Mark H. Levine, counsel on behalf of the **Gertrude Stein Democratic Club** ("Stein"), respectfully submits the following Memorandum of Points and Authorities to the District of Columbia Board of Elections and Ethics (the "Board") in reply to some of the points made at oral argument by counsel for the proponents of the **MARRIAGE INITIATIVE OF 2009** (the "Initiative"), Cleta Mitchell, co-chairman of the Republican National Lawyers Association, and Austin R. Nimocks of the Alliance Defend Fund.[1]

I. ALTHOUGH THE DC MARRIAGE CODE HAS ALWAYS BEEN GENDER-NEUTRAL, THE *DEAN* COURT HELD IN 1995 THAT THE INTENT OF THE DC COUNCIL WAS TO DENY MARRIAGE TO SAME-SEX COUPLES AT THAT TIME.

As this Board is well aware, the District of Columbia City Council is currently considering legislation to clarify that marriage laws in the District of Columbia do not discriminate on the basis of sex or sexual orientation. During their rebuttal at the hearing on October 26, 2009, counsel for the proponents of the Initiative argued forcefully that this fact must mean that the current DC Human Rights Act does not protect DC residents from marriage discrimination on these bases. Paraphrasing Initiative counsel Ms. Mitchell's rhetorical flourish: "How could the Human Rights Act enacted in 1977 have co-existed for 30 years with the denial of same-sex marriage under DC law?" Her obvious conclusion is the Human Rights Act cannot possibly apply to same-sex couples, then or now.

This argument has a certain simplistic charm, until one considers the history of marriage laws in the District and the Human Rights Act. Ms. Mitchell's rhetorical question inferred very strongly that statutory law in the District has prohibited the recognition of the

[1] As noted in Stein's prior brief, the Alliance Defense Fund receives tens of millions of dollars annually from fundamentalist evangelicals nationwide in a campaign to deny the civil rights of gay people and to otherwise breach the wall of separation between Church and State by promoting their brand of theocracy nationwide.

marriage of gay couples for the last thirty years. That is false. In fact, as this Board expressly found in its June 2009 ruling on the virtually identical referendum proffered by Harry Jackson and his identical counsel, "[p]rior to the [Jury and Marriage Amendment] Act [of 2009], District law was silent regarding the recognition of such marriages in the District."[2] Even *Dean v. District of Columbia*, 653 A.2d. 307 (DC. 1995), which denied the issuance of a marriage license to a DC-resident gay couple in 1995, concluded that the language of DC's marriage statute was "gender neutral," even as it also concluded that the intent of the DC Council in 1995 was to deny marriage licenses to same-sex couples. *Id.* at 310 (Although "the marriage statute is gender-neutral and does not expressly prohibit same-sex marriages," the "language and legislative history of the marriage statute demonstrate that neither Congress nor the Council of the District of Columbia has ever intended to define 'marriage' to include same-sex unions.")

Dean, 653 A.2d. 307 at 309-21, discusses at great length the history of marriage laws in the District. It notes that DC marriage laws in 1995 date back to a DC Council ordinance of 1977, which, in large part, dates back to the Congressional District of Columbia Code of 1901, which, in turn, comes primarily from the Maryland marriage laws of 1777. *Id.* at 310-11 & n.2. Although this marriage law had been amended from 1777 to 1977 in some respects (*e.g.* marriage between "colored persons in the District of Columbia" is no longer prohibited, *id.* at 310-11 n.2), the court in 1995 found that DC's marriage law had never been amended to allow same-sex couples to marry; in fact, a bill that would have expressly allowed these unions was rejected in 1977. *Id.* at 312 & n. 6. Interestingly, the converse is also true. To the dismay of the Catholic Archdiocese of Washington, a bill "to

[2] *In re Referendum Concerning the Jury and Marriage Amendment Act of 2009*, DCBOEE Administrative Hearing No. 09-004 (Mem. Op. and Order, June 2009), slip op. at 9.

prohibit same-sex unions expressly" was *also* rejected in 1977. *Id.* at 312 n. 6. *Dean*'s extensive look at the legislative history makes clear that the DC City Council in 1977 left the marriage code ***purposely ambiguous***, neither endorsing nor prohibiting same-sex marriages.

