



ARCHDIOCESE OF WASHINGTON

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**Statement of the Roman Catholic Archdiocese of Washington
To the Committee on Public Safety and the Judiciary of the Council of the District of
Columbia Regarding the “Religious Freedom and Civil Marriage Equality Amendment Act
of 2009” (D.C. Council Bill 18-0482)**

Monday, October 26, 2009

Chairman Mendelson, members of the Committee, we appreciate the opportunity to speak with you today on behalf of the Roman Catholic Archdiocese of Washington to express our opposition to Bill 18-0482, which would redefine marriage to include same-sex unions. The Archdiocese represents over 580,000 Catholics in the metropolitan area, including at least 60,000 registered Catholics in the District of Columbia. They come from many backgrounds and nations and worship in over 15 languages at 40 parishes. Every day across the District of Columbia, clergy and laity, employees and volunteers spend countless hours engaged in the charitable works of the Church.

Catholic Charities, the social services arm of the Archdiocese, is the single largest private provider of social services in the Washington metropolitan region, operating more than 65 charitable programs providing food, housing, healthcare, job training, and family and immigration services to thousands of people in need, regardless of faith. Our parishes care for the most vulnerable through over 93 different local outreach ministries; Catholic Charities shelters nearly one third of the District’s homeless every night; Catholic schools educate over 6,400 students in the District alone. The Archdiocese of Washington is present in this city to serve. Catholics in this Archdiocese donate millions of dollars and tens of thousands of hours of volunteer service to make a positive difference in the lives of people in this city. Doing so is integral to the practice of our faith. We are here today to request that the Council help protect our ability to continue to provide these services to the District of Columbia.

Bill 18-0482 puts our ability to work in partnership with the District of Columbia to provide residents with these services at risk. The opposition we express is against a bill, not against any people. The Catholic Church teaches that marriage is the union of a man and a woman open to creating and nurturing children with their unique and complementary gifts. Based on its religious convictions, the Archdiocese opposes this legislation and any effort to redefine marriage as other than that between a man and a woman. As explained below, the Archdiocese has deep concerns that this Bill would restrict the free exercise of religious beliefs if passed as introduced. The Archdiocese urges the Council to include appropriate religious exemption language to help protect the rights of religious organizations and individuals within the District of Columbia. By adding such language, the Council will preserve the ability of the Archdiocese to serve the residents of the District of Columbia, and help to uphold the fundamental principles of religious freedom.

***Marriage is the Union of One Man and One Woman:
The Teaching of the Roman Catholic Church***

The Catholic Church believes that marriage is the exclusive, life-long, faithful union between one man and one woman.¹ This definition of marriage does not originate with religious law or civil law but finds its origin in natural law, embedded in human beings' minds and hearts. As the Vatican's authority on the doctrine of our faith has written, "The Church's teaching on marriage and on the complementarity of the sexes reiterates a truth that is evident to right reason and recognized as such by all the major cultures of the world. Marriage is not just any relationship between human beings. It was established by the Creator with its own nature, essential properties and purpose."²

While marriage is integral to the Catholic faith, we also recognize that it is more than a religious institution. Because the truths about marriage and its dignity are revealed in the natural order itself, they can be understood through the use of human reason. Marriage between a man and woman existed long before human government. It is an institution engraved in our very nature and for this reason it cannot be redefined by an individual or government. The natural and complementary differences between a man and a woman are at the core of what defines a marriage. By nature, no other type of union can bring children into the world and no other union can be called marriage. Any other union is fundamentally different from marriage. Promoting the teachings of the Church, our United States Catholic Bishops recently reiterated, "By reason of its very nature...marriage exists for the mutual love and support of the spouses and for the procreation and education of children. These two purposes, the unitive and the procreative, are equal and inseparable. The institution of marriage has a very important relationship to the continuation of the human race, to the total development of the human person, and to the dignity, stability, peace, and prosperity of the family and of society."³

What Catholics believe about marriage is relevant here because marriage is a private relationship with a public significance. Marriage is not just a union of two people who love each other and are committed to each other. Marriage is reserved to the union of one man and one woman because of their unique ability to create children and to give children a nurturing structure that benefits from the unique gifts of both a mother and a father. Men and women are not interchangeable. They complement each other physically, psychologically and emotionally. Marriage protects the rights of children to have and to benefit from both a father and a mother. By redefining marriage the law would abandon this long-standing ideal. The Church sees itself as a partner with society in forming strong marriages and giving children the best possible environment in which to thrive—that is, with a mother and father united in a stable marriage.

¹ *Catechism of the Catholic Church* 1601: "The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised by Christ the Lord to the dignity of a sacrament." (quoting CIC, can. 1055 § 1; cf. *Gaudium et Spes* 48 § 1); see Mark, Chapter 10:6-8, "God made them male and female. For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh. So they are no longer two but one flesh;" and, see, Mark, Chapter 10:9, "what God has joined together, no human being must separate."

² Congregation for the Doctrine of the Faith, "Considerations Regarding Proposals to give legal recognition to unions between homosexual persons," citing Second Vatican Council, Pastoral Constitution *Gaudium et Spes*, 48.

³ United States Conference of Catholic Bishops, Committee on Marriage and Family Life and Committee on Domestic Policy, *Statement on Same-Sex Marriage*, July 1996, available at www.usccb.org/laity/marriage/samesexstmt.shtml.

We recognize that the Church's teaching on human sexuality is challenging for many individuals. As Archbishop Donald Wuerl stated recently in a pastoral message to homosexual Catholics, "Modern cultural pressures and assumptions are often at odds with the teachings of Christ handed down throughout the centuries ... Our support of marriage is not meant to discriminate against any individual or family. The Catechism of the Catholic Church upholds the human dignity of every person and condemns any form of unjust discrimination.⁴ The archdiocese's efforts to affirm marriage and opposite legislative efforts to redefine it flow from the understanding of the nature of marriage and its purpose."⁵

Marriage is Not Just a Personal Relationship, but One with Public Impact

Social science research on marriage supports what the Catholic Church has always taught: marriage matters.⁶ And, marriage between biological parents – a father and mother - matters for children more than any other type of structure. Throughout all time, diverse religions, cultures and civil governments have recognized and defined marriage as between a man and a woman.⁷ That is because by its very nature, marriage is more than a public declaration of personal love between two individuals. Marriage is the framework and the stable structure within which a new generation is created and then raised with the role models of a father and a mother and their complementary gifts.⁸

It is because marriage is so important for our society and our children that the decline in marriage has generated such great concern among social scientists, government leaders,

⁴ *Catechism of the Catholic Church* 2358.

⁵ Archbishop Donald W. Wuerl, "A Pastoral Message for Homosexual Catholics in the Archdiocese of Washington," dated Oct. 6, 2009 (available at www.adw.org/family/pdf/09Marr_DWW_msg_1006.pdf).

⁶ The Archdiocese of Washington believes that marriage is not just a personal relationship, but one with public impact. Because marriage is a spiritual, social and public good, the Church begins teaching about marriage early, to elementary age children. The Archdiocese also offers information and programs for teens and young adults on healthy relationships and formation in chaste living. In addition, every couple who marries in a Catholic church participates in marriage preparation, even if one member of the couple is not Catholic. The goal is to prepare couples for their wedding, for their lives together as husband and wife, and for their role as future parents. The Archdiocese of Washington, through its parishes and organizations, provides support to couples at all stages of their relationships - those who are engaged, happily married, or even contemplating divorce.

