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**LEGISLATIVE TESTIMONY**

TO: Joint Committee on the Judiciary  
FROM: Daniel Avila, Esq., Assoc. Dir. For Public Policy  
RE: Transcription of Hearing Remarks Favoring H. 4617 concerning Marriage  
DATE: April 11, 2006

Mr. Chairman, I'll start. I'm Dan Avila, Associate Director for Policy & Research for the Massachusetts Catholic Conference and the four bishops of the Catholic Church in Massachusetts. We support the proposed amendment.

I'm going to put on my legal hat to cover 3 issues.

First of all, I'll discuss the ramifications of Article 48 with respect to the duty of the legislature to review proposed citizen initiated constitutional amendments.

Secondly, I'll look at the amendment itself and some of its characteristics briefly—there will be testimony following mine more concrete and specific.

Third, I'll look at an issue which has come up before this legislature regarding the constitutionality of the proposal before this committee.

Let me take the first point. This committee—and the legislature—is not a rubber stamp committee according to Article 48 of the state constitution. However, Article 48 has a specific aim which the SJC articulated quite well in its 1976 ruling in *Buckley v. Secretary of State* and which I quote:

[Article 48] created a people's process. It presented to the people the direct opportunity to enact statutes [and constitutional amendments] regardless of legislative opposition. It projected a means by which the people could move forward on measures which they deemed necessary and desirable without the danger of their will being thwarted by legislative action. As Mr. Joseph Walker of Brookline stated in the Constitutional Convention [approving Article 48], "The principle of the initiative and referendum in its purity means that the people of this Commonwealth may have such laws and may have such a Constitution as they see fit themselves to adopt."

You are not a rubber stamp. However, with respect to the aims of the Article 48 review—that is, your responsibility to review proposed constitutional amendments, I submit that unless this amendment is so far out of the mainstream or unless it raises serious questions of a constitutional nature, then your role is one of letting this go forward to the people. It is for the people to debate the many questions that have been

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and will be raised about the amendment's substantive nature—whether the amendment creates good or bad policy, this must be addressed by the people.

My second point—I'll be very brief here. The proposed amendment seeks to reaffirm the definition of marriage as the union between a man and a woman. You have heard and will continue to hear the many policy arguments in favor of the amendment so I will pass along to my third point.

The third point—Is this amendment constitutional under the 14<sup>th</sup> Amendment of the United States Constitution? It would create two groups—the group of same-sex couples who have already obtained their licenses—those licenses would not be touched by the amendment—and the second group of those same-sex couples who have not yet obtained a license before 2008. The argument is that this is discrimination, unjustified discrimination, that allows the marriage licenses already in existence to continue while barring prospective couples from obtaining licenses after 2008.

The proposed amendment is similar, if not identical to, many kinds of laws and other constitutional amendments that simply create gradual reform. The United States Supreme Court has upheld this approach, most specifically in the *New Orleans v. Duke* case in 1976, which dealt with a New Orleans licensing scheme allowing licensed vendors to continue to operate if they had eight years experience, while from a point going forward new vendors could not apply for a license.

It was argued that this was unjust discrimination and arbitrary. If in fact the goal of the city was to clean up, if you will, the French Quarter then why allow existing licensed vendors to remain?

A similar argument is being made with respect to the constitutional amendment before this committee today. If in fact it is so important to treat marriage as only between a man and a woman, and if indeed it is such a threat to allow for marriage licenses to be issued to same-sex couples, how can you then square the goals of the new amendment with the continued existence of some licenses? The United States Supreme Court said in *Duke* that the goal of gradual reform and the type of classification that's typical of gradual reform is consistent with the guarantee of equal protection.

So the federal arguments being raised against the marriage amendment, I think, will fail.

This conclusion is in line with those arguing at the national level, that is gays and lesbians and other supporters of same-sex marriage rights, to stay away from the federal courts. This indicates their negative assessment of their chances—they think that they will not stand a chance before the federal courts on a constitutional claim based on the same arguments being raised against the marriage amendment here.

The Massachusetts Catholic Conference urges the Committee to report this legislation with a favorable recommendation.