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LEGISLATIVE TESTIMONY

To: Joint Committee on the Judiciary
From: James F. Driscoll, Esq., Executive Director
Re: Senate 764/House 502, “An Act Relative to Transgender Equal Rights”
Date: June 8, 2011

The Massachusetts Catholic Conference (“Conference”) respectfully submits this testimony in opposition to Senate 764/House 502, “An Act Relative to Transgender Equal Rights.”

Summary of the Bill

- Sections 1-5 Add “transgender youth” to the title and scope of the Massachusetts Commission on Gay, and Lesbian, and Bisexual Youth (amending M.G.L. c. 3, § 67).
- Section 6 Expands the membership of the advisory board of the Massachusetts Commission Against Discrimination by requiring the inclusion of “people of diverse gender identities or expressions” (amending M.G.L. c. 6, § 56).
- Section 7 Amends the state “hate crimes” reporting statute (M.G.L. c. 22C, § 32). The bill authorizes law enforcement agencies participating in a voluntary statewide project that compiles data on crime incidents to include in their incident reports “hate crimes” motivated by prejudice against the victim’s “gender identity or expression.” The reporting statute defines “hate crime” as “any criminal act coupled with overt actions motivated by bigotry and bias,” and currently includes “racial, religious, ethnic, handicap, gender, and sexual orientation prejudice.”
- Secs 8-10 Amend various state statutes governing public schools and charter schools (M.G.L. c. 71, §§ 89(f) & (l); M.G.L. c. 76, §§ 5 & 12B(j)) by adding “gender identity or expression” as a protected status to non-discrimination requirements related to school admission and activities.
- Secs 11-14 Amend the state statute (M.G.L. c. 151B) prohibiting discrimination in employment, housing, insurance, credit, and real estate transactions. The bill adds “gender identity or expression” as a protected status to numerous non-discrimination provisions in Chapter 151B, which currently prohibits discrimination based on race, color, religious creed, national origin, sex, sexual orientation, age, ancestry and handicap. Section 7 of the bill defines “gender identity or expression” as “a gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual’s physiology or assigned sex at birth.”
- Secs 15-16 Amend the state “hate crimes” criminal statute penalizing personal or property assaults intended to intimidate the victim because of the victim’s race, color, religion, national origin, sexual orientation, or disability (M.G.L. c. 265, § 39), by adding “gender identity or expression.” The bill thus adds a category of assaults based on the victim’s gender identity or expression to a statutory scheme that, when involving status-based

intimidation, increases the maximum fine from \$1,000 to \$5,000 for assaults that do not cause bodily injury, and from \$5,000 to \$10,000 for assaults resulting in bodily injury, and allows for triple damages in assault cases causing property damage.

Secs 17-19 Amend the state statute prohibiting discrimination in places of public accommodation (M.G.L. c. 272, §§ 92A & 98) by adding “gender identity or expression” to the protected status list, which currently includes race, color, religious creed, national origin, sex, sexual orientation, deafness, blindness or any physical or mental disability, and ancestry. Thus the bill would guarantee “the full enjoyment of accommodations consistent with an individual’s gender identity or expression” in such places as public schools, rest rooms, swimming pools, bathhouses, and with limited exceptions, exercise facilities (see Section 18 of the bill). Under the current statute (M.G.L. c. 272, § 98), protection against status-based discrimination in public accommodations “is recognized and declared to be a civil right.”

Section 20 Provides that if any provision of the bill is struck down by the courts, the other provisions shall remain in effect.

Preliminary Considerations

Every individual human being possesses an inherent personal dignity that includes the right not to be subjected to violence or unjust discrimination. All violence against persons is reprehensible and deserves condemnation regardless of the motivation.¹ Differential treatment in the provision of services, accommodation or access, however, is not always objectionable. Rather, it is only arbitrary discrimination, based on prejudice that lacks any connection to principles of justice or the common good, which must be opposed.

