DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

In Re:	)	
Referendum Concerning the Jury And Marriage Amendment Act of 2009	)	Administrative Hearing No. 09-004

MEMORANDUM OPINION AND ORDER

I. Introduction

This matter came before the Board of Elections and Ethics (hereinafter "the Board") during a special hearing on Wednesday, June 10, 2009 pursuant to the submission of a proposed measure, the "Referendum Concerning the Jury and Marriage Amendment Act of 2009" ("the Referendum"). The Referendum seeks to suspend section 3 of Act 18-0070, the "Jury and Marriage Amendment Act of 2009," ("the Act") until it has been presented to the registered qualified electors of the District of Columbia for their approval or rejection. The purpose of the Special Hearing was to determine whether or not the Referendum presents a proper subject matter for a referendum in the District. Reverend Harry R. Jackson, Jr., the lead proposer of the Referendum, appeared before the Board *pro se*.[1] Chairman Errol R. Arthur and Board member Charles R. Lowery, Jr. presided over the hearing.

II. Statement of the Facts

Section 3(b) of the Act provides that same-sex marriages entered into and recognized as valid in other jurisdictions shall be recognized as valid marriages in the District. It reads as

1 Although Rev. Jackson spoke on his own behalf before the Board, David W. New, Esq. is the counsel of record for Rev. Jackson and the other proposers of the Referendum. Brian W. Raum, Esq., of the Alliance Defense Fund, filed a Notice of Appearance on behalf of the proposers on May 27, 2009, and, along with Rev. Jackson, presented the argument on their behalf at the hearing.

follows:

> Sec. 1287a. Recognition of Marriages from Other Jurisdictions. – A marriage legally entered into in another jurisdiction between 2 persons of the same sex that is recognized as valid in that jurisdiction, that is not expressly prohibited by sections 1283 through section 1286, and has not been deemed illegal under section 1287, shall be recognized as a marriage in the District.[2]

The Act's originating bill, B18-0010 ("the Bill") was introduced on Friday, January 02, 2009 by D.C. Council Chairman Vincent Gray at the request of Mayor Adrian Fenty.[3] An Amendment to the Bill, which included the language of section 3(b), was offered by Councilmember Phil Mendelson on April 7, 2009. The Council approved the Bill as amended on its first reading on that date. The Council approved the Bill again on its final reading on Tuesday, May 5, 2009 by a vote of 12-1. The Council transmitted the Bill to Mayor Fenty on Wednesday, May 6, 2009, and the Mayor signed the Bill on the same day.[4] The resulting Act was transmitted to the U.S. Congress on Monday, May 11, 2009, and is projected to become law on Monday, July 6, 2009.[5]

On Wednesday, May 27, 2009, Rev. Harry R. Jackson, Jr., Rev. Walter E. Fauntroy, Rev. Dale E. Wafer, Melvin Dupree, Sandra B. Harris, Dr. Patricia Johnson, and Bobby Perkins, Sr. ("the Proposers") filed the Referendum with the Board.[6] Also on May 27, the Proposers filed a

---

2 The D.C. Code provisions referenced dictate that marriages entered into in other jurisdictions will not be recognized in the District if they are: incestuous or bigamous; have been judicially declared null and void; or contain at least one individual who is not of the age of consent, unable to consent to marriage due to mental incapacity, and/or has been forced or fraudulently tricked into consenting to the marriage.

3 *See* D.C. Official Code § 1-204.22(5) (2006).

4 *See* D.C. Official Code § 1-204.04(e) (2006).

5 *See* D.C. Official Code § 1-206.02(c)(1) (2006).

