STATEDMENT OF CONSTITUTIONAL LAW SCHOLARS

TO: INTERESTED PARTIES
FROM: PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT
RE: MISSOURI S.J.R. 39
DATE: APRIL 18, 2016

Previously, we issued a lengthy legal analysis outlining a number of reasons Missouri Senate Joint Resolution 39 conflicts with the Establishment Clause of the U.S. Constitution. This statement summarizes our prior memo and addresses an additional harm SJR 39 would impose on Missourians: By forbidding the government from imposing a “penalty” on certain religious actors, SJR 39 will immunize these actors from prosecution if they commit criminal acts, including trespass, harassment, and even violent crimes, based on their religious beliefs about marriage equality.

I. SJR 39 Immunizes Religious Actors From Criminal Prosecution and Civil Suit

SJR 39 forbids the state from imposing a “penalty” on certain state and private actors because of actions they take related to a “sincere religious belief concerning marriage between two persons of the same sex.” The term “penalty” under the amendment “means, but is not limited to, any adverse action taken by the state to alter the tax treatment of, deny grants, contracts, or benefits to, or recognize a civil claim against, a religious organization or individual (emphasis added). The amendment would therefore prevent the state from both bringing criminal prosecutions and adjudicating civil claims where a religious organization acts in accordance with “a sincere religious belief concerning marriage between two persons of the same sex.”

While not expressly included in SJR 39’s definition of “penalty,” criminal prosecution by the state clearly is a “penalty.” Missouri law routinely employs the term “penalty” to mean both criminal punishments and civil fines or actions. Moreover, supporters and sponsors of SJR 39 admit that SJR 39’s intent is to override sexual orientation antidiscrimination laws. These laws, as is typical of civil rights laws in Missouri and across the country, impose criminal penalties for certain forms of anti-LGBT discrimination, including criminal fines and jail time.

SJR 39’s broad language therefore risks preventing the state from enforcing criminal laws against “religious organizations”—defined broadly to include large nonprofits and even some for-profit entities—and their members for acts motivated by a sincere belief about marriage. For example, Section 36.1(1) of SJR 39 would prevent prosecution of a member of the Westboro Baptist Church for violations of state or local criminal trespass, property damage, harassment, and assault laws, if committed because of a sincere religious opposition to marriage equality for same-sex couples. SJR 39 would also severely limit enforcement of state and local hate crime

1 See, e.g., Mo. Const. Art. III, § 38(d) (using the term “penalty” to refer to both criminal and civil penalties); Mo. Rev. Stat. § 565.027.1 (referring to felony as “penalty”).
2 St. Louis, Mo. Code of Ordinances § 3.44.080; § 3.44.150; Kansas City, Mo. Code of Ordinances § 38-101.
Even the murder of a same-sex couple could be shielded from municipal and state prosecution if committed by a member of a “religious organization” and motivated by a religious belief about marriage. Federal hate crimes statutes could result in prosecution of some egregious crimes such as violence with a deadly weapon, but only if the crime involves or affects interstate commerce and only if the U.S. Justice Department chooses to intervene. SJR 39 would enshrine in the Missouri Constitution the right to act in accordance with sincere religious beliefs—even if those acts are criminal. It would quite literally contravene a steadfast principle of First Amendment law that “‘[y]our right to swing your arms ends just where the other man’s nose begins.’”

SJR 39’s definition of “penalty” also forbids the government from adjudicating many civil suits, such as those based on state or local tort, contract, and antidiscrimination law. This exemption applies to any acts committed by a religious organization (again, this includes large nonprofits and some for-profits), as well as denial of most wedding-related services by individuals and closely-held businesses, if motivated by a sincere religious belief about marriage. Many Missouri municipalities have LGBT antidiscrimination ordinances that would be gutted by this provision. SJR 39 would additionally strip Missourians of contractually-created rights that protect employees, renters, and consumers. For example, an employee could be fired from a religious hospital for expressing her support for marriage equality despite a “good cause” provision of a collective bargaining agreement; a person who rents an apartment from a religious housing provider could be evicted, despite his lease agreement, if he gets engaged to his same-sex partner; and a couple who hires a chain restaurant to cater their wedding would be unable to sue for breach of contract if the restaurant cancelled upon learning that the couple was of the same sex. Religious organizations would be immunized from legal obligations to their customers and employees with which their competitors must comply.

