

# Superior Court of the District of Columbia

CIVIL DIVISION - CIVIL ACTIONS BRANCH

## INFORMATION SHEET

Harry R. Jackson, Jr., et al \_\_\_\_\_

Case Number: 9000740-10

vs

Date: \_\_\_\_\_

District of Columbia Board of Elections and Ethics \_\_\_\_\_

One of the defendants is being sued  
in their official capacity.

|   |                                  |   |
|---|----------------------------------|---|
| Name: (please print) <b>Austin R. Nimocks</b> |                                  | Relationship to Lawsuit<br><input checked="" type="checkbox"/> Attorney for Plaintiff<br><input type="checkbox"/> Self (Pro Se)<br>Other: _____ |
| Firm Name: <b>Alliance Defense Fund</b>       |                                  |   |
| Telephone No.: <b>202.393.8690</b>            | Six digit Unified Bar No.: _____ |   |

TYPE OF CASE:     Non-Jury                       6 Person Jury                       12 Person Jury  
Demand:\$ \_\_\_\_\_                      Other: \_\_\_\_\_

### PENDING CASE(S) RELATED TO THE ACTION BEING FILED

Case No.: \_\_\_\_\_ Judge: \_\_\_\_\_ Calendar #: \_\_\_\_\_

Case No.: \_\_\_\_\_ Judge: \_\_\_\_\_ Calendar #: \_\_\_\_\_

### NATURE OF SUIT: (Check One Box Only)

#### A. CONTRACTS

- 01 Breach of Contract
- 02 Breach of Warranty
- 06 Negotiable Instrument
- 15 \_\_\_\_\_

- 07 Personal Property
- 09 Real Property-Real Estate
- 12 Specific Performance

#### COLLECTION CASES

- 14 Under \$25,000 Pltf. Grants Consent
- 16 Under \$25,000 Consent Denied
- 17 OVER \$25,000

#### B. PROPERTY TORTS

- 01 Automobile
- 02 Conversion
- 07 Shoplifting, D.C. Code § 27-102(a)
- 03 Destruction of Private Property
- 04 Property Damage
- 05 Trespass
- 06 Traffic Adjudication

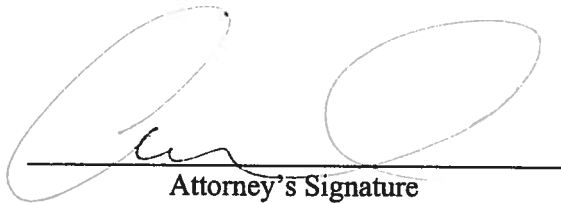
#### C. PERSONAL TORTS

- |  |  |   |
|--|--|---|
| <ul style="list-style-type: none"><li><input type="checkbox"/> 01 Abuse of Process</li><li><input type="checkbox"/> 02 Alienation of Affection</li><li><input type="checkbox"/> 03 Assault and Battery</li><li><input type="checkbox"/> 04 Automobile-Personal Injury</li><li><input type="checkbox"/> 05 Deceit (Misrepresentation)</li><li><input type="checkbox"/> 06 False Accusation</li><li><input type="checkbox"/> 07 False Arrest</li><li><input type="checkbox"/> 08 Fraud</li></ul> | <ul style="list-style-type: none"><li><input type="checkbox"/> 09 Harassment</li><li><input type="checkbox"/> 10 Invasion of Privacy</li><li><input type="checkbox"/> 11 Libel and Slander</li><li><input type="checkbox"/> 12 Malicious Interference</li><li><input type="checkbox"/> 13 Malicious Prosecution</li><li><input type="checkbox"/> 14 Malpractice Legal</li><li><input type="checkbox"/> 15 Malpractice Medical (Including wrongful deaths)</li><li><input type="checkbox"/> 16 Negligence-(Not Automobile, Not Malpractice)</li></ul> | <ul style="list-style-type: none"><li><input type="checkbox"/> 17 Personal Injury – (Not Automobile, Not Malpractice)</li><li><input type="checkbox"/> 18 Wrongful Death (Not malpractice)</li><li><input type="checkbox"/> 19 Wrongful Eviction</li><li><input type="checkbox"/> 20 Friendly Suit</li><li><input type="checkbox"/> 21 Asbestos</li><li><input type="checkbox"/> 22 Toxic/Mass Torts</li><li><input type="checkbox"/> 23 Tobacco</li><li><input type="checkbox"/> 24 Lead Paint</li></ul> |
|--|--|---|

