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ACLU
AMERICAN CIVIL LIBERTIES UNION of ILLINOIS

December 3, 2012

Representatives Harris, Mell, Cassidy, Flynn Currie,
Feigenholtz, Williams, Biss and Jakobsson
Senator Steans
Springfield, IL 62706

Re: HB5170, the Religious Freedom and Marriage Fairness Act – OPPOSE exemptions to allow sexual orientation bias disguised as protection for religious belief

Dear Representatives Harris, Mell, Cassidy, Flynn Currie, Feigenholtz, Williams, Biss and Jakobsson:

We write to address in advance arguments that may be brought to you seeking changes to HB5170 to permit discrimination against same-sex couples in the name of free exercise of religion. The undersigned organizations would strongly oppose any such changes. We urge you to reject amendments to HB5170 that would permit such discrimination. Any such amendments would serve only to gut current vital protections against discrimination for lesbian and gay—and many other—Illinoisans, and would be unjustified to protect religious freedom because HB5170 already includes clear, resolute safeguards for religious freedom that are consistent with the Illinois Constitution[1] and the U.S. Constitution,[2] the Illinois Religious Freedom Restoration Act,[3] the Illinois Human Rights Act,[4] and the Illinois Religious Freedom Protection and Civil Union Act.[5]

With these laws and others, Illinois has built a legal framework that protects the freedom of belief and worship while also ensuring that our State can protect its residents from discrimination, regardless of whether motivated by religious doctrine or personal views. This framework maintains a distinction that is central in our secular government. As the U.S. Supreme Court put it generations ago, religious liberty "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[6]

Sadly, America had to learn the hard way that denial of equal access to the marketplace—selective withholding of goods or services from a shunned minority—imposes terrible costs both on those rejected and on our society as a whole. Discrimination injures and corrodes, regardless of its motive.

And yet, some groups that disapprove of same-sex couples and their children may argue that the well-established, basic protections from discrimination by public accommodations—businesses that open their doors to the public for profit—in the Illinois Human Rights Act should be ***weakened or withdrawn*** as a condition of allowing same-sex couples the freedom to marry. Some probably will claim that they will be impeded unjustly in their religious beliefs and practices if they must sell to, serve or otherwise publicly interact with same-sex couples who intend to marry or are married as a matter of civil law. This letter explains why any such arguments are legally unsound and problematic. Instead, HB5170 should be approved as is, a bill consistent with this great state's wise religious paradigm: freedom to practice one's own religion, with the freedom for all loving and committed couples to enter civil marriages.

- **HB5170 Will Not Provide Equality to Same-Sex Couples If It Permits Discrimination Against Them By Businesses, Service Providers, Employers, or Others Covered by the Human Rights Act.**

Illinois has a long history of protecting its citizens from discrimination[7] and has specifically prohibited discrimination against lesbian, gay, bisexual, and transgender Illinoisans since 2006.[8] Among the protections currently provided to everyone in Illinois are those established by the Illinois Human Rights Act. This important set of laws requires that all persons be treated equally, without discrimination on specified invidious grounds including sexual orientation, "in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations."[9] With particular relevance to issues that may arise in connection with HB5170, the Illinois Human Rights Act long has made clear that business establishments operating in the public marketplace may not pick and choose in a discriminatory manner among potential customers when offering goods or services to the public.[10]

The overriding purpose of non-discrimination legislation such as the Human Rights Act is to make it possible for those protected by the laws to participate in the "almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[11] Stated more broadly, civil rights laws protect basic human dignity.[12] Consistent with this purpose, the U.S. Supreme Court has declared that a state's "commitment to eliminating discrimination" is a "goal . . . [that] plainly serves compelling state interests of the highest order."[13]

The government's compelling interests in abolishing sexual orientation discrimination include "the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit from society, and equal protection of the life, liberty and property that the Founding Fathers guaranteed to us all."[14] Thus, as the U.S. Supreme Court has observed, regulations banning sexual orientation discrimination "are well within the State's usual power to enact . . . ."[15]

HB5170, the Religious Freedom and Marriage Fairness Act, seeks to advance Illinois' commitment to fair treatment, since it will end the discriminatory ban against allowing same-sex couples access to civil marriage and will provide instead for "same-sex and different-sex couples and their children equal access to the status, benefits, protections, rights, and responsibilities of civil marriage."[16] To ensure that same-sex couples and different-sex couples are treated fairly under the law, HB5170 offers to same-sex couples who marry all of the same obligations under both civil and criminal law, along with the same protections, rights, and benefits previously available only to opposite-sex couples. But if the antigay lobbying against the freedom to marry in other states is any guide, some may claim if same-sex couples are granted the freedom to marry, businesses whose owners may object to providing services related directly or indirectly to wedding celebrations should be given a special exception to allow them to discriminate. Although all businesses currently are required to treat lesbian, gay and bisexual people equally, including same-sex couples in legal relationships, these businesses now may erroneously assert that the prospect of married same-sex couples poses a different issue for them as a religious matter.[17]

