ALLIANCE DEFENDING FREEDOM

FOR FAITH. FOR JUSTICE.

MEMORANDUM

DATE: February 4, 2013

RE: Legal Analysis on Religious Discrimination in Proposed Illinois Same-Sex Marriage Legislation

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Introduction

The proposed amended legislation to redefine marriage in Illinois (the "Bill") is cleverly called the "Religious Freedom and Marriage Fairness Act." But that title is very misleading. The reality is that the Bill is not about *fairness*—at least not for churches, temples, mosques, and other houses of worship (together, "churches"). And it certainly is not about *religious freedom*.[1] Rather, if enacted, the Bill will harm churches, church-related organizations, and people of faith. First, it will trample the religious freedom of Illinois' churches by requiring them to do things that violate their sincerely held religious beliefs about homosexual behavior and same sex marriage. The Bill will do the same to church-related organizations, like church schools, denominational headquarters, and adoption agencies. And finally, the Bill will demolish any semblance of freedom of conscience for those people of faith who object to same sex marriage because of their sincerely held religious beliefs.

It is therefore wrong to call this Bill a "religious freedom" act. This Bill is not about religious freedom. It is about religious intolerance. It will be used as a weapon against churches and people with sincerely held religious convictions, forcing them to accept and even celebrate behavior that their faith teaches them is "sinful." That is not religious freedom. Nor is it fairness. It is nothing but religious intolerance and discrimination.

Illinois' Legislature should therefore reject this Bill.

In Part I, below, we will explain how the Bill will hurt churches. In Part II, we will discuss how it will hurt religious organizations. In Part III, we will explain how the Bill will hurt common, ordinary religious people. Finally, in Part IV we will demonstrate

[1] The Bill is *only* about redefining marriage so as to allow for same sex marriages, as Section 5's purpose statement makes clear. While we recognize the many negative policy implications of redefining marriage, we do not offer any analysis of them in this memo.

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that the State's Religious Freedom Restoration Act will not provide protection against these harms.

I. The Bill Will Hurt Churches.

The Bill, if enacted, will hurt churches. Section 15 explicitly states that "[n]othing in this Act" changes or limits any protection afforded by the Human Rights Act or the Religious Freedom Restoration Act. The Religious Freedom Restoration Act, unfortunately, will not provide churches, religious organizations, or citizens any protection against the harms the Bill will impose on them.[2] The Human Rights Act, however, will impose great burdens on churches and others who object to same sex marriage or homosexual behavior on religious grounds. It will force them to rent their buildings to same sex couples for their wedding ceremonies and other celebrations, even when doing so violates their sincerely held religious beliefs. It will also force churches to hire those who engage in behavior that the churches teach is "sinful," thereby violating their sincerely held religious beliefs. The Senate should therefore reject this Bill.

A. The Bill Will Force Churches To Let Their Facilities Be Used By Same Sex Couples To Celebrate Their Weddings.

The version of the Bill available yesterday (February 4, 2013) included Section 209(a-10), which would arguably force churches to rent their facilities to same sex couples for their weddings and other celebrations. The most recent version, released this morning, does not include this Section. We provide analysis of it in case the Legislature determines to resurrect it. However, regardless of whether Section 209(a-10) is included in the Bill, churches will be forced by it to make rental decisions that violate their sincerely held religious beliefs. Section 15, which ties the Bill to the Human Rights Act, guarantees it.

1. Analysis of Section 209(a-10) and Section 15.

Section 209(a-10)(1)-(2) purports to guarantee that churches may restrict the use of their facilities to those celebrations that comport with their religious beliefs.[3] But that

[2] *See infra*, Part IV.

[3] Section 209(a-10)(1)-(2) provides: "For purposes of this subsection (a-10), 'religious organization' is limited to churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and ecumenical organizations, mission organizations, and other faith-based associations and societies whose principal purpose is the study, practice, or advancement of religion. (2) Nothing in this Act shall be construed to: (A) require a religious

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guarantee is deceptive. In reality, it has no force, since the section subsequently states that "[n]othing in this Act shall be construed to . . . abrogate or expand any other protection provided by the Illinois Human Rights Act."[4] Consequently, the Human Rights Act is determinative for what churches can, and cannot do, with regard to renting their facilities.[5] As will be demonstrated infra, that places a severe burden on churches, forcing them to rent to "all comers" and preventing them from making facility decisions in accordance with their sincerely held religious beliefs.

