Before the
District of Columbia Office of Human Rights
441 4th Street NW, Suite 570N
Washington, DC 20001

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JOHN F. BANZHAF III, Complainant *

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v. *

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JOHN GARVEY, Respondent • *

C/O Catholic U, 620 Michigan Ave., N.E., D.C. 20064 *

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SUMMARY OF COMPLAINT, AND REQUEST FOR IMMEDIATE MEDIATION

By this formal legal complaint, John F. Banzhaf III, a professor of law at the George Washington University Law School who has filed more than 100 successful complaints alleging discrimination on the basis of sex, race, national origin, age, and disability with the D.C. Office of Human Rights, charges and complains against John Garvey, the newly-installed President of Catholic University, but in his individual and personal capacity, for aiding and abetting illegal discrimination on the basis of sex at Catholic University [CU] in violation of the express provisions of D.C. Human Rights Act [Act]. This complaint seeks to hold him liable in his individual and personal capacity for damages, attorney fees, and other appropriate relief and remedies.

The complaint charges that eliminating all mixed-gender dormitories on campus, and henceforth forcing students who live on campus to reside in single-sex residences, constitutes discrimination on the basis of sex since students will be assigned to dormitories solely on the basis of their sex, and many will be denied their residence of choice solely because of, and on the basis of, their sex.

The complaint charges that this discrimination cannot be justified under the "business necessity exemption" – which requires the respondent to show that, without such discrimination, it could not remain in business – because CU has had mixed-gender dormitories for more than a quarter of a century and has thrived during that time, and because the overwhelming majority of universities (including other Catholic universities) remain successful without such sex discrimination.

Binding judicial precedent makes it clear that even strongly held religious views, even where directly applicable, do not shield a university from its legal obligation not to discriminate in providing access to its facilities. In any event, here CU's long history of mixed-gender dormitories, and respondent Garvey's own published explanation for the sudden change to all sex-segregated dormitories, make it clear that the justification for the discrimination is not based upon a basic tenet of Catholic teaching. For the same reason also, Garvey cannot rely upon the Religious Freedom Restoration Act [RFRA].

Complainant respectfully requests that the Office institute the mandatory mediation process required by D.C. law at its earliest possible convenience to assure that students about to enter CU are not unlawfully discriminated against on the basis of gender in being able to pick or seek assignment to dormitories, and to limit the costs of unnecessary renovations to the dormitories apparently now already underway which would otherwise unfortunately be passed along unfairly to the students.

• **See notes at end about additional respondents, as well as additional allegations, and possible filings in other legal venues**.

Complainant John F. Banzhaf III, in support of his complaint, alleges upon information and belief as follows:

THE COMPLAINANT, INCLUDING HIS HISTORY OF SIMILAR ACTIONS

1. Complainant John F. Banzhaf III is a Professor of Law at George Washington University. In this capacity he and/or his students have filed numerous complaints with the Office of Human Rights alleging discrimination based upon sex, race, national origin, age, and disability. As a result,

1A. All of the dry cleaners engaged in the practice at the time of charging women more than men to launder shirts were required to sign settlement agreements with the Office agreeing to no longer discriminate on the basis of sex, even though they were able to prove that the higher prices were arguably justified because it often cost more to launder the shirts of smaller women.

1B. All of the hair cutters engaged in the practice at the time of charging women more than men for the same simple basic haircut were required to sign settlement agreements with the Office agreeing to no longer discriminate on the basis of sex, even though they claimed that the higher price for women was justified because it took the respondents longer to cut the hair of women.

1C. In a complaint which was brought by three women, all bars, night clubs, and similar establishments engaged in the practice at the time of charging women less for drinks and/or admission, under a promotion known as "ladies nights," were required to sign settlement agreements with the Office agreeing to no longer discriminate on the basis of sex. Here the respondents argued that the promotion benefitted women because they paid less, but also benefitted men because it attracted more women to the bar for the men to interact with. However, the desires of the women as well as those of the men did not justify sex discrimination, regardless of any alleged benefits.

1D, Both the Cosmos Club and the Metropolitan Club, which previously had been all-male "men's clubs," were forced to sign settlement agreements with the Office agreeing to stop discriminating on the basis of sex or gender in selecting and admitting members, even through they argued that being forced to admit women would interfere with the comradery of the club, stifle free speech, and violate constitutional freedom of association.

2. In a proceeding known as Banzhaf and Schwartz v. Cosmos Club, the Office upheld Banzhaf's complaint that the Cosmos Club discriminated against women, and held in a written agency ruling that, pursuant to **§ 2-1403.04(a)**, Prof. Banzhaf was authorized to file complaints against "any person or organization, whether or not an aggrieved party . . including a complaint of general discrimination, unrelated to a specific person of instance." In other words, the statute expressly authorizes him to file a complaint – in this instance of sex discrimination – even though he is not himself subject to the discrimination and/or even a member of a class subject to the discrimination.

3. Complainant Banzhaf has also been successful in other instances of sex discrimination – e.g., he filed the complaint which led to the first women being admitted to formerly all-male state-supported military academies – as well as in other legal areas; see, e.g., http://banzhaf.net/

THE RESPONDENT, AND THE CHARGE OF AIDING AND ABETTING

4. Respondent John Garvey is the incoming president of CU. In the past he has been an attorney, a professor of law, and the dean of a law school. He is charged with liability in his individual capacity.

5. In his capacity as incoming president of CU, he is in a position to very substantially influence, if not dictate or determine, many of the policies of CU, including those related to its dormitories.

6. Indeed, in an OpEd piece in the ***Wall Street Journal*** [WSJ], a copy of which is attached and hereby made a part of this complaint, respondent Garvey explained why as president he has decided to institute a new policy of completely sex-segregated dormitories, a departure from more than 25 years of practice during which CU has had multi-gender dormitories.

7. Garvey is named as a respondent because it is alleged that he violated **§ 2-1402.62** which provides: Aiding or Abetting – "It shall be an unlawful discriminatory practice for any person to aid, abet, invite, compel, or coerce the doing of any of the acts forbidden under the provisions of this chapter or to attempt to do so." In sum and substance, it is alleged that Garvey aided and abetted the decision of CU to force students into dormitories based upon their sex by using his power and influence as President of CU to make that change.

8. As the Office of Human Rights may recall, in 1993 this complainant filed a complaint entitled "Law Professor John F. Banzhaf III, Complainant v. Lisa Mundy, Senior Editor, City Paper, et. al., Respondents" against three employees of THE CITY PAPER. It charged these three individual employees with violating the Act by aiding and abetting the running of advertisements for bars which featured "ladies' rights"; a practice apparently lawful in Virginia where the bars were located, but allegedly prohibited by the Act in the District. THE CITY PAPER was not named as a respondent. After the Office declined to even consider a motion to dismiss since its rules do not provide for such motion practice, and Complainant advised the three employees of his intent to seek both damages and attorney's fees from them in their individual and personal capacities, the Respondents agreed to settle and to pay an agreed-upon amount for Complainant's attorney's fees for the preparation of the complaint and his appearance at the initial conference. The Office thereafter formally approved the settlement, including the novel application of the statute.

