


**COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON PUBLIC SAFETY AND THE JUDICIARY
COMMITTEE REPORT**

1350 Pennsylvania Avenue, NW 20004

TO: All Councilmembers
FROM: Councilmember Phil Mendelson, 
Chairman, Committee on Public Safety and the Judiciary
DATE: November 10, 2009
SUBJECT: Report on Bill 18-482, "Religious Freedom and Civil Marriage Equality Amendment Act of 2009"

The Committee on Public Safety and the Judiciary, to which Bill 18-482, "Religious Freedom and Civil Marriage Equality Amendment Act of 2009" was referred, reports favorably thereon with amendments, and recommends approval by the Council.

CONTENTS

I.	Background and Need	1
II.	Legislative Chronology	14
III.	Position of the Executive	15
IV.	Comments of Advisory Neighborhood Commissions	15
V.	Summary of Testimony.....	16
VI.	Impact on Existing Law	17
VII.	Fiscal Impact	17
VIII.	Section-by-Section Analysis	18
IX.	Committee Action	22
X.	Attachments	22

I. BACKGROUND AND NEED

Bill 18-482, the Religious Freedom and Civil Marriage Equality Amendment Act of 2009, is the culmination of the District of Columbia's long pursuit of equality for same-sex couples in the law. The District, resolute in its conviction to provide equal rights and equal dignity to all residents, has, through domestic partnership laws, made parallel the rights and responsibilities of same-sex couples to those of opposite-sex spouses. True equality, however, is not obtained until same-sex couples are afforded the same rights, the same responsibilities, and are included in the same, single system of law for all. Bill 18-482, by affirmatively stating in the law that same-sex couples can legally refer to one another as "married," realizes this ideal of true equality sought after in the District.

The Committee believes that it is impermissible to continue requiring gay and lesbian individuals to operate as a separate, purportedly equal, class of citizens in the District. This legislation will remedy that inequity. In recognizing same-sex marriage in the District, Bill 18-

482 does not redefine any concept in the law (indeed, the Committee maintains same-sex marriage is already permitted under District law), as nowhere in our Code is the institution of marriage reserved to opposite-sex couples. Rather, Bill 18-482 removes the custom, or practice, that marriage is only between a man and a woman. This simple legislative act puts in the law what is already in the law: that the right of marriage applies fully to all in the District.

At the same time, Bill 18-482 preserves religious freedom. While the Committee believes without doubt or reservation that the civil right of marriage should be enjoyed by same-sex couples, it acknowledges that this view is not universally held. In particular, certain religious institutions may have different beliefs on the concept of marriage. Bill 18-482 accommodates the sincerely held objections of such religious leaders and organizations with regard to the solemnization or celebration of same-sex marriages. Provisions in this legislation ensure religious freedom by clearly stating that no religious organization will be required to celebrate marriage for a same-sex couple where doing so violates the tenets of their religious faith.

Bill 18-482 also enhances religious freedom by giving religious organizations the *right* to solemnize same-sex marriages. The Committee received extensive testimony from religious leaders who argued that their inability to marry same-sex couples hampered their ability to fully practice their faith. For instance, Dean Snyder, Senior Pastor of Foundry United Methodist Church in DC, in arguing for the right to allow his church to marry same sex couples, stated that:

[i]f there are religions that choose to discriminate against gay and lesbian people, that may be their right. But we should not use the law to *force* those clergy who believe that God blesses same-sex marriage to discriminate.¹

In the same way, the freedom to marry, or not to marry, is an individual choice reflecting one person's commitment to another. By excluding certain individuals from this institution, it not only makes this choice for them but also brands their relationship as somehow inferior. This basic civil right is truly the choice of each individual, not the choice of the state. Bill 18-482 remedies the exclusion of same-sex couples from the institution of marriage, allowing them to rightfully claim access to this fundamental human right.

Marriage as a Basic Civil Right

If we are all created equal, then gays and lesbians are entitled to the same rights and privileges, the same fundamental freedoms, mandated for all individuals. Access to equal treatment under the law inevitably includes the freedom to marry. U.S. Supreme Court Chief Justice Earl Warren, in a unanimous 1967 decision striking down Virginia's anti-miscegenation law, wrote: "[t]he freedom to marry has long been one of the vital personal rights essential to the

¹ *Bill 18-482, Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009, at 2 (written testimony of Rev. Dean J. Snyder, Senior Pastor, Foundry United Methodist Church).

orderly pursuit of happiness by free men.”² Marriage, Warren continued, is “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”³

Fairness demands that gays and lesbians are treated equally before the law and permitted access to the universal entitlements of citizenship. Such entitlements, says NAACP Chairman Julian Bond, are the definition of a civil right. In a speech before members of the lesbian, gay, bisexual, and transgender (LGBT), March 2009, he stated:

When someone asks me, “are gay rights civil rights?” my answer is always, “Of course, they are.” Civil rights are positive legal prerogatives: the right to equal treatment before the law. These are the rights shared by everyone. There is no one in the United States who does not, or should not, enjoy or share in enjoying these rights. Gay and lesbian rights are not special rights in any way. It isn’t “special” to be free from discrimination. It is an ordinary, universal entitlement of citizenship.⁴

In a recent op-ed in the *Washington Post*, Mr. Bond repeated this call for equality and argued that “[w]e can no longer pretend that civil rights do not include rights for lesbian, gay, bisexual and transgender Americans.”⁵

Several civil rights leaders from the 1960s have likewise expressed strong support for marriage equality. Coretta Scott King voiced her support for same-sex marriage in 2004 while denouncing a proposed constitutional amendment that would have banned it.⁶ Likewise, Georgia Congressman John Lewis wrote in an op-ed in the *Boston Globe* that:

[i]t is time to say forthrightly that the government's exclusion of our gay and lesbian brothers and sisters from civil marriage officially degrades them and their families. It denies them the basic human right to marry the person they love. It denies them numerous legal protections for their families.⁷

² *Loving v. Virginia*, 388 U.S. 1, 10 (1967).

³ *Id.* at 11 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1992)).

⁴ Chris Johnson, *NAACP National Chairman Julian Bond: It isn't 'special' to be free from discrimination*, HRC Back Story, Mar. 16, 2009, <http://www.hrcbackstory.org/2009/03/julianbond/> (quoting from Julian Bond speech before the 2009 Creating Change Conference).

⁵ Julian Bond, Op-Ed., *Rights still to be won*, WASH. POST., Oct. 9, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/08/AR2009100803292.html> (last visited Nov. 7, 2009). In the same piece, Mr. Bond remarks: “[f]limsy justifications for anti-LGBT bias are giving way to evidence that society is strengthened, not weakened, when LGBT people are given equal protection under the law. Where they are free to marry those they love, the sky has not fallen.” *Id.*

⁶ *Coretta Scott King gives her support to gay marriage*, USA TODAY, Mar. 24, 2004, available at http://www.usatoday.com/news/nation/2004-03-24-king-marriage_x.htm (last visited Nov. 8, 2009) (in a speech before the Richard Stockton College in Pomona, Ms. King stated: “[g]ay and lesbian people have families, and their families should have legal protection, whether by marriage or civil union. A constitutional amendment banning same-sex marriage is a form of gay bashing and it would do nothing at all to protect traditional marriages.”)