SEE REVERSE SIDE AND CHECK HERE  IF USED

## INFORMATION SHEET, Continued

|  |  |  |
|--|--|--|
| <p><b>C. OTHERS</b></p> <p><b>I.</b></p> <p><input type="checkbox"/> 01 Accounting</p> <p><input type="checkbox"/> 02 Att. Before Judgment</p> <p><input type="checkbox"/> 04 Condemnation (Emin. Domain)</p> <p><input type="checkbox"/> 05 Ejectment</p> <p><input type="checkbox"/> 07 Insurance/Subrogation<br/>Under \$25,000 Pltf.<br/>Grants Consent</p> <p><input type="checkbox"/> 08 Quiet Title</p> <p><input type="checkbox"/> 09 Special Writ/Warrants<br/>DC Code § 11-941</p> | <p><input type="checkbox"/> 10 T.R.O./Injunction</p> <p><input type="checkbox"/> 11 Writ of Replevin</p> <p><input type="checkbox"/> 12 Enforce Mechanics Lien</p> <p><input checked="" type="checkbox"/> 16 Declaratory Judgment</p> <p><input type="checkbox"/> 17 Merit Personnel Act (OEA)<br/>(D.C. Code Title 1, Chapter 6)</p> <p><input type="checkbox"/> 18 Product Liability</p> <p><input type="checkbox"/> 24 Application to Confirm, Modify,<br/>Vacate Arbitration Award<br/>(D.C. Code § 16-4315)</p> | <p><input type="checkbox"/> 25 Liens: Tax/Water Consent Granted</p> <p><input type="checkbox"/> 26 Insurance/Subrogation<br/>Under \$25,000 Consent Denied</p> <p><input type="checkbox"/> 27 Insurance/Subrogation<br/>Over \$25,000</p> <p><input type="checkbox"/> 28 Motion to Confirm Arbitration<br/>Award (Collection Cases Only)</p> <p><input type="checkbox"/> 26 Merit Personnel Act (OHR)</p> <p><input type="checkbox"/> 30 Liens: Tax/Water Consent Denied</p> |
| <p><b>II.</b></p> <p><input type="checkbox"/> 03 Change of Name</p> <p><input type="checkbox"/> 06 Foreign Judgment</p> <p><input type="checkbox"/> 13 Correction of Birth Certificate</p> <p><input type="checkbox"/> 14 Correction of Marriage<br/>Certificate</p>   | <p><input type="checkbox"/> 15 Libel of Information</p> <p><input type="checkbox"/> 19 Enter Administrative Order as<br/>Judgment [D.C. Code §<br/>2-1802.03(h) or 32-1519(a)]</p> <p><input type="checkbox"/> 20 Master Meter (D.C. Code §<br/>42-3301, et seq.)</p>  | <p><input type="checkbox"/> 21 Petition for Subpoena<br/>[Rule 28-I (b)]</p> <p><input type="checkbox"/> 22 Release Mechanics Lien</p> <p><input type="checkbox"/> 23 Rule 27 (a)(1)<br/>(Perpetuate Testimony)</p>  |

  
 \_\_\_\_\_  
 Attorney's Signature

2-5-10  
 \_\_\_\_\_  
 Date

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**  
**Civil Division**

HARRY R. JACKSON, JR., a registered, )  
qualified voter in the District of Columbia and )  
proponent of the Referendum on the Religious )  
Freedom and Civil Marriage Equality )  
Amendment Act of 2009, )

1100 First Street, S.E., Apt. 1310 )  
Washington, D.C. 20003 )

ROBERT KING, a registered, qualified voter )  
in the District of Columbia and proponent of )  
the Referendum on the Religious Freedom )  
and Civil Marriage Equality Amendment Act )  
of 2009, )

3102 Apple Road, N.E. )  
Washington, D.C. 20018 )

WALTER E. FAUNTROY, a registered, )  
qualified voter in the District of Columbia and )  
proponent of the Referendum on the Religious )  
Freedom and Civil Marriage Equality )  
Amendment Act of 2009, )

