

Joint Committee on the Judiciary
Testimony of Catherine R. Connors
In favor of
LD 1020, An Act To End Discrimination in Civil Marriage and Affirm Religious Freedom
April 22, 2009

Senator Bliss, Representative Priest, members of the Judiciary Committee, my name is Cathy Connors. I'm a lawyer and a partner at Pierce Atwood, a law firm in Portland. My husband and I live in Kennebunk. I'm a Republican, a Catholic, and I am testifying in favor of LD 1020.

My focus is on comments that some opponents have made as to the legal consequences of passage of LD 1020 on religious liberties. The suggestion has been made that enactment of this bill will, among other things:

- bring marriage of same-sex couples into the schools against parental wishes;¹
- require religious organizations to act contrary to their beliefs;² and
- force healthcare providers to act contrary to their religious consciences.³

Pointing to lawsuits from other states, the thrust of the argument is that LD 1020 will force individuals in Maine who believe that homosexuality is immoral to act against their beliefs.

There are several reasons why this argument should carry no weight with the Committee.

First, the argument is simply misdirected. The cases cited do not turn on the marriage issue at all. Each situation arose under general non-discrimination laws that forbid different treatment of gay people in ordinary civic transactions, regardless of the marital status of the people involved. The school case, for example, was not based on a law allowing same-sex couples to marry, but rather on a pre-existing school curriculum standard intended to foster respect for the diverse persons and families in the Massachusetts public schools, including gay families, whatever the marital status of the parents. Each of these cases is discussed in detail below.

¹ The case predominantly cited for this proposition is *Parker v. Hurley*, 514 F.3d 87, 94 (1st Cir. 2008) ("*Parker*").

² The cases predominantly cited for this proposition are two decisions from the New Jersey Department of Law and Public Safety, Division of Civil Rights involving the same religious organization, Ocean Grove Camp Meeting Association. *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. PN34XB-03008 (N.J. Dept. of Law and Public Safety, Div. of Civil Rights) and *Moore v. Ocean Grove Camp Meeting Ass'n*, No. PN34XB-03012 (N.J. Dept. of Law and Public Safety, Div. of Civil Rights) ("*Bernstein*"). Opponents also sometimes cite the decision of Catholic Charities of Boston in 2006 to stop acting as an adoption agency.

³ The case predominantly cited for this proposition is *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court*, 44 Cal. 4th 1145, 708 81 Cal. Rptr. 3d 708, 189 P.3d 959 (2008) ("*Benitez*").

Second, setting aside the immateriality of the specific cases cited by opponents, and focusing on the general proposition they assert -- that enactment of LD 1020 will impinge on their right to practice their religious beliefs as they choose -- this claim also ignores the substantial and existing legal protections religious organizations possess in Maine, under constitutional principles and statute, which will not change as a result of passage of LD 1020. This point is also discussed in more detail below.

I. The cases cited for the proposition that religious rights will be constrained by passage of LD 1020 do not support that proposition.

What follows is a detailed description of each of the cases relied upon to date by the opponents of LD 1020.

Parental Rights and Schools

The *Parker* case from Massachusetts is cited for the proposition that the legalization of marriage for same-sex couples will restrict parental rights to prevent their children's exposure in school to materials depicting same-sex families.

In the *Parker* case, the school in Lexington, Massachusetts was not teaching or advocating marriage for same-sex couples. Rather, as to the Parker family, their son, Jacob, was sent home in kindergarten with a "diversity book bag" that included a book, "Who's In A Family," that depicted a variety of families, including a same-sex family. In first grade, Jacob's classroom book collection included "Who's In a Family" and "Molly's Family," a book that told how Molly had a family with two moms. Jacob was not required to read the books or to listen to them being read. The case also involved a second family whose son, in his second-grade class, was read the story "King and King," a fairy tale about a prince who, seeking to marry, ultimately falls in love and marries a prince. That story was certainly designed to help create tolerance for families headed by same-sex couples. At the same time, no child was asked to endorse or affirm marriage for same-sex couples.