In 1995, when a gay couple sued for a marriage license, the *Dean* court was forced to determine what the DC Council had refused to decide back in 1977. *Dean* had to find, despite the silence of DC's marriage statutes, the DC Council's intent with regard to the legality of same-sex marriages. In doing so, *Dean* obviously could not rely on the silent, gender-neutral DC Code (which, on its face, would have allowed same-sex marriage). Instead, *Dean* examined the one part of the marriage code that was gender-specific: the prohibition of incestuous marriages (which, for example, prohibited a man from marrying his mother but did not prohibit him from marrying his father). *Id.* at 313-14 & nn. 10-11. *Dean* also looked at gender-specific aspects of the divorce code, *id.* at 314-15, and concluded that despite the silent, gender-neutral marriage statute, there was a "consistent legislative understanding and intent that 'marriage' means—and thus is limited to—unions between persons of opposite sexes." *Id.* at 315.

The *Dean* court further bolstered its opinion with a look at the Black's Law Dictionary definition of marriage, *id.* at 315, and case-law from other jurisdictions, *id.* at 315-16, finding that "cases from other jurisdictions with marriage statutes similar to the District's—neither expressly prohibiting nor expressly authorizing same-sex marriages—have uniformly interpreted "marriage," by definition, as requiring two members of opposite sexes." *Id.* at 315-16. "Of course, the meanings of words are continually evolving," the *Dean* court said (*id.* at 315), but at least as of 1995, the result was clear: "the word

'marriage,' when used to denote a legal status, refers *only* to the mutual relationship between a man and a woman as husband and wife, and therefore that same-sex "marriages" are legally and factually—*i.e.*, definitionally—impossible." *Id.* at 361 (Terry, J., concurring).

Dean's sole mission was to determine the intent of the legislature for the District of Columbia. *See id.* at 320 ("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 or at least in its legislative history"). Although *Dean* found, "we cannot conclude that any legislature for the District of Columbia that has addressed the marriage statute has ever intended to authorize same-sex unions", *id.* at 315, the court did *not* find that gay couples seeking to marry were without remedy:

> "It seems obvious that the remedy for the dilemma facing these appellants lies exclusively with the legislature. . . . The separation of powers doctrine prohibits such action by a court. . . . Thus the Council, and only the Council, can provide Messrs. Dean and Gill [gay men who sought a marriage license] with the relief they seek."

Id. at 362 (*Terry, J.*, concurring).

II. TODAY, THE INTENT OF THE DC CITY COUNCIL HAS CHANGED. IN 2009, DC PUBLIC POLICY PROMOTES MARRIAGE EQUALITY.

The foregoing extended citation from the *Dean* decision's accurate description of the legal landscape in 1995 serves only to illustrate the dramatic differences that have occurred in the last 14 years. Every single interpretive pillar upon which *Dean* made its former conclusion that the DC Council intended to prohibit same-sex marriages has been removed. Gender distinctions in DC's incest and divorce statutes are gone. In seven U.S. States, Canada, and many other sovereign nations, same-sex marriage is no longer "legally

and factually—*i.e.*, definitionally—impossible." Even Black's Law Dictionary has added same-sex unions to its definition of marriage.[3] And while the marriage code in 2009—as in 1995—remains silent for the moment on the issue of whether DC gay couples may marry in the District, legislation has been introduced from a greater than two-thirds majority of the City Council (10 out of 13 members) to clarify that same-sex couples may marry in DC. This bill is expected to become law within two months.

More importantly, the District of Columbia City Council has, with the Jury and Marriage Amendment Act of 2009 (passed 12-1 and signed by the Mayor into law), made the Council's intent crystal clear by already recognizing same-sex marriage in the District. As Justice Terry said in *Dean* (*id.* at 362), "only the Council" can allow same-sex marriage. Today, the Council has emphatically done so. Today, the District of Columbia has a clear public policy in favor of recognition of same-sex marriage. *Jackson v. District of Columbia Bd. of Elections and Ethics*, No. 2009 CA 004350 B slip op. at 9 (D.C. Superior Ct. June 30, 2009).

III. ALTHOUGH THE HUMAN RIGHTS ACT MAY NOT HAVE REQUIRED MARRIAGE EQUALITY IN 1995, IT DOES REQUIRE MARRIAGE EQUALITY NOW.

