



April 1, 2016

The Honorable Representative Gabrielle LeDoux, Chair
The Honorable Representative Wes Keller, Vice Chair
House Judiciary Committee
Alaska House of Representatives
State Capitol
Juneau, AK 99801

By email: Representative.Gabrielle.LeDoux@akleg.gov
Representative.Wes.Keller@akleg.gov

Re: House Bill 236: ACLU of Alaska Review

Dear Chair LeDoux and Vice Chair Keller:

Thank you for letting us share our thoughts about House Bill 236. While the bill reiterates clergy's strong, existing First Amendment right to solemnize just those marriages that comport with their faith, it dramatically—and we expect, unintentionally—rewrites the decades-long balance between faith and secular nondiscrimination laws that protect everyone in public spaces. Though we do not support HB 236 in its current form, we offer in the attached appendices two ways for the committee to amend it, either of which will reemphasize clergy's constitutional freedom of religion without disturbing the sixty-two-year equilibrium between faith and nondiscrimination laws. If the committee makes the changes in either appendix, the ACLU of Alaska would be pleased to endorse the bill.

The right to freely practice one's religion is the first freedom in the First Amendment, and we have stalwartly defended that right since the ACLU's founding nearly 100 years ago. Last year alone, the:

- ACLU of Pennsylvania interceded on behalf of a Christian inmate seeking to have a communal prayer during the Christmas holiday;
- ACLU of Hawai'i secured the rights of a pastor and his wife to hand out religious literature on a public sidewalk;
- ACLU of New Hampshire filed suit on behalf of a prisoner's mother and three-year-old son against a prison policy that prohibits Christmas cards, prayer cards, and drawings sent through the mail;
- ACLU of Virginia defended students' right to wear rosary beads in a public high school; and
- ACLU of Michigan backed Christian evangelists' right to protest at a street festival.

All told, the ACLU files an average of one suit per month to vindicate the right of all Americans to practice their religion.¹ We unreservedly endorse the initial part of HB 236 that reiterates no person of faith is *obliged* to solemnize a marriage simply because they are *authorized* to do so. As the conditions of marriage solemnization can be deeply entwined with religious belief, we would zealously oppose any attempt by the state to force someone to solemnize a marriage under conditions that violate that person's sincerely held religious beliefs. The Constitution of the State of Alaska and the United States Constitution stand ready to ensure that does not happen.

But we are concerned by the portions of HB 236 that reach beyond the discrete scope of marriage solemnization and extend to circumstances “related to” marriage solemnization and celebration—circumstances ordinarily considered part of the public sphere. Specifically, HB 236 appears to endeavor to inoculate religious practitioners who are authorized to solemnize marriages from being subject to the same civil nondiscrimination protections that govern everyone else when providing “services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, or celebration of a marriage.”

Providing such services, accommodations, facilities, goods, or privileges are non-religious activities. Just as a commercial hotel is governed by applicable civil rights legislation when it opens itself up to the public to rent out a banquet hall for a wedding reception—e.g., it is not permitted to discriminate in providing that space according to someone's race or religion—so too should every institution—secular or religious—be when it opens itself up to the public to provide similar secular services.

We all agree that religious freedom is important. Since the beginning of the United States and of the State of Alaska, our respective Free Exercise Clauses have worked well: they allow churches to hire the clergy that they want, to pray the way their tradition teaches, and to solemnize marriages as their faith requires. And for decades, in all areas of nondiscrimination protection—such as race, religion, and sex—the Federal and Alaska Constitutions' freedom of religion protections have successfully protected churches in their religious practices.

This well-balanced relationship between religious freedom and civil rights has been bolstered by the Supreme Courts of both Alaska and the United States. No less an authority than Justice Antonin Scalia—no stranger to robust defense of religious liberty—wrote the majority opinion for the U.S. Supreme Court 26 years ago that religious belief does not excuse one from generally applicable laws and regulations that do not target religion. As Justice Scalia observed, “We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”² Not long after, the Alaska Supreme Court similarly held that

¹ For a more complete list, please read *ACLU Defense of Religious Practice and Expression*, <https://www.aclu.org/aclu-defense-religious-practice-and-expression> and <https://www.aclu.org/other/aclu-defense-religious-practice-and-expression-pdf>.

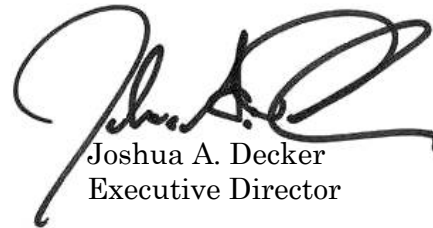
² *Empl. Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990).

religious belief does not excuse one from anti-discrimination laws based on one's religious convictions. It observed, "The Free Exercise Clause of the United States and Alaska Constitutions do not permit [someone] to disobey the state and municipal anti-discrimination laws by entitling him to an exemption."³ The balance point between the sphere of religious liberty and the sphere of civil rights protections—for race, sex, religion, *and* gay and transgender individuals—has existed for decades, and existed well, far removed from the point HB 236 would reset it.

