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June 9, 2009

BY FACSIMILE AND HAND DELIVERY

Kenneth J. McGhie, General Counsel
District of Columbia Board of Elections and Ethics
441 4th Street, N.W., Suite 250
Washington, D.C. 20001-2745

Re: Referendum on Jury and Marriage Amendment Act of 2009

Dear Mr. McGhie:

Section 16(c)(3) of the District of Columbia Election Code of 1955, effective June 7, 1979 (D.C. Law 3-1; D.C. Official Code § 1-1001.16(c)(3)), allows the Board of Elections to consult with this office to ensure that referendum measures are in the proper legislative form. In addition, you have asked if the proposed measure is the proper subject for a referendum. I have reviewed the proposed referendum for compliance with the requirements of District law, including the Initiative, Referendum, and Recall Charter Amendments Act of 1977, effective March 10, 1978 (D.C. Law 2-46; D.C. Official Code § 1-204.101 *et seq.*), the Initiative, Referendum, and Recall Procedures Act of 1979, effective June 7, 1979 (D.C. Law 3-1; D.C. Official Code § 1-1001.01 *passim*), the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; DC Official Code 1-201.01§ *et seq.*) ("Home Rule Act"), the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1401.01 et seq.) ("Human Rights Act"), and judicial interpretations of these statutes.

Based on my review of the authorities cited above, it is my opinion that as currently drafted, the proposal is not the proper subject for a referendum under District law because it would authorize, or would have the effect of authorizing, discrimination prohibited by the Human Rights Act. Because this proposal is legally objectionable, it should not be certified as the proper subject for a referendum.

DISCUSSION

On May 5, 2009, the Council of the District of Columbia approved the Jury and Marriage Amendment Act of 2009. That measure amended District of Columbia law to provide that marriages legally entered into in another jurisdiction by 2 persons of the same sex shall be recognized in the District of Columbia. The act was signed by the Mayor on May 6, 2009. (See , D.C. Act 18-70; 56 DCR 3797). It was transmitted to Congress on May 11, and is projected to become law on July 6, 2009.

According to the summary statement submitted by the proposer, the proposed measure, entitled "A Referendum Concerning the Jury and Marriage Amendment Act of 2009", would:

> Allow the voters of the District of Columbia the opportunity to decide whether the District of Columbia will recognize as valid a marriage legally entered into in another jurisdiction between 2 persons of the same sex. A "No" vote to the referendum will continue the current law of recognizing only marriage between persons of the opposite sex.

The legislative text of the Referendum asks: "Should Section 3 of the Jury and Marriage Amendment Act of 2009 be approved?" The measure then sets forth the text of section 3 of the act.

The Board's review of Intitiative and Referendum measures is governed by the Initiative, Referendum, and Recall Charter Amendments Act of 1977, effective March 10, 1978 (D.C. Law 2-46; D.C. Official Code § 1-204.101 *et seq.*) , and the Initiative, Referendum, and Recall Procedures Act of 1979, effective June 7, 1979 (D.C. Law 3-1; D.C. Official Code § 1-1001.01 *passim*) (Referendum Acts).

With certain specific exceptions, the referendum process may be used to suspend acts of the Council of the District of Columbia prior to the act becoming law, according to the provisions of section 404 of the Home Rule Act . The Referendum Acts provide that the Board shall refuse to accept a measure if the Board finds that:

> it is not a proper subject of referendum under the terms of title IV of the District of Columbia Home Rule Act, or . . . "[t]he measure authorizes, or would have the effect of authorizing, discrimination prohibited under the Human Rights Act."[1]

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[1]D.C. Official Code § 1-1001.16 (b)(1)(C). The provision prohibiting initiatives and referendums that violate the Human Rights Act was an "outgrowth of proposals by the Gay Activists Alliance." See Committee on Government Operations Staff Draft Committee Report No. 1 on Bill 2-317, the Initiative, Referendum, and Recall Procedures Act of 1978, at 11 (Council of the District of Columbia April 28, 1978). It is designed to "ensure that no initiated measure will establish an affirmative policy in favor of discrimination in this community."

