HUSCH BLACKWELL

MEMORANDUM

Date: April 18, 2016

From: Husch Blackwell, LLP

Re: SJR 39

We have been asked to review SJR 39 as perfected by the Senate to identify problems that could impede it from achieving its goal or which may implicate constitutional infirmities. In that regard, we have identified below various legal, policy and enforcement issues regarding SJR 39.

(1) The definition of "individual" in Section 36.5(2) of SJR 39 is overly broad

The definition of "individual" in Section 36.5(2) of SJR 39 includes, among others, *public* employees, including state court and municipal judges, county clerks and employees of state agencies. Although the measure states at Section 36.4(1) that "nothing in this section prevents the state from providing a marriage license…" the measure does not *mandate* that the state do so in accordance with applicable federal law, nor does it *require* state officials to perform their public functions. As the state acts only through these officials/employees, the measure effectively allows public officials to avoid the "penalty" of an "administrative charge" or other "penalty" as the result of a refusal to perform their constitutional and statutory duties.

The ramifications of this include the following: judges refusing to marry same-sex couples; county employees refusing to issue marriage licenses to same-sex couples; and department of revenue officials refusing to accept joint tax returns of same-sex couples, with the agency employing the individual powerless to take any employment action against the employee. SJR 39 would not only prevent those officials/employees from being subject to discipline by their employer, it would also prevent any civil action against the official/employee, including a writ of mandamus requiring the official/employee to carry out his/her public duties, all in violation of the United States Supreme Court's recent decision in *Obergefell v. Hodges*.

(2) SJR 39, Section 36.2(6), violates Article V, Section 4 and Article II, Section 1 of the Missouri Constitution

Article V, Section 4 of the Missouri Constitution permits higher courts to issue original writs against lower courts, and Article II, Section 1 establishes the principle of separation of powers among the three branches of government. However, Sections 36.2(6) and 36.5(2) of SJR 39 exempt judges from a civil action, which would include an action for a writ of mandamus/prohibition. Thus, SJR 39 is likely unconstitutional in that it seeks to prevent a remedy explicitly permitted under the Missouri Constitution, in violation of both Article V, Section 4 and of the separation of powers clause contained in Article II, Section 1.

(3) SJR 39, Sections 36.1(1) through 36.1(4), violates Article I, Section 14, Article I, Section 2 and Article I, Section 7 of the Missouri Constitution because the measure gives rights and protections to people of certain religious beliefs, while not affording people with different beliefs with the same or equal protection under the law

Article I, Section 14 of the Missouri Constitution states that "the courts shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." Similarly, Article I, Section 14 states that "all persons are created equal under the law and are entitled to equal rights and opportunity under the law..." Finally, Article I, Section 7 mandates that "no preference shall be given to nor discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

Sections 36.1(1) through 36.1(4) of SJR 39 violate each of these constitutional provisions in that these provisions give *preference* to people of *certain* religious beliefs, thus treating people with beliefs not covered by the measure (or people with no religious beliefs at all) differently under the law, in violation of Article I, Section 14, Article I, Section 2 and Article I, Section 7 of the Missouri Constitution. These provisions would also violate corresponding provisions in the establishment and equal protection clauses of U.S. Constitution. *See U.S. Const., Amend. I and XIV.*

(4) Section 36.1(4) of SJR 39 does not define what it means to "personally be a participant" in a same-sex marriage

The "personally be a participant" wording of Section 36.1(4) of SJR 39 is so broad and unclear that one could argue he/she is participating in a same-sex marriage by providing *any* goods or services, of *any* kind, for a same sex marriage or wedding. For example, a company that rents tables could refuse to do so if those tables are intended for use in a same-sex marriage. This overly broad language greatly exceeds the second portion of Section 36.1(4), which allows an individual to refuse to provide goods or services of "expressional or artistic creation." If the intent of Section 36.1(4) is to shield individuals who provide goods/services of "expressional or artistic creation," the "personally be a participant" language should be removed, as it serves no purpose other than to significantly expand the types of goods/services protected by the section to a point well-beyond good/services of "expressional or artistic creation."

(5) SJR 39 uses the undefined term "marriage" in Section 36.1(1) and (2), the undefined terms "marriage or ceremony" in Section 36.1(3) and the undefined terms "wedding or marriage" in Section 36.1(4), thus treating individuals and entities differently under the statute and creating confusion with regard to what protections are afforded under the respective provisions

In describing the protections afforded by under SJR 39, Sections 36.1(1) through 36.1(4) use different, undefined terms in different sections of the law. This creates confusion, uncertainty and subjects SJR 39 to additional equal protection challenges.

For example, SJR 39 uses only the term "marriage" in Sections 36.1(1) and 36.1(2). It uses the terms "marriage or ceremony" in Section 36.1(3). And it uses the terms "wedding or marriage" in Section 36.1(4). As SJR 39 uses similar, yet different words in different places, Courts will interpret these provisions to have different meanings and to offer different protections to different individuals and/or organizations in different instances. Typically, Courts interpret statutes using the plain meaning of the words used, usually as those words are defined in the dictionary if they are not separately defined in the legislation.

The dictionary definition of *marriage* is "the relationship that exists between a husband and a wife" and "a similar relationship between people of the same sex." In other words, the term "marriage" includes the *on-going relationship* between a married couple, i.e. the status of being married, which lasts beyond the mere "wedding" or "ceremony" date. The definition of *ceremony* is "the formal activities conducted on some solemn or important public or state occasion." The definition of *wedding* is "the act or ceremony of marrying; marriage; nuptials." Thus, a ceremony could include something more than a wedding; for instance, the renewal of wedding vows.