⁷ John Lewis, Op-Ed., *At a crossroads on gay unions*, THE BOSTON GLOBE, Oct. 25, 2003, available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2003/10/25/at_a_crossroads_on_gay_unions/ (last visited Nov. 8, 2009).

This call to end the discrimination against gays and lesbians, and to provide equal access to marriage has also been given by Mildred Loving. A person with first-hand experience challenging discriminatory marriage laws, Ms. Loving stated in a speech on the 40th anniversary of the Supreme Court decision that bears her name,⁸ her belief that:

all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. Government has no business imposing some people's religious beliefs over others. Especially if it denies people's civil rights.⁹

The Committee received similar statements of support for marriage equality from witness after witness during two days of public hearings. From these statements, whether delivered by an individual hoping to one day find their better half, or by a couple decades into a relationship and consumed with the responsibilities of raising children, it is clear that marriage *means* something. It means more than what we can delineate in words or encompass in our laws. It is better defined by those two people in an intimate relationship in how they are committed to each other. It envelops not just the relationship of spouses, but their broader family and how they, and their family, are perceived and associate with society. This relationship, then, is fundamental.

To refuse this civil right to same-sex couples is an affront to constitutional principles proclaiming equality for all, and it labels these couples and their families as somehow different. The District has rightfully extended the rights and responsibilities associated with the definition of family to same-sex couples through the domestic partnership law, making such familial relationships equal, all but in name, to that shared by opposite-sex couples. The relationship between same-sex couples, however, is just as real a relationship, and the family on which the relationship is founded is just as real. Perhaps because of growing recognition of this, statements such as the following were echoed repeatedly in testimony on Bill 18-482:

I am convinced that the key to a strong family is not the gender of the parents, but rather the love, commitment, and faithfulness they manifest toward each other and where applicable, toward their children.¹⁰

If, then, our laws and policies dictate that same-sex couples “qualify as a family for certain situations, logic dictates that same-sex couples have the right to consummate that familial relationship with marriage.”¹¹ In addition to the extraordinary number of tangible benefits that extend from marital status,¹² marriage also provides numerous intangible benefits to spouses and

⁸ Loving, *supra* note 2.

⁹ Mildred Loving, “Loving for All,” Prepared for Delivery on June 12, 2007, the 40th Anniversary of the *Loving v Virginia* Announcement, available at http://www.freedomtomarry.org/pdfs/mildred_loving-statement.pdf (last visited Nov. 7, 2009).

¹⁰ Bill 18-482, *Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009, at 2 (written testimony of Rev. Dennis W. Wiley, PhD, Covenant Baptist Church, and co-chair, DC Clergy United for Marriage Equality).

¹¹ Kevin Aloysius Zambowicz, “*To Love and Honor All the Days of Your Life*”: *A Constitutional Right to Same-Sex Marriage?*, 43 CATH. U.L. REV. 907, 928 (1994).

¹² By way of example, the 1995 *Dean* decision lists approximately 72 provisions in the D.C. Code conferring rights upon married couples. *Dean v. District of Columbia*, 653 A.2d 307, 323 (D.C. App. 1995) (at note 19). In 2003, a

their families. Among them, the universal respect and recognition that comes with being able to refer to one's partner as "my spouse."¹³

Access to this basic civil right of marriage has long been enjoyed by opposite-sex couples; the Committee believes that same-sex couples lay equal claim to this right. Fundamental fairness, for these couples and their families, necessitates that the Council act to adopt marriage equality in the District. Writing in 2004, Peter Gomes, Plummer Professor of Christian Morals and Pusey Minister in the Memorial Church at Harvard University, aptly summarized this sentiment in stating:

To extend the civil right of marriage to homosexuals will neither solve nor complicate the problems already inherent in marriage, but what it will do is permit a whole class of persons, our fellow citizens under the law heretofore irrationally deprived of a civil right, both to benefit from and participate in a valuable yet vulnerable institution which in our changing society needs all the help it can get.¹⁴

The institution of marriage in this country carries an imprimatur of commitment, respect and solemnity that can never be achieved with a "separate but equal" system of rights.

Public Policy of the District to Provide Equality

It has been the longstanding policy of the District to provide equal rights, and equal dignity, to all residents. Since the creation of domestic partnerships in 1992,¹⁵ progress toward equality has been unwavering. The initial establishment of domestic partnerships set up a registration procedure to permit District employees to share health care benefits with their domestic partners.¹⁶ Since enactment, the District has expanded the rights and responsibilities of domestic partnerships to be on par with that of spousal relationships. Most recently, this Committee has brought forward legislation such as the Domestic Partnership Equality Act of

report release by the Gay and Lesbian Activists Alliance found 212 rights and responsibilities of civil marriage in the D.C. Code (only 8 of which were, at the time, extended to domestic partners). Gay and Lesbian Activists Alliance of Washington, D.C., *Marriage Law in the District of Columbia*, 1 (Dec. 2003), available at <http://www.glaa.org/archive/2004/glaamarriagereport.pdf> (last visited Nov. 7, 2009).

¹³ *Bill 18-482, Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009, at 2 (written testimony of Rev. John W. Wimberly, Jr., President, American Civil Liberties Union of the Nation's Capital).

¹⁴ Peter J. Gomes, *For Massachusetts, a chance and a choice*, BOSTON GLOBE, Feb. 4, 2008, available at: http://www.boston.com/news/globe/editorial_opinion/oped/articles/2004/02/08/for_massachusetts_a_chance_and_a_choice/ (last visited Nov. 7, 2009).

¹⁵ Health Care Benefits Expansion Act of 1992 (D.C. Law 9-114; D.C. Official Code § 32-701 *et seq.*).

¹⁶ Although created in 1992, the District was prohibited, through the federal government's oversight, from utilizing District or federal funds to implement this law until 2001. It was not until December 6, 2001, when the House of Representatives passed the District of Columbia appropriations bill for fiscal year 2002, that the prohibition was dropped.