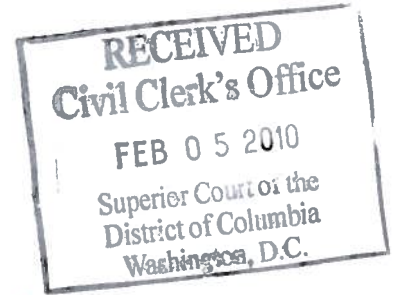
4105 17th Street, N.W. )  
Washington, D.C. 20011 )

JAMES SILVER, a registered, qualified voter )  
in the District of Columbia and proponent of )  
the Referendum on the Religious Freedom )  
and Civil Marriage Equality Amendment Act )  
of 2009, )

7123 Chestnut Street, N.W. )  
Washington, D.C. 20012 )

ANTHONY EVANS, a registered, qualified )  
voter in the District of Columbia and )  
proponent of the Referendum on the Religious )  
Freedom and Civil Marriage Equality )  
Amendment Act of 2009, )

4021 7th Street, N.E., Apt. #4 )



0000740-10

Civil Action No. \_\_\_\_\_

[Next Court Event: none scheduled]

Washington, D.C. 20017 )  
)  
DALE E. WAFER, a registered, qualified )  
voter in the District of Columbia and )  
proponent of the Referendum on the Religious )  
Freedom and Civil Marriage Equality )  
Amendment Act of 2009, )  
)  
4021 19th Street, N.E. )  
Washington, D.C. 20018 )  
)  
MELVIN DUPREE, a registered, qualified )  
voter in the District of Columbia and )  
proponent of the Referendum on the Religious )  
Freedom and Civil Marriage Equality )  
Amendment Act of 2009, )  
)  
1904 Naylor Road, S.E. )  
Washington, D.C. 20020 )  
)  
and HOWARD BUTLER, a registered, )  
qualified voter in the District of Columbia and )  
proponent of the Referendum on the Religious )  
Freedom and Civil Marriage Equality )  
Amendment Act of 2009, )  
)  
1301 Whittier Place, N.W. )  
Washington, D.C. 20012 )  
)  
Petitioners, )  
)  
v. )  
)  
DISTRICT OF COLUMBIA BOARD OF )  
ELECTIONS AND ETHICS, an agency of )  
the District of Columbia government, )  
)  
441 4th Street, N.W., Suite 250 )  
Washington, D.C. 20001 )  
)  
Respondent. )  
)

0000740-10

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**PETITION FOR REVIEW OF AGENCY DECISION  
AND FOR WRIT IN THE NATURE OF MANDAMUS**

Petitioners Harry R. Jackson, Jr., Robert King, Walter E. Fauntroy, James Silver, Anthony Evans, Dale E. Wafer, Melvin Dupree, and Howard Butler (the “Proponents”) petition this Court, pursuant to D.C. Code § 1-1001.16(b)(3), for review of the February 4, 2010 decision of the District of Columbia Board of Elections and Ethics (“the Board”) rejecting the Referendum on the Religious Freedom and Civil Marriage Equality Act of 2009 (“the Referendum”), and for a writ in the nature of mandamus compelling the Board to accept the Proponents’ Referendum because the Board lacks the authority to reject the Referendum under the Initiative, Referendum, and Recall Charter Amendments Act of 1978, D.C. Code §§ 1-204.101 to 1-204.115, and for a declaration that the Referendum does not violate the District of Columbia Human Rights Act of 1977, D.C. Code § 2-1401.01 *et seq.* A true and correct copy of the decision from the Board is attached to this petition (referenced herein as “Board Decision”).

## INTRODUCTION

1. The people of the District of Columbia reserved to themselves the sovereign right of referendum in the Initiative, Referendum, and Recall Charter Amendments Act of 1978, D.C. Code §§ 1-204.101 to 1-204.115 (the “Charter Amendments Act”).

