

Testimony in Support of the Maryland Religious Freedom and Civil Marriage Protection Act

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Good afternoon. I am Director of Constitutional Litigation at Lambda Legal Defense & Education Fund, Inc., a national organization dedicated to achieving full civil rights for those who are lesbian, gay, bisexual, transgender or living with HIV. Thank you for this opportunity to testify on a subject that so deeply affects lesbian and gay couples and their children in this state. On behalf of Lambda Legal's many Maryland members, we urge enactment of the Religious Freedom and Civil Marriage Protection Act (the "Act").

I want particularly to speak on behalf of several couples, Lambda Legal's clients, whose stories speak volumes about why same-sex couples need the security and protections that come with marriage. Each of these couples has entered into a valid marriage in a jurisdiction out of state — without the sky having fallen in those places but with stronger families instead — yet each still suffers discrimination in Maryland. I also want to address several legal issues that have been raised in the debate over this Act. *First*, some other legal status, like civil union, cannot ensure that same-sex couples can fully protect their families or advance Maryland's interests in providing for the security of its families. *Second*, the Act balances the religious freedoms of clergy and religious organizations with the critical need same-sex couples have for the freedom to marry. No further exemptions are warranted. *Third*, arguments raised by opponents to the Act concerning procreation and the wellbeing of Maryland children are based on misconceptions, junk social science and indifference to the needs of the many Maryland children being reared by same-sex couples.

As the experiences of three Maryland families illustrate, same-sex couples need the protections that come from marriage.

Let me first tell you about three Maryland families, typical of many others, who seek the protections for one another and for their children that come only with marriage.

Margaret Selby and Colette Hayward have been a couple for nearly two decades, together raised two children to adulthood and now enjoy their three young grandchildren. Maggie is a police officer, patrolling the streets of Baltimore County to keep its residents safe from danger. Maggie's fellow officers threw a celebration for Maggie and Colette before their 2009 marriage in Massachusetts. Maggie, though she is too modest to talk about it herself, is an extraordinary police officer, earning commendation after commendation for her dedication. For example, for the third time Maggie has been named her precinct's Officer of the Year, for such heroism as intervening to disarm a distraught man who was ready to shoot a social worker. Yet despite their marriage, Maggie's dedication to her job, and the fear Colette lives with every time Maggie goes off on patrol, the County Police Department is

refusing to respect their marriage and to allow Maggie to take care of Colette with spousal health insurance and other protections.

Juanika Ballard and Monica Williams, a couple for over six years, met in church in Baltimore and later married in Connecticut. Juanika too is a Baltimore County police officer. In 2009 she was horribly injured when a driver slammed into her patrol car. She had to be cut from the car and airlifted with a broken back to the hospital. Monica was by her side in the months it took to nurse Juanika back to health, so that Juanika could resume her job protecting the people of Baltimore County. When Monica's father died just a few weeks ago, Juanika wanted to be by Monica's side, yet was told by the Police Department that she could not take the same bereavement leave for the funeral and family gathering that other married spouses on the force receive in the same circumstances. Juanika also is being told that she cannot have spousal health insurance for Monica, who has returned to school to get her degree in order to make a better life for the children they are raising together.

Stacy and Barbara Pipkin married in the District of Columbia and have recently adopted a baby together, their 10-month old son Caiden. They are being told by Stacy's employer, the Ann Arundel County Public Schools, that she cannot have the same spousal health coverage other married employees receive in order to insure Barbara, who has devoted herself for 30 years to working with developmentally disabled adults. They want to make the best life they can for Caiden, including to raise him with the protections and stability that come with marriage.

While each of these couples is entitled to have its marriage given legal recognition in Maryland, still they have to fight — with lawyers and anxiety and doing without in the meantime — just to be treated as other married couples are.

Neither civil unions nor any other measures offer a substitute for the protections that come with marriage, and it would be particularly poor public policy for Maryland to deny marriage to its residents.

There is no substitute for the security and protections that come to hardworking families through marriage. If a couple has the money, they may be able to hire a lawyer to draft a briefcase full of legal documents like wills, domestic partner affidavits, health care directives and powers of attorney. But even if the couple hauls that briefcase around everywhere they go, it still is no substitute for the hundreds of protections that come automatically with marriage. Those documents did not help another Lambda Legal client, Janice Langbehn, who could not be by her dying partner's side at a Florida hospital because the couple was not married.