The question presented under the statutory scheme is whether approval of the referendum would authorize, or have the effect of authorizing discrimination prohibited by the Human Rights Act. If it would, the Board must refuse to accept the measure.

I. THE PROPOSED MEASURE, IF APPROVED, WOULD HAVE THE EFFECT OF AUTHORIZING DISCRIMINATION PROHIBITED BY THE HUMAN RIGHTS ACT AND IS THUS AN IMPROPER SUBJECT FOR A REFERENDUM

The Human Rights Act of 1977 states that:

> It is the intent of the Council of the District of Columbia, in enacting this act, 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 . . . sex, . . ., sexual orientation, gender identity or expression . . .[2]

The Human Rights Act has been described as a broad remedial statute, to be generously construed. *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 889 (D.C. 1998); *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392, 398 (D.C. 1991). The D.C. Court of Appeals has also described the Human Rights Act as a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds." *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000) (citation and internal quotations omitted). *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 685 (D.C. Cir. 2006)

There are at least two sections of the Human Rights Act that would be violated by approval of the referendum – section 231 (D.C. Official Code § 2-1402.31)(prohibiting discrimination in public accommodations); and section 273 (D.C. Official Code § 2-1402.73)(prohibiting discrimination to limit or refuse to provide District government benefits). Any practice which has "the effect or consequence" of violating any of the provisions of the Act is deemed an unlawful discriminatory practice.[3]

Committee on Government Operations Committee Report No. 1 on Bill 2-317, the Initiative, Referendum, and Recall Procedures Act of 1978, at 10 (Council of the District of Columbia May 3, 1978). The Court of Appeals has considered two challenges brought under the provisions, rejecting one (Hessey v. Burden, 615 A.2d 562, 579 (D.C. 1992)), and deciding the other on alternate grounds, see, Committee for Voluntary Prayer v. Wimberly, 704 A.2d 1199, 1203 (D.C. 1997) (proposed initiative violated First Amendment).

[2]D.C. Official Code § 2-1401.01.

[3]D.C. Official Code § 2-1402.68.

The D.C. Court of Appeals has held that this "effects clause" of the Human Rights Act imports into the Act "the concept of disparate impact discrimination developed by the Supreme Court in *Griggs v. Duke Power Co." Gay Rights Coal. v. Georgetown Univ.*, 536 A.2d 1, 29 (D.C. 1987). Thus, it is not necessary to show discriminatory intent if the practice at issue has a discriminatory effect. *Ramirez v. District of Columbia,*, 2000 U.S. Dist. LEXIS 4161 (D.D.C. Mar. 27, 2000); *see also Gay Rights Coal. of Georgetown Univ. Law Ctr.*, 536 A.2d 1, 30 (D.C. 1987) (The effects clause of the DCHRA prohibits unintentional discrimination as well as intentional.).

Section 231 of the Human Rights Act makes it an unlawful discriminatory practice to, wholly or partially for a discriminatory reason based on the *actual or perceived*: . . . sex, . . . marital status, . . . sexual orientation, gender identity or expression:

> (1) To deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations.

Section 273 of the Human Rights Act provides that it is a violation of the Human Rights Act for the District government to:

> refuse to provide any facility, service, program, or *benefit to any individual* on the basis of an individual's actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business. (Emphasis added).[4]

There are significant rights and responsibilities that inure to married persons that are denied by failure to recognize an out-of-state marriage.[5] Thus, for the District government to deny persons the benefits flowing from marriage on the basis of their sexual orientation or gender identity or expression is contrary to the provisions of the Human Rights Act.

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[4]D.C. Official Code § 2-1402.73. Significantly, section 273 was added to the Human Rights Act after the Dean decision. See, section 2(g) of the Human Rights Amendment Act of 2002, effective October 1, 2002 (D.C. Law 14-189; 49 DCR 6523).

[5]*See, e.g.*, Marriage Law in the District of Columbia, GLAA (noting over 200 rights and responsibilities in the District, and more than 1,000 federal rights and responsibilities of civil marriage that are not available to domestic partners.)
http://www.glaa.org/archive/2004/glaamarriagereport.pdf *See also Varnum v. Brien*, 763 N.W.2d 862, 903 (Iowa 2009) (Plaintiffs identify over 200 Iowa statutes affected by civil-marriage status.).

