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BY ELECTRONIC MAIL 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: Proposed Initiative on Preservation of Traditional Marriage One Man One Woman 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 initiative measures are in the proper legislative form. In addition, you have asked for comments on whether the proposed measure is the proper subject for an initiative. I have reviewed the proposed initiative for compliance with the requirements of District law,[1] and based on my review , it is my opinion that as currently drafted, the proposal is not the proper subject for an initiative 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 an initiative.

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[1]The authorities include 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.

This office previously commented on three similar measures: the Referendum on the Jury and Marriage Amendment Act of 2009, effective July 7, 2009 (D.C. Law 18-9; 56 DCR 6111),[2] the Marriage Initiative of 2009, (56 DCR 7537), and the Referendum on the Religious Freedom of Civil Marriage Equality Amendment Act of 2009. All of these measures were found not to be the proper subject for an initiative or referendum. Because many of the comments on those measures remain relevant, they are incorporated into these comments and restated for the record. Only section I presents new legal arguments.

Based on the authorities more fully discussed below, the proposal is not the proper subject of an initiative under District law because it does not propose a law, would authorize, or would have the effect of authorizing, discrimination prohibited by the Human Rights Act, and it would constitute a law appropriating funds. Because this proposal is legally objectionable, it should not be certified as the proper subject for an initiative.

DISCUSSION

The proposed Preservation of Traditional Marriage One Man One Woman 2009 was filed with the Board of Elections and Ethics ("Board") on December 23, 2009. According to the summary statement submitted by the proposer, the purpose of the initiative is to:

- allow the citizens of the District of Columbia to vote to preserve traditional marriage as between one man and one woman
- define marriage as between one man and one woman
- amend D.C. Code § 46-401 by redesignating section 1283 "Marriage is the legally recognized union between one man and one woman. No person may enter into a marriage in the District of Columbia with another person unless it is a man and a man[3]

The legislative text of the initiative merely contains a long title that reads "To repeal the District of Columbia's "Religious Freedom and Civil Marriage Equality Act of 2009." It then

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[2]The Jury and Marriage Amendment Act was the subject of a referendum filed previously. That referendum was found to be an improper subject for a referendum by both this Board and the D.C. Superior Court. *See, Jackson v. D.C. Board of Elections and Ethics*, 113 Daily Wash.L.Rptr. 2473 (D.C. Super. Ct. June 30, 2009)(Retchin, J.) Identical issues were also decided when both the Board and the D.C. Superior Court rejected an initiative measure that would have amended District law to provide that "Only marriage between a man and a woman is valid or recognized in the District of Columbia." *See, Jackson v. D.C. Board of Elections and Ethics* (2009 CA 008613B) (Macaluso, J.).

[3]This language is as it appears in the original.

reproduces the text of D.C. Act 18-248, the Religious Freedom and Civil Marriage Equality Amendment Act of 2009. To that extent, it is unlikely that the initiative proposes a law at all.

ANALYSIS

The Board's review of initiative and referendum measures is governed by D.C. Official Code § 1-1001.16(b). That section provides that with certain specific exceptions, the initiative process may be used to propose laws, and that the Board shall refuse to accept a measure if the Board finds that:

> it is not a proper subject of an initiative ... 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."[4]

According to its summary statement, the proposed initiative would prohibit *both* the celebration of marriages in the District and the recognition of same-sex marriages legally entered into and recognized as valid in other jurisdictions. Therefore, it would not only prevent the District from prospectively recognizing same-sex marriages legally entered into and recognized as valid in other jurisdictions in accordance with its longstanding and statutorily mandated policy and practice, it also would have the effect of stripping recognition of marriages that are now recognized in the District in accordance with the Jury and Marriage Amendment Act of 2009.

I. THE PROPOSED MEASURE DOES NOT PROPOSE A LAW.

The initiative process can only be used to propose "laws". The proposed measure does not propose a "law" so the initiative process cannot be used. It is inappropriate to label the proposed measure as an "initiative" because it does not, according to the ordinary use of the term, propose a "law". The proposal resembles a referendum, in that it seeks only to repeal an act of the Council.

The Court of Appeals, in *Convention Center Referendum Committee v. District of Columbia*

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[4]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). 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).