The federal appellate court ultimately said that the school's refusal to provide an exemption for these parents to exposure to these materials did not burden the right to free exercise of religion. *Parker* thus stands for the well-established proposition that a public school, in keeping with its interest in preparing the next generation of citizens and in promoting respect for the many types of people in our society, including the children and parents of same-sex unions—an interest that the Parker plaintiffs conceded—may introduce children to materials which depict same-sex relationships without first notifying parents and allowing them an opportunity to "opt out." Local school boards get to decide on the curriculum used in their district's schools in accordance with state-enacted guidelines and directives. If parents are dissatisfied, they have the political options of working to change the curricula through, e.g., composition of the school board, or the personal options of private school or home schooling for their children.

But vis-à-vis LD 1020, the relevant point here is, whether or not one agrees with the court's ruling – whether you think parents should have an opt-out right in public schools to

exposure to materials depicting same-sex families – marriage status isn't material to that debate. The court's ruling would apply regardless of the legal marital status of same-sex couples.

What children are taught in Massachusetts is not a product of its law on marriage, but rather Mass. Gen. Laws, Chapter 69, which requires the State Board of Education to establish academic standards for core subjects and requires that the standards “be designed to inculcate respect for the cultural, ethnic and racial diversity of the commonwealth....” Applying Chapter 69, the Massachusetts' State Board established standards in 1999, including a Comprehensive Health Curriculum Framework. Within the Framework are “Strands,” including a Social and Emotional Health Strand, which contains a Family Life component. The Family Life component provides that students learn about the significance of family generally. The Learning Standards for elementary school grades include the ability to “[d]escribe different types of families,” and “[d]escribe the concepts of prejudice and discrimination.” These standards were in place before Massachusetts recognized same-sex marriage as a constitutional right and, as indicated, they focus on families, not legal status.

Maine's curriculum development system is similar to the Massachusetts system in that the specific content of the curriculum is left to local control, with broad content standards established by the Board of Education. The Maine statute provides that the “basic course of study for the elementary schools must provide for the instruction of all students in [subjects such as English language arts, foreign languages, math, social studies, etc.]” 20-A M.R.S. § 4711. The statute further directs the Department of Education to establish a statewide system of learning called “learning results,” which set forth general “parameters for essential instruction ...”, 20-A M.R.S.A. § 6209. Elementary and secondary schools and school administrative units are required to implement the learning results, but the statute does not dictate the curriculum the schools adopt to meet those requirements. *Id.* § 4502.

The learning results themselves are similar to the “Learning Standards” in Massachusetts, but do not expressly reference family, “different types of families,” or similar terminology. A “guiding principle” of the learning results is that each student should leave school as a “responsible and involved citizen who . . . [u]nderstands and respects diversity.” A “key idea” in the Social Studies set of learning results is “unity and diversity.” The term “marriage or” “sexual orientation” appear nowhere in the learning results.

Maine law does require the Commissioner of the Department of Health and Human Services to “take initiatives to implement comprehensive family life education services.” “Comprehensive family life education” is defined by statute as

[E]ducation in kindergarten to grade 12 regarding human development and sexuality, including education on family planning and sexually transmitted diseases, that is medically accurate and age appropriate; that respects community values and encourages parental communication; that develops skills in communication, decision making and conflict resolution; that contributes to healthy relationships; that promotes responsible sexual behavior with an emphasis on abstinence; that addresses the use of contraception; that promotes individual responsibility

and involvement regarding sexuality; and that teaches skills for responsible decision making regarding sexuality.

22 M.R.S. § 1901. The statute expressly provides that, to the extent this education occurs in the school, parents may choose to have their children not participate. *Id.* § 1911. It further provides that the law is to be “construed to protect the rights of all persons to pursue their religious beliefs, to follow the dictates of their own consciences, to prevent imposition upon any person’s moral standards and to respect the right of every person to self-determination in respect to family planning.” *Id.* § 1909.

