DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

In Re:	)	
Preservation of Traditional Marriage One Man One Woman 2009	)	Administrative Hearing No. 10-002

MEMORANDUM OPINION AND ORDER

I. Introduction

This matter came before the District of Columbia Board of Elections and Ethics (hereinafter "the Board") during a Special Hearing on Tuesday, February 16, 2010 pursuant to the submission of a proposed initiative measure, "Preservation of Traditional Marriage One Man and One Woman 2009" ("the Initiative"). The purpose of the Special Hearing was to determine whether or not the Initiative presents a proper subject matter for initiative in the District. Joyce A. Little, the proposer of the Initiative, appeared *pro se* before the Board. Chairman Errol R. Arthur and Board member Charles R. Lowery, Jr. presided over the hearing.

II. Statement of the Facts

On December 23, 2009, Ms. Little filed the Initiative with the Board.[1] According to its legislative text, the Initiative, if passed, would "repeal the District of Columbia's 'Religious Freedom and Civil Marriage Equality Act of 2009.'" The Religious Freedom and Civil Marriage Equality Act of 2009 ("Civil Marriage Equality Act") is an act of the Council of the District of Columbia that is projected to take effect on March 3, 2010.

Also on December 23, 2009, Ms. Little filed a verified statement of contributions

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[1] *See* D.C. Official Code § 1-1001.16(a) (2006).

with the D.C. Office of Campaign Finance.[2] On January 5, 2010, the Board's Office of the General Counsel ("the General Counsel") transmitted a Notice of Public Hearing and Intent to Review regarding the Initiative ("the Notice") to the Office of Documents and Administrative Issuances for publication in the D.C. Register.[3] On January 5, 2010, the General Counsel also sent the Notice to the Mayor, the Chairman of the D.C. Council, the D.C. Attorney General, and the General Counsel for the Council, inviting them to address the issue of whether the Initiative presents a proper subject for initiative. The Notice was published in the D.C. Register on January 8, 2010.

The Board held the proper subject hearing on February 16, 2010.[4] In response to the Board's invitation to comment on the propriety of the Initiative, the Board received written testimony and heard oral testimony during the hearing from several individuals and organizations. The Board also held the record open for additional comments until the close of business on February 19, 2010. In all, the Board heard testimony from nine witnesses and received and considered comments from approximately six individuals and/or organizations.

III. Analysis

A. Introduction

Under the terms of Title IV of the Home Rule Act, "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

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2 *See* D.C. Official Code § 1-1001.16 (b)(1)(A) (2006).

3 *See* D.C. Mun. Regs. tit. 3 § 1001.2 (2007).

4 *See* D.C. Mun. Regs. tit. 3 § 1001.3 (2007).

qualified electors of the District of Columbia for their approval or disapproval."[5] Since the initiative power is the power of direct legislation, it follows that an initiative must propose "legislative" action.[6] Thus, as a threshold requirement, an initiative must propose a "law."[7] If the initiative is found to propose a "law," the Board then undertakes a proper subject inquiry pursuant to D.C. Official Code § 1001.16(b)(1).[8]

Based upon the written and oral opinions submitted to the Board regarding the propriety of the Initiative, the Board's own research and consideration of the matter, the Board now concludes that the Initiative cannot be accepted because it does not propose a "law," as understood by the terms of Title IV of the Home Rule Act.

B. The Initiative does not propose a "law" because it does not propose new legislation or amend or repeal existing legislation.

Included within the people's right of initiative is not only the right to propose new legislation, but also "the right to repeal and amend existing legislation."[9] The Charter Amendments give the "electorate the right to propose 'laws,' and the word 'laws' includes both new legislation and the amendment and repeal of existing legislation."[10] As the D.C. Court of Appeals clearly stated in *Convention Center v. D.C. Board of Elections and Ethics* ("*Convention Center*"):

> "...the mere existence of a referendum right to approve or disapprove acts of the Council [] does not imply that the electorate cannot use the initiative

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5 D.C. Official Code § 1-204.101 (emphasis added). *See also* § 1-1001.02 (10).