Bd. of Elections & Ethics, 441 A.2d 889 (D.C. 1981), examined the question of whether the Initiative in that case "proposed a law." The court stated that:

> To ascertain the scope of an initiative, the Initiative Procedures Act *directs attention to the initiative bill itself*. This focus is not only sensible but also necessary. Because the initiative may establish a law, *it must include a bill*; thus, neither the Board of Elections nor the court truly can determine whether an initiative conforms to the limitations on the initiative right unless it scrutinizes the very bill that would become law. *Id*. at 898 (Emphasis added).

Here, the proposed initiative is analogous to a referendum. It does not include any legislative text except for a long title. Besides the long title, the legislative text would have the effect of reenacting the D.C. Act 18-248, the Religious Freedom and Civil Marriage Equality Amendment Act of 2009.

In the *Convention Center* case, the Court of Appeals examined whether an Initiative proposed a "law" where the initiative would have required the District government to "not construct or operate a Convention Center" or "not provide any further tax revenues or . . . public funds" for a Convention Center. The Court concluded that the initiative did propose a law because the Council could have passed an act having the same effect as the initiative. Here, the proposal contains no substantive text.

In several other jurisdictions, it has been held that even used liberally the term "law" has to have some sort of binding result. *In re Initiative Petition No. 364*, 930 P.2d 186, (Okla. 1996) (federal term limits); E.g., *State of Nebraska ex. Rel. Brant v. Beemann*, 350 N.W. 2d 18, (1984); See also, *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356(1909)(a statement from Justice Holmes that law should have public force); *State of Montana ex rel. Harper v. Waltermire*, 691 P.2d 826 (1984) (Montana Constitution was "designed to enact laws", initiative power does not include the power to enact legislative resolutions). If the voters pass the proposed measure it cannot become a law; it is not binding, is incapable of being carried into effect, and is incapable of being enforced.

II. 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 AN INITIATIVE

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 . . .[5]

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 proposed initiative – 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.[6]

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,

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[5]D.C. Official Code § 2-1401.01.

[6]D.C. Official Code § 2-1402.68.

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).[7]

There are significant rights and responsibilities that inure to married persons that are denied to persons who are not permitted to marry or by the state's failure to recognize a valid out-of-state marriage.[8] 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. In *Jackson v. District of Columbia Board of Elections and Ethics*, No. 2009 CA 004350B, slip. op., at 8 (D.C. Superior Ct. 2009), the court, citing *Goss v. Bd of Education*, 373 U.S. 683, 688 (1963), noted that courts have held that different treatment can equate to discrimination "whether or not the material benefits and services offered appear uniform."

A. The Court of Appeals decision in *Dean v. District of Columbia* does not preclude the Board from finding the Initiative to be improper, because the factual and legal underpinnings of that decision no longer exist, and it is irreconcilable with subsequent legislative enactments of the Council.

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 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.

The decision in *Dean* was predicated upon the court having determined that there was no evidence within District law that the definition of the term "marriage" meant anything other than a union between a man and a woman.[9] In fact, the court concluded that, under District law, marriage

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[7] 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).

[8] *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.).

[9] *Dean*, 653 A.2d at 310-316.

between anyone other than a man and a woman was "impossible."[10] Given this impossibility, the court held that the refusal to issue a marriage license to a same-sex couple could not be construed as violating the Human Rights Act proscriptions on discrimination based upon sex or sexual orientation even though the court acknowledged that the act's proscriptions were to be construed and applied broadly. The reason it so held was because nothing in the Human Rights Act – or in any other relevant District law pertaining to marriage[11] – evinced a Council intent to alter the then-accepted definition of marriage.

> (T)here cannot be discrimination against a same-sex marriage if, *by independent statutory definition extended to the Human Rights Act*, there can be no such thing. See Singer, 522 P.2d at 1190-95 (Washington's Equal Rights Amendment does not require the state to authorize same-sex marriage because such relationships are outside definition of marriage).

Dean, 653 A.2d at 320 (emphasis added).

Employing the reasoning of *Dean* today would lead to the opposite conclusion. First and foremost, District law now *recognizes* same-sex marriages that were legally entered into and recognized as valid in other jurisdictions. Earlier this year, the Council passed the Jury and Marriage Amendment Act of 2009, which amended the District's marriage statute to expressly require the District to recognize "a marriage legally entered into in another jurisdiction between 2 persons of the same sex that is recognized as valid in that jurisdiction."[12] The Jury and Marriage Amendment Act of 2009 completed its passive review before Congress and became District law on July 7, 2009. Therefore, the notion that, under District law, marriage between anyone other than a man and a woman is an impossibility is no longer accurate. The recognition of same-sex marriages is now not only possible under District law, it is required. That fact – alone – knocks the critical underpinning out from under the *Dean* decision.