The content of marriage preparation is both practical and spiritual. Couples learn about the Church's teachings on marriage in a clear manner and are challenged to look at their relationship realistically. Marriage preparation typically covers the Biblical basis and sacrament of marriage, communication techniques, prayer, parenting, natural family planning, and financial matters. For those couples further along in their marriage, parishes and Catholic organizations provide support and skills to help keep marriages intact. For those couples whose marriages do end, through divorce or death, the Church's support does not cease. A number of local groups meet regularly for social, educational and spiritual support after separation, divorce or the death of a spouse.

The Catholic Church prepares couples for and helps couples sustain happy and healthy marriages because it is good for them, their children, and society. As set forth below, when a husband and wife stay united in marriage, their union benefits not only the couple and their children, but the common good.

⁷ See Helen Alvare, *The Moral Reasoning of Family Law: The Case of Same-Sex Marriage*, 38 Loy. U. Chi. L.J. 349, at 1 (Winter 2007) (citing, at n2, the various Abrahamic faith traditions' scriptural teachings on marriage and then discussing the ability to reason to each faith's conclusion, without necessarily relying on scripture).

⁸ Helen Alvare, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & its Predecessors*, 16 Stanford Law & Policy Review 135 (2005).

educators and child advocates.⁹ The reality is that children from intact biological families tend to be better off educationally and economically, to delay sexual activity and to have lower rates of delinquency. Overwhelmingly, research shows that girls without fathers are more likely to be sexually active and become pregnant as teenagers¹⁰ while boys without fathers have higher rates of delinquency, violence and aggression.¹¹

Nationally, marriage rates have fallen nearly in half since 1960, according to the National Marriage Project at Rutgers University. In 2008, there were just 39.2 marriages per 1,000 unmarried women in the United States over the age of 15; in 1960, the rate was 73.5.¹² Here in the District of Columbia these are very real concerns. Just 28 percent of adult men and 23 percent of adult women in the District of Columbia are married – compared with approximately 50 percent nationwide.¹³ Nearly 60 percent of our children are living in single parent households,¹⁴ the teen pregnancy rate is 58.3 pregnancies per 1,000 teen girls¹⁵ and far too many of our youth, particularly our minority youth, are involved in the juvenile justice system. As the research establishes, sociologists and scholars studying marriage and the family overwhelmingly recognize the critical role marriage plays in the well-being of children and adults.¹⁶

⁹ See Raymond C. O'Brien, *Single-Gender Marriage: A Religious Perspective*, 7 TEMP. POL. & CIV. RTS. L. REV. 429, 458-59 n.156 (1998) (offering religious view against same-sex marriage and emphasizing normative function of marriage for society); Katherine Shaw Spaht & Symeon C. Symeonides, *Covenant Marriage and the Law of Conflicts of Laws*, 32 CREIGHTON L. REV. 1085, 1088 (1999) (stating that children benefit if marriages are preserved); THE NATIONAL MARRIAGE PROJECT AT RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, *THE STATE OF OUR UNIONS 2000: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA* 31 (2000) (providing evidence that marriage plays a critical role in the well-being of adults and an even more significant role in the overall well-being of children); Maggie Gallagher, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* 123 (1996) (listing examples of the ways daughters are affected by divorce).

¹⁰ Bruce J. Ellis, et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, *Child Development* 74: 801-821 (2003); Dean Byrd, *Gender Complementarity and Child-rearing: Where Tradition and Science Agree*, *Journal of Law and Family Studies*, 2004.

¹¹ Byrd, *supra* note 2.

¹² *The State of Our Unions 2008: The Social Health of Marriage in America*, The National Marriage Project. Rutgers, The State University of New Jersey, February 2009, available at <http://marriage.rutgers.edu/>.

¹³ D'Vera Cohn, "The States of Marriage and Divorce: Lots of Ex's Live in Texas," Pew Research Center, October 15, 2009.

¹⁴ Kids Count Data Center, The Annie E. Casey Foundation, <http://datacenter.kidscount.org/data/acrossstates/Rankings.aspx?loct=3&by=a&order=a&ind=106&dtm=430&tf=35>, accessed October 21, 2009.

¹⁵ District of Columbia Department of Health: Center for Policy, Planning, and Epidemiology: State Center for Health Statistics. Reported Pregnancies and Pregnancy Rates in the District of Columbia, 2003-2007, May 20, 2009

¹⁶ *Marriage Decline in America: Testimony Before the Subcommittee on Human Resources, Committee on Ways and Means* 1 (2001) (testimony of David Popenoe). Popenoe reports:

“The social science evidence is now overwhelming that children fare better in life if they grow up in a married, two-parent family. Children who grow up in other family forms are two to three times at greater risk of having serious behavioral and emotional problems when they become adolescents and adults. Many of today's youth problems can be attributed, directly or indirectly, to the decline of marriage.”

Congresswoman Eleanor Holmes Norton recently weighed in on the importance of marriage: "For centuries the family was central to African-American survival in our country. However, in recent decades, we have seen a precipitous decline in marriage, and with it, family life itself." She sponsored a standing-room only workshop called, "Single Women, Unmarried Men: What Has Happened to Marriage in the Black Community," as part of the Congressional Black Caucus Foundation Forum¹⁷ in September 2009. The serious concern for the well-being of marriage and families is present, both locally and nationwide. Politicians and academics alike have spoken to the issue, and argue that the conversation must be turned away from individual self-interest and toward the well-being of children. For example, George Mason University law professor Helen Alvare writes:

[T]here appears to be a growing consensus that, if citizens were to reconnect marriage with notions of permanence and responsible parenting, important problems now suffered by children, adults and society would be considerably alleviated. At a time like this, the same-sex marriage debate stands out. It is framed almost entirely by its proponents as an individual or group civil rights controversy. Yet a debate about the legal recognition of marriage ought to reflect marriage law's longstanding interest in and bias toward children's interests versus any limited interest group for adult emotional happiness and social acceptance.¹⁸

Social science research establishes that it is not simply the presence of adults in the household that matters, but the presence of both biological parents. Children from intact, married, biological families with father and mother do better on a range of measures, such as education, delayed sexual activity and avoidance of drug abuse.¹⁹ An analysis conducted by the Alabama Policy Institute noted that this holds true even if there is a second parent in the household, such as a step-parent or even if parents are cohabitating outside of marriage.²⁰

Likewise, a significant study from Princeton and the University of Wisconsin-Madison researchers found that, "Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents, regardless of whether the parents are married when the child is born, and regardless of whether the resident parent remarries."²¹

Id.; see also THE NATIONAL MARRIAGE PROJECT, *supra* note 8, at 30-31 (explaining the evidence that shows stable and satisfying marriages are critical to adults' well-being and emphasizing that marriage is even more vital for the overall well-being of children). The American trend toward single-parenting is the family trend that affects children and teens the most. Id. at 31. Children in these single-parent families have "negative life outcomes at two to three times the rate of children in married, two-parent families." Id.

