GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL

February 9, 2010

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

Re: "Preservation of Traditional Marriage One Man One Woman 2009"

Dear Mr. McGhie:

This responds to your January 5, 2010 letter, in which you invite comment on whether the proposed initiative, entitled "Preservation of Traditional Marriage One Man One Woman 2009" ("Initiative"), is a proper subject matter for initiative under District law.

The following Summary Statement was contained in the Notice of Public Hearing that accompanied your letter:

> The purpose of this initiative is to allow the citizens of the District of Columbia to vote to preserve traditional marriage as between one man and one woman.
> - This initiative would define marriage as between one man and one woman.
> - This initiative would amend as follows:
> - Section 1283 (DC Official Code section 46-401) is redesignated as 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 woman.

Conclusion

The District of Columbia has long been a leader in the protection of human rights and the eradication of discrimination. As such, the District currently recognizes same-sex marriages validly performed in other jurisdictions. This recognition reflects the District's commitment to equality, as expressed in the District's Human Rights Act. The proposed Initiative seeks to redefine what is recognized as a marriage in the District and, in doing so, would strip only same-sex couples of the marital recognition they currently enjoy with respect to foreign same-sex marriages and will soon enjoy with respect to District same-sex marriages. Guided by the principles of equality and the recent decision in *Jackson v. District of Columbia Bd. of Elections & Ethics*, No. 2009 CA 008613 (D.C. Super. Ct. 2010) ("*Jackson II*"), I find that the proposed

Initiative is not a proper subject for initiative under District law, as it discriminates, or has the effect of discriminating, in contravention of the Human Rights Act.

Discussion

An initiative may be used to propose laws directly to the registered voters of the District for their approval. *See* section 2(a) of 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(a) (2006 Repl.), which defines "initiative" as follows:

> The term "initiative" means the process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval.

Here, the proposed Initiative, if passed, would prohibit the District from continuing to recognize valid foreign same-sex marriages, where such recognition was explicitly conferred by section 1287a of An Act To establish a code of law for the District of Columbia ("Code Establishment Act"), effective July 7, 2009, D.C. Law 18-9, D.C. Official Code § 46-405.01 (56 DCR 3797). The proposed Initiative would also prevent the District from authorizing the performance of same-sex marriages under D.C. Act 18-248, the "Religious Freedom and Civil Marriage Equality Amendment Act of 2009" ("Amendment Act"), which was signed by the Mayor on December 18, 2009 and is projected to become law on March 2, 2010.

In view of the prohibition in District law – as more fully discussed below – against any initiative that authorizes, or has the effect of authorizing, certain kinds of discrimination, the question the Board of Elections and Ethics must decide is this: does an initiative that would strip only same-sex couples of legal marital status and the rights and privileges that go along with it violate the District's longstanding protection of human rights? This question must be categorically and emphatically answered in the affirmative.

Since the passage of the Human Rights Act of 1977 ("HRA"), effective December 13, 1977, D.C. Law 2-38, D.C. Official Code § 2-1401.01 *et seq.* (2007 Repl. & 2009 Supp.), the District has been a leader in the protection of equal rights. The HRA states:

> It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of… sex… marital status… sexual orientation, gender identity or expression….

The HRA is a broad, remedial statute to be generously construed. *See Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 889 (D.C. 1998) (citing *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392, 398 (D.C. 1991)). It has also been described as a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds, including sex and sexual orientation." *Dean v. District of Columbia*, 653 A.2d 307, 319 (D.C. 1995).

Notably, the HRA "was primarily designed to protect from invidious discrimination those persons or groups who have traditionally been subjected to unfair treatment. Although heterosexuals are and should be covered too, *the main purpose of the sexual orientation provision was to ensure that homosexuals enjoy equal rights previously denied to them.*" *Howard Univ. v. Green*, 652 A.2d 41, 49 n.12 (D.C. 1994)(emphasis added).

