation agencies in the position of “gatekeepers for federal funding,” thereby giving them functional “regulatory control” of colleges and universities,<sup>40</sup> federal policy should also protect the religious liberty of colleges and universities. For example, federal standards already require accrediting agencies, as a condition of federal recognition, to “consistently apply and enforce standards that respect the stated mission of the institution, including religious mission.”<sup>41</sup> Stronger language would specifically state that accrediting agencies may not penalize religious institutions for operating according to the belief that marriage is one man and one woman and that sexual relations are properly reserved to marriage.<sup>42</sup>

## Conclusion

Policy at all levels of government should protect the freedom to live according to the belief that marriage is one man and one woman and that sexual relations are properly reserved to marriage. Federal policy should protect religious freedom and rights of conscience in areas including exemptions from taxation, deductions for charitable contributions, conditions attached to government programs, federal spending in educational and social service programs, and accreditation of higher education institutions.

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40. Burke and Butler, “Accreditation: Removing the Barrier to Higher Education Reform” (internal quotations omitted in second quotation).

41. “Accreditation in the United States: Subpart B—The Criteria for Recognition,” U.S. Department of Education, [http://www2.ed.gov/admins/finaid/accred/accreditation\\_pg13.html](http://www2.ed.gov/admins/finaid/accred/accreditation_pg13.html) (accessed November 5, 2013). Also see 20 U.S.C. § 1099b(a)(4)(A).

42. Another way to reduce religious freedom threats in the accreditation process would be to decouple accreditation and federal funding. The Heritage Foundation has recommended that “[f]ederal policymakers should ... decouple accreditation and federal funding through amendments to the Higher Education Act, eliminating the necessity that colleges get accredited by the government-sanctioned system.” Burke and Butler, “Accreditation: Removing the Barrier to Higher Education Reform.” Decoupling accreditation and federal funding “would allow independent accrediting institutions to enter the market, thereby providing students with numerous options for creating their ‘degree’ and shaping their college experience.” *Ibid.* This reform would also reduce potential conflicts with religious freedom in the accreditation process.