9. Subsequently, in Wallace v. Skadden, Arps, et al., 715 A.2d 873 (1998), the District of Columbia Court of Appeals likewise ruled that individuals could be sued and held liable for aiding and abetting actions by an entity in violation of the Act. In this case it held that partners of a law firm could be held liable for aiding and abetting discrimination by the law firm itself, and it did so for at least two separate reasons. The first is that Act's definition of "employer" includes the words "any person acting in the interest of such employer, directly or indirectly." The other and separate basis, as the court explained it, is that:

> Moreover, if Skadden, Arps unlawfully discriminated against the plaintiff as alleged, then **the partners who carried out the allegedly discriminatory acts aided and abetted the employer's discrimination, in violation of Section 1-2526.** An aider or abettor is one who "in some sort **associates himself with the venture**, . . . **participates in it** as **something he wishes to bring about**, [and] **seeks by his action**

to make it succeed." Roy v. United States, 652 A.2d 1098, 1104 (D.C. 1995) (quoting United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (Learned Hand, J.)). **Even if we were to assume that the individual partners are not employers, and thus not principals in the alleged discrimination, the complaint fairly alleges that these defendants participated in the discrimination and sought to make it succeed.**

Our Human Rights Act was designed "to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit. . . ." D.C. Code § 1-2501 (1992). "Civil rights statutes are remedial and must be generously construed." Simpson v. District of Columbia Office of Human Rights, 597 A.2d 392, 398 (D.C. 1991) (interpreting Human Rights Act). **If we were to adopt the construction of the Act urged on us by the partner-defendants, then a plaintiff could secure no relief – not even an injunction prohibiting further discrimination in the future – against an individual partner who has personally and willfully denied the plaintiff the equal employment opportunity which is the plaintiff's due under the Act. We do not believe that the Council contemplated such a result, and we therefore hold that the Skadden, Arps partners were properly joined as defendants**. [emphasis added]

10. Then, in MacIntosh v. Building Owners, [MACINTOSH II], 355 F. Supp. 2d 223 (2005), the U.S. District Court for the District of Columbia held that the director and vice president of a non-profit corporation could be sued because the Act covered individuals who acted in its interests, pursuant to D.C. Code Ann. **§ 2-1401.02(10)**, and who may have aided and abetted any of the acts forbidden under the Act, pursuant to D.C. Code Ann. § 2-1402.62.

Based on these **two aspects** of the statute, first the inclusion of "any person acting in the interests of the employer" in the definition of "employer" and **second the prohibition against aiding, abetting, inviting or coercing discrimination forbidden under the DCHRA, the D.C. Court of Appeals concluded that the partners were amenable to suit in their individual capacities for alleged violations of the DCHRA.** Id. at 889. [emphasis added]

Thus, because the law in the District of Columbia prohibits employer discrimination and provides for individual liability pursuant to the DCHRA and because therefore plaintiff's claims are not claims on which no relief can be granted, the Motions to Dismiss Count I filed by Defendants BOMA, Chamberlain, and Burton are denied.

11. Shortly thereafter, in Lance v. United Mine Workers of America, 400 F. Supp. 2d 29 (2005), another judge of the same court reached substantially the same conclusion. Judge Royce C. Lamberth began by quoting from Judge Sullivan in MacIntosh II:

In the Memorandum Opinion accompanying that Order, published at 310 F. Supp. 2d 240 [MacIntosh I], the Court misstated the current state of the law regarding individual liability under the D.C. Human Rights Act [and dismissed the plaintiff's claims against the defendants in their individual capacity]. Having since received a Motion to Reconsider from the plaintiff and the benefit of an amicus curaie

brief filed by the Metropolitan Washington Employment Lawyers Association, the Court finds that certain changes to the discussion of that issue in the March 30, 2004 Opinion are in order.

He then stated:

> In so doing, Judge Sullivan **extended the Wallace II holding beyond partners at a law firm**. See MacIntosh II, 355 F. Supp. 2d at 224. MacIntosh II **constitutes the most current and correct interpretation of the governing law** as set forth by the District of Columbia Court of Appeals, and **allows a plaintiff to maintain suit against individual supervisors in a DCHRA action**. n2 [NOTE 2:
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> Judge Sullivan, having served as a Judge on the District of Columbia Court of Appeals for years prior to his appointment to this Court, is uniquely qualified to state how the D.C. Court of Appeals will interpret the D.C. Human Rights Act." [emphasis added]

12. See also: Mitchell v. National Railroad Passenger Corp., 407 F. Supp. 2d 213 (2005):

> Green and Porter claim that they cannot be held individually liable under the DCHRA. The DCHRA states, with regard to race, age, gender and disability discrimination: It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the race, . . . sex, age, . . .[or] disability . . . of any individual: 1) By an employer. - To fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment. . . .
>
> D.C. Code Ann. § 2-1402.11(a)(1) (emphasis in original). District of Columbia and federal courts often rely upon decisions of the federal courts in Title VII, § 1981, ADEA, and ADA cases to aid in construing the DCHRA. See Chang v. Inst. for Pub.- Private P'ships, Inc., 846 A.2d 318, 324 (D.C. 2004) (ADA); Lively v. Flexible Packaging Ass'n, 830 A.2d 874, 887-88 (D.C. 2003) (Title VII); McManus v. MCI Communications Corp., 748 A.2d 949, 956 n.7 (D.C. 2000) (ADEA); Daka, Inc. v. Breiner, 711 A.2d 86, 94 (D.C. 1998) (Title VII); Villines v. United Bhd. of Carpenters & Joiners of Am., AFL-CIO, 999 F. Supp. 97, 102 n.21 (D.D.C. 1998) (§ 1981); Carney v. Am. Univ., 960 F. Supp. 436, 449 (D.D.C. 1997) (§ 1981), aff'd in part, rev'd in part on other grounds, 331 U.S. App. D.C. 416, 151 F.3d 1090 (D.C. Cir. 1998). For example, the District of Columbia Court of Appeals in DCHRA cases has adopted "'the same three-part, burden-shifting test articulated by the Supreme Court for Title VII cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)[,]'" Futrell v. Dep't of Labor Fed. Credit Union, 816 A.2d 793, 802 (D.C. 2003) (age and race claims) (quoting Hollins v. Fed. Nat'l Mortgage Ass'n, 760 A.2d 563, 571 (D.C. 2000)); RAP, Inc. v. D.C. Comm'n on Human Rights, 485 A.2d 173, 176-77 (D.C. 1984) (sex claim); followed federal cases in recognizing a cause of action for an age-based hostile work environment claim, Daka, Inc., 711 A.2d at 95; adopted federal elements of a sexual harassment

claim, Howard Univ. v. Best, 484 A.2d 958, 978 (D.C. 1984); and followed federal Title VII precedent to enforce an agreement to arbitrate employment discrimination claims. Benefits Communications Corp. v. Klieforth, 642 A.2d 1299, 1304 (D.C. 1994).

The District of Columbia Court of Appeals has consistently said, however, that it would adopt in DCHRA cases federal civil rights precedents "when appropriate," not indiscriminately. Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 889 n.31 (D.C. 1998) (quoting Klieforth, 642 A.2d at 1301); see also Arthur Young & Co. v. Sutherland, 631 A.2d 354, 371-72 (D.C. 1993) (**permitting, given the text of the DCHRA and its legislative history, punitive damages awards despite their unavailability under Title VII**, and noting that "Title VII is not the only source of the DCHRA"). And in Wallace, the court held that although individual employees cannot be held liable under Title VII**, the text and history of the DCHRA suggest no similar bar.**

The DCHRA's definition of employer is broader than Title VII's and includes "any person acting in the interest of such employer, directly or indirectly." D.C. Code Ann. §§ 2-1401.02(10). **The DCHRA also makes it unlawful to aid and abet, or to attempt, any of the discriminatory acts forbidden by the statute. Id. § 2-1402.62. These textual provisions "find[] no analogue in the federal statute."** Wallace, 715 A.2d at 889. Thus, Wallace held that law firm partners alleged to have participated in unlawful discriminatory conduct could be held liable individually. Id.; see also Lance v. United Mine Workers of Am. 1974 Pension Trust, 400 F. Supp. 2d 29, 2005 U.S. Dist. LEXIS 25164, Civil Action No. 04-746(RCL), 2005 WL 2766073, at (D.D.C. Oct. 26, 2005) (**holding individual defendants subject to suit**); MacIntosh v. Bldg. Owners & Managers Ass'n Int'l, 355 F. Supp. 2d 223, 227-228 (D.D.C. 2005) (**holding plaintiff's supervisor subject to suit**). This result was unremarkable since **the DCHRA, as a remedial statute, "must be generously construed**[,]'" Wallace, 715 A.2d at 889 (quoting Simpson V. District of Columbia Office of Human Rights, 597 A.2d 392, 398 (D.C. 1991)), and its "primary purpose [was] to eradicate all employment discrimination[.]" n35 Daka, 711 A.2d at 94. **The text and purpose of the DCHRA, and Wallace, do not suggest that it would be appropriate to follow Title VII here** and preclude a claim against individual management and supervisory employees involved in committing the allegedly discriminatory conduct. n36 Green and Porter, then, are proper defendants in plaintiff's DCHRA claim. [emphasis added]

13. In summary, it is now clear beyond any doubt whatsoever that, under the Act, persons who participated in an allegedly discriminatory action or decision may be sued and held liable in their individual and personal capacities when the victim of the alleged discrimination is an employee. This is the holding of the District of Columbia Court of Appeals, and one which has been followed by at least two U.S. District Court judges. This is also one of the grounds upon which the instant complaint, seeking to hold Garvey liable in his individual capacity, is based.