Whatever the tenets of particular religions may be concerning same-sex couples and marriage, the Illinois Human Rights Act has served the people of Illinois well. It has ensured that when any of us enters a bakery, a restaurant, a hotel, a clothing store, a print shop, or any other commercial establishment, we are able to be served as others are served, regardless of the religious views the proprietor or employees may hold about particular groups of people. If this guarantee of equal access

to the marketplace were to be changed, then the fair treatment HB5170 aims to offer with one hand will be withdrawn by the other.

Illinois' commitment to fair treatment of all Illinoisans will be seriously undermined if *any* of Illinois' existing protections against discrimination are diminished. And none of us in Twenty-First Century America—including interfaith and interracial couples, those who divorced and remarried, and same-sex couples—should have to accept a stripping of Human Rights Act protections as the price of marrying the one we love. All Illinoisans benefit from extending the freedom to marry to all loving and committed couples *and* by prohibiting discrimination in employment, housing, access to credit, and the availability of public accommodations. The freedom to marry is not a justification for this State to waver in its commitment to preventing discrimination in other ways.

- **New Exemptions to HB5170 Are Not Needed Because Existing Illinois Law Already Protects Religious Freedom Effectively**

Along with the essential anti-discrimination protections, Illinois law also provides robust protections for free exercise of religion. Article I, Section 3 of the Illinois Constitution guarantees freedom of religious belief, expression and worship.[18] The First Amendment to the U.S. Constitution does as well. These guarantees prevent government from requiring any individual or group to perform, participate in or host a religious ceremony, including a religious marriage.[19] Consequently, individual denominations, and religious leaders such as pastors or rabbis, currently enjoy absolute freedom to determine who among the couples eligible to marry under state law are eligible to marry within their faith tradition.[20] This guarantee is complete, and passage of HB5170 will have no impact on these cherished protections for religious denominations to determine for themselves, free of governmental interference, whom they will marry. The Illinois Religious Freedom Restoration Act reinforces that the state constitutional guarantee for religious belief, expression, and worship is to be enforced in a strong, effective manner.[21]

This does not mean, however, that the protection for religious practice is limitless and trumps our shared need for civic order and public safety, including our need for protection from discrimination when engaging in commercial interactions in the marketplace. The Illinois Constitution is explicit that "the liberty of conscience hereby secured shall not be construed to … excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State."[22] Numerous state constitutions use this framing, which has its roots in the New York Constitution. Justice Scalia examined the history of this text in *City of Boerne v. Flores*, explaining why it does not support religious exemptions from health, safety and other laws that regulate conduct to protect others and maintain order.[23] In short, historically, "licentious" simply meant law-breaking.[24] Similarly, "threat to peace and safety" means violation of laws that stop people from harming each other. According to New York's high court, that language allows the legislature to ban "actions which are in violation of *social duties* or subversive of *good order*."[25]

As the U.S. Supreme Court made plain when holding that discriminatory "referrals" of patrons based on personal characteristics such as race injure not only those deemed by others to be "objectionable"[26] but society as a whole, our State's constitutional protections for religious freedom do not authorize violations of nondiscrimination laws.[27] Thus, government does not improperly burden religious freedom when making and enforcing laws—such as antidiscrimination laws—that police the public sphere to insist upon fair, peaceful interactions.

And were this not the case, imagine how changed—how segregated and contentious—our society would become. Landlords could claim a right to evict tenants when they disapprove for religious reasons of the race, national origin, religion or sex of a tenant's spouse or domestic partner. Loan agents could refuse a mortgage based on religious disapproval of the co-applicant spouse. A hotel or motel manager could, on religious grounds, refuse would-be guests because they were in an interfaith relationship. And imagine the isolation and anguish of a hospital patient or nursing home resident denied visitation with his or her lawful spouse because staff members, or a religiously affiliated institution's policies, refuse on religious grounds to honor the patient's marriage.

These are likely consequences of religious exemptions that recently have been requested of legislatures considering marriage equality bills. If this kind of special exception to our State's existing nondiscrimination protections were granted, all of these scenarios are sadly plausible. Problems already have arisen concerning employment and medical care, as well as refusal of lodging and reception facilities, photography services, and even wedding dresses and cakes.[28] These incidents came to public notice because businesses defied nondiscrimination laws or policies.

This problem is not new. Our nation's history of discrimination based on marital status, sex, race, and other grounds reveals the long and inglorious pedigree of today's use of religion in defense of antigay discrimination.[29] The good news is that enforcement of nondiscrimination laws has dramatically reduced citation of religion to excuse these various forms of discrimination, making possible harmony between religious freedom and equal access guarantees.