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

verified statement of contributions with the D.C. Office of Campaign Finance.[7] On Thursday, May 28, 2009, the Board's Office of the General Counsel ("the General Counsel") transmitted a Notice of Public Hearing and Intent to Review regarding the Referendum ("the Notice") to the Office of Documents and Administrative Issuances for publication in the D.C. Register.[8] Also on May 28, the General Counsel sent the Notice to the Mayor, the Chairman of the D.C. Council, the D.C. Attorney General, and the General Counsel for the D.C. Council, inviting them to address the issue of whether the Referendum presents a proper subject for referendum. The Notice was published in the D.C. Register on Friday, June 5, 2009.

The Board held the proper subject hearing on Wednesday, June 10, 2009.[9] In response to the Board's invitation to comment on the propriety of the Referendum, the Board received written testimony and heard oral testimony during the hearing from numerous individuals and organizations**.** The Board also held the record open until the close of business on Thursday, June 11, 2009 for additional comments. In all, the Board received and considered comments from approximately 75 individuals and/or entities.

III. Analysis

A. Introduction

The D.C. Board of Elections and Ethics ("the Board") may not accept a referendum measure if it:

> finds that it is not a proper subject of … referendum … under the terms of Title IV of the District of Columbia Home Rule Act or upon any of the following grounds:

---

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

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

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

(A) The verified statement of contributions has not been filed pursuant to §§ 1-1102.04 and 1-1102.06;[10]
(B) The petition is not in the proper form established in subsection (a) of this section;[11]
(C) The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2;[12] or
(D) The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46.[13] [14]

Based upon the written and oral opinions submitted to the Board regarding the propriety of the Referendum, as well as its own research and consideration of the matter, the Board now concludes that the Referendum does not present a proper subject of referendum because it would authorize discrimination prohibited under the Human Rights Act ("HRA").

B. The Initiative and Referendum Right

With the passage of the Initiative, Referendum, and Recall Charter Amendments Act in 1978 ("the Charter Amendments Act"),[15] electors in the District of Columbia were granted the "power of direct legislation",[16] putting them on a par with the District's legislative body, the Council of the District of Columbia ("the Council").[17] The Council itself had been established

10 The verified statement of contributions consists of the statement of organization required by D.C. Official Code § 1-1102.04 and the report of receipts and expenditures required by D.C. Official Code § 1-1102.06.

11 D.C. Official Code § 1-1001.16 (a) provides that initiative measure proposers must file with the Board "5 printed or typewritten copies of the full text of the measure, a summary statement of not more than 100 words, and a short title of the measure to be proposed in an initiative."

12 Chapter 14 of Title 2 of the D.C. Official Code contains the District of Columbia Human Rights Act. *See* D.C. Official Code § 2-1401.01 *et seq.* (2006 Repl.).

13 D.C. Official Code § 1-204.46 deals with budgetary acts of the D.C. Council.

14 D.C. Official Code § 1-1001.16 (b)(1) (2006 Repl.).

15 D.C. Law 2-46, 24 D.C. Reg. 199 (1978) (*codified as amended* at D.C. Official Code § 1-204.101 *et seq.*).

16 *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002) ("Marijuana Policy Project").

17 *See Convention Ctr. Comm. v. D.C. Board of Elections and Ethics*, 441 A.2d 889, 897 (D.C. 1981)("Absent express or implied limitation, the power of the electorate to act by initiative is coextensive with the power of the

five years earlier pursuant to the United States Congress' enactment of the Self-Government and Governmental Reorganization Act ("the Home Rule Act"),[18] a primary purpose of which was to relieve Congress of the burden of legislating for the District by "delegat[ing] certain legislative powers to the government of the District of Columbia."[19]

As a result of the Charter Amendments Act, any registered qualified elector may use the initiative process to propose a law by presenting it to the electorate for its approval or disapproval. Upon voter approval, a proposed initiative measure will become "an act of the Council," and, if it survives the Congressional review period to which acts of the Council are subjected, a law in the District of Columbia.[20] Moreover, the District's registered qualified electors may use the referendum process to propose to suspend an act of the D.C. Council, or some part(s) thereof, until such act has been presented to the electorate for its approval or disapproval.