¹⁷ Press release, "Norton's Congressional Black Caucus Foundation Forum on Stopping the Decline of Marriage among Blacks to Foster Frank Discussion" - http://www.norton.house.gov/index.php?option=com_content&task=view&id=1299&Itemid=88

¹⁸ Alvare, *supra* note 1.

¹⁹ Schneider, Barbara, Ph.D., Allison Atteberry and Ann Owens, "Family Matters: Family Structure and Child Outcomes," Alabama Policy Institute: Birmingham, AL, June 2005.

²⁰ Id.

²¹ Sara Lanahan and Gary Sandefur, *Growing up with a Single Parent*, Cambridge: Harvard University Press, 1994.

In addition, marriage's protection against childhood poverty is well known. Children raised in a home without a father are five times more likely to live in poverty than a child with both parents. According to the U.S. Census Bureau, in 2008, 8.3 percent of children who lived in families with married parents lived in poverty; 40.2 percent of children in fatherless families live in poverty.²²

Moreover, growing up without both parents has been linked with higher levels of delinquency. According to a United States Department of Justice study, over half of inmates grew up in a single-parent household or with a guardian; and, nearly 40 percent of inmates grew up in a single-mother household.²³ And, children who are not living with both biological parents have a significantly higher risk of having an affective disorder, according to a study of more than 3,400 middle school students.²⁴

Social science also establishes that men and women are not interchangeable.²⁵ When it comes to marriage and parenting, each brings his or her unique differences to the family and the children, modeling the roles children will experience in society. In a 2002 report, *Child Trends* noted, “[I]t is not simply the presence of two parents, as some have assumed, but the presence of *two biological parents* that seems to support children’s development”²⁶ (emphasis in original). The absence of a father, as discussed earlier, has a particularly significant impact on children, both boys and girls.²⁷ Finally, research also shows it is not just the children who benefit from the gender differences in marriage.²⁸

Efforts to redefine marriage send the message that mothers or fathers are expendable, yet the statistics and social science research convincingly indicate this is not true. Marriage, which binds a father and mother together, creating a stable environment for children, has been found to be the most successful environment for a child.

***Archdiocesan Charitable Programs:
Committed to Serving the District of Columbia***

²² U.S. Census Bureau, *America’s Families and Living Arrangements: 2008*, Table C-8, Washington, DC: <http://www.census.gov/population/socdemo/hh-fam/cps2008/tabC8-all.xls>

²³ Doris J. James, *Profile of Jail Inmates, 2002*. Bureau of Justice Statistics Special Report, U.S. Department of Justice, Office of Justice Programs, July 2004.

²⁴ Steven P. Cuffe, Robert E. McKeown, Cheryl L. Addy and Carol Z. Garrison. *Family Psychosocial Risk Factors in a Longitudinal Epidemiological Study of Adolescents*. *Journal of American Academic Child Adolescent Psychiatry* 44 (February 2005): 121-129.

²⁵ Leonard Sax, *Why Gender Matters: What Parents and Teachers Need to Know about the Emerging Science of Sex Differences* (New York: Doubleday, 2005).

²⁶ Kristin Anderson Moore, et al., *Marriage from a Child’s Perspective: How Does Family Structure Affect Children, and What Can We Do about It?*, *Child Trends Research Brief*, June 2002.

²⁷ Dean Byrd and Kyle D. Pruett, *The Paternal Presence*, *Families in Society: The Journal of Contemporary Human Services*, 1993.

²⁸ “Marriage and the Public Good: Ten Principles.” The Witherspoon Institute, Princeton, NJ, August 2008.

Consistent with the evidence from the social sciences above, the Catholic Church upholds marriage between a man and a woman to promote the common good and to protect a child's right to a father and a mother. The teachings of the Roman Catholic Church forbid the Archdiocese from endorsing or encouraging same-sex marriage, yet require that we treat all human beings with dignity and respect. We cannot, consistent with our faith, validate and support same-sex unions by extending employee spousal benefits, employment, or adoption services when it would condone a repudiation of one of our core religious beliefs. Nor can we permit our facilities to be used for marriage ceremonies, receptions and other activities that promote same-sex marriage. Thus, in order to comply with Bill 18-0482, it appears that we would have to restrict our services and facilities to Catholics only.

We understand the current Bill includes some language regarding religious organizations that cannot recognize same-sex marriage. However, because the Bill's language does not apply to a religious entity that makes services, accommodations or goods available to the general public, the exemption appears to provide no protection or accommodation for the Archdiocese and its social service, educational and other ministries. The absence of that exemption in the Bill will severely impact organizations like Catholic Charities, the largest private social service provider in the District of Columbia, and others who attend to the material and spiritual needs of hundreds of thousands of Washingtonians each year regardless of creed.

The Catholic Church has been serving the residents of this community since its inception. Our legacy of service to the men, women and children of our city – the elderly, infirm, immigrant, homeless and hungry – can be traced back hundreds of years. Today, the Archdiocese of Washington is not only the single largest faith group in the District of Columbia, but, through our social service agencies and parish ministries, the single largest non-governmental provider of social services in the city.

Our Social Service Agencies

Each year, more than 68,000 people in the District of Columbia turn to Catholic Charities for help. Sixty-three separate programs provide, shelter, food, medical and dental care, emergency assistance, *pro bono* legal aid, family and immigration services, job training and education for the developmentally disabled, mental health services, and caregiver respite.

On any given night, 31 percent of the entire homeless population in the District finds shelter through Catholic Charities. Each year, we serve 9,600 men, women and children. One of the first stops for many new immigrants to the city is the Spanish Catholic Center. Last year, 19,000 immigrants came through the Center's doors for medical and dental care, legal aid and education, employment and counseling assistance.

Foster care, adoption and child abuse prevention services help 200 children annually at Catholic Charities, while 223 abandoned and abused children at St. Ann's Infant and Maternity Home and 30 pregnant and parenting teens and their children found a safe, temporary home. Children at St. Ann's receive specialized care, including physical therapy, speech therapy and counseling. Last year alone, St. Ann's raised nearly \$3 million in private support to care for vulnerable young people.

Victory Housing, the affordable housing arm of the Archdiocese, operates both family and senior housing in the District of Columbia. Two such projects, totaling more than 100 units, have been completed recently, while another 98-unit senior housing project is in development.

The Prison Outreach Ministry builds upon a longstanding commitment of the Archdiocese to serve those who have been incarcerated. More than 1,000 people receive support from volunteers and staff, including mentoring, information referrals and reentry kits to facilitate their return to the community.

Parish and School Ministry

Service to others is an essential part of our faith. Each year, in the 21 Catholic schools in the District, students give back to the community through service. One of the most notable programs is Archbishop Carroll's annual Thanksgiving food drive. One of the largest high school food drives in the nation, Archbishop Carroll students collect and deliver more than 40,000 pounds of food for those in need in our city every year.

The 40 Catholic parishes in the District of Columbia are involved in over 93 outreach ministries to help the poor and vulnerable in the city, supporting thousands of families through such services as emergency rent and utility assistance, health ministries, the SHARE Food Network, after-school programs, and food, clothing and toy drives. In recent years more than 180,000 pounds of canned goods have been collected annually by Catholic parishes to benefit the Capital Area Food Bank. Sixteen parishes operate food pantries or soup kitchens, and six sponsor health ministries. Seniors turn to parishes throughout the District for assistance with housing, finances, and prescriptions.

