



June 9, 2009

VIA ELECTRONIC MAIL

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
Washington, D.C. 20001

RE: A Referendum Concerning the Jury and Marriage Amendment Act of 2009
Board Hearing at 10:30 a.m. on Wednesday, June 10, 2009

Dear Mr. McGhie:

This letter will serve as the Referendum Proponents'¹ memorandum supporting "A Referendum Concerning the Jury and Marriage Amendment Act of 2009," filed with the District of Columbia Board of Elections and Ethics on May 27, 2009.

I. Background of the Proposed Referendum.

The Council of the District of Columbia passed the Jury and Marriage Amendment Act of 2009, Act No. 18-0070 (the "Act"), on May 5, 2009, by a vote of 12 to 1 with Councilmember Marion Barry casting the lone vote against the Act. The Act was signed by Mayor Adrian M. Fenty on May 6, 2009, and transmitted to the United States Congress on May 11, 2009. Following the required period of review by the United States Congress, the Act is scheduled to become effective on July 6, 2009.

The Act would add a new section to the D.C. Code, Section 1287a, providing legal recognition to same-sex "marriages" entered into in other jurisdictions. Unrelated to the proposed referendum, the Act would also amend the consanguinity provision in the District's marriage statutes, D.C. Code § 46-401, to make the list of marriages void *ab initio* gender neutral and amend certain disclosure provisions in D.C. Code § 47-1805.04 pertaining to the release of tax information to the United States District Court for the District of Columbia.

The Act provides in pertinent part:

¹ The Referendum Proponents are Bishop Harry R. Jackson, Jr., Rev. Walter E. Fauntroy, Dr. Patricia Johnson, Melvin Dupree, Sandra B. Harris, Bobby Perkins, Sr., and Rev. Dale E. Wafer.

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.

Jury and Marriage Amendment Act of 2009, Act No. 18-0070 (May 5, 2009).

The Act does not legalize same-sex "marriage" for residents of the District, but only grants legal recognition to such "marriages" from other jurisdictions. Thus, the Act creates the untenable situation, where District residents continue to adhere to the long held understanding of marriage as only between a man and a woman, but foreign marriages, from outside the District, need not adhere to this understanding.

On May 27, 2009, the Proponents filed a proposed referendum with the District of Columbia Board of Elections and Ethics (the "Board") entitled, "A Referendum Concerning the Jury and Marriage Amendment Act of 2009" (the "Referendum"), which seeks to send to the voters the question of whether of the District should recognize same-sex "marriages" from other jurisdictions. The next day, May 28, 2009, the Board sent a letter to Bishop Harry R. Jackson, Jr. informing him that a hearing on the Referendum had been tentatively scheduled for 10:30 a.m. on Wednesday, June 10, 2009. The letter further informed Bishop Jackson that if he wished to submit a memorandum in support of the Referendum, he should do so by 4:00 p.m. on Tuesday, June 9, 2009. Bishop Jackson and all the Proponents collectively file this memorandum explaining the purpose of the Referendum and demonstrating that the Referendum presents a "proper subject" for the referendum process and should be approved by the Board.

II. The Purpose of the Proposed Referendum.

The voters of the District of Columbia have the "power of direct legislation." *Convention Center Referendum Comm. v. District of Columbia Bd. of Elections & Ethics*, 441 A.2d 889, 897 (D.C. 1981). They specifically have the right of referendum, which allows any group of District voters to place a law passed by the Council on hold and insist that the law only go into effect if it is approved by a majority of the District's voters. D.C. Code § 1-204.101(b). This process insures that the voters decide what they think is best for the District. D.C. Code § 1-204.104.

The right of referendum uniquely "allow[s] the electorate to voice directly its sentiments and make that sentiment public policy." *Julius Hobson, Council of the District of Columbia, Memorandum on the Initiative and Referendum Act*, at 1, 3 (Jan. 3, 1977). Moreover, this right is to be "liberally construed." *Convention Center*, 441 A.2d at 913.

The Referendum offered by Bishop Jackson and his fellow proponents aims to send the question of whether the District should recognize same-sex "marriages" to the District's voters. If the Board approves the Referendum, the voters, rather than the thirteen members of the Council of the District Columbia, will decide whether the District should adhere to the long held

definition of marriage as being a legal union between a man and a woman rather than deferring to the laws of other states and countries on this critical issue.

The Proponents believe that marriage is inherently and fundamentally the union of a man and a woman – a concept deeply embedded in the fabric our society. This historic understanding of marriage is not rooted in bigotry, hatred or discrimination but rather on the biological and social reality that children need both a mother and a father. As the New York Court of Appeals stated in its landmark case upholding New York’s marriage laws:

[T]he traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind.