2006¹⁷, the Omnibus Domestic Partnership Equality Act of 2008¹⁸, and the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009¹⁹. Collectively, these measures have provided sweeping reform: replacing outdated gender-specific language throughout the Code with gender neutral language, advancing parity in a variety of areas of the law between domestic partners and married couples, and providing one of the nation's most progressive statutes on parentage rights.²⁰

Though the process has been prolonged and incremental, the District has been resolute in its commitment to providing equality in the law for same-sex and opposite-sex couples. Equality, however, is not ultimately achieved until District law explicitly permits same-sex couples to avail themselves of the same system afforded to opposite-sex couples. The first step in realizing this ideal came earlier this year with the Council's adoption of the Jury and Marriage Amendment Act of 2009.²¹ Section 3 of that legislation amended District law to recognize marriages legally entered into in other jurisdictions between two persons of the same sex as marriages in the District. While the change was made explicit in the law, the Council was clear that this recognition was already permitted under existing law.²²

The Committee likewise believes that the changes made by Bill 18-482 clarify what is already provided for in the law. In 1990, the District of Columbia Superior Court's denial of a marriage license to a same-sex couple prompted the couple to litigate, resulting in the District of Columbia Court of Appeals decision in *Dean v. District of Columbia*.²³ In ruling that District law did not require the Clerk of the Superior Court to issue a marriage license to same-sex couples, the court relied upon gender-specific language found in the D.C. Code and the definition of marriage in contemporary (as well as much older) dictionaries. While the Committee believes same-sex marriage was authorized by the law in 1995 when *Dean* was decided, those factors relied upon by the court in *Dean* have since been methodically, and

¹⁷ D.C. Law 16-79 (marked up by the Committee on November 8, 2005, the legislation allows domestic partners to protect themselves and their families, particularly in times of crisis).

¹⁸ D.C. Law 17-231 (marked up by the Committee on March 11, 2008, the legislation overhauls numerous provisions in the Code so that District law recognizes rights and responsibilities for domestic partners that currently exist for spouses).

¹⁹ D.C. Law 18-33 (marked up by the Committee on October 14, 2008, the legislation provides legal recognition of the parent-child relationship for children born to domestic partners).

²⁰ As was noted in testimony provided to the Committee during the October 19, 2007 hearing, terms such as "husband," "wife," "widow," and "widower" refer "back to the days before marriage was an equal partnership when a man owned a woman. In that archaic legal context, the gender specific terms were appropriate. With the significant changes to marriage law in the past century, those archaic ideas were purged, but not all of the language has been modernized." *Bill 17-135, Omnibus Domestic Partnership Equality Amendment Act of 2007: Hearing Before the D.C. Council Committee on Public Safety and the Judiciary*, Oct. 19, 2007, at 1 (written testimony of Bob Summersgill, public witness).

²¹ D.C. Law 18-9.

²² See e.g., Amendment to Committee Print: Bill 18-10, the Disclosure to the United States District Court Act of 2009 (Apr. 7, 2009) (the rationale stated for the amendment notes: "[t]his amendment makes explicit what is already the law: to recognize marriages duly performed in other jurisdictions, including officially sanctioned marriages between persons of the same-sex.>").

²³ 653 A.2d 307 (D.C. App. 1995).

purposefully, reversed by the Council or have become obsolete through societal and cultural changes. The court, for instance, gave considerable attention to the gender specific terminology in the District's consanguinity provision to conclude that the legislature intended to limit marriage to a male-female relationship.²⁴ Section 3(a) of the Jury and Marriage Amendment Act of 2009 replaces this gender-specific language with gender-neutral terms.

While the *Dean* court consulted several dictionaries in making a determination that marriage is confined to couples of the opposite-sex, it also acknowledged that "the meaning of words are continually evolving".²⁵ The lexicon with regard to personal relationships has indeed evolved since that decision, mirroring the recognition in society and other legal systems that same-sex unions are included in the term "marriage." Even the publications relied upon in *Dean* -- namely *Webster's* and *Black's Law Dictionary*²⁶ -- have since been revised. In its eighth edition, published in 2004, *Black's*²⁷ includes "same-sex marriage" in its entry for marriage and *Webster's* too has been updated to include same-sex marriages in its definition of marriage.²⁸ Interestingly, the *Oxford English Dictionary*, long revered as authoritative in this regard, even includes "long term relationships between partners of the same sex" in its definition of marriage.²⁹

The evolution in the definition of marriage tracks the evolution in society toward more widespread acceptance of same-sex marriage. The laws in the District, as well as throughout the country, exhibit progress toward the rightful recognition of same-sex couples as equal to that of opposite-sex couples. In testimony before this Committee, Reverend Paul Roberts Abernathy remarked of this progress that:

[t]hroughout history we have changed our laws to reflect our ever deepening consciousness about what promotes a productive stable society. This legislation addresses an issue that in our day does exist and, more importantly, acknowledges the reality that same-sex relationships are a part of the rich tapestry of life in our beloved District of Columbia.³⁰

²⁴ *Id.* at 313 (discussing D.C. Official Code § 30-101, re-codified as § 46-401).

²⁵ *Dean*, *supra* note 23, at 315.

²⁶ *Id.* The D.C. Court of Appeals, relying on the publications available at the time, cites *Black's Law Dictionary* (6th ed. 1990) and two versions of *Webster's* dictionary: *Webster's Modern Dictionary* (1902) and *Webster's Third New International Dictionary* (1986).

²⁷ BLACK'S LAW DICTIONARY (8th ed. 2004).

²⁸ See e.g., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 761 (11th ed. 2003) (including in the definition of marriage "the state of being united to a person of the same sex in a relationship like that of a traditional marriage"). See also Daniel Redman, *Noah Webster gives his blessing: Dictionaries recognize same-sex marriage—who knew?*, SLATE, Apr. 7, 2009, available at <http://www.slate.com/id/2215628/> (last visited Nov. 6, 2009) (noting that the 2008 *Webster's Contemporary School and Office Dictionary* uses gender-neutral language in its definition of marriage).

²⁹ See Redman, *supra* note 28; see also, *Gay marriage gets recognition in the dictionary*, USA TODAY, Mar. 18, 2009, available at http://www.usatoday.com/news/nation/2009-03-18-gay-marriage_N.htm (last visited Nov. 8, 2009).

³⁰ Bill 18-482, *Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009, (written testimony of Rev. Paul Roberts Abernathy, Rector, St. Mark's Episcopal Church)

Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire legally recognize same-sex marriages.³¹ Seven foreign countries also sanction same-sex marriages: Netherlands, Belgium, Spain, South Africa, Canada, Norway, and Sweden.³² While recognition of same-sex marriage in this jurisdiction a decade ago would have been unprecedented, “like it or not, [] customs change with an evolving social order.”³³ So, too, must the law change -- to reflect and support current social customs. The District cannot justify the continued discrimination of same-sex couples on account of the historical discrimination gays and lesbians have experienced. As one witness stated at the hearing, “[w]e must not allow history and tradition to shackle freedom and justice.”³⁴

Marriage and Religious Freedom

While there is currently division among different religious institutions over the recognition of same-sex marriage, the Council must recognize that the legislature cannot dictate the beliefs of any religious institution.³⁵ Testimony received on Bill 18-482 demonstrates that certain religious denominations have sincerely held objections to the recognition of same-sex marriage.³⁶ The Committee has neither the intention nor desire to force any religious leader to perform a marriage in contradiction of his or her religious beliefs.