2. The right of referendum provides the people with lawmaking authority coextensive with that of the District of Columbia Council, restricting the citizens’ lawmaking authority only regarding emergency acts, acts levying taxes, and acts appropriating funds for the general operation budget. D.C. Code § 1-204.101(b).<sup>1</sup>

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<sup>1</sup> The Charter Amendments Act provides, in pertinent part, that:

The term “referendum” means the process by which the registered qualified electors of the District of Columbia may suspend acts of the Council of the District of Columbia (except emergency acts, acts levying taxes, or acts appropriating funds for the general operation budget) until such acts have been

3. The Proponents seek to exercise their right of referendum by placing on the ballot a measure that would ask the voters to approve or reject the Religious Freedom and Civil Marriage Equality Amendment Act of 2009.

4. To that end, the Proponents filed the Referendum on the Religious Freedom and Civil Marriage Equality Act of 2009 (“the Referendum”) with the Board on January 6, 2010. (Board Decision at 2). It provides the voters of the District of Columbia the opportunity to accept or reject the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 which, in part, legislates regarding the District’s longstanding definition of marriage as being a legal union between a man and a woman – a subject squarely within the lawmaking authority of the citizenry.

5. The Board held a public hearing on January 27, 2010, to determine whether the Referendum presented a proper subject for the referendum process. (Board Decision at 1).

6. Counsel to the Board announced at the January 27, 2010 hearing that the Referendum was in proper legislative form and the Proponents had duly complied with the ministerial requirements of the Initiative, Referendum, and Recall Procedures Act, D.C. Code § 1-1001.16 (the “Initiative Procedures Act” or the “IPA”), having filed their Referendum Committee in accordance with D.C. Code §§ 1-1102.04 and 1-1102.06. (Board Decision at 2).

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presented to the registered qualified electors of the District of Columbia for their approval or rejection.

D.C. Code § 1-204.101(b).

7. On February 4, 2010, the Board denied Proponents' Referendum solely on the basis that it would "have the effect of authorizing discrimination in contravention of the HRA." (Board Decision at 18).

8. The Referendum does not seek to appropriate funds or involve an act appropriating funds for the general operation budget. (Board Decision at 13-16).

9. The Proponents now petition this Court, pursuant to D.C. Code § 1-1001.16(b)(3), for review of the Board's decision and, for a writ in the nature of mandamus compelling the Board to accept the Referendum since it does not involve an emergency act, act levying taxes, or an act appropriating funds for the general operation budget, the lone restrictions provided within the Charter Amendments Act creating the right of referendum.

10. The Board determined that the Referendum is "not a proper subject for referendum," because it "seeks to frustrate [the] effort" "to eliminate the discriminatory exclusion of same-sex couples from the institution of marriage on the basis of sex and sexual orientation" and, therefore, would "have the effect of authorizing discrimination in contravention of the HRA." (Board Decision at 17-18). Yet, this finding by the Board is erroneous and contrary to law because the HRA restriction imposed by the Council on the people's right of referendum is an impermissible requirement not authorized by the Charter Amendments Act. This additional subject matter restriction impermissibly conflicts with the broad nature of the right of referendum reserved by the people in the Charter Amendments Act, and the Council does not possess the legislative authority to amend itself the constitution (Charter) of the District.

11. Proponents further seek the declaration of this Court that the Referendum does not violate the HRA, because this Court and the Court of Appeals have consistently held that the regulation of the marital relationship falls outside the intended scope of the HRA. The definition

of marriage does not involve, and has never involved, one's "sexual orientation," and a marriage law which treats men and women both equally, allowing them each to marry someone of the opposite sex, does not discriminate on the basis of sex.

12. The citizens' right under the Home Rule Charter to legislate through the referendum is coextensive with that of the District of Columbia Council on all subjects *other* than making appropriations.

13. The Council has enacted laws governing marriage—and is so engaged at the present time. The citizens are likewise entitled to legislate on the subject of the definition of marriage, without the additional impediments ostensibly imposed on their referendum powers by the IPA, D.C. Code § 1-1001.16(b)(1).

