

**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:
H.B. NO. 2569, RELATING TO CIVIL UNIONS.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, January 31, 2012 **TIME:** 2:00 p.m.
LOCATION: State Capitol, Room 325
TESTIFIER(S): David M. Louie, Attorney General, or
Jill T. Nagamine, Deputy Attorney General

Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General appreciates and agrees with this bill's intent, which is to allow for improved and effective implementation of the civil union law. However, we have several concerns about this draft of the bill and provide the following comments and suggestions.

The purpose of this bill is to amend various statutory provisions relating to civil unions to conform to the intent of the Legislature in enacting chapter 572B, Hawaii Revised Statutes (HRS), and to allow for improved and effective implementation of the civil union law. Our main concerns are (1) addressing the legal gap in benefits for couples in reciprocal beneficiary relationships who must terminate their reciprocal beneficiary relationship prior to entering a civil union, and (2) ensuring that clarifications made to the civil union law do nothing to weaken the meaning of the law itself.

Concerns relating to reciprocal beneficiary relationships:

Section 2 of the bill would remove from section 572B-2, HRS, the prohibition against parties to reciprocal beneficiary relationships entering into civil unions. This, in conjunction with other clarifying amendments that we suggest in relation to section 9 of the bill, would allow

couples in reciprocal beneficiary relationships, who would otherwise be eligible to enter a civil union, to do so without terminating their reciprocal beneficiary relationship first. The positive effect of this change would be to eliminate an unintended gap in rights and benefits that is created in current law upon the termination of a reciprocal beneficiary relationship pending the solemnization of the civil union. By deleting this prohibition from section 572B-2, the rights and benefits of a reciprocal beneficiary relationship would exist until they are replaced by the rights and benefits of a civil union. The current requirement of having to terminate the reciprocal beneficiary relationship prior to being issued a license for a civil union would be removed.

Section 7 of the bill would amend section 572B-10, HRS, by requiring manual termination of a reciprocal beneficiary relationship in Hawaii to validate a civil union entered in a different jurisdiction. This conflicts with proposed provisions that would allow automatic termination upon solemnization or recognition of civil unions. As long as the eligibility requirements for recognition of civil unions from other jurisdictions are met, there does not seem to be a need to require this extra step for those couples who are in reciprocal beneficiary relationships. Requiring the couple to manually terminate rather than have an automatic termination by operation of law would create confusion and perhaps lead to the existence of conflicting statuses. We recommend against the proposed amendment to section 572B-10.

Section 9 of the bill would amend section 572C-7, HRS, to make reciprocal beneficiary relationships terminate upon the issuance of a license for a civil union. That does not eliminate the benefit gap created under current law between the end of the reciprocal beneficiary relationship and the civil union or marriage. Unless the reciprocal beneficiary relationship terminates upon solemnization of civil union or marriage, a gap remains. To eliminate the gap, we propose the following amendment to section 572C-7(c) instead of the proposed language:

(c) ~~[Any marriage license subsequently issued by the department to any individual registered as a reciprocal beneficiary shall automatically terminate the individual's existing reciprocal beneficiary relationship.] Any reciprocal beneficiary relationship shall automatically terminate upon either of the reciprocal beneficiaries entering into a marriage or a civil union solemnized by a person licensed by the department to solemnize marriages or civil unions or entering into a legal union in another jurisdiction that is recognized as a marriage or civil union in this State.~~

Other concerns with the bill:

Section 3 of the bill would amend section 572B-4(b), HRS, to expand the list of members of the clergy who are authorized to solemnize civil unions to include the same people who are authorized to solemnize marriages. If expansion of the list of members of the clergy is the purpose of this section, it accomplishes its purpose. If it is the intent of this section to make marriage solemnizers and civil union solemnizers the same, this wording does not accomplish that, because under the current law judges who perform civil unions can include federal or state judges from other states, whereas judges who perform marriages must be of a state or federal court in the State of Hawaii.

Section 5 of the bill would clarify that in addition to the agent, the Department of Health is authorized to collect the fee for the civil union license. Before the advent of online application procedures that expedite the licensing process in part by requiring payment of fees directly to the Department of Health online, agents were historically assigned the Department of Health's task of collecting license fees. This amendment would clarify that the Department of Health is authorized to collect those fees directly. This amendment is unnecessary due to the Department

of Health's existing authority to collect fees pursuant to section 321-1(g), HRS. It also would create a problem, because without also making an amendment to the marriage statute to clarify that the Department of Health can collect online fees for marriage licenses, there would be possible confusion about the Department of Health's authority to collect fees for marriage licenses. Authority already exists for the Department of Health to collect fees, so we recommend this amendment be omitted.