> Of course, the meanings of words are continually evolving, and we do not overlook the fact that the terms "marriage" and "gay marriage" are used colloquially today to refer to long-term same-sex relationships between gays and between lesbians. Our task, however, is to determine what the legislature intended "marriage" to mean when the marriage statute was enacted, codified, or amended. Given the statutory language used, buttressed by the usual definition of "marriage," we cannot conclude that any legislature for the District of Columbia that has addressed the marriage statute has ever intended to authorize same-sex marriages.

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[10] *Dean*, 653 A.2d at 361.

[11] "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 marriages." 653 A.2d at 310.

[12] 56 DCR 3797.

Dean, 653 A.2d at 315.

The court, in fact, forecast the remedy that has now come to be:

> It seems obvious that the remedy for the dilemma facing these appellants lies exclusively with the legislature. The Council of the District of Columbia can enact some sort of domestic partners law, bestowing on same-sex couples the same rights already enjoyed by married couples, whenever it wants to. But no court can order a legislature to enact a particular statute so as to achieve a result that the court might consider desirable, or to appropriate money for a purpose that the court might deem worthy of being funded. The separation of powers prohibits such action by a court. Nor can a court alter or expand the definition of marriage, as that term has been understood and accepted for hundreds of years. Thus, the Council, and only the Council can provide Messrs. Dean and Gill with the relief they seek.

Dean, 653 A.2d at 362 (citations omitted).

The Council has done just that, changing the definition of "marriage" so that it now expressly encompasses same-sex marriages. It would be anomalous to construe the holding and reasoning of *Dean* as effectively prohibiting the Council from doing so. In sum, the holding of *Dean* is confined to the state of District laws on marriage as they existed at the time of the decision, and as explained more fully below, those laws have changed.[13]

B. <u>The legal environment and statutory law in the District of Columbia has fundamentally changed since *Dean* was decided.</u>

As the Council and other opponents demonstrated before the Board when the referendum on the Jury and Marriage Amendment Act was considered, the legal environment and 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, all eight of the statutory provisions that the *Dean* court cites as support for the proposition that marriage was gender-specific, (D.C. Code 16-901, 911, 912, 913, 916, 46-601, 46-401, 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 as that language pertains to marriage and the rights, benefits, and

[13]See also, *Jackson v. District of Columbia Board of Elections and Ethics*, No. 2009 CA 004350B, slip. op., at 7 (D.C. Superior Ct. 2009), in which the court recognized that "[u]nlike when *Dean* was decided, therefore, same-sex marriage is not a factual impossibility."

obligations incident to marriage. Thus, in addition to the factual predicate, the "corroborative" statutory underpinnings of that decision are gone.[14]

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,[15] amendments to the divorce laws,[16] 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."[17] The referenced law changes, including the amendment added by the Jury and Marriage Amendment Act expressly stating that same-sex marriages legally entered into and recognized as valid in other jurisdictions will be recognized in the District, must be read together with the evolving Human Rights Act and Council actions to extend the protection of the Human Rights Act to persons who have entered into, or desire to enter into same-sex marriages.

The Human Rights Act has been amended in a number of significant ways since 1995.[18] 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 issuance of licenses, that the act applies to not only actual, but also

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[14]*Dean*, at 309-310, (neither Congress, nor the Council has changed gender-specific language). The only provision in the Marriage Act that was cited in *Dean* at the time the referendum was decided, D.C. Official Code § 46-401, was changed by the Jury and Marriage Amendment Act of 2009.

[15]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.

[16]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.

[17]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).

[18]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) .

"perceived" membership in a protected class, and that the act applies to discrimination based upon sexual identity and expression. Several of these protections did not exist in 1995 when *Dean* was decided.

At the time of the *Dean* decision, 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.[19] 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 its 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).[20] 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

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[19]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.

[20]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).