14. In addition, it appears that even when the victim's status is someone other than an employee – e.g., a student at an "educational institution," or a visitor to a "place of public accommodation" – a person who aids or abets can also be sued and held liable in their individual and personal capacities

based upon the clear language of the Act – language which was expressly relied upon as an alternative legal ground in the above decisions.

BACKGROUND AND FACTUAL ALLEGATIONS

15. Some fifty years ago, most if not virtually all universities had dormitories strictly segregated by sex. Based upon the belief that they acted in loco parentis to help safeguard the morals, ethics, and values of their students, they forced students to live in sex-segregated dormitories where they often also had curfews, strict limits on areas of the dorm to which opposite-sex students would be admitted, other rules designed to limit sexual activity (e.g., both feet on the floor, etc.), and other limitations.

16. Not coincidentally, it was also a time when books and movies were strictly censored; when most female students would be ashamed to admit losing their virginity, much less having had sex with more than one man; giving birth prior to marriage was so taboo that young women were often sent out of state to avoid the shame and stigma; young women did not have the pill or other reliable methods to control conception; hard-core pornography was not easily available; men and women could not be shown in bed together in movies even if they were married; and the conduct of women – who were expected to dress and act as "ladies" – was vastly different from that of males at the same institution.

17. At that time, and only at such a time, it might have been argued that, without such sex discrimination in the assignment of dormitories, it would have been impossible for most universities – at least those that provided dormitories for students who did not live nearby – to remain in business, since at that time parents arguably would not send or permit their children to attend a university which housed them in a dormitory with members of the opposite sex.

18. Today, however, things are very different. Over 90% all universities – including many Catholic universities like Georgetown as well as CU – have coed dormitories; i.e., dormitories which are not sex segregated. Parents and student alike obviously accept them, as evidenced by their use at most universities, because they are more in tune with the new realities related to the current roles of the two genders. Women have the contraceptive and reproductive protection of the pill; premarital sex is not only no longer taboo but is widely accepted and openly discussed; women as well as men are regarded as sexual beings and their sexual needs are widely discussed in magazines and elsewhere, if not actively encouraged; sexuality is openly shown on television, and even more widely shown in movies, on cable TV, and on the Internet where even hard-core pornography is widely and readily available for everyone to see and be influenced by.

19. Even more directly relevant, the Act [especially **§ 2-1402.21**] now protects men and women who wish to live with one another like husband and wife, but without the benefit of marriage, by guaranteeing that those providing lodging will not discriminate against them in renting apartments and other housing, even if the landlord's desire not to rent an apartment to a male-female couple who are not married is based upon deeply held religious, ethical, or moral considerations.

20. At least since 1982, CU has had mixed-gender dormitories. Indeed, of the university's current 17 residence halls and 25 modular housing units, only 6 – a tiny minority – are currently segregated by sex. See, Single-Sex Dorms Right for Catholic University, Washington Times [6/17/11]

21. Thus it is clear that neither religious doctrine/tenets/teachings/obligations, nor pressure from prospective or current students, faculty, Trustees, etc. today prohibits mixed-gender dormitories, and/or requires that all students on campus live is sex-segregated dormitories – even though many years ago that might have been the case. Prohibiting single-sex dormitories is thus clearly not a business necessity.

22. CU is a successful university, and the number of applications for admission it receives every year far exceeds the number of new students which can possibly be admitted. Thus, even if – for some totally unexpected reason – this general acceptance by parents, prospective students, etc. for mixed-gender dormitories should weaken, and the number of applications for admission were to decline somewhat as a result, CU would still continue to receive far more applicants than it has room for, and would thus be able to remain in business as a university without sex-segregating all of its dormitories..

23. Respondent recently wrote an OpEd piece for the ***Wall Street Journal*** in which he sets out reasons why universities – not just Catholic and/or religiously-based universities – should consider moving from mixed-gender dormitories to sex-segregated dormitories. In his own words:

> I want to mention two places where schools [not just Catholic or religious ones] might direct that concern, and a slightly old-fashioned remedy that will improve the practice of virtue. . . . Here is one simple step colleges [not just Catholic or religious ones] can take to reduce both binge drinking and hooking up: Go back to single-sex residences. [notes in brackets added]

24. Indeed, nowhere in this OpEd piece does Garvey suggest that his suggestion is limited to Catholic Universities. Moreover, nowhere in the piece does he even refer to the Catholic religion and/or to any of its teachings, doctrines, tenets, or commandments in any context whatsoever, much less as the reason or justification for his decision to segregate all of CU's dormitories by sex.

25. He also notes that the remedy he is proposing for pragmatic and secular reasons, not religious ones, is behind the times: a "slightly old-fashioned remedy that will improve the practice of virtue." In short, he seems to recognize that his desire to return to the sex-segregated practices common half a century ago are inconsistent with the many changes – including those described above – which have occurred in the intervening 50 plus years; changes he is powerless to counteract at CU.

26. Respondent explains that the primary reasons for moving from mixed-gender to sex-segregated housings is to protect and advance moral vision, virtue, and ethics, especially "Nicomachean Ethics," and not in compliance with – or even to advance – any element of the Catholic faith or its doctrines or teachings:

> But I believe that intellect and virtue are connected. . . . Aristotle suggests in the "Nicomachean Ethics" that the influence runs the other way. He says that if you want to listen intelligently to lectures on ethics you "must have been brought up in good habits." The goals we set for ourselves are brought into focus by our moral vision.

> "Virtue," Aristotle concludes, "makes us aim at the right mark, and practical wisdom makes us take the right means." If he is right, then [presumably all] colleges and universities should concern themselves with virtue as well as intellect.

27. In his view, the two primary reasons for discriminating on the basis of gender by having only single-sex residential housing is to reduce sex and drinking: 'Here is one simple step colleges can take to reduce both binge drinking and hooking up: Go back to single-sex residences."

28. In this connection, it should be noted that engaging in sexual intercourse is not only not illegal, but has in fact been declared to be a fundamental right, at least for adults over the age of 17. The consumption of alcoholic beverages, at least by the many college students who are over 20, is also not illegal. Thus, while neither factor prevents a university from seeking to discourage these activities, they may do so only in ways which are also lawful.

29. It is also perhaps interesting – although legally irrelevant – to note that the scholar upon whose statistics and studies Garvey primarily relied in suggesting that sex-segregated dorms might reduce the incidence of binge drinking and hookups has publicly stated that his research does not in fact support Garvey's assertions or proposed sex-segregation remedy: As NPR put it: "Garvey also cites a 2009 study that found students in co-ed dorms are twice as likely to binge drink and have multiple sexual partners. Brian Willoughby, a professor at Brigham Young University, authored the study. 'A lot of people will ask me, 'So, is your research saying we should just get rid of co-ed dorms? And I don't think that's what the research is saying' he says."
www.npr.org/2011/06/21/137303208/catholic-university-to-phase-ou ..

30. Whatever moral or ethical considerations may apply when a university seeks to discourage adults from the constitutionally protected activity of engaging in sexual intercourse, or in discouraging those permitted to lawfully drink from doing so, they do not override the clear prohibitions against discrimination so clearly set forth in the Act:

29A. [**§ 2-1401.01**] "It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination **for any reason** other than that of individual merit, including, but not limited to, discrimination by reason of race, . . . sex, . . . sexual orientation . . ." [emphasis added]

29B. [**§ 2-1402.01**]"Every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an **equal opportunity to participate in all aspects of life**, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions. [emphasis added]

THE CLEAR COMMANDS OF THE DC HUMAN RIGHTS ACT re DISCRIMINATION

31. The Act applies to and governs universities located in the District of Columbia, including those which may have a Catholic or other religious affiliation. This includes CU, which is located at 620 Michigan Ave., N.E., Washington, DC 20064, and is classified as a "educational institution."

