

MEMORANDUM

TO: INTERESTED PARTIES

FROM: PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT

RE: MISSOURI S.J.R. 39

DATE: APRIL 12, 2016

We offer the following legal analysis of Missouri Senate Joint Resolution 39. We are legal scholars with expertise in matters of religious freedom, civil rights, and constitutional law, and wish to call attention to provisions of the amendment that we believe raise serious conflicts with the Establishment Clause of the U.S. Constitution. By creating a religious accommodation that is vague, overbroad, and would meaningfully harm other Missourians, SJR 39 conflicts with established First Amendment doctrine. Perhaps most importantly, the Missouri constitution now provides ample protection to the religious liberty rights of the people of Missouri,<sup>1</sup> rendering SJR 39 an unnecessary supplement to those more than adequate provisions already embodied in state and federal law. This proposed amendment to the Missouri constitution risks unsettling a well-considered balance between religious liberty and other equally fundamental rights.<sup>2</sup>

**I. SJR 39 Violates the Establishment Clause of the First Amendment**

The religion clauses of the First Amendment state that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>3</sup> Entailed within these principles is the notion that the government may not favor or disfavor any particular religion or religion in general.<sup>4</sup> Moreover, the Supreme Court has consistently struck down overly generous legislative accommodations for religious beliefs where such accommodations cause a meaningful harm to other private citizens.<sup>5</sup> For instance, in 1985 the Supreme Court held

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<sup>1</sup> MO, CONST., Art. 1, § 5.

<sup>2</sup> While not the focus of this memo, we also note that we have significant concerns about SJR 39’s constitutionality under the Equal Protection Clause. As a constitutional amendment that substantially involves the state in public and private discrimination and places a political burden on a class of citizens, we believe SJR 39 conflicts with Supreme Court precedent including *Reitman v. Mulkey*, *Hunter v. Erickson*, and *Romer v. Evans*. See, *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>3</sup> U.S. CONST. amend. I.

<sup>4</sup> See, e.g., *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (“A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of ‘neutrality’ toward religion...favoring neither one religion over others nor religious adherents collectively over nonadherents”) (internal quotation marks omitted).

<sup>5</sup> See, *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985). See also, Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 357 (2014); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why*

in *Estate of Thorton v. Caldor*, that a Connecticut statute giving workers the absolute right to a Sabbath day of rest violated the Establishment Clause. It held that the statute impermissibly advanced religion by “impos[ing] on employers and employees an absolute duty to conform their business practices to the particular religious practices of the [observing] employee.”<sup>6</sup> In *Texas Monthly, Inc. v. Bullock*, the Court similarly found that a state tax exemption for religious periodicals violated the Establishment Clause by forcing non-religious publications to “become indirect and vicarious donors” to religious entities.<sup>7</sup> In *Cutter v. Wilkinson*, the Court upheld a broad religious accommodation law while explaining that accommodations need not be granted where they “impose unjustified burdens” on third parties or the State.<sup>8</sup> Only two years ago, in *Burwell v. Hobby Lobby*, the Court granted a religious accommodation to employers under the Religious Freedom Restoration Act but emphasized repeatedly in its opinion the fact that employees’ rights and interests would, according to the Court, not be harmed.<sup>9</sup>

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.<sup>10</sup> The non-endorsement principle is best articulated in several Supreme Court cases that involve expressive actions which may be attributed to the state, such as those taken by government employees, on government property, or during government-sponsored activities.<sup>11</sup> In these contexts, the relevant test is whether, in light of the context and history of the relevant law or action, a reasonable observer would perceive a state endorsement of religion.<sup>12</sup> If so, it amounts to a violation of the Establishment Clause.

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*an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014); *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).

<sup>6</sup> *Caldor*, 472 U.S. at 709.

<sup>7</sup> *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (internal quotations omitted).

<sup>8</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005).

<sup>9</sup> *See, Burwell v. Hobby Lobby Stores, Inc.* 134 S.Ct. 2751, 2759 (2014) (“The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.”).