These ministries serve people of all faiths. Parishes also regularly open their doors to the community, hosting Scout meetings, Alcoholics Anonymous, Narcotics Anonymous and neighborhood meetings. They also have supported efforts by the District of Columbia government to keep neighborhoods safe by allowing ShotSpotter technology to be placed on our buildings.

Some examples of the extraordinary care provided by Catholic parishes include Assumption Parish, on Martin Luther King Avenue in Ward 8. Between 400 and 450 families receive food, clothing, rental assistance and other emergency assistance each month. Likewise, Annunciation Parish, in Ward 3, provides rent assistance, support for homeless men and women, and care for seniors and pregnant women. The Father McKenna Center at St. Aloysius Parish annually assists approximately 26,000 homeless men in its Ward 6 drop-in center (one of a handful of such centers in the city), providing such services as showers, laundry, job searches, medical referrals and support group meetings. During the same period, 2,200 households received food from the Center's food pantry, and \$56,000 in rent and utility assistance.

There are even more examples of direct support provided to the general public by churches of the Archdiocese. The Shrine of the Sacred Heart in Ward 1 works in partnership with Catholic Charities to provide dinner for the homeless, hypothermia shelters in the winter, and food, counseling, showers, clothing exchange and job placement for 200 people daily. The parish also has a Sunday literacy program with 25 participants, a food pantry and helps immigrants with translation services. The Holy Comforter-St. Cyprian Community Action Group (CAG) in Ward 6 helps 2,500 – 3,000 people annually recover from addiction through rehabilitative services provided in concert with the District's Continuum of Health Care System. St. Luke Parish hosts a prison ministry mentor training program and houses a federal program (CSOSA) that provides computer training for parolees in Ward 7. Moreover, nearly 200 people have received high school diplomas through a five-year partnership between St. Teresa of Avila,

St. Thomas More, Living Wages, and Americorps. Finally, Blessed Sacrament Parish in Ward 3 not only provides food for area shelters, but each December 500 parishioners gather for one day, collecting 50,000 cans of food for the area poor.

As mentioned, the services listed above are made available to the general public. Therefore, as it is currently written, the Bill's exemption appears that it may not apply to our programs. Of the few states that have considered the redefinition of marriage, we are not aware of a single one that has limited its religious freedom exemption to only those entities that make no "services, accommodations, or goods available for purchase, rental, or use to members of the general public." In fact, same-sex marriage laws in these states provide broader religious exemptions than does Bill 18-0482. At a minimum, and as discussed at greater length below, the Bill's exemption must be amended to protect all religious objectors—both organizations and individuals—not simply those organizations that minister exclusively to their own members. The Archdiocese urges the Council to spare the Archdiocese and District taxpayers the unnecessary expense of conflicts, loss of services and legal challenges that may arise out of a too-narrow conscience exemption.

Why the current religious exemption language in Bill 18-0482 is inadequate: Real religious liberty implications for the Archdiocese of Washington

The Roman Catholic Archdiocese of Washington opposes any legislation aimed at redefining marriage. At the core of Catholic teachings is the belief that marriage is the union of one man and one woman, designed by God to complement one another, physically, psychology and emotionally in love, and to be co-creators with God in bringing children into the world. Because Bill 18-0482 specifically contradicts this Catholic meaning of marriage, the application of the law to Catholic individuals and organizations would severely restrict their ability to exercise and express their religious beliefs.

As the local Church in Washington, the Archdiocese has the responsibility to protect the religious freedom of its 40 parishes, 21 Catholic schools, hundreds of service programs, and tens of thousands of individual believers. The Archdiocese of Washington urges the District of Columbia City Council to fully consider the conflicts of conscience that passage of this Bill would cause if more robust religious exemptions are not included in it. If such conflicts are to be avoided, and if the rights of conscience of all Washingtonians are to be genuinely respected, then it is essential that the Bill include exemption language in this law to preserve free religious exercise in the District of Columbia.

The principles of religious liberty at stake in this matter are profound and the consequences of their potential violation are clear. Although the title of Bill 18-0482 implies that its provisions adequately protect religious freedom, we submit that they do not. In particular, the Archdiocese of Washington anticipates that the contents of Bill 18-0482, without a much broader religious exemption, would burden its religious expression and would detrimentally affect its ministries and programs.

We ask the Council to recognize that the Bill's current language appears to force the Archdiocese into a very difficult choice: we must either (1) choose to limit our social services, educational programs and ministries to only those of the Catholic faith, in order to comply with the Bill's exception while preserving our faith; or, (2) we may choose to continue to offer all of our social services, educational programs and ministries to all District residents of any denomination, but in doing so we may not continue to uphold our belief that marriage is the

union of one man and one woman. The predicament is real, especially in light of the Catholic faith's calling to serve all those in need.²⁹

For the Archdiocese to truly exercise the principles of its faith, it cannot voluntarily choose to exclude non-Catholic residents from the social services, educational programs and ministries it offers. Yet under Bill 18-0482, the Archdiocese could not serve all those in need without violating either the law or its faith. Such a situation is unacceptable in a society founded on principles of religious freedom. For the following reasons, a more robust religious exemption must be included in Bill 18-0482.

Hiring Policies and Employee Benefits

The Archdiocese of Washington does not discriminate against a person in hiring because he or she is homosexual. It must always operate in accordance with the teachings and doctrines of the Roman Catholic Church. However, like other religious or mission-driven organizations, our employees are expected to respect and uphold the teachings and traditions of the Roman Catholic Church and to act in ways that promote the best interests of our Catholic faith. As the Bill is written, the Archdiocese would appear to be liable under antidiscrimination laws for upholding its teachings and doctrines in the exercise of its employment policies. In addition, the Archdiocese's health care plan is a self-funded group plan that provides employees with health care benefits for themselves and, at their election, for a husband or wife of the opposite sex under a legal marriage (who is neither divorced nor legally separated). Without an exemption that would permit the Archdiocese to continue its benefits plan, the Archdiocese's ability to uphold its religious beliefs in its employment practices would be greatly threatened.

Adoption and Foster Care Services

Catholic Charities of the Archdiocese of Washington is licensed by and contracts with the District of Columbia to provide foster care and adoption services. Catholic Charities has been a leader in foster care in this city for more than 80 years, and consistently receives high rating from the District of Columbia's Family Services Agency.

In accordance with Catholic teachings and beliefs, Catholic Charities recognizes marriage as a union between one man and one woman. Under the language of the current Bill, Catholic Charities could be challenged under public accommodations laws or lose its license for refusing to offer these services to members of a same-sex marriage. Moreover, should Catholic Charities be required to place children with same-sex married couples as foster or adoptive parents by District licensing requirements, these services would have to end, as happened to Catholic Charities in Massachusetts when same-sex marriage was legalized there. Refusing to add meaningful religious exemption language to this Bill would cause the District's children who are in foster care or seeking adoption to suffer most.

In addition, Catholic Charities works in partnership with the District of Columbia under other contracts to provide independent living and teen parenting programs, emergency homeless shelters, and mental health and substance abuse treatment centers. All of these programs will be threatened in the absence of reasonable religious liberty protections in this Bill.

