

March 23, 2023

House Human Services, Youth & Early Learning Committee
Washington State Legislature
260A John L. O'Brien Building
P.O. Box 40600
Olympia, WA 98504-0600

Re: Written version of Public Testimony on SB 5280

Dear Chair Senn and Members of the Committee:

Below is the written version of testimony I gave before your Committee on Tuesday on Senate Bill 5280.

Sincerely,



Eric N. Kniffin
Fellow, Ethics & Public Policy Center

Public Testimony on SB 5280
House Human Services, Youth & Early Learning Committee
March 21, 2023

Good afternoon. My name is Eric Kniffin. I am here today as a fellow with the Ethics and Public Policy Center, a think tank in Washington, DC. I am also a civil rights attorney.

I applaud the Committee's desire to protect children. SB fifty-two eighty is a good bill and the Catholic Church supports it. But it would be a mistake to amend the bill and try to force priests to tell the state what people say in confession.

Based on recent conversations, I am concerned that members of this committee might not adequately understand the mandatory reporter law as it stands today, as well as the practical and legal effects of trying to require clergy to violate their religious vows.

First, the mandatory reporter law already recognizes lots of privileges. RCW 24.44.030(b) incorporates RCW 5.60.060 into the State's mandatory reporter law, taking rules about testimony in court and using them to limit people's obligations as mandatory reporters. This

committee should understand how broad these exceptions are before it takes steps to intrude on a sacrament of the Catholic Church.

Second, it is important to understand why our constitution and laws recognize privileges. According to the Washington Supreme Court, “[B]ecause some relationships are deemed so important and cannot be effective without candid communication, courts and legislatures have granted them privilege,” specifically citing the attorney-client and clergy-penitent privileges.¹

The U.S. Supreme Court has likewise said the clergy penitent and attorney client privileges “are rooted in the imperative need for confidence and trust.”²

These first two points show why attempts to make priests tell the government what people confess would be unconstitutional.

One test courts use to see whether a restriction on religion is constitutional is whether the government is equally zealous in restricting similar secular activities. For example, prison safety is important, but if a prison will allow beards for medical reasons, it has to make exceptions for religious beards too.³

The same is true here: It is plainly unconstitutional for government to say that it is good for *lawyers* to keep confessions secret for *secular* reasons, but it is illegal for *priests* to keep confessions secret for *religious* reasons. That is why no court has ever approved government invasion of the sacrament of confession.⁴

Before this committee votes on Friday, I challenge you to cite examples of the problem you claim you must solve. When has the seal of the confessional delayed or blocked Washington

¹ *Lowy v. PeaceHealth*, 280 P.3d 1078, 1086 (Wash. 2012).

² *Trammel v. United States*, 445 U.S. 40, 51 (1980) (emphasis added).

³ *Holt v. Hobbs*, 574 U.S. 352, 367–68 (2015) “Although the Department denied petitioner’s request to grow a ½-inch beard [for religious reasons], it permits prisoners with a dermatological condition to grow ¼-inch beards. The Department does this even though both beards pose similar risks. . . . Although the Department’s proclaimed objectives are to stop the flow of contraband and to facilitate prisoner identification, ‘[t]he proffered objectives are not pursued with respect to analogous nonreligious conduct,’ which suggests that ‘those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree.’ (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)).

Likewise, protecting public health is important, but if movie theaters can open during a pandemic, then the government can’t shut down churches. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (“California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time.”).

⁴ *Mockaitis v. Harclerod*, 104 F.3d 1522, 1533 (9th Cir. 1997).

authorities from knowing about child abuse? Similarly, why you would attack this religious privilege while leaving secular privileges intact?

Please keep these critical points in mind as you deliberate on this bill. Attempting to invade the clergy penitent privilege is unwise, unnecessary, and unconstitutional.

For more information on what I have presented here, please see the public comment I submitted on February 24 regarding HB 1098.⁵ I would also be happy to participate in a working session or speak to any of you individually.

Thank you.

⁵ Eric Kniffin, Public Comment on Washington State HB 1098 (2023) available at <https://eppc.org/publication/eppc-scholar-urges-washington-state-not-to-violate-seal-of-the-confessional/>.