<sup>10</sup> *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community”) (O’Connor, J., concurring); *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 305 (2000) (“Contrary to the District’s repeated assertions that it has adopted a ‘hands-off’ approach ... the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion.”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989) (“the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally”); *U.S. v. Lee*, 455 U.S. 252, 263 fn. 2 (1982) (Stevens, J., concurring) (“T[t]he risk that 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.”).

<sup>11</sup> *See, Santa Fe Independent School District*, 530 U.S. 290; *Lee v. Weisman*, 505 U.S. 577, 604 (1992) (Backmun, J., concurring) (“Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion”); *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005). *See also, Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009) (Stevens, J., Concurring) (government speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses”).

<sup>12</sup> *See, Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O’Connor, J., concurring) (“To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by

On our reading of the law of religious liberty, SJR 39 runs afoul of each of the above constitutional principles.

a. *The Establishment Clause Forbids Religious Accommodations That Impose Harms on Other Private Citizens and State Endorsement of Religion*

In the name of promoting religious diversity and freedom of conscience, SJR 39 disrupts the careful balance set forth in the U.S. Constitution, a balance between private religious practice, non-endorsement of religion by the state, and other fundamental rights such as rights to equality and liberty.<sup>13</sup> It substantially oversteps the limitations on state action set out by the Establishment Clause by privileging religious believers and immunizing them from compliance with laws generally applicable to all other citizens of the state. SJR 39's overly broad solicitude toward religiously motivated disagreement with laws of general application essentially creates an immunity from liability and a license to discriminate in the name of religion.

Specifically, SJR 39 strips Missourians of validly promulgated antidiscrimination protections in order to accommodate the preferences of religious individuals and institutions. Many Missouri municipalities have local ordinances that protect LGBT people from some forms of discrimination.<sup>14</sup> Missouri's two largest cities, St. Louis and Kansas City, both have robust

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an objective observer, acquainted with the text, legislative history, and implementation of the statute.”); *Santa Fe Independent School Dist. v. Doe*, 30 U.S. 290, 308 (2005) (“In cases involving state participation in a religious activity, one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools”) (internal citations omitted).

<sup>13</sup> We note that not all provisions of the law pose clear Constitutional problems. For example, Section 36.1(2) of the bill prohibits any civil claims or government action against “any clergy or other religious leader on the basis that such cleric or leader declines to perform, solemnize, or facilitate a marriage or ceremony because of a sincere religious belief concerning marriage between two persons of the same sex.” S.J.R. 39, 98th Gen. Assemb., Reg. Sess. (Mo. 2016). This section does not violate the Establishment Clause; however it is an unnecessary protection, as religious leaders already have this right under the Free Exercise Clause of the First Amendment, which provides extremely robust protections to houses of worship and religious leaders. *See, McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (*cert. denied*, 409 U.S. 896 (1972)); *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694 (2012).

<sup>14</sup> St. Louis, Missouri Code of Ordinances § 3.44.080(B) (prohibiting private employers that employ six or more non-family persons, labor organizations, employment agencies, and academic, professional, or vocational schools, from discriminating on the basis of “sexual orientation, gender identity or expression.”); § 3.44.080(C) (prohibiting discrimination on the basis of sexual orientation, gender identity or expression in housing, real estate loans, credit, and financial assistance); § 3.44.080(C) (prohibiting discrimination on the basis of sexual orientation, gender identity or expression in public accommodations); § 3.44.080(E) (prohibiting discrimination on the basis of sexual orientation, gender identity or expression within programs receiving money from the City of St. Louis); § 15.19.030 (prohibiting intimidation and harassment on the basis of sexual orientation, gender identity or expression); § 3.110.100 (requiring certain city contractors to have a personnel policy that prohibits discrimination on the basis of sexual orientation, gender identity or expression). Note that religiously-owned or operated organizations are exempted from some provisions of the city's antidiscrimination law, but only to the extent that they are permitted to preference co-religionists. *See*, St. Louis, Missouri Code of Ordinances § 3.44.080(B)(8); § 3.44.080(C)(3)(b). *See also*, Kansas City Code of Ordinances § 2-364 (prohibiting the city from discriminating against city employees on the basis of sexual orientation and gender identity); § 38-103 (prohibiting discrimination on the basis of sexual orientation and gender identity by employers who employ six or more persons, labor organizations, and employment agencies except with regard to any “religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or

LGBT antidiscrimination protections in the employment, housing, and public accommodations contexts. As acceptance for LGBT rights continues to grow, additional municipalities are likely to enact similar protections.

