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Hon. Marian Walsh
Massachusetts Senate
State House
Boston, MA 02133-1053

November 4, 2005

Dear Senator Walsh:

Upon receipt of your October 11, 2005, letter concerning Senate Bill 1074, the four Roman Catholic Ordinaries asked me to respond on their behalf.

You begin and end your October 11 letter by asserting that the Attorney General “already” has the authority under the charitable reporting statutes to oversee and supervise the handling of assets by religious entities.

However, as you acknowledged in an August 16, 2004 “Dear Colleague” letter, “the Attorney General’s interpretation [of the public charity statutes] is that organizations which are ‘primarily religious in purpose,’ are exempt from both the registration and filing requirements [of the charitable reporting statutes].”¹ If the state’s chief legal officer holds that religious entities should be exempted from the reporting and filing requirements, then it is difficult to see how these same entities nonetheless can be subject to far more intrusive measures authorized by the charitable reporting statutes. Such measures would include court-ordered investigations for the purpose of giving the Attorney General oversight and supervisory control over the charity’s handling of assets.²

The Attorney General’s interpretation of current law, which presumably includes his reading of constitutional guarantees, buttresses our position that your legislation would change the current law by expanding government control over religious entities, and would do so in an unconstitutional manner.

It is precisely the giving over of control to the Attorney General and the courts concerning the handling of religious assets that prompts our constitutional objections to your legislation. The

¹ “Dear Colleague” Letter from Sen. Marian Walsh at 1 n.1 (Aug. 16, 2004) citing to the Attorney General’s Guide to the Registration and Filing Requirements of the Division of Public Charities, available online at <http://www.ago.state.ma.us/filelibrary/registra.pdf>.

² See e.g. M.G.L. c. 12, § 8H. The Massachusetts Catholic Conference testimony submitted in August spells out the ramifications of applying this and similar sections to religious entities. See Edward F. Saunders, Jr., Testimony submitted to the Joint Committee on the Judiciary, Massachusetts General Court (Aug. 8, 2005).

official inquiry currently authorized under the charitable reporting statutes for secular organizations, when amended by your legislation to apply to religious entities, will entangle the government in necessarily religious questions.

For example, as you point out in your October 11 letter, such questions would include: “Is the corporation adhering to its stated purposes?”;³ Are the assets being “wasted”, “diverted” or “misapplied”?;⁴ Are the entity’s leaders “properly seeing that the charities carry out their mission?”.⁵ One can foresee disputes involving the contention that a particular ecclesiastical decision to fund a particular ministry “wastes” the religion’s resources in light of other claims of need, for example. Your direct reference to “purpose” and “mission” makes the threat of religious entanglement that much more obvious.

In addition, your October 11 letter touches on another religious concern when after referring to a policy of the Evangelical Council for Financial Accountability you state that you find it “somewhat disconcerting that a group whose membership interprets the Bible ‘literally’ have a more progressive accounting policy than the world’s oldest, and some would say foremost, Christian sect.”⁶

Such inquiries and concerns would involve the Attorney General and the courts in doctrinal debates. They would have to decide on the religious mission and purposes of the religious entity. The Bible and other religious teachings would have to be consulted. In the end, public officials would have to determine whether this parish closing or that use of church funds comports with the religion’s doctrine.

Thus, your legislation would force the government to take sides on religious questions when there is a conflict about what the mission is of a religious entity and what asset-related option best complies with that mission.

Elsewhere you have indicated your belief that in light of “the recent events with the Archdiocese [of Boston], and particularly, the closure and potential sale of income generating assets,” referring, of course, to the closing of parishes and schools, “the exemption for religious organizations does not seem to make sense.”⁷ In turn, if the Attorney General’s informed interpretation of current law is accurate, then your legislation seeks to change current law by removing existing exemptions, thereby handing to the Attorney General and the courts the power to second-guess such closings.

Again, such oversight and supervision necessarily would be based on a public official’s estimation of the Catholic Church’s mission and purpose. It is here where the constitutional guarantees concerning religion would be violated. As indicated in the U.S. Supreme Court reference you cited in your October 11 letter, state interference with religion that goes beyond “routine regulatory interaction” by involving “inquiries into religious doctrine” and “detailed

³ October 11 Letter at 2.

⁴ *Id.* at 8.

⁵ *Id.*

⁶ *Id.* at 3 n. 6.