Over the course of two days of testimony, and through comments submitted for the record, the Committee has heard from numerous religious leaders and institutions expressing strong support for same-sex marriage. Witnesses testified how same-sex marriage is not only consistent with their faith, but that their faith teaches them that such equality is required. Stressing this ideal, Reverend Dennis Wiley testified that:

[the recognition of same-sex marriage] is theologically right because we are all created equal in the image of God, it is historically right because those of use who have been the victims of

³¹ While the California Supreme Court ruled in May 2008 that same-sex couples have the right to marry, Proposition 8, limiting marriage to one man and one woman, was subsequently passed in November. The approximately 18,000 same-sex marriages previously performed in California remain valid.

³² See Human Rights Campaign website, Questions about Same-Sex Marriage, available at <http://www.hrc.org/issues/5517.htm> (last visited Nov. 7, 2009). In addition, a number of countries extend rights to same-sex couples, although more limited than marriage: Croatia, Denmark, Finland, France, Germany, Iceland, Israel, New Zealand, Portugal, Slovenia, Switzerland, and the United Kingdom. *Id.* See also, *Norway passes law approving gay marriage*, L.A. TIMES, Jun. 17, 2008, available at <http://www.latimes.com/news/local/la-on-norwaymarriage18-2008jun18,0,402614.story> (last visited Nov. 10, 2009), and *Sweden allows same-sex marriage*, BBC NEWS, Apr. 2, 2009, available at <http://news.bbc.co.uk/2/hi/7978495.stm> (last visited Nov. 10, 2009).

³³ *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993).

³⁴ *Bill 18-482, Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009, at 2 (written testimony of Philip E. Pannell, DC Coalition of Black Lesbians, Gays, Bisexuals, and Transsexuals).

³⁵ Wimberly, *supra* note 13, at 3.

³⁶ See e.g., *Bill 18-482, Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009 (written testimony of the Archdiocese of Washington).

oppression ought to be the last ones to oppress anybody else, it is morally right because all of God's children should be able to live the truth rather than be forced to perpetuate a lie, and it is legally right because same-sex persons are entitled to the same rights and protections under the law as any other persons, and "among these are life liberty, and the pursuit of happiness."³⁷

Reverend Wiley and others have stated that their inability to solemnize same-sex unions prevents them from fully exercising their faith. The contention that permitting same-sex couples to marry would somehow diminish an individual's faith was strongly countered by religious leaders of many denominations. Reverend Susan O'Neill Hayward testified that:

I cannot pretend to know God's will for certain, but I believe fervently that the God I worship – the liberating, equalizing, love affirming God I have encountered in Scriptures and my experiences will bless it. And I know that we will recognize it as sacred and real – for the simple reason that our marriage will make us happy and secure and it will not cause harm to others. On the contrary: it will make us better able to serve others and God.³⁸

As these statements suggest, many view the ability to perform marriages between persons of the same-sex as an expansion of religious freedom, not a hindrance. The revised Bill 18-482 is effectively neutral in that it recognizes and respects both the right to solemnize, and the right not to solemnize, same-sex unions. By permitting the marriage of same-sex couples, but not requiring any religious institution to perform them against their religious beliefs, no burden is placed on any religious institution with regard to the solemnization or celebration of a same-sex marriage.

Bill 18-482 specifies that no religious leader, regardless of their denomination, will be required to solemnize or celebrate any marriage where doing so goes against their religious beliefs. Further, in respecting the beliefs of religious associations, organizations, or societies, the legislation specifies that such entities are not required to partake in the celebration or solemnization of a same-sex marriage through the provision of services, accommodations, facilities, or goods. The legislation states explicitly that any such refusal is protected from a civil claim or cause of action.

This balance, permitting those whose faith endorses same-sex unions to solemnize them as marriages while not requiring (and even exempting from liability) those whose faith compels them to oppose such marriages, allows for the respect and recognition of all religious beliefs. No religion, then, is limited by this legislation, and no religious doctrine is advanced by this legislation to the detriment of any others. While the state should not force any religious society to celebrate a marriage ceremony contrary to its religious beliefs, the "religious beliefs of some

³⁷ Wiley, *supra* note 10, at 1.

³⁸ Bill 18-482, *Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009, at 1 (written testimony of Rev. Susan O'Neill Hayward, First Congregational United Church of Christ of Washington DC); *See also*, Written testimony of Rev. Dr. Joseph Palacios, Adjunct Professor of Liberal Studies, Georgetown University ("[a] Catholic's faith is not diminished by the implementation of full civil and human rights for gays, lesbians, and transsexual").

do not justify the state engaging in discriminatory behavior”³⁹ against others. Echoing this sentiment, Rev. Charles Arehart commented that while “[m]y religious beliefs and yours are ours to hold, [] the state must be governed separate from our faith convictions.”⁴⁰

Testimony was also received during the hearing that questioned whether the Council even possesses the authority to legislate on the issue of marriage. Suggestions by some have been that the issue of marriage is beyond the purview of this body -- that a secular legislature may not legislate on the issue of marriage. The regulation of marriage has long been reserved to the states,⁴¹ and the law is clear that religious issues related to marriage may be legislated. On this matter the U.S. Supreme Court stated, well over a century ago, that:

it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.⁴²

The concern addressed by Bill 18-482 is the inequitable bar to accessing the rights and responsibilities of marriage to a segment of our society. As the Supreme Judicial Court of Massachusetts, in its landmark decision finding that state could not deny the benefits and obligations of civil marriage to same-sex couples, wrote:

We are concerned only with the withholding of the benefits, protections, and obligations of civil marriage from a certain class of persons for invalid reasons. Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage. Our concern, rather, is whether historical,

³⁹ *Bill 18-482, Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009, (written testimony of Rev. Robert M. Hardies, Senior Minister, All Souls Church, Unitarian; Co-chair, DC Clergy United for Marriage Equality). Elsewhere in his testimony Rev. Hardies states:

[w]hen the state denies equal protection and security to some couples, simply because of their sexual orientation, the state harms them, making it more difficult for them to love and care for each other. Such harm is an affront to basic fairness and human decency. I believe that it’s also an affront to God’s justice and God’s love. *Id.*

⁴⁰ *Bill 18-482, Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009, (written testimony of Rev. Dr. Charles R. Arehart, Interim Pastor, Metropolitan Community Church of Washington, DC).

⁴¹ See *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877) (“The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.”); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (“Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.”); and *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (citing *Pennoyer v. Neff*).