32. In general, the Act prohibits discrimination on the basis of many factors, including sex, with only very limited exceptions, most especially where discrimination is a "business necessity."

33. Applying specifically to CU, the Act provides that [**§ 2-1402.41**] "It is an unlawful discriminatory practice, subject to the exemptions in **§ 2-1401.03(b)**, for **an educational institution**:
(1) To **deny, restrict**, or to **abridge or condition the use of**, or access to, **any of its facilities**, services, programs, or benefits of any program or activity to any person otherwise qualified, **wholly or partially**, for a discriminatory reason, based upon the actual or perceived: race . . . sex, . . .sexual orientation . . . [emphasis added]

34. To the extent that it might arguably be applicable, the Act similarly prohibits discrimination based upon factors including race, sex, and sexual orientation with regard to both housing [**§ 2-1402.21**] and public accommodations [**§ 2-1402.3**].

ONLY DISCRIMINATION, NOT DISCRIMINATION *AGAINST*, IS REQUIRED

35. It must be carefully noted that the prohibition is a very broad one, and is not limited to situations in which one group is necessarily harmed or treated less favorably than another group. Rather the statute very broadly prohibits any attempt to "restrict . . . use of, or access to" any facility or service. In other words, one group need not be discriminated ***against*** compared to another for there to be a violation – any restriction on the use of facilities based on race, sex, etc. constitutes a violation.

36. For example, if CU decided that it could reduce racial tensions, racial incidents, and even racial violence by requiring blacks to reside in all-black dormitories, and whites to reside in all-white dormitories, it would be discriminating on the basis of race even if all dormitories were somehow of equal quality, were equally good, equally desirable, etc. – an impossibility. The clear, sweeping, and comprehensive prohibitory language of the statute makes it plain that such "separate but equal" residential facilities violate the statute, just as the practice of "separate but equal" violated the Constitution when engaged in by state-supported schools, so that it would not be necessary for a complainant to show whether it was whites or blacks which were discriminated against.

37. Similarly, if CU decided to reduce tensions and misunderstandings between Jewish and Muslim students by requiring each to live in separate dormitories based solely upon their religion, it would likewise constitute discrimination prohibited by the Act, even if both dormitories were equal in every conceivable way – also an impossibility in practice.

38. The same would be true if, for the arguably laudable purpose of avoiding disputes over parking based upon religion, the university established separate segregated parking lots (e.g., Parking Lot J for Jewish Students, and Parking Lot M for Muslim Students) – even if the parking lots were equal in every conceivable way.

39. For the same reason, if CU decided that it would be better if homosexual students were required to live in dormitories restricted solely to homosexuals, and heterosexual students were likewise forced to live in dormitories of exactly the same quality and desirability but restricted solely to heterosexuals, the decision of the D.C. Court of Appeals in Gay Rights Coalition Of Georgetown University Law Center v. Georgetown University, 536 A.2d 1 (1987) [Georgetown] makes it clear that this would likewise violate the Act, regardless of the religious or other arguably praiseworthy motives of CU for mandating such segregation. "The Human Rights Act cannot depend for its enforcement on a

regulated actor's purely subjective, albeit sincere, evaluation of its own motivations. " Id at 78. See also, Jung v. George Washington University, 875 A.2d 95 at109 (2005).

40. For exactly the same reason, forcing students to live in dormitories segregated by sex constitutes discrimination under the Act, even if the dormitories for each gender were somehow to be equal in all respects. This would be no different than deciding that it would be better if students were assigned to separate math classes based solely on sex (e.g., Math For Men 101 vs. Math For Women 101) even if the two courses were identical in every possible respect, or if students were required to park their cars in single-sex parking lots which were identical in size, location, desirability, etc.

41. As is well recognized with regard to any real estate or housing situation, however, no two dormitories can ever be exactly and completely equal. Some dormitories will be older, some will have smaller rooms, some will be closer to certain locations (e.g., gymnasium or swimming pool, a particular classroom building, etc.), some will have unique features which some students will find desirable, etc. So, even if the concept of "separate but equal" were good law, it could not possibly apply to dormitories.

42. Moreover, many individual students will in fact be discriminated ***against*** under a system consisting entirely of sex-segregated dormitories. Many women who might desire to reside in a particular dormitory – because of its location on campus, its particular amenities, or other factors – will be denied the opportunity to even apply to live there, solely because of their sex.

43. Similarly , many men who might desire to reside in a particular dormitory – because of its location on campus, its particular amenities, or other factors – will be denied the opportunity to even apply to live there, again solely because of their sex. In other words, they will be discriminated against solely because of their sex – exactly what the Act prohibits.

44. When complainant charged bars with engaging in illegal sex discrimination by charging women and men different prices for drinks, the respondents argued that neither gender was discriminated against. The bars said that women were not discriminated against since they were charged less of drinks (although the female complainants argued that the practice constituted discrimination against women because it perpetuated the no-longer-true stereotype that women cannot afford to pay their own way). The bars also argued that men were not discriminated against because it was the men who benefitted from the much larger number of women who were attracted to the bar by the lower prices (although men in dozens of jurisdictions have in fact filed legal complaints against the practice which have largely been sustained). But both argument were soundly rejected, both in D.C. and elsewhere because a complainant in a sex discrimination proceeding is not required to show that any particular gender was discriminated against – only that there was discrimination based upon sex.

45. In summary, and in the precise words of the statute, any attempt by an entity such as a business or a university to "condition the use of, or access to, any of its facilities [presumably including to individual dormitories], services, programs, or benefits . . . wholly or partially, for a discriminatory reason, based upon the actual or perceived: race . . . sex, . . .sexual orientation . . ." is illegal.

46. Requiring students to park in separate parking lots, to attend separate classes, or to reside in separate dormitories, in whole or even in part based upon factors like race, religion, sexual

orientation, or sex – even if the facilities for both groups are exactly equal in every way ["separate but equal"], violates the clear prohibitions in the Act, unless the respondent can meet the very high standards of proof required under the Act to establish a "business necessity."

THE "BUSINESS NECESSITY EXCEPTION" IS OBVIOUSLY NOT APPLICABLE

47. The only possible justification for discriminating on the basis of sex is if the discrimination is absolutely required for the discriminator to remain in business. More precisely, the Act provides:

> Any practice which has a discriminatory effect and which would otherwise be prohibited by this chapter shall not be deemed unlawful if it can be established that such practice is not intentionally devised or operated to contravene the prohibitions of this chapter and can be justified by **business necessity**. Under this chapter, **a "business necessity" exception is applicable only in each individual case where it can be proved** by a respondent that, without such exception, **such business cannot be conducted** . . . [emphasis added] [**§ 2-1401.03(a)**]

48. The exception might be applicable to discrimination based upon sex, but only in an extremely limited number of situations. Some are obvious. For example, a university presumably could require its male athletes to wear an athletic cup when engaging in certain contact sports without imposing a similar requirement for women athletes, since such a rule would provide protection for males but, for anatomical reasons, be totally inapplicable and useless when applied to women. Similarly, it might perform pap tests solely for female students, and prostate exams solely on male students.

49. As another obvious example, consider that many universities provide prescriptions for pills for birth control, and to better regulate the menstrual cycle, for female students, but not for male students, thereby discriminating on the basis of sex. But such discrimination clearly falls within the business necessity exception since there are no pills suitable for males to take to prevent pregnancy, nor do male have menstrual cycles to be regulated.

50. Similarly, universities customarily provide, in their gymnasiums and swimming pools, both separate locker rooms in which students undress and change clothing, and separate group shower rooms where students shower in close proximity to one another. This sex discrimination is not absolutely dictated by biological differences, since it is physically possible for the two genders to shower and to get undressed in each others presence – unlike pap smears for men which are biologically impossible.