A. By refusing to recognize a valid marriage entered into in another state by a same-sex couple when the District government would have recognized the marriage if entered into by a heterosexual couple, the District government has discriminated on the basis of sexual orientation in violation of the Human Rights Act.

In *Dean v. District of Columbia*, 653 A.2d 307, 319-20 (D.C. 1995), the D.C. Court of Appeals held that the Human Rights Act did not require the Superior Court to grant a marriage license to a same-sex couple. The matter pending before the Board is distinct from the matter considered in *Dean* . In *Dean*, the court considered whether the District could decline to create or celebrate a same-sex marriage, but did not consider the even more extraordinary action in which the government (or in this case, the electorate) breaks up an existing legal relationship, or refuses to recognize the legal right of persons to remain married solely because of their sexual orientation. This crucial distinction between a jurisdiction declining to create or celebrate a same-sex marriage and refusing to recognize marriages valid in other states has been determined by at least one other state to constitute a violation of that state's law prohibiting discrimination on the basis of sexual orientation.[6]

The salient reasoning employed in *Dean* was that although the general prohibitions of the Human Rights Act against discrimination based upon sexual orientation could apply to the refusal of the District to issue a marriage license to a same-sex couple, the court was not going to presume the Council intended to effect such a "dramatic change" in the law without an express provision in the Human Right Act reflecting that intent.

> (W)e cannot conclude that the Council ever intended to change the ordinary meaning of the word "marriage" simply by enacting the Human Rights Act. Had the Council intended to effect such a major definitional change, counter to common understanding, we would expect some mention of it in the Human Rights Act of at least in its legislative history . . . We therefor cannot conclude that the Council intended the Human Rights Act to change the fundamental definition of marriage.

Dean, 653 A.2d at 320.

Here, however, the same reasoning dictates that the general prohibitions of the Human Rights Act against discrimination based upon sexual orientation <u>should</u> apply because it <u>should not</u> be

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[6]See *Martinez v. County of Monroe*, 2008 NY Slip Op 909, 1 (N.Y. App. Div. 4th Dep't 2008), appeal dismissed 889 N.E.2d 496 (2008), in which the Supreme Court of New York, Appellate Division, distinguishes the New York case of *Hernandez v. Robles*, 7 N.Y. 3d 338 (2006) (which found no right for same sex couples to marry in New York state), and held that the refusal to recognize same sex marriages that were solemnized in other jurisdictions was a violation of the New York Human Rights Law (NY CLS Exec § 296).

presumed that the Council intended to "effect such a dramatic change" as refusing to recognize marriages that have been legally entered into and recognized by other jurisdictions without having expressly stated its intent to do so.

B. <u>District law has historically recognized marriages that are valid in the place of their celebration.</u>

Existing District law requires the recognition of marriages that were valid at their place of celebration. Since at least 1901, the District has recognized marriages valid in the state in which they were solemnized, unless the marriage was between persons domiciled in the District at the time of the marriage and the marriage would have been expressly prohibited by one of the provisions contained in D.C. Official Code § 46-401 through 46–404, or the marriage is in violation of the "strong public policy" of the District. *Hitchens v. Hitchens*, 47 F. Supp. 73, 74 (D.D.C. 1942) (validity of marriage determined by law in the state where the marriage occured); *McConnell v. McConnell*, 99 F. Supp. 493, 494 (D.D.C. 1951); *District of Columbia. Rhodes v. Rhodes*,, 68 App.D.C. 313, 96 F.2d 715 (1938); *Carr v. Varr*, D.C., 82 F.Supp. 398 (1949); *Gerardi v. Gerardi*, D.C. , 69 F.Supp. 296 (1946).[7] The District does not have a "strong public policy" against same sex marriages, because is does not have a policy at all. None of the express prohibitions in the Marriage Act apply to a same-sex marriage, and courts do not make public policy.[8]

In *Martinez*, it was alleged that a previous court decision upholding a refusal to issue a marriage license to the state's residents reflected the public policy of the state, the court reasoned:

> *Hernandez* does not articulate the public policy for which it is cited by defendants, but instead holds merely that the New York State Constitution does not *compel* recognition of same-sex marriages solemnized in New York. The Court of Appeals noted that the Legislature *may* enact legislation recognizing same-sex marriages and, in our view, the Court of Appeals thereby indicated that the recognition of plaintiff's marriage is not against the public policy of New York. It is also worth noting that, unlike the overwhelming majority of states, New York has not chosen, pursuant to the federal Defense of Marriage Act (*28 USC § 1738C*), to enact legislation denying

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[7]This is consistent with the general and apparently universally accepted rule that the validity of a marriage is to be determined by the law of the place of the celebration of the marriage, or the *lex loci contractus*. 2 Beale, Conflict of Laws, pp. 703, 704; 35 Am.Jur.,Sec. 167 et ff., p. 282.

[8]The one provision that was cited by the *Dean* court as potentially applicable has been repealed. *See*, section 2 of the Marriage Amendment Act of 2008, effective September 11, 2008 (D.C. Law 17-222; D.C. Official Code § 46-403), which eliminated a provision that made illegal "(a)ny marriage either of the parties to which shall be incapable, from physical causes, of entering into the married state."

full faith and credit to same-sex marriages validly solemnized in another state.[9]

Dean, likewise, noted that the Council could enact legislation recognizing same-sex marriages. Thus, the application of that court's reasoning to the instant matter is apparent.

In *Evans v. United States*, 862 A.2d 644 (1996), the court, applying the reasoning of *Dean*, rejected a claim that the Human Rights Act prohibited the exercise of peremptory challenges to jurors on the basis of age. The court explained that the specific statutory language permitting peremptory challenges could not be negated by general Human Rights Act language prohibiting discrimination in "public service."

> We note that there is no specific language in the DCHRA or commentary in its legislative history limiting peremptory challenges based on age or indeed, based on any characteristic prohibited in the DCHRA. Indeed, there is no mention at all regarding jury selection or peremptory challenges in the DCHRA . . . Thus, general language forbidding discrimination in "public service" is too ambiguous a mandate to be interpreted to clearly include a limitation on statutorily-granted peremptory challenges . . . We adopt the court's reasoning in Dean, that without any specific mention or reference in the language of the DCHRA or legislative history to the specific act claimed to be prohibited by the DCHRA, we cannot assume that the Council intended to cut back on the previously-existing, statutorily-permitted practice of exercising peremptory challenges on the basis of age."

Evans, 862 A.2d at 648-649.

Here, by stark contrast, the existing statutorily permitted practice in the District is that marriages legally entered into in and recognized by another state will be recognized in the District as mandated by the Full Faith and Credit Clause of the Constitution. The only District statutory provision pertaining to recognition of marriages celebrated in other jurisdictions refuses to extend this recognition only to those marriages celebrated in other jurisdictions between "persons having and retaining their domicile in the District" that would have been expressly illegal if celebrated in

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[9]The Governor subsequently issued an Executive Order to implement this decision. Following a legal challenge, the Order was upheld. *Golden v. Paterson*, 2008 NY Slip Op 28546, 1 (N.Y. Sup. Ct. 2008) ("Recognizing same sex marriages performed outside New York neither encroaches on that power, nor conflicts with [prior court] holding that New York is not required to license same sex marriages within the state."). The Attorney General of Rhode Island has also concluded that under principles of comity and full faith and credit, "Rhode Island will recognize any marriage validly performed in another sate unless it would be against the strong public policy of this state to do so." A copy of the letter may be reviewed at: http://tinyurl.com/RI-AGopinionFeb2007

the District. D.C. Official Code § 46-405.[10] There is no statutory provision in the District that expressly prohibits the celebration of same-sex marriages, and, even if there were, it would not prohibit the District from recognizing the marriages of persons of the same sex that were legally entered into and recognized by a jurisdiction that permits celebration of same-sex marriages.