Concerns relating to statutory interpretation:

In addition to the above specific comments about the bill's wording, we are concerned that any amendments to clarify the civil union law, if made in some sections of the HRS but not in others, might be construed as the Legislature's intending to exclude the application of the civil union law to unreferenced sections. To avoid that erroneous construction, we strongly urge inclusion of the following in a purpose section and in the legislative history:

Act 1, Session Laws of Hawaii 2011, specifically the new section codified as section 572B-9, Hawaii Revised Statutes, gave civil union partners all the same rights, benefits, protections, and responsibilities under law as given to those who contract, obtain a license, and are solemnized pursuant to chapter 572, Hawaii Revised Statutes. During the months of preparation to implement Act 1 and in the time since Act 1 became effective on January 1, 2012, however, it has come to the Legislature's attention that certain provisions of Hawaii's statutes would benefit from additional clarification to aid in the proper implementation of Act 1 and minimize confusion as we move forward. Therefore, in making these amendments with this measure, it is the intent of the Legislature to reconfirm and clarify the provisions of chapter 572B, Hawaii Revised Statutes, as enacted by

Act 1, Session Laws of Hawaii 2011. Nothing in this measure shall be interpreted to weaken or lessen any of the protections, obligations, rights, and responsibilities governed by any provision of Act 1.

Thank you for the opportunity to testify.

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January 28, 2012

Tuesday, January 31, 2012 - 2:00 p.m.

House Judiciary Committee

State Capitol RM 325

415 South Beretania Street

Honolulu, HI 96813

RE: House Bill 2569 RELATING TO CIVIL UNIONS - STRONG SUPPORT

Aloha Chair Keith-Agaran and fellow committee members,

On behalf of Honolulu Pride we would like to say Mahalo for hearing House Bill 2569 as well as a extending a big MAHALO to Governor Abercrombie for submitting HB 2569 as part of the his 2012 administration's packet.

We have seen first hand the trouble that couples in a Reciprocal Beneficiary (RB) trying to enter into a Civil Union. The way it is now first a couple has to dissolve the RB by mailing in a letter to the Department of Health (DOH). Then that letter may sit in the P.O. Box for a couple of days before it is even begun to be processed and that can take time before it is signed by the Director of DOH. Then a certificate is mailed to the couple so they then can go get a CU license and then have it solemnized.

During the time the RB has been terminated and the couple is able to get their Civil Union solemnized they are vulnerable. If the couple is lucky enough to have joint health insurance through Partner A's job it is canceled for Partner B since they are no longer a couple under the eyes of the law. So if something tragic happens to Partner B during this time it can bankrupt the couple. Or worse yet if either one of the is killed during this time the other besides being devastated could lose everything if the deceased partner's blood relative shows up and challenges the will if they have one. That is not right but that is the law as it stands today.

So we ask that you make it better, make it right and pass HB 2569 because it helps fix the imperfections in Act 1 - 2011 as well as the right thing to do.

Mahalo for the opportunity to testify,

Rob Hatch
Legislative Representative



Email to: JUDtestimony@Capitol.hawaii.gov
Hearing on: January 31, 2012 @ 2:00 p.m.
Conference Room #325

DATE: January 30, 2012

TO: House Committee on Judiciary
Rep. Gilbert S.C. Keith-Agaran, Chair
Rep. Karl Rhoads, Vice Chair

FROM: Allen Cardines, Jr., Executive Director

RE: Opposition to HB 2569 Relating to Civil Unions

Honorable Chairs and members of the House Committee on Judiciary, I am Allen Cardines, **representing the Hawaii Family Forum**. Hawaii Family Forum is a non-profit, pro-family education organization committed to preserving and strengthening families in Hawaii, representing a network of various Christian Churches and denominations.

Let's be clear at the forefront that the Hawaii Family Forum remains staunchly opposed to the recent establishment of civil unions in Hawaii. We strongly believe, and have stated on the record, that the legalization of these "unions" were just a step toward the legal recognition of same-sex "marriage" in Hawaii. Recent news stories and even public statements by supporters of civil unions have reiterated the fact that they are not satisfied.

We oppose this particular measure, however, because we strongly believe that the government should never force religious and/or private institutions to act contrary to their moral/religious tenets or governance. Removal of the provision (which we believed was a weak "protection" clause to begin with) under Section 3 (b) is absolutely abhorrent and does exactly that.

We will not attempt to argue the legal merits of the law, but we will continue to raise our voices against any effort to keep people of faith, and church communities, from practicing according to their religious belief.

Mahalo for the opportunity to testify.



HAWAII CATHOLIC CONFERENCE
6301 Pali Highway
Kaneohe, HI 96744-5224

Email to: HUDtestimony@Capitol.hawaii.gov
Hearing on: January 31, 2012 @ 2:00 p.m.
Conference Room # 325

DATE: January 30, 2012

TO: Committee on Human Services
Representative Gilbert Keith-Agaran, Chair
Representative Karl Rhoads, Vice Chair

FROM: Walter Yoshimitsu, Executive Director

RE: Comments Regarding HB 2569 Relating to Civil Unions

Honorable Chairs and members of the House Committee on Judiciary, I am Walter Yoshimitsu, **representing the Hawaii Catholic Conference**. The Hawaii Catholic Conference is the public policy voice for the Roman Catholic Church in the State of Hawaii, which under the leadership of Bishop Larry Silva, represents Catholics in Hawaii.