Use of Church Facilities

²⁹ *Catechism of Catholic Church* 2443-2449.

It is common practice for parishes in the Archdiocese of Washington to offer their facilities for short-term use by non-profit and community-based organizations and private individuals. The Archdiocese has a large number of parish facilities in the District of Columbia with space for gatherings, community events, public meetings and other not-for-profit purposes. Most parishes make such space available to for these purposes for free or at a modest cost and when not otherwise being used by the Church, its schools, parishioners or parish-based organizations. Space is made available as long as the intended use or event is in keeping with the teachings of the Catholic Church. If the Archdiocese continues to make its facilities available to the public while staying true to its faith, Catholic parishes will likely be subject to litigation and loss of tax-exempt status for refusing to make a facility available for an event related to same-sex marriage. In the alternative, it appears that under the Bill's current exemption language, the Archdiocese might be forced to shut its doors to community and non-profit groups like Alcoholics Anonymous, Narcotics Anonymous, and others.

Catholic Individuals' Rights

The Archdiocese of Washington has over 60,000 registered parishioners within the District of Columbia. As one of its core religious beliefs, the Church teaches its faithful that marriage is a relationship between a man and a woman. The Bill's language as it stands does not provide these individuals with any protection for expressing religious beliefs that conflict with the Bill. Therefore, the potential for individual conflicts of conscience over the District's redefinition of marriage is vast. For example, Catholics teaching in our public schools may be required to teach about same-sex marriage. Catholics working for government social service agencies may be required to place foster children with same-sex married couples. Catholic professionals may be prohibited from speaking their views on marriage in the workplace. Finally, nondiscrimination laws and government policies redefining marriage -- without provisions for religious and conscience objection -- may provoke private forms of discrimination against religious individuals who believe marriage is between one man and one woman. For all of the religious individuals who may conscientiously object to same-sex marriage based on their beliefs, the Council must include adequate religious accommodations in this Bill.

Unintended Consequences: Entangling the Legal Landscape

Unless Bill 18-0482's very narrow exemption for religious activities "related to the solemnization or celebration of a marriage, or the promotion of marriage" is expanded, all of the practical problems listed above threaten to undermine the Archdiocese's ability to serve. Conflicts between religious liberty and same-sex couples' rights are widespread in other jurisdictions,³⁰ and by redefining marriage, the District of Columbia Council invites pervasive

³⁰ See, e.g., *Elane Photography v. Willock*, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. Ct) (filed Jul. 1, 2008) (New Mexico photographer fined for refusing on religious grounds to photograph a same-sex commitment ceremony); *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. PN34XB-03008 (N.J. Dep't of Law and Public Safety, Notice of Probable Cause issued Dec. 29, 2008) (finding that a religious organization likely violated public accommodations laws by denying a same-sex couple use of its wedding pavilion); *Butler v. Adoption Media*, 486 F.Supp.2d 1022 (N.D. Cal. 2007) (administrators of Arizona adoption facilitation website found subject to California's public accommodations statute because they refused to post profiles of same-sex couples as potential adoptive parents); Patricia Wen, "They Cared for the Children": *Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families*, BOSTON GLOBE, June 25, 2006, at A1 (Catholic Charities, Massachusetts' largest adoption agency, stopped providing adoption services due to a conscientious objection.).

church-state conflict into the district bounds.³¹ Legal scholars on both sides of the same-sex marriage debate agree that the impending collision between religious liberty and sexual liberty must be addressed in any law redefining marriage.³²

Because of the significant impact any change in civil marriage laws will have, religious liberty law experts have entered the dialogue by directly communicating with legislatures considering same-sex marriage bills. We urge the Council to review and consider the careful analysis provided by these legal scholars to Chairman Gray in their letter of October 22, 2009. In conjunction with their comments, we ask you to consider the Archdiocese's concerns about the Bill. Following the legal scholars' assessment of the need for robust religious liberty protections,³³ the Archdiocese of Washington asks Council to consider the legal confrontations that are looming for the District and that have become realities in other states where same-sex marriage is recognized without clear, meaningful religious accommodations.

A. *When the Archdiocese or other religious organizations refuse to recognize same-sex marriage as equivalent to marriage between one man and one woman, they will risk the threat of civil litigation on multiple fronts. Threat of litigation has a chilling effect on the free exercise of religion.*

As outlined above, the Archdiocese cannot, as a matter of religious conviction and conscience, treat a same-sex marriage to be the equivalent of an opposite-sex marriage in its employment and benefits policies. These policies, which uphold Catholic religious tenets, may pose the risk of litigation under anti-discrimination laws.³⁴ Specifically, for employment

³¹ See, e.g., The Becket Fund for Religious Liberty's *amicus* brief filed April 25, 2007 in *Kerrigan et. al v. Commissioner of Public Health et. al*, 957 A.2d 407 (2008), available at www.becketfund.org/files/0ae06.pdf; and see The Becket Fund for Religious Liberty's *amicus* brief filed in *Varnum v. Brien*, 763 N.W.2d 862 (2009), available at www.becketfund.org/files/18afa.pdf.

³² Robin Fretwell Wilson, Thomas C. Berg, Carl H. Esbeck, Richard W. Garnett, Marc D. Stern, and Edward McGlynn Gaffney, Jr., Letter to Chairman Vincent Gray, dated October 22, 2009 ("Letter to Chairman Gray") (outlining the need for robust religious exemption language in D.C.'s proposed same-sex marriage bill), attached; Maggie Gallagher, *Banned in Boston: the coming conflict between same-sex marriage and religious liberty*, The Weekly Standard, May 15, 2006, Vol. 11, Issue 33 (listing the viewpoints of scholars on both sides of the same-sex marriage issue, who generally agree that this matter "'is going to affect every aspect of church-state relations'" (quoting Anthony Picarello, then president and general counsel for the Becket Fund); *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*, Douglas Laycock, Anthony R. Picarello, Jr. and Robin Fretwell Wilson, eds. (Rowman & Littlefield: 2008).

³³ See Letter to Chairman Gray, *supra* note 33; see also Thomas C. Berg, Carl E. Esbeck, Richard W. Garnett, and Robin Fretwell Wilson, *Letter to Governor John Balducci*, dated May 1, 2009, p. 1-3, available at <http://mirrorofjustice.blogs.com/files/sp-384-me-letter-to-governor.pdf> (suggesting that the conflicts between religious liberty and same-sex marriage generally fall into one of two forms: religious organizations and individuals that object to same-sex marriage are likely to face increased litigation under antidiscrimination laws; and religious organizations and individuals will "face a range of penalties at the hands of state agencies and local governments, such as the withdrawal of government benefits or exclusion from government facilities.")