Therefore, the referendum being sought here really will be putting to a vote whether this existing statutorily permitted practice of the District recognizing marriages legally entered into and recognized by another state will not apply to marriages of 2 persons of the same sex. Since there is no express statutory provision to the contrary, the general prohibition of the Human Rights Act against discrimination on the basis of sexual orientation should govern. In sum, the reasoning of *Dean*, as elucidated by *Evans*, dictates that this undoing of a longstanding, statutorily permitted practice based solely on the sexual orientation of the persons seeking to be included within its scope would constitute a discriminatory act under the Human Rights Act. To hold otherwise would be to *assume* that the Council intended to cut back on the broad protections against discrimination afforded by the Human Rights Act to allow for contravention of an express statutory provision that has extended full faith and credit to marriages legally entered into and recognized by other jurisdictions since 1901.

There is no reason for the District government to refuse to recognize a same-sex marriage validly entered into in another jurisdiction when under the same circumstances it would recognize a heterosexual marriage – unless it is attributed to disparate treatment or discrimination. D.C. Official Code § 2-1402.31 (a) states that when done "wholly or partly for a discriminatory reason based on the . . . sexual orientation . . . of any individual," it is "an unlawful discriminatory practice . . . to deny . . . any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodations." As stated previously, the Human Rights Act has been made expressly applicable to the District government under D.C. Official Code § 2-1402.73.

C. <u>The law in the District of Columbia has fundamentally changed since *Dean* was decided.</u>

The District's laws have been systematically and comprehensively changed since *Dean* was decided 14 years ago so that the "common understanding" of the word "marriage" that the court gleaned from examining the District's statutory scheme as it existed at the time and relied upon to support its holding has been fundamentally and intentionally altered. For example, seven of the eight statutory provisions that the *Dean* court cites as support for the proposition that marriage was

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[10]D.C. Official Code § 46-405 states: "If any marriage declared illegal by the aforegoing sections shall be entered into in another jurisdiction by persons having and retaining their domicile in the District of Columbia, such marriage shall be deemed illegal, and may be decreed to be void in said District in the same manner as if it had been celebrated therein."

gender-specific, (D.C. Code 16-901, 911, 912, 913, 916, 46-601, and 46-718), have been amended by the Council to remove the gender-specific references as part of a systemic effort to employ gender-neutral language throughout the D.C. Official Code statutes pertaining to marriage and the rights, benefits, and obligations incident to marriage. Thus, the "corroborative" statutory underpinnings of that decision are gone.[11]

The changes include an amendment to the Human Rights Act that expands the scope and coverage of the act, amendments to the Marriage Act that eliminate reasons for voiding a marriage,[12] amendments to the divorce laws,[13] and amendments to numerous other statutes that eliminate gender-specific distinctions of spouses. The Report on the Human Rights Act indicated that the Act should "be read in harmony with and as supplementing other laws of the District."[14]

The Human Rights Act has been amended in a number of significant ways since 1995.[15] Section 231 (D.C. Official Code § 2-1402.31, which was at issue in *Dean*, has been amended to add the language "actual or perceived," so that a person would be included within a protected class if they were perceived to be a member of the class. Section 273 (D.C. Official Code § 2-1402.73), which expressly made the provisions of the Human Rights Act applicable to the District government, was not even enacted until 2002, seven years after *Dean*. These amendments clarify that the act covers the District government's issuances of licenses, that the act applies to not only actual, but also "perceived" membership in a protected class, and that the act applies to discrimination based upon

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[11]*Dean*, at 309-310, (neither Congress, nor the Council has changed gender-specific language). One remaining provision in the Marriage Act that was cited in *Dean*, D.C. Official Code 46-401, would be changed by the Jury and Marriage Amendment Act of 2009.

[12]The Marriage Amendment Act of 2008, effective September 11, 2008 (D.C. Law 17-222) (55 DCR 8295), eliminated certain grounds for voiding marriages, and repeals the requirement of a premarital blood test.

[13]The Omnibus Domestic Partnership Equality Amendment Act of 2008, effective September 12, 2008 (D.C. Law 17-231), amended Title 16 of the District of Columbia Official Code to remove gender specific references.

[14]See, Report of the Committee on Public Services and Consumer Affairs on Bill 2-179, the Human Rights Act of 1977, at 3 (Council of the District of Columbia July 5, 1977).