This testimony will not focus on the merits of civil unions in Hawaii as this legislature has already decided to establish them. Our testimony today focuses on the protections that need to be provided to those who have objections to civil unions for religious reasons.

We understand that the deletion on pages 3 and 4 of the bill is a housekeeping measure because it is a duplication of language in HRS § 572B-4(c). Nevertheless, as we stated in our testimony last year, the language presently contained in HRS § 572B-4(c) is a very weak clause and we were concerned about the effect it would have on us as a religious institution.

We tried to strengthen it by supporting HB 1244 Relating to Solemnizations. That bill, as originally written, did not receive the support we had hoped and it was deferred in committee. However, we and other churches and religious organizations continue to be very concerned about the impact of the civil union law on both our organizations and the religious freedom rights of individuals.

Accordingly, we would recommend that the language be strengthened to protect us, and all organizations and individuals in Hawaii who do not agree with civil unions for religious reasons, from acting contrary to our religious beliefs and tenets. We have put suggested language attached, to be included as a new section of HB 2569.

Thank you for the opportunity to testify.

Religious Freedom Protection Exemption for Civil Unions Bill

SECTION __. Chapter 572B, Hawaii Revised Statutes, is amended by adding a new section, to be appropriately designated and to read as follows:

"§572B - __ Protection of religious freedom. (a) The exemptions contained in this section are intended to further the compelling governmental interest of protecting the free exercise of religion, and they shall be liberally construed to provide the utmost protection to religious freedom.

(b) No religious organization, organization supervised or controlled by or in connection with a religious organization, individual employed by any such organization while acting in the scope of that employment, or clergy or minister shall be required to solemnize any marriage or civil union, provide services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, or celebration of any marriage or civil union, or treat any marriage or civil union as valid for any purpose if such action would cause such organizations or individuals to violate their sincerely held religious beliefs.

(c) No private individual, non-profit organization, or for-profit organization shall be required to provide services, accommodations, facilities, goods, or privileges that assist or promote the solemnization, formation, or celebration of any marriage or civil union, or that facilitates the development or preservation of any marriage or civil union if such action would cause such individuals, organizations, or owners of such organizations to violate their sincerely held religious beliefs.

(d) No governmental employee or official shall be required to provide services that assist or promote the solemnization, formation, or celebration of any marriage or civil union if such action would cause that employee or official to violate his or her sincerely held religious belief, unless another employee or official is not available and willing to provide the requested governmental service; but in no instance shall a judicial officer authorized to solemnize marriages or civil unions be required to solemnize any marriage or civil union if to do so would violate his or her sincerely held religious beliefs.

(e) No refusal to provide services, accommodations, facilities, goods, or privileges protected by this Section shall result in a civil or criminal claim or cause of action or any action by the State or any of its political subdivisions to penalize or withhold benefits or privileges, including but not limited to tax exemptions or governmental contracts, grants, or licenses, from any protected organization or individuals."

EQUALITY HAWAII

Tuesday, Jan. 31, 2012 • 2 p.m. • Conference Room 325
Testifying in Support of HB2569 On Behalf of Equality Hawaii

Aloha, Chairman Keith-Agaran & Vice Chairman Rhodes:

Thank you for allowing Equality Hawaii to testify in support of HB2569. HB2569 is a product of the Department of Health's Civil Union Implementation Task Force in which an Equality Hawaii representative was a member. HB2569 is designed to create some administrative fixes to Act 1 and it addresses many of the concerns being raised by our members. We support this bill with amendments.

As the state's largest lesbian, gay, bisexual and transgender organization, Equality Hawaii has fielded countless inquires from our members with questions and concerns about Act 1, which we address below.

Reciprocal Beneficiary "Gap Issue"

Per Act 1, same-sex couples currently in a Registered Reciprocal Beneficiary Relationship (RBR) who wish to enter into a civil union with each other must first formally terminate their RBR in order to obtain a civil union license. This creates a "gap" or loss of legal protections from the moment of RBR termination until the solemnization of civil union, which can occur up to 30 days after issuance of civil union license. While the RBR law is limited in scope, it does offer some vital legal rights that protect couples in times of crisis including health care decision making, hospital visitation and ability to inherit without a will. Many couples have told us that they are afraid to enter this gap period, especially if one or both of the partners has a serious health issue. It is a gamble equivalent to driving without auto insurance.

The intent of HB2569 as described in the bill summary as well as numerous discussions within the DOH Civil Union Implementation Task Force was to eliminate this gap through:

- 1) removing the requirement for formal RBR termination prior to issuance of civil union license and
- 2) have RBR automatically terminate by operation of law once civil union is solemnized.

