

April 7, 2011

Governor Chris Gregoire  
Office of the Governor  
PO Box 40002  
Olympia, WA 98504-0002  
Fax: 360-753-4110

CC: Washington Committee on  
Health Care and Wellness

Re: ESB 5005 and HB 1015 Concerning exemption from immunization

Dear Governor Gregoire:

I am writing at the request and on behalf of citizens of Washington regarding SB 5005 and HB 1015. Unfortunately, both versions contain significant Constitutional flaws, detailed below. For this reason, we respectfully request that you exercise your authority to prevent these bills from being signed into law.

#### LEGAL ANALYSIS

- I. ESB 5005 passed the Senate on February 22, 2011, and the House on March 25, 2011. The latest version contains the following problematic language:

*(1)(b) A written certification signed by any parent or legal guardian of the child or any adult in loco parentis to the child that the religious beliefs of the signator are contrary to the required immunization measures...*

*(2)(a) The form presented on or after the effective date of this section must include a statement to be signed by a health care practitioner stating that he or she provided the signator with information about the benefits and risks of immunization to the child...*

*(2)(c) Any parent or legal guardian of the child or any adult in loco parentis to the child who exempts the child due to religious beliefs pursuant to subsection (1)(b) of this section is not required to have the form provided for in (a) of this subsection signed by a health care practitioner if the parent or legal guardian demonstrates membership in a religious body or a church in which the religious beliefs or teachings of the church preclude a health care practitioner from providing medical treatment to the child.*

The above subsections would require parents exercising a religious exemption to either have a form signed by a healthcare practitioner or to belong to an organized

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religion, in order to qualify for a vaccine religious exemptions. Regarding the first of these options:

- a. In addition to the obvious concern of making health care practitioners the gatekeepers for non-medical exemptions (legally, religious beliefs are mutually exclusive from science), this requirement exceeds the boundaries of the First Amendment. Federal courts have held that the state “must offer the exemption to all persons who sincerely hold religious beliefs. . .” Sherr and Levy vs. Northport East-Northport Union Free School District, 672 F. Supp. 81, 98 (E.D.N.Y., 1987). This is a simple two-prong test. The only requirements are a belief that is religious in nature and that is sincerely held. See also Mason v. General Brown Cent. School Dist., 851 F.2d 47 (2nd Cir. 1988), and Lewis v. Sobel, 710 F. Supp. 506, (S.D.N.Y. 1989). Therefore, the additional requirements of a doctor’s counseling and signature on a form would exceed, and thus violate, the First Amendment.
- b. Regarding the second option, federal courts have held that a vaccine religious exemption law limiting the exemption to a “recognized religious organization . . . violates both the establishment and free exercise clauses of the First Amendment to the United States Constitution.” Sherr and Levy vs. Northport East-Northport Union Free School District, 672 F. Supp. 81, 99 (E.D.N.Y., 1987). Another federal court later stated that the “beliefs need not be consistent with the dogma of any organized religion, whether or not the plaintiffs belong to any recognized religious organization.” Farina v. The Board of Education, 116 F. Supp.2d 503, 507 (S.D.N.Y. 2000) (citing Sherr, 672 F. Supp. at 91). More recently, yet another federal court also ruled that the state’s religious exemption clause requiring membership in an organized religion with tenets in opposition to the immunization requirements violated the First and Fourteenth Amendments. McCarthy v. Boozman, 212 F.Supp.2d 945 (W.D.Ark. 2002).

State courts have also ruled vaccine religious exemption statutes requiring church membership were also ruled to be unconstitutional. See, e.g., Dalli v. Board of Education, 358 Mass. 753, 267 N.E.2d 219 (1971), and Davis v. State, 294 Md. 370, 451 A.2d 107 (1982). So, SB 5005’s second option raises Constitutional concerns with the free exercise and establishment clauses of the First Amendment, and with the equal protection clause of the Fourteenth Amendment.

- c. Finally, not only do each of the above-cited SB5005 options for exercising a vaccine religious exemption raise Constitutional issues individually and separately, the two taken together raise still more Constitutional concerns. Sherr and Farina show that the First Amendment treats those who have sincerely held religious beliefs but who are not members of an organized religion equally with those who are members of organized religions for vaccine religious exemption purposes. SB 5005’s different treatment of these two categories of religious beliefs raises additional concerns under both the

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First Amendment's free exercise and establishment clauses and the Fourteenth Amendment's equal protection clause.

- II. HB 1015 passed the House on February 14<sup>th</sup> but did not pass the Senate. It contained the following problematic language:

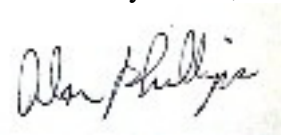
*(1) Any child shall be exempt in whole or in part from the immunization measures required by RCW 28A.210.060 through 28A.210.170 upon the presentation of any one or more of the ((following)) certifications required by this section, on a form prescribed by the department of health((:)). The form presented on or after the effective date of this section must include a statement to be signed by a health care practitioner stating that he or she provided the signator with information about the benefits and risks of immunization. . .*

*(b) A written certification signed by any parent or legal guardian of the child or any adult in loco parentis to the child that the religious beliefs of the signator are contrary to the required immunization measures...*

The language here has the same problems identified in I. a. above.

For each and all of the above-cited reasons, we respectfully request that you exercise your authority to veto SB 5005, and HB 1015 should it pass the House despite these concerns and come before you for your signature.

Sincerely Yours,

A handwritten signature in cursive script, appearing to read "Alan Phillips". The signature is written in dark ink on a light-colored, slightly textured paper background.

Alan Phillips, Esq.  
NC State Bar No. 30436