[15]Amendments include the Human Rights Amendment Act of 1998, effective April 20, 1999 (D.C. Law 12-242); the Human Rights Amendment Act of 2002, effective October 1, 2002 (D.C. Law 14-189); the Domestic Partnership Protection Amendment Act of 2004, effective April 8, 2005 (D.C. Law 15-309); the Human Rights Clarification Amendment Act of 2005, effective March 8, 2006 (D.C. Law 16-58); and the Prohibition of Discrimination on the Basis of Gender Identity and Expression Amendment Act of 2008, effective June 25, 2008 (D.C. Law 17-177).

sexual identity and expression. Several of these protections did not even exist in 1995 when *Dean* was decided.

When *Dean* was decided, no state had legalized same-sex marriages, so the issue of District recognition of out-of-state marriages between persons of the same sex could not have been considered.[16] In contrast to the state of the law at that time, a number of states now recognize same-sex marriages, either as a result of judicial decision or legislative action. (see *Kerrigan v. Commissioner of Public Health* 957 A.2d 407 (Conn. 2008) (statute limiting marriage to opposite-sex couples violates state constitution); *Varnum v. Brien* 763 N.W.2d 862)(Iowa 2009) (same); *Goodridge v. Department of Public Health* 798 N.E.2d 941) (Mass. 2003) (same); Vermont, (state legislature amended that state's marriage statute to permit same-sex marriage over a gubernatorial veto) (Vt. Act No. 3, S. 115 (2009-2010 Legis. Sess., eff. Sept. 1, 2009), Maine (state legislature also recently amended that state's marriage statute to permit same-sex couples to marry)(Me. L.D. No. 1020, S.P. No. 384 (124th Leg., 1st Sess., enacted May 6, 2009); and in California, marriages entered into prior to Constitutional amendment are valid.

The District has adopted policies that have continued to move in the direction of conferring greater equality upon gay and lesbian couples as well as others who qualify as domestic partners in acts, including the Domestic Partnership Equality Amendment Act of 2006, effective April 4, 2006 (D.C. Law 16-79), and the Omnibus Domestic Partnership Equality Amendment Act of 2008, effective September 12, 2008 (D.C. Law 17-231).[17] The Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, signed by the Mayor on May 21, 2009 (D.C. Act 18-84; 56 DCR 4269), equalizes treatment of spouses and domestic partners under District law by providing legal recognition of the parent-child relationship for children born to domestic partners. The committee report for the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, stated plainly that "The purpose of this legislation is to formally acknowledge that

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[16]It was noted in *Dean*, that the Supreme Court of Hawaii, in *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (Haw. 1993), had recently reversed a trial court decision barring same-sex marriages. *Dean*, at 316.

[17]The Omnibus Domestic Partnership Equality Amendment Act of 2008 was introduced as Bill 17-135, the Prevention of Child Abuse and Neglect Amendment Act of 2007 and renamed the Omnibus Domestic Partnership Equality Amendment Act of 2008. It incorporated the provisions of Bill 17-136, the Domestic Partner Claim of Dead Bodies from the Anatomical Board Act of 2007 and Bill 17-183, the Omnibus Domestic Partner Property Amendment Act of 2007, and Bill 17-331, the Domestic Partner Inheritance Tax Fairness Act of 2007. – The committee report for Bill 17-135, states that Bill 17-135 would amend numerous sections of the District of Columbia Code with the intent to extend the rights and responsibilities of domestic partners, bringing the status of domestic partnerships more equally in line with married spouses, and updating outdated language in the Code with regard to gender specific terms. Report of the Committee on Public Safety and the Judiciary on Bill 17-135, the Omnibus Domestic Partnership Equality Amendment Act of 2008 (Council of the District of Columbia March 11, 2008).

families created by same-sex couples are not distinguishable from any other family currently recognized under District law."[18]

CONCLUSION

Because the proposal authorizes discrimination, it violates the initiative process under D.C. Official Code § 1-1001.16(a), and, therefore, is not a proper subject for an initiative. For those separate, adequate, and independent reasons, this proposed measure is legally objectionable.

Brian K. Flowers

General Counsel
Council of the District of Columbia

cc: Honorable Vincent C. Gray, Chairman
Members of the Council

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[18]Report of the Committee on Public Safety and the Judiciary on Bill 18-66, Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, at 1 (Council of the District of Columbia March 10, 2009).