Upon review of HB2569, we observed an error in Section 9 of the draft before you. The language of Section 9 (c) automatically terminates a couple's RBR at the moment of issuance of civil union license instead of solemnization. This is of serious legal consequence as it maintains the gap issue. A civil union is formed only at solemnization, not issuance of license, and solemnization may occur up to 30 days after issuance of license. We request section 9 (c) be amended to terminate RBR upon solemnization of civil union and suggest the following language:

Any reciprocal beneficiary relationship shall automatically terminate upon either of the reciprocal beneficiaries entering into a marriage or a civil union solemnized by a person licensed by the department to solemnize marriages or civil unions or forming, or have formed, a legal union in another jurisdiction that is recognized as a marriage or civil union in this state.

The above language not only addresses the issue of civil union formed in Hawaii but also "unions" formed in other jurisdictions that Hawaii recognizes as civil unions. In order for this change to be implemented, additional simple amendments are required that relate to recognition of out of state unions.

Recognition of "Unions" Formed in Other Jurisdictions

Another area of constant confusion regards same-sex couples who have formed legal relationships in other states that are not labeled as "marriages" or "civil unions."

According to Act 1, these "unions" are recognized as civil unions provided that:

- 1) the couple meets the eligibility requirements of Act 1,
- 2) the relationship is legal where contracted, and
- 3) can be documented.

The problem is that Act 1 does not provide further guidance as to what else may constitute a "civil union." In particular, states such as California, Oregon, Washington and Nevada label their "civil unions" as "domestic partnerships." Such domestic partnerships provide all state level spousal rights as do Hawaii civil unions. Furthermore, some states and municipalities have created limited domestic partnerships/laws that are more akin to Hawaii's RBRs.

While the requirement to formally terminate an RBR to obtain a Hawaii civil union license is eliminated in HB2569, it is not eliminated for RBR couples in Hawaii who possess an out-of-state legal union that they wish to be recognized as a civil union in Hawaii. These couples are quite common as many have either moved to Hawaii with legal unions from other jurisdictions (most typical are California Domestic Partnerships) or they have flown to North America from Hawaii to legally marry either in Canada or a U.S. state that permits marriage of same-sex couples.

Having one RBR termination rule for in-state Hawaii civil unions and another for out-of-state unions creates confusion, however, the rationale for this difference is due to the current language of Act 1. If a couple has another state or municipal level limited, non-spousal equivalent union, under Act 1, as long as that couple doesn't have a Hawaii RBR, and meets the other requirements, that union is recognized as Hawaii civil union even if the couple never intended to take on the full benefits and obligations of spousal status. Automatically recognizing these more limited legal unions as Hawaii civil unions essentially forces spousal status on couples who may or may not want it. It is for this reason, that Equality Hawaii proposes additional amendments that will simplify the out-of-state union recognition process and maintain one rule for all couples.

Delete the language in Section 7 of HB2569 that requires formal termination of RBR for out-of-state unions and replace with the out-of-state recognition language that can be found in SB2571. Section 22 of SB2571 reads:

*SECTION 22. Section 572B-10, Hawaii Revised Statutes, is amended to read as follows:
"§572B-10 [Civil unions] Unions performed in other jurisdictions. All unions entered into in other jurisdictions between two individuals not recognized under section 572-3 shall be recognized as civil unions; provided that the relationship meets the eligibility requirements of this chapter, has been entered into in accordance with the laws of that jurisdiction, and can be documented.*

(ADD) For purposes of this section, a "union" means a legal union that confers rights, benefits, protections, and responsibilities that are substantially equivalent in scope to those described in section 572B-9, regardless of whether it bears the name civil union.

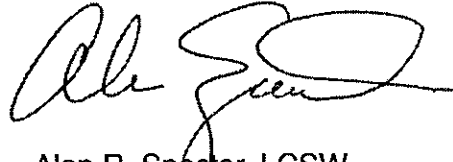
Equality Hawaii believes these proposed amendments will allow for a smoother implementation of Act 1 and they address the ongoing concerns raised by our members.

Mahalo for allowing us to testify.

Aloha,

Scott Larimer

Scott Larimer
Co-Chair
Equality Hawaii



Alan R. Spector, LCSW
Legislative Co-Chair
Equality Hawaii

CHRISTIAN VOICE of HAWAII

Standing for Righteousness in the Public Square
Post Office Box 23055 • Honolulu, Hawai'i 96823

HOUSE COMMITTEE ON JUDICIARY COMMITTEE

PUBLIC HEARING:

JANUARY 31, 2012

2 PM, CAPITOL AUDITORIUM)

TESTIMONY IN OPPOSITION TO HB 2569 – RELATING TO CIVIL UNIONS

CHAIR REP. KEITH-AGARAN, VICE-CHAIR REP. RHOADS and MEMBERS of the HOUSE JUDICIARY COMMITTEE:

Aloha. I offer this testimony today on behalf of Christian Voice of Hawaii, a network of more than 800 ministers from many denominations throughout Hawaii. The network involves pastors and leaders of numerous faith-based ministries that are active in providing support services in communities throughout the islands — from homeless shelters, to food distribution, family counseling, medical care, elderly and hospice care, social and spiritual counseling, assisting un-wed mothers, problem pregnancies, child services, education and so forth.

