

January 29, 2010

VIA E-MAIL (ogc@dcboee.org)

Kenneth J. McGhie
General Counsel's Office
District of Columbia Board of Elections and Ethics
One Judiciary Square
441 4th Street, N.W., Suite 270 N
Washington, D.C. 20001

RE: *In the Matter of the Referendum on the Religious Freedom and Civil Marriage Equality Amendment Act of 2009*; Filed January 6, 2010
Hearing Date – January 27, 2010

Dear Mr. McGhie:

This letter will supplement the Proponents' earlier letter memorandum to the District of Columbia Board of Elections and Ethics (the "Board"). The efforts by opponents of the proposed Referendum to manufacture "facts" to demonstrate *any* reliance by the District of Columbia Council on "revenues" arising from enactment of the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 (the "Act") are nothing more than a cynical attempt to create yet another barrier to the citizens' right to the referendum, as guaranteed in the District of Columbia Charter Amendments Act.

The proposed referendum *is* a proper subject for a referendum, to-wit:

1. It does not relate to an emergency act of the Council.
2. It does not levy taxes.
3. It does not make appropriations to the general operations budget of the District of Columbia.

There is no evidence whatsoever that the Council relied on any budgetary forecasts, positive *or* negative, related to the Act in approving the FY 2010 Budget, or in revising the FY 2009 and 2010 Budgets of the District of Columbia. The FY 2010 Budget was submitted to the United States Congress on September 28, 2009. The extensive committee reports, revenue projections of the Chief Financial Officer, and other actions and records of the Council reflect *no* reference whatsoever to the Act or *any* revenue projections or implications related to the Act insofar as the general operations budget of the District of Columbia for the fiscal years 2009 and 2010. See <http://www.dccouncil.washington.dc.us/fiscalyear2009and2010budgetgapclosing> (last visited Jan. 29, 2010). The revenue projections related to the Act were not even released by the Chief Financial Officer until December 15, 2009, the same day the Act was passed by the Council.

The schedule for the development of the FY 2011 budget has yet to be announced—such that there are *no* revenue impact projections or reports, positive *or* negative, related to the Act on which the Council has formulated and relied for the “general operations budget” of the District.

In other words, any argument that the Act makes appropriations or levies taxes is totally spurious. Even a broad construction of the terms does not allow a completely fabricated claim of a fiscal impact that does not exist.

Further, the Fiscal Impact Statement provided to the Council in its consideration of the Act specifically states that there is *no* impact for FY 2010 through FY 2013. Fiscal Impact Statement – “Religious Freedom and Civil Marriage Equality Amendment Act of 2009,” Office of the Chief Financial Officer, at 1 (Nov. 2, 2009). A true and correct copy of the Fiscal Impact Statement is attached to this letter as Exhibit A.

The fact that the Council has not budgeted based on the alleged revenue projections concerning the Act means that the proposed Referendum cannot possibly “negate or limit” a Budget Request Act. D.C. Code § 1-1001.16(b)(1)(D). The language, relied on by the opponents of the Referendum, from *Hessey v. District of Columbia Board of Elections and Ethics*, 601 A.2d 3 (D.C. 1991) (en banc), about interpreting “this limitation very broadly” and as “extend[ing] . . . to the full measure of the Council’s role in the District’s budget process” relates to the “laws appropriating funds” restriction imposed on the right of *initiative* by the Charter Amendments Act. *Id.* at 20. That language has nothing to do with the people’s right of *referendum*.

Indeed, in *Dorsey v. District of Columbia Board of Elections and Ethics*, 648 A.2d 675 (D.C. 1994), the case relied on by the Office of the General Counsel, the Court of Appeals explained:

More fundamentally, [D.C. Code § 1-204.101(a)] prohibits use of the *initiative* process to propose “laws appropriating funds.” In *Hessey*, 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”

Id. at 677 (internal citations omitted; emphasis added). The *Dorsey* court only had in view the “laws appropriating funds” restriction imposed on the right of *initiative* by the Charter Amendments Act, *not* the right of *referendum*.

When the *Dorsey* court discussed the IPA’s prohibition on referenda and initiatives that would “negate or limit” a Budget Request Act, it was clear that the revenue projections for traffic fines and booting were relied on in preparing the budget request to Congress.