SJR 39 also interferes with the judiciary’s ability to enforce contractually-created rights that protect employees, renters, and consumers. For example:

- an employee who is fired for expressing her support for marriage equality may lose the ability to sue her employer under a “good cause” provision of a collective bargaining agreement;
- a person who rents an apartment from a religious housing provider may be unable to enforce his lease agreement if he is evicted for getting engaged to his same-sex partner; and
- a couple who hires a band to play at their wedding could not sue for breach of contract if the band refused to perform for religious reasons upon learning that the couple was of the same sex.

Finally, SJR 39 interferes with same-sex couples’ newly secured right to civil marriage itself by allowing state actors to shirk their duty to impartially serve the public and refuse to issue marriage licenses to, or to marry, same-sex couples. This will make same-sex couples’ constitutional right to marry contingent on their finding a willing government employee, and will subject them to moral disapproval and stigma by public officials.

As explained in more detail below, by exempting certain religious entities and believers from an obligation to treat all Missourians equally, SJR 39 sacrifices the equality rights of many in order to accommodate the religious preferences of a few. What is more, SJR 39 would allow state workers or state-funded programs to discriminate based on their religious faith, thereby violating the Establishment Clause even more clearly by lending the color of law to a particular religious belief.<sup>15</sup>

*b. SJR 39 Would Allow Public and Private Actors A Safe Harbor Based On “A Sincere Religious Belief Concerning Marriage Between Two Persons Of The Same Sex.”*

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society”); § 38-105 (prohibiting discrimination on the basis of marital status, sexual orientation and gender identity in housing except with regards to organizations “operated, supervised or controlled by or in conjunction with a religious organization, association or society”); § 38-105 (prohibiting discrimination on the basis of sexual orientation and gender identity in commercial real estate loans); § 38-113 (prohibiting discrimination on the basis of marital status, sexual orientation and gender identity in public accommodations); § 3-517 (requiring city construction contracts to contain a clause prohibiting discrimination on the basis of sexual orientation and gender identity). See also, AMERICAN CIVIL LIBERTIES FOUNDATION OF KANSAS AND WESTERN MISSOURI, *The Rights of Lesbian, Gay, Bisexual and Transgendered People in Missouri and Kansas* (last updated 2013) available at [http://www.aclu-mo.org/files/8614/0206/7726/ACLU-LGBT\\_Handbook-Update-3-22-13.pdf](http://www.aclu-mo.org/files/8614/0206/7726/ACLU-LGBT_Handbook-Update-3-22-13.pdf) (cataloging LGBT antidiscrimination ordinances in Missouri cities and counties including Clayton, Columbia, Creve Coeur, Ferguson, Kirksville, Kirkwood, Maplewood, Olivette, Richmond Heights, and University City.).

<sup>15</sup> See, e.g., *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989) (holding that the government violates the Establishment Clause when it “conveys or attempts to convey a message that religion or a particular religious belief is favored or preferred”) (internal citations and quotation marks omitted).

SJR 39 would allow state workers, state-funded programs, religious non-profits, and some for-profit businesses to act in ways that would otherwise violate generally applicable laws if they can justify their actions with “a sincere religious belief concerning marriage between two persons of the same sex.” It forbids the government from imposing a “penalty” on certain actors because of their religious views on marriage. The range of government actions deemed to be a “penalty” under the amendment is extensive; it includes not only imposing a fine or altering an entity’s tax status, but also reducing or denying any government benefit, contract, or grant. This would substantially limit the ability of the state of Missouri and its municipalities to control their own government funds. SJR 39 also forbids the government from adjudicating civil discrimination and other claims *between private parties*. Such absolute protection for religious faith goes far beyond what is provided in many other religious accommodation laws, such as the federal Religious Freedom Restoration Act (RFRA), which limits the government’s legislative and administrative actions but does not hinder the judiciary’s ability to enforce the law.<sup>16</sup>