As observed in a 1984 statement by the Roman Catholic Bishops in the Commonwealth against a bill to add sexual preference as a protected classification,

It must be remembered always that there is a necessary distinction, very often ignored, between unjust discrimination (the arbitrary limitation of human rights) and the necessary limitation placed on the exercise of human rights whenever such actions would interfere with the just rights of others and harm society. All people of good will must oppose unjust discrimination. However, there are times in our lives when each of us experiences the pain, discomfort and challenges of necessary limitations on our rights whenever there is a prudent judgment that the common good is at stake.²

Senate 764/House 502 seeks to prohibit discrimination against persons on the basis of their “gender identity” or “gender expression.” These terms are broadly defined in the bill to include all forms of “gender-related identity, appearance, expression, or behavior,” and are to be protected even when one’s asserted identity, appearance, expression or behavior is determined not to correspond to one’s biological sex.

The bill raises a critical policy question. Is it unjust or otherwise in conflict with the common good to bar individuals from qualifying for sex-specific services, accommodations or access due to their own biological sex and despite their claimed identification with the opposite biological sex?

¹ See New York State Catholic Conference, Statement on Hate Crimes Legislation (Nov. 16, 1999), http://www.nyscatholicconference.org/pages/news/show_newsDetails.asp?id=89.

² Massachusetts Catholic Conference, Statement of the Bishops (May 31, 1984), available online at <http://www.macathconf.org/Archives1984BishopsStatementSexOrientationMay31.pdf>.

The Conference submits that, based on policy-related concerns to be discussed in the next section, differential treatment that limits eligibility according to one's biological identity as male or female, and not according to one's self-identification, comports with justice and the common good. If enacted, the bill instead would violate established principles of justice contrary to the common good.³

Practical Policy Concerns

The bill would require places of public accommodation and public schools in Massachusetts to grant to a broad category of individuals access to sex-specific programs, services or places solely on the basis of one's self-assertion that he or she identifies with the qualifying sex designation. Three immediate policy concerns arise.

Destabilizing Legal Impact

First, as approvingly acknowledged by a supporter of "a right to gender self-determination," "[c]laiming that all people have a right to determine their genders destabilizes the male/female binary upon which numerous social spaces and legal rights, entitlements and documents

³ The policy issues to be addressed below are distinct from the philosophical issues also raised by the bill. The Roman Catholic Church agrees with the metaphysical proposition, informed by biblical theology, that the body and soul of the human being are united, such that one's sexual identity is rooted in one's biological identity as male or female. See Catechism of the Catholic Church, nos. 364, 365, 2332, 2333, 2393. Thus in Catholic teaching, sexual difference is considered "a reality deeply inscribed in man and woman." Congregation for the Doctrine of the Faith, Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World, no. 8 (2004). The Church regards this view of reality as normative, obliging men and women to accept their biological identity as their sexual identity. See Catechism at no. 2393 ("By creating the human being man and woman, God gives personal dignity equally to the one and the other. Each of them, man and woman, should acknowledge and accept his [and her] sexual identity."). "If the Church speaks of the nature of the human being as man and woman, and demands that this order of creation be respected, this is not some antiquated metaphysics. What is involved here is faith in the Creator and a readiness to listen to the 'language' of creation. To disregard this would be the self-destruction of man himself, and hence the destruction of God's own work. What is often expressed and understood by the term 'gender' ultimately ends up being man's attempt at self-emancipation from creation and the Creator." Pope Benedict XVI, Address To The Members Of The Roman Curia For The Traditional Exchange Of Christmas Greetings (Dec. 22, 2008). The filing of this bill in Massachusetts is part of a movement to persuade the courts and legislatures to establish what one Massachusetts author refers to as "a right to gender self-determination" that "transcends the binary" and overrides "a legal regime which vigilantly polices the brutal boundaries of male and female," and thus the legislation raises provocative philosophical questions. See Laura K. Langley, Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities, 12 Tex. J. on Civil Liberties & Civil Rights 101, 101, 103 (2006-07) (the author is identified as a Northeastern University School of Law student and graduate of Boston University). Recently the Holy See objected to a proposal at the United Nations to establish gender identity as a protected classification in international law partly on the grounds that "it takes up controversial concepts [that] imply that sexual identity is defined solely by culture and is thus susceptible to be transformed at will, according to individual desire or historical and social influences." Statement of the Holy See on the Declaration on human rights, sexual orientation and gender identity (Dec. 18, 2008). The bill before this Committee would similarly involve the General Court in the endorsement of a controversial philosophical view, as evidenced by the language in the bill referring to an "individual's assigned sex at birth," as if one's status as male or female comes into being not as the result of one's own pre-natal make-up of DNA but because of some post-natal human assignment. The Conference respectfully suggests that taking sides in this sort of philosophical debate lies beyond the legislature's competence. Policy considerations aside, the Conference opposes the bill in its entirety since all of its provisions rely on an understanding of "gender identity" that conflicts with Church and natural law teaching.