³⁴ See *Issues Brief: Same-Sex Marriage and State Anti-Discrimination Laws*, The Becket Fund for Religious Liberty, October 2008, 3-5, available at <http://www.becketfund.org/files/34a97.pdf> (accessed October 21, 2009), stating:

By recognizing same-sex marriage without creating exemptions for conscientious objectors, states would inadvertently allow members of same-sex unions to sue religious organizations under gender discrimination laws. See, e.g., *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality op.) (discrimination by state against same-sex marriage was form of sex-based discrimination); *In re Marriage Cases*, 183 P.3d 384, 436-40 (Cal. 2008) (evaluating but

purposes, the District of Columbia Human Rights Act (“DCHRA”) currently prohibits discrimination based on “race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, or political affiliation.” D.C. Code § 2-1402.11(a). The DCHRA only provides a very narrow exception for religious employers, by stating that it does not bar religious organizations from “limiting employment, or admission to or giving preference to persons of the same religion or political persuasion as is calculated by the organization to promote the religious or political principles for which it is established or maintained.” D.C. Code § 2-1401.03. In a similar context, any archdiocesan decision to refuse spousal benefits would become susceptible to suit based on anti-discrimination grounds.

In addition, without expanding Bill 18-0482 to include adequate religious exemptions, the Bill appears to expose the Archdiocese to a stream of lawsuits under various public accommodation laws. Its parish-based outreach programs to the poor and its services to the homeless, hungry and needy in the District of Columbia are all open to the general public, regardless of creed. Accordingly, if the law treats them no differently than secular businesses and merchants, they could be compelled by the government to recognize same-sex marriage. As religious liberty advocates have argued in Connecticut:

... the advent of legal same-sex marriage sets the stage for widespread litigation against religious institutions that refuse to treat married same-sex couples as moral equivalents to married men and women. The risk is especially acute for those religious institutions that have very open policies concerning membership and service provision. Specifically, the more widely available to the public ... the greater the risk that a service or facility will be regulated under public accommodation statutes.³⁵

A concrete example of this risk occurred in Sacramento, when Catholic Charities was required to provide prescription contraception insurance to its employees despite the fact that doing so violated Catholic Charities’ religious beliefs.³⁶ Forcing the accommodation of same-sex married couples in certain archdiocesan facilities and services would fully undermine its ability to uphold its religious beliefs. Application of public accommodation laws to our parishes and service providers threatens the futures of soup kitchens, homeless shelters, daycare centers, schools, foster care services and more in the District of Columbia

B. The Archdiocese risks losing government licenses, contracts and benefits if it refuses to treat same-sex marriages as the equivalent to the marriage of a man and a woman. The loss of

ultimately rejecting claim of gender discrimination); cf. WIS. STAT. § 111.36(1)(d) (defining sexual orientation discrimination as a form of gender discrimination). And because gender discrimination laws are on the books in all 50 states [and the District of Columbia], moral objections to same-sex marriage could be treated as a form of gender discrimination in every state.

³⁵ The Becket Fund for Religious Liberty’s *amicus* brief filed April 25, 2007 in *Kerrigan et. al v. Commissioner of Public Health et. al*, 957 A.2d 407 (2008), at 6.

³⁶ *Catholic Charities v. Superior Court of Sacramento*, 32 Cal. 4th 527 (2004) (where the Court held that Catholic Charities was not exempt from state laws requiring contraception prescription coverage because it did not require employees to be Catholic nor inculcate those receiving its services with Catholic values).

government licenses and contracts would harm District residents and would restrict the Church's fulfillment of its call to serve.

As the Council will hear from the president of Catholic Charities of the Archdiocese of Washington today, and as is well-known throughout this city, the District of Columbia government relies heavily on the social service arm of the Catholic Church to provide for District residents' needs. Catholic Charities operates 63 programs that work in the District providing services ranging from free legal aid to emergency shelter to adults, children and families. These programs served more than 68,000 people in the city last year and all could be jeopardized by the contents of Bill 18-0482 if its exemption is not broadened. Because the legalization of same-sex marriage without religious accommodation implicitly labels religious organizations who object to same-sex marriage as discriminatory, the government may deny licenses and contracts to these religious institutions that exercise their faith.³⁷ A balanced same-sex marriage law must shield religious organizations and individuals from being penalized by the District for exercising their religious beliefs.³⁸

Additionally, if the law labels the Church's exercise of its religious convictions as unlawful discrimination, its tax-exemption may be placed at risk. In other jurisdictions, where religious organizations failed to treat same-sex marriage as valid, tax exempt status has been revoked and fines have been imposed.³⁹ To continue to serve the poor, ailing, and hungry residents of the District of Columbia, as it has over the course of the District's history, the Archdiocese must be assured – through a meaningful religious exemption - that the government will not suppress its religious exercise in such a way.

³⁷ The religious liberty scholars who have written to Chairman Gray identify the reality of the risk of government stripping contracts and benefits from religious organizations, stating:

An objector may be penalized by losing access to government grant programs or other state or local benefits. Thus, in *Catholic Charities of Maine v. City of Portland*, the district court upheld a Portland ordinance that forced a religious charity either to extend employee spousal benefits to registered same-sex couples, or to lose eligibility to all city housing and community development funds. Similarly, the Salvation Army lost \$3.5 million in social service contracts with the City of San Francisco because it refused, on religious grounds, to provide benefits to the same-sex partners of its employees. The Boy Scouts of America have litigated, and lost, numerous suits over a state's authority to deny them access to benefits that others receive, when the law was otherwise silent.

Letter to Chairman Gray, *supra* note 3, p. 7 (internal citations omitted).

³⁸For example, Robin Fretwell Wilson writes, in regard to Catholic Charities' ceasing adoption services in Massachusetts due to that State's licensing requirement, which barred discrimination against same-sex couples:

Arguably, a sensible approach would have been to carve out an exemption for Catholic Charities, allowing the agency to place children only with heterosexual, married couples. This solution would have had little practical cost to same-sex couples. Adoption placement by Catholic Charities comprised only 4 percent of the adoptions in the state. Same-sex couples, therefore, have access to the services of other agencies handling the great bulk of the state's placements. Yet by failing to create an exemption, the state prodded Catholic Charities to cease providing adoption services altogether, forcing other agencies to absorb the placement of those children and likely lengthening the placement process.

Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, at 81.

³⁹ Jill P. Capuzzo, *Group Loses Tax Break Over Gay Union Issue*, N.Y. Times, Sept. 18, 2007 (discussing *Bernstein v. Ocean Grove Camp Meeting Ass'n*).

C. *If same-sex marriage is legalized, fundamental fairness demands protection for both religious freedom and same-sex couples' rights.*

Finally, the Council should consider lessons drawn from other jurisdictions that have addressed same-sex marriage in their legislatures. In the few states where the debate has arisen, legal experts have contributed their scholarship to advise lawmakers of the principles of religious liberty at stake. For example, earlier this year Professor Douglas Laycock of the University of Michigan School of Law wrote publicly to the Governor of Maine, warning him against the enactment of same-sex marriage legislation without adequate religious liberty protections, stating:

I support same-sex marriage. I think the pending bill [in Maine] can be a great advance for human liberty. But careless or overly aggressive drafting could create a whole new set of problems for the religious liberty of those religious believers who cannot conscientiously participate in implementing the new regime. The net effect for human liberty would be no better than a wash if same-sex couples now oppress religious dissenters in the same way that those dissenters, when they had the power to do so, used to oppress same-sex couples.... It is far better to respect the liberty of both sides and let same-sex marriage be implemented with a minimum of confrontation.⁴⁰