Even if Section 209(a-10) is not included in the Bill, the problems for churches remain. Section 15 explicitly says that the Bill must be read and applied consistently with the Human Rights Act and the Religious Freedom Restoration Act. The Religious Freedom Restoration Act, unfortunately, will not guarantee protections for churches' and others' religious freedom if the Bill is enacted.[6] The Human Rights Act, however, imposes definite requirements on those who qualify as places of public accommodation, which churches almost certainly do.

2. The Effect of the Human Rights Act on the Bill.

The Human Rights Act (the "HRA") provides in pertinent part that "[a] place of public accommodation" includes various locations, which it enumerates in list form. Included within that list is "an auditorium, convention center, lecture hall, or other place of public gathering[.]"[7] It is not clear whether churches are included within that definition. However, that definition is certainly broad enough to include every church; for, every church is a place of public gathering, having an auditorium or lecture hall. Furthermore, the HRA definition section states that the enumerated list is not exhaustive; rather, places of public accommodation "include[], but [are] not limited to," the enumerated list. Consequently, it is reasonable to conclude that churches may be determined to be subject to the HRA. Any protection the Bill provides churches concerning their facility decisions is therefore potentially limited by the HRA, since the Bill provides that it does not "abrogate . . . any other protection provided by the" HRA.

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organization to make its facilities available for solemnization or celebration of a marriage; (B) prevent a religious organization from limiting employment to individuals of the same religious faith or from making internal personnel decisions concerning the terms and conditions of employment to the extent permitted by Article 2 of the Illinois Human Rights Act; or (C) abrogate or expand any other protection provided by the Illinois Human Rights Act."

[4] Bill, § 209(a-10)(2).

[5] The HRA is codified at Chapter 775 of the Illinois Statutes.

[6] *See infra*, Part IV.

[7] 775 Ill. Stat. § 5/5-101(A)(4).

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The HRA, meanwhile, provides that "it is a civil rights violation . . . on the basis of unlawful discrimination" to "[d]eny or refuse another the full and equal enjoyment of the facilities, goods, and services of any public place of accommodation."[8] "Unlawful discrimination," meanwhile, is defined to mean "discrimination against a person" for, among other reasons, his or her sexual orientation.[9] Arguably, churches would not currently be required to rent their facilities to same sex couples for wedding ceremonies because same sex marriage is illegal in Illinois. But if this Bill is enacted, churches that let persons or groups use their facilities, whether for rent or free of charge, will almost certainly be forced to let same sex couples use their facilities for marriage ceremonies and other celebrations. And they will have to do this no matter what their sincerely held beliefs are. To refuse to do so would be unlawful discrimination under the HRA.

So, if a church rents its facilities for traditional, opposite-sex celebrations, and the State of Illinois then considers that church to be a "public accommodation," it no longer receives protection to allow its facilities to be used solely for unions that accord with its doctrinal position. Rather, these churches must rent to all comers, including those that seek to use the church's property for events inconsistent with its religious beliefs. Under this Bill, the church's sincerely held religious beliefs, and the nature of the rentals that it does permit, are deemed immaterial in the eyes of the State.

Similarly, if a church that rents its facilities to Alcoholics Anonymous or some other group for uses consistent with its beliefs, the HRA might require it to rent its facilities for same-sex ceremonies; otherwise, it would be "deny[ing] or refus[ing] another the full and equal enjoyment of the facilities, goods, and services of any public place of accommodation."

To avoid this result, churches that object to same sex marriage because of their sincerely held religious beliefs will have to refuse to let anyone use its facilities. But that will mean those churches will not be able to celebrate *any* weddings, including those that are consistent with their doctrinal positions. It will also mean that those churches' communities will suffer, as the churches are forced to turn away worthwhile organizations like Alcoholics Anonymous.[10] The Constitution cannot tolerate, however,

[8] 775 Ill. Stat. § 5/5-102(A).

[9] 775 Ill. Stat. § 5/1-103(O-1).

