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January 28, 2012

Majority Leader Lisa Brown
P.O. Box 40403
Olympia, WA 98504-0403

Re: Religious liberty implications of same-sex marriage
Senate Bills 5793 and 6239
House Bills 1963 and 2516

Dear Senator Brown:

We urge you to insist that pending bills on same-sex marriage be amended to include robust and specific protections for religious liberty, and then to pass the bill.

All the signers of this letter have studied and written about the law of religious liberty for many years. Two of us contributed to the leading book on protecting both religious liberty and equality in marriage, *Same-Sex Marriage and Religious Liberty* (2008).

Any bill on same-sex marriage should include religious liberty protections on the lines proposed in the separate letter that you recently received from Professors Robin Fretwell Wilson, Thomas C. Berg, and others. We come to these issues from a rather different perspective from the Wilson-Berg group, but their analysis of potential legal conflicts is accurate, and their proposed statutory language is necessary to legislation that is fair and just to all sides.

We support same-sex marriage. We think the pending bills can be a great advance for human liberty. But careless or overly aggressive drafting could create a whole new set of problems for the religious liberty of those religious believers who cannot conscientiously participate in implementing the new regime. The net effect for human liberty will be no better than a wash if same-sex couples now oppress religious dissenters in the same way that those dissenters, when they had the power to do so, used to oppress same-sex couples. Religious exemptions are the right policy; they are also right politically. Put genuine religious exemptions in the bill, and at a stroke, you take away one of the opponents' strongest arguments.

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I. Religious Organizations

House Bill 2516 and Senate Bill 6239 address only a small part of the problem. The statement of legislative intent in §1 says that the legislature intends to "respect the freedom of clergy and religious institutions . . . to determine which marriages to recognize for religious purposes." But no such protection is provided in the substantive sections of the bill. Section 4(2) on the clergy, and §7 on religious organizations, apply only to the "solemnization or celebration of a marriage," and in House Bill 2516, even the protection for religious organizations is both ambiguous and limited. The substitute version of Senate Bill 6239, passed in committee on January 26, is an improvement, but its protections are still confined to "solemnization or celebration."

No provision of the bills provides any protection for clergy or religious organizations who refuse to "recognize" a marriage once solemnized. Thus, the bills do not protect ministers who provide religious counseling from demands that they counsel same-sex couples, or religious adoption agencies from demands that they place children with same-sex couples, or religious colleges from demands that they provide married student housing for same-sex couples. The bill does not protect churches from demands that they provide fringe benefits for same-sex spouses. There is no reason for the state to intrude into these religious institutions, or to force expensive litigation over the scope of state and federal constitutional protections.

Even with respect to celebration of a marriage, §7's protections for religious organizations are deeply ambiguous and sharply limited in the House bill and in the original version of the Senate bill. The new language in the substitute version of the Senate bill is a substantial improvement. The Senate substitute protects religious organizations without ambiguous qualifications (but again, only with respect to solemnization and celebration). In the hopes that the new Senate language is the current proposal from the bill's supporters, we confine to a postscript our analysis of the earlier language that still appears in the House bill.

We think the best solution is the more elaborate language proposed by Professors Wilson and Berg. But at the very least, the phrase "solemnization or celebration of a marriage" should be amended each time it appears — in §7(1) and in §7(2) — to say "solemnization, celebration, or recognition of a marriage." And in §4(2), the phrase "solemnize any marriage" (which appears twice), and "solemnize a marriage," should be amended in each case to say "solemnize, celebrate, or recognize any marriage."

II. Individuals

Moreover, House Bill 2516 and Senate Bill 6239 provide no protection at all for individuals who provide services to help celebrate weddings or provide professional services to help sustain marriages. This omission threatens serious harm to a religious minority while conferring no real benefits on same-sex couples, who will nearly always be able to readily obtain such services from others who are happy to serve them.

It is not in the interest of the gay and lesbian community to create religious martyrs when enforcing the right to same-sex marriage. To impose legal penalties or civil liabilities on a wedding planner who refuses to do a same-sex wedding, or on a religious counseling agency that refuses to provide marriage counseling to same-sex couples, will simply ensure that conservative religious opinion on this issue can repeatedly be aroused to fever pitch. Every such case will be in the news repeatedly, and every such story will further inflame the opponents of same-sex marriage. Refusing exemptions to such religious dissenters will politically empower the most demagogic opponents of same-sex marriage. It will ensure that the issue remains alive, bitter, and deeply divisive.

It is far better to respect the liberty of both sides and let same-sex marriage be implemented with a minimum of confrontation. Let the people of Washington see happy, loving, same-sex marriages in their midst; let them see (this cannot be helped) that some of those marriages fail, just as many opposite-sex marriages fail; let them see that these same-sex marriages, good and bad, have no effect on opposite-sex marriages. Let the market respond to the obvious economic incentives; same-sex couples will pay good money just like opposite-sex couples. Let same-sex marriage become familiar to the people, and do these things without oppressing religious dissenters in the process. Same-sex marriage will be backed by law, backed by the state, and backed by a large and growing number of private institutions. Much of the dissent will gradually fade away, and nearly all the rest will go silent, succumbing to the live-and-let-live traditions of the American people. The number of people who assert their right to conscientious objection will be small in the beginning, and it will gradually decline to insignificance if deprived of the chance to rally around a series of martyrs.