In addition, the value given by the City Council to the advancement of new same-sex marriage rights must be weighed against the consequences of restricting the fundamental religious liberty of residents of the District of Columbia. If there is a route that preserves the religious freedom of religious institutions like the Archdiocese, while simultaneously affording same-sex couples their rights, legal scholars indicate it must be taken. Scholars point out that the inclusion of robust religious accommodations will not encumber the rights of same-sex couples, stating:

Exemptions for religious conscientious objectors will rarely burden same-sex couples. Few same-sex couples...will have to go far to find merchants, professionals, and counseling agencies, or any other desired service providers who will cheerfully meet their needs and wants. And same-sex couples will generally be far happier working with a provider who contentedly desires to serve them ...⁴¹

Ultimately, because the State of Maine enacted same-sex marriage legislation without the religious liberty protections suggested by Professor Laycock and other scholars, those who opposed the law demanded a referendum, which is now pending in the November election. In response, Professor Laycock delivered another letter to Governor Balducci, comparing a same-sex marriage statute without adequate religious accommodations to a U.S. Constitution without a Bill of Rights, and making the critical point:

Exemptions are important even if only a few people claim them, because exemptions avoid the harm of forcing sincere believers to violate deep commitments of

⁴⁰ Douglas Laycock, Letter to Maine Governor John Balducci, dated April 30, 2009, p. 1, available at <http://mirrorofjustice.blogs.com/files/mainexemptionsbalducci1.doc> (accessed October 21, 2009).

⁴¹ Id. at 2.

conscience...Religious minorities and same-sex couples make essentially parallel and mutually reinforcing claims against the larger society. Each claims that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when that identity is manifested in conduct.⁴²

To refuse to include an adequate exemption in the same-sex marriage law would be to require religious organizations like the Archdiocese of Washington and religious individual objectors to choose between exercising their faith and following the law. The District of Columbia City Council must recognize that preservation of the religious liberties of the Archdiocese of Washington, other religious organizations and religious individuals in the District of Columbia requires, at a minimum, language in Bill 18-0482 that clearly provides broad religious exemptions to its provisions. By adding such exemptions, the Council will prevent widespread legal battles and reassure its citizenry that religion expressed or practiced in the public square will not be deemed illegal or discriminatory. The Council risks the loss of vital social, educational and business services for District residents, an increase in costly litigation, and the division and dissatisfaction of its citizenry if this matter is not handled with due consideration. The Archdiocese wants to continue to provide shelter to the homeless, food to the hungry, education to the young, and healing to the sick. As it currently is written, Bill 18-0482 will not permit us to do so.

⁴² Douglas Laycock, Letter to Governor John Balducci, dated October 5, 2009, p. 2, available at <http://mirrorofjustice.blogs.com/files/laycock-mainealdacci100509.pdf> (accessed October 21, 2009).

*Legal Analysis of the Constitutional and Statutory Conflicts Posed by the Religious Freedom and Civil Marriage Equality Amendment Act of 2009*⁴³

A. The Text of the Religious Freedom and Civil Marriage Equality Amendment Act of 2009

Section (a) of the proposed bill, entitled the “Religious Freedom and Civil Marriage Equality Amendment Act of 2009” (the “Bill”), creates a right to same-sex marriage:

“Sec. 1283a. EQUAL ACCESS TO MARRIAGE.—

“(a) Marriage is the legally recognized union of 2 people. Any person who otherwise meets the eligibility requirements of sections 1283 (D.C. Official Code § 46-401), 1284 (D.C. Official Code § 46-402), and 1285 (D.C. Official Code § 46-403) may marry any other eligible person regardless of gender. Each party to a marriage shall be designated “bride,” “groom,” or “spouse.”

Section (c) of the Bill exempts religious ministers from any requirement actually to solemnize same-sex marriages:

“(c) No priest, minister, imam, or rabbi of any religious denomination and no official of any nonprofit religious organization authorized to solemnize marriages, as defined in this section, shall be required to solemnize any marriage in violation of his or her right to the free exercise of religion guaranteed by the First Amendment to the United States Constitution.

Section (d) of the Bill contains a statement of the constitutional doctrine of religious institutional autonomy as applied to a religion’s control over its own marriage rites:

“(d) Each religious organization, association, or society has exclusive control over its own religious doctrine, teachings, and beliefs regarding who may marry within that particular religious tradition’s faith, as guaranteed by the First Amendment to the United States Constitution.

The Bill’s Section (e) addresses *practices* of religious organizations *relating to* (as distinguished from the narrower act of solemnizing itself) the solemnization or celebration of marriage:

“(e) Notwithstanding any other provision of law, a religious organization, association or society, or a nonprofit organization which is operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide services, accommodations, facilities or goods for a purpose related to the solemnization or celebration of a marriage, or the promotion of marriage, that is in violation of the entity’s religious beliefs, unless the entity makes such services, accommodations, or goods available for purchase, rental, or use to members of the general public. Any refusal to provide services, accommodations, facilities or goods in accordance with this section shall not create any civil claim or cause of action, or result in any District action to penalize or withhold benefits from such entity, unless such entity

⁴³ Prepared by Williams & Connolly, Counsel to the Archdiocese of Washington

makes such services, accommodations, or goods available for purchase, rental, or use to members of the general public.

To summarize, section (a) of the Bill authorizes same-sex marriage. Section (c) addresses the role of religious officials who solemnize marriage itself and exempts such officials from any legal obligation to perform same-sex marriages in violation of religious conscience. Section (d) merely restates an existing constitutional protection.⁴⁴ And section (e) addresses practices that go beyond the (comparatively narrow) act of performing the religious marriage rite, namely, “services, accommodations, facilities or goods for a purpose related to the solemnization of marriage, the celebration of marriage or the promotion of marriage” (“the Services”). As to that broader range of activities, section (e) exempts religious organizations (but not individuals acting in the exercise of religious conscience) from having to provide the Services so long as the religious organization does not “make [the Services] available...to members of the general public.”

B. In Its Current Form, the Bill Threatens to Encroach Upon the Free Exercise Rights of Religious Institutions and Individuals within the District of Columbia in Violation of Existing Federal Constitutional and Statutory Law.

As discussed at great length above, the Archdiocese ministers to thousands of persons each year, without regard to whether they are or are not Catholic. If the exemption language of sections (c) and (e) is not broadened, the Archdiocese’s continuing ability to serve many thousands of non-Catholic Washingtonians in a manner that does not compromise Catholic teaching is gravely threatened. Certain problems arising from the too-narrow exemption language are discussed below.

First, as applied to the Archdiocese, the Bill’s exemption appears to do no more than exclude priests from liability for refusing to perform same-sex marriages when to do so would be contrary to Catholic doctrine. Bill §(c). Such a narrow exemption is, in a sense, no exemption at all, because it provides religious ministers no more protection than what is already mandated by the Free Exercise Clause of the First Amendment to the United States Constitution.

Second, the exemption in its current, narrow form does not take account of the broader institutional autonomy enjoyed by religious institutions under the Free Exercise Clause. The Supreme Court has long recognized that Churches have a right to manage their internal affairs without state interference. *See Serbian Eastern Orthodox Diocese for U. S. of America and Canada v. Milivojevic*, 426 U.S. 696, 722 (1976) (“religious freedom encompasses the ‘power (of religious bodies) to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.’”) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116, 73 S.Ct. 143, 154, 97 L.Ed. 120 (1952)). A critical component of this right is the ability of a church to hire employees who will carry out its religious mission in a manner consistent with its beliefs. This right extends not only to the selection of ministers, but to the selection of all lay personnel who are responsible for implementing the church’s religious mission. *See, e.g., E.E.O.C. v. Catholic University of America*, 83 F.3d 455, 464 (D.C. Cir. 1996) (Free Exercise Clause prevented application of Title VII to Catholic University’s selection of a canon law professor).