Counsel for proponents of the Initiative also argue based on *Dean* that because the DC Human Rights Act did not expressly confer marriage equality in 1995, it cannot do so today. This argument is inaccurate, both as a matter of statutory construction and based on the clear language of the Act. One of the most famous Supreme Court cases in the United States of America, *Brown v. Board of Education*, unanimously construed the "equal protection under the laws" clause of the Fourteenth Amendment to the United States

[3] http://www.slate.com/id/2215628/ The American Heritage Dictionary, the Oxford English Dictionary, and Webster's, among others, have followed suit.

Constitution to desegregate American schools, even though, as counsel for the segregationists pointed out in 1954, the Congress that authored this very Amendment in 1868 segregated schools in the District of Columbia. The Supreme Court rejected this argument, even though schools had been segregated for more than a century in the United States, by finding the clear, unequivocal language of the Amendment trumped the legislative intent of the 1868 Congress.

The present example is even stronger than *Brown*, because the Fourteenth Amendment does not contain the "exception" clause of the DC Human Rights Act. The last section of Chapter 14 of Title 2, the DC Human Rights Act, provides:

> "**§ 2-1402.73 Application to the District Government.**
>
> Except as otherwise provided for by District law or when otherwise lawfully and reasonably permitted, it shall be an unlawful discriminatory practice for a District government agency or office to limit or 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, …"

Based on *Dean*'s determination of DC Council intent circa 1995, the denial of marriage for same-sex couples in 1995 was an "otherwise lawfully permitted exception provided for by District law." But such an exception clearly does *not* apply now that the DC Council has forcefully declared its pro-marriage-equality public policy in 2009. Just as Congress in the Lily Ledbetter Act of 2009 overruled the Supreme Court's interpretation of Congressional intent in the civil rights laws, so the DC Council through the Jury and Marriage Amendment Act of 2009 overruled the DC Court of Appeals' interpretation in 1995 of the DC Council's intent with regard to the District's marriage laws.

Today, the DC Human Rights Act requires same-sex marriages to be performed in the District. A court would be hard-pressed in October 2009 to deny a marriage license to

any same-sex couple married in the District of Columbia, especially because, under the Jury and Marriage Amendment Act of 2009 (D.C. Code §46-405.01), there are hundreds of same-sex marriages recognized in the District of Columbia of residents who were married outside the District. The fact that gay and lesbian couples whose marriages have been performed in DC have not yet applied for marriage licenses here does *not* prove that marriage licenses would be unavailable to them if they were to proceed with a court action under current DC law. It only shows that these couples smartly want to wait a couple of months more for the City Council to expressly clarify the law (and thus avoid a multi-million-dollar lawsuit from the likes of the Alliance Defense Fund).

As noted in Stein's prior brief, the Initiative, Referendum, and Recall Procedures Act of 1979, as amended, establishes procedures for enacting law in the District of Columbia through voter initiatives: "Upon receipt of each proposed initiative or referendum measure, the Board *shall refuse* to accept the measure if the Board finds: . . . (C) The measure authorizes, or would have the effect of authorizing, discrimination under Chapter 14 of Title 2." D.C. Code § 1-1001.16 (b)(1)(C) (emphasis added). As there is no longer an exception in the Human Rights Act provided by District law, an initiative that authorizes marriage discrimination on the basis of sex or sexual orientation is no longer proper.

IV. THE PROCEDURAL ARGUMENT OF THE DC BOARD OF ELECTIONS BEFORE THE COURT IN THE REFERENDUM CASE DOES NOT PRECLUDE THE BOARD'S SUBSTANTIVE FINDING OF DISCRIMINATION.

Cleta Mitchell, in her argument at the October 26 hearing, colorfully claimed the Board would be playing "Lucy with the football" if it denied Initiative proponents a chance

to proceed, because the Board had argued in earlier court proceedings in June 2009 that proponents of a virtually identical referendum should be denied their procedural request to stay the date the Jury and Marriage Amendment Act became effective as law. In that case, the Board substantively found the referendum could not proceed because it authorized discrimination. *In re Referendum Concerning the Jury and Marriage Amendment Act of 2009*. The referendum proponents then sat on their rights for several weeks before finally filing a court action challenging the Board's ruling and arguing in that lawsuit they needed a stay in order "have their day in court." The Board responded, in a brief to the court, that rather than take the completely unprecedented (and probably unjurisdictional) step of staying the effective date of the law, the court should allow the law to proceed because, among other reasons, referendum proponents could later propose an initiative and make their argument in court that the Human Rights Act did not apply at that future time.