In sum, school curricula are governed by laws regarding curricula. The laws and standards in Massachusetts that were being implemented in Lexington public schools when the *Parker* case arose were in effect prior to recognition of marriage for same-sex couples in that state, and the thrust of that curricula is families and diversity, not legal marital status. Current Maine law expressly protects the rights of parents to pursue their own beliefs; like Massachusetts, none of its current curricula standards is dependent upon legal status; and passage of LD 1020 would not change this law.

Religious or Religiously-Affiliated Organizations

The cases cited to support the claim that allowing same-sex couples to marry will impinge on the ability of religions or religiously affiliated organizations to practice their religious beliefs also do not support that proposition.

Catholic Charities of Boston

In June 2006, Catholic Charities in Boston decided not to continue to offer adoption services. But this decision was not related to the arrival of marriage equality in Massachusetts.

Catholic Charities of Boston was formed in 1897 and continuously provided adoption services from its inception until it ceased the practice in June of 2006. In 1977, Catholic Charities signed its first agreement with the Massachusetts Department of Social Services to handle “special needs” adoptions, which included babies born with physical disabilities or drug addictions and teenage foster children. It was funded by the Commonwealth to do this work. In 1989, the Massachusetts Legislature expanded the anti-discrimination law to include discrimination based on sexual orientation. In 1993, the Massachusetts Supreme Judicial Court issued a decision allowing same-sex couples to adopt children. In 1997, Catholic Charities completed its first adoption with a same-sex couple as adoptive parents of a “special needs” child. Between 1997 and 2006, the organization placed 13 children in state custody with special needs with adoptive gay parents without any publicity or incident.

In the fall of 2005, the *Boston Globe* reported that Catholic Charities was adopting children into gay families. In February of 2006, Cardinal O’Malley and the three other Catholic bishops in Massachusetts decided that Catholic Charities’ participation in the adoption of children by gay families would cease. That position violated the non-discrimination terms of the

contract Catholic Charities had signed with the Commonwealth of Massachusetts. In response, eight board members of Catholic Charities resigned.

Cardinal O'Malley and his fellow bishops lobbied Governor Romney and the Massachusetts Legislature for an exemption for Catholic Charities from the state anti-discrimination law. Governor Romney and the Legislature declined, and Catholic Charities closed its adoption agency on June 30, 2006.

Hence, as a threshold matter, no gay person and no same-sex married couple challenged Catholic Charities. Its dispute was internal. And once again, the issue was not the legal status of marriage. Instead, Catholic Charities decided to withdraw from providing adoption services because Massachusetts anti-discrimination laws preclude sexual orientation discrimination; Cardinal O'Malley decided that Catholic Charities could no longer comply with the law (as it had been doing since 1990). That law was and is not dependent upon the legal status of the adopting parent(s) as married or unmarried.

Here in Maine, adoption is also not dependent upon marital status, whether the adopting parents are of the same sex or not. 18-A M.R.S. § 9-301. *In re Adoption of M.A.*, 2007 ME 123, 938 A.2d 1088. Hence again, whether gay couples can gain the legal status of being married will not change these adoption laws.

Bernstein v. Ocean Grove Camp Meeting Ass'n.

The facts in *Bernstein* were as follows.

Ocean Grove Camp Meeting Association (“Ocean Grove”) is a non-profit corporation founded in 1869, describing itself as a ministry organization rooted in the Methodist heritage. It owns all of the land, including the beach and boardwalk, in the one-square mile section of Neptune Township, New Jersey known as Ocean Grove. Much of the land is used for secular or commercial purposes. Residential and commercial buildings have been erected on portions of the land. Individuals and business entities own many of these buildings and lease the underlying land from Ocean Grove through 99-year renewable leases.

One of the parcels of land owned by Ocean Grove is the Boardwalk Pavilion, a rectangular open-sided structure covered by a roof that contains fixed wooden benches facing a small stage, which in turn, faces the beach and ocean. Except for the time when the Boardwalk Pavilion was reserved by Ocean Grove or rented to third parties, the Boardwalk Pavilion was open for general public use. The public used the Pavilion space in many ways, “including as a place to sit, congregate, picnic, play and to seek shade and shelter from the weather.” There were signs posted prohibiting smoking, bicycling and skateboarding, but there were no signs indicating that public use of the structure is prohibited in any way.