⁴⁴ *See Serbian Eastern Orthodox Diocese for U. S. of America and Canada v. Milivojevic*, 426 U.S. 696, 722 (1976) (“religious freedom encompasses the ‘power (of religious bodies) to decide for themselves, free from state interference, matters . . . of faith and doctrine.’”).

It appears that, as currently drafted, Bill No. 18-0482 would greatly interfere with the Archdiocese's ability to hire employees who share its values. As an organization that (in the words of Section (e)) serves "the general public," the Archdiocese's inability (without breaching Catholic teaching) to provide certain "services, accommodations, facilities or goods" to same-sex couples—e.g., certain spousal benefits—could deprive the Archdiocese of the ability to serve needy citizens of the District under existing agreements with the D.C. government. The expected effect of the Bill, if enacted without expanded protection for religious conscience, would be to put the Archdiocese (and its employees) in a position that is simply untenable under the First Amendment: the District will effectively force the Archdiocese either to violate the law or to abandon forms of religious practice – care for the poor, hungry and homeless – that are fundamental to the practice of Catholic social teaching.

Third, the Bill's provision relating to accommodations, *see* §(e), also appears to threaten the Archdiocese's constitutional right of association under the First Amendment. As indicated above, many Archdiocesan facilities are made open to organizations not composed exclusively of Catholics, including community groups such as Alcoholics Anonymous and the Girls Scouts. By allowing these organizations to use its facilities, the Archdiocese communicates a certain message—*i.e.*, that it approves of their mission and activities. *See Boy Scouts of America v. Dale*, 530 U.S. 630, 653 ("we must...give deference to an association's view of what would impair its expression."). Because this form of accommodation has an expressive component, the Archdiocese could not, for example, allow a same-sex marriage ceremony to be performed in a Knights of Columbus hall or in a parish banquet facility without conveying a message that its religious principles do not permit it to send. Yet if the Bill goes into effect as written, the Archdiocese would appear to be confronted with the choice of either closing the doors of such facilities to all non-Catholics—thereby making itself eligible for the exemption as written—or leaving those doors open to the general public without the ability to limit access to activities consistent with Church teaching—and thereby send a message of endorsement for activities that it cannot, in good conscience, support. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 575 (1995) ("the choice of a speaker not to propound a particular point of view...is presumed to lie beyond the government's power to control."). In short, unless the current exemption language is broadened, the Bill may infringe upon the Archdiocese's First Amendment right "to hold a point of view different from the majority and to refuse to foster...an idea [it] find[s] morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

Fourth, the Bill contains no exemption whatsoever for *individuals*. Although a Catholic priest's individual conscience-based objections to solemnizing same-sex marriage appear to be covered by section (c) of the Bill, the slightly broader protection enjoyed by religious organizations (set forth in section (e)) covers only "entit[ies]." The Bill appears not to recognize the right of any individual ever to decline to provide Services relating to same-sex marriage.

Finally, the Bill appears to be defective as a matter of existing federal statutory law. Unlike states that have recognized same-sex marriage, the District of Columbia is covered by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 ("RFRA"), which forbids any government action that imposes a "substantial" burden upon religious exercise. *See Potter v. District of Columbia*, 558 F.3d 542, 546 (D.C. Cir. 2009) ("Under RFRA, ... the District of Columbia may not substantially burden a person's exercise of religion unless the government 'demonstrates that application of the burden to the person-(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" (quoting 42 U.S.C. § 2000bb-1)). At a minimum, a "substantial burden" is imposed by any government policy that has a "tendency to coerce individuals into acting

contrary to their religious beliefs.” *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450 (1988). A policy that forces an organization like the Archdiocese to choose between fulfilling its service mission and following the tenets of its faith is *per se* coercive.

Furthermore, in its current form the Bill can scarcely be said to have accomplished its statutory objective through “least restrictive means.” As set forth above, absent a broader exemption, the Archdiocese may be forced to curtail sharply the forms of service it provides to needy Washingtonians. (An exemption broader than what is set out in Bill section (e) may well satisfy that federal statutory obligation, however.)

At the very least, RFRA creates a major complication that threatens to entangle the Bill in litigation for years to come and divert needed resources from both the District and religious organizations. It is in the interests of the Council, the Archdiocese and all persons served by local churches, Catholic and non-Catholic alike, to reach an accommodation that respects religious conscience and permits continued provision of needed services.

C. A Broader Exemption Is Needed to Comply with Existing Constitutional and Statutory Law

To survive constitutional scrutiny and comply with RFRA, Bill No. 18-0482 must, at a minimum, be amended to allow both religious organizations and religious individuals to provide goods and services to the general public without compromising deeply held religious beliefs. The following proposed language would – if substituted for the first sentence of §(e) of the Bill – in the Archdiocese’s view, help to go a long way toward accomplishing this objective:

Notwithstanding any other provision of law, no religious corporation, association or organization, no nonprofit organization owned, controlled or operated by a bona fide religious corporation, nor any individual, shall be subject to civil suit or penalized or denied benefits under the laws of the District of Columbia or any subdivision of the District of Columbia, including but not limited to privileges related to the solemnization of any marriage, laws regarding employment discrimination, housing, public accommodations, licensing, government grants or contracts, or tax-exempt status, for refusing to provide services, accommodations, advantages, facilities, goods, for refusing to solemnize any marriage, for refusing to treat as valid any marriage, or for refusing to provide benefits or services to individuals who participate in any marriage, where such providing, solemnizing, treating as valid, or providing benefits and services, would cause that individual, corporation, association or organization to violate their sincerely held religious beliefs.

This language is derived from a proposal a distinguished group of legal scholars recently submitted to the Governor of Maine in connection with that state’s efforts to legalize same-sex marriage. See Ltr. to Governor James Baldacci from Prof. Thomas Berg *et al.* (May 1, 2009), available at <http://mirrorofjustice.blogs.com/files/sp-384-me-letter-to-governor.pdf>. Such a proposal has two important advantages over the existing exemption language. First, it more effectively recognizes claims of conscience by religious organizations and individuals and does so in a manner that does not threaten the Archdiocese’s continuing ability to serve needy citizens of the District. Second, the proposal comports more fully with the requirements of RFRA, which imposes on the District a greater obligation to accommodate religious objections to same-sex

marriage than is required of any state that has considered or may consider proposals similar to Bill No. 18-0482.

A conscience exemption along the lines of what the Archdiocese has proposed hardly would be unprecedented. Numerous provisions of federal and state law account for the potential adverse impact government laws and regulations can impose on religious believers through conscience exemptions. Such provisions have been enacted in a variety of contexts, both in the District of Columbia and at the federal level.

Accordingly, the Bill should be amended to provide an appropriately broad conscience exemption, similar in scope to the one the Archdiocese has proposed.