

Michigan Law

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BY E-MAIL AND OVERNIGHT

Hon. John Lynch, Governor of New Hampshire
State House
25 Capitol St.
Concord, NH 03301

Re: Religious liberty protections proposed by Governor Lynch

Dear Gov. Lynch:

We are supporters of same-sex marriage who urge you to stand firm in your insistence on religious liberty amendments to H.B. 436.

The amendments you have proposed are quite modest. They protect only religious institutions and their employees; in our view, they ought also to protect individuals who work for secular not-for-profit organizations or in small businesses. But the bare minimum for any plausible protection of religious liberty is to protect the work of religious institutions. You should not retreat from insisting on at least this much protection for religious liberty.

American legislatures from the seventeenth century forward have enacted exemptions to protect religious conscience from the requirements of general legislation. A scholarly study found some 2000 religious exemptions in state and federal statutes as of 1992. Specific legislative exemptions avoid constitutional litigation and often provide more effective protection than what judges would provide if forced to rely on the general language of the state or federal constitution.

Exemptions for religious conscience protect a fundamental human liberty. And they ameliorate social conflict in cases such as this, when Americans with radically different views on fundamental moral questions seek to live together in peace and equality in the same society. As one of us said in an earlier letter,^{*} allowing generous religious exemptions will smooth the implementation of same-sex marriage and hasten the day at which it becomes familiar and broadly accepted, with opponents resigned to the new situation. Refusing exemptions creates the potential for a series of martyrs who will keep the issue alive, inflame conservative religious opinion, and empower the most demagogic opponents of same-sex marriage.

It seems to be uncontroversial that churches should not be compelled to perform same-sex weddings in violation of their own teachings. The same readings of scripture, and the same theological and doctrinal traditions, that cause some churches to refuse to perform same-sex weddings will cause those same churches to refuse to recognize same-sex marriages in any other context. Their religious motive is the same whatever the context. A religious exemption does not enshrine bigotry in the statute in the one context any more than in the other. Rather, exemptions enshrine religious liberty and the live-and-let-live traditions of the American people.

Of course the oldest form of bigotry in western culture is religious bigotry. Hostility to religious believers because of their belief is no more defensible than hostility to gays and lesbians because of their sexual orientation. And to say that these churches can believe whatever they want but they cannot act on it is no more defensible than saying that gays and lesbians can have their sexual orientation but they cannot act on it. Same-sex couples and conservative religious believers make parallel claims on the larger society. They each say that some aspects of human identity are so fundamental that they should be left to each individual (and to their voluntary associations), free of any but the most essential regulation. It is a great thing to be on the cusp of protecting the liberty and equality of same-sex couples, but you should at the same time preserve the liberty and equality of religious institutions and religious believers.

We endorse the careful analysis of your proposed statutory text in the letter that Professor Thomas C. Berg and others sent you earlier today. We will not repeat that analysis here, but urge you to adhere to your position, or to strengthen it and protect believers as well as institutions and their employees.

All the signers of this letter have studied and written about the law of religious liberty for many years; three of us have written in particular about how to protect both sexual liberty and religious liberty. Two of us contributed to the leading book on the issue, *Same-Sex Marriage and Religious Liberty* (2008). Each of us signs this letter in our individual capacities; neither the American Jewish Congress nor any of our universities

^{*} Available at <http://mirrorofjustice.blogs.com/mirrorofjustice/2009/05/the-continuing-ssm-religious-liberty-debate-in-new-hampshire.html>

takes a position on the issues addressed in this letter. Professor Laycock is authorized to sign on behalf of the entire group. We are available to discuss these issues further if that would be of any benefit.

Very truly yours,

Andrew Koppelman
John Paul Stevens Professor of Law
Northwestern University

Douglas Laycock
Yale Kamisar Collegiate Professor of Law
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Michael Perry
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