⁴² *Reynolds v. United States*, 98 US 145, 165 (1878).

cultural, religious, or other reasons permit the State to impose limits on personal beliefs concerning whom a person should marry.⁴³

The Committee respects that not all view the marriage of same-sex couples similarly, but, much as the District cannot make the choice for a religious institution to perform same-sex marriages, the District cannot make the choice for a religious institution that it will not do so. Bill 18-482 makes this clear.

Calls for an Initiative on Marriage Equality

The Committee received testimony at both the October 26th and November 2nd hearings on Bill 18-482 on whether to place the issue of same-sex marriage recognition before the District voters. Some argued that our democratic system requires such a vote,⁴⁴ others countered that a resident's access to equal treatment under the law should never be subject to the whims of a political contest.⁴⁵ These arguments were also pitted against one another in a hearing held earlier in the day on October 26th, when the District of Columbia Board of Elections and Ethics (BOEE) heard public testimony on whether a proposed measure, "Marriage Initiative of 2009," is a proper subject for initiative. This Committee, as was expressed by Committee Chairperson Mendelson in his testimony before BOEE,⁴⁶ maintains that as a matter of fairness and equity a civil right should not be subject to an initiative.

Allowing a vote on this issue would be contrary to both laws and longstanding policies of the District. It is the policy of the District, inherent in the Human Rights Act of 1977 (HRA), to provide equal rights, and equal dignity, to all residents. The HRA, among other things, prohibits discrimination based on sexual orientation.⁴⁷ District law currently requires that BOEE reject any proposed initiative that authorizes, or has the effect of authorizing, discrimination as prohibited by the HRA.⁴⁸ The proposed initiative seeks to redefine what is discriminatory, contravening the recognition that discrimination against an individual because of their sexual orientation is intolerable. This is equally apt with regard to the suggestion that the Council require a referendum vote through legislation.

⁴³ *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 965 (Mass. 2003) (at note 29).

⁴⁴ See, e.g., *Bill 18-482, Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009, at 3 (written testimony of Robert "Bob" King, Commissioner, ANC 5A07).

⁴⁵ See e.g., *Bill 18-482, Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009, (written testimony of Isaiah J. Poole, public witness).

⁴⁶ See *Marriage Initiative 2009: Hearing Before the District of Columbia Board of Election and Ethics*, Oct. 26, 2009, at 2 (written testimony of Phil Mendelson, Chairman, Committee on Public Safety and the Judiciary, Council of the District of Columbia).

⁴⁷ D.C. Law 2-38; D.C. Official Code § 2-1401.01 *et seq.* (2007 Repl.).

⁴⁸ D.C. OFFICIAL CODE § 1-1001.16(b)(1)(C) (2006 Repl.).

In June, proponents of a referendum similar to the proposed initiative argued that the proposed referendum would not discriminate in violation of the HRA because same-sex couples are able to avail themselves of the District's domestic partnership laws. BOEE correctly rejected this argument. In upholding the Board's decision the Superior Court of the District of Columbia noted:

[E]ven if unmarried same-sex couples could receive the same benefits as married couples, courts have long held that different treatment can equate to discrimination whether or not the material benefits and services offered appear uniform.⁴⁹

It must also be noted that the District, like the United States overall, is a representative democracy. Representatives are elected to adopt or revise public policy. Public policy is not adopted directly by the people but through their representatives. On issues where the District's populace has been far more divided (e.g., construction of a baseball stadium or the 2007 change in school governance) the Council did not act subject-to-a-plebiscite.

A vote on the recognition of same-sex marriage would offer an opportunity for citizens to vote "yes" to discrimination. The District's current recognition of same-sex marriages performed in other jurisdictions, as well as the proposal in this bill to permit same-sex couples to marry in the District, is in keeping with fundamental fairness and recognition of basic civil rights for all District residents. It should be axiomatic in this country that "our rights as Americans do not depend on the approval of others."⁵⁰

Domestic Partnership Registration

As introduced, Bill 18-482 contained a sunset provision that proposed to discontinue registration of domestic partnerships beginning in 2011.⁵¹ Having received extensive testimony as well as a number of written comments opposed to this provision, the Committee recommends preservation of domestic partnership registration.

The District of Columbia has sanctioned domestic partnerships, whether between same-sex or opposite sex couples, since 1992. The Health Care Benefits Expansion Act of 1992⁵² defined domestic partnerships for the District, and set up a registration procedure for entering into a domestic partnership. The District has since passed a number of bills that have expanded the rights and responsibilities of domestic partners.⁵³ While both gay and straight couples may

⁴⁹ Jackson v. District of Columbia Board of Elections and Ethics, No. 2009 CA 004350 B, 8 (D.C. Superior Ct. 2009) (citing Goss v. Bd. Of Educ., 373 U.S. 683, 688 (1963)).

⁵⁰ Lewis, *supra* note 7.

⁵¹ Section 3(a) of Bill 18-482 as introduced ("The ability to register a new domestic partnership in subsection (a) shall sunset as of January 1, 2011.").

⁵² D.C. Law 9-114 (codified at D.C Official Code § 32-701 *et seq.*).

⁵³ See *e.g.*, notes 17-19, *supra*.

register as domestic partners, the previous inability of gay couples to marry meant that advances in the domestic partnership law likely benefited them the most.

However, domestic partnerships have been and remain available to opposite-sex couples. In addition, two people not romantically involved, such as relatives, can register as domestic partners for such purposes as sharing benefits. Moreover, while the vast majority of registered domestic partners in the District are same-sex couples, and while it is possible, given the opportunity, that these couples will choose marriage over domestic partnerships, there are likely to be some same-sex couples that prefer domestic partnerships as an alternative to marriage.

Further, recent advancements in our domestic partnership law stand to create an anomalous situation if registration were to cease. Legislation enacted in 2008 and later strengthened in early 2009⁵⁴ recognizes domestic partnerships from other states as domestic partnerships in the District. As was pointed out in testimony during the hearing on Bill 18-482, a couple that registers as domestic partners in another jurisdiction after the sunset provision would be recognized as domestic partners in the District even though two individuals in the District would be unable to protect their relationship by doing the same.⁵⁵

The Committee recognizes that it may be appropriate, at some point in the future, to modify our domestic partnership law. However, it is not necessary to evaluate discontinuing domestic partnerships at this time, nor is the current legislation the appropriate vehicle. The ability to register domestic partnerships in the District remains important. This allows those who do not wish to marry or are unable to marry to provide legal protection to their relationship. As domestic partnerships apply equally to same-sex and opposite-sex couples, as well as to non-sexual relationships, the Committee believes that preserving the right to register is necessary.

Retaining the domestic partnership option at the same time the District is recognizing the ability of same-sex couples to marry does not dilute the statement made by this legislation that same-sex couples are equal to opposite-sex couples.

