AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
DC CLERGY UNITED FOR MARRIAGE EQUALITY
DISCIPLES JUSTICE ACTION NETWORK
EQUAL PARTNERS IN FAITH
GAY AND LESBIAN ACTIVISTS ALLIANCE
HUMAN RIGHTS CAMPAIGN
NATIONAL COUNCIL OF JEWISH WOMEN
PEOPLE FOR THE AMERICAN WAY
THE INTERFAITH ALLIANCE
UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS
UNITED CHURCH OF CHRIST, JUSTICE AND WITNESS MINISTRIES

November 20, 2009

Hon. Vincent C. Gray
Chairman
Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Re: Bill 18-482, the Religious Freedom and Civil Marriage Equality Amendment Act of 2009

Dear Chairman Gray:

The undersigned organizations write to respond to some arguments recently made by the Roman Catholic Archdiocese of Washington and the Washington Post Editorial Page and to urge you (or another Council-member) to move an amendment to the Committee Print at first reading on December 1.

I. Response to Objections

A. Spousal Benefits

In its November 10 letter to Councilmember Mendelson, the Archdiocese claims that the bill "leaves [it] susceptible to legal action for … refusal, on the basis of sincere religious belief, to provide a medical benefits plan for employees in which spousal medical benefits are provided to the same-sex marriage partner of a gay or lesbian employee."

There are two defects in this argument.

First, we believe the Archdiocese has the ability to solve this problem without an amendment to the bill, and without offending its religious beliefs. When San Francisco enacted a law requiring employers to provide the same benefits to domestic partners as to married couples, the Archdiocese of San Francisco found that it could comply with that law and its beliefs by allowing each employee to designate one person — any person — as an additional beneficiary. We attach a copy of a story from the June 4, 1998, San Francisco Chronicle reporting this development. It is reasonable to assume that the religious doctrine of the Archdiocese of Washington is the same as the doctrine of the Archdiocese of San Francisco.

Second, this boat has already sailed. Religious employers such as Catholic Charities have *already* been obligated to provide spousal benefits to the same-sex spouses of employees since July 7, 2009, which was the effective date of D.C. Law No. 18-9, the Jury and Marriage Amendment Act of 2009. Under that Act, civil marriages of same-sex couples lawfully created in other jurisdictions are recognized as legally valid in the District of Columbia. Employers in the District of Columbia cannot pretend that such couples are not married. Thus, the only effect of Bill 18-482 (in this context) will be to extend to same-sex couples *married in the District of Columbia* the same legal protections that already exist — and that already bind religious employers — with respect to same-sex couples married in other jurisdictions. It would certainly be anomalous to give couples married here in the District of Columbia lesser rights than couples married elsewhere.

B. Adoption and Foster Care Placement

The Archdiocese also claims that under Bill 18-482, it will no longer be able to "refus[e] … to facilitate an adoption or foster care by a same-sex couple." Aside from the question of whether or not a social services provider ought to be allowed to favor its religious beliefs over the best interests of a ward of the government — to which the Council's answer should be a clear "No" — this boat also sailed last July. Catholic Charities cannot discriminate against same-sex couples married in other jurisdictions when it comes to adoption and foster care placement. Couples married here in the District of Columbia should not be second-class citizens compared to those married in other places.

In addition, Catholic Charities has been subject for decades to the D.C. Human Rights Act's prohibition on discrimination by places of public accommodation, which from the beginning has included a ban on discrimination based on sexual orientation. Thus, the passage of a law extending the freedom to marry to same-sex couples does nothing to change

Catholic Charities' existing obligations regarding non-discrimination in the provision of adoption and foster care services.

C. Use of Non-Tax Funds

The Washington Post editorial of November 15, 2009 ("Marital Discord," p. A-22) states that, "a church official told us, 'We're not going to stop doing what we're doing.' If it loses or gives up its contracts, the church would continue to serve the District with the resources it has and would look for ways to replace city funding."

However, nothing in Bill 18-482, or in the D.C. Human Rights Act, limits the scope of D.C. anti-discrimination laws to activities funded with taxpayer funds. Even if Catholic Charities eschews all public funding, its employee benefit policies and its policies regarding adoption and foster care placement remain subject to the Human Rights Act, just as the Washington Post and all other employers remain subject to the Human Rights Act whether or not they are District contractors or grantees.

II. <u>Our Proposed Amendment</u>

In the Committee Print, proposed D.C. Code § 40-406(e) provides that "a religious society, or a nonprofit organization which is operated, supervised, or controlled by or in conjunction with a religious society, shall not be required to provide services, accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a **same-sex** marriage, or the promotion of **same-sex** marriage through religious programs, counseling, courses, or retreats, that is in violation of the religious society's beliefs." (Boldface added.)

The amendment we urge is the deletion of the phrase "same-sex" in this section. That phrase was added by the Judiciary Committee; as far as we know, no witness at the lengthy public hearing suggested this addition.

By adding the phrase "same-sex," the Committee Print leaves the law confused, inequitable, and perhaps more difficult to defend in court.

First, addition of the phrase "same-sex" confuses the law, because it suggests that religious societies are under a legal obligation to provide services and facilities to solemnize or celebrate other sorts of marriages that violate their religious beliefs. It is hardly clear that this is true, and it would surely come as a surprise to religious societies of all faiths in the District of Columbia to learn that they must host weddings they find religiously objectionable for reasons other than that the parties are of the same sex.

Second, the addition of the phrase “same-sex” sends the message that same-sex marriages are worthy of less protection against discrimination than other marriages, for they would become the only kind of marriage specifically subordinated to religious objections by the D.C. Code. That difference, in turn, might give rise to a legal argument, in a case challenging this Act, that the District of Columbia has a less compelling interest in prohibiting sexual orientation discrimination regarding marriage than in prohibiting other kinds of discrimination regarding marriage. We know the Council does not share that view, but singling out same-sex marriage for lesser protection under the statute — as the Committee Print does — might lead a court to misconstrue the Council’s intent in this respect.

Third, on the merits, the Council should not *want* to give same-sex marriage any lesser protection against discrimination than other kinds of marriages. Marriages of same-sex couples should be *equal* to marriages of opposite-sex couples. That is the simple but important purpose of this bill. Inserting the phrase “same-sex” contradicts that purpose.

Fourth, the Council should not want to be in the business of telling religious institutions which marriages they must solemnize or celebrate, or to whom they must provide *religious* services. Just as proposed D.C. Code § 40-406(c) provides that no minister should be required to solemnize or celebrate any marriage, likewise no church, synagogue or mosque should be required to host any wedding that is offensive to its faith, and no religious entity should be required to provide religious programs, religious counseling (for example, premarital counseling or married couples counseling), religious courses, or religious retreats to any couple that does not qualify for such services under the tenets of the religion.

Deleting the phrase “same-sex” in proposed D.C. Code § 40-406(e) will solve these problems, and we urge the Council to adopt that amendment at the first reading of Bill 18-482.

Respectfully,

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of the Nation’s Capital

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cc: All Councilmembers