Act of 2009, stated plainly that "The purpose of this legislation is to formally acknowledge that families created by same-sex couples are not distinguishable from any other family currently recognized under District law."[21]

The precedential value of any judicial decision is mooted by the repeal of the authority underlying that decision. We have seen this in the area of telecommunications and Internet services in which technological advances created a sea change in the factual underpinnings supporting a prior judicial interpretation to the extent that an agency decision that varied from a superior tribunal's decision was allowed to stand. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (U.S. 2005) (A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.); *City of Las Vegas v. Lujan*, 891 F.2d 927, 934 (D.C. Cir. 1989) ("A change in congressional instructions, of course, absolves the Secretary from explaining why his policy has changed, if indeed it has.").

Finally, on October 6, 2009, a bill was introduced in the Council, the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 that was co-sponsored by 10 Members of the Council with the support of the Mayor.[22] The proposed initiative is aimed at preempting the bill, which would amend the District's marriage statute to legally recognize same-sex marriages celebrated in the District, and undoing the Jury and Marriage Amendment Act of 2009.

C. By refusing to permit the celebration of a marriage or to recognize a valid marriage entered into in another state by a same-sex couple when the District government permits these unions 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.

The issue of whether the refusal to recognize out-of-state, same-sex marriages while recognizing out-of-state, opposite-sex marriages was decided by the Board and the Superior Court when the Referendum on the Jury and Marriage Amendment Act was considered.[23] The Attorney General, in his submission to the Board on this proposed initiative, has briefed the issues regarding

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[21]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).

[22]The 10 members were Councilmember David A. Catania, Phil Mendelson, Michael Brown, Jack Evans, Muriel Bowser, Kwame Brown, Jim Graham, Mary Cheh, Tommie Wells, and Chairman Vincent Gray. See also *The Washington Post*, October 6, 2009 (Mayor Fenty has vowed to sign the Bill).
http://www.washingtonpost.com/wp-dyn/content/article/2009/10/06/AR2009100602259.html

[23]*Jackson v. District of Columbia Board of Elections and Ethics*, No. 2009 CA 004350B, slip. op. (D.C. Superior Ct. 2009)

the application of *res judicata* and collateral estoppel based on the Board and Superior Court's prior rulings. I agree with, and incorporate, those arguments and authorities by reference.

If approved, the initiative would have the effect of throwing into turmoil the lives of numerous families and couples whose marriages are now statutorily required to be recognized under District law. Prior to the enactment of the Jury and Marriage Amendment Act, existing District law required 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 was 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).[24] With the enactment of the Jury and Marriage Amendment Act, the District now has a "strong public policy" in favor of same sex marriages, because it is the legislature, and not the courts, that makes public policy.[25]

Therefore, the initiative, like the referendum that preceded it, is being sought to put 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 two persons of the same sex. Since there is a statutorily recognized right to recognition of these marriages, the broad prohibitions of the Human Rights Act against discrimination on the basis of sexual orientation should govern. In sum, this reversal of a longstanding, now statutorily required 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 – a statute that today expressly mandates the recognition of same-sex marriages.

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[24]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.

[25]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."

There is no reason for the District government to refuse to recognize a same-sex marriage legally entered into and recognized as valid 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."

III. THE PROPOSED MEASURE, IF APPROVED, WOULD RESULT IN DECREASED REVENUES AND HAVE A NEGATIVE IMPACT ON THE DISTRICT'S BUDGET

The referendum process may be used to suspend acts of the Council, however, a referendum cannot suspend an act appropriating funds, allocating funds, or which would negatively impact the District's budget. 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(b)) ("Charter Amendment Act"), defines a referendum as:

> the process by which the registered qualified electors of the District of Columbia may suspend acts of the Council of the District of Columbia (*except emergency acts, acts levying taxes, or acts appropriating funds for the general operation budget*) until such acts have been presented to the registered qualified electors of the District of Columbia for their approval or rejection. (Emphasis added).[26]

The prohibition on referendums pertaining to acts that "appropriate funds for the general operating budget" is to be construed broadly. *Dorsey v. District of Columbia Board of Elections and Ethics*, 648 A.2d 675 (D.C. 1994); *Hessey v. District of Columbia Board of Elections and Ethics*, 601A.2d 3, 9, 15 (D.C. 1991)(*en banc*). Courts have construed the prohibition on initiatives that propose "laws appropriating funds" to include not only laws that would require unbudgeted funds to implement, but also laws that would eliminate revenues, thereby creating a budget deficit or otherwise interfering with the allocation of revenues. *Dorsey; Hessey; Restaurant Association of Metropolitan Washington v. District of Columbia Board of Elections and Ethics*, 2004 WL 20102203. The thrust of these exceptions to the rights of initiative and referendum is to ensure that matters relating to the District's local budget process remain exclusively within the province of the Mayor and Council, the elected officials of the District.