First, SJR 39 forbids the government from imposing a “penalty” on a religious organization that “acts in accordance with a sincere religious belief concerning marriage between two persons of the same sex.”<sup>17</sup> “Religious organization” is defined to include any religious corporation, whether or not it is affiliated with a church or denomination, “where said organization holds itself out to the public in whole or in part as religious and its purposes and activities are in whole or in part religious.”<sup>18</sup> There does not appear to be any requirement that religious organizations be non-profit entities; thus this category could include not just schools, hospitals, non-profit housing providers, and social service agencies, but also a publishing company that sells both Christian and secular books or a fast food chain that closes on Sunday and prints Bible verses on the menu. All of these organizations would be legally allowed to discriminate against employees,<sup>19</sup> beneficiaries, or customers because of the organizations’ religious opposition to marriage equality. With regard to discrimination against employees, the exemption is not limited to the hiring and firing of ministerial employees (in keeping with religious exemptions in federal law) but would apply to *all* employees of religious organizations regardless of their proximity to the religious “mission” of the organization—sweeping in

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<sup>16</sup> 42 U.S. Code § 2000bb–1.

<sup>17</sup> S.J.R. 39, 98th Gen. Assemb., Reg. Sess. (Mo. 2016).

<sup>18</sup> *Id.*

<sup>19</sup> The Supreme Court has held that an exemption within Title VII of the Civil Rights Act that allows certain religious organizations to impose religious conditions on their employees does not violate the Establishment Clause. *See, Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). However, the exemption in Title VII is narrow in scope, and SJR 39 provides a far more expansive exemption than what the court upheld in *Amos*.

Specifically, Title VII exempts from its requirements any “religious corporation, association, educational institution, or society,” but does not define these terms. 42 U.S.C. § 2000e-1. Under case law, “organizations not owned or operated by a formal house of worship have generally not qualified for the exemption, even where the organizations were founded based on religious principles, engage in religious activities or have boards of trustees comprised of church members.” *See, John P. Furfaro & Rise M. Salins, Religious Organizations Exemption*, 239 N.Y. L.J. 65 (Apr. 4, 2008) *available at* [https://www.skadden.com/sites/default/files/publications/Publications1379\\_0.pdf](https://www.skadden.com/sites/default/files/publications/Publications1379_0.pdf).

In contrast, as mentioned, SJR 39 defines a “religious organization” to include organizations that are unaffiliated with any church or denomination, and potentially even some for-profit entities. S.J.R. 39, 98th Gen. Assemb., Reg. Sess. (Mo. 2016). This exemption is so broad that it raises Establishment Clause questions despite the Court’s ruling in *Amos*.

janitors, gardeners, cashiers, accountants, and a wide range of employees whose job description may have little or nothing to do with the purported religious nature of the organization.<sup>20</sup>

The amendment’s language protecting religiously motivated “acts in accordance with a sincere religious belief concerning marriage between two persons of the same sex” is particularly troubling. This language suffers from irredeemable vagueness and overbreadth insofar as it is impossible to predict the meaning and scope of beliefs it might protect. They could include:

- terminating a heterosexual employee who has voiced support for the rights of same-sex couples to marry;
- refusing to rent an apartment to a married same-sex couple;
- refusing service to a customer who is shopping for a wedding gift for a same-sex couple;
- terminating an employee who shares with her coworkers that she attended a wedding of a same-sex couple.

Organizations that choose to discriminate on the basis of a “religious belief concerning marriage between two persons of the same sex”—whatever that might include—would be given blanket immunity from compliance with otherwise applicable laws regulating equal opportunity in the educational, housing, and employment contexts based on their religious views about the marriage rights of same-sex couples.

