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BY EMAIL

Speaker Frank Chopp
Washington State House of Representatives
339C Legislative Building
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Olympia, WA 98504-0600
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Re: Religious Liberty Implications of Engrossed Substitute Senate Bill 6239-ES

Dear Speaker Chopp:

We write to address the religious liberty implications of Engrossed Substitute Senate Bill 6239-ES, slated for discussion tomorrow by the House. Despite seven amendments in the Senate, SB 6239-ES offers incomplete protections—covering only some people who desire for religious reasons to step-aside from facilitating same-sex marriages. As we explain below and more fully in our attached letters of January 29, 2012 and January 11, 2012, without further revisions, SB 6239-ES will give only an illusion of protecting religious freedom.

This becomes apparent from a simple reading of the text. Section 1(4) exempts religious "officials," like ministers, rabbis, and imams, from the duty to "solemnize or recognize" a marriage. It also makes them immune "from any civil claim or cause of action based on a refusal to solemnize or recognize any marriage under this section" and provides that "No state agency or local government" may "penalize, withhold benefits from, or refuse to contract with any religious organization" based "on the refusal of a person associated with such religious organization to solemnize or recognize a marriage." For this purpose, recognizing a marriage means to "provide religious-based services that (i) Are delivered by a religious organization [or their agent] and (ii) are designed for married couples or couples engaged to marry and are directly related to solemnizing, celebrating, strengthening, or promoting a marriage, such as religious counseling, programs, courses, retreats, and workshops."

Section 1(5) exempts religious organizations from "provid[ing] accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage," while Section 1(6) makes religious organizations "immune" from civil suits. In contrast to Section 1(4), both provisions leave out "recognition."
Section 2(6) provides parallel treatment of "religiously affiliated educational institution[s]," which may be "required to provide accommodations, facilities, advantages, privileges, service, or goods related to the solemnization or celebration of a marriage, including a use of any campus chapel or church." Like other religious organizations, these institutions are immune from suit, but only for "the solemnization or celebration of a marriage."

Separately, Section 2(5) provides that:

> No state agency or local government may base a decision to penalize, withhold benefits from, license, or refuse to contract with any religious organization based on the opposition to or refusal to provide accommodations, facilities, advantages, privileges, service, or goods related to the solemnization or celebration of a marriage.

Unlike Section 1(4), it forbids government penalty of a religious organization when it "opposes" a marriage or refuses to "solemnize[e] or celebrat[e]" a marriage, but not when it refuses to recognize one.

Section 3 explains that "Religious organization…must be interpreted liberally to include faith-based social service organizations" serving the larger community, while Sections 14-16 say that nothing in SB 6239-ES changes "existing law" regarding "the manner in which a religious or nonprofit organization may be licensed to and provide adoption, foster care, or other child-placing services." None of these provisions adds any more religious liberty protections than already exists in Washington law.

Together these Sections appear to give considerable religious freedom to objectors. In reality, however, SB 6239-ES's cramped "protections" have little real value for religious believers who adhere to a traditional view of marriage.

Consider one innocuous service churches might offer after Washington recognizes same-sex marriage: marriage retreats. Many churches routinely offer marital counseling services—and many naturally want to limit these services to couples in marriages recognized by their faith tradition. If such groups politely say no to same-sex couples, they receive no protection. The immunity for religious organizations granted in Sections 1(6) and 2(6) extends to solemnization and celebration. The terms "solemnization" and "celebration" have temporal connotations, and presumably do not reach activities that would require a religious organization to "recognize" a couple's marriage long after the marriage's solemnization. Moreover, while the term "recognition" would cover marriage counseling, it appears only in Section 1(4), creating considerable uncertainty about the scope of protection.

Section 2(5)'s "protection" against government penalty for refusing to solemnize a relationship likewise fails to avert predictable, but needless clashes over same-sex marriage. The real protection that religious organizations need from government penalty is for the decision not to recognize a marriage that violates the organization's own religious beliefs—not the decision not to solemnize it. We know this from experience. The city of San Francisco stripped $3.5 million in social services contracts from the Salvation Army when it refused, for religious reasons, to provide benefits to its employees' same-sex partners.

It seems implausible that the Washington Senate intended this result. Yet by not including "recognition" in all of SB 6239-ES' provisions, SB 6239-ES creates genuine fodder for litigation—precisely the outcome that well-crafted exemptions should forestall. The Sections are inconsistent and incoherent in sometimes protecting against forced recognition and sometimes not. While SB 6239-ES' precise meaning will ultimately be a matter of interpretation, judges typically will not "read in" words when the Legislature included them elsewhere.

Equally troubling, the definition of recognition in SB 6239-ES is a narrow, confined one. It does not include many activities that other states have explicitly protected in same-sex marriage legislation elsewhere. Unlike New Hampshire and New York, it fails to expressly protect religious organizations from the "promotion of marriage … through housing designated for married individuals." N.H. Rev. Stat. Ann § 457:37(3). *See also* N.Y. Dom. Rel. § 10-b (2). Unlike Vermont, New Hampshire and New York, it fails to exempt religiously affiliated fraternal organizations, like the Knights of Columbus (which are permitted to limit insurance coverage to spouses in traditional marriages). *See* VT. STAT. ANN. TIT. 8 § 4501(b); N.H. REV. STAT. ANN. § 457:37(IV) (2009); N.Y. Dom. Rel. § 10-b (2). Unlike Connecticut and Maryland's proposed law, it fails to expressly exempt religiously affiliated adoption agencies that receive no government support. *See* Conn. Pub. Acts No. 09-13 § 19; Maryland SB 241 § 3(a)(2).

Senate Bill 6239-ES also provides no protections whatsoever for ordinary individuals. Bakers, photographers, seamstresses, florists and B&B owners who, for religious reasons prefer to step aside from celebrating or facilitating same-sex marriages may be subject to suit under Washington's Law Against Discrimination. Penalties for violating that law may be steep. *See* Wash. Rev. Code § 49.60.250.5 (2011) (providing that the penalty may include actions that "in the judgment of the administrative law judge, will effectuate the [law's] purposes…except that damages for humiliation and mental suffering shall not exceed twenty thousand dollars").

Every other state that has recognized same-sex marriage by legislation has provided more religious liberty protections than this, as the attached letter of January 29, 2012 shows.

Robust religious liberty protections constitute a middle path that allows the Legislature to achieve *both* of its stated goals in Engrossed Substitute Senate Bill 6239-ES: extending the benefits of civil marriage to same-sex couples "while protecting religious freedom."

The time to fix these drafting errors—so that Washington's same-sex marriage law provides real, not sham religious freedom protections—is now.

We hope this analysis will assist you in evaluating Engrossed Substitute Senate Bill 6239-ES.

Respectfully Yours,[*]

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[*] We write in our individual capacities and our employers take no position on this or any other bill.