The same can and must happen for antigay discrimination. When anyone engages in business or practices a profession regulated by the state to protect others, they should be subject to the core principle that has served our country well for decades: "'When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.'"[30] Indeed, there is poignancy as well as principle behind the point when those who choose to make their living selling wedding services or goods demand special exemption from anti-bias laws in order to inject sectarian hostility into a business field ostensibly about celebrating love and commitment.

- **Like the "Religious Freedom Protection and Civil Union Act," HB5170 Maintains Clear, Effective Protections for Free Exercise of Religion**

HB5170 makes explicit that its proposal to allow equal access to **civil** marriage permits no interference with the eligibility rules for **religious** marriage or the related practices of any religious denomination.[31] The bill protects religious freedom while preventing discrimination, just as in the Illinois Religious Freedom Protection and Civil Union Act.[32] Under the civil union act, no clergy have been required to solemnize a civil union, nor have any churches or other houses of worship been required to host a civil union ceremony or otherwise to alter their religious services or practices in any way. The provisions of HB5170 will operate with similar clarity and effectiveness to ensure that clergy and religious denominations continue to enjoy the robust freedom of worship with respect to solemnization of marriage that they have enjoyed since the birth of this state.

- **Recommendation and Conclusion**

HB5170 should not be amended to allow discrimination by those engaging in business transactions or other activities governed by the Human Rights Act. Regardless of whether discrimination has a sectarian or secular motive, it inflicts harm. That approach to commerce tears our social fabric and imposes painful personal costs that same-sex couples should not be asked to pay as their price for the freedom to marry that so many in our state already dearly cherish.

We would be pleased to discuss the matters in this letter with any of you, and to provide additional information or references upon your request. Thank you for your important leadership toward the freedom to marry for same-sex couples and equal treatment of their families under Illinois law.

Very truly yours,

Lambda Legal and the ACLU of Illinois

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[1] IL CONST., art. I, sec. 3.

[2] U.S. CONST., amend. I.

[3] § 775 ILCS 35/1 and following.

[4] § 775 ILCS 5/1-101 and following.

[5] § 750 ILCS 75/1 and following.

[6] *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940).

[7] *See, e.g., Chase v. Stephenson*, 71 Ill. 383 (1874) (finding that public school segregation on the basis of race violated Illinois law eighty years prior to the U.S. Supreme Court's decision in *Brown v. Board of Educ*., 347 U.S. 483 (1954)).

[8] P.A. 93-1078, eff. Jan. 1, 2006.

[9] § 775 ILCS 5/1-102.

[10] § 775 ILCS 5/5-101(A).

[11] *Romer v. Evans*, 517 U.S. 620, 631 (1996).

[12] *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964).

[13] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). *Accord E.E.O.C. v. Mississippi Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) ("[T]he government has a compelling interest in eradicating discrimination in all forms.").

[14] *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 37 (D.C. 1987).

[15] *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 572 (1995); *see also Presbytery of New Jersey v. Florio*, 902 F. Supp. 492, 521 (D.N.J. 1995) (finding state interest in eliminating discrimination on the basis of sexual orientation, was "not only substantial but also [could] be characterized as compelling").

[16] Section 5, HB5170.

[17] For general discussions of this problem, see NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169 (2012) and Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace*, 5 NW. J.L. & SOC. POL'Y 236 (2010).

[18] Article I, Section 3 of the Illinois Constitution provides:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State.
>
> No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.

[19] Lupu & Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274, 285 (Fall 2010) (explaining why "the state cannot commandeer the clergy in the state's efforts to gain social approval for a particular form of marriage, be it inter-faith, inter-racial, same-sex, or otherwise. … [T]he First Amendment diffuses and separates powers, remitting the question of who may be entitled to religious marriage entirely to the judgment of clergy and the faith communities they represent"). *See also* Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?,* 8 STAN. J.C.R. & C.L. 123, 144 (April 2012). Numerous state high courts have emphasized this point. *See, e.g., Varnum v. Brien,* 763 N.W.2d 862, 906 (Iowa 2009); *In re Marriage Cases*, 43 Cal. 4th 757, 855 (2008); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 965 n.29 (Mass. 2003). It has long been clear that the First Amendment of the U.S. Constitution provides this same basic protection. *See Cantwell v. Connecticut*, 310 U.S. at 303-304 (the First Amendment's protection of free exercise of religion "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. … On the other hand, it safeguards the free exercise of the chosen form of religion.").

[20] Moreover, churches and religious schools are protected not only in the substance of their doctrine and their manner of worship but in their selection of and control over their ministers and religious teachers as well. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012) (the First Amendment to the U.S. Constitution requires a ministerial exception when a secular law is invoked to interfere with a religious school's selection of its ministers and religious teachers); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (same).