[10] These limitations also expose the narrowness of the exemptions contained within the Illinois Human Rights Act. *See, e.g.*, Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 NW. J. L. & SOC. POL'Y 260, 260–62 (2010) (arguing that religious accommodations to gay rights laws should be given for reasons that are practical, civic,

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such interference by the government with churches' Free Exercise rights guaranteed by the First Amendment. The Bill thus falls short of the constitutionally-required protections for religious liberty.[11]

B. The Bill Will Interfere With Churches' Hiring Decisions.

The Bill provides that it will not "prevent a religious organization from limiting employment to individuals of the same religious faith or from making internal personnel decisions concerning the terms and conditions of employment *to the extent permitted by Article 2 of the Illinois Human Rights Act*."[12] Consequently, the HRA controls, and the Bill's protections are limited by the HRA's provisions.

The HRA provides that it is "a civil rights violation" for an employer to "refuse to hire" someone because of his or her sexual orientation or to otherwise impede their employment.[13] An exemption for HRA scrutiny is provided for the hiring decisions made by churches and religious organizations "with respect to the employment of individuals *of a particular religion* to perform work connected with the carrying on by [the church or organization] of its activities."[14] It is not clear, however, what this means. Does the HRA only provide protection for churches when they decide not to hire someone who is not of their "particular religion," so that it protects a Baptist church from having to hire a Muslim, or even a Presbyterian, secretary? Would the protection apply equally to the

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or based on moral sympathy and principle); SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008) (including varying perspectives on the topic from six prominent scholars in the field: Marc D. Stern, Jonathan Turley, Robin Fretwell Wilson, Douglas W. Kmiec, Chai R. Feldblum, and Charles J. Reid, Jr.).

[11] Section 15, which is new to the Bill, provides that "[a]ny religious denomination or Indian Nation or Tribe or Native Group is free to choose which marriages it will solemnize or celebrate as provided in Section 209 of the Illinois Marriage and Dissolution of Marriage Act." This, however, does not protect churches from having to rent their facilities to all comers or violate the HRA. First, this Section does not protect *churches*. But even if it did, protection from having to solemnize a wedding is not the same as protection from having to allow one's facilities to be used for a wedding. Section 15 is thus wholly inadequate to protect churches from having to allow their buildings to be used for ceremonies that violate their religious beliefs.

[12] Bill, § 209(a-10)(2)(B).

[13] 775 Ill. Stat. § 5/2-102(A). An "employer" is defined to include only those who employ fifteen or more employees. *Id*. Consequently, churches with fewer than fifteen employees are likely not subject to the HRA. However, churches and religious organizations employing fifteen or more employees likely *are* subject to it, as explained in the text above.

[14] 775 Ill. Stat. § 5/2-101(B)(2).

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decision of a Baptist church to decline to hire a Baptist secretary who was married to a same sex spouse, when hiring that secretary would violate the church's religious beliefs about marriage and homosexual behavior? Or, would it be a violation of the HRA if a church declined to hire a person of its faith tradition who was married to a spouse of the same sex?

We simply do not know the answers to these questions, because the HRA does not provide them. And because there is not yet any case law on the subject it is not clear how the courts might rule if a church were prosecuted for a HRA violation in its hiring practices. What we do know, however, is that some churches sincerely believe that homosexual behavior, and same sex marriage, is "sinful." To force those churches to hire employees whose life-choices contradict the churches' sincerely held religious beliefs imposes an impermissible burden on their Free Exercise rights. Yet the Bill can be read to require a church to hire those of its own faith who engage in homosexual behavior, or are married to a same sex spouse, even when doing so would violate the church's doctrinal position. In such a situation, the church could even be required to provide the same marriage benefits as they provide opposite sex spouses. The Bill thus falls far short of protecting the hiring decisions of churches.

II. The Bill Will Hurt Religious Organizations.

Not only will the Bill hurt churches, it will also hurt religious schools, denominational headquarters, religious adoption agencies, and every other religious organization that has a sincerely held religious belief that same sex marriage is "sinful." Like churches, such organizations may be required by the HRA to hire those whose lifestyles and choices directly contradict their sincerely held religious beliefs. Also like churches, they may be forced to allow their facilities to be used for same sex weddings and other celebrations that violate their doctrinal position.

Equally problematic is the Bill's definition of a "religious organization." Only "religious organizations" are afforded whatever limited protections the Bill provides from having to allow one's facilities to be used for the solemnization or celebration of marriages.[15] But the Bill defines "religious organization" as being "limited to churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and

[15] As has already been explained, the Bill does not actually provide any concrete protections; for, whatever protection it provides is limited by the HRA, which eliminates such protections. However, if this analysis is incorrect and some actual protections are provided, they are *only* provided to "religious organizations."