Moreover, since revoking a contract or grant is considered a “penalty,” organizations that discriminate could continue to receive taxpayer money while denying services on the basis of their religious beliefs. Currently, at least two Missouri cities—St. Louis and Kansas City—*forbid* some recipients of city grants or contracts from discriminating on the bases of sexual orientation and gender identity.<sup>21</sup> Not only would SJR 39 allow religious organizations to violate those ordinances, under the amendment the state would lose even the discretionary power to withdraw state money from an organization that accepts a grant or contract to provide particular services, and then refuses to perform those services on the basis of a religious belief regarding marriage. For example, a taxpayer-funded homeless shelter could refuse to provide housing to anyone who refused to attest to the shelter’s position on marriage of same-sex couples, an adoption agency that contracts with the state could refuse to work with same-sex couples on the ground that only married heterosexuals would make good parents, or a community health clinic that receives a grant to hire a psychiatrist could refuse to hire any doctor married to a same-sex partner. These are not mere hypotheticals: adoption agencies across the country have refused to work with loving same-sex couples who wish to start a family, and at least one Missouri homeless shelter

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<sup>20</sup> The hiring and firing of clergy members is already exempted from employment discrimination law under the “ministerial exception” of the Free Exercise Clause. *See, McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (*cert. denied*, 409 U.S. 896 (1972)); *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694 (2012).

<sup>21</sup> St. Louis, Missouri Code of Ordinances § 3.44.080(E) (prohibiting discrimination on the basis of sexual orientation, gender identity or expression within programs receiving money from the City of St. Louis); § 3.110.100 (requiring certain city contractors to have a personnel policy that prohibits discrimination on the basis of sexual orientation, gender identity or expression); Kansas City Code of Ordinances § 3-517 (requiring city construction contracts to contain a clause prohibiting discrimination on the basis of sexual orientation and gender identity).

that does not currently receive taxpayer money has openly refused to shelter same-sex couples.<sup>22</sup> Workplace discrimination against LGBT people is widespread and SJR 39 threatens to open new, broad avenues to immunize that discrimination.<sup>23</sup>

Second, the amendment would prohibit the state and municipalities from imposing a “penalty”—including adjudication of private civil claims—on any individual who declines to be a “participant in”<sup>24</sup> or to “provide goods or services of expressional or artistic creation” for a wedding because of a “sincere religious belief concerning marriage between two persons of the same sex.”<sup>25</sup> SJR 39 does not define “participant,” and its definition of “individual” includes natural persons and closely held commercial enterprises owned by natural persons.<sup>26</sup> It would therefore allow even secular, private businesses to discriminate against same-sex couples by refusing to provide them nearly any wedding-related good or service, including wedding planning, catering, floral arrangements, music, clothing, or invitations. Despite the language which seems to limit religious refusals to “expressional or artistic” activities, there is no such limitation for those who do not wish to be a “participant in” a wedding. Therefore this provision could allow for exemptions of non-artistic services that would nevertheless require participation in a wedding, such as a limo driver, waiter, bartender, or cleaner. And again, the term “on the basis of a “religious belief concerning marriage between two persons of the same sex,” is unconstitutionally vague and could be interpreted to apply not only to services commissioned by a same-sex couple seeking to marry but to any person whose beliefs, actions, or associations conflict with a “religious belief concerning marriage between two persons of the same sex.”

Third, the provision that bans Missouri from penalizing anyone who refuses to participate in a wedding may also allow for discrimination by certain state employees. SJR 39’s definition of an “individual” does not clearly exempt government employees, whose job duties may include

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<sup>22</sup> See, Alana Semuels, *Should Adoption Agencies Be Allowed to Discriminate Against Gay Parents?*, THE ATLANTIC (Sept. 23, 2015), <http://www.theatlantic.com/politics/archive/2015/09/the-problem-with-religious-freedom-laws/406423/>; Jessica Chasmar, *Kansas City Homeless Shelter Bans Gay Couples Due to Christian Beliefs*, WASHINGTON TIMES (Nov. 17, 2014), <http://www.washingtontimes.com/news/2014/nov/17/kansas-city-homeless-shelter-bans-gay-couples-due-/>. See also, Ruth McCambridge, *Homeless Shelters Differ in Policies on Admitting Same-Sex Couples*, NONPROFIT QUARTERLY (Nov. 18, 2014), <https://nonprofitquarterly.org/2014/11/18/homeless-shelters-differ-in-policies-on-admitting-same-sex-couples/>; Mark Oppenheimer, *Sounding Quiet Dissent About a Holiday Perennial*, N.Y. TIMES (Dec. 24, 2011), <http://www.nytimes.com/2011/12/24/us/beliefs-salvation-army-hears-dissent-over-gay-views.html>; NATIONAL COALITION FOR THE HOMELESS, *LGBT Homelessness* (last visited Apr. 7, 2016), <http://nationalhomeless.org/issues/lgbt/> (“Frequently, homeless LGBT persons have great difficulty finding shelters that accept and respect them.”).

