

February 12, 2024

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: Public Comment on Senate Bill 6298

Dear Committee Members,

Thank you for the opportunity to offer comment on Senate Bill 6298 (SB 6298), currently pending before the Washington State Legislature.

I am writing to you as a Fellow with the Ethics and Public Policy Center in Washington, DC, where my work focuses on protecting rights of conscience and religious liberty. The views expressed in my testimony are my own and do not represent any official position of EPPC. I have also been a civil rights lawyer for twenty years, helping vindicate the First Amendment and statutory rights of religious organizations and helping governmental bodies advance their interests without violating their constituents' rights.

Last year, I submitted a public comment to the Legislature along with an extensive memorandum explaining why Substitute House Bill 1098, which would have added clergy as mandatory reporters without recognizing the clergy-penitent privilege, was a bad bill.¹ I explained that attempting to invade the clergy-penitent privilege would not improve child safety, that SHB 1098 was out of step with other state laws, and that the bill, if passed into law, would be held constitutional.

I am heartened to see that this year the Washington State Legislature has chosen a different path. SB 6298 proposes to make two important changes to Washington's mandatory reporter law that reflect recommendations I made last year.

First, SB 6298 would amend RCW 26.44.020 by adding members of the clergy to the State's list of mandatory reporters for child abuse and neglect. This is a good change that would bring Washington into line with the majority of other states and aligns with the Catholic Church's own policies. Today, Washington is one of only seven states where clergy are not mandatory

¹ Eric Kniffin, *EPPC Scholar Urges Washington State Not to Pressure Clergy to Violate Seal of the Confessional*, EPPC (Feb. 24, 2023), <https://eppc.org/publication/eppc-scholar-urges-washington-state-not-to-violate-seal-of-the-confessional/> ("Kniffin Memo").

reporters.² But regardless of whether state law requires priests to report, Catholic bishops agree that priests should do so. The United States Conference of Catholic Bishops' (USCCB) Charter for the Protection of Children and Young People states that dioceses "are to report an allegation of sexual abuse of a person who is a minor to the public authorities with due regard for the seal of the Sacrament of Penance" and "are to cooperate with public authorities about reporting cases even when the person is no longer a minor."³ Consistent with the USCCB's Charter, all three Catholic dioceses in Washington State *already* require priests to report alleged abuse to civil authorities.⁴

Second, SB 6298 respects religious liberty by amending RCW 26.44.030 with a narrowly crafted exemption for the penitential communication privilege. As I explained last year, a bill that failed to make provisions for this long-established privilege—like 2023's Substitute House Bill 1098—would not help protect children because it would be struck down as unconstitutional. Catholic priests must keep confessions absolutely confidential under penalty of excommunication.⁵ Our constitutional tradition respects this commitment, which is why court decisions often place the clergy-penitent privilege right alongside the attorney-client privilege.⁶

Moreover, the experience of other states shows that Washington does not need to invade the privacy of the confessional to protect children. For example, in 2020 Hawaii added clergy to its list of mandatory reporters while adding an exemption for information "gained solely during a penitential communication."⁷

The United States Constitution and the Washington State Constitution require government to respect religious liberty. But the right to religious liberty is not limitless. SB 6298 strikes a careful balance by honoring the confidentiality of penitential communications but carefully defining this right. Legislators should proceed with confidence that courts will honor and enforce this balance.

² Besides Washington State, clergy are not mandatory reporters in Iowa, Kansas, New York, South Dakota, Alaska, and Georgia.

³ USCCB, *Charter for the Protection of Children and Young People* at Art. 4 (Rev. 2018) <https://www.usccb.org/resources/Charter-for-the-Protection-of-Children-and-Young-People-2018-final%281%29.pdf>.

⁴ Archdiocese of Seattle, *Policy for the Prevention and Response to Sexual Abuse, Sexual Misconduct, and Sexual Harassment* at 5, <https://archseattle.org/wp-content/uploads/2021/08/Safe-Environment-Program-Policy-Prevention-Response-Eng-8.31.2021.pdf>; Diocese of Spokane, *Excerpt from the Diocese of Spokane Administrative Policies/Procedures: Prevention, Education, and Reporting of Abuse*, https://files.ecatholic.com/6397/documents/2021/11/The%20Duty%20to%20Report.pdf?_t=1637774089000; Diocese of Yakima, *Policy Regarding Sexual Abuse of Minors by Clerics, Men and Women Religious, Seminarians, Employees, and Volunteers* at §2003, <https://yakimadiocese.org/wp-content/uploads/2015/12/Sexual-Abuse-Policies-2017-English-with-VAC-protocol.pdf>.

⁵ Kniffin Memo at 9-16.

⁶ *Id.* at 19-20.

⁷ *Id.* at 22-23 (citing 2020 Hawaii Laws Act 35 (H.B. 1942)).

A recent decision from a Florida state appellate court, *State v. Gonzalez*, provides a helpful example.⁸ In 2020, Juan Martin Gonzalez, a fifty-seven year old male, molested a twelve year old girl who attended his church. When their pastor heard what Gonzalez had done, he called an emergency meeting where Gonzalez was required to explain what had happened and ask for forgiveness. At least fourteen people attended the meeting; Gonzalez was also aware that it was being videotaped.

Gonzalez claimed the State's attempt to use the recorded confession against him violated his rights under the clergy-penitent privilege. But the Florida court rejected Gonzalez's argument: Florida's privilege—like SB 6298—does not protect a penitential communication unless it is "confidential."⁹ The court found that Gonzalez's admission and request for forgiveness fell outside the privilege because it was made to "assembled church leaders" and because it was recorded for viewing by others not present.

In my judgment, the penitential communication privilege that SB 6298 would add to RCW 26.44.030, like the Florida privilege at issue in *State v. Gonzalez*, properly balances the State's interest in protecting children with its interest in respecting religious liberty. Proposed RCW 26.44.030(1)(g) carefully defines what counts as a "penitential communication." I am further encouraged by bill sponsor Senator Frame's statement that the "duty to warn" in proposed RCW 26.44.030(1)(g)(vi) does "not put[] [Catholic] priests in a position of breaking their vows but rather provid[es] an avenue to interrupt the abuse of children that they reasonably believe is imminent."¹⁰

I hope that this analysis is helpful to the Washington State Legislature as you deliberate over proposed changes to the State's mandatory reporter law. Please let me know if I may be of any further assistance to you in this matter.

Sincerely,



Eric N. Kniffin
Fellow, Ethics & Public Policy Center

CC: Committee counsel Luke Wickham and Omeara Harrington;
SB 6298 Sponsor Senator Noel Frame; and
Jean Welch Hill, Executive Director, Washington State Catholic Conference

⁸ *State v. Gonzalez*, No. 2D22-3707 (Fla. Dist. Ct. App. Jan. 31, 2024), available at <https://casetext.com/case/state-v-gonzalez-2205>. See also Howard Freeman, *Recorded Statements Made to Church Leaders and Privilege Not Privileged*, Religion Clause (Feb. 1, 2024), <https://religionclause.blogspot.com/2024/02/recorded-statements-made-to-church.html>.

⁹ Fla. Stat. 90.505(a)(b).

¹⁰ Washington State Legislature Senate Human Services Committee, Hearing (Jan. 25, 2024, 8:00 A.M.) at 1:06:47, available at <https://app.leg.wa.gov/committeeschedules/?eventID=2024011403#//28243/////year>.