14. This Court and the Court of Appeals have consistently held that where the IPA conflicts with the Charter Amendments Act, the Charter Amendments Act prevails. *Price v. District of Columbia Bd. of Elections & Ethics*, 645 A.2d 594, 599 (D.C. 1994) (“[T]o the extent any IPA provision is inconsistent with the Charter Amendments, the latter controls.”); *Convention Ctr. Referendum Comm. v. District of Columbia Bd. of Elections & Ethics*, 441 A.2d 889, 915 (D.C. 1981) (*en banc*) (“As implementing legislation [of the Charter Amendments Act], the Initiative Procedures Act is valid, of course, only insofar as it conforms to the underlying Charter Amendments.”).

## JURISDICTION

15. This Court has subject matter jurisdiction of this case pursuant to D.C. Code § 11-921 and D.C. Code § 1-1001.16(b)(3), which provides in pertinent part that “[i]f the Board refuses to accept any initiative or referendum measure submitted to it, the person or persons submitting such measure may apply, within 10 days after the Board’s refusal to accept such

measure, to the Superior Court of the District of Columbia for a writ in the nature of mandamus to compel the Board to accept such measure.”

16. This Court has *in personam* jurisdiction over the Board.

#### **THE PARTIES**

17. Petitioner Harry R. Jackson, Jr. is a qualified registered voter in the District and an official proponent of the Referendum. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board’s decision, a declaration that the HRA restriction imposed by the Council on the people’s right of referendum is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Referendum does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Referendum.

18. Petitioner Robert King is a qualified registered voter in the District and an official proponent of the Referendum. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board’s decision, a declaration that the HRA restriction imposed by the Council on the people’s right of referendum is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Referendum does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Referendum.

19. Petitioner Walter E. Fauntroy is a qualified registered voter in the District and an official proponent of the Referendum. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board’s decision, a declaration that the HRA restriction imposed by the Council on the people’s right of referendum is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Referendum does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Referendum.

20. Petitioner James Silver is a qualified registered voter in the District and an official proponent of the Referendum. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of referendum is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Referendum does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Referendum.

21. Petitioner Anthony Evans is a qualified registered voter in the District and an official proponent of the Referendum. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of referendum is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Referendum does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Referendum.

22. Petitioner Dale E. Wafer is a qualified registered voter in the District and an official proponent of the Referendum. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of referendum is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Referendum does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Referendum.

23. Petitioner Melvin Dupree is a qualified registered voter in the District and an official proponent of the Referendum. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of referendum is an impermissible requirement not authorized by

the Charter Amendments Act, a declaration that the Referendum does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Referendum.

24. Petitioner Howard Butler is a qualified registered voter in the District and an official proponent of the Referendum. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of referendum is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Referendum does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Referendum.

25. The respondent in this case is the Board, a three-member body created by statute. D.C. Code § 1-1001.03. Because of a vacancy on the three-member election board, Chairman Errol R. Arthur and Board Member Charles Lowery, Jr. are currently the only sitting members. The Board's duties include overseeing the initiative and referendum process. D.C. Code § 1-1001.16. The Board is specifically tasked with determining whether a proposed referendum presents a proper subject for the referendum process. D.C. Code § 1-1001.16(b)(1).

### **THE REFERENDUM PROCESS**

26. The right of referendum means the process by which five percent of the registered qualified electors of the District of Columbia may suspend acts of the Council of the District of Columbia (except emergency acts, acts levying taxes, or acts appropriating funds for the general operation budget) until such acts have been presented to the registered qualified electors of the District of Columbia for their approval or rejection. D.C. Code §§ 1-204.101(b), 1-204.102.

27. "If a majority of the registered qualified electors voting in a referendum approve an act . . . , then . . . the act approved by referendum shall be an act of the Council upon the certification of the vote on such . . . act by the District of Columbia Board of Elections and

Ethics, and such act shall become law subject to the provisions of § 1-206.02(c).” D.C. Code § 1-204.105.

28. Under the Initiative Procedures Act, D.C. Code § 1-1001.16, there are certain ministerial requirements established by the Council regarding the administration of the people’s legislative powers, starting with the requirement that the referendum process begins with a voter or voters filing a proposed referendum with the Board. It must include the text of the referendum, a short title, and a summary statement. D.C. Code § 1-1001.16(a)(1).

29. Accompanying the proposed referendum, the voter or voters must submit an affidavit testifying to their name, address, and status as a registered qualified elector of the District of Columbia. D.C. Code § 1-1001.16(a)(1).