Conclusion

By adopting Bill 18-482, as revised in the Committee Print, the Council will advance several compelling needs: furthering the basic civil right of individuals to marry, enabling religious practice for those faiths wanting to celebrate same-sex marriage, and promoting

⁵⁴ See section 30(c) of Bill 17-135, *supra* note 18 (“Relationships established in accordance with the laws of other jurisdictions that are substantially similar to domestic partnerships established by this act, as certified by the Mayor, shall be recognized as domestic partnerships in the District.”); and section 4 of Bill 18-66, *supra* note 19 (revising language authorizing the Mayor to recognize relationships from other jurisdictions substantially similar to domestic partnerships to make recognition automatic).

⁵⁵ Bill 18-482, *Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009, at 4 (written testimony of Nancy Polikoff, Professor of Law, American University Washington College of Law).

stability in familial relationships currently denied the legal protections of marriage. At the same time, the legislation provides exemptions to protect those faiths which disapprove of same-sex marriage.

The government owes a duty to its citizens to be an advocate and protector of their rights. This government has, for too long, breached this sacred trust by permitting -- against the very laws it has passed to prevent such inequity -- the continued discrimination of gays and lesbians with regard to the right to marry and enjoy all the rights and privileges appertaining thereto. As our nation's capital, the seat of democracy, the District of Columbia should be better. Consider the comments of one witness on why he deserved the right to be married:

“[W]hen I think about Washington DC, its monuments and its people, the one thing that stands out more than anything else is the offer of promise. Promise of what we as Americans can and should be and the promise that the pursuit of happiness is not an ideal that is granted to only some of us, but is universal in its application.”⁵⁶

The District of Columbia should live up to that promise; it should stand as a beacon for freedom and equality for all. “Grave inequalities make for gross injustice, the sort of which no culture of compassion dare tolerate.”⁵⁷ Bill 18-482, the Religious Freedom and Civil Marriage Equality Amendment Act of 2009, brings progress to this ideal by ensuring that marriage, a basic civil right, a fundamental human right, is accessible to all.

II. LEGISLATIVE CHRONOLOGY

- September 12, 2008 Effective date of D.C. Law 17-231, the “Omnibus Domestic Partnership Equality Act of 2009,” which authorized the Mayor to recognize same-sex relationships from other jurisdictions in the District of Columbia.
- July 7, 2009 Effective date of D.C. Law 18-9, the “Jury and Marriage Amendment Act of 2009,” which recognizes marriages legally entered into in another jurisdiction by two persons of the same sex as marriages in the District of Columbia.
- October 6, 2009 Bill 18-482, the “Religious Freedom and Civil Marriage Equality Amendment Act of 2009,” is introduced by Councilmembers Bowser, K. Brown, M. Brown, Catania, Cheh, Evans, Graham, Gray, Mendelson, and Wells, and is referred to the Committee on Public Safety and the Judiciary.
- October 9, 2009 Notice of a Public Hearing is published in the *D.C. Register*.

⁵⁶ *Bill 18-482, Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009 (written testimony of Tony Wagner, Regional Field Director, Human Rights Campaign) (quoting from letter written by his mother regarding the recognition of same-sex marriage).

⁵⁷ Abernathy, *supra* note 30.

- October 16, 2009 Notice of Intent to act on Bill 18-482 is published in the *D.C. Register*.
- October 26, 2009 The Committee on Public Safety and the Judiciary holds a public hearing on Bill 18-482.
- November 2, 2009 The Committee on Public Safety and the Judiciary holds a continuation of the October 26, 2009 public hearing on Bill 18-482.
- November 10, 2009 The Committee on Public Safety and the Judiciary marks-up Bill 18-482.

III. POSITION OF THE EXECUTIVE

The Executive Office of the Mayor provided no witness to testify on Bill 18-482 at the October 26th hearing or November 2nd continuation, nor provided any comments on this legislation.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The following Advisory Neighborhood Commissions adopted resolutions regarding Bill 18-482. Copies of the resolutions are attached to this report.

Advisory Neighborhood Commission 1C approved a resolution on June 3, 2009 in support of legislation recognizing the right of same-sex couples to marry in the District of Columbia.

Advisory Neighborhood Commission 2A approved a resolution on October 21, 2009 in support of legislation recognizing the right of same-sex couples to marry in the District of Columbia.

Advisory Neighborhood Commission 2B approved a resolution on October 14, 2009 in support of legislation recognizing the right of same-sex couples to marry in the District of Columbia.

Advisory Neighborhood Commission 3B approved a resolution on October 8, 2009 in support of Bill 18-482.

Advisory Neighborhood Commission 3C approved a resolution on September 21, 2009 in support of legislation recognizing the right of same-sex couples to marry in the District of Columbia.

Advisory Neighborhood Commission 3E approved a resolution on May 14, 2009 in support of legislation recognizing the right of same-sex couples to marry in the District of Columbia.

Advisory Neighborhood Commission 5C approved a resolution on October 20, 2009 in support of Bill 18-482.

Advisory Neighborhood Commission 6D approved a resolution on October 19, 2009 in support of Bill 18-482.

The essence of the issues and concerns raised by each of the Advisory Neighborhood Commissions in their recommendations are addressed in the “Background and Need” section of this report.

V. SUMMARY OF TESTIMONY

The Committee on Public Safety and the Judiciary held a public hearing on Bill 18-482 on Monday, October 26, 2009. Due to the large number of witnesses (269) that registered to testify on this legislation, the Committee held a continuation of the hearing on Monday, November 2, 2009. Over the course of these two days, the Committee heard testimony from 219 witnesses, totaling nearly 17 hours of testimony. A list of witnesses who testified on either date is attached to this report. A copy of all testimony received before the record closed on November 9, 2009 -- both written statements received from those who testified as well as comments submitted by individuals and organizations seeking to weigh in on the proposed legislation -- has been filed as part of the official record for Bill 18-482 with the Legislative Services Division of the Council of the District of Columbia.

The testimony received, whether written or presented orally, elucidates how the issue of same-sex marriage evokes strong emotions from both proponents and opponents.

The overwhelming majority of testimony received by the Committee was in favor of Bill 18-482. Witnesses from organizations and religious institutions as well as individual witnesses pressed that fundamental fairness required the Council to act promptly on this legislation. Several discussed current inequities in the law for same-sex relationships couples and for protecting the families of same-sex couples. Testimony was received from same-sex couples seeking equal access to the rights and responsibilities of their opposite-sex counterparts, as well as from straight family members and friends imploring the Council to enact marriage equality.

The Committee also received testimony from individuals, organizations, and religious institutions opposed to the recognition of same-sex marriage as contemplated in Bill 18-482. Many individuals testified that the bill is a redefinition of marriage in contradiction of moral or religious doctrine. Religious organizations also expressed concern about the lack of protection afforded under this legislation for religious freedom. Some argued that the bill imposes beliefs

or practice on all faiths, even those disapproving of same-sex marriage. Others argued that to allow same-sex marriage would destroy family structure in our society. Those opposed to the legislation urged the Council to require an initiative on the issue to permit voters to decide whether same-sex marriage would be recognized in the District.