Ocean Grove itself repeatedly and affirmatively represented to the New Jersey State government that the Boardwalk Pavilion was open to the public on an equal basis. For example, in 1989, Ocean Grove applied to the New Jersey Department of Environmental Protection (NJDEP) for a Green Acres real property tax exemption for the Pavilion on the basis that the

property was generally open and accessible to the public. The NJDEP approved Ocean Grove's Green Acres application, finding that "the lands in question will be open to the public on an equal basis." More recently, on March 2, 2007, when applying for renewal of its Green Acres tax exemption, Ocean Grove reaffirmed that the "all segments [of the Pavilion property are] open to all public."

On or about March 5, 2007, Harriet Bernstein and Luisa Paster applied to Ocean Grove for permission to reserve the Boardwalk Pavilion for their civil union ceremony to be held on September 30, 2007. Ocean Grove denied the request on the basis that use of the Ocean Grove facility for a civil union service was in conflict with the policies of the United Methodist Church. Bernstein brought a complaint against Ocean Grove with the New Jersey Department of Law and Public Safety, Division of Civil Rights, alleging that Ocean Grove's refusal to permit civil union ceremonies at the Pavilion Boardwalk constituted unlawful public accommodation discrimination based on civil union status within the meaning of the New Jersey Law Against Defamation ("NJLAD").

The Division on Civil Rights determined that probable cause of discrimination existed, finding:

- The Boardwalk Pavilion is a public accommodation subject to the NJLAD because "the Pavilion has functioned like the beaches and boardwalks, and has been used by the general public for a variety of purposes consistent with the general absence of any notice restricting its use," as well as the fact that Ocean Grove itself affirmatively represented to the State government that the Pavilion would be open to all persons on an equal basis.
- Under the NJLAD, a public accommodation may not discriminate based on civil union status.
- Enforcement of the NJLAD in this case did not violate Ocean Grove's free exercise of religion protected under the First Amendment because the Boardwalk Pavilion is not a place of worship: "[G]iven the strong evidence that [Ocean Grove] intentionally makes the Pavilion available for public use and does not dedicate it solely to the practice of religion, the [NJLAD], a neutral law of general application, does not unconstitutionally impair [Ocean Grove's] right to free exercise of religion." Similarly, Ocean Grove's right to use its facilities to convey a message consistent with its Methodist purpose was not compromised because the Boardwalk Pavilion was not used by Ocean Grove to convey a religious message, and a civil union ceremony before private invited guests itself conveys no message and is not expressive association.

In the fall of 2007, the NJDEP reviewed Ocean Grove's application for renewal of its Green Acres tax exemption, and by letter dated September 15, 2007, rejected that portion of Ocean Grove's application that pertained to the Boardwalk Pavilion. The NJDEP decision was based on the fact that the Green Acres statute and regulations establish equal access as a prerequisite for the tax benefit, and Ocean Grove's decision to refuse permission of a civil union

ceremony at the Boardwalk Pavilion demonstrated that the Pavilion was not open to all persons on an equal basis.

In sum, the structure where the lesbian couple requested rental was not a church but a Boardwalk Pavilion—an open-air space that Ocean Grove itself represented as open to the public on an equal basis. It is because it violated that pledge to open access that Ocean Grove ran afoul of the law. The tax exemption that was revoked from Ocean Grove was not an income tax exemption such as the federal 501(c)(3) exemption, but rather a state property tax exemption for land open to the public on an equal basis.

Thus, again, the issue in *Bernstein* turned on New Jersey’s public accommodation law, and in the remedy phase, to a state property tax exemption for land open to the public. The couple in the case wasn’t getting married, and the results of the decisions would have been the same whether the couple could legally marry or not.

