AMERICAN CIVIL LIBERTIES UNION of MARYLAND

**Testimony for the House Judiciary Committee**
**HB 175 – Religious Freedom and Civil Marriage Protection Act**
**February 25, 2011**
**Support**

**HB 55 – Religious Freedom and Civil Marriage Protection Act**
**February 25, 2011**
**Support**

**HB 963 – Maryland's Marriage Protection Act**
**February 25, 2011**
**Oppose**

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The American Civil Liberties Union of Maryland strongly supports passage of HB 175, the Religious Freedom and Civil Marriage Protection Act, and the identical HB 55. This bill is a long overdue measure to ensure that all families in Maryland are treated with fairness and equality. Ensuring the passage of this bill has long been, and will continue to be, a priority for the ACLU of Maryland and its 14,000 members throughout the state. We oppose passage of HB 963 which seeks to alter Maryland's Constitution to elevate discrimination against families headed by lesbian and gay couples to a constitutional command. It is difficult to conceive of anything less appropriate as a constitutional princple.

Our testimony today focuses in part on the claim, which we believe is not well founded, that passage of the bill (paraticularly as amended in the Senate) will endanger the religious liberty of persons or entities with theological objections to marriage equality. We take this claim seriously, because protecting religious freedom is part of our mission to protect the civil liberties guaranteed in the Bill of Rights, just as protecting lesbian and gay Marylanders' (and others') right to equal protection is also part of our mission. A partial (and very long) list of cases in which the ACLU defended religious practices and expression, both here in Maryland and around the country, can be found at http://www.aclu.org/aclu-defense-religious-practice-and-expression.

Before addressing the specific claims of conflict between marriage equality and religious practices, it is important to note several basic points. First, we recognize that some religious denominations do not sanction marriages between members of the same sex, while others treat such a marriage no differently than a marriage between persons of the opposite sex. But doctrines about what kinds of unions are given religious sanction are and should be separate and independent from the question of which unions are sanctioned by the state. For example, some faiths or clergy do not recognize interfaith marriages, some will not marry persons who have been previously married (absent an annulment or divorce sanctioned by the denomination), etc., but few, if any, persons believe that those religious doctrines ought to control which marriages the state will recognize. In short, although we use the same word – marriage – for both the religious and state institutions, what a particular religious body recognizes as a valid marriage is not, need not, and indeed, in a religiously plurastic society like ours, cannot, be the same as what the state recognizes as a valid marriage. There always have been, and always will be marriages that the state recognizes that some religions will not recognize as valid. That situation will not change when this bill passes, and that situation poses no threat to religious freedom.

With respect to the claims made by marriage opponents regarding infringements on the free exercise of religion, there are three basic points. First, as discussed more fully below, the specific examples that opponents of marriage equality consistently cite as demonstrating the inherent conflict between marriage equality and religious freedom have nothing to do with recognition of same-sex couples' relationships. Rather, all involve application of laws prohibiting discrimination based on sexual orientation, and involve lesbian or gay couples who were not, in fact, married, or where marriage had nothing to do with the claimed discrimination or defense. Second, Maryland's existing anti-discrimination law already has significant exemptions to protect religious belief. The balancing of interests embodied in the exemptions was worked out in the legislative process, and the overall system has worked without any problems in Maryland for decades. Moreover, the addition of sexual orientation as a prohibited basis for discrimination has also been in place for a decade, and was sufficiently non-controversial that opponents failed to gather the requisite number of signatures to bring it to referendum. Finally, the law already has a mechanism for dealing with situations that do not fall within the exemptions, namely the ability to assert, on a case-by-case basis, that the discriminatory conduct at issue is protected by either the Free Exercise Clause or the First Amendment's protection of expressive association. There is no need to completely rewrite our current anti-discrimination law to create new and unprecedented exemptions allowing discriminatory conduct directed at lesbian and gay people.