Exemptions for religious conscientious objectors will rarely burden same-sex couples. Few same-sex couples in Washington will have to go far to find merchants, professionals, counseling agencies, or any other desired service providers who will cheerfully meet their needs and wants. And same-sex couples will generally be far happier working with a provider who contentedly desires to serve them than with one who believes them to be engaged in mortal sin, and grudgingly serves them only because of the coercive power of the law. The religious exemptions proposed in the Wilson-Berg letter are drafted to exclude the rare cases where these suppositions are not true, such as a same-sex couple in a rural area that has reasonably convenient access to only one provider of some secular service. Such cases are no reason to withhold religious exemptions in the more urban areas where most of the people – and most of the same-sex couples – actually live.

III. The Earlier Bills

House Bill 1963 and Senate Bill 5793, which appear to still be pending, require less discussion. Their *only* protection for religious liberty is §1(h), which says that clergy are not required to solemnize weddings. There is no protection whatever for churches, synagogues, and other religious organizations, no protection for religious individuals other than clergy, and no protection for clergy with respect to anything except presiding at wedding ceremony.

IV. Conclusion

Enacting the right to same-sex marriage with generous exemptions for religious dissenters is the right thing to do. It respects the right of conscience for all sides. It protects the sexual liberty of same-sex couples and the religious liberty of religious dissenters. It is obviously better for the traditional religious believers; on a few moments' reflection, it is also better for the same-sex couples. Because it is better for both sides, it is better for Washington. The language proposed in the Wilson-Berg letter would protect the liberty of both sides. We urge you to add it to the pending bills.

At the very least, the bills must be amended to fulfill the promise in their preamble — religious organizations should be protected with respect to the *recognition* of marriage.

Each of us signs this letter in our individual capacities; none of our employers takes a position on the issues addressed in this letter. We are available to discuss these issues further if that would be of any benefit.

Very truly yours,

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PS: The scope of coverage in §7 of House Bill 2516

Section 7(1) of House Bill 2516 says that religious organizations are not required to assist "the solemnization or celebration of a marriage," with certain exceptions; §7(2) says the refusal to assist "the solemnization or celebration of a marriage" does not create a civil claim, with an exception that is somewhat different from the exceptions in §7(1). What is the difference between these two subsections? One plausible reading is that there are services that are not "required" under §7(1), but that refusing those services may nonetheless give rise to a civil claim under §7(2). That trap for unwary churches should be unambiguously eliminated.

Even with respect to solemnization and celebration of a marriage, the religious exemptions in these two subsections are too narrow. In many cases, they may not cover the use of church facilities for the wedding reception or even the wedding itself. Section 7(1) does not apply to any service "offered to the public for a fee." Not-for-profit religious organizations operate without profit, but they do not operate without cost. If a church charges a fee to cover the costs of using its reception space (or the cost of using its worship space for a wedding), and if it has ever made that space available to someone not already a member of the church, it may be sued on the theory that it has offered the space to the public for a fee, and it would have to litigate the meaning of "offered to the public." Moreover, a church may make its physical space or other services more broadly available as a form of religious outreach, or in an effort to cover its costs of operation, but these efforts should not be grounds for forfeiting its right to religious liberty.

Section 7(2) does not apply to "transactions governed by law against discrimination." The effect of this is to incorporate an existing definition in Wash. Rev. Code §49.60.040(2). That definition is ambiguous, but the ambiguity has not mattered, because it applies to discrimination that has little religious significance and that few if any churches engage in. But recognition of marriage is of great religious significance, so incorporating that ambiguous definition here is deeply problematic.

Section 49.60.040(2) covers any place "where charges are made for admission, service, occupancy, or use of any property or facilities," but not to any place of accommodation "which is by its nature distinctly private," and not to any religious school or cemetery. The express exemption of religious schools plainly implies that the legislature did not contemplate covering churches. But churches are not expressly exempted, and in today's more confrontational atmosphere, the rest of the definition may well be interpreted to cover them. Churches that seek to spread their religious message are not "by [their] nature distinctly private." So if a church charges a fee to cover the cost of using its space, it may be engaged in a "transaction governed by law against discrimination," and thus outside the protection of §7(2), whether or not that reception space is "offered to the public." Apart from all that, if "public use is permitted" then to that extent, the space would also be within the definition in §49.60.040(2) and outside the religious liberty protections of §7(2).

In sum, the protection for religious institutions in §7 covers only the "solemnization or celebration of a marriage," and it probably does not cover all of that.