C. Restrictions on the Initiative and Referendum Right

Although the right of initiative and referendum is to be "liberally construed", *Convention Center Referendum Comm v. District of Columbia Bd. Of Elections and Ethics*, 441 A.2d 889, 913, there are certain specific limitations on that right.[21] For example, although the electorate's initiative and referendum power is largely coextensive with the Council's power to legislate, the

---

legislature to adopt legislative measures.").

18 87 Stat. 777 (1973) (*codified as amended at* D.C. Official Code § 1-201.01 *et seq.*).

19 D.C. Official Code § 1-201.02(a) (2006 Repl.).

20 *See* D.C. Official Code §§1-204.105, 1-206.02(c) (2006 Repl.).

21 *See* Section III A *infra*; *see also Hessey v. District of Columbia Bd. of Elections and Ethics*, 601 A.2d 3 at 11 n.18 (D.C. 1991) ("No proponent of initiative or referendum would maintain that all municipal activity should be subject to popular election. If governments are to function there must be some area in which representative action will be final.") (citations omitted).

statutory definition of the term "initiative" makes clear that, in contrast to the Council, the electorate may not, for example, propose laws that appropriate funds.[22] This limitation on the right of initiative – which applies to referenda as well - was added to the Charter Amendments Act to insure that the electorate would not use its newly-created right to propose laws authorizing programs and activities as a means by which to interfere with the fiscal responsibilities assigned to the Council by the District Charter.[23]

D. The Human Rights Act

Another clear restriction on the right of initiative and referendum is that these processes may not be used to authorize discrimination prohibited under the Human Rights Act (HRA).[24] Enacted in 1977, the stated purpose of the HRA is to

> secure an end in the District of Columbia to discrimination for any reason other than individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.[25]

The HRA prevents discrimination in public accommodations, among other areas. Specifically, section 231 of the HRA provides that

> [i]t shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based on the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family

22 *See* D.C. Official Code § 1-204.101(a) (2006 Repl.).

23 Of the 24 states that have an initiative and/or referendum process, at least 13, including the District, impose subject matter limitations. For example, Massachusetts precludes any measure involving religion or the judiciary (Mass. Const. amend. art. XLVIII, c.II, § 2 (2009)), Ohio prohibits any measures involving property taxes (Ohio Const. art. II, § 1(e) (2009)), and Alaska, Massachusetts, and Wyoming prohibit measures from making or repealing appropriations (Alaska Const. art. XI, § 7 (2009); Mass. Const. art. XLVIII, c.II, § 2; Wyo. Const. art. 3, § 52(g) (2008)).

24 *See* D.C. Official Code § 1-1001.16 (b)(1)(C); D.C. Official Code § 2-1401.01 *et seq*. (2006 Repl.).

25 D.C. Official Code § 2-1401.01 (2006 Repl.).

> responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual:
>
> (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.[26]

In 2002, the Human Rights Act was amended to make plain its application to the District of Columbia 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, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business.[27]

When the enabling legislation required to implement the Charter Amendments Act was being considered by the Council, there was an extensive debate as to whether to exclude laws concerning human rights from the initiative and referenda processes. Ultimately, those in favor of the human rights exclusion were victorious; the Council approved an amendment – offered by Councilmember Marion Barry - to the Charter Amendment Act's enabling legislation that reflected the Council's intent that "the initiative and referendum process would never be used to interfere with basic civil and human rights."[28]

The amendment in its earliest form, provided that initiative and referendum

---

26 D.C Official Code § 2-1402.31 (2006 Repl.)

27 D.C. Official Code § 2-1401.73 (2006 Repl.).

28 Memorandum from Councilmember Marion Barry to D.C. Council Government Operations Committee members regarding Proposed Amendment to 2-317, the "Initiative, Referendum, and Recall Procedures Act of 1978" (April 26, 1978).