<sup>23</sup> See, MISSOURI FOUNDATION FOR HEALTH, *LGBT Health Disparities in Missouri* (last visited Apr. 7, 2016) <https://www.mffh.org/mm/files/LGBTHealthEquityFactSheet.pdf> (“One in seven LGBT Missourians report experiencing workplace discrimination. LGBT families are more likely to be poor, underemployed and multiracial than non-LGBT families.”).

<sup>24</sup> As applied to private citizens, SJR 39’s provision providing a right not to participate in a wedding is constitutional, albeit unnecessary. No federal, state, or municipal law in Missouri would require a private person to attend or participate in another’s wedding.

<sup>25</sup> S.J.R. 39, 98th Gen. Assemb., Reg. Sess. (Mo. 2016).

<sup>26</sup> The term “closely held commercial entity owned by a natural person or persons” is not further defined in the amendment. This is significant, as there is no standard definition for this term, which may include even large national chains. See *Burwell v. Hobby Lobby Stores, Inc.* 134 S.Ct. 2751(2014).

issuing a marriage certificate or officiating a wedding.<sup>27</sup> Thus, it appears that the provision would exempt even clerks, judges, and other state employees from their responsibility to perform their job duties fairly and impartially.

*c. By Providing Overly Broad and Vague Religious Accommodations and Endorsing Religious Beliefs, SJR 39 Violates the Establishment Clause*

All of the accommodations discussed in the previous section violate the Establishment Clause by shifting a burden from religious actors to other private citizens. SJR 39 immunizes religious believers from relevant municipal laws and policies that protect the rights and liberties of Missourians. Even where renters, employees, customers, or members of the public are protected from discrimination under local law or by contract, these provisions eliminate any recourse if they are denied housing, employment, or services because their beliefs, actions, or associations conflict with a store owner's, landlord's, or employer's "religious belief concerning marriage between two persons of the same sex." For example, in many Missouri municipalities, same-sex couples have the right to patronize wedding vendors of their choice, and an individual married to someone of the same sex cannot be fired from a for-profit religious business (e.g., a Christian bookstore) based on that marriage. Additionally, employment contracts may contain "good cause" requirements for termination, or leases may contain guarantees that renters can live with their immediate families. Under SJR 39, however, such discrimination would be sheltered from civil liability if motivated by religious faith "concerning marriage between two persons of the same sex."

In addition to losing otherwise-applicable legal remedies, by protecting religiously-motivated discrimination SJR 39 will harm Missourians by increasing the likelihood that LGBT people and supporters of marriage equality face bias and pejorative treatment. The Supreme Court ruled in *Obergefell* "that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter."<sup>28</sup> Exemptions that condone discrimination impose a disability on, and express disapproval for, a class of persons whose relationships are otherwise entitled to recognition by the state. This stigma is even more acute when it comes from government employees, who represent the state and have an obligation to impartially serve the public under Missouri's Constitution,<sup>29</sup> oaths of office,<sup>30</sup> code of judicial conduct,<sup>31</sup> and the

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<sup>27</sup> 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." S.J.R. 39, 98th Gen. Assemb., Reg. Sess. (Mo. 2016).

<sup>28</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602.

<sup>29</sup> See, MO. CONST., Art. I, § 2 ("all persons are created equal and are entitled to equal rights and opportunity under the law").

<sup>30</sup> See, MO. STAT. § 51.060 ("Before taking office every clerk of the county commission shall take and subscribe an oath or affirmation that he will support the Constitution of the United States and of the state of Missouri, and demean himself faithfully in office").

<sup>31</sup> See also, Mo. Code of Judicial Conduct, Canon 2, Rule 2.2 (A judge shall uphold and apply the law, and shall perform all duties of judicial office promptly, efficiently, fairly and impartially); Rule 2.1 ("To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent recusal"). Judges and court staff are, in fact, specifically prohibited from discriminating on the basis of sexual orientation, gender identity, or marital status by Missouri's judicial code of conduct. See, Mo. Code of Judicial Conduct, Canon 2, Rule 2.3 ("A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including



federal constitution. Even if a couple is able to obtain a marriage license or have their marriage solemnized by a non-objecting employee without a significant delay, this does not negate the stigmatizing effect of being denied a government service because of their identity.