51. But given concerns about modesty and sexual privacy which in our society generally and customarily mandate separate shower and changing facilities for men and women, a university should easily be able to establish business necessity – arguing, and proving if necessary, that few if any students would be willing to attend if they had to shower and change in the presence of the other sex.

52. A similar justification is usually advanced for having separate male and female group restrooms. Thus, while a university could hardly justify [under business necessity] having separate restrooms for whites and blacks, Jews and Muslims, etc., it probably could meet its burden of establishing a business

necessity to have separate restrooms for men and women since, without this type of sex discrimination, few if any students would be willing to attend.

53. However, as noted previously, the same justification (business necessity exception) cannot be established for requiring sex-segregated classes, sex-segregated laboratories, sex-segregated parking lots, sex-segregated computer and printing facilities, or sex-segregated dormitories.

54. In virtually all of situations in which the complainant herein filed charges of sex discrimination with the Office of Human Rights, the respondents presented what they thought were good and valid reasons for the sex discrimination, in some cases going so far as to argue that the discrimination was dictated by business necessity. Yet, because it is so difficult to meet the strict conditions necessary to establish a business necessity, their arguments were uniformly rejected. A few examples include:
■ The Cosmos Club argued that admitting women to an all-male club would interfere with the comradery of the club, stifle free speech, and violate constitutional freedom of association. Nevertheless, the Club was ordered to admit female members.
■ The Citadel claimed that admitting women would destroy its esprit de corps and unique educational mission, lead to different physical and dress standards, and violate the university's and students' constitutional freedom of association. Yet the courts ordered women to be admitted
■ Dry cleaners were in a position to prove that, in many situations, it did in fact cost them far more to iron women's shirts than men's shirts, thus arguably justifying the price difference. But they were forced to agree to settlements prohibiting different rates for laundering shirts based upon gender.
■ Bars argued that it was OK to charge men more than women for drinks and/or admission on ladies nights because both genders benefitted: women were happy to get cheap drinks, and men were happy to have more women come into the bar to drink the cheap drinks. But bars and nightclubs in the District were forced to agree to end this gender discrimination by signing consent agreements with the Office; a result consistent with many other jurisdictions around the country.
■ Hair cutters argued that, because women tend to be fussier about their hair and therefore take longer to satisfy, it was justified to charge women more for the same simple hair cut than men. But such stereotypes were not a legal defense, and the hair cutters were forced to sign settlement agreements ending the practice.
■ The D.C. City Paper argued that the First Amendment permitted it to run ads for ladies nights in bars located outside D.C. where the practice hadn't been outlawed, but they had to cease the practice, and apologize for the ads, as a result of a settlement with the Office.

55. Since a business necessity exception can be established only in those rare instances where a respondent can show that, without the otherwise-prohibited discrimination, "such business cannot be conducted," the Office has generally regarded a showing that other similar business are conducted without the discrimination as virtually conclusive proof that business necessity can't be established.

56. For example, when the instant complainant charged dry cleaners with unlawful sex discrimination for charging women more than men to lauder shirts, and virtually all dry cleaners did in fact engage in that discriminatory practice, his most telling and conclusive evidence that the business necessity exception did not apply was a showing that a small number of dry cleaners were able to remain in business without engaging in such discrimination.

57. Similarly, when the instant complainant charged hair cutters with unlawful sex discrimination for charging women more than men for the same simple haircut, and virtually all hair cutters engaged in that discriminatory practice, his most telling and conclusive evidence that the business necessiry exception did not apply was again a showing that a small number of hair cutters were able to remain in business without engaging in such discrimination.

58. Moreover, when several bars tried to argue that holding an occasional ladies nights was essential for remaining in business, a simple showing that other similar bars remained in business without engaging in that form of sex discrimination defeated with argument for a business necessity exemption.

59. Here the evidence that the business necessity exception does not apply is much stronger, indeed overwhelming. In stark contrast to the three situations [dry cleaners, hair cuts, and ladies nights] described above, the overwhelming majority of universities – including many Catholic ones like Georgetown – not only remain in business but thrive with mixed-gender dormitories. Indeed – and the strongest possible evidence – CU itself has not only remained in business but thrived with mixed-gender dormitories for more than 25 years. Thus it cannot possible claim with a straight face that things have changed so much in the past several months that it will literally go out of business if it houses any of its incoming freshmen in mixed-gender dormitories this fall, or if it fails to provide only sex-segregated residential housing the following academic year.

60. In further support of the view that Garvey cannot possibly establish a business necessity exception, it should be noted that the statute expressly further provides that: "a 'business necessity' exception . . . **cannot** be justified by . . . the **comparative characteristics** of one group as opposed to another [or] the **stereotyped characterization** of one group as opposed to another . . ." [emphasis added] [**§ 2-1401.03(a)**]

61. Yet, as President Garvey has said in justifying this new policy, he regards women as more civilized than men – a clear stereotyped view of the genders. Garvey opined: "I would have thought that young women would have a civilizing influence on young men. . . . Young women are trying to keep up—and young men are encouraging them (maybe because it facilitates hooking up online."

62. Regardless of the validity of his suggestion that women are more civilized than men (apparently that they are less likely to want to have sex or drink), it is obviously a stereotyped characterization of one group as opposed to another – exactly the basis upon which the Act says discrimination cannot be based.

63. While there may be some tendency for women to be more "civilized" than men, it is obviously true that there is a vast overlap: some men are more "civilized' than many women (with a lower-than-average tendency to have intercourse or drink), and some women are less "civilized" than many men (with a higher-than-average tendency to have intercourse or drink).

64. Thus, it's obvious that in this instance, where the motivation is clearly based upon stereotypes, this form of sex discrimination cannot possibly be justified by the business necessity exception – as a few additional actual examples make abundantly clear.

65. In the legal proceeding involving hair cutters, the respondents sought to rely upon the stereotype that it took longer to cut women's hair than men's hair, and thus a higher price was justified. Dry cleaners argued that women were more likely than men to have shirts which did not fit on the standard pressing machine, so a high price to launder women's shirts was justified. Bars argued that the lower price for women's drinks benefitted and was accepted by men because it helped to attract more women to the bar for the men to meet. All such arguments, being legally irrelevant because they were based upon ". the comparative characteristics of one group as opposed to another [or] the stereotyped characterization of one group as opposed to another," were rejected. For similar reasons, the justifications offered by Garvey (reducing sex and drinking), however praiseworthy or however factually valid, cannot justify the sex discrimination, and override the clear commandments of the Act.

66. Moreover, in the cases of the dry cleaners, hair cutters, and bars, each could and did argue that they had engaged in the discriminatory practice for years, and feared that without it, they could not remain in business. Here, CU has had mixed-gender dormitories for more than 25 years and has managed not only to remain in business but to thrive. Thus CU cannot argue with a straight face that failure to change to a new system this summer will force it to go out of business.

67. In the cases of the dry cleaners and hair cutters, most of those engaged in each business also engaged in sex discrimination. Here, the overwhelming majority of universities in the country – including other Catholic universities like CU and nearby Georgetown – have mixed-gender dormitories and manage not only to remain in business but to thrive. Thus CU cannot reasonably argue that it alone will go out of business unless it suddenly does what virtually no other college is doing.

68. In most business situations – e.g., dry cleaners, hair cutters, bars, etc. – the entity does not have an overwhelming number of potential customers requiring it to turn away many, and therefore operates at less than full capacity. For related reasons, such businesses also usually operate on a narrow profit margin, so they could argue that a decline of only a small percentage in the number of customers might make it difficult if not impossible for them to remain in business, given their high fixed costs.

69. In sharp and stark contrast, CU each year receives far more applications for admission than it can possible accommodate, and each year it is forced to turn away many potential students, including some who are on its wait list. Thus, even if its failure to discriminate could possibly result in a substantial decline in the number of applicants – a contention which is extremely doubtful – CU would nevertheless still be able to fill all of its available spots with students and, with their tuition revenue, remain solidly and successfully in business.