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND

Opponents of marriage equality consistently cite the same litany of cases as evidence for their claim that marriage equality is inherently incompatible with religious freedom. But the cases fail to establish the point, because they do not involve conflicts with same sex marriage *per se*, but rather involve application of laws that bar discrimination based on sexual orientation, laws that will not and need not change with passage of this bill. We discuss the cases most frequently cited in some detail below, but it is worth noting at the outset that none of them arose under Maryland's anti-discrimination laws, despite the fact that Maryland has prohibited discrimination based on sexual orientation for the last decade, and despite the fact that Marylanders have been getting married outside of Maryland (and lesbian or gay married couples have been moving to Maryland) since Massachusets started recognizing same sex marriages in 2004.

*Catholic Charities of Maine v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004) involved application of a city ordinance conditioning receipt of of housing and community development funds from the city on the recipients' agreement to provide the same benefits to registered domestic partners as they provide to spouses. The district court said that conditioning receipt of city funds in this way did not violate Catholic Charities free exercise or free speech rights. Maryland has no similar law explicitly requiring equal benefits, and the law at issue did not require the church to recognize same sex marriages.

In *Evans v. City of Berkeley*, 38 Cal. 4$^{th}$ 1 (Cal. 2006), the California Supreme Court upheld the city's revocation of a subsidy given to the Boy Scouts, in the form of free berths in the City's marina, because the organization would not assure the City that it would operate the boating program in a non-discriminatory manner, based on the organization's policies denying membership to "avowedly" gay and athiest children. The case had nothing to do with recognition of marriage, but concerned general prohibitions on sexual orientation discrimination.

In *Boy Scouts of America v. Wyman*, 335 F.3d 80 (3d Cir. 2003), the court upheld a decision denying the Boy Scouts the right to participate in the state's employee charitable contributions campaign, finding that campaign was a non-public forum, and that the prohibition on organizations that discriminate in violation of state law was viewpoint neutral. Again, the lawsuit had nothing to do with recognition of marriage.

Opponents also frequently cite an unreported case in which the Ocean Grove Camp Meeting Ass'n, a Methodist organization, lost a New Jersey property tax exemption granted to groups that make their property available to the public, because it refused to allow a lesbian couple to hold a civil union ceremony in a boardwalk pavilion that it owned. As above, the case had nothing to do with compelled recognition of same-sex couples' relationships, but concerned receipt of a public subsidy (in the form of special tax treatment) that was conditioned on ensuring equal access for all members of the public. The case would have been exactly the same had the Association denied a gay book club permission to use the pavilion.

Finally, *Elane Photography v. Willock*, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. Ct., filed June 1, 2008) involved a commercial photography business fined for violating New Mexico's anti-discrimination statute when it refused to photograph a same-sex commitment ceremony. Like each of the other cases discussed, there was no issue of compelled recognition of a marriage. The case concerned application of anti-discrimination statutes to a business covered by the public accommodations provision. The case had nothing to do with whether the couple was or was not married, and would have raised the same issues if the business had refused to photograph the gay olympics.



In short, as the above examples demonstrate, what opponents are arguing for is a complete rewrite of our anti-discrimination laws granting a broad license to discriminate. But anti-discrimination laws have always been premised on the fundamental assumption that we all have an equal right to participate in the commercial and social spheres of our society. And they work only if all participants in the those spheres have to abide by them, regardless of their personal beliefs, religiously motivated or otherwise. Anti-discrimination laws do not and cannot change or restrict what people believe, they restrict what people do, regardless of strongly held beliefs. And landlords, business owners, professionals, or employers, or government employees who disapprove of lesbian and gay relationships are no more entitled to an exemption from laws barring discrimination in those areas than are those persons who disapprove of interracial relationships or think non-adherents to their religion are sinners. Nor is such persons' freedom to practice their religion or maintain their beliefs denied by denying them the right to discriminate in those areas. Everyone simply has to play by the same rules.

