

Mark H. Levine, counsel on behalf of the **Gertrude Stein Democratic Club**, the largest GLBT advocacy organization in the District of Columbia ("Stein"), respectfully submits the following Memorandum of Points and Authorities to the District of Columbia Board of Elections and Ethics (the "Board") in support of the proposition that the current Referendum on the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 is not a proper subject for a referendum in the District of Columbia because it authorizes discrimination in violation of the DC Human Rights Act and because it affects the budget process.

I. DÉJÀ VU, PART 3: VIOLATION OF THE D.C. HUMAN RIGHTS ACT

As this Board is acutely aware, this is not the first or second time that the anti-gay Alliance Defense Fund ("ADF") and its front man, Rev. Harry Jackson, have attempted to file citizens' petitions to prevent or forestall marriage equality in the District of Columbia. First, with the Referendum on the Jury and Marriage Amendment Act, and second, with the "Marriage Initiative," this group has repeatedly tried to deny gay and lesbian citizens of the District the equal rights under the law that heterosexual District citizens enjoy. Within just the last eight months or so, this Board has already twice ruled that any attempt to deny gay and lesbian citizens marriage equality violated the DC Human Rights Act. Similarly, the D.C. Superior Court (under two different judges) has also twice ruled against the petitioners on this point, with the second Superior Court expressly rejecting petitioners' additional argument that the DC Charter of 1977, through improper implementation, somehow prevented the Council from protecting human rights and equal rights under the law.

There is no need to reinvent the wheel. On June 9, 2009, Stein submitted a brief to the Board in opposition to the ADF Referendum. On October 16, 2009, Stein

submitted a brief in opposition to the ADF Initiative. And on October 28, Stein submitted an additional reply brief to some of the points made at oral argument by ADF counsel. Stein requests all three of these memoranda to be considered in the present case, as if fully incorporated herein. These memoranda describe in detail why these proposals violate the Human Rights Act, why *Dean* no longer applies, and why the District of Columbia must legally refuse to allow a majority vote on minority rights in violation of the Human Rights Act.

II. ADDITIONAL VIOLATION OF D.C. CODE § 1-202.101
(MATTER RELATED TO BUDGET PROCESS)

The legal prohibition of referenda that violate the Human Rights Act is not the only reason why this Board must dismiss the proposed referendum as improper subject matter. There are budget considerations as well. **The District Charter specifically bars "acts levying taxes" and "acts appropriating funds for the general operation budget" from being subject to referendum. D.C. Code § 1-202.101(b).** No one – not even the ADF – disputes that "[m]atters related to the budget process remain within the control of the Mayor and the Council." See the "Petition for Review of Agency Decision and for Writ in the Nature of Mandamus" filed in DC Superior Court by ADF on behalf of Harry Jackson *et al.* on November 18, 2009 (quoted language at 13, paragraph 49).

As the D.C. Attorney General points out in footnote 10 (page 19) of its Motion to Dismiss (or, in the Alternative, for Summary Judgment) filed in *Jackson v. District of Columbia Board of Elections and Ethics ("Jackson II")* before Judge Macaluso on December 18, 2009:

The District's Office of the Chief Financial Officer, as part of its fiscal-impact analysis of the Religious Freedom and Civil Marriage Equality

Amendment Act of 2009, has submitted to the Council “an analysis of the potential revenue implications of same-sex marriages in the District of Columbia.” That analysis (*available online at* www.davidcatania.com/publicdocuments/Financial_Impact_of_Marriage.pdf) estimates that such marriages could add more than \$1 million in additional tax revenues per year. Similarly, a recent study conducted at the UCLA School of Law concluded that extending marriage to same-sex couples in the District could boost the economy by upwards of \$50 million over three years, generating increases in local tax and fee revenues of over \$5 million, and potentially creating approximately 700 new jobs. The Williams Institute, “The Economic Impact of Extending Marriage to Same-Sex Couples in the District of Columbia,” (Apr. 2009) (*available online at* <http://www.law.ucla.edu/williamsinstitute/pdf/DC%20Econ%20Impact.pdf>).

An additional \$5 million in taxes is a substantial budget consideration. And the referendum, if approved by the Board, and adopted by the voters, would remove this additional \$5 million from the DC budget.