II. SJR 39 Allows Government Workers and Government-Funded Programs to Discriminate Based on Religious Beliefs

SJR 39 also gives public servants and taxpayer-funded actors an affirmative right to discriminate under color of law. It prohibits the government from imposing a “penalty” on state and state-funded actors who discriminate against or refuse to provide services to Missourians based on a “sincere religious belief concerning marriage between two persons of the same sex.”

---

3 Mo. Rev. Stat. § 557.035.2; St. Louis, Mo. Code of Ordinances § 15.19.030 (prohibiting intimidation and harassment on the basis of sexual orientation, gender identity or expression); 4 18 U.S. Code § 249.  
7 This may also include compliance with local domestic partnership laws, such as that enacted in St. Louis and Kansas City. See https://www.stlouis-mo.gov/government/departments/register/domestic-partnership-registry.cfm, and http://cityclerk.kcmo.org/LiveWeb/content/content.aspx?id=9.
Under SJR 39, the state may not penalize any individual who declines to be a “participant in” a wedding because of a religious belief concerning marriage between same-sex persons. The bill does not define “participant,” but it may be read to include government employees whose job duties involve issuing a marriage certificate or officiating a wedding. It therefore appears to create a new right for clerks, judges, and other state employees to refuse to perform their job duties fairly and impartially if that refusal is based on a “sincere religious belief concerning marriage between two persons of the same sex.” Same-sex couples’ newly secured constitutional right to civil marriage would become contingent on their finding a willing government employee. SJR 39 would also subject same-sex couples to state-sanctioned moral disapproval and stigma by public officials.

Because revoking a contract or grant is defined as a “penalty” under SJR 39, organizations could continue to receive taxpayer money while discriminating against Missouri citizens on the basis of the institution’s religious perspective on marriage between same-sex couples. At least two Missouri cities currently forbid some grant or contract recipients from discriminating based on sexual orientation and gender identity. Under SJR 39, a religious organization not only could violate those ordinances in providing services, but also demand taxpayer money to do so. Cities and the state would lose their discretionary power to withdraw government money from an organization that accepts a grant or contract to provide particular services and then refuses to perform those services on a nondiscriminatory basis because of a religious belief regarding marriage. For example, a taxpayer-funded homeless shelter or adoption agency could refuse to provide services to same-sex couples, or a community health clinic that receives a grant to hire a psychiatrist could refuse to hire anyone supportive of marriage equality.

III. By Endorsing Religion and Causing Third Party Harms, SJR 39 Violates the Establishment Clause

All of the newly created religious exemptions outlined above violate the Establishment Clause of the First Amendment, which forbids the government from favoring or disfavoring any particular religion or religion in general. The Supreme Court has consistently held that when legislative accommodations for religious beliefs cause meaningful harm to other private citizens they violate the Establishment Clause. Even where an accommodation does not impose a clear burden on others, the government may violate the Establishment Clause if its actions tend to express support for a particular religious faith.

---

8 SJR 39 states only that it nothing in its language “prevents the state from providing a license to marry or providing any other marital entitlement, service, or benefits authorized by state law.”
9 St. Louis, Missouri Code of Ordinances § 3.44.080(E); § 3.110.100; Kansas City Code of Ordinances § 3-517.
10 See, Estate of Thornton v. Caldor, 472 U.S. 703 (1985); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989); Cutter v. Wilkinson, 544 U.S. 709 (2005); Burwell v. Hobby Lobby Stores, Inc. 134 S.Ct. 2751, 2759 (2014) (granting a religious accommodation to employers while repeatedly emphasizing that employees’ rights and interests would not be harmed); Board of Education of Kiryas Joel Village School District, 512 U.S. at 725 (“There is a point, to be sure, at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment”) (Kennedy, J., concurring).
By accommodating religious beliefs in a way that will significantly harm other Missourians, SJR 39 violates the Establishment Clause. The amendment will eliminate any state or local recourse if Missourians are harmed because of another’s actions, including otherwise-criminal actions, related to a “religious belief concerning marriage between two persons of the same sex.” It will increase the likelihood that LGBT people and supporters of marriage equality will face violations of their own liberty and equality rights, including their freedom of religion. It sanctions bias and pejorative treatment by both private and public actors, and therefore conflicts with long-standing First Amendment principles.