The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude.

Hernandez v. Robles, 7 N.Y.3d 338, 362 (N.Y.2006).

The District has always maintained the understanding that marriage “is inherently a male-female relationship.” *Dean v. District of Columbia*, 653 A.2d 307, 313 (D.C. 1995). Though that view has been challenged over the years, the Council and the courts have consistently defended the traditional framework of marriage. For instance, in 1975, Councilmember Arrington Dixon introduced a bill “permit[ing] marriages between persons of the same sex.” *Id.* at 311. The bill generated a “fervent debate” and the Council persuaded Dixon to withdraw the bill. *Id.* Likewise, in 1995, two men sued the District for refusing to issue them a marriage license. *Id.* at 309. The Court of Appeals rejected the men’s challenge, affirming that “no legislature for the District of Columbia—Congress or Council—has ever intended to sanction same-sex marriages.” *Id.* at 318.

Yet twelve of the thirteen members of the Council of the District of Columbia readily abandoned this long held understanding of marriage on May 5, 2009, with almost no debate. Provisions relating to the recognition of same-sex “marriages” were tacked on to a bill relating to the disclosure of the District’s tax information and then hastily passed as part of the Council’s “consent agenda”—a package of typically uncontroversial bills considered together without objection. The bill initially passed without any discussion and no dissenting votes. Only after Councilmember Marion Barry realized what had happened and moved for reconsideration was there any debate. Even then the debate about the recognition of same-sex “marriages” lasted a mere forty minutes—beginning at about 11:20 a.m. and ending at noon. The Council then voted 12 to 1 to recognize same-sex “marriages,” with Councilmember Marion Barry casting the single dissenting vote. See D.C. Council Votes 12-1 to Recognize Other States’ Gay Marriages, *Washington Post* (May 5, 2009), available at http://voices.washingtonpost.com/dc/2009/05/dc_council_votes_to_recognize.html (last visited June 9, 2009).

In short, the decision to jettison the foundational definition of marriage as between a man and a woman was not given the care and concern it deserves. This Referendum seeks to remedy this problem by allowing the voters of the District the opportunity to fully discuss the issue and decide for themselves whether the District should abandon its longstanding concept of marriage. Bishop Jackson and his fellow proponents believe the will of twelve members of the Council should not determine the fate of marriage in the District; the collective will of the voters should. This Referendum puts the decision about the recognition of same-sex “marriages” back in the hands of the voters where it belongs.

III. The Proposed Referendum Presents a “Proper Subject” for the Referendum Process.

At the June 10 hearing, the Board will consider whether the Proponents’ Referendum is a proper subject for a referendum under Title IV of the District’s Self-Government and Governmental Reorganization Act, D.C. Code § 1-201.1 *et seq.* (popularly known as the “Home Rule Act”). Part of the determination will rest on whether the measure “authorizes, or would have the effect of authorizing, discrimination” prohibited by the District of Columbia Human Rights Act of 1977, D.C. Code § 2-1401.01 *et seq.* (“DC-HRA”). D.C. Code § 1-1001.16(b)(1). The Proponents’ Referendum satisfies all these criteria and, thus, is a “proper subject” for referendum to be accepted by the Board.

A. The Referendum is a “Proper Subject” Under Title IV of the Home Rule Act.

Title IV of the Home Rule Act is the District Charter. It “establishes a tripartite form of government for the District of Columbia, with an elected Council and Mayor, and a judicial system established by Congress in 1971.” *Hessey v. District of Columbia Bd. of Elections & Ethics*, 601 A.2d 3, 14 (D.C. 1991). Title IV also “addresses the District’s budget process as well as financial management policies and responsibilities and borrowing authority, bonds and notes, and the independent agencies.” *Id.*

For a proposed referendum measure to be a “proper subject” under Title IV, it must not “directly amend the [District] Charter,” “change the structure of government and the procedures and responsibilities assigned by the Charter,” or relate to “acts appropriating funds.” *Id.* at 12, 14. Moreover, the act must *not* yet have become law. D.C. Code § 1-204.102(b)(2).

The Proponents’ Referendum in no way touches on the structure or procedures for government established by Title IV of the Home Rule Act. Instead, the Referendum provides the voters of the District of Columbia the opportunity to decide whether the District should recognize same-sex “marriages” entered into in other jurisdictions or whether the District should hold to its longstanding commitment to recognize only marriages between one man and one woman. Neither the structure nor the procedures of the District’s government as set out in the Title IV are implicated by the Referendum.