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[26] *See also* section 2(a) of the Initiative, Referendum, and Recall Procedures Act of 1979, effective June 7, 1979 (D.C. Law 3-1; D.C. Official Code § 1-1001.02)(11) ("Procedures Act"), which contains the same definition for a referendum.

In *Dorsey v. District of Columbia Board of Elections and Ethics*, 648 A.2d 675 (D.C. 1994), the Court of Appeals held that a proposed ballot initiative that would prohibit the District government from "booting" and thereby impounding motor vehicles as a fine-collection measure and would also require an "amnesty . . . from time-to-time" from increased penalties for late payment of traffic fines was not a proper subject of an initiative because it would have constituted a law appropriating funds. The Court noted that:

> ." In *Hessey v. District of Columbia Bd. of Elections & Ethics*, 601 A.2d 3, 9, 15 (D.C. 1991) (en banc) , we interpreted this limitation very broadly, holding that it "extend[s] . . . to the full measure of the Council's role in the District's budget process. . . ." 601 A.2d at 20. We explained that "the word 'appropriations,' when used in connection with the functions of the Mayor and the Council in the District's budget process, refers to the discretionary process by which revenues are identified and allocated among competing programs and activities." 601 A.2d at 19 (em-phasis added). As part of the annual budgetary process, for example, the Mayor must submit to the Council "a report on all available revenues," and the Mayor and Council in turn must "identify expenses and revenues, and . . . propose a balanced budget for Congressional approval . . . ." 601 A.2d 3 at 10. Through the "laws appropriating funds" limitation, Congress and the Council ensured that these "matters relating to the local budget process would remain within the control of the Mayor and Council, and that initiatives [would] not create deficits or interfere with the locally elected officials' decisions about how District government revenues should be spent." 601 A.2d at 15.

In *Restaurant Association of Metropolitian Washington v. District of Columbia Board of Elections and Ethics*, 2004 WL 20102203 (D.C. Super. 2004) (Terrell, J.), the court determined that an initiative that would have restricted smoking in the workplace violated the "laws appropriating funds" prohibition. The court, citing Hessy, stated that "[e]ven if Initiative 66 raised tax revenues, the initiative would still be considered a "law appropriating funds." The intent of the "law appropriating funds" limitation was to ensure that any matters pertaining to the local budget process would remain within the control of the Mayor and Council, and the initiatives would not create deficits or interfere with the elected officials' decision on budgetary matters. *Dorsey*, 648 A.2d 677.

This referendum, if successful, would result in a reduction of revenues for the District. As part of its consideration of the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 on final reading on December 15, 2009, the Council considered an analysis by the Office of the Chief Financial Officer showing that the implementation of the law would generate additional revenue between $14,970 and $1,080,537. A copy of that analysis is attached as Exhibit A. Another study predicts that more than $50 million over three years would be generated in local tax and fee revenues, potentially creating approximately 700 new jobs. *See*, The Williams Institute, "The

Economic Impact of Extending Marriage to Same-Sex Couples in the District of Columbia," (Apr. 2009).[27]

In addition, the referendum, if successful, would prevent the District from realizing increased tax revenues resulting from increased numbers of married couples filing income tax returns. The Income Tax Joint Filing Clarification Act of 2009, signed by the Mayor on December 17, 2009 (D.C. Act 18-246) would permit married same-sex individuals to file either a joint return or separate returns on a combined form prescribed by the Mayor as if the federal government recognized the right of married same-sex individuals to file jointly. As stated by the court in Dorsey:

> That these funds are only a tiny part of the District's annual revenue projections is beside the point; the electorate may no more eliminate them by Initiative than it could abolish *or lower* the sales tax or local income tax-matters integral to the "power of the purse" which Congress and the Council reserved exclusively to local government.

Dorsey, 648 A.2d at 677.