petitions must be rejected if they

> authorize[], or would have the effect of authorizing, discrimination for any reason other than individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.[29]

In its current form, the amendment simply indicates that measures which would authorize discrimination prohibited under the HRA are prohibited, reflecting the legislature's intent that the HRA encompass any and all District laws that are intended to address impermissible forms of discrimination. It is clear, then, that the Board, as "the gatekeeper for the initiative process,"[30] must refuse to accept initiative and referendum measures that would thwart legislative efforts to eradicate unlawful discrimination. Accordingly, the Board must determine whether or not the Act constitutes such an effort, such that a request for a referendum concerning the Act must necessarily be denied.

E. Same-Sex Marriage in the District

As stated above, the Act provides that same-sex marriages entered into and recognized as valid in other jurisdictions shall be recognized as valid marriages in the District. Presently, Massachusetts, Connecticut, Iowa, Maine, Vermont, New Hampshire currently permit, or are set to permit, same-sex marriages. From June 2008 until November 2008, California also authorized same-sex marriages. In November of 2008, California voters voted in favor of Proposition 8, an initiative constitutional amendment

29 *Id.*

30 *Marijuana Policy Project v. United States*, 304 F.3d 82, 84 (D.C. Cir. 2002).

banning same-sex marriages.[31] However, same-sex marriages performed prior to the enactment of the proposition are still recognized as valid in California. Additionally, Belgium, Canada, the Netherlands, Norway, South Africa, Spain, and Sweden allow same-sex marriages. Accordingly, contrary to times past, there can be, and is, such a thing as a valid same-sex marriage.

Prior to the Act, District law was silent regarding the recognition of such marriages in the District. However, as the General Counsel for the D.C. Council has stated, "[e]xisting District law requires the recognition of marriages that were valid at their place of celebration."[32] This broad policy of recognition insures that couples who enter into valid marriages elsewhere and then relocate into the District are privy to all of the rights and responsibilities that marriage in the District carries.[33]

Rather than allow District law to continue to remain silent on the issue of whether or not valid same-sex marriages would be recognized in the District and, consequently, afforded the same status as heterosexual marriages, the Council saw fit to legislate the

---

31 The formal title of Proposition 8 was "Eliminates Right of Same–Sex Couples to Marry. Initiative Constitutional Amendment".

32 Letter from Brian Flowers, General Counsel, Council of the District of Columbia, to Kenneth J. McGhie, General Council, D.C. Board of Elections and Ethics regarding the Referendum on Jury and Marriage Amendment Act of 2009 (June 9, 2009)("Flowers' Letter") at 6 (discussing laws and cases supporting proposition that "the District has recognized marriages valid in the state in which they were solemnized, unless the marriage was between persons domiciled in the District at the time of the marriage and the marriage would have been expressly prohibited by one of the provisions contained in D.C. Official Code § 46-401 through 46-404, or the marriage is in violation of the 'strong public policy' of the District.").

33 Proponents and supporters of the Referendum have argued that the Referendum, if successful, would not discriminate in violation of the HRA because same-sex couples, whether or not they are validly married in other jurisdictions, would still be able to avail themselves of the District's comprehensive and generous domestic partnership laws, and thereby reap the same benefits and obligations of marriage that heterosexual married couples receive. The Board is not persuaded by this argument. Heterosexual married couples whose marriages originate in other jurisdictions are not required to shed their marital status and find consolation in the fact that there is, in the District, an alternative form of union available. The HRA dictates that same-sex couples who are validly married in other jurisdictions should similarly not be so constrained.