The domestic partner protections Maryland provides to same-sex couples, though a step in the right direction, fall far, far short of what married couples can count on — no one could say they are any kind of substitute for marriage.

And civil union is no answer either, as both Connecticut and Vermont learned, and moved from civil union to full marriage equality to ensure that same-sex couples and their families were not shunted to a lesser, unequal status. Civil unions are a new creation, meant to relegate same-sex couples to a separate status from different-sex couples, who are free to marry. The stigmatizing message civil union

sends to same-sex couples, their children and their communities is loud and clear: same-sex couples and their families deserve only a second-class status.

In very practical terms as well, civil unions fall far short of equality. They are not recognized world-wide as marriages are. Same-sex couples should not have to explain what their civil union means and why their relationships should be recognized everywhere they go. Enacting civil unions would also be particularly poor public policy for Maryland. Only marriage brings the 1,000-plus federal benefits and protections that hinge on marital status. While currently the federal Defense of Marriage Act (“DOMA”) limits spousal benefits and protections to those in different-sex marriages, DOMA has already been held unconstitutional by federal judges in ongoing court challenges (*see Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010); *In re Levenson*, 587 F.3d 92 (9th Cir. J. Reinhardt 2009)). President Obama has said he opposes DOMA and seeks its repeal by Congress. Notably, on February 23, 2011 the Department of Justice announced that it has reached the legal conclusion that DOMA is unconstitutional and that it will no longer defend DOMA in court. Just as “Don’t Ask, Don’t Tell” was declared unconstitutional in the courts and recently repealed by Congress, so too can we expect DOMA to fall in the very near future. When that happens, married same-sex couples — but not those in civil unions — will be eligible for the myriad federal benefits that come only with a married status. These range from social security benefits, to veterans’ benefits, to tax benefits, to very significant employee benefits for federal workers and their spouses. Given the many federal workers who live in Maryland, it would be especially bad state policy to cut off a whole segment of Maryland residents from the very substantial federal benefits that come only with marriage.

The Religious Freedom and Civil Marriage Act balances religious freedoms with the compelling need of Maryland same-sex couples for the protections that come only with marriage, and efforts to build in further religious exemptions that could lead to discrimination against many types of couples should be rejected.

Section 2 of the Act expressly confirms that religious clergy remain free to decide whether or not to solemnize a marriage based on the clergy’s religious beliefs. It affirms the First Amendment and Maryland constitutional protections that apply to clergy in making such decisions. Some clergy and religious denominations seek to be able to perform religious marriage ceremonies and to facilitate in conferring civil marriage rights for same-sex couples, consistent with their religious beliefs. Others have religious beliefs that do not condone marriages between same-sex couples. Section 2 of the Act makes clear that the Act does not seek in any way to interfere with the religious freedoms of clergy in this arena. No clergy will be required under the Act to perform religious marriage ceremonies that do not conform with their religious beliefs.

Section 3(a) of the Act, added in the Senate Judicial Proceedings Committee, extends the religious exemption further. It exempts “a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by a religious organization, association, or society” from any obligation to provide “services, accommodations, advantages, facilities, goods, or privileges” related to “the solemnization or celebration of a marriage that is in violation of the entity’s religious beliefs.” This provision addresses the potential concerns of religious organizations, associations or societies, and of organizations operated by them, whose religious beliefs

would be violated by providing services related to the solemnization or celebration of a particular marriage. Thus, a Catholic organization or society, or an organization controlled by a Catholic organization or society, would not be required to rent its banquet hall for a marriage ceremony or a marriage celebration to a same-sex couple, or, for that matter, to any other type of couple if doing so would violate the entity's religious beliefs.

Same-sex couples seeking accommodations, services and facilities for their marriage ceremonies would not be able to obtain them from such organizations with religious objections, but, no doubt, in the State of Maryland there are numerous other religiously-affiliated and non-religiously affiliated providers alike that would welcome these couples, as well as the revenue from the business these couples would bring. Like the three couples discussed, currently many Maryland same-sex couples are traveling to neighboring District of Columbia or to other jurisdictions to hold their weddings and marriage celebrations. The Act will allow these couples to marry right here in Maryland, surrounded by family and friends, and to use the services of the many Maryland businesses and religious entities eager to serve them.