THERE ARE NO APPLICABLE EXEMPTIONS FOR RELIGION, EVEN IF RELEVANT

70. Binding case law in the District of Columbia has established that even sincerely held religious beliefs, or motivations based upon religious belief – even if religious tenets were relevant, which they are not in the instant case – do not provide a shield from the rules prohibiting discrimination on the basis of race, gender, sexual orientation, and other listed factors.

71. More specifically, the District's highest court ruled that Georgetown University's refusal to provide equal access of its facilities to an organization of gay students promoting homosexuality was a violation of the act, despite the very strong teachings of the Catholic Church on this subject, and the university's expressed purpose of seeking to discourage such sexual acts. Here's how the court summarized its ruling:

> The Human Rights Act does, however, mandate that the student groups be given **equal access to any additional 'facilities** and services' triggered by that status. Georgetown's asserted **free exercise [of religion] defense does not overcome the Human Rights Act's edict** that the tangible benefits be distributed without regard to sexual orientation. [emphasis added] [536 A.2d 1 at 6]

72. Similarly, here facilities, services and other benefits of being a student, including the option to seek housing in different residential dormitories (since each has unique features and advantages) must be distributed without regard to gender.

73. It is important to note again that the court here did not prohibit simply situations in which a group is discriminated ***against***. Rather, it condemned any effort to deny equal access to facilities and services based upon any of the protected bases such as race, sex, or sexual orientation, regardless of the strong, sincere, well-known, and long-standing religious view of the Catholic Church and Georgetown University on the issue of homosexuality.

74. This case does not necessarily hold, and Complainant does not necessarily argue, that any student has a legally protected right to housing in any particular dormitory or other residence, since placement and assignment of housing may depend on many other factors such as their status (as a freshman, sophomore, junior, etc.), what type of housing they are seeking (single, double, or triple room, suite, etc.), whether they are applying with other students to room with them, and even factors such as how well they fare in a lottery (which many universities use to help insure fairness in room assignments).

75. What they do have a right to, however, is to be able to participate in the assignment process without being discriminated against solely because of factors such as race, sex, or sexual orientation.

76. In the Georgetown case, the respondent was able to show that the Catholic religion did in fact very strongly reject and condemn homosexuality, and that it had never encouraged or supported it in any way. In short, its opposition was clearly based upon basic and fundamental Catholic beliefs and doctrine. But, in sharp contrast, in the instant situation there is no basic and fundamental Catholic belief or doctrine prohibiting mixed-gender dorms. How could there be, if CU, Georgetown, and many other Catholic universities have had mixed-gender dormitories for generations

77. Moreover, there is no need to guess as to this issue, since Garvey very clearly explained the reasons behind the move to sex-segregated dormitories in his OpEd. That piece offered a number of purely secular reasons which he said applied to all universities, not just to a Catholic one. Even more telling, his OpEd did not cite to any piece of Catholic thinking, doctrine, belief, etc.

78. Fortunately, the Office need not blindly accept whatever Garvey or others might maintain now as to any possible religious motive behind the new discrimination. While it is established that the law

will not inquire into the validity, logic, or consistency of the beliefs of a religious organization, it is equally well established that it can and frequently does inquire and question whether any particular belief is sincerely held, and whether or not it is in fact the motivation behind a particular act.

79. There have been no significant changes in fundamental Catholic beliefs or requirements which could possible serve to motivate, much less require, a follower of the religion like CU or Georgetown to suddenly abandon a tradition of mixed-gender dormitories which has existed for more than 25 years, and to insist that henceforth all dormitories must be sex-segregated only – or, more specifically, that religious teachings require all freshman dormitories to be sex-segregated this fall, whereas those for sophomores and others can remain mixed-gender until the next year.

80. In short, Garvey cannot rely upon some generalized religious defense to discrimination because:
■ his published reasons for segregating CU's dorms are all secular;
■ he cited no religious reasons whatsoever for segregating the dormitories;
■ his arguments for segregation were, in his words, aimed at secular as well as religious universities;
■ no change in fundamental Catholic doctrine can be cited in support of this fundamental change;
■ Georgetown and other Catholic universities are not moved to make similar changes
■ **Georgetown** holds that even deeply held fundamental beliefs are not a valid legal defense.

RELIGIOUS EXCEPTIONS UNDER THE ACT ARE VERY LIMITED; NOT APPLICABLE

81. Notwithstanding the above very clear demonstration that the decision to sex-segregate all dormitories is not based upon a religious requirement, it should be noted that the Act does provide several very narrow limited exemptions and/or exceptions for religious institutions. For example:

A. § 2-1401.03(b) provides that "Nothing in this chapter shall be construed to bar any **religious or political organization**, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious or political organization, from **limiting employment, or admission** to or **giving preference to persons of the same religion** or political persuasion as is calculated by the organization to promote the religious or political principles for which it is established or maintained." [emphasis added]

B. § 2-1401.03(d) Nothing in this chapter shall prohibit any **religious organization**, association, or society or non-profit organization which is operated, supervised or controlled by or in conjunction with a religious organization, association or society from **limiting the sales, rental or occupancy of housing accommodations** which it owns or operates for other than a commercial **purpose to members of the same religion or organization, or from giving preference to these persons**, unless the entity restricts its membership on the basis of race, color, or national origin. [emphasis added]

C. § 2-1402.41. (3) Notwithstanding any other provision of the laws of the District of Columbia, it shall not be an unlawful discriminatory practice in the District of Columbia for **any educational institution that is affiliated with a religious organization** or closely associated with the tenets of a religious organization to deny, restrict, abridge, or condition - (A) The use of any fund, service, facility, or benefit; or (B) The granting of any endorsement, approval, or recognition, to **any person**

or persons that are organized for, or engaged in, promoting, encouraging, or condoning any homosexual act, lifestyle, orientation, or belief. [emphasis added]

82. But **A. § 2-1401.03(b)** applies only to employment or admission, and so has no application to the instant situation. Also, **C. § 2-1402.41(3)** applies only to homosexuals and/or homosexual activities, and so has no application to the instant situation.

83. On the other hand, **B. § 2-1401.03(d)** applies to the rental and occupancy of housing accommodations operated for other than a commercial purpose. However, it authorizes the owner or operator to discriminate only on the basis of religion, and not on the basis of sex, so it can provide no justification or shield for Garvey's sex discrimination at CU, even if it were – contrary to his own words and other evidence – based upon basic religious teaching.

84. Clearly the drafters of the Act recognized that, at least in some rare situations, exceptions must be made for religious institutions, and the fact that they wrote them into the statute shows that they recognized this need. However, the fact that none of the sections directly or even indirectly authorizes discrimination on the basis of sex, but rather permit discrimination only in favor of those of the same religious persuasion [A, C], and against those associated with homosexuality [B] shows that no such exemption based upon religion was intended for discrimination based upon sex, in housing or elsewhere.

85. Under the familiar canon of statutory construction known as ***expressio unius est exclusio alterius*** ("the express mention of one thing excludes all others"), listing only a small number of situations in which religious organizations are specifically authorized to discriminate very strongly if not conclusively suggests that no other exceptions were intended, or should be read into the act.

THE RELIGIOUS FREEDOM RESTORATION ACT DOES NOT PROTECT GARVEY

86. The Religious Freedom Restoration Act [RFRA], 42 U.S.C. § 2000bb et seq., prohibits the District of Columbia from substantially burdening a person's exercise of religion unless the District demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. §§ 2000bb-1(a)-(b), 2000bb-2(1)-(2). Section 2000bb-2(1)-(2) includes the District as a "covered entity." However, the RFRA is inapplicable in the instant situation.

87. As the U.S. Court of Appeals for the District of Columbia affirmed less than one month ago, the statute applies only in very limited circumstances where the challenged governmental action forces plaintiffs "to engage in conduct that their religion forbids or . . . prevents them from engaging in conduct their religion requires." Patrick Mahoney, Reverend, et al v. John Doe, 2011 U.S. App. LEXIS 12478 (June 2011).