Accordingly, Sections 36.1(1) and 36.1(2) do not provide protections for a *wedding* or *ceremony* (as those Sections use only the term "marriage"); Section 36.1(3) does not afford protections for a *wedding* (as it uses the terms "marriage or ceremony"); and Section 36.1(4) does not apply to a *ceremony* (as it uses the terms "wedding or marriage"). In addition to being confusing and potentially ambiguous (thus leaving it to the courts to determine what each term actually means), the fact that SJR 39 applies to a "marriage" in one instance, a "marriage or ceremony" in a second instance and a "wedding or marriage" in yet a third instance will result in a court concluding that the measure does not even survive the lowest level of rational basis scrutiny under the U.S. Constitution.

(6) The definition of "religious organization" in Section 36.5(3)(b) is overly broad

The definition of "religious organization" under Section 36.5(3)(b) of SJR 39 applies to, among other entities, schools, universities, corporations, hospitals and healthcare facilities "whether or not [the organization is] connected to or affiliated with a church" and to organizations that are only "part religious" if the organization's "activities are in whole or part religious."

This definition raises numerous issues/questions related to the fact that it is entirely unclear what it means to be "part religious" or for "activities" be "part religious" under Section 36.5(3)(b). For example, how is a corporation part religious? Is it "part religious" if one of its officers is religious? Are its activities part religious if the corporation contributes to religious organizations? Likewise, how is a university part religious? May a public university be "part religious" because it offers a non-denominational center in which students of varying faiths may worship? Is a public hospital "part religious" because clergy are permitted to pray with patients in the patients' rooms? Is a nursing home or public nursing home district "part religious" because it transports residents to a church service?

The combination of (1) an organization not needing to be affiliated with a church and (2) the allowance of "part religious" entities and/or "part religious" "activities" results in a potentially limitless universe of entities covered under the definition of a "religious organization" in Section 36.5(3)(b).

(7) SJR 39 will have unintended consequences with regard to federal funding received by the State of Missouri

Combining the overly broad "personally be a participant" language of Section 36.1(4) with the overly broad universe of entities that are "part religious" under Section 36.5(3)(b) effectively means that public universities, hospitals, schools

and corporations may, under the protections of SJR 39, deny services to individuals in same-sex marriages in certain instances, eventually resulting in the respective entities; e.g. public schools, universities and hospitals losing any federal funding that such entities receive, including Medicaid/Medicare funds, all federal grants and federal highway appropriations, since such funds are contingent on compliance with federal law, and since in *Obergefell v. Hodges* the United States Supreme Court held that same-sex couples have a fundamental right to marriage, and the rights and protections afforded thereto, under Federal law.

(8) The definition of a "penalty" in Section 36.2 of SJR 39 is overly broad

A "penalty" under Section 36.2 could include almost anything, since Section 36.2 affirmatively states that a "penalty" is "not limited to" the listed provisions in Sections 36.2(1) through 36.2(6). Under these Sections, a "penalty would thus include anything that may fall under the plain definition of the word, to include anything from an employee reprimand to a criminal proceeding.

(9) SJR 39 exposes the state to significant, unintended financial liability

Section 36.6 allows SJR 39 to be asserted not only in defense of a "penalty" (which again could be almost anything) sought to be imposed by the state, but also permits an affirmative "claim" for damages against the state.

A claimant/plaintiff under Section 36.6(4) could seek both compensatory and punitive damages based on the section's reference to compensatory damages and "any other appropriate relief."

The state has also waived its sovereign immunity under Section 36.6(4). Thus SJR 39 applies to anything that could be described as a "penalty" (""penalty' means, but is not limited to) against a potentially infinite number of entities ("part religious") under a broad, undefined and unclear set of circumstances ("personally be a participant"). SJR 39 therefore exposes the state to numerous unforeseen legal claims, resulting in an unknown and unforeseeable amount of liability to the state. In fact, SJR 39 would even permit one state agency to sue another and/or court to sue each other for money damages. The fiscal note implications of this situation are significant.

(10) SJR 39 will have unintended consequences with regard to the ability of a "religious organization'" to deny services to couples in same-sex marriages

and negatively impact the state's ability to pursue and enforce certain legal remedies

Section 36.1(1) of SJR 39 states: "That the state shall not impose a penalty on a religious organization on the basis of that organization's belief concerning marriage between two persons of the same sex."

If you insert the definitions of the defined terms in SJR 39 and standard dictionary definitions for the undefined terms in the bracketed areas below, it results in the following meaning/interpretation of Section 36.1(1):

> That the [courts of this state] shall not impose [civil or criminal liability] on a [corporation that is part religious] on the basis of the corporation's belief concerning [the marital relationship] between two persons of the same sex.

This plain language interpretation of Section 36.1(1) raises numerous troubling concerns. For example:

- May a partly religious hospital deny medical services to a person in a same-sex marriage and be shielded from liability being imposed by the courts?
- May a partly religious nursing home refuse nursing services to a resident who enters into a same sex marriage after his/her residency has begun?
- May a partly religious hospital be shielded from liability after refusing to treat a pregnant woman (in a same-sex marriage) who requires emergency medical services for her health or the health of her baby?
- May a partly religious university (which, again, could include a public university) be shielded from liability and/or injunctive relief for expelling a student who enters into a same-sex marriage after becoming enrolled?
- May a partly religious school (again, this could be a public school depending on the circumstances) deny admission to a child of a same-sex couple and be shielded from any judicial relief?