The members of the Christian Voice of Hawaii network hereby register our **OPPOSITION** to **HB 2569 – RELATING TO CIVIL UNIONS** because it poses a danger to religious freedoms guaranteed by both the constitutions of the State of Hawaii and the United States of America.

Although **HB 2569** claims to be “housekeeping” in nature, SECTION 3 clearly oversteps its “housekeeping” parameters by striking the current language in the HRS Section 572B-4 that protects the rights of “solemnizers” such as ministers, pastors and others who may decline to officiate civil unions on the basis that civil unions conflicts with the tenets of their religion.

The sentence **HB 2569** seeks to strike is what could be termed a “religious exemption” clause even though it doesn’t specify religion. It reads:

Nothing in this section shall be construed to require any person authorized to perform solemnizations of marriages or civil unions to perform a solemnization of a civil union, and no such authorized person who fails or refuses for any reason to join persons in a civil union shall be subject to any fine or other penalty for the failure or refusal.

The elimination of this crucial sentence would strip away the only vestige of religious protection in this statute and leave ministers and pastors vulnerable to punitive legal action should they choose to not officiate civil unions. In essence, this legislation would make ministers vulnerable to being prosecuted by the state for choosing to uphold the principles of their religion. This would constitute a monumental violation of the First Amendment of the Bill of Rights.

Ua mau ke Eā i ka 'Āina i ka Pono.
The Sovereignty of the Land is perpetuated in Righteousness.

The fact is, even the language currently contained in HRS Section 572B (the language this bill is trying to eliminate) is far too inadequate to protect religious freedoms in Hawaii with regard to civil unions. HRS Section 572B provides virtually no protection for churches, church properties, religious institutions such as schools, members and congregants and individuals who prefer to exercise their religious beliefs. HRS Section 572B leaves them all exposed and vulnerable to state-sanctioned religious persecution.

Christian Voice of Hawaii strongly opposes the elimination of the "religious exemption" clause in HRS Section 572B. Instead we recommend that it be kept and that new language be added to include anti-discrimination protections for religious institutions and for individuals.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Leon Siu". The signature is fluid and cursive, with the first name "Leon" and last name "Siu" clearly distinguishable.

Leon Siu
*Director,
Christian Voice of Hawaii*

Ua mau ke Eā i ka 'Āina i ka Pono.
The Sovereignty of the Land is perpetuated in Righteousness.

Citizens for Equal Rights

PO BOX 240908,
Honolulu, HI 96804-0908
www.equality808.com
808-271-7833

Tuesday, January 31, 2012 Time: 2:00 p.m.

House Judiciary Committee
House Conference Room 325
415 South Beretania Street
Honolulu, HI 96813

RE: House Bill 2569 Relating to Civil Unions – Support with Amendments

To: Representative Gilbert S.C. Keith-Agaran, Chair
Representative Karl Rhoads, Vice Chair
Members of the Committee

My name is Tambry R. Young, and I was a member of the Civil Unions Implementation Task Force (CUTF) and am the current President of Citizens for Equal Rights. The CUTF was established last session to address implementation process issues surrounding Act 1 relating to Civil Unions. The CUTF consisted of staff members from the Attorney General's office, personnel from the Department of Health, and members of the legislature, the Hawaii Tourism Authority and LGBT organizations.

The CUTF met several times last year to address issues associated with the development of a Civil Union and Marriage licensing process that went live at 12:00 a.m. on January 1, 2012. This online process has made it much more convenient for those wanting to obtain a Marriage or Civil Union license and has been successful in addressing the purpose for the CUTF.

Along with the implementation process, the task force was also able to discuss areas within Act 1 that could be made clearer, consistent and more appropriate. A sub-committee was established to look into various Statutes that relate to Act 1 and to propose legislation, which is being presented here in HB 2569.

In addition to areas covered in HB 2569, I would like to offer a comment for consideration regarding the termination of a reciprocal beneficiary (RB) relationship cited in SECTION 9. Please consider including language that would ensure that the gap period of benefits and protections which a couple would experience upon termination of the RB relationship be as minimal as possible.

HB 2569 has done a tremendous job in meeting concerns of the CUTF members and other related departmental concerns. As a member of the CUTF, I speak in support of HB 2569 and ask that you consider my comment regarding the termination of the RB relationship when passing this bill.

Thank you for this opportunity to testify in support of HB 2569.