depend.”⁴ The state would have to legally accommodate the decisions of individuals to “identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities” regardless of the legal consequences.⁵

Given the destabilizing objective of the campaign for “gender self-determination,” it is not surprising that the bill now before this Committee was intentionally drafted broadly so as to permit any person for any reason to demand under state law to be identified with the particular sexual designation he or she chooses at any moment.⁶

The bill’s passage would launch the Commonwealth into a chaotically shifting legal milieu by forbidding the state from requiring an individual’s self-identification for legal purposes to comply with any time limitation, documentation, or other commitment that formalizes and stabilizes one’s individual sex designation. An individual would be legally empowered to pose as both a man and a woman at different times or at the same time, and for any length of time, however short in duration.

Violation of the Right of Privacy

Second, there remains the biological fact of opposite sex differences of a physiological nature which underpin important legal and social policies; these policies would be undercut or negated by the bill. The bill’s broad scope implicates a host of potential conflicts in a variety of areas.

For example, many sex-specific services, accommodations or places exist as a means of protecting the privacy interests of those who use them. Specifically, all individuals have the constitutionally protected right of privacy in shielding one’s body from exposure to persons of the opposite biological sex in situations involving partial or full disrobing in close quarters.⁷

⁴ Langley, *Self-Determination in a Gender Fundamentalist State*, supra note 2, at 102.

⁵ *Id.* at 104. A publication by a national transgender rights organization distributed to homeless shelters, although it recommends that males who identify themselves as female should have access to women’s shelters, acknowledges that biological females residing in homeless shelters for women may be confused and upset by biological males seeking access to the same shelter “who identify as both genders or alternate genders,” and who seek to “pass” as “a woman at night but dress[] as a male during the day.” National Gay and Lesbian Task Force Policy Institute & National Coalition for the Homeless, *Transitioning Our Shelters: A Guide to Making Homeless Shelters Safe for Transgender People* 38 (2003), <http://www.thetaskforce.org/downloads/reports/reports/TransitioningOurShelters.pdf>.

⁶ Ethan Jacobs, “Advocates, Opponents of Trans Rights Bill to Have Their Say on Beacon Hill,” *BayWindows.com*, Feb. 28, 2008, at <http://www.baywindows.com/index.php?ch=news&sc=glbt&sc2=news&sc3=&id=70904> (see comments of Laura Langley and Jennifer Levi about drafting the bill with the intent of protecting the right of even “non-transgendered-identified” persons to access single-sex settings despite being of the opposite biological sex).

⁷ See *Safford Unified School District #1 v. Redding*, 557 U.S. ___, slip op. at 8 (June 25, 2009) (Docket no. 08-479) (affirming the “reasonable societal expectations of personal privacy” where exposure of the human body is concerned and emphasizing the embarrassment and intrusiveness to children of involuntary exposure); see also *York v. Story*, 324 F. 2d 450, 455 (9th Cir. 1963), cert den. 376 U.S. 939 (1964) (“We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one’s unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”); *Fort v. Ward*, 621 F. 2d 1210, 1717 (2d Cir. 1980) (recognizing that the “interest entitled to protection concerns the involuntary viewing of private parts of the body by members of the opposite sex”); *Fisher v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1133, 1142 (4th Cir. 1982) (recognizing a “general right, constitutionally protected, not to be subjected by state action to involuntary exposure in a state of nakedness to members of the opposite sex”); *Cumby v. Meachum*, 684 F. 2d 712, 714 (10th Cir. 1982) (finding that the constitutional right of privacy is violated by state policies that result in involuntary exposure to the view of persons of the opposite sex of such personal activities “as undressing, using toilet facilities, or showering”); *Everson v.*

The bill interferes with this fundamental right by expressly granting access to all individuals of one biological sex (regardless of whether they have undergone sex reassignment surgery, or are otherwise diagnosed as gender-dysphoric)⁸ into settings designated for exclusive use by members of the other biological sex, including in rest rooms, bathhouses, exercise facilities, shelters and public school locker rooms. See Section 18 of the bill.