6 *Convention Center v. D.C. Board of Elections and Ethics*, 441 A.2d 889, 897 (D.C. 1981).

7 *Id.* at 896.

8 D.C. Official Code § 1-1001.16(b)(1).

9 *Id.* at n.38.

10 *Id.*

> to repeal or amend existing legislation. Rather than being mutually exclusive, the two processes of initiative and referendum overlap. Courts in many other jurisdictions have interpreted their initiative provisions as extending to the repeal of existing *laws*.[11]

In making this determination of whether an initiative proposes a "law," the D.C. Court of Appeals in *Convention Center* instructs that the Board must first focus on the legal scope of the initiative.

> "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 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.[12]

A bill is "the form of a *proposed law* before it is enacted into law by vote of the legislative body."[13] Accordingly, the Board must scrutinize the Initiative to determine whether it proposes a law.

Here, the Initiative is fatally deficient in this threshold requirement that an initiative propose a "law" because the Initiative seeks to repeal an act, as opposed to existing legislation.[14] Looking at the Initiative's "legislative text" alone,[15] it is clear that the Initiative seeks to repeal the Civil Marriage Equality Act. However, the Civil

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11 *Id.* (emphasis added) (internal citations omitted).

12 *Id.* at 898.

13 *Black's Law Dictionary* 167 (6th ed. 1990).

14 *Convention Center*, 441 A.2d at n.38.

15 The Initiative's summary statement also states that the Initiative would "define marriage as between one man and one woman." But, as *Convention Center* directs, the Board must look to the bill (or, the "legislative text") in its proper subject inquiry. Here, the legislative text of the Initiative only addresses the repeal of the Religious Freedom and Civil Marriage Equality Amendment Act of 2009.

Marriage Equality Act is not yet *law* (or, "existing legislation") in the District.[16] Although the Civil Marriage Equality Act was approved by the Council and signed by the Mayor, acts of the Council are subjected to a 30-day Congressional review period.[17] An act will only become law if during this 30-day review period both the House of Representatives and the Senate do not adopt a concurrent resolution disapproving of the act.[18] Here, the Civil Marriage Equality Act has not yet emerged from its Congressional review period. Because its progress towards becoming law can still be obliterated with a joint resolution of disapproval, it has not yet become law in the District.

While an initiative may propose a law which specifically repeals a *law* in effect in the District of Columbia, an initiative which seeks to repeal an *act* of the Council does not "propose a law." The Initiative, which only seeks to repeal the Civil Marriage Equality Act, does not propose a law because it neither repeals or amends existing legislation nor proposes new legislation. Therefore, the Initiative does not have a valid bill. Further, because the Board cannot "determine whether an initiative conforms to the limitations on the initiative right unless it scrutinizes the very bill that would become law," the Board's analysis on whether the Initiative presents a proper subject for initiative must end at this threshold inquiry.[19]

IV. Conclusion

Title IV of the Home Rule Act defines, in short, the term "initiative" to mean the process by which the electors of the District of Columbia may propose "laws." To

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16 The projected effective date of the Civil Marriage Equality Act is March 3, 2010.

17 *Convention Center*, 441 A.2d at n.14.

18 *Id.*

19 *Id.* at 898.

propose a law, an initiative must either repeal or amend existing legislation or propose new legislation. Where an initiative does neither, it does not contain a valid bill. Since the Initiative does not seek either to repeal a law or propose new legislation, the Initiative does not contain a proper bill and fails this threshold requirement. Accordingly, it may not be accepted by the Board.

For the foregoing reasons, it is hereby:

ORDERED that the Initiative is **RECEIVED BUT NOT ACCEPTED** pursuant to D.C. CODE § 1-1001.16(b)(2).

March 1, 2010
Date

Errol R. Arthur
Chairman, Board of Elections and Ethics

Charles R. Lowery, Jr.
Member, Board of Elections and Ethics