Since, as noted above, the claims concerning the tension between marriage equality and religious freedom rest not on which marriages the state recognizes, but on laws prohibiting discrimination based on sexual orientation, it is also worth discussing in detail the extensive protections for religious liberty (or private discrimination) that exist in Maryland law. First, Maryland's law prohibiting discrimination by "public accommodations" has an exceptionally narrow definition of which businesses are covered. It does not apply to all businesses, programs, or facilities to which the public has access, but only to establishments that "provide lodging to transient guests," facilities "principally engaged in selling food or alcoholic beverages," "place[s] of exhibition or entertainment," "retail establishments" that "offer[] goods, services, entertainment, recreation, or transportation," Md. Code, State Gov. § 20-301, or persons licensed or regulated by the Department of Labor, Licensing, or Regulation. *Id.* § 20-402. The law does not cover "private club[s]," and does not apply to hotels or rooming houses that have five rooms or less if the proprietor lives on the premises. *Id.* § 20-303.

The law prohibiting employment discrimination does not apply to small businesses with less than sixteen employees, *id.* § 20-601(d)(2), and does not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion or sexual orientation to perform work connected with the activities of the religious entity." *Id.* § 20-604(2).

The law prohibiting housing discrimination does not apply to the sale or rental of a single family dwelling, as long as the owner does not use the services of a real estate agent or rental agent, nor does it prohibit landlords from discriminating based on sexual orientation if the building contains fewer than six dwellng units and the owner resides on the premises. *Id.* § 20-704(a).

Finally, what happens if there is a conflict between religious belief and the dictates of law? Of course there is a mechanism for dealing with that under existing law, because such conflicts have existed long before the marriages of same-sex couples began to be recognized, and will continue to exist in a wide variety of other contexts. Persons or organizations alleging such conflicts can argue that the application of the law violates their rights under either the Free Exercise clause of the First Amendment (guaranteeing the right to practice one's religion free from government interference), or under their First Amendment right to free expression or expressive association. While the Supreme Court has narrowed the scope of the Free Exercise Clause's protections in *Employment Division v. Smith*, 494 U.S. 872 (1990) (holding that facially neutral laws of general applicability that are otherwise valid, and that incidentally burden religious practices do not violate the establishment clause), the Court has recognized claims that anti-discrimination statutes may, in particular circumstances, infringe on free expression rights. *See, e.g. Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (application of law prohibiting discrimination based on sexual orientation to decision to terminate gay scoutmaster violated organization's right to express its disapproval of gay relationships); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995) (parade organizers' right to free expression prohibited state from applying anti-discrimination law to require organizers to include a group expressing a message that the organizers did not wish to convey). This case-by-case method of adjudicating claimed conflicts has stood the test of time, and is adequate for resolving any novel issues raised by cases where existing statutory protections are insufficient. The Committee should resist efforts to establish broad personal conscience clauses that would give persons a license to discriminate with impunity. The additional protections added by the Senate committee and on the floor are sufficient to protect the categories of situations where religious exemptions may be required.

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND

**Civil Unions**

Some have suggested that in lieu of granting equal rights to marry, the state should instead avoid use of the word marriage, and instead provide that same-sex couples can obtain "civil unions," which are claimed to be equal in all but the name. It is important to note first that if the goal is truly equality, the concern about nomenclature is misplaced, because it is based on a misunderstanding. We use the the one word marriage to refer to two very separate parallel institutions. One the one hand there is the civil, legal institution of marriage, which is purely created by the state, and which defines the rights, benefits, and responsibilities that follow from the legal relationship that the state creates. On the other hand, the term refers to the religious and social institution that exists apart from the state rules, and which does not perfectly overlap. As noted above, there are religious traditions or clergy that will not recognize interefaith mariages, or will not marry someone who has a previous marriage that has not been annulled according to the dictates of the particular faith. But the fact that we use the same term for both does not mean that a change in the legal rules has any bearing on the rules that various religious denominations follow. It has not in the past, and will not in the future.