⁷ “Dear Colleague” Letter, *supra* note 1.

monitoring and close administrative contact”⁸ indeed would “violate the nonentanglement command.”⁹ Your legislation contemplates a level of intrusion with religion that far exceeds the routine.

The Secretary of the Commonwealth provided materials at the committee hearing, ostensibly to support your legislation, that included a legal opinion from the Secretary’s staff supporting our position on the unconstitutionality of this aspect of your legislation. In a memo to the Secretary from Laurie Flynn, Legal Counsel and Director of Corporations, Kelly Kopyt, Assistant Director of Corporations, and Frances Gould, staff attorney, the Secretary was advised that “a challenge by the attorney general with regard to the discretion of a religious organization to use solicited funds for religious purposes would likely be held an impermissible intrusion into ecclesiastical authority.”¹⁰ This advice should be heeded when considering legislation that expands the role of the Attorney General and the courts vis a vis the managing of financial and other assets for religious purposes by religions.

The Massachusetts Council of Churches raised an important point about the circumstances surrounding the introduction of your legislation when it referred to the “impropriety of using the legislative arm of government to deal with a[n] internal dispute in one denomination, in this case the Roman Catholic Church.”¹¹ You have acknowledged that you filed the legislation in response to a debate over the closing of a parish in your district.¹² Others support the bill as necessary to “convert” the “institutional” Church,¹³ to provide a means for “sending the church a message,”¹⁴ to “give the church a tweak,”¹⁵ and to “restore the faith” of Catholics in their church.¹⁶

Thus the record evidences an underlying intent to target the particular practices of a particular religion at the behest of those immersed in the various internal debates about ecclesiastical governance of that religion. As John Garvey, the Dean of the Boston College Law School, noted recently, “Some Catholics are unhappy with the Church’s handling of [the clergy sexual abuse scandal and parish closings],” and your legislation “would enlist the attorney general on the side of unhappy Catholics.”¹⁷

⁸ *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 696 (1989).

⁹ “Dear Colleague” Letter, *supra* note 1.

¹⁰ Memorandum to William Francis Galvin, Secretary of the Commonwealth from Laurie Flynn et al. at 7 (Aug. 8, 2005), on file with the Joint Committee on the Judiciary, Massachusetts General Court.

¹¹ Testimony of Laura Everett, Massachusetts Council of Churches before the Joint Committee on the Judiciary, Massachusetts General Court (Aug. 8, 2005).

¹² “Dear Colleague” Letter, *supra* note 1.

¹³ See Statement of the Voice of the Faithful at <http://www.votf.org/walsh/>, avowing bill would require churches to “heed the words of St. Paul” to “[I]ive as children of light.”

¹⁴ John M. Bowen, East Longmeadow affiliate of Voice of the Faithful, quoted in Bill Zajac, *Tax Exemptions Face Challenges*, *The Republican* (Springfield), Aug. 14, 2005.

¹⁵ Testimony of Thomas P. O’Neill before the Joint Committee on the Judiciary, Massachusetts General Court (Aug. 8, 2005).

¹⁶ Testimony of Senator Jarrett Barrios before the Joint Committee on the Judiciary, Massachusetts General Court (Aug. 8, 2005).

¹⁷ John Garvey, Opinion Editorial, *No on Church Disclosure Bill*, *Boston Globe*, Aug. 11, 2005.

Yet, the government may not “lend its power to one or the other side in controversies over religious authority or dogma”¹⁸ or fail to grant religious organizations “an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”¹⁹

Your legislation would violate these constitutional duties for all of the reasons stated herein. Nothing in your October 11 letter alleviates the concerns raised in the Massachusetts Catholic Conference testimony in August.

Sincerely,

Edward F. Saunders, Jr., Esq.
Executive Director

CC:

Archbishop Sean P. O’Malley

Bishop George W. Coleman

Bishop Timothy A. McDonnell

Bishop Robert J. McManus

Senate President Robert E. Travaglini

Speaker of the House Salvatore F. DiMasi

Senate Minority Leader Brian P. Lees

House Minority Leader Bradley H. Jones

Senator Robert S. Creedon, Jr., Chair, Joint Committee on the Judiciary

Representative Eugene L. O’Flaherty, Chair, Joint Committee on the Judiciary

¹⁸ Employment Division of Oregon v. Smith, 494 U.S. 872, 877 (1990).

¹⁹ Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 107 (1952).