SJR 39 also risks violating the Establishment Clause by improperly endorsing, or seeming to endorse, certain religious beliefs. The amendment lends the color of law to religiously-motivated discrimination by state workers performing state functions. For example, if a judge explicitly refused to solemnize a wedding because of his religious opposition to same-sex marriage—a belief that is specifically protected by SJR 39—this could cause a reasonable person to think that the government has endorsed the religious grounds for such opposition. Providing public funds to an organization that refuses to serve LGBT Missouri citizens for religious reasons also creates the perception of religious endorsement by the state. A reasonable observer could believe that the government has endorsed the religious belief that this population is sinful or unworthy of assistance. This violates the Establishment Clause, which forbids the government from supporting organizations that “impose religiously based restrictions on the expenditure of taxpayer funds, and thereby impliedly endors[ing] the religious beliefs of” that organization.

In the name of promoting religious diversity and freedom of conscience, SJR 39 sacrifices the rights of many in order to accommodate the preferences of a few. It disrupts the careful governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.”); McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844 (2005).

12 See generally, Memorandum from the Public Rights/Private Conscience Project to Interested Parties, Proposed Conscience or Religion-Based Exemption for Public Officials Authorized to Solemnize Marriages (June 30, 2015) available at http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/marriage_exemptions_memo_june_30.pdf. The fact that the discrimination is permissive rather than mandatory is not dispositive; like the students’ religious speech in Santa Fe Independent School District v. Doe, the decision of the state to permit such religiously-motivated conduct by government employees on government property in the provision of government services is “clearly a choice attributable to the State.” Santa Fe Independent School District v. Doe, 530 U.S. 290, 311 (2000).

13 The Supreme Court has typically upheld grants to religious organizations under the Establishment Clause, provided secular services are given to religious and secular actors on a neutral basis. See, e.g., Mitchell v. Helms, 530 U.S. 793 (2000). Permitting religious grant recipients to discriminate, however, is not a matter of merely providing funds for the same services in a neutral way. By permitting grant recipients to refuse to provide funded services to certain populations based on a religious belief, the government allows the grant recipients to redefine state programs in religious terms, to the benefit of religion, and to the detriment of non-adherents and program recipients.

balance set forth in the U.S. Constitution between private religious practice, non-endorsement of religion by the state, and other fundamental rights such as rights to equality and liberty. It therefore substantially oversteps the limitations on state action set out by the Establishment Clause by privileging religious believers and immunizing them from compliance with laws, including criminal laws, which are generally applicable to all other citizens of the state.

Elizabeth Sepper
Associate Professor
Washington University in St. Louis School of Law

Adrienne D. Davis
William M. Van Cleve Professor of Law
Washington University in St. Louis School of Law

Nancy Levit
Interim Associate Dean of Faculty
Curators’ and Edward D. Ellison Professor of Law
UMKC School of Law

Marcia L. McCormick
Professor and Director of the Wefel Center for Employment Law
Professor of Women's and Gender Studies
Saint Louis University School of Law

Gregory Magarian
Professor of Law
Washington University in St. Louis School of Law

Jasmine Abdel-khalik
Associate Professor
UMKC School of Law

Patricia Harrison
Children and Youth Advocacy Clinic Supervisor
Saint Louis University School of Law

Peggie Smith
Professor of Law
Washington University in St. Louis School of Law

Annette R. Appell
Professor
Washington University in St. Louis School of Law

* Titles and institutions are for identification purposes only.
Jamila Jefferson-Jones  
Associate Professor  
UMKC School of Law  

Ann Marie Marciarille  
Associate Professor of Law  
UMKC School of Law  

Pauline T. Kim  
Charles Nagel Chair of Constitutional Law and Political Science  
Co-Director, Center for Empirical Research in the Law  
Washington University in St. Louis School of Law  

Susan Frelich Appleton  
Lemma Barkeloo & Phoebe Couzins Professor of Law  
Washington University in St. Louis School of Law  

Jesse A. Goldner  
John D. Valentine Professor of Law  
Saint Louis University School of Law  

Katherine Franke  
Sulzbacher Professor of Law  
Columbia University