[21] § 775 ILCS 35/15. Section 15 provides: "Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest."

[22] IL CONST., art.I, sec. 3.

[23] *City of Boerne v. Flores,* 521 U.S. 507, 538-44 (1997) (conc. opn. of Scalia, J.).

[24] *Id*. at 540, fn. 1.

[25] *People v. Sandstrom*, 279 N.Y. 523, 530 (1939) (italics added).

[26] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259 (1964).

[27] *Id.* at p. 260.

[28] *See, e.g.,Bodett v. Coxcom, Inc*., 366 F.3d 736 (9th Cir. 2004) (Christian supervisor unsuccessfully claimed a religious right to harass lesbian subordinate); *North Coast Women's Care Medical Group, Inc. v. Superior Court (Benitez),* 44 Cal. 4th 1145 (2008) (lesbian patient improperly refused infertility care based on physician's religious objection to patient's same-sex relationship); *Knight v. State of Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (visiting nurse wrongly engaged in anti-gay proselytizing to home-bound AIDS patient). Examples of religion-based refusals of lodging include, in Vermont, *Baker &Linsley v. Wildflower Inn* (*see* http://www.aclu.org/blog/lgbt-rights-religion-belief/settlement-no-gay-reception-case-shows-public-businesses-do-not) and in Hawaii, *Cervelli v. Aloha Bed & Breakfast* (*see* http://www.lambdalegal.org/in-court/legal-docs/cervelli_hi_20111219_complaint. And here in Illinois, a gay couple planning their civil union reception was turned down by two bed and breakfast establishments that routinely host weddings; one not only refused the couple but berated them with religiously condemning emails (*see* http://www.aclu-il.org/mattoon-couple-challenge-denial-of-services-at-two-illinois-bed-and-breakfast-facilities/).

In New Mexico, a professional wedding photographer refused to photograph a lesbian couple's ceremony (*seeElane Photography, LLC v. Willock*, 284 P.3d 428 (N.M. Ct. App. May 31, 2012), *cert. granted*, Aug. 16, 2012). In New Jersey, a wedding dress shop owner refused to sell a dress when she learned the intended bride was marrying another woman (*see* http://articles.philly.com/2011-08-18/news/29900898_1_bridal-shop-dresses-gay-marriage). In Iowa and Colorado, bakeries refused to sell wedding cakes to lesbian and gay customers for their marriage celebrations (*see* http://www.huffingtonpost.com/2011/11/14/iowa-wedding-cake-lesbian-couple_n_1092789.html and http://www.huffingtonpost.com/2012/07/23/masterpiece-cakeshop-colorado-bakery-gay-wedding-cake_n_1695386.html). In all of these instances, the individuals refusing equal treatment to gay people or same-sex couples asserted a right to discriminate, despite applicable state law and/or corporate policy prohibiting discrimination, because of their personal religious beliefs.

[29]*See, e.g., Smith v. Fair Emp. & Housing Comm'n*, 12 Cal. 4th 1143 (1996) (Christian landlord refused on religious grounds to rent to unmarried heterosexual couple); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska Sup. Ct., 1994) (same); *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (unequal health insurance benefits offered to female employees based on school's religious tenets); *Newman v. Piggie Park Enterprises, Inc*., 256 F. Supp. 941, 944-45 (D.S.C. 1966), *rev'd,* 377 F.2d 433 (4th Cir. 1967) (asserting religious objection to racial integration, drive-in restaurant refused service to non-White guests). *See generally* Eskridge, *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 664 (2011) (exploring parallels between religious objections made by White Christians against the push for equal treatment of African Americans, and the antigay religious arguments made today against equal treatment of gay people, including in marriage); Cruz, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. Rev. 1176, 1221 (1994) (exemptions from sexual orientation nondiscrimination laws "would undermine the egalitarian public order that such laws seek to establish, creating precisely the access and dignitary harms that the Supreme Court held to be the legitimate concern of antidiscrimination laws.").

[30]*Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 565 (2004) (quoting *United States v. Lee*, 455 U.S. 252, 261 (1982)).

[31] A new subsection (a-5) would amend 750 ILCS 5/209(a) as follows: "Nothing in this Act shall be construed to require any religious denomination, Indian Nation or Tribe or Native Group, or any officiant acting as a representative of a religious denomination, Indian Nation or Tribe or Native Group, to solemnize any marriage. Instead, any religious denomination, Indian Nation or Tribe or Native Group is free to choose which marriages it will solemnize."

[32] § 750 ILCS 75/15 provides: "Nothing in this Act shall interfere with or regulate the religious practice of any religious body. Any religious body, Indian Nation or Tribe or Native Group is free to choose whether or not to solemnize or officiate a civil union."