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BY TELECOPY AND U.S. MAIL

Governor Chris Gregoire
Office of the Governor
P.O. Box 40002
Olympia, WA 98504-0002

Re: Religious Liberty Implications of Substitute Senate Bill 6239

Dear Governor Gregoire:

We write to address the religious liberty implications of Substitute Senate Bill 6239, approved yesterday by the Senate committee on Government Operations, Tribal Relations & Elections. Senate Bill 6239-S gives only an illusion of providing robust religious liberty protections, as we explain below and more fully in our letter of January 11, 2012 regarding the religious liberty implications of House Bill 1963, which carried over from 2011 (we attach that letter as well).

At first blush, Senate Bill 6239-S appears to offer more robust protections than the failed House Bill 1963, which provided protections only for the clergy. Senate Bill 6239-S seeks to extend the benefits of civil marriage to same sex couples while purporting to "protect[] religious freedom." But Senate Bill 6239-S constrains those "protections" so much that they would have little real value to religious groups and individuals who adhere to a traditional view of marriage.

Section 7(1) provides that "No religious organization is required to provide accommodations, facilities, advantages, privileges, services, or goods related to the solemnization or celebration of a marriage," while Section 7(2) provides that religious organizations that refuse "will be immune from any civil claim or cause of action, including a claim pursuant to" Washington's Law Against Discrimination. Section 7(3) defines a religious organization to include "churches, mosques, synagogues, temples, nondenominational ministries, interdenominational and ecumenical organizations, mission organizations, faith-based social agencies, and other entities whose principal purpose is the study, practice, or advancement of religion." Section 4(2) provides that "No state agency or local government may base a decision to penalize, withhold benefits from, or refuse to contract with any church or religious denomination on the refusal of a person associated with such church or religious denomination to solemnize a marriage under this section."

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. For example, many churches routinely offer marriage counseling and marriage retreats for their members, either directly through the church or an affiliated organization—and many naturally will want to limit such services only to couples in marriages recognized by their faith tradition. Because Section 7(1) confines its protections to solemnization and celebration, will every church or church-affiliated group that attempts to sustain the marriages of its members then be open to suit under Washington's Law Against Discrimination for doing so?

Section 4'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. Furthermore, the organizations in need of real protections are religiously affiliated nonprofits, not just churches *qua* churches. 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. In 2007, the administrators of an Arizona adoption facilitation website were found subject to California's public accommodations statute because they refused to post profiles of same-sex couples as potential adoptive parents).

Senate Bill 6239-S 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. These laws expressly insulate religious organizations and individuals from needless clashes over same-sex marriages. They allow:

Core Religious Liberty Protections Enacted Elsewhere	Substitute Senate Bill 6239-S
All jurisdictions (New York, New Hampshire, Vermont, Connecticut, and the District of Columbia) **expressly** allow a religiously-affiliated group to refuse to "provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage." N.Y. Dom. Rel. § 10-b (1). *See also* VT. STAT. ANN. TIT. 8 § 4502(1); N.H. REV. STAT. ANN. § 457:37(III); D.C. Code § 46-406(e) (covering "services, accommodations, facilities, or goods"); 2009 Conn. Pub. Acts No. 09-13, § 17.	**Protected in Section 7(1)**
All jurisdictions (New York, Connecticut, District of Columbia, New York and Vermont) **expressly** insulate covered religious objectors	**Protected in Section 7(2)**

from **private suit.** (VT. STAT. ANN. TIT. 8 § 4502(1); 2009 CONN. PUB. ACTS NO. 09-13, § 19; D.C. Code § 46-406(e); N.Y. DOM. REL. § 10-b (1).	
Four **expressly** protect religious objectors, including religiously affiliated **nonprofit organization**, from being **"penalize[d]"** by the government for such refusals, say, for example, through the loss of governments grants. D.C. Code § 46-406(e)(2). *See also* 2009 Conn. Pub. Acts No. 09-13, § 17; N.H. REV. STAT. ANN. § 457:37(III)); N.Y. DOM. REL. § 10-b (1).	**Section 4(2) encompasses only "church[es] or religious denomination[s]." Silent as to nonprofits.**
Two jurisdictions (District of Columbia and New Hampshire) **expressly** protect religious organizations from "the promotion of same-sex marriage through religious programs, counseling, courses, or retreats, that is in violation of the religious society's beliefs." D.C. Code § 46-406(e) (2011)). *See also* N.H. REV. STAT. ANN § 457:37(3) (exempting "the promotion of marriage through **religious counseling**, programs, courses, retreats, or housing designated for married individuals"). **New York** may protect this. *See* N.Y. DOM. REL. § 10-b (2) ("… nothing in this article shall limit or diminish the right, … of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization … from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained").	**Silent**
Two jurisdictions (New Hampshire and New York) **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) ("… [N]othing in this article shall limit or diminish the right, … of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization to limit employment or sales or **rental of housing accommodations** or admission to or give preference to persons of the same religion or denomination…").	**Silent**
Two states (Vermont and New Hampshire) expressly allow religiously-affiliated fraternal organizations, like the Knights of Columbus, expressly 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).	**Silent (unless somehow exempted under Washington's Law Against Discrimination)**
One state (Connecticut) **expressly** allows a religiously-affiliated **adoption or foster care agency** to place children only with heterosexual married couples so long as they don't get any government funding. (Conn. Pub. Acts No. 09-13 § 19).	**Section 4(2) encompasses "faith-based social agencies" but only for the refusal to solemnize or celebrate a marriage**
Two states (New Hampshire and New York) **expressly** exempt **individual employees** "being managed, directed, or supervised by or in conjunction with" a covered from celebrating same-sex marriages if	**Silent.**

doing so would violate "religious beliefs and faith." N.Y. Dom. Rel. § 10-b (1). *See also* N.H. REV. STAT. ANN. § 457:37(III).	

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

Supporters of same-sex marriage should support this middle path for reasons of prudence as well as principle. Consider Maine's experience in 2009. There, legislators steadfastly refused to include the robust religious freedom protections embraced elsewhere, opting for hollow guarantees. Maine voters overturned Maine's law in a people's referendum by a narrow 52.9% to 47.1% margin. No one knows how many voters were swayed by the need for more religious liberty protections, but if a mere 3% of voters could have been swayed to change their votes by live-and-let-live religious liberty protections, Maine would have same-sex marriage today.

As in Maine, Washington voters likely will have the final say on same-sex marriage. Washington's referendum process has been used three times since 2006, once to erase a legislative victory. While Referendum Measure 71 approved Washington's all-but-marriage domestic partnership law in 2009, it did so by a fairly narrow margin (53.15% - 46.85%). Supporters of same-sex marriage may well achieve a temporary, Pyrrhic victory for same-sex couples if the resulting law fails to include meaningful religious freedom protections.

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

Respectfully Yours,[*]

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