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ecumenical organizations, mission organizations, and other faith-based associations and societies *whose principal purpose is the study, practice, or advancement of religion*."[16]

That definition is certainly broad enough to protect a seminary. But what about a religious high school, whose principal purpose is not the study of religion but rather education in general? Does the Bill afford it any protection? Or, must it allow its facilities to be used for the celebration of marriages or else violate the HRA public accommodation requirements? And similarly, does the Bill protect a religious high school from having to hire a teacher or other employee who engages in homosexual behavior, or is married to a same sex spouse?

The same questions apply equally to any religious organization whose principal purpose is not the study, practice, or advancement of religion, including many religious charitable organizations. It is our belief that no church or religious organization is protected by the Bill from having its decisions concerning employment and facility use scrutinized.[17] But to the extent that any protection is afforded, it is *only* afforded to religious organizations having as their principal purpose "the study, practice, or advancement of religion." This limited scope will leave many religious organizations with no protection for their hiring decisions and facility-use choices whatsoever.

III. The Bill Will Hurt Citizens.

Not only will the Bill hurt churches and religious organizations, it will hurt Illinois' citizens. It will do so in several ways.

A. The Bill Does Not Provide First Amendment Freedom of Conscience Rights To All Those Authorized To Solemnize Marriages.

First, the proposed new Section 209(a-5) purports to provide religious denominations and other religious officiants (hereinafter "Clergy") great religious freedom.[18] In reality, it only provides the freedom already guaranteed by the U.S.

[16] Bill, § 209(a-10)(1) (emphasis added).

[17] *See supra*, Part I.

[18] It provides: "Nothing in this Act shall be construed to require any religious denomination or Indian Nation or Tribe or Native Group, or any minister, clergy, or officiant acting as a representative of a religious denomination or Indian Nation or Tribe or Native Group, to solemnize any marriage. Instead, any religious denomination or Indian Nation or Tribe or Native Group, or any minister, clergy, or officiant acting as a representative of a religious denomination or Indian Nation or Tribe or Native Group is free to choose which marriages it will

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Constitution—and even then, only to select Illinois citizens. In pertinent part, the section provides that Clergy are free to choose which marriages they will solemnize. But this merely codifies the already established constitutional right of ministers, clergy, and religious institutions under the Free Exercise Clause of the First Amendment to the United States Constitution to abide by their sincerely held religious beliefs. This includes their right to solemnize relationships consistent with these beliefs, and to decline to solemnize those that violate their beliefs.[19]

While § 209(a-5) provides Clergy with the protection guaranteed them by the First Amendment, it fails to provide that protection to other persons authorized to solemnize marriages—such as judges or clerks.[20] Yet the same First Amendment that protects Clergy applies to all citizens. Thus, under this law, those expressly excluded by § 209(a-5), including judges and clerks, can be forced to violate their conscience and religious beliefs with regard to whose marriages they solemnize. This disparate treatment is not only inexplicable, but cannot be tolerated by the First Amendment.

Providing incomplete protections is unnecessary considering the vocal support of faith leaders around the state for same-sex marriage. This virtually guarantees all same-sex couples will have clergy available to solemnize their unions if HB 0110 is enacted.[21] This has certainly been the case in the states of Maine,[22] Maryland,[23] and Washington,[24] all of whom recently enacted same-sex marriage, as well as the handful of other states that have adopted same-sex marriage in recent years. Viewed in this context, the omissions identified in § 209(a-5) are unnecessary to ensure same-sex couples are able to

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solemnize. No refusal by a religious denomination or Indian Nation or Tribe or Native Group, or any minister, clergy, or officiant acting as a representative of a religious denomination or Indian Nation or Tribe or Native Group to solemnize any marriage under this Act shall create or be the basis for any civil, administrative, or criminal penalty, claim, or cause of action." H.B. 0110, § 209(a-5), 98th Gen. Assem., Reg. Sess. (Ill. 2013).

[19] *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[20] IL ST CH 750 § 5/209 (2009) (authorizing judges and clerks to solemnize marriages).

[21] *See, e.g.*, http://www.lgbtqnation.com/2012/12/hundreds-of-religious-leaders-back-illinois-marriage-equality-bill/ (last visited Jan. 22, 2013).