Single-sex services, programs and facilities take into account the sensitive nature of having to partially or fully disrobe in front of others, an experience of invaded privacy that, when occurring in the presence of members of the opposite biological sex, increases diametrically the sense of one's personal vulnerability. Single-sex policies are designed to shield persons from having to disrobe in the presence of, or from witnessing bodily exposures by, members of the opposite biological sex. The right to privacy applies independently from the issue of security, for even the most secure areas that nonetheless allow access to persons of the opposite sex, thereby increasing the risk of unavoidable opposite-sex bodily exposure, violate the right.

In effect, the bill would require the state to elevate the interests of those, who, for whatever reason, wish to enter rest rooms and like facilities designated for persons of the opposite biological sex and where bodily exposure regularly occurs, over the fundamental, constitutionally protected privacy interests of those who desire to prevent such exposure by avoiding opposite-sex settings. Changing the law in a way that disassociates "gender identity" from biological references cannot change the reality of physiological sexual difference which forms the very basis of the privacy right at issue.⁹

The bill would require Massachusetts law to prefer the desires and interests of the person who asserts that he or she identifies with the opposite biological sex, thus taking precedence over other important interests rooted in biological facts as if those facts can be ignored or wished away.

Overbroad Remedy

As already noted, the bill seeks to vindicate the interests of a class of persons that is broadly defined. As a result, the protected class would include those individuals who already have access to services, accommodations, facilities or programs designed for use by members of their own biological sex, and yet who need not show under the bill that taking advantage of the presently

Michigan Dep't of Corrections, 391 F.3d 737, 757 (6th Cir. 2004) ("Most people 'have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating."); *Brannum v. Overton County School Bd.*, 516 F. 3d 489, 495 (6th Cir. 2008) ("Perhaps it is merely an abundance of common experience that leads inexorably to the conclusion that there must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex when not reasonably necessary for some legitimate, overriding reason, for the obverse would be repugnant to notions of human dignity and personal integrity.").

⁸ Gender dysphoria involves "persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender-role of that sex" that causes "clinically significant distress or impairment in social, occupational, or other important areas of functioning". American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* § 302.9 (4th ed., text-revised 2000).

⁹ In addition, to take another example of potential conflict, insurance policies are designed to accommodate the statistical differences in life expectancy and other actuarial factors related to each of the biological sexes. The scope of the bill raises the question of whether insurers would be forbidden to arrange insurance plans according to the insured's biological sex if the insured self-identifies with the opposite sex. Again, changing the law in a way that gives individuals the right to identify with one or the other biological sex regardless of biological realities cannot make those realities disappear.

allowed access will pose any hardship to them. The bill would grant them the right of entry to services, accommodations or programs designed for use by members of the opposite biological sex solely on the basis of their self-assertion that they happen to identify with that biological sex at the time of entry.¹⁰

The United States Supreme Court has adopted a narrower legal definition of “transsexual” persons based on medical authorities. According to the Court, a person who is to be considered transsexual is “one who has ‘[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,’ and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change.”¹¹ As one of the bill’s drafters explains, however, under the bill “[a] transgender person who identifies as a particular gender would be entitled to use bathroom, locker room and other single-sex facilities for that gender, regardless of whether or not they have had surgery or are taking hormones.”¹²

The bill therefore seeks to impose a far-reaching and unfairly skewed remedy that bears no reasonable relation to the true dimensions of any problem that might actually be at issue. If there are individuals who for medical reasons experience “clinically significant” discomfort¹³ in certain settings, the solution is not to override the privacy interests of other persons. It is a contradiction to argue that the discomfort of one group requires the granting of access to other settings that then causes the discomfort of another group, as if the discomfort of those others who rely on the privacy of single-sex settings does not count.¹⁴ The legislature is equipped to investigate the actual dimensions of the problem and to explore ways of addressing the issue of discomfort in certain places caused by medical conditions and finding solutions that respect the privacy and comfort of everyone.¹⁵ The bill fails to provide an even-handed remedy.