Like New Jersey, Maine has an antidiscrimination statute that makes unlawful the denial of public accommodations on account of sexual orientation. *See* 5 M.R.S. §§ 4591, 4592. The Maine statute lists specific examples of public accommodations subject to the law, and also includes a broad catch-all definition that would apply to accommodations such as the Boardwalk Pavilion in the Ocean Grove cases. *See* 5 M.R.S. §§ 4553(8) (listing various examples), 4553(8)(N) (broadly defining “public accommodation” as “[a]ny establishment that in fact caters to, or offers its goods, facilities or services to, or solicits or accepts patronage from, the general public.”).

Maine law thus already prevents organizations that own or operate public accommodations from prohibiting equal access to that accommodation. Nothing in LD 1020 would alter the burden placed on any religious entity that has taken its space and made that space into a generally available public accommodation. LD 1020 does nothing to increase or otherwise alter the protections contained in Maine’s existing public accommodation statute.

Healthcare Providers and Their Consciences

Here, the focus of the opponents to LD 1020 is the California *Benitez* case. The facts are as follows.

Guadalupe Benitez, a lesbian, sued two ob-gyns in a five-person private practice after they refused to perform an intra-uterine insemination. Benitez contends that the refusal was based on her sexual orientation, a violation of California’s Unruh Civil Rights Act. The doctors contend that their religious beliefs prohibit them from assisting an unmarried woman to become pregnant.

Under California law, the medical practice being sued constitutes a public accommodation. As a result, everyone is entitled to full and equal treatment at the practice, and discrimination on the basis of sexual orientation is prohibited. The doctors who were sued accepted that proposition, but also argued that the state and federal constitutions’ protection of free exercise of religion prohibited them from being exposed to liability under this state law.

The California Supreme Court disagreed. It ruled, consistent with a United States Supreme Court decision written by Justice Antonin Scalia, that no one is relieved from the obligation to obey a law of general applicability on the grounds that it interferes with their religious beliefs. In addition, the Court ruled that the state has a compelling interest in prohibiting discrimination, and that there is no less intrusive way to carry out that compelling interest.

After ruling that the doctors could not rely on their religious beliefs to refuse treatment to Ms. Benitez, they did also rule that there was a question to be decided at trial whether the refusal to treat had been based on Ms. Benitez's sexual orientation or her status as an unmarried woman. If it turns out to be the latter, the doctors might well prevail, as marital status discrimination was not unlawful in public accommodations at the time Ms. Benitez was denied treatment.

Thus, yet again, this California case is governed by a state's general public accommodations anti-discrimination laws. Maine's public accommodations statute already precludes discrimination on account of sexual orientation. 5 M.R.S. § 4592(1). Current Maine law provides the same sort of protections as the California statute. However one feels about a doctor's right to refuse to treat someone based on sexual orientation, the Legislature has already addressed this subject, and LD 1020 wouldn't change these laws.

Other cases

Opponents are fond of citing other cases as well – for example, a New Mexico case where a photographer refused to take photos of a civil commitment ceremony.⁴ Once again, a marriage wasn't involved; once again, the issue was the effect of general state anti-discrimination laws; and once again whether a gay couple in Maine could be legally married would not affect the question whether a photographer could refuse to take photos of a commitment ceremony, civil union, marriage, or birthday party for that matter. A civil society requires people who open their doors for business to open their doors to everyone.

In sum, opponents cite a pattern of cases in which people assert personal or religious beliefs to refrain from engaging in some activity with gay people. The outcomes of these cases, however, do not depend upon whether those gay people can marry. Instead, they are governed by already existing laws protecting against discrimination based on sexual orientation.

