

Mark H. Levine, counsel on behalf of the **Gertrude Stein Democratic Club**, respectfully submits the following Memorandum of Points and Authorities in support of the proposition that the Referendum concerning the Jury and Marriage 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.

I. BACKGROUND OF "JURY AND MARRIAGE AMENDMENT ACT OF 2009"

On May 6, 2009, District of Columbia Mayor Adrian M. Fenty signed into law the Jury and Marriage Amendment Act of 2009 ("JAMA"), which the DC City Council approved by a vote of 12 to 1. JAMA will become law in the District of Columbia following the decline of Congress to exercise its 30-day right to review the legislation under section 602(c)(1) of the District of Columbia Home Rule Act.

JAMA was a clarification of DC law. Under JAMA, the District of Columbia expressly recognizes the valid marriages of DC residents legally entered into in another jurisdiction, without regard to the sex or sexual orientation of the married parties.¹

Prior to JAMA, DC law was unclear on the question of recognition of out-of-state marriages. Although in 1995 the DC Court of Appeals did interpret the gender-neutral DC Code as making illegal any same-sex marriages performed in the District,² the court

¹ See JAMA, Section 3(b) and *passim*. The law also modified the section banning incestuous marriages (Section 1283, D.C. Code §46-101) to make the section gender-neutral. JAMA, Section 3(a).

² *Dean v. District of Columbia*, 653 A.2d. 307 (DC. 1995). The plain statutory language of current DC law then and now is gender-neutral on marriages performed in DC, neither expressly prohibiting nor authorizing such marriages between individuals of the same gender. See Title 46, Chapter 4, D.C. Official Code §§ 46-401 et seq. But the Court in *Dean* found that the DC Council would not have intended such a "major definitional change" in 1977 as allowing its gay residents to marry without expressly mentioning it, *Dean*, 653 A.2d at 320, given the legislative history of the statute, the incest definitions therein, the "traditional understanding of 'marriage'," and case-law from other states, none of which allowed same-sex marriage back in 1995. *Dean, passim*. The court noted, for example, that the current DC marriage statute stemmed from a Congressional law that, at one time, regulated "slave marriages" using the term "husband" and "wife." 653 A.2d. at 313 n. 10 (referencing former D.C. Code §30-116).

made clear that its decision was only one of statutory interpretation and that the DC City Council could easily rectify the matter: "[T]he Council, and only the Council, can provide [the gay couple who sued to obtain a marriage license] with the relief they seek." *Dean*, 652 A.2d 362 (*Terry, J.*, concurring).

At the time of this 1995 decision, no state in the nation permitted gay couples to marry. So the Court of Appeals understandably failed to address at that time the issue of whether marriages of gay couples performed out of state would be legally recognized in DC. In fact, according to the plain language of DC's marriage statutes from 1995 until today, the DC Code, even pre-JAMA, contained no prohibition on recognition of another jurisdiction's marriage of gay couples.³ But even though there's no such language in the Code requiring unequal treatment of marriages outside DC based on sexual orientation, the DC Council feared a court might once again infer an intention by the DC Council to conduct discrimination the Council did not want to do.

So the DC Council passed JAMA to clean up any possible ambiguity in the law. From this point on, the DC Government's intent and law are crystal clear: DC will expressly recognize any marriage "legally entered into in another jurisdiction between 2 persons of the same sex that is recognized as valid in that jurisdiction" and not expressly prohibited by the provisions in footnote 3 below.⁴

³The D.C. Code currently only prohibits recognition of valid marriages performed outside of DC if said marriages are:

- incestuous or bigamous (Section 1283, D.C. Code §46-401),
- judicially declared void (Section 1284, D.C. Code §46-402), or
- not consented to, because (a) one or both parties were under the age of consent (16 years of age), (b) consent was procured by force or fraud, or (c) one or both parties were "unable by reason of mental incapacity to give valid consent to marriage" (Section 1285, D.C. Code §46-403) .

⁴ JAMA, Section 1287a, to be codified as D.C. Code §46-407a.

II. PROPOSED REFERENDUM

On May 27, 2009, Harry R. Jackson Jr., the pastor of the Hope Christian Church in Beltsville, Maryland, proposed a Referendum to repeal JAMA. (Mr. Jackson swears under oath to be a "registered qualified elector in the District of Columbia" but a press account reports that as of yesterday, he continues to both reside and be registered to vote at one of his Maryland homes.⁵) Jackson's "Summary Statement" claims a " 'No' vote to the referendum will continue the current law of recognizing only marriage between persons of the opposite sex." This formulation is confusing and, as drafted, inaccurate. "Current law" post-JAMA does not allow DC to discriminate on the basis of sex or sexual orientation. And even under current law pre-JAMA, as noted above, no DC statute required such discrimination. It is unclear whether Jackson's repeal of JAMA, if successful, would return DC to its pre-JAMA ambiguity or do what Jackson seeks: actively make DC's gay citizens separate and unequal by "unmarrying" them while straight citizens in the exact same circumstance are respected.

