Religious Liberty Problems of the (Misnamed) Respect for Marriage Act

The bill establishes a national policy on same-sex marriage that will be used to target people and institutions of faith, including schools. It will be used to deny them:

- tax exempt status;
- government contracts, scholarships, and grants; and,
- licenses including for adoption, foster care, and counseling services.

The bill doesn’t provide a single benefit for civilly married same-sex couples not already granted by the Obergefell decision. All it does is arm activists and bureaucrats, including at the IRS, with new grounds to harass or sue people who hold to the historic definition of marriage.

Legally, Congress will be endorsing a compelling governmental interest in advancing same-sex marriage over and against religious freedom. Even the Obergefell decision refused to go this far because whenever Congress or courts establish a “national policy” on anti-discrimination, religious freedom historically loses. Indeed, the Supreme Court in the 1980s upheld IRS revocation of tax-exempt status for a religious university based on a national policy of anti-discrimination.

The Supreme Court’s decisions in Fulton and Masterpiece Cakeshop won’t prevent targeting of faith-based organizations, including schools and adoption agencies, so long as government actors enact anti-discrimination policies without exceptions and avoid saying that they think people of faith are bigots.

The bill acknowledges these religious liberty concerns but makes only empty gestures to address them. The rules of construction in this bill do nothing to prevent any of the downstream harms identified above. The bill does not provide any religious liberty affirmative defenses which are the only things that would blunt the attacks the bill would unleash.

If senators are serious about religious freedom, they should adopt Senator Lee’s proposed amendment based on the First Amendment Defense Act. The amendment has been thoroughly vetted by legal scholars and policy experts and would substantially limit the clear and present danger to religious liberty this gratuitous and vindictive bill represents.