Tambry R. Young
Member - Civil Unions Task Force
President - Citizens for Equal Rights

Shawn A. Luiz
Attorney at Law
1132 Bishop Street
Suite 1520
Honolulu, Hawaii 96813
Tel. (808) 538-0500 Fax (808) 538-0600 E-mail: attorneyluiz@msn.com

January 30, 2012

Via Facsimile to (808) 586-6211

Committee on Judiciary
HB 2569
Relating To Civil Unions
Tuesday, January 31, 2012
2:00 p.m.
Conference Room 325

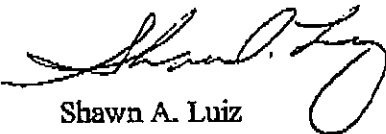
HB 2569 takes away a First Amendment Protection that was consistent with federal law. The proposed deletion of the language relating to immunity for persons who refuse to perform civil unions is ill-advised.

By agreement of the parties, the Federal Court has stayed Emmanuel Temple, The House of Praise, et al. v. Neil Abercrombie, et al.; Civil No: 11-790 JMS-KSC, pending some of these very matters before the Legislature.

Instead of decreasing the First Amendment Protection, the Legislature should expand HB 2569 to provide complete immunity to persons who refuse to perform a civil union for religious grounds; and should expand HB 2569 to provide complete immunity to persons who refuse to rent property for such unions to take place for religious grounds.

In summation, HB 2569 should be amended to provide maximum First Amendment Immunity. **If this Honorable Committee can take my testimony out of order I would greatly appreciate it as I have an appearance before another Tribunal at 4:00 p.m.**

Very Truly Yours,



Shawn A. Luiz

Telephone:
(808) 534-1514

JAMES HOCHBERG
ATTORNEY AT LAW

Cellular Phone:
(808) 256-7382

Fax:
(808) 538-3075

745 Fort Street
Fort Street Tower, Suite 1201
Honolulu, Hawaii 96813

Email Address:
Jim@JamesHochbergLaw.com

January 30, 2012

"Tolerance is a two-way street. Otherwise, the rule mandates orthodoxy, not anti-discrimination." JULEA WARD v. VERNON POLITE; United States Court of Appeals, Sixth Circuit. Decided and Filed: Jan. 27, 2012.

State of Hawaii
House of Representatives
Committee on Judiciary

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Rep. Karl Rhoads, Vice Chair

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HEARING on **HB 2569** Relating to Civil Unions

Date: Tuesday, January 31, 2012

Time: 2:00 PM

Place: Conference Room 325

RE: TESTIMONY IN STRONG OPPOSITION TO HB 2569 RELATING TO CIVIL UNIONS

Dear Chair, Vice Chair and Committee Members:

This testimony is written to oppose HB 2569 in the strongest possible language. I am a civil rights attorney having practiced law in Honolulu since 1984. Many of my cases deal with defending or prosecuting civil rights claims in the Hawaii Civil Rights Commission, as well as both state and federal courts. I have been affiliated with the Rutherford Institute since the 1980's and the Alliance Defense Fund since the 1990s. In 1995, Speaker Souki appointed me as one of seven members of the Commission on Sexual Orientation and the Law, where I served for more than six months until

JAMES HOCHBERG

ATTORNEY AT LAW

House Committee on Judiciary
Testimony in Strong Opposition to
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its work was completed. I hope that my training and experience in civil rights issues will lead you to seriously consider this testimony in strong opposition to HB 2569.

I most strongly object in particular, to Section 3 of HB 2569, which in its entirety states (including the strike-through proposed deleted language):

SECTION 3. Section 572B-4, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) Any judge or retired judge, including a federal judge or judge of another state who may legally join persons in chapter 572 or a civil union, may solemnize a civil union. Any [ordained or licensed member of the clergy] minister, priest, or officer of any religious denomination or society who has been ordained or is authorized to solemnize civil unions according to the usages of such denomination or society, or any religious society not having clergy but providing solemnization in accordance with the rules and customs of that society, may solemnize a civil union. Solemnization may be entirely secular or may be performed according to the forms and usages of any religious denomination in this State. ~~[Nothing in this section shall be construed to require any person authorized to perform solemnizations of marriages or civil unions to perform a solemnization of a civil union, and no such authorized person who fails or refuses for any reason to join persons in a civil union shall be subject to any fine or other penalty for the failure or refusal.]~~"

As you can see, the last sentence is proposed to be stricken from the law. This last sentence reads:

"Nothing in this section shall be construed to require any person authorized to perform solemnizations of marriages or civil unions to perform a solemnization of a civil union, and no such authorized person who fails or refuses for any reason to join persons in a civil union shall be subject to any fine or other penalty for the failure or refusal."

Without this sentence in Act 1 of the 2011 legislative session, it is quite possible that this body would not have been able to pass the bill. This one sentence attempted to lay to rest the concern that a conscience-based refusal to solemnize a civil union would be met with a legal claim for damages. This one sentence sought to include in the bill a protection from this concern. If my recollection is accurate, this is one of the repeated concerns about the creation of civil unions in Hawaii. It is inconceivable that HB 2569 could pass with that deletion in place. Its removal can have no conceivable purpose other than to attack religious liberty in Hawaii, and I look to your committee to amend this bill to remove the deletion in Section 3. Rather than delete this sentence and the protection for conscience it so wisely affords, the Civil Unions statute should be amended to strengthen the protections for decisions to avoid solemnizing or otherwise affirming civil unions based on conscience.