SJR 39 provides an unprecedented and overly broad immunity to religious beliefs by creating an immunity from civil suits for anyone who can claim that their actions fall within the vague category of “religious belief concerning marriage between two persons of the same sex.” It allows religious faith to trump other private rights, including the right to be free from invidious discrimination, without considering how religious liberty claims might be balanced against the rights of other Missourians and other important state interests. Further, it provides cover for discrimination against a discrete minority whose right to equality and dignity has only recently been formally recognized by the State, and against ideas, actions or associations that run contrary to the protected party’s religious beliefs “concerning marriage between two persons of the same sex.” By shifting these significant costs from religious to secular parties, SJR 39 violates the Establishment Clause.

In addition to providing a religious accommodation that will cause significant harm to third parties, SJR 39 runs the risk of 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 the Missouri Constitution—this could cause a reasonable person to think that the government has endorsed the religious grounds for such opposition.<sup>32</sup> Providing public funds to an organization that places religious restrictions on the use of those funds also creates the perception that the government has endorsed such discrimination.<sup>33</sup> Awarding a grant to an organization that explicitly refuses to provide services to same-sex couples could cause a reasonable observer to 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

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but not limited to bias, prejudice, or harassment based upon ... gender identity, religion, ... sexual orientation, or marital status, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so”).

<sup>32</sup> 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](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).

<sup>33</sup> Of course, the Supreme Court has held that not every grant given to a religious organization or group violates the Establishment Clause. The Court has typically upheld grants where secular services are provided to religious and secular institutions 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. Rather, 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.

“impose religiously based restrictions on the expenditure of taxpayer funds, and thereby impliedly endors[ing] the religious beliefs of” that organization.<sup>34</sup>

*d. SJR 39 Hinders the Public’s Interest in Ensuring Equal Access to Government and Government-Funded Services*

SJR 39 is not only unconstitutional but also poses substantial policy problems. The exemptions offered to government grantees will thwart the state’s ability to prevent discrimination and ensure the delivery of necessary services to all Missourians. Allowing private organizations to apply for and receive government grants and contracts to deliver services, and then to selectively withhold or deny those services based on their religious beliefs, will make it impossible for the state to effectively carry out its policy goals.<sup>35</sup> Further, private organizations that choose to apply for a public grant or contract should be expected to advance public values, including the value of non-discrimination. When programs are funded with general tax revenues and intended to benefit public needs, the public has a strong interest in seeing that those services are delivered in a fair and nondiscriminatory manner.

Further, the government has a compelling interest in ensuring that public employees serve members of the public equally and without regard to any particular identity characteristic, and that the religious beliefs of state employees are not prioritized over the rights and needs of those they have sworn to serve. SJR 39 instead requires that the faith-based beliefs of government employees be put above their duties as public servants.

## **Conclusion**

In summary, SJR 39 contains overbroad religious accommodations, encourages discrimination, and conflicts with established First Amendment doctrine.

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<sup>34</sup> *Am. Civil Liberties Union of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 488 (2012) (finding that it violated the Establishment Clause for a nonprofit to place religious conditions on the use of federal funds). *See also*, *Dodge v. Salvation Army*, 1989 WL 53857 (S.D. Miss. 1989) (“The [government] grants constituted direct financial support in the form of a substantial subsidy, and therefore to allow the Salvation Army to discriminate on the basis of religion... would violate the Establishment Clause of the First Amendment in that it has a primary effect of advancing religion and creating excessive government entanglement.”).

<sup>35</sup> *Bowen v. Roy*, 476 U.S. 693, 699 (1986) (“The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.”). *See also*, *id.* at 711-12 (Burger, C.J., concurring) (“Appellees may not use the Free Exercise Clause to demand Government benefits, but only on their own terms, particularly where that insistence works a demonstrable disadvantage to the Government in the administration of the program.”).

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