30. Upon receipt of the referendum, the Board undertakes a review to determine whether it presents 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”), or under one of four other grounds, including that the referendum “authorizes, or would have the effect of authorizing, discrimination” prohibited by the HRA. D.C. Code § 1-1001.16(b)(1).

31. If the Board refuses to accept a proposed referendum, it endorses the measure as being “received but not accepted” and “retain[s] the measure pending appeal.” D.C. Code § 1-1001.16(b)(2). At that point, the persons submitting the referendum have ten (10) days to apply to this Court “for a writ in the nature of mandamus to compel the Board to accept such measure.” D.C. Code § 1-1001.16(b)(3). This Court is to expedite consideration of the matter. D.C. Code § 1-1001.16(b)(3).

32. If a referendum is accepted, the Board is responsible for preparing, adopting, and arranging for publication of a proposed summary statement, short title, and legislative form. During the ten (10) calendar days following publication, a voter who objects to the proposed summary statement, short title, and legislative form may seek expedited review by this Court. Absent such judicial review, the proposed summary statement, short title, and legislative form are deemed to be accepted by the Board. D.C. Code § 1-1001.16(c)-(e).

33. Once the proposed summary statement, short title, and legislative form are accepted by the Board, the Board provides the proposer with an original petition form to be used in printing petition sheets for circulation. The proposer must secure the signatures of five percent of the registered voters in the District, including five percent of the registered voters in at least five of the eight wards, to submit the referendum petition to the Board. D.C. Code § 1-1001.16(g)-(j).

34. Before accepting a referendum, the Board checks, among other things, whether the petition is “not in the proper form” or “on its face clearly bears an insufficient number of signatures.” However, the Board is not required to certify whether the petition contains the minimum number of “valid” signatures until thirty (30) calendar days after the petition has been accepted. D.C. Code § 1-1001.16(k) & (o).

35. Once the signatures have been verified, the Board shall conduct an election within 114 days after the date the measure has been certified as qualified to appear on the ballot, unless there is a previously scheduled general, primary, or special election that will occur between 54 and 114 days after the date the measure has been certified as qualified to appear on the ballot, then the Board may present the referendum measure at that election. D.C. Code § 1-1001.16(p)(1).

**REFERENDUM ON THE RELIGIOUS FREEDOM AND  
CIVIL MARRIAGE EQUALITY AMENDMENT ACT OF 2009**

36. On January 6, 2010, the Proponents filed with the Board the Referendum on the Religious Freedom and Civil Marriage Equality Amendment Act of 2009. The proposed referendum provides the voters of the District of Columbia the opportunity to accept or reject the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 which, in part, legislates regarding the District's longstanding definition of marriage as being a legal union between a man and a woman – a subject squarely within the lawmaking authority of the citizenry.

37. Beginning on January 8, 2010, the Board published notice to the Proponents and other entities regarding the Referendum, the public hearing thereon, and informing the Proponents that if they wished to submit a memorandum in support of the Referendum, they should do so by January 22, 2010.

38. On January 15, 2010, the Board published notice in the *D.C. Register* that it had received the Referendum and scheduled a public hearing on the Referendum for January 27, 2010, in the One Judiciary Square Building.

39. On January 22, 2010, the Proponents timely filed a legal memorandum with the Board, explaining why the Referendum presented a proper subject for the referendum process.

40. On January 27, 2010, the Board held a public hearing on the Referendum to determine whether it presents a proper subject for the referendum process. The Proponents and their counsel attended the hearing and provided testimony in support of the Referendum.

41. At the hearing, counsel to the Board publicly announced that the Referendum is in proper legislative form and in compliance with the District of Columbia Office of Campaign Finance filing requirements.

42. On February 4, 2010, the Board rejected the Referendum solely on the grounds that it did not present a proper subject for the initiative process under the Initiative Procedures Act because it would “have the effect of authorizing discrimination in contravention of the HRA.” (Board Decision at 18). The Board marked the Referendum as “RECEIVED BUT NOT ACCEPTED,” and now holds the Referendum pending this Court’s review.