In addition to the large amount of oral testimony presented during two days of hearings on Bill 18-482, the Committee has also received and reviewed extensive written comments both in support of and in opposition to the legislation.

VI. IMPACT ON EXISTING LAW

Bill 18-482 amends Chapter 4 of Title 46 to clarify that marriage is the legally recognized union of two persons in the District of Columbia, and that this cannot be denied because of gender or sexual orientation. Although currently not prohibited by District law, the provisions of this legislation affirmatively provide for same-sex couples to marry in the District.⁵⁸ This legislation also incorporates language into D.C. Code § 46-406 ensuring that no individual of any religious denomination would be required to perform any solemnization or celebration of a marriage in violation of his or her religious beliefs. Likewise, Bill 18-482 absolves from liability in a civil claim or a cause of action any religious organization, association, or society, or a nonprofit organization which is operated, supervised, or controlled by or in conjunction with such an entity, for refusing to provide services, accommodations, facilities, or goods related to the solemnization or celebration of a same-sex marriage. Further, a religious entity is not liable for refusing to provide services, accommodations, facilities, or goods for the promotion of same-sex marriage through religious programs, religious counseling, religious courses, or religious retreats.

The legislation also amends D.C. Code § 32-702, pertaining to domestic partnerships, to clarify that domestic partners may marry, and to provide that domestic partners who have registered in the District of Columbia (as opposed to same-sex relationships from other jurisdictions recognized as domestic partnerships pursuant to D.C. Code § 32-702(i) without having to register) will not be charged a marriage license fee. Such domestic partners would have already been charged a fee for registration of their domestic partnership in the District.

VII. FISCAL IMPACT

The attached November 2, 2009 Fiscal Impact Statement from the Chief Financial Officer states that funds are sufficient to implement the provisions of Bill 18-482. The Chief Financial Officer notes that allowing couples of the same-sex to marry would have no cost to the District of Columbia. The Committee believes, however, that the legislation will have a positive

⁵⁸ As noted elsewhere in this report, the Committee believes same-sex marriage is already permitted under District law.

fiscal impact in two ways. First, the legislation makes the District a more attractive and tolerant place for lesbian, gay, bisexual, and transgender couples to live, thereby increasing economic activity. Second, by permitting additional marriage ceremonies (and related receptions) to take place in the District, the legislation will generate corresponding tax revenue.⁵⁹

VIII. SECTION-BY-SECTION ANALYSIS

Section 1 states the short title of Bill 18-482.

Section 2 amends Chapter Forty-Three of An Act To establish a code of law for the District of Columbia (31 Stat. 1391; D.C. Official Code § 46-401 *passim*) as follows:

Subsection (a) re-designates the existing D.C. Code § 46-401 as § 46-401.01 to permit the provision inserted by subsection (b) to be the lead section in the chapter.

Subsection (b) inserts a new section defining marriage in District law as the legally recognized union of two persons. In so doing, this definition clarifies that marriage cannot be denied because of the gender or sexual orientation of the two persons seeking to marry. District law currently does not specify the gender of the marrying parties, and gender-specific terms have been methodically replaced, through earlier legislation, throughout the Code with gender-neutral terms.

As has been discussed elsewhere in this report, there is no provision in District law that currently prevents the recognition of same-sex marriage. This provision clarifies, then, that same-sex couples may marry in the District of Columbia. The intent of this legislation is to overrule the decision in *Dean v. District of Columbia*.⁶⁰ Further, in enacting this provision the intent is also to clarify that restricting marriages to opposite-sex couples is a violation of the Human Rights Act of 1977 (HRA)⁶¹ as such restriction is discriminatory on the basis of gender and sexual orientation.

The only marriages expressly prohibited by District law are those marriages enumerated in D.C. Code § 46-401 (section 1283) and D.C. Code § 46-403 (section 1285). Marriages under the former provision are void without being so decreed (*void ab*

⁵⁹ A 2004 report of the Congressional Budget Office (CBO) estimated that universal recognition of same-sex marriage in the United States would have a *positive* budgetary impact. Accounting for over 1,100 statutory provisions where marital status affects benefits, rights, or privileges, the CBO estimated that legalization of same-sex marriage would increase federal tax revenues by approximately \$400 million a year, initially, with a corresponding outlay in federal payments of less than \$50 million a year. On the whole, the CBO estimated that recognition of same-sex marriage would provide a slight improvement of less than \$1 billion in each of the succeeding 10 years. Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriage* (June 21, 2004), available at <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf> (last visited Nov. 8, 2009).

⁶⁰ *Dean*, *supra* 23.

⁶¹ D.C. Law 2-38; D.C. Official Code § 2-1401.01 *et seq.* (2007 Repl.).

initio); marriages under the latter provision are voidable. A marriage may be declared null and void by judicial decree as provided for by D.C. § 46-402 (section 1284), or through proceedings to annul the marriage based on marriage participants who lack the requisite ability to consent (thereby rendering the marriage illegal) as provided for by D.C. Code § 46-404 (section 1286).

Section 2(b) of Bill 18-482 applies to the ability to enter into a marriage in the District of Columbia. The District already recognizes marriages entered into in other jurisdictions, subject to the following Code provisions. D.C. Code § 46-405 (section 1287) is limited to determining the legality of a marriage entered into in another jurisdiction by two persons domiciled in the District.⁶² This section does not govern marriages entered into by two persons married in another jurisdiction who subsequently move to the District. It is intended to prevent District residents from circumventing the requirements of D.C. Code § 46-401 and D.C. Code § 46-402. The recently inserted D.C. Code § 46-405.01 (section 1287a),⁶³ was added for the purpose of clarifying that a same-sex marriage validly entered into in another jurisdiction – even if between two residents of the District – would be recognized as a marriage in the District.

Subsection (b) affirmatively states that the marriage of any two persons entered into in the District is legal -- including same-sex marriages -- except those that are illegal under D.C. Code § 46-401 and § 46-403 (which, as stated earlier, does not prohibit same-sex marriages). Subsection (b) also inserts a provisions requiring language to be construed as gender-neutral where necessary to implement the rights and responsibilities relating to the marital or familial relationships.

Subsection (c) makes a conforming amendment within D.C. Code § 46-405.01.

Subsection (d) inserts three provisions within D.C. Code § 46-406 in order to ensure the protection of religious freedom as it pertains to the solemnization, celebration, or promotion of marriage.