Section 3(a) applies only to marriage ceremonies and celebrations. It appropriately does not provide a wholesale exemption from application of Maryland's non-discrimination laws that otherwise apply to an entity, even if that entity would be exempted under Section 3(a) of the Act. Thus, a religiously-affiliated organization that currently falls under the definition of a public accommodation under Maryland's non-discrimination laws (which, for example, do not apply to a "private club") will continue to be required to abide by the non-discrimination laws' prohibition on discrimination on such protected bases as race, sex and sexual orientation, unless what is involved is services for a marriage ceremony or celebration in violation of the entity's religious beliefs.

Section 3(b) of the Act further provides that a refusal by an entity covered under Section 3(a) to provide services, etc. in accordance with that subsection "may not create a civil claim or cause of action or constitute the basis for the withholding of governmental benefits or services from the entity." This provision addresses concerns asserted by some over the possibility of conflict and litigation over a religious entity's claim to an exemption from provision of marriage services because of the entity's religious beliefs. It is an effort to shield religious entities from litigation over their refusal to provide services for marriage ceremonies and celebrations. It also provides that the government may not use the religious refusal of the entity as a basis to withhold governmental benefits or services from the entity. Thus, this provision clarifies that the government may not use a religious refusal by an entity as the basis to withhold, for example, garbage pick-up services.

In reality, there have been virtually no known cases in the nation of religious entities facing litigation or having governmental benefits withheld because of a refusal to provide services for a civil marriage ceremony or celebration. Some opponents of marriage rights for same-sex couples point to a few cases in which entities denied services to same-sex couples in violation of public accommodations laws. Notably, those cases did not involve civil marriage ceremonies or celebrations at all, and were in jurisdictions that do not yet even confer civil marriage for same-sex couples. In the five states and the District of Columbia where same-sex couples currently are accorded civil marriage rights, there has been a marked absence of conflict between same-sex couples seeking to marry on the one hand and religiously-affiliated organizations with religious objections to those couples' marriages on the other.

Proposals to dramatically expand the religious exemption should be rejected. These proposals, to exempt individuals and non-religiously-affiliated businesses from the requirements of Maryland's non-discrimination laws when it comes to marriage-related services, would deal a serious blow to the non-discrimination principles enshrined for decades in Maryland law. These proposals have been adopted *nowhere* in the country, for good reason.

Under these proposals, a for-profit business or its employees currently covered under the public accommodations law would be permitted to refuse services based on religious beliefs in connection with the marriages of same-sex couples, or, for that matter, inter-racial couples, inter-faith couples, previously divorced couples, couples where the mother does not stay home to rear the children, or other types of couples whose marriages offend a particular religious belief. So, for example, a grocery shop or its employee could refuse on the basis of religious beliefs to sell food and beverages to a same-sex, inter-racial or inter-faith couple on the check-out line. Maryland for decades has required businesses engaged in commerce in the public marketplace to abide by basic non-discrimination principles, whether the businesses' objections to doing so stem from religious beliefs or from other reasons for discrimination.

Likewise, the suggestion that government employees, like clerks, should be exempted from performing their duties while on the government payroll because of religious objections to the marriages of certain types of couples should be rejected out of hand. Such an exemption would free government employees to assert a religious objection to serving same-sex couples, inter-racial couples, or couples of particular religions, if doing so is contrary to the employees' religious convictions. This would open the door to discrimination in the provision of government services, a serious setback for Maryland, as well as potentially violating the Fourteenth Amendment's Equal Protection Guarantee and the First Amendment's Free Exercise and Establishment Clauses. Moreover, the suggestion that employees be permitted to discriminate only if another employee is available to perform the government duties creates a standard too nebulous to apply and too open to abuse. It does not offer a realistic or acceptable alternative to the longstanding principle that government employees may not in performance of their jobs discriminate against members of the public.

Maryland children are helped, not harmed, by granting the freedom to marry to same-sex couples.

Proponents and opponents of marriage rights agree on one important point — we all recognize that a stable married couple supported by the financial and legal protections of marriage offers a good setting in which to raise children. That is why it is particularly unfair to deprive the children of lesbian and gay couples of the security that comes from allowing their parents to marry.