Act. This legislative initiative is significant for several reasons. First, it unequivocally declares that the District is a jurisdiction that affords full faith and credit to valid same-sex marriages.[34] Second, it is consistent with recent efforts by the Council to eradicate impermissible discrimination on the basis of same-sex discrimination by putting same-sex couples on a par with heterosexual couples in numerous provisions of District law. The Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, a partial aim of which was to "formally acknowledge that families created by same-sex couples are not distinguishable from any other family currently recognized under District law,"[35] is one example. Council efforts to remove gender-specific references in statutes pertaining to marriage and/or the rights and responsibilities thereof are another.[36] Finally, the Act effectively adds discrimination against same-sex couples who have entered into valid marriages in other jurisdictions to the list of acts of discrimination prohibited under the HRA. This final consequence of the Act is most significant when considering the import of *Dean v. District of Columbia ("Dean")*[37] – a case cited frequently by both proponents and opponents of the Referendum – with respect to this matter.

---

34 "This amendment makes clear what is already the law: to recognize marriages duly performed in other jurisdictions, including officially sanctioned marriages between persons of the same-sex." Amendment offered by Councilmember Phil Mendelson to Bill 18-10, Disclosure to the United States District Court Act of 2009 (Committee Print) (April 7, 2009).

35 Report of the Committee on Public Safety and the Judiciary on Bill 18-66, the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009 at 9 (Council of the District of Columbia, March 10, 2009).

36 Flowers Letter at 8 (discussing fact that several statutory provisions "have been amended by the Council to remove the gender-specific references as part of a systemic effort to employ gender-neutral language throughout the D.C. Official Code statutes pertaining to marriage and the rights, benefits, and obligations incident to marriage.").

37 653 A.2d 307 (D.C. 1995).

F. The *Dean* Case

In *Dean*, the D.C. Court of Appeals ruled that there was no violation of the HRA when the Clerk of the Superior Court denied a marriage license to a same-sex couple. The court reasoned that the HRA, though intended to prohibit discrimination of many kinds, was not intended to prohibit discrimination of *every* kind, and was clearly not intended to prohibit discrimination on the basis of sexual orientation such that the long-standing definition of marriage was now altered to include same-sex couples. In reaching this conclusion, the court stated that,

> [h]ad the Council intended to effect such a major definitional change, counter to common understanding, we would expect some mention of it in the [HRA] or at least in its legislative history. … There is none. … This is not surprising, however, for 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 [HRA], there can be no such thing.[38]

As discussed above, there is now, unlike in 1995 when *Dean* was decided, such a thing as a valid same-sex marriage. The Council has, through the Act, expressed its determination to clearly state that discrimination against same-sex couples who are validly married elsewhere is prohibited. Simply stated, the Act means that the HRA now requires the District government and all public accommodations, *inter alia*, to refrain from discriminating against same-sex couples who are validly married elsewhere unless the marriage is otherwise prohibited in the District. For these reasons, *Dean*, while informative, is not controlling in this matter.

IV. Conclusion

For the very same reasons, the Board must reject the Referendum. The Referendum instructs that "[a] 'NO' vote … will continue the current law of recognizing

38 *Dean*, 653 A.2d at 320.

only marriage between persons of the opposite sex."[39] Notwithstanding the incorrect statement of existing law, it is clear that the Referendum's Proposers would, in contravention of the HRA, strip same-sex couples of the rights and responsibilities of marriage that they were afforded by virtue of entering into valid marriages elsewhere, and that the Council intends to clearly make available to them here in the District, simply on the basis of their sexual orientation. Because the Referendum would authorize discrimination prohibited by the HRA, it is not a proper subject for referendum, and may not be accepted by the Board.[40]

For the foregoing reasons, it is hereby:

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

June 15, 2009
Date

Errol R. Arthur
Chairman, Board of Elections and Ethics

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

39 The Referendum Summary Statement.

40 The Proposers and supporters of the Referendum have requested that the Board accept the Referendum and thereby allow voters to be heard, for what they say would be the first time, regarding the desirability of the Act among the electorate. The Board, as an entity responsible for ensuring the integrity of a very critical aspect of the democratic process, is particularly sensitive to issues of fairness and due process. However, the Board must also act in a manner which adheres to its statutory obligations.