The first provision (new subsection (c)) ensures that no religious official of any denomination -- be they priest, minister, imam, rabbi, etc. -- nor any other official of any religious society who is authorized to celebrate marriages shall be required to solemnize or celebrate marriages in violation of his or her religious beliefs. In referring to a minister of any religious society, used elsewhere in the existing text of this section, it is the intent to encompass religious leaders regardless of denomination. As introduced, this subsection included language at the end regarding the free exercise of religion guaranteed by the First Amendment to the U.S. Constitution. This language was removed as

⁶² Under D.C. Code § 46-404, a marriage entered into in another jurisdiction by two persons domiciled in the District of Columbia is a legal marriage in the District of Columbia if it complies with D.C. Code § 46-401 (section 1283) and D.C. Code 46-403 (section 1285).

⁶³ D.C. Law 18-9, *supra* note 21. This legislation was adopted by the Council on May 6, 2009, and became effective July 7, 2009. The section renumbering is affected by Bill 18-482.

unnecessary as well as to prevent any interpretation that such language was intended to qualify the preceding language. As amended, this provision makes clear there is no intention or desire to force any religious leader to perform any marriage.

The second provision (new subsection (d)) affirmatively states that a religious society has exclusive control over its own religious or theological doctrine, including beliefs over who may marry within that religious society's faith. As introduced, this subsection included language at the end regarding the free exercise of religion guaranteed by the First Amendment to the U.S. Constitution. This language was removed as unnecessary as well as to prevent any interpretation that such language was intended to qualify the preceding language. As amended, this provision makes clear there is no intention or desire to interfere with the how marriage is viewed under the belief system of any religious society.

The third provision (new subsection (e)) provides that, notwithstanding any other provision of law, a religious society (or a nonprofit organization which is operated, supervised, or controlled by or in conjunction with a religious society) is not required to provide services, accommodations, facilities or goods for the purpose of the solemnization or celebration of same-sex marriage. The Human Rights Act of 1977 (HRA) currently prohibits discrimination based on gender or sexual orientation. Absent this provision, religious leaders and religious societies might be required to take part in the solemnization or celebration of same-sex marriages. This provision is recognition that some religious institutions are opposed to same-sex marriage. This provision also exempts from liability any of the above referenced entities refusal to promote same-sex marriage. The term "promotion" is defined in this section to mean the promotion of marriage through religious programs, religious counseling, religious courses, or religious retreats.

As introduced, new subsection (e) included language that excluded an entity described in that section from liability "unless the entity makes such services, accommodations, or goods available for purchase, rental, or use to members of the general public."⁶⁴ The Committee has removed this language (in both instances where it appeared) after considerable comment from both secular and non-secular organizations. Including this language might have had the undesirable impact of religious institutions closing their spaces to community groups and organizations, as there would otherwise be civil liability stemming from any refusal to solemnize or celebrate a same-sex marriage.

New subsection (e) is intended to exempt the type of entity named from a civil claim or cause of action for the solemnization, celebration, or promotion (as defined) of same-sex marriage that would otherwise be a violation of the HRA. This exemption from liability does not extend to discrimination that extends tangentially to the recognition of same-sex marriage. Thus, a religious institution is not exempt from liability if, for

⁶⁴ Bill 18-482 as introduced.

example, it denies health care benefits to the same-sex spouse of an employee. While the legislation permits religious institutions to determine, according to their religious beliefs, who may marry according to the tenets of that religion, it is the intent to not permit -- consistent with our laws -- discrimination based on gender, sexual orientation, or marital status.

For purposes of all three subsections, the terms “solemnization” and “celebration” have similar meanings. Both terms are used in D.C. Code § 46-406(b). In using both terms the intended meaning is to celebrate, perform, or solemnize with reverence or veneration in a ceremony to establish the marriage by an officiant before witnesses. Further, while the legislation as introduced referred to a “religious organization, association or society,”⁶⁵ the Committee print has shortened this to “religious society.” Both “religious” and “society” are defined terms within D.C. Code § 46-406. “Religious society” is intended to encompass religious organizations, religious associations, and religious societies, as originally intended when this law was adopted in 1901.

Section 3 amends section 3 of the Health Care Benefits Expansion Act of 1992 (D.C. Law 9-114; D.C. Official Code § 32-702), governing the registration and termination procedures for domestic partnerships, as follows:

Subsection (a) amends existing language providing for the automatic termination of a domestic partnership when domestic partners marry one another, inserting that the termination is “by operation of law” and clarifying that the termination occurs upon the certification of marriage. This precludes a couple from being both married and in a domestic partnership simultaneously.

Subsection (b) provides that domestic partners who have registered in the District, and so have paid the fee for registration, shall not be required to pay an additional fee for a marriage license if they seek to convert their domestic partnership to a marriage. As the District has been slow to affirmatively permit same-sex couples to marry, it would be unfair to require these couples to pay for a marriage license fee when, had the choice been available at the time they registered their domestic partnership, they would have chosen marriage. The registration fee for a domestic partnership (\$35) is identical to the fee for a marriage license.

Section 4 makes a conforming amendment within D.C. Code § 16-903.

Section 5 adopts the Fiscal Impact Statement.

Section 6 establishes the effective date by stating the standard 30-day Congressional review language.

⁶⁵ *Id.*

IX. COMMITTEE ACTION

On November 10, 2009, the Committee on Public Safety and the Judiciary met to consider Bill 18-482, the "Religious Freedom and Civil Marriage Equality Amendment Act of 2009." The meeting was called to order at 1:38 p.m., and Bill 18-482 was the fourth item on the agenda. After ascertaining a quorum (Chairman Mendelson and Councilmembers Alexander, Bowser, Cheh, and Evans present), Chairman Mendelson moved the print with leave for staff to make technical changes. Councilmember Alexander moved an amendment to provide individuals with the same protections as religious institutions with regard to the solemnization, celebration, or promotion of same-sex marriages. After an opportunity for discussion, the vote on the amendment failed one to four (Councilmember Alexander voting aye, Chairman Mendelson and Councilmembers Bowser, Cheh, and Evans voting nay). Councilmembers Evans, Cheh, and Bowser each made a statement in support of Bill 18-482 as reflected in the print. Chairman Mendelson read a statement from Councilmember Catania supporting the committee print and report into the record. Councilmember Alexander made a statement that she would not be supporting the legislation. Following these statements the vote on the print passed four to one (Chairman Mendelson and Councilmembers Bowser, Cheh, and Evans voting aye, Councilmember Alexander voting nay). Chairman Mendelson then moved the report with leave for staff to make technical and editorial changes. After the opportunity for discussion, the vote on the report passed four to one (Chairman Mendelson and Councilmembers Bowser, Cheh, and Evans voting aye, Councilmember Alexander voting nay). The meeting adjourned at 2:03 p.m.

X. ATTACHMENTS

1. Bill 18-482 as introduced.
2. List of witnesses from the October 26, 2009 public hearing and the November 2, 2009 continuation on Bill 18-482.
3. Resolutions of Advisory Neighborhood Commissions regarding Bill 18-482.
4. Fiscal Impact Statement.
4. Committee Print for Bill 18-482.