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[T]he Council's annual revenue projections incorporated into a Budget Request Act include penalties for late payment of traffic fines (the sort that would be forgiven under appellant's periodic "amnesty" scheme) and fees for booting and associated towing fees, which would no longer be available under the initiative. Thus, by purporting to take effect on January 1, 1993, the proposed initiative would have "negate[d]" the Budget Request Act for that year to the extent the act was based on those projected revenues.

Id. at 676-77. The same was true in *Restaurant Association of Metropolitan Washington v. District of Columbia Board of Elections and Ethics*, No. 04-1785, 2004 WL 2102203 (D.C. Super. Ct. May 21, 2004). The Council had already relied on restaurant tax revenues in preparing its budget request to Congress.

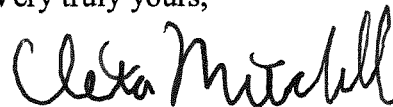
[E]videnced in the Government of the District of Columbia FY 2005 Proposed Budget and Financial Plan submitted to the Council by Mayor Anthony A. Williams, it is reported that the Council makes assumptions about the tax revenue to be earned from the sales and use tax on food, beverages, and the sale of cigarettes. The Restaurant Sales Tax (which includes bars) is projected to earn annual revenues between \$18,632,000 and \$22,105,000 from 2004 through 2008.

Id. at *6.

There is absolutely no evidence here that the Council has relied on projected revenues from issuing marriage licenses to same-sex couples in preparing a Budget Request Act for Congress. Instead, we have a speculative revenue projection that was sent to the Council at the eleventh hour to help manufacture an argument that a referendum would somehow "negate or limit" a Budget Request Act.

For these reasons, the Board of Elections and Ethics is precluded from asserting that the proposed referendum "makes appropriations" or "levies taxes" as a pretext for denying the citizens their right to the referendum under the Charter Amendments Act D.C. Code § 1-204.101(b).

Very truly yours,



Cleta Mitchell
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Austin R. Nimocks
Timothy J. Tracey
Alliance Defense Fund

Attorneys for Proponents


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



Natwar M. Gandhi
Chief Financial Officer

MEMORANDUM

TO: The Honorable Vincent C. Gray
Chairman, Council of the District of Columbia

FROM: Natwar M. Gandhi 
Chief Financial Officer

DATE: November 2, 2009

SUBJECT: Fiscal Impact Statement – “Religious Freedom and Civil Marriage Equality Amendment Act of 2009”

REFERENCE: Bill 18-482, As Introduced

Conclusion

Funds are sufficient in the FY 2010 through FY 2013 budget and financial plan to implement the provisions of the proposed legislation.

Background

The proposed legislation would amend D.C. Official Code (§ 46-401 *passim*) by adding both a new section entitled Equal Access to Marriage which would permit same-sex couples to marry in the District of Columbia, and a new subsection that states that no priest, minister, imam, or rabbi of any religious denomination and no official of any nonprofit religious organization is required to perform marriages and that no religious organization is required to provide services, accommodations, facilities or goods for a marriage ceremony. The proposed legislation also would amend Section 3 of the Health Care Benefits Expansion Act of 1992¹ to discontinue the registration of new domestic partnerships as of January 1, 2011; to allow any two persons in a valid domestic partnership to apply for and receive a marriage license at no cost²; and to dissolve domestic partnerships as of the date on the marriage certificate.

¹ Approved June 11, 1992 (D.C. Law 9-114, D.C. Official Code § 32-702).

² Provided that the parties are eligible to marry pursuant to D.C. Official Code § 46-401 *et seq.*

Exhibit A

Financial Plan Impact

Funds are sufficient in the FY 2010 through FY 2013 budget and financial plan to implement the provisions of the proposed legislation. Allowing couples of the same sex to marry and giving religious organizations the right to decline to perform certain marriage ceremonies would have no cost for the District of Columbia. In addition, discontinuing domestic partnerships and allowing domestic partners to receive a marriage license at no cost would also have no fiscal impact, as the couples had previously paid the exact same fee of \$45 when they entered into the domestic partnership.³ Lastly, under current law health benefits are already offered to domestic partners and dependent children of domestic partners of District of Columbia government employees. Thus the D.C. Government would not incur any additional health care related costs if the domestic partners were to become legally married.

³ Under current law, the cost to apply for and receive a certificate of domestic partnership is \$45. This is the same cost of applying for and receiving a marriage certificate.