In *Dorsey v. District of Columbia Bd. of Elections & Ethics*, 648 A.2d 675, 677 (D.C. 1994), a voter proposed an initiative to prevent the DC Government from putting a "boot" on parked cars and to require periodic amnesty for late fees on parking fines. The District of Columbia Court of Appeals upheld the Board's denial of such an initiative on the basis that it violated the "appropriating funds" portion of D.C. Code § 1-202.101 (then DC Code § 1-281):

"D.C.Code § 1-281(a) [now § 1-202.101(a)] prohibits use of the initiative process to propose 'laws appropriating funds.' In *Hessey, supra*, 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....' 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'...

"However modestly, appellant's proposed initiative 'would intrude upon the discretion of the Council to allocate District government revenues in the budget process,' *id.* at 19, in the manner forbidden by § 1-281(a) [now § 1-202.101(a)]. . . . 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 the elected government." . . . Because appellant's initiative would affect or 'relate to,' *id.* at 12-13, 15, the budget process in the broad manner defined by *Hessey*, it constitutes a law appropriating funds prohibited by § 1-281(a) [now § 1-202.101(a)].

Id. (emphasis added). Thus, in *Dorsey*, the District of Columbia's highest court laid out a "very broad" standard for rejecting initiatives and referenda on the grounds of "appropriating funds". These proposals need merely "relate" to the local budget process and affect only a "tiny part" of revenue. Like the foregone revenue in late fees for booted cars at issue in *Dorsey*, the \$5 million forgone by the District in the event this referendum would succeed is more than sufficient to make the current proposal not a proper subject for referendum.

It is of little import that the expected increase in tax revenues is somewhat speculative. In *Restaurant Ass'n of Metro. Wash. v. BOEE*, 2004 WL 2102203, *4 (Super. Ct. of D.C.), the Court rejected a proposed initiative to prohibit smoking in all public places, because it would cause "a negative fiscal impact on restaurant tax revenue assumptions heavily relied on by the Council." The Court's decision in *Restaurant Association* was far more speculative than the one presently before the Board. Whether or not the prohibition of smoking increases or decreases restaurant tax revenue is subject to some controversy. But there is no controversy that if same-sex couples are allowed to marry in the District, more such marriages will occur. Whether this brings in \$5 million in revenue or only \$1 million in revenue is of little import, as even a change in "a tiny part of the District's annual revenue projections" is sufficient to bar such a referendum. *Dorsey*, 648 A.2d at 677.

III. THE BOARD SHOULD RULE ON THE BUDGET ARGUMENT, EVEN IF IT FINDS THAT THE PROPOSED REFERENDUM VIOLATES THE HUMAN RIGHTS ACT.

Although the Human Rights Act prohibition is more than sufficient to defeat the initiative, the Board should reject the Referendum on the additional budget ground as well. The D.C. Court of Appeals has, in the past, ruled that "*all* challenges" (emphasis in original) to a proposed initiative should be considered and ruled upon at the time they are first raised. *Hessey v. Burden*, 615 A.2d 562, 569 (D.C. 1992) (*Hessey II*). The reasoning of the District's highest court is instructive:

"we hold that the Board, in deciding whether to accept or reject a proposed initiative under D.C.Code § 1-1320(b)(1) [now D.C.Code § 1-1001.16(b)(1)], should, in the great majority of cases, consider and rule on *all* challenges to the initiative when they are raised, regardless of the merits of any one. As the only neutral party in the debate over whether this particular initiative was a proper subject, the Board should have ensured that the court would consider all seven challenges at once. The Board could have accomplished that result by itself addressing all seven when the opponents first raised their challenges to the proposed initiative. We strongly urge the Board to follow such a course in the future, and to consider all the challenges to a proposed initiative when they are first presented so that the court, faced with a mandamus application under D.C.Code § 1-1320(b)(3) [now D.C.Code § 1-1001.16(b)(3)], may have the benefit of the Board's thinking on each issue.

Id. (emphasis in original).

IV. CONCLUSION

For all the reasons set forward in Stein's prior Memoranda of Law, the Board should reject the present referendum on the grounds that it violates the DC Human Rights Act. In addition the Board should reject the present referendum on the grounds that it violates D.C. Code § 1-202.101(b) (barring referenda that would levy taxes or appropriate funds). Although the prohibition against discrimination under the Human

Rights Act provides more than sufficient reason to reject the referendum in and of itself, the Board should make the additional finding that the proposed referendum would violate the DC Charter's budget restriction, as per the instructions of the DC Court of Appeals in *Hessey II*.

Respectfully submitted,

_____/s/_____
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Dated: January 22, 2010

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