In order to support the eradication of discrimination, the Board of Elections and Ethics is required to refuse to accept an initiative if it finds that the proposed measure is "not a proper subject of initiative" because it authorizes, or would have the effect of authorizing, discrimination prohibited under the HRA. *See* section 16(b)(1)(C) of the Initiative, Referendum and Recall Procedures Act of 1979, effective June 7, 1979, D.C. Law 3-1, D.C. Official Code § 1-1001.16(b)(1)(C) (2006 Repl.). The propriety of this requirement was most recently upheld and applied to reject a proposed initiative to validate or recognize marriage in the District as only between one man and one woman in *Jackson II*. *See* slip. op. at 6-14.

The proposed Initiative could result in the authorization of, or have the effect of authorizing, discrimination prohibited under the HRA by depriving only same-sex couples of the legal status, rights, and responsibilities they currently enjoy as married persons under the law of other jurisdictions pursuant to section 1287a of the Code Establishment Act and will soon enjoy as persons who can marry in the District after the Amendment Act becomes law. This impermissibly discriminates, as access to the rights and responsibilities of civil marriage are protected by the HRA.

The analysis of whether validly recognized same-sex marriages in the District are protected by the HRA is necessarily framed to some extent by the decision in *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995). In *Dean*, the Court of Appeals held that the denial of a marriage license to a same-sex couple did not violate the HRA. However, in doing so, the court acknowledged that "the elimination of discrimination within the District of Columbia should have the highest priority and that the Human Rights Act should therefore be read in harmony with and as supplementing other laws of the District." *See id.* at 319 (citations omitted).

The *Dean* court went on to consider the legislative history of the HRA and the other District laws concerning marriage. In its consideration, the court attached great importance to gender specific terms in the District's marriage statutes. It further reasoned that the HRA was not meant to affect the meaning of "marriage" because there were not any comments in the legislative history indicating that the Council so intended. *See id.* Thus, the court concluded that "by legislative definition – as we have seen – 'marriage' requires persons of opposite sexes; there 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." *Id.* at 320.

Dean is instructive in that it determined the reach of the HRA by considering the legislative history of the HRA, current statutory context, and legislative intent in determining impermissible discrimination. *See In Re: Marriage Initiative of 2009*, No. 09-006 at 11 (D.C. Bd. of Elections & Ethics, Nov. 17, 2009). The court in *Dean* considered these factors and found no support for same-sex marriage under the HRA. However, applying this same analytical framework today, the conclusion in *Dean* no longer holds true.

Since the *Dean* decision, there have been "many significant changes in the District's marriage law." *See Jackson v. District of Columbia Bd. of Elections & Ethics*, No. 2009 CA 004350, slip op. at 6 (D.C. Super. Ct. 2009) ("*Jackson I*"). At the time *Dean* was decided, there were eight gender-specific provisions in the District's marriage statutes noted by the court, all of which have since been amended to remove the gender-specific references. *See* D.C. Official Code §§ 16-901, 16-911, 16-912, 16-913, 16-916, 46-601, 46-718, 46-401. These amendments occurred as part of a systemic effort to employ gender-neutral language throughout the D.C. Code, particularly as it pertains to the rights, benefits, and obligations associated with the institution of marriage.

Furthering the District's affirmative policy of prohibiting discrimination on the basis of sex, sexual orientation, gender, and gender identity or expression, the District has also taken steps to recognize same-sex marriages. Under section 1287a of the Code Establishment Act, District law explicitly recognizes valid same-sex marriages from other jurisdictions. Distinct from the facts presented in *Dean*, the recognition of same-sex marriage in the District is not just possible, it is required by law.

Thus, when the D.C. Superior Court was confronted with a referendum to prohibit the recognition of valid foreign same-sex marriages in *Jackson I*, the court took note of the dramatic social and legal shift from *Dean* and concluded that *Dean* can no longer be touted as supporting the idea that the HRA permits discrimination against same-sex marriages. *See id.*, slip op. at 7.

Accordingly, *Jackson I* addressed the issue of marriage equality and discrimination against same-sex couples. The court noted that there are more than 200 rights and responsibilities of civil marriage that are unavailable to domestic partners, making the debate over recognition more than a "quarrel" over status or nomenclature. *Id.* at 8. Noting that "even if unmarried same-sex couples could receive the same benefits as married couples, courts have long held that different treatment can equate to discrimination whether or not the material benefits and services offered appear uniform." *Id.* (citing *Goss v. Bd. of Educ.*, 373 U.S. 683, 688 (1963)).