Here, the referendum, if successful, would lower the amount of income taxes the District otherwise could collect and foreclose additional revenue streams. These are matters that impact the District's local budget process, forcing the Mayor and the Council to make budget-related decisions based upon reduced revenue.

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 the stated separate, adequate, and independent reasons, the proposed Marriage Initiative of 2009 is legally objectionable.

Brian K. Flowers

General Counsel
Council of the District of Columbia

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

[27] *See*, http://www.law.ucla.edu/williamsinstitute/pdf/DC%20Econ%20Impact.pdf

Government of the District of Columbia
Office of the Chief Financial Officer

The Office of the General Counsel

December 15, 2009

The Honorable David A. Catania
Council of the District of Columbia
1350 Pennsylvania Avenue, NW, Suite 404
Washington, DC 20004

Dear Councilmember Catania:

Enclosed please find an analysis of the potential revenue implications of same-sex marriages in the District of Columbia. The enclosed table was prepared by the OCFO's Office of Revenue Analysis.

If you have questions, please let me know.

Sincerely,

David Tseng
General Counsel

Enclosures

cc: All Councilmembers
Peter Nickles, Attorney General
Eric Goulet, Council Budget Director

EXHIBIT A

Distribution	Low end	High end
# Same Sex Couples to get married	**1,948**	**20,998**
DC[a]	1,948	1,948
VA & MD Suburbs[b]	0	2,989
States where Marriage is Legal[c]	0	0
All Other States[d]	0	16,061
Wedding Expenses (DC Metro Residents)	**$4,473,036**	**$22,127,634**
Total Number of weddings[e]	998	4,937
Average Wedding Expenses[f]	$8,964	$8,964
Spent in DC[g]	50%	50%
Spent outside of DC	50%	50%
Wedding Expenses (Destination Couples)	**$0**	**$17,514,521**
Total Number of weddings	0	16,061
Average Wedding Expenses[h]	$2,181	$2,181
Spent in DC[i]	-	50%
Spent outside of DC	-	50%
Tourism Expenses[j]	**$0**	**$4,842,392**
Average visitor expenditure	$335	$335
Average party size	2	2
Spent in DC	0	45%
Spent outside of DC	0	55%
Marriage License Fees	**$44,910**	**$902,160**
DC Marriage License Fee	$45.00	$45.00
Total Number of DC Resident Weddings[k]	998	998
Total Number of Out-of-State Weddings	0	19,050
TOURISM EXPENSES IN DC	$0	$4,842,392
WEDDING EXPENSES IN DC	$4,473,036	$39,642,155
OTHER EXPENDITURES CROWDED OUT BY WEDDING EXPENDITURES	$4,473,036	$11,063,817
TOTAL TAX BASE	$0	$33,420,729
Effective Tax Rate	7%	7%
TAX REVENUE	$0	$2,339,451
MARRIAGE LICENSE FEES	$44,910	$902,160
TOTAL TAX REVENUE OVER THREE YEARS	$44,910	$3,241,611
ANNUAL AVERAGE TAX REVENUE	**$14,970**	**$1,080,537**

Assumptions

[a] According to the three year estimate of the Census American Community Survey (2006-2008), the total number of same-sex households in the District of Columbia is 3,896. Based on the experience of Massachusetts, we estimate that 50% of all same sex households in DC will marry in the three years following the legalization of same sex marriage.

[b] We assume that 25% of all same sex couples in the Virginia and Maryland Suburbs in the DC Metropolitan Area will marry in DC in three years following the legalization of same-sex marriage.

[c] This includes Massachusetts, Connecticut, Vermont, New Hampshire and Iowa.

[d] We assume that 2.5% of all same sex couples in the remaining states will marry in DC in three years following the legalization of same-sex marriage.

[e] There are currently 950 same sex domestic partners registered in DC and we assume their celebrations will not be as extensive.

[f] Average cost estimated at 25% of DC Metro Average of $35,855.

[g] We assume that not all wedding spending will occur in the District. 50% is our best guess.

[h] Average cost estimated at 10% of National Average of $21,814

[i] We assume that not all wedding spending will occur in the District. 50% is our best guess.

[j] From Washington DC's 2008 Visitor Statistics, Destination DC

[k] The $45 marriage license fee will be waived for all couples who have registered as domestic partners. Currently 950 domestic partners have registered and we assume all of them will apply for a marriage license.