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March 12, 2013

Re: SB 0010
Religious liberty implications of same-sex marriage

Hon. Tom Cross
316 Capitol Building
Springfield, IL 62706

Dear Rep. Cross:

Senate Bill 0010, providing for same-sex marriage, is now before the House. We urge you to amend the bill to include robust and specific protections for religious liberty — and then that you pass the bill.

All the signers of this letter have studied and written about the law of religious liberty for many years. One of us edited and contributed to the leading book on protecting both religious liberty and equality in marriage, *Same-Sex Marriage and Religious Liberty* (2008).

Any bill on same-sex marriage should include religious liberty protections on the lines proposed in the separate letter that you recently received (on or about January 23 and February 26) from a group of scholars led by Professor Robin Fretwell Wilson. We come to these issues from a rather different perspective from Professor Wilson's group, but their analysis of potential legal conflicts is accurate, and their proposed statutory language is necessary to legislation that is fair and just to all sides.

We support same-sex marriage. We think equality in marriage can be a great advance for human liberty. But careless or overly aggressive drafting could create a whole new set of problems for the religious liberty of those religious believers who cannot conscientiously participate in implementing the new regime. The net effect for human liberty will be no better than a wash if same-sex couples now oppress religious dissenters in the same way that those dissenters, when they had the power to do so, used to oppress same-sex couples.

We realize that you may not share our view of equality in marriage. But we are confident you share our view of religious liberty. And we think it is critical to enact religious liberty protections with respect to same-sex marriage now, before it is too late. Same-sex marriage is coming sooner or later; all the polling data show that the supporters of same-sex marriage are much younger than the opponents. Right now, the issue is close; supporters of same-sex marriage may have to bargain to get their bill. But as their support increases, they will have less need to bargain, they will be freer to respond to the most aggressive members of their movement, and they will have the votes to enact same-sex marriage with no protection whatever for religious liberty. That is very close to what they are trying to do; the protections for religious liberty in Senate Bill 0010 are very wordy but they may actually protect very little. But at least from our distant observation point, it is not yet clear that they have the votes. Someday they will, probably sooner rather than later. The time to get legislation to protect religious conscience is now.

It is not enough to protect the right of clergy not to perform same-sex weddings. It is also necessary to protect the churches and synagogues in their other functions, and to protect religious counseling services and religious adoption agencies. It is important to protect religious individuals who assist with weddings or provide professional services to help sustain marriages. The Wilson group's letter has specific statutory language that would accomplish these goals.

I. Religious Organizations

Section 15 of the bill states a broad and helpful principle in sweeping terms: "Nothing in this Act shall interfere with or regulate the religious practice of any religious body." This language is also part of the Illinois Religious Freedom Protection and Civil Union Act. 750 Ill. Comp. Stat. §75/15.

But the bare statement of principle leaves it to litigation to determine what is a "religious practice," what is a "religious body," what is interference or regulation, and whether the Assembly intended the full sweep of its language. Sections 15, and the amendments to § 209 of the Marriage and Dissolution of Marriage Act, go on to provide in great detail that clergy are not required to officiate at weddings and that one important subset of religious organizations need not provide physical facilities for weddings or wedding receptions. Some lawyers will inevitably argue that these more specific provision somehow limit the scope of the more general provision in § 15.

The issue of "solemnization" and "celebration" is important, but it is only the most obvious part of the issue for religious organizations. A bill that addresses only solemnization and celebration would do less to protect religious liberty than any other state that has enacted same-sex marriage. Equally important, and more likely to be litigated, is the issue of "recognition" of same-sex marriages by religious organizations for purposes of carrying out their religious missions.

Marriage is both a legal relationship and a religious relationship. The profound religious significance of marriage means that many religious organizations and individual believers experience marriage equality as reaching deep into a fundamentally religious institution. A religious organization, in the course of carrying out its religious mission, cannot in good conscience treat as married two persons whose relationship fundamentally violates the religious organization's understanding of marriage. Must the pastor provide pastoral counseling for a same-sex married couple? Must a religious college provide married-student housing for same-sex couples? A religious-liberty provision addressed only to solemnization neglects these and many similar issues.

We think the best solution is the more elaborate language proposed by Professor Wilson's group. It anticipates the range of issues likely to arise and addresses them with care. But at the very least, any bill on same-sex marriage should protect all religious organizations, and it should protect decisions about "recognition" as well as decisions about solemnization and celebration.

II. Individuals

Senate Bill 0010 provides no protection for individuals who provide services to help celebrate weddings or professional services to help sustain marriages. This omission threatens serious harm to a religious minority while conferring no real benefits on same-sex couples. Same-sex couples will rarely if ever actually want such personalized services from providers who fundamentally disapprove of their relationship, and they will nearly always be able to readily obtain these services from others who are happy to serve them.

The Wilson group's letter offers carefully crafted language that would address this problem in a way that is fair to both sides. It would protect only individuals and very small businesses, and only when some other business is reasonably available to provide the same service. But it would help ensure that people committed to a traditional view of marriage are not driven from the field.

III. Conclusion

Enacting the right to same-sex marriage with generous exemptions for religious dissenters is the right thing to do. It respects the right of conscience for all sides. It protects the liberty of same-sex couples and the liberty of religious dissenters. Adding religious liberty protections is obviously better for the traditional religious believers; on a few moments' reflection, it is also better for the same-sex couples. Because it is better for both sides, it is better for Illinois. The language proposed in the Wilson group's letter would protect the liberty of both sides. We urge you to add it to any bill on same-sex marriage.

At the very least, the bills should protect “recognition” and should protect all religious organizations.

Each of us signs this letter in our individual capacities; none of our employers takes a position on the issues we address. We are available to discuss these issues further if that would be of any benefit.

Very truly yours,

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