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You might well also consider that there is pending in the U.S. District Court in Honolulu, a law suit challenging the insufficiency of this protective sentence in the Civil Union law. This case highlights the dilemma that churches are placed in even without deleting this sentence in 572B-4(b). The case raises the issue that while the existing protections for refusing to participate in solemnization of a civil union address only fines or other similar penalties, the existing law does not clearly protect persons from court ordered injunctive relief to affirmatively engage in some action or refrain from engaging in some action relative to a solemnization request. The plaintiffs in that case filed it late last year as Civil No. 11-00790. The plaintiffs are asking the court to protect their First Amendment rights. Should the legislature move and pass this bill with Section 3 as written, striking that protection from the statute, it would be quite easy for the plaintiffs in that case to add to the claims in the litigation, the issues related to the deletion of this protective language. Your body could soon be faced with an order by U.S. Federal Judge J. Michael Seabright. The legislative process is certainly always better served when the elected representatives act to uphold the Constitution, rather than being ordered to do so by a court. Your oath demands it. For your convenience, your oath is found in Section 4 of Article XVI of the Constitution of the State of Hawaii, and it provides:

All eligible public officers, before entering upon the duties of their respective offices, shall take and subscribe to the following oath or affirmation:

"I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States, and the Constitution of the State of Hawaii, and that I will faithfully discharge my duties as ... to best of my ability."

As used in this section, "eligible public officers" means the governor, the lieutenant governor, the members of both houses of the legislature, the members of the board of education, the members of the national guard, State or county employees who possess police powers, district court judges, and all those whose appointment requires the consent of the senate.

For at least the 220 years since the First Amendment to the Constitution of the United States of America was ratified on December 15, 1791, our nation and its citizens have enjoyed something very precious called the freedom of religion. That includes the constitutionally sacred right held firmly by all religious institutions to be free from government intrusion into ecclesiastic affairs. The deletion of the protection of the right to refuse to participate in a civil union solemnization by those licensed to do so, would create an unconstitutional invasion into the barrier known in the law as church autonomy.

Just a few weeks ago in their unanimous January 11, 2012 *Hosanna-Tabor v EEOC* opinion, the U.S. Supreme Court emphasized that Establishment Clause of our First Amendment prevents the government from making ecclesiastical decisions for religious organizations-in that specific case,

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that the government could not dictate who would fill church offices. (*Hosanna-Tabor v EEOC*, No. 10-553, 2012 WL 75047 at *8 and *15 (Jan. 11, 2012)). Our highest court explained that a church must have sole authority, without government interference, in addressing "a matter 'strictly ecclesiastical.'" (Id. at *15 (quoting *Kedroff*)). Justices Alito and Kagan jointly concurred, saying: "we have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs. The Constitution guarantees religious bodies 'independence from secular control or manipulation - in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" (Id. at *17 (quoting *Kedroff*)). Surely the discretion to choose not to join two people in a civil union is a matter of faith and doctrine - a matter strictly ecclesiastical, and surely the Establishment Clause prevents our statute from dictating religious theology on that matter.

At its core, church autonomy gives religious organizations independence from secular control or manipulation and the power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. at 116. More modern Supreme Court cases often integrate church autonomy indirectly in answering constitutional questions. For instance, in *Thomas v. Review Board*, 450 U.S. 707 (1981), the Supreme Court ruled against the government which argued that an employee who sought worker's compensation benefits did not correctly understand the teachings of his church. *Id.* at 715. The Court stated that it is not within the judicial function or judicial competence to inquire whether a person correctly perceives the commands of their faith and that courts are not arbiters of scriptural interpretation. *Id.* at 716.

For the same reasons, the deletion of the protective language from existing law, as suggested and intended by HB 2569, far exceeds legitimate legislative authority with respect to the autonomy of the religious institutions and the response they take to requests to solemnize civil unions. The critical importance of remaining within the proscribed boundaries of legislative authority cannot be overstated. To assist you understand these limits on legitimate legislative actions, the balance of this testimony will describe how the legal doctrine of church autonomy enshrines religious freedom. The goal is to refresh the recollection to avoid future violations.

The most important issue regarding church autonomy is whether government action fits within the scope of the doctrine. The scope of church autonomy can be categorized into four separate areas: (i) questions of doctrine, the resolution of doctrinal disputes, and weighing the religious importance of a church's words and events;¹ (ii) ecclesiastical polity and its administration;² (iii) the

¹ See *Maryland & Va. Churches of God v. Church at Sharpsburg*, 396 U.S. 367, 368 (1970)(*per curiam*); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449-51 (1969); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 725-33(1872); *Thomas v. Review Bd.*, 450 U.S. 707, 715-16

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selection, credentialing, promotion, discipline, and conditions of appointment of clergy and other ministers;³ and (iv) the admission, guidance, expected moral behavior, and discipline of church parishioners.⁴ The law is clear that no statute can intrude into those areas, and imposing a fine or penalty on any clergy who declines to perform a ceremony would directly intrude on religious doctrine and violate church autonomy. The same would hold true for any injunctive order of a court proscribing or prescribing any conduct in this regard.