88. The Mahoney decision was in turn based upon an earlier ruling in Henderson v. Kennedy, 253 F.3d 12 at 16 (D.C. Cir. 2001) which similarly ruled: "plaintiffs cannot claim that the regulation forces them to engage in conduct that their religion forbids or that it prevents them from engaging in conduct their religion requires. See Goodall by Goodall v. Stafford County Sch. Bd., 60 F.3d 168,

172-73 (4th Cir. 1995); Cheffer v. Reno, 55 F.3d 1517, 1522 (11th Cir. 1995); Bryant v. Gomez, 46 F.3d 948 (9th Cir. 1995) (per curiam)."

89. Of course the Catholic religion does not require universities to have only sex-segregated dormitories, nor does it require its followers to live only in dormitories which are segregated by sex. If it did, both CU and Georgetown – as well as other Catholic universities – would have been in open defiance for more than a quarter century.

90. Nor, of course, does the Catholic religion forbid mixed-gender dormitories, not does it forbid its adherents from residing in mixed-gender dormitories. If it did, Garvey would certainly have mentioned the doctrine in his OpEd explaining why he is mandating sex-segregated dormitories.

91. It would make no difference if Garvey were to suddenly and belatedly seek to claim that his decision was motivated in general by his general religious concerns about advancing more vision, virtue, and ethics, especially "Nicomachean Ethics" [as set forth in his OpEd piece], nor by a general opposition of the Catholic religion to sin – even assuming that sex between consenting adults and the consumption of alcoholic beverages is a sin.

92. In other words, the mere fact that a discriminatory act is motivated by religion does not allow the discriminator to seek the protection of RFRA: only those acts which are strictly required or strictly prohibited by the core tenets of the religion are subject to its requirements. This was made clear by the two decisions cited above.

93. In Henderson, plaintiff evangelical Christians argued that the RFRA gave them the right to sell T-shirts on the National Mall in violation of the neutral-on-its-face law which prohibited such sales. The court of appeals rejected this argument, saying:

> **Under RFRA, then, the question is: does the ban on selling t-shirts on the Mall "substantially burden" plaintiffs' exercise of their religion? The answer is clearly no. We are not aware of any religious group that has as one of its tenets** selling t-shirts on the National Mall, even if the t-shirts bear a religious message. Plaintiffs do not claim to belong to any such group, nor do they allege that selling t-shirts in that particular area of the District of Columbia is **central to the exercise of their religion.**
>
> In their identical declarations, submitted in opposition to summary judgment, Henderson and Phillips stated only that they "hold the sincere religious belief that [they] are obligated by the Great Commission to preach the good news, the gospel, of salvation through Jesus Christ to the whole world … by all available means…." With respect to t-shirts, they stated that in "obedience to [their] vocation, [they] have distributed at a price publications and t-shirts that [they have] written or designed, or containing content that conforms with [their] beliefs, because the preparation of these materials requires money; [their] vocation includes the distribution of such materials for an amount that covers the cost to create them and to enable [them] to carry out [their] vocation."
>
> **Given these representations, plaintiffs cannot claim that the regulation forces them to engage in conduct that their religion forbids or that it prevents them**

> **from engaging in conduct their religion requires**. See Goodall by Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 172-73 (4th Cir. 1995); Cheffer v. Reno, 55 F.3d 1517, 1522 (11th Cir. 1995); Bryant v. Gomez, 46 F.3d 948 (9th Cir. 1995) (per curiam). . . . [emphasis added] [Id. at 16-17]

94. The court went on to note at 16-17 that: "Nor does the regulation **"significantly inhibit or constrain conduct or expression that manifests some central tenet** of [Henderson's or Phillips's] individual beliefs." Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995). Plaintiffs have not treated selling t-shirts on the Mall as rising **to that level of significance in their religion."**

95. The same observations may be made, perhaps even more strongly, with regard to CU: since the university has had mixed-gender dorms for more than 25 years, and Garvey failed to even mention any portion of Catholic doctrine in support of his decision, it would unquestionably appear that prohibiting CU from sex-segregating all of its dormitories does not inhibit or constrain conduct that manifests some central tenet of the Catholic religion, nor one which rises to that level of significant in his religious views.

96. The plaintiffs in Henderson naturally argued for a less restrictive test, suggesting that the legal issue should be whether the governmental restriction forced "adherents of a religion to refrain from **religiously motivated conduct**." [emphasis added] However, the court strongly rejected that suggestion, noting that virtually any activity aimed at achieving any good or advancing any virtue might be said to be religiously motivated:

> One can conceive of many activities that are **not central or even important** to a religion, but **nevertheless might be religiously motivated**. **In fact it is hard to think of any conduct that could not potentially qualify as religiously motivated** by someone's lights. To make religious motivation the critical focus is, in our view, to read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement. [emphasis added] [Id. at 17]

97. Actually, the Henderson court went even further, noting that the very case upon which the Henderson plaintiffs had sought to rely for their more-inclusive definition of "substantially burdening a person's exercise of religion" [the Mack case] had in fact applied a much narrower test: one which required courts to find that the beliefs were important if not central to the religion:

> Despite the language we have quoted from the Mack opinion, see supra note 2, we do not think this is what the Seventh Circuit intended. Later in its opinion, the court of appeals indicated that under its test courts **must "separate center from periphery** in religious observances," that **only practices that are "important" (if not central) to the religion qualify**, and that the "proper and feasible question for the court is simply whether the practices in question are important to the votaries of the religion… 80 F.3d at 1179-80. [emphasis added] [Ibid.]

98. The same issue and arguments were raised again in the Mahoney case, especially since the trial judge had adopted the more inclusive sincere-religious-belief test rather than the narrower central-

tenet one: “The district court accepted Mahoney's allegation that his proposed chalking was motivated by a sincere religious belief.”

99. But the court of appeals at 19-20 firmly rejected the more including sincere-religious-belief test, and insisted upon applying the much narrower central-tenant forbidding-or-requiring standard:

> Mahoney's novel two-step legal framework **is at odds with this court's precedent**. In Henderson v. Kennedy, 253 F.3d 12, 346 U.S. App. D.C. 308 (D.C. Cir. 2001), we explained that "**to make religious motivation the critical focus is . . . to read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement."** Id. at 17. Henderson instead focused RFRA's "substantial burden" inquiry on the nexus between religious practice and religious tenet: whether the regulation at issue "force[d plaintiffs] to engage in conduct that their religion forbids or . . . prevents them from engaging in conduct their religion requires." Id. at 16. [emphasis added].

100. Indeed, the Mahoney court, like the Henderson court, pointed out that the sincere-religious-belief test – if adopted – would have expanded the reach of the statute to an almost unlimited number of activities, something far beyond what Congress had intended:

> There is an important benefit of this latter approach. In adhering to RFRA's plain text, it avoids expanding RFRA's coverage beyond what Congress intended, preventing RFRA claims from being reduced into questions of fact, proven by the credibility of the claimant. [Id. at 20]

101. Thus the law in this circuit, affirmed by the court of appeals just last month, is that the RFRA does not become applicable simply because a plaintiff might be able to show that his otherwise discriminatory conduct was religiously motivated. Rather, he must prove that he is being forbidden from doing something his religion commands, or ordered to do something that it prohibits..

102. Here, Respondent Garvey has made no religious claims whatsoever for his discriminatory conduct, relying instead upon arguments which he suggests would be equally applicable to secular universities: virtue, ethics, morality, concern about drunkenness, etc.

103. So, even if Garvey were to suddenly and belatedly claim, even sincerely, that his decision was religiously motivated, that would not override the compelling state interest the District has repeatedly expressed in preventing discrimination, and protect him under RFRA from the legal consequences of his decision to aid and abet discrimination based upon sex.

ADDITIONAL NOTES OF IMPORTANCE

104. At this time, Complainant attacks solely Garvey’s decision to have only sex-segregated housing facilities, and does not allege that maintaining several single-gender dormitories – the current situation at CU – is necessarily a violation of the Act. However, Complainant does reserve the right, and puts Respondent on notice, that he may at any time amend this complaint, or file a new and separate

complaint, alleging that having any sex-segregated dormitories at CU is illegal. Here is why the difference in approach is warranted, especially at this stage of the preceding.