On this basis, the court in *Jackson I* found that a referendum banning the recognition of valid foreign same-sex marriages was discriminatory, in that it would deny same-sex couples the rights and responsibilities of civil marriage based on their gender and sexual orientation. *See id.* Consequently, the proposed referendum was rejected as improper, as it authorized, or would have the effect of authorizing, discrimination prohibited under the HRA. *Id.*

Of particular importance to the proposed measure here is the Superior Court's decision in *Jackson II*. There, the court addressed an initiative which stated, "Only marriage between a man and a woman is valid or recognized in the District of Columbia." *See* slip op. at 3. In *Jackson II*, the court went further than it had in *Jackson I*, concluding that "*Dean's* holding is no longer controlling." *Id.* at 20.

Addressing the impact of *Dean*, the *Jackson II* court took note of the changed legislative landscape. Given that all of the statutory provisions relied on in *Dean* have been repealed or amended to allow for same-sex marriages and that valid foreign same-sex marriages are now

specifically recognized, the court found a "clear manifestation of intent to alter the traditional definition of marriage." *Id.* at 19-20. Whereas *Dean* expressly relied upon the absence of such an indication, the changed legislative landscape and clear intent by the Council to alter the traditional definition of marriage have undercut the premise of *Dean* to the point that it is "no longer controlling." *Id.* at 20.

Accordingly, the court decided that the proposed initiative violated the HRA. The initiative in question in *Jackson II* would have stripped the recognition of valid foreign same-sex marriages conferred by D.C. Official Code § 46-405.01. Thus, the court noted that "if enacted, the initiative would deprive *only* same-sex individuals of the legal status, rights, and privileges they enjoy as married persons" (emphasis added), and went on to conclude that the initiative "patently 'authorizes or would have the effect of authorizing discrimination based upon… actual or perceived… sexual orientation [or] gender identity.'" *Id.* at 14-15.

There is strikingly little difference between the initiative in *Jackson II* and the current proposed Initiative. The initiative rejected in *Jackson II* stated, "Only marriage between a man and a woman is valid or recognized in the District of Columbia." The proposed measure here states, "Marriage is the legally recognized union between one man and one woman." Both the initiative rejected in *Jackson II* and the instant measure are to be seen, in short, as seeking to redefine and limit marital recognition as between only one man and one woman. Such an effort was rejected in *Jackson II* and should again be rejected here. Analogous to the initiative in *Jackson II*, the proposed Initiative would impermissibly strip marital recognition *only* with respect to same-sex couples. It would deny them the legal status, rights, responsibilities, and obligations of civil marriage they currently enjoy with respect to valid marriages outside the District and – soon – with respect to valid marriages in the District, solely because of their gender and sexual orientation.

Revoking marital recognition based on one's gender and sexual orientation deprives homosexuals of the over 200 rights and responsibilities of marriage. The HRA specifically prohibits the denial of any "facility, service, program, or benefit" that is based on gender, sex, gender identity, or sexual orientation. *See* D.C. Official Code § 2-1402.73. Consequently, any effort to foreclose same-sex couples the rights and responsibilities of civil marriage discriminates, or has the effect of discriminating, in contravention of the HRA.

In sum, the proposed Initiative is not a proper subject for initiative under District law, and the Board of Elections and Ethics should, therefore, reject it.

Sincerely,

Peter J. Nickles
Attorney General for the District of Columbia

cc: The Honorable Adrian M. Fenty, Mayor
Bridget Davis, Director, Office of Policy and Legislative Affairs

Vincent Gray, Chairman, Council of the District of Columbia
Yvette Alexander, Council of the District of Columbia
Marion Barry, Council of the District of Columbia
Muriel Bowser, Council of the District of Columbia
Kwame Brown, Council of the District of Columbia
Michael Brown, Council of the District of Columbia
David Catania, Council of the District of Columbia
Mary Cheh, Council of the District of Columbia
Jack Evans, Council of the District of Columbia
Jim Graham, Council of the District of Columbia
Phil Mendelson, Council of the District of Columbia
Harry Thomas, Jr., Council of the District of Columbia
Tommy Wells, Council of the District of Columbia