[22] *See, e.g.*, http://equalitymaine.org/lgbt-resources-maine-faith-organizations (last visited Jan. 22, 2013).

[23] *See, e.g.*, http://www.equalitymaryland.org/uploads/5020/original/clergy.pdf (list of Maryland clergy directly volunteering their services to solemnize ceremonies for same-sex couples) (last visited Jan. 22, 2013).

[24] *See, e.g.*, http://equalityfederation.salsalabs.com/o/35037/p/salsa/web/common/public/content?content_ item_KEY=117 (last visited Jan. 22, 2013).

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solemnize their unions and pose a direct threat to the religious freedom of those non-Clergy persons authorized to solemnize unions in Illinois.[25]

B. The Bill Does Not Provide First Amendment Freedom of Conscience Rights To Those Providing Marriage-Related Services.

Second, the last sentence of Section 209(a-5), along with much of Section 209(a-10), purports to safeguard those who choose to solemnize relationships that are consistent with their religious beliefs, guaranteeing that the government will not discriminate against them, withhold benefits from them, or refuse to contract with them should they refuse to solemnize marriages because of their religious beliefs. But this protection is impermissibly and inexplicably narrow because it applies only to religious denominations and their Clergy.

These sections fail to comport with First Amendment guarantees because they lack protections for companies whose businesses are wedding or marriage-related, such as owners of wedding venues.[26] They too have First Amendment Free Exercise and Conscience rights, yet their right to not participate in a wedding that violates their sincerely held religious beliefs is not protected by the Bill. But because same sex couples have not historically experienced trouble in finding places to solemnize and celebrate their unions, from churches to town halls, these omissions in Section 209(a-5) are unnecessary. Just as there is no shortage of clergy who are willing to perform same-sex weddings, the recent same-sex marriage experiences in Maine,[27] Maryland,[28] and

[25] IL ST CH 750 § 5/203 (2012) (authorizing county clerk to issue marriage licenses); *see, e.g.*, Thomas Kaplan, *Rights Collide as Town Clerk Sidesteps Role in Gay Marriages*, The New York Times, Sept. 27, 2011, *available at* http://www.nytimes.com/2011/09/28/nyregion/rights-clash-as-town-clerk-rejects-her-role-in-gay-marriages.html?_r=0 (last visited Jan. 22, 2013) (town clerk legally challenged for declining to issue marriage license to same-sex couple, though couple obtained marriage license from another clerk).

[26] *See, e.g.*, *Bernstein et al v. Ocean Grove Camp Meeting Ass'n*, Dkt. No. PN34XB-03008 (DCR Oct. 23, 2012). (Christian ministry sued for choosing to act according to its sincerely held religious beliefs in declining use of its pavilion for same-sex couple's civil union).

[27] *See* Kelley Bouchard, *44 couples obtain marriage licenses*, Portland Press Herald, available at http://www.pressherald.com/news/Maine-same-sex-couples-begin-license-process-at-1201-am.html (same-sex couples exchanged vows in public parks, city council chambers, city halls, clerks' offices, and in private ceremonies) (last visited Jan. 22, 2013).

[28] *See* Associated Press, *Many weddings as gay marriage becomes legal in Md.*, USA Today, available at http://www.usatoday.com/story/news/nation/2013/01/01/same-sex-marriage-maryland/1801917/ (same-sex couples exchanged vows at City Hall in Baltimore) (last visited Jan. 22, 2013).

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Washington[29] show that there is no shortage of venues, faith-based or secular, for same-sex couples to commemorate their new legal unions. Even the National Cathedral in Washington, D.C. has opened its doors for the solemnization of same-sex unions.[30] Moreover, beyond the successful solemnization of their legal unions, same-sex couples routinely find individuals and businesses eager to assist them with the ceremonies and other details of their celebrations. Illinois does not need to force people of faith who own marriage-related businesses to violate their sincerely held beliefs when it comes to same sex marriage. Doing so is unnecessary, and hurts Illinois' citizens.