105. It is clear beyond any reasonable doubt that Garvey cannot prove that, without a system in which all dormitories are segregated by sex, CU could not remain in business. Since CU has managed to remain in business and thrive for more than 25 years with mixed-gender dorms, and since most other universities – including many other Catholic ones like Georgetown – have remained in business with mixed-gender dormitories, Respondent cannot possibly show that a system of all sex-segregated dorms is necessary in order for CU to remain in business. This is the basis of the instant complaint.

106. In stark contrast, since CU – like many other universities – has always had a few sex-segregated dormitories, it could at least argue that having a few sex-segregated dorms, in addition to mixed-gender ones, is necessary for it to remain in business, and therefore are lawful under the business necessity exception to the Act. On the other hand, since mixed-gender dormitories are so widely accepted – apparently in ever growing recognition of the equality of the sexes, and that adults can live in the same building – Complainant doubts that CU or Garvey could even meet this much lower burden of proving that eliminating all single-sex dorms would lead to business failure.

107. For that reason, Complainant at this time attacks, as illegal sex discrimination, only a system in which all dormitories are segregated by sex, and does not at this time seek to establish that the presence of any CU dormitory segregated by sex necessarily violates the Act. However, he respectfully reserves the right to do so in the future in this or in another proceeding.

108. At this time, Complainant has filed a formal complaint of aiding and abetting sex discrimination in violation of the Act solely against Garvey, and not against the many others who likewise have (or are) "aiding and abetting" this discrimination within the meaning of the Act as it has been construed both by the Office, and more authoritatively by the courts. However, Complainant does reserve the right, and puts Respondent on notice, that he may at any time amend this complaint, or file a new and separate complaint, charging additional persons with aiding and abetting.

109. For example, it appears likely that investigation will show that the Board of Trustees cooperated in and/or otherwise approved the segregation plan, so that its members – especially its Chairman and Vice Chairmen – could likewise be charged as aiders and abettors. Therefore, Complainant reserves the right, and puts Respondent on notice, that he may at any time amend this complaint, or file a new and separate complaint, charging some or all of the Trustees with aiding and abetting.

110. Likewise, investigation is expected to show that CU's Academic Senate also cooperated in and/or otherwise approved the segregation plan, so that its members – and especially its leaders – could likewise be charged as aiders and abettors. Therefore Complainant reserves the right, and puts Respondent on notice, that he may at any time amend this complaint, or file a new and separate complaint, charging some or all of its faculty members with aiding and abetting.

111. Similarly, investigation is expected to show that other persons on the CU campus – including, but not limited to, the Provost, faculty who serve as representatives to the Board of Trustees, the Director of Housing Services and her staff, etc. – also cooperated in and/or otherwise approved the segregation plan, so that these persons could likewise be charged as aiders and abettors. Therefore

Complainant reserves the right, and puts Respondent on notice, that he may at any time amend this complaint, or file a new and separate complaint, also charging some or all of these persons.

112. At this time, the only action this author has taken is to file a formal legal complaint with the Office of Human Rights. However, he respectfully reserves the right, pursuant to **§ 2-1403.16** to also raise the same or related issues in one or more complaints filed in one of more courts of competent jurisdiction, against any one or more of the individuals described above.

113. The procedure described immediately above is in accordance with the Act which provides for a choice of legal remedies. While any one person may not at the same time pursue remedies in the two different forums, the statute does not preclude a person who has filed a complaint with the Office at the same time serving as counsel (or assisting other counsel) in bringing suit and raising identical issues in judicial proceedings – providing only that the named plaintiff in such court proceedings is not at the same time a complainant before the Office.

114. Indeed, Complainant was involved in just such a situation. In or about 1993, Complainant and some of his law students filed complaints arguing that the practice by car rental companies of refusing to rent to persons under the age of 26 violated the Act. Subsequently, another law student who had not joined in the original complaint, but who was part of the same student group involved in the project, filed suit in her own name with this author's assistance. Defendant Hertz argued that the same issue raised by essentially the same group could not be raised in a court while the complaints were still before the Office. But Judge John H. Suda ruled that this procedure was entirely proper, before also ruling against Hertz on the merits. See, e.g., Too Young to Rent, but Not to Sue; Hertz Pays the Price for Turning GWU Law Student Away, Washington Post [11/23/1993].

115. D.C. law mandates that all such complaints must be promptly served upon respondent(s), and that mediation – in accordance with D.C. law and the Office's regulations – be held shortly thereafter. As noted in 8. above, the Office has also taken the position that its rules do not permit motion practice at this point, and that motions to dismiss will not be acted upon prior to mandatory mediation.

Respectfully submitted,

John F. Banzhaf III, Complainant
104 N. Jackson ST., Arl., VA 22201
(703) 527-8418 john@banzhaf.net

SIGNED and sworn to before me by Complainant John F. Banzhaf III this ____ of July, 2011.

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NOTARY PUBLIC

John Garvey, Why We're Going Back to Single-Sex Dorms:

Student Housing Has Become a Hotbed of Reckless Drinking and Hooking Up

WALL STREET JOURNAL [6/12/2011

My wife and I have sent five children to college and our youngest just graduated. Like many parents, we encouraged them to study hard and spend time in a country where people don't speak English. Like all parents, we worried about the kind of people they would grow up to be.

We may have been a little unusual in thinking it was the college's responsibility to worry about that too. But I believe that intellect and virtue are connected. They influence one another. Some say the intellect is primary. If we know what is good, we will pursue it. Aristotle suggests in the "Nicomachean Ethics" that the influence runs the other way. He says that if you want to listen intelligently to lectures on ethics you "must have been brought up in good habits." The goals we set for ourselves are brought into focus by our moral vision.

"Virtue," Aristotle concludes, "makes us aim at the right mark, and practical wisdom makes us take the right means." If he is right, then colleges and universities should concern themselves with virtue as well as intellect.

I want to mention two places where schools might direct that concern, and a slightly old-fashioned remedy that will improve the practice of virtue. The two most serious ethical challenges college students face are binge drinking and the culture of hooking up.

Alcohol-related accidents are the leading cause of death for young adults aged 17-24. Students who engage in binge drinking (about two in five) are 25 times more likely to do things like miss class, fall behind in school work, engage in unplanned sexual activity, and get in trouble with the law. They also cause trouble for other students, who are subjected to physical and sexual assault, suffer property damage and interrupted sleep, and end up babysitting problem drinkers.

Hooking up is getting to be as common as drinking. Sociologist W. Bradford Wilcox, who heads the National Marriage Project at the University of Virginia, says that in various studies, 40%-64% of college students report doing it.

The effects are not all fun. Rates of depression reach 20% for young women who have had two or more sexual partners in the last year, almost double the rate for women who have had none. Sexually active young men do more poorly than abstainers in their academic work. And as we have always admonished our own children, sex on these terms is destructive of love and marriage.

Here is one simple step colleges can take to reduce both binge drinking and hooking up: Go back to single-sex residences.

I know it's countercultural. More than 90% of college housing is now co-ed. But Christopher Kaczor at Loyola Marymount points to a surprising number of studies showing that students in co-ed dorms (41.5%) report weekly binge drinking more than twice as often as students in single-sex housing (17.6%). Similarly, students in co-ed housing are more likely (55.7%) than students in single-sex dorms (36.8%) to have had a sexual partner in the last year—and more than twice as likely to have had three or more.

The point about sex is no surprise. The point about drinking is. I would have thought that young women would have a civilizing influence on young men. Yet the causal arrow seems to run the other way. Young women are trying to keep up—and young men are encouraging them (maybe because it facilitates hooking up).

Next year all freshmen at The Catholic University of America will be assigned to single-sex residence halls. The year after, we will extend the change to the sophomore halls. It will take a few years to complete the transformation.

The change will probably cost more money. There are a few architectural adjustments. We won't be able to let the ratio of men and women we admit into the freshman class vary from year to year with the size and quality of the pools. But our students will be better off.

Mr. Garvey is president of The Catholic University of America in Washington, D.C.