The push for civil unions is also flawed because civil unions are inherently unequal.[1] By giving the legal relationship a different name for same-sex couples, the state is explicitly and implicitly saying that the relationships that lesbian and gay couples form are entitled to less respect. That is not equality, and it stigmatizes both the persons in those relationships, and their children, just as the current prohibition on marriage does. Moreover, in practice civil unions are not equal to marriage for at least four important reasons.

First, creating a parallel institution sanctions discrimination by private employers with respect to benefits that accrue to spouses. Because of a federal statute known as ERISA, a large percentage of private employers (all those with self-funded health benefit plans) are exempt from any state regulation of the health insurance provided through those plans (because of the statute's preemption of local regulation). And under federal law, civil unions are not a marriage, so employers with such plans could continue to exclude same-sex spouses from coverage. In addition, most contracts, union and otherwise, provide benefits to spouses. For unions, extending benefits to same-sex couples with civil unions (and not married spouses) would mean negotiating new provisions, which they might be reluctant to do, and which employers might not agree to. Employers would say that civil unions are not marriages, because state says they're not the same. So many employers would continue to discriminate against same-sex couples and families. And the discrimination would exist not just with respect to health benefits but also with respect to pensions, flexible spending accounts, family or medical leave, the definition of "dependent," etc.



Second, adopting civil unions would sanction continued discrimination by public accommodations. Businesses could continue to discriminate against same-sex couples in civil unions with respect to financial transactions, medical care, auto insurance, etc., because they could say that their services were available only to spouses, and those couples were not married.

Third, having civil unions means that same-sex couples' unions will not have the same "portability" or capacity to be recognized in other states. This can arise in many situations: the couple moves from Maryland to another state; is visiting another state; or owns property in another state. For married opposite sex couples recognition is simply universal and taken for granted. But even those states that recognize out of state same-sex marriages don't necessarily recognize out of state civil unions. Couples thus are exposed to many potential problems when traveling, moving, upon dissolution, and with respect to custody or visitation issues. And the demand that the relationship be recognized, and that the couple not be treated as legal strangers, has to be litigated on a case by case basis. For example, in New York, which recognizes out of state marriages of same-sex couples, there are conflicting cases on recognition of out of state civil unions. *See Debra H. v. Janice R.*, 14 NY3d 576 (N.Y. Ct. App. 2010) (recognizing effects of Vermont civil union for purposes of granting standing under New York law to seek custody and visitation); *cf. Langan v. St. Vincent's Hosp*., 25 A.D. 3d 90 (App. Div., 2nd Dep't 2005) (refusing to recognize civil union for purpose of granting standing to bring wrongful death action); *Langan v. State Farm Ins. Co.*, 48 A.D.3d 76 (App. Div., 3rd Dep't 2007 (refusing to recognize civil union for purpose of seeking survivor benefits under worker's compensation law).

Fourth, adopting civil unions would also preclude any possibility of recognition of the relationship under federal law. No federal laws recognize civil unions. It is a completely unknown concept or term in federal law. But there are over 1000 federal benefits based on marriage. The Defense of Marriage Act (DOMA) currently blocks federal recognition of marriages by same-sex couples, but DOMA has been declared unconstitutional in two separate

[1] The Final Report of the New Jersey Civil Union Review Commission, available at http://www.state.nj.us/lps/dcr/downloads/CURC-Final-Report-.pdf, extensively canvasses the myriad ways in which civil unions are not equal to marriage.

cases (now on appeal), *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010) (DOMA violates Equal Protection Clause); *Massachusetts v. Dep't of Health and Human Serv's*, 698 F.Supp.2d 234 (D.Mass. 2010), (DOMA violates 10th Amendent). Further, the United States Department of Justice (with the personal approval of President Obama and Attoreny General Holder) has just notified Congress, http://www.justice.gov/opa/pr/2011/February/11-ag-223.html, that it believes DOMA is unconstitutional, and will not defend DOMA in two challenges filed in New York and Connecticut, *Windsor v. U.S.*, and *Pederson v. OPM*. Maryland citizens who have civil unions will get none of the federal benefits provided to spouses, even when DOMA is overturned.