Interference with Conscience

A fourth category of concerns arises from the fact that the bill will create issues of conscience. For example, advocates for the bill admit that the non-discrimination mandate contained therein will interfere with and override the religious interests of faith-based providers of services and programs offered to the general public.¹⁶ A flyer produced in April 2009 and posted online by the

¹⁰ Supporters of the bill claim that under the bill entry into sex-specific avenues such as women’s gyms would be allowed only for “those transgender women who can certify their gender via established Massachusetts medical protocol.” The Truth About H.1728/S.1687, <http://www.masstpc.org/publications/legis/debunking-apr09.pdf> (noting that the document was “compiled by GLAD, MPTC and the Transgender Civil Rights Coalition”) (see response to “Myth 3”). The bill does not refer to any medical protocol or protocol requirement (nor do supporters identify the whereabouts of such a requirement) and the Conference is unaware of any state-mandated protocol existing under other state laws.

¹¹ *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (quoting American Medical Association, *Encyclopedia of Medicine* 1006 (1989)).

¹² Laura Langley, Mass. Transgender Political Coalition, as quoted in Jacobs, *supra* note 6.

¹³ See *supra* note 8.

¹⁴ See comments of Jennifer Levi as reported in Jacobs, *supra* note 6 (“discomfort should not be at the heart of the refusal to adopt non-discrimination laws”).

¹⁵ For example, the state could mandate the creation of sex-neutral accommodations identified for use by persons uncomfortable in settings with other individuals of their same biological sex.

¹⁶ One of the key statutes that the bill would amend makes no distinction between secular and religious establishments. The public accommodations law, M.G.L. c. 278, §§ 92A & 98, subjects all places of public accommodation to a non-discrimination mandate. “Public accommodation” is defined broadly to include any place “which is open to and accepts or solicits the patronage of the general public” without any further qualification that would exclude religious entities from its scope. M.G.L. c. 278, § 92A. Those churches and schools that do not limit access to their worship services or educational programs to their own adherents would have to abide by the “gender

Gays & Lesbians Advocates & Defenders, the Massachusetts Transgender Political Coalition, and the Transgender Civil Rights Coalition explains that current religious exemptions in the law are limited and thus “people of faith running commercial enterprises (like hospitals) cannot pick and choose among customers.”¹⁷ This raises the prospect that religious institutions will be forced under the bill to violate their religious principles in circumstances involving “gender identity” discrimination claims.¹⁸

Considering the impact of the bill in the medical setting is instructive. Current protocols require sensitivity to the dynamics of patient examinations in situations where the medical provider and the patient are of different biological sexes. The bill would complicate these situations by granting individuals who identify with the opposite biological sex the civil right to override those protocols, thereby posing conflicts for the exercise of individual and institutional conscience heretofore protected by the protocols.

Conclusion

Creating a new “right to gender self-determination,” as this bill would accomplish as a matter of practice, would destabilize the law, override privacy, and conflict with conscience. As a result, the bill would interfere with core interests, policies and protections that flow from considerations of justice and the common good.

Position of the Conference

On the basis of the foregoing, the Conference urges the Committee to give an unfavorable report recommending that Senate 764/House 502 ought not pass.

The Massachusetts Catholic Conference is the public policy office of the Roman Catholic Bishops in the Commonwealth, representing the Archdiocese of Boston and the Dioceses of Fall River, Springfield, and Worcester.

identity” non-discrimination mandate as described herein, such as by opening sex-specific restrooms on church or private school premises to individuals of the opposite sex who identify with the other sex, even when it conflicts with religious doctrine.

¹⁷ The Truth About H.1728/S.1687, supra note 10 (see response to “Myth 6”).

¹⁸ See, e.g., Catholic News Agency, “Catholic Hospital to Allow Transgender Surgery After Being Sued,” Mar. 3, 2008, <http://www.catholicnewsagency.com/new.php?n=11967>, detailing case of Seton Medical Center in Daly City, California where a lawsuit was filed against the Catholic hospital alleging discrimination based on the hospital’s religious-based initial refusal to allow a sex change operation to be performed in its institution.