Unfortunately, the current language of HB 236 includes an unprecedented and wholly unnecessary rollback of civil rights protections. If enacted as is, it would reset the equilibrium point that has balanced religious freedom and civil rights protections for decades and that have served Alaska and the United States well. To preserve this well-established equipoise, we suggest the committee adopt one of the two alternate versions we are attaching in the appendices to this letter. Adopting either substitute would ensure that the committee achieves HB 236's goal of reiterating the robust religious freedoms enshrined in the Alaska and United States Constitutions, without rolling back essential civil rights protections that express Alaska's interest in a fairer, more equitable society.

We look forward to working with you to do what it takes to see this just bill become a just law.

Sincerely,



Joshua A. Decker
Executive Director

cc: Rep. Neal Foster	Representative.Neal.Foster@akleg.gov
Rep. Bob Lynn	Representative.Bob.Lynn@akleg.gov
Rep. Charisse Millett	Representative.Charisse.Millett@akleg.gov
Rep. Matt Claman	Representative.Matt.Claman@akleg.gov
Rep. Jonathan Kreiss-Tomkins	Representative.Jonathan.Kreiss-Tomkins@akleg.gov
Rep. Kurt Olson	Representative.Kurt.Olson@akleg.gov
Rep. Dave Talerico, Sponsor	Representative.Dave.Talerico@akleg.gov

³ *Swanner v. Anchorage Equal Rights Commn.*, 874 P.2d 274, 285 (Alaska 1994).

Appendix: Proposed Option 1

A BILL

FOR AN ACT ENTITLED

1 **“An Act relating to marriage solemnization.”**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 * **Section 1.** AS 25.05.261 is amended by adding new subsections to read:

4 (c) Nothing in this section creates or implies a duty on a person authorized to
5 solemnize a marriage under (a)(1) or (3) of this section to

6 (1) solemnize a marriage; or

7 (2) provide services, accommodations, facilities, goods, or privileges **to the public**
8 for a purpose related to the solemnization, formation, or celebration of a marriage.

9 (d) A person permitted to solemnize a marriage under (a)(1) or (3) of this
10 section is not subject to criminal or civil liability for refusing to solemnize a marriage
11 or refusing to provide, **unless provided to the public,** services, accommodations, facilities, goods, or privileges for a
12 purpose related to the solemnization, formation, or celebration of a marriage.

13 (e) The state or a municipality may not penalize a person who is permitted to
14 solemnize a marriage under (a)(1) or (3) of this section for refusing to solemnize a
15 marriage or refusing to provide, **unless provided to the public,** services, accommodations, facilities, goods, or
16 privileges for a purpose related to the solemnization, formation, or celebration of a
17 marriage. In this subsection, "penalize" means to take an action affecting a benefit or
18 privilege guaranteed to the person by law, including a tax exemption or state or
19 municipal contract, grant, or license.

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Appendix: Proposed Option 2

A BILL

FOR AN ACT ENTITLED

1 **“An Act relating to marriage solemnization.”**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 * **Section 1.** AS 25.05.261 is amended by adding new subsections to read:

4 (c) Nothing in this section creates or implies a duty on a person authorized to
5 solemnize a marriage under (a)(1) or (3) of this section to

6 [(1)] solemnize a marriage[; OR

7 (2) PROVIDE SERVICES, ACCOMMODATIONS, FACILITIES, GOODS, OR PRIVILEGES

8 FOR A PURPOSE RELATED TO THE SOLEMNIZATION, FORMATION, OR CELEBRATION OF A MARRIAGE.]

9 (d) A person permitted to solemnize a marriage under (a)(1) or (3) of this

10 section is not subject to criminal or civil liability for refusing to solemnize a marriage

11 [OR REFUSING TO PROVIDE SERVICES, ACCOMMODATIONS, FACILITIES, GOODS, OR PRIVILEGES FOR A

12 PURPOSE RELATED TO THE SOLEMNIZATION, FORMATION, OR CELEBRATION OF A MARRIAGE].

13 (e) The state or a municipality may not penalize a person who is permitted to

14 solemnize a marriage under (a)(1) or (3) of this section for refusing to solemnize a

15 marriage [OR REFUSING TO PROVIDE SERVICES, ACCOMMODATIONS, FACILITIES, GOODS, OR

16 PRIVILEGES FOR A PURPOSE RELATED TO THE SOLEMNIZATION, FORMATION, OR CELEBRATION OF A

17 MARRIAGE]. In this subsection, "penalize" means to take an action affecting a benefit or

18 privilege guaranteed to the person by law, including a tax exemption or state or

19 municipal contract, grant, or license.

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