The court agreed with the Board both substantively and procedurally. Substantively, the Court affirmed the Board ruling that the Referendum authorized discrimination and thus could not proceed under the Human Rights Act. Procedurally, the Court found it had no power to stay the effective date of the law, and, even if it did, the proponents could come back with a virtually identical initiative to re-present its argument with plenty of time and a full panoply of due process. Now the proponents are back with their virtually identical initiative. The Board is still well within its rights – and indeed is required under the doctrine of collateral estoppel – to come to the same conclusion that the Initiative must be refused because the Initiative, like the prior referendum, authorizes discrimination in violation of the Human Rights Act.

But what the Board said in its brief in the referendum case remains accurate. This time, proponents have plenty of time to make their arguments in the courts without requiring a stay unprecedented in the law. The Board did not promise the court it would waive a substantive hearing on the Initiative. The Board only promised that the proponents would have their day in court. And they will. And like Charlie Brown, they will lose. But no one is "playing Lucy" with any "football."

V. THE DEFENSE OF MARRIAGE ACT DOES NOT APPLY.

Finally, counsel for proponents of the Initiative made a last-ditch effort in their rebuttal to defend the Initiative based on the Defense of Marriage Act ("DOMA"). In doing so, they wisely did not quote from that particular Federal law. DOMA has only two provisions. The first states:

> "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

28 U.S.C. § 1738C. Even if the District of Columbia is considered equivalent to a "State, territory, or possession," this provision makes clear only that the District is "not required" to recognize a same-sex marriage. DOMA certainly does not prohibit DC or any other state from recognizing same-sex marriage. Indeed, more than a half dozen states do precisely that, and no court has ever suggested this runs afoul of DOMA.

The second provision of DOMA provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7. The District of Columbia is not one of the "various administrative bureaus and agencies of the United States," and its Code is not an "Act of Congress" or a "ruling, regulation, or interpretation." Agencies and administrative bureaus are appointed by the President or Congress to interpret the law, not elected by a polity to make the law. Even the Alliance Defense Fund, with all its millions, would be hard-pressed to argue that the District of Columbia is an administrative bureau or agency like the Department of Agriculture. The legislature of the District of Columbia, like the legislatures of the fifty States, is free to make its own marriage policy unbound by DOMA, subject only to legislative overrule by Congress under Home Rule.

VI. CONCLUSION

The majority of states in the United States allow no direct democracy by referendum or initiative. And even in the minority of states that allow some form of direct democracy, the majority of those limit the subject matter of these initiatives. But this reliance on representative, rather than direct democracy, poses no constitutional concerns. The United States Constitution "guarantees to every State . . . a Republican Form of Government," Article IV, Section 4, *i.e.* representative democracy, rather than direct democracy, suffices.

Most of the argument by proponents of the Initiative were based either on theocracy or tradition. They either wish to impose their personal religious beliefs on fellow citizens who do not share their religion (violating the First Amendment's Establishment Clause), or they say, in effect, that "because it has always been, it shall always be." The proponents' tradition arguments are thus in large measure identical to

the arguments made by proponents of slavery and segregation, who similarly argued that because a practice existed for centuries, it must therefore continue.

This Board has easily dismissed such arguments in the past and must continue to do in the future. Under the First Amendment, people have freedom to say what they wish, but arguments based on religion or tradition, rather than law, should not be countenanced in a constitutional democracy. Once the DC Council has determined that its gay and lesbian citizens should have at least as much right to marry as the District's heterosexual mass murderers (who have always had such right), the Board must turn a deaf ear to those whose religion teaches them that gay and lesbian citizens should have fewer civil rights than murderers. This is what the Human Rights Act requires.

The District of Columbia has emphatically changed its public policy from marriage discrimination to marriage equality. While the logic of *Dean* applies, its holding in 1995 no longer does. The Initiative, Referendum, and Recall Procedures Act requires this Board to refuse to accept referenda or initiatives which violate the Human Rights Act, and the Defense of Marriage Act does not provide to the contrary.

The Gertrude Stein Democratic Club respectfully requests that the DC Board of Elections and Ethics reject the Initiative on the grounds that it is not a proper subject for an initiative in the District of Columbia.

Respectfully submitted,

_/s/_____
Mark H. Levine

Counsel on behalf of the
Gertrude Stein Democratic Club

Dated: October 28, 2009

Gertrude Stein Democratic Club
1929 18th St NW, PMB 2000
Washington, DC 20009