Leading child welfare experts all agree that same-sex couples, many of whom are rearing children in Maryland, make fit parents.

According to 2005 census data, approximately 21% of same-sex couples in Maryland are raising children under the age of 18. As of that year, nearly 6,000 of Maryland's children were living in households headed by same-sex couples. Many children are conceived by same-sex couples aided by the widely available reproductive technologies commonly used by different-sex and same-sex couples

alike to form their families. Moreover, nearly 7% of Maryland's adopted children live with a lesbian or gay parent.

All the leading social science and child welfare experts in the nation concur that children reared by same-sex parents fare every bit as well as children reared by different-sex parents. The American Psychological Association, the American Academy of Pediatrics, the National Association of Social Workers, the Child Welfare League of America, and many other leading experts reject as unfounded and contrary to the overwhelming social science data the procreation and childrearing arguments made by opponents of marriage rights. These experts instead call for the freedom to marry for same-sex couples to benefit children raised in such families.

Allowing same-sex couples to marry harms no one else's family.

Some marriage opponents suggest that other people's marriages and children could somehow be harmed by permitting same-sex couples to marry. These arguments have no basis in reality. No one else is deterred from marrying, or hurt in their marriage, by permitting same-sex couples to marry as well. Marriage is not a zero-sum game with only a limited number of marriage licenses to go around.

Allowing same-sex couples to marry will not change how government-funded adoption agencies should place children.

The argument is sometimes made that if same-sex couples are permitted to marry, government-funded faith-based adoption agencies will not be able to refuse to place children in foster care with same-sex couples. But government-funded social service providers already are not permitted to discriminate on the basis of sexual orientation, whether marriage is involved or not. Allowing same-sex couples to marry does not change the governing child-welfare-based adoption standards in Maryland calling for a case-by-case assessment of the fitness of prospective parents to adopt children from the foster care system. Many Maryland children in foster care, including many hard-to-place special needs children, find loving homes with lesbian and gay adoptive parents. All the leading child welfare and adoption experts, like the Child Welfare League of America and the National Association of Social Workers, agree that lesbian and gay adults make good parents and are an important resource for children in need of adoptive families. It would be a grave mistake to enact an amendment to the Act exempting such adoption agencies from adhering to the sound child welfare principles that guide adoption services in Maryland. Nor should any amendment be enacted that might allow religious criteria to govern government-funded social services in ways that could violate the Establishment Clause.

Allowing same-sex couples to marry will not affect school curricula.

Some opponents make the ill-founded claim that if same-sex couples can marry in Maryland then schools around the state will be forced to promote in their curricula marriage between same-sex couples. In fact, allowing same-sex couples to marry has no bearing on what gets taught in Maryland public schools. School districts, as always, are given substantial leeway to decide what should be taught to school children in age-appropriate ways. Schools would not have to teach anything about lesbian and gay couples and marriage any differently from curriculum choices they now make. Nothing in the Religious Freedom and Civil Marriage Protection Act bears on these curriculum choices. Moreover,

parents will still retain the right guaranteed under state law to opt their child out of health education instruction concerning family life and human sexuality.

Schools do have an obligation to protect children from bullying and harassment, including for such reasons as that the children or their parents are lesbian or gay. Ensuring that these children are safe and acknowledged is part of the basic responsibility of the schools. This Committee should reject any effort to amend the Act to add provisions that interfere with carefully crafted education laws and policies on curriculum and that prevent local school districts from making age-appropriate educational choices.

Frankly, resort to this curriculum argument by opponents of marriage for same-sex couples is no more than a scare tactic. The bill before you is not about what children are taught in schools, but about making sure that the children of same-sex couples can have the protections of marriage. Young people who are the children of these families, or who are themselves lesbian or gay, should not have to suffer discrimination based on ill-founded myths and stereotypes. Concerns about children should cause you to support, not oppose, the Religious Freedom and Civil Marriage Protection Act.

Conclusion

In ending discrimination in marriage for same-sex couples, the Legislature will make families like the Pipkins, the Selby-Haywards and the Ballard-Williamsses that much stronger. It will make the communities these families so selflessly serve that much stronger. In ending discrimination in marriage, this Legislature will have one of its finest hours.

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