It is not only wedding venues and their owners who are afforded no protection by the Bill. Bakeries,[31] photographers,[32] wedding venues, bed and breakfast establishments,[33] caterers,[34] deejays, florists, and perhaps others are also left unprotected. Nor is this protection extended to the owners of those businesses. Section 209(a-5) leaves these individuals and businesses unprotected from government discrimination should they choose, because of their sincerely held religious beliefs, to participate in only opposite-sex unions. But the First Amendment is not limited to only "religious denomination[s]" and Clergy. It applies equally to all Americans, including

[29] *See* Caterina Orloff, *LOOK: Wedding album: same-sex marriages on a historic day*, MSNBC.com, available at http://tv.msnbc.com/2012/12/10/gay-and-lesbian-couples-wed-in-washington-state/ (same-sex couples exchanged vows at the First Baptist Church of Seattle, city halls, wedding chapels, and the historic Paramount Theatre in downtown Seattle) (last visited Jan. 22, 2013).

[30] *See* Ben Brumfield, *Washington National Cathedral to wed same-sex couples*, CNN.com, available at http://www.cnn.com/2013/01/09/us/us-same-sex-weddings/index.html (last visited Jan. 22, 2013).

[31] *See, e.g.*, *Masterpiece Cakeshop, Colorado Bakery, Allegedly Denies Wedding Cake To Local Gay Couple*, huffingtonpost.com, Jul. 23, 2012, *available at* http://www.huffingtonpost.com/2012/07/23/masterpiece-cakeshop-colorado-bakery-gay-wedding-cake_n_1695386.html (last visited Jan. 22, 2013) (Colorado-based bakery whose owner believes that marriage is the union of one man and one woman legally targeted by same-sex couple).

[32] *See, e.g.*, *Elane Photography v. Willock*, 2012-NMCA-086, 284 P.3d 428 (wedding photographer sued by same-sex couple for declining an invitation to photograph the same-sex couple's commitment ceremony).

[33] *See, e.g.*, *Gay Couple Sues Illinois Bed And Breakfast For Refusing To Host Civil Union Ceremony*, huffingtonpost.com, May 25, 2011, *available at* http://www.huffingtonpost.com/2011/02/23/gay-couple-sues-illinois_n_827115.html (last visited Jan. 22, 2013) (same-sex couple "filed complaints with the Illinois Attorney General and the Illinois Department of Human Rights" against business that declined to host their civil union ceremony based on religious beliefs).

[34] *See, e.g.*, *Gay couple sue caterer for canceling*, UPI.com, Sept. 18, 2012, *available at* http://www.upi.com/Top_News/US/2012/09/18/Gay-couple-sue-caterer-for-canceling/UPI-30591347987934/ (last visited Jan. 22, 2013) (same-sex couple sued a New York City restaurant for declining to cater their same-sex ceremony).

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corporations.[35] The Illinois Constitution also guarantees the "free exercise and enjoyment of religious profession and worship," and that "no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions."[36] Thus, guarantees and protections for all would be constitutionally necessary additions if the Bill is to be enacted.

C. The Bill Does Not Provide First Amendment Freedom of Conscience Rights To Faith-Based Child Welfare Agencies.

Third, the Bill fails to recognize that domestic ceremonies and celebrations, whether same-sex or opposite-sex, oftentimes involve much more than just "religious organizations" or representatives of those organizations. Section 209(a-10) lacks protections to preserve the rights of all Illinoisans to *recognize* or *participate in* those relationships and events consistent with their religious tenets, including the usage of their property or facilities. Thus, Section 205(a-5) taken with Section 209(a-10) might permit the state to penalize or refuse to contract with a faith-based child-welfare agency—like an adoption or foster agency—that, for religious reasons, strives to place children in homes with both mothers and fathers. Regrettably, this type of unnecessary discrimination has already occurred in Illinois, after the state extended legal recognition to same-sex couples.[37] It also took place in both Massachusetts and the District of Columbia soon after those jurisdictions redefined marriage to include same-sex couples.[38] And since some adoption or child-welfare agencies in Illinois are already committed to serving

[35] *See Citizens United v. FEC*, 558 U.S. 310, 883 (2010).

[36] ILL. CONST. art. I, § 3.

[37] *See, e.g.*, Laurie Goodstein, *Illinois Catholic Charities close over adoption rule*, The Boston Globe, *available at* http://www.bostonglobe.com/news/nation/2011/12/29/illinois-catholic-charities-close-rather-than-allow-same-sex-couples-adopt-children/Km9RBLkpKzABNLJbUGhvJM/story.html (last visited Jan. 22, 2013) ("[M]ost of the Catholic Charities affiliates in Illinois are closing down rather than comply with a new requirement that says they can no longer receive state money if they turn away same-sex couples as potential foster care and adoptive parents.").