It is in part based on concerns like those noted above that state supreme courts in California, *In re Marriage Cases,* 43 Cal.4th 757 (2008), Connecticut, *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135 (2008), and Massachusets, *In re Opinions of the Justices to the Senate*, 440 Mass. 1201 (2004), have held that civil unions were not in fact equal to marriage, and that requiring same-sex couples to have civil unions instead of marriage violated their state constitutions.

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND

**Promoting Marriages Between Same-Sex Couples in Schools**

Opponents of equal treatment for same-sex couples have repeatedly claimed that allowing such couples to marry in Maryland will mean that our public schools will become engaged in "promoting" such marriages to their students. This claim has no connection to reality. The marriage bills before the Committee do not change the curriculum in any public school, nor do they change the way that curriculum is developed. More importantly, independent of the bills before the Committee, Maryland schools already have students who come from families headed by same-sex couples, both married and unmarried, and have for many years (Massachusetts first allowed same-sex couples to marry in 2004, and four other states have followed since then). That fact has not changed any school curriculum, or led to any "promotion" of marriage between same-sex couples, nor will this bill. It will simply give lesbian and gay families the same protections and responsibilities that their heterosexual neighbors have.

To the extent the subject of same-sex marriages and relationships are discussed at all in schools, it is generally in the context of the comprehensive health programs mandated by state education regulations. And those regulations have extensive protections to ensure that the curriculum is age appropriate,[2] is developed with parental input,[3] that parents are notified when it is being

[2] COMAR § 13A.04.18.01 provides that "the instructional program [the Comprehensive Health Education Program] shall provide for the diversity of student needs, abilities, and interests at the early, middle, and high school learning years, and shall include the Maryland Health Education Content Standards with related indicators and objectives as set forth in §§C—I of this regulation." COMAR § 13A.04.18.03.B(3)(a) provides that "the content shall be concerned with the advanced physiology and psychology of human sexual behavior and related matters and may be offered as an elective course at the middle or high school level, or both. However, it shall differ in kind and degree according to the level of maturity of the students."

[3] COMAR § 13A.04.18.01.F(2) provides that "the local school system shall establish a joint committee of educators and representatives of the community for the purpose of reviewing and commenting on instructional material [related to the Comprehensive Health Education Program] to be submitted to the superintendent for consideration when recommending instructional material to be approved by the local Board of Education." COMAR § 13A.04.18.01.F(6) provides that "the school shall provide special opportunities for parents/guardians to view all instructional materials to be used in the program before the materials are used in the classroom." And COMAR § 13A.04.18.01.F(7) provides that "each local school system shall publish at regular intervals a list of its approved instructional materials."

taught,[4] and that parents have an opportunity to opt-out of having their children attend classes they object to.[5] In short, parents are amply protected under current rules from having their children taught anything related to human sexuality that they object to, whether for religious reasons or not. No further protections are needed or appropriate.

For the foregoing reasons we urge the Committee to give HB 175 and HB 55 a favorable report, and to give HB 963 an unfavorable report.

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND

[4] COMAR § 13A.04.18.01.F(4) provides that "written notification is made to parents/guardians announcing this unit of study."

[5] COMAR § 13A.04.18.01.F(5)(a) provides that "students may be excused from this unit of the program upon written request from their parent/guardian." And COMAR § 13A.04.18.03.B(3)(b) provides that " other aspects of sexual behavior related to Focus Area Three shall be offered in an identifiable elective course. A student who chooses this course shall have the prior consent of the student's parents/guardians . . . . Erotic techniques of human intercourse may not be discussed. All instruction shall be objective and carefully supervised.