But Jackson's Referendum should not proceed. On June 10, the District of Columbia Board of Elections and Ethics ("Board of Elections") will consider the question of whether Jackson's proposed referendum "is a proper subject for a referendum in the District of Columbia." *See Board of Election's Public Notice* for June 10, 2009 hearing. To decide this, the Board of Elections must determine, among other things:

1. If the voters of the District of Columbia have legislative power by referendum to require the District of Columbia government to discriminate against DC residents solely on the basis of their gender and/or sexual orientation?

⁵ See http://www.washblade.com/thelatest/thelatest.cfm?blog_id=25696. The article is attached as an exhibit hereto.

2. With regard, say, to valid marriages legally performed in Iowa, if DC voters may force the DC government through referendum to make distinctions among couples married in Iowa that Iowa itself does not recognize? May DC treat the same valid Iowa marriages differently based solely on differences in the married couples' gender and sexual orientation?
3. May a DC referendum require DC to recognize marriages outside its jurisdiction as valid in DC only for DC's straight citizens while requiring the DC Government to "unmarry" DC's gay couples legally married in the exact same jurisdiction solely on the ground that "DC gay people cannot be allowed to have the same marriage benefit that DC straights enjoy"?
4. May the majority of DC voters deny DC's gay minority equal rights under the law in DC, even though the express language of the Human Rights Act bans such discrimination, even though DC Referendum law bans referendum measures in violation of the Human Rights Act, and even though the DC City Council has passed a law expressly requiring the DC government to recognize *all* its citizens married outside its jurisdiction equally under the law without regard to their gender or sexual orientation?

III. A DC REFERENDUM MAY NOT VIOLATE THE HUMAN RIGHTS ACT

The Initiative, Referendum, and Recall Procedures Act of 1979, as amended, establishes procedures for enacting law in the District of Columbia through voter initiatives. D.C. Code § 1-1001.16. "Upon receipt of each proposed initiative or referendum measure, the Board *shall refuse* to accept the measure if the Board finds: . . . (C) The measure authorizes, or would have the effect of authorizing, discrimination under Chapter 14 of Title 2." D.C. Code § 1-1001.16 (b)(1)(C) (emphasis added). The last section of Chapter 14 of Title 2, the DC Human Rights Act, provides as follows:

"§ 2-1402.73 Application to the District 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, . . ."

The Board of Election has no discretion in the matter. It *shall refuse* to accept the proposed referendum measure if the measure authorizes discrimination or has the effect of authorizing discrimination under the Human Rights Act. So does Jackson's referendum authorize discrimination or have the effect of doing so? Actually, it goes much further than that. If Jackson's Referendum does what he wants it to do, the measure would not just authorize discrimination; it would *require* discrimination. Jackson seeks to force the DC Government, against the will of its elected representatives, to treat identical out-of-state marriages differently and force a "separate and unequal" policy on the backs of gay DC residents, while straight DC residents would continue to have their marriages respected as "first-class citizens".

It is beyond dispute that marriage is a benefit. And the Human Rights Act makes it unlawful for any District government agency to deny that benefit to someone based solely on his or her sex or sexual orientation. And yet that is exactly what Jackson seeks to do with his referendum. He seeks to make it law that a man's marriage to a woman is respected but a woman's marriage to a woman is not, solely on the basis of her gender. He seeks to require DC to recognize valid out-of-state marriages only if that marriage consists of straight persons while denying recognition of equally valid marriages performed under identical circumstances in the same location solely on the basis that the individuals in the disfavored marriage contract are gay.

In addition to sex and sexual orientation discrimination, Jackson seeks religious discrimination: to establish his personal religion as the Law over other religions that teach the equality of all mankind, their equal dignity in the eyes of God and equal rights under the Law. Jackson's church can discriminate all it wants on the basis of sex, sexual

orientation, gender identity, religion, and even race, and he can fulminate *against* gay people in his Church, but he cannot force the DC Government to do the same. Neither can he nor even the majority of DC residents through direct referendum can force their government to mistreat their fellow citizens. Only the District's elected representatives or Congress can do that and then only to the extent consistent with the United States Constitution.

Some of those who support marriage discrimination against gay couples argue that would not be discrimination by the DC Government against its own gay citizens to force DC to "unmarry" gay couples, because gay individuals could just leave their life partners and marry straight people instead to get equal benefits. A similar argument made without regard for the emotional anguish suffered by forcibly separating life-long companions (or the fraud of marrying solely to get marriage benefits) was unsuccessfully made in the Supreme Court case of *Loving v. Virginia* (1967), when proponents of banning interracial marriage argued their position was not a violation of equal protection under the law because "whites could still marry whites" and "blacks could still marry blacks." But, of course, the ban on marriages of gay couples is far more severe than an interracial marriage ban. An interracial marriage ban, as awful as it is, at least allows individuals to marry *someone* with whom it is possible to have sexual and emotional intimacy, even if he or she must marry someone of their own race. But if gay people are banned from marrying each other, they are effectively prohibited from marrying *anyone*.

The clear result of a ban on recognition of gay couples is to consign gay citizens of DC never to obtain the same benefit of marriage that straight citizens enjoy. And that is inconsistent with the DC Human Rights Act. But if marriage inequality is inconsistent