[38] *See, e.g.*, Father Robert J. Carr, *Boston's Catholic Charities to stop adoption service over same-sex law*, Catholic Online, *available at* http://www.catholic.org/national/national_story.php?id=19017 (last visited Jan. 22, 2013) ("Catholic Charities in Boston announced March 10 that it is getting out of the adoption business, over Massachusetts state law requiring that that the agency place children with same-sex couples."); Julia Duin, *Catholics end D.C. foster-care program*, Washington Times, *available at* http://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care/ (last visited Jan. 22, 2013) ("The Archdiocese of Washington's decision to drop its foster care program is the first casualty of the District of Columbia's . . . same-sex marriage law.").

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same-sex couples,[39] any legislation that does not safeguard the organizational values of all adoption or child-welfare agencies inexplicably fails to exhibit tolerance.

IV. The State's Religious Freedom Restoration Act Is Insufficient To Protect Churches, Religious Organizations and Citizens.

Illinois has enacted a law specifically designed to protect religious freedom, known as the Religious Freedom Restoration Act (the "RFRA").[40] The RFRA guarantees that the free exercise of religion is protected.[41] It further provides that the State may only substantially burden a person's exercise of religion when the Government can prove that it has a "compelling governmental interest" for doing so, and also that its law uses the "least restrictive means."[42]

The RFRA provides great religious freedom for Illinois' churches and citizens. Unfortunately, it will likely not protect against the harms caused by the Bill, recited above. Several courts have held that protecting against discrimination on the basis of sexual orientation is a compelling interest.[43] While this issue has not apparently been litigated in Illinois, it is reasonable to conclude that an Illinois court could find that forcing a church to submit to the HRA's public accommodations law, and rent its facilities to a same sex couple for their wedding, furthered a compelling interest in ending discrimination and was the least restrictive means for doing so.[44]

The RFRA, therefore, will not guarantee that Illinois' churches, religious organizations, and citizens are protected from the harms caused them by the Bill. The Illinois Legislature should therefore not enact this Bill unless and until it has sufficient protections added to safeguard religious liberties.

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[39] *See, e.g.*, http://www.adoptioncenterofillinois.com/meet-families-who-want-to-adopt/# (last visited Jan. 22, 2013).

[40] Codified at 775 Ill. Stat. §§ 35/1 et seq.

[41] 775 Ill. Stat. § 35/15.

[42] *Id*.

[43] *See, e.g., Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1 (D.C. Cir. 1987); *N. Coast Women's Care Med. Group, Inc. v. San Diego County Superior Court*, 44 Cal. 4th 1145, 189 P.3d 959 (Cal. 2008).

[44] We note that we vehemently disagree with that hypothetical conclusion. Still, we recognize that several courts have held similarly, and so that holding would be possible were this issue to be litigated in Illinois.

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Conclusion

In conclusion, the proposed legislation to redefine marriage in Illinois will, if enacted, hurt churches, religious organizations, and everyday people of faith. The Bill fails to protect the fundamental freedom of religion of all Illinoisans, safeguarded in both the United States and Illinois Constitutions. The so-called religious protections put forth in the proposed legislation are not only inadequate, but the extreme narrowness of those protections suggests intent to legislate prejudice toward individuals who possess deeply held religious beliefs about marriage. As the 6th Circuit recently stated in its opinion declaring that a university cannot compel a student to alter or violate her belief system, "Tolerance is a two way street."[45]

If this legislation is to be adopted, it should be amended to protect all citizens, including Illinois' churches and religious organizations. Constitutional safeguards are especially important when making significant policy shifts, like redefining marriage—the full consequences of which will not be known for some time. To ensure all Illinois citizens are treated properly under the law, the Bill should rectify hurtful treatment of churches and religious organizations along with its disparate treatment of certain individuals by affording protections that will safeguard the constitutionally-protected religious freedoms of all Illinoisans.

As the Bill currently stands, it is not about religious freedom as its name deceptively implies. It is rather about religious intolerance and bigotry. We urge the Illinois Legislature to refuse to enact this Bill in its present form. If the Bill is to be enacted, it should include adequate safeguards to actually protect religious freedom. Otherwise, the Legislature will enact a law that harms churches, church-related organizations, and people. We urge the Legislature to refuse to do that.

[45] *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012).

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