II. Existing laws protect religious beliefs and practices.

LD 1020 relates to civil legal marital status. As noted, non-discrimination laws like the Human Rights Act, which already exist, focus on public accommodations and commercial transactions; they do not and cannot constrain religious practices or beliefs. That Act enumerates characteristics upon which discrimination is forbidden, including race and ethnicity, age and disability, sex and sexual orientation. Those laws serve the essential function of equal access to participation in the full range of activities in civic life. For all protected characteristics, the Act has already struck a balance between ensuring, on the one hand, equal opportunities for all persons in accessing jobs, housing, and publicly available goods and services, and on the other

⁴ *Vanessa Willock v. Elane Photography, LLC* (HRD No. 06-12-20-0685).

hand, protection for religious organizations so that religious practices and beliefs are not impinged.

Thus, the non-discrimination law allows non-profit religious or fraternal corporations and associations to employ members of the same religion or fraternity, notwithstanding the non-discrimination law (except for purposes of disability-related discrimination). 5 M.R.S. § 4553 (4). Further, the Human Rights Act specifically allows “a religious corporation, association, educational institution or society” to give preference to members of that religion when the “work [is] connected with the carrying on by the corporation, association, educational institution or society of its activities.” 5 M.R.S § 4573-A (2). Moreover, “a religious organization may require that all applicants and employees conform to the religious tenets of that organization.” *Id.* Both these explicit statutory exemptions and court interpretations of the First Amendment have long made clear that religious faiths may select their own members, leaders and generally their employees without government intervention.

In the area of housing, Maine law excepts “the rental of any dwelling owned, controlled or operated for other than a commercial purpose by a religious corporation to its membership, unless such membership is restricted on account of race, color or national origin.” 5 M.R.S. §4553 (6)(C). On the other hand, if a religious corporation engages in the business of housing in the commercial, secular marketplace, the non-discrimination rules apply.

In sum, the Legislature has, by statute, already made policy decisions on how to balance the goals of non-discrimination with religious liberties. Nothing in LD 1020 will change that. Moreover, LD 1020 expressly affirms that no governmental entity may “compel, prevent or interfere in any way with any religious institution’s religious doctrine, policy, teaching or solemnization of marriage within that particular religious faith’s tradition as guaranteed by the Maine Constitution, Article 1, Section 3 or the First Amendment of the United States Constitution.” LD 1020, Sec. 5. If anything, LD 1020 strengthens the rights of Maine religions to practice and teach their religious faiths as guaranteed by the Maine Constitution.

As to individuals and distinct from religious organizations, the opponents of LD 1020 thus mischaracterize what they seek, which is really a right to act in violation of existing law, that is, a right discriminate against gay people in ordinary commercial and secular transactions. There is no issue as to people of any particular faith being compelled to believe that marriage for same-sex couples is good, as constitutional protections for religious belief are absolute. *Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872, 877 (1990) (majority opinion by Justice Scalia). People are also free to express those beliefs. *Id.*

When it comes to how people act in accord with their religious beliefs, Justice Scalia noted that free exercise does not require religious exemptions from neutral, generally applicable laws. Civil rights laws like Maine’s Human Rights Act are an example of a generally applicable law. That people have religious beliefs that conflict with the obligation of equal treatment under non-discrimination laws is not new. Segregationist theology was used, ultimately unsuccessfully, to defend discriminatory Jim Crow laws.

And there lies the heart of the matter. Much of the opposition against LD 1020 is simply misdirected. The opponents' unhappiness lies not with the specific issue addressed in this bill – a civil legal status of marriage – but a broader desire not to associate with gay people. But through a series of laws as noted above, the Legislature has already addressed this topic – when something is a public accommodation and must adhere to anti-discrimination rules; when personal beliefs may exempt someone from having to associate, and so on. Whatever the concerns of those who would like broader exemptions or different rules, let's not confuse that issue with the topic before the Legislature today. And let's not forget that this tension between non-discrimination and religion first arose with respect to race and is nothing new.

The question before the Legislature now is whether gay couples should be allowed to obtain the civil legal status of marriage. Whether they can or cannot marry will not affect the rights of anyone else regarding whether they must associate or accommodate gay people, married or otherwise. LD 1020 will simply put a specific legal status on an equal footing.

Thank you.

Catherine R. Connors
Pierce Atwood LLP
One Monument Square
Portland, ME 04101