Of course, the deleted language protects more than clergy. The original language extended an entirely appropriate protection to all officiants. Clergy are not the only people who hold religious beliefs, and religious freedom does not extend only to our churches and temples. All citizens of Hawaii are free to hold religious beliefs, and many do. Presiding over a civil union ceremony may violate a secular officiant's religious conscience, and our law should not insist that they do so. "Tolerance is", as the 6th Circuit Court of Appeals informed us just a few days ago in *Ward v. Polite*, Nos. 10-2100, 10-2145, 2012 WL 251939 at *6 (6th Cir. 2012), "a two-way street." And just as the unconstitutional rule in that case required the plaintiff to violate her religious conscience, a requirement for secular officiants to violate their religious conscience by solemnizing a union "mandates orthodoxy, not anti-discrimination." *Id.* Just as a mandate for clergy violates our constitutional protections of religious freedom, a mandate for any other officiant also violates our cherished religious liberties.

In closing, it must be noted, that Section 3 of HB 2569, which is the most unacceptable portion of this bill, is not addressed in the descriptions of the bill. Why would this most egregious

(1981); *Order of St. Benedict v. Steinhauser*, 234 U.S. 640, 647-51 (1914).

² See *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-24 (1976); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 451 (1969); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (*per curiam*); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952); *Shepard v. Barkley*, 247 U.S. 1, 2 (1918) (*aff'd mem.*).

³ See *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-24 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952); *Gonzales v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929); See also *NLRB v. Catholic Bishop*, 440 U.S. 490, 501-04 (1979); *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 472 (1892); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867).

⁴ *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139-40 (1872); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872); cf. *Order of St. Benedict v. Steinhauser*, 234 U.S. 640, 647-51 (1914).

JAMES HOCHBERG

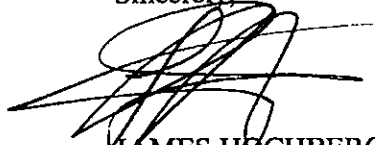
ATTORNEY AT LAW

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language not be included in the long descriptions of the bill, both in the notice of hearing and in the last five pages of the bill itself which is supposed to address the impacts of the bill?

Should you or your committee members have any questions, I would be happy to address them.

Sincerely



JAMES HOCHBERG

JH:lz

Testimony for HB2569 on 1/31/2012 2:00:00 PM

Testimony for HB2569 on 1/31/2012 2:00:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Friday, January 27, 2012 3:51 PM

To: JUDtestimony

Cc: keolabear@hotmail.com

Testimony for JUD 1/31/2012 2:00:00 PM HB2569

Conference room: 325

Testifier position: Support

Testifier will be present: No

Submitted by: Keola Akana

Organization: Individual

E-mail: keolabear@hotmail.com

Submitted on: 1/27/2012

Comments:

Please pass this bill in order to strengthen and clarify the Civil Union, Act 1 law of the 2011 legislature. Mahalo.

Testimony for HB2569 on 1/31/2012 2:00:00 PM

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mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Friday, January 27, 2012 4:11 PM

To: JUDtestimony

Cc: toddhairgrove@hotmail.com

Testimony for JUD 1/31/2012 2:00:00 PM HB2569

Conference room: 325

Testifier position: Comments Only

Testifier will be present: No

Submitted by: Todd Hairgrove

Organization: Individual

E-mail: toddhairgrove@hotmail.com

Submitted on: 1/27/2012

Comments:

if they want a Divorce i have no prob with that

Testimony for HB2569 on 1/31/2012 2:00:00 PM

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mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Saturday, January 28, 2012 7:13 AM

To: JUDtestimony

Cc: surfdoc@aloha.net

Testimony for JUD 1/31/2012 2:00:00 PM HB2569

Conference room: 325

Testifier position: Support

Testifier will be present: No

Submitted by: Shay Bintliff, MD, FACEP

Organization: Individual

E-mail: surfdoc@aloha.net

Submitted on: 1/28/2012

Comments:

Thank you for moving this forward so that Civil Unions can be clarified!

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mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Saturday, January 28, 2012 10:58 AM

To: JUDtestimony

Cc: gary@islandindoor.com

Testimony for JUD 1/31/2012 2:00:00 PM HB2569

Conference room: 325

Testifier position: Support

Testifier will be present: No

Submitted by: Gary Bradley

Organization: Individual

E-mail: gary@islandindoor.com

Submitted on: 1/28/2012

Comments:

Please support this bill! We just had to do the cancel, wait, then go for the civil union and it should have been transparent for us. mahalo