43. The Board’s rejection of the Referendum began the ten (10) day time period for applying to this Court for a writ in the nature of mandamus ordering the Board to accept the Referendum. D.C. Code § 1-1001.16(b)(3). By operation of law, the ten (10) day time period is set to expire on or about February 15, 2010.

44. The Proponents now apply to this Court, pursuant to D.C. Code § 1-1001.16(b)(3), for review of the Board’s decision and a “writ in the nature of mandamus” compelling the Board to accept the Referendum.

### **COUNT I**

#### **THE HRA RESTRICTION CONTAINED IN THE INITIATIVE PROCEDURES ACT IS AN INVALID AND IMPERMISSIBLE RESTRAINT ON THE PEOPLE’S RIGHT OF REFERENDUM**

45. The people of the District of Columbia reserved to themselves the right of referendum in the Charter Amendments Act. The Charter Amendments Act amended the Home Rule Act and the “constitutional analog” of the District of Columbia, reserving to the people the power to suspend acts of the Council until such acts have been presented to the registered qualified electors of the District of Columbia for their approval or rejection. D.C. Code § 1-204.101(b).

46. The only substantive limitations contained within the District’s “constitutional analog” on the people’s right of referendum regards emergency acts, acts levying taxes, or acts

appropriating funds for the general operation budget. D.C. Code § 1-204.101(b). As acknowledged by the Board, the Referendum at issue does not purport to suspend an emergency act, an act levying taxes, or an act appropriating funds for the general operation budget.

47. The Council in 1979 passed Initiative Procedures Act, D.C. Code § 1-1001.16, to facilitate and procedurally regulate the people's right of referendum. Because the people's right of referendum is codified within the Charter and "constitutional analog" of the District, and is not merely a creature of statute, the Council cannot substantively alter or amend the referendum right. Rather, the referendum right can only be substantively altered or amended through a proper amendment of the Charter.

48. However, the IPA seeks to improperly impose a substantive limitation, not found in the Home Rule Act or the Charter Amendments Act, on the people's right of referendum—the HRA restriction. D.C. Code § 1-1001.16(b)(1)(C). It purports to entirely exclude from the people's right of referendum any measure said to "authorize[], or . . . have the effect of authorizing, discrimination prohibited under" the HRA. D.C. Code § 1-1001.16(b)(1)(C). This provision is an explicit attempt by the Council to gather unto itself a superior level of both moral and lawmaking authority in direct conflict with the District's "constitutional analog."

49. The Board relied exclusively upon this legally impermissible subject matter restriction to deny approval of the Referendum.

50. Because the HRA restriction impermissibly conflicts with the right reserved in the Charter Amendments Act, the restriction is invalid and the Board erred in relying on the restriction to disapprove the Referendum.

51. This Court and the Court of Appeals have both ruled that the express language of the Charter Amendments control over inconsistent provision of the IPA. *Price*, 645 A.2d at 599

("[T]o the extent any IPA provision is inconsistent with the Charter Amendments, the latter controls."); *Convention Ctr.*, 441 A.2d at 915 ("As implementing legislation [of the Charter Amendments Act], the Initiative Procedures Act is valid, of course, only insofar as it conforms to the underlying Charter Amendments."). Thus, to the extent any IPA provision is inconsistent with the Charter Amendments, or otherwise seeks to dilute the co-extensive lawmaking authority of the people with the Council, the explicit and clear language of the Charter Amendments controls.

## COUNT II

### **THE REFERENDUM IS A PROPER SUBJECT FOR THE CITIZENS OF THE DISTRICT BECAUSE THE DEFINITION OF MARRIAGE FALLS OUTSIDE THE INTENDED AND ACTUAL SCOPE OF THE HRA**

52. This Court and the Court of Appeals have both ruled that the "City Council consciously chose not to make the language of the Human Rights Act applicable to the regulation of the marital relationship." *Dean v. District of Columbia*, No. 90-13892, slip op. at \*4-8 (D.C. Super. Dec. 30, 1991), *aff'd*, *Dean v. District of Columbia*, 653 A.2d 307, 318-20 (D.C. 1995) (emphasis added).

53. The text of the HRA and its legislative history demonstrate that the HRA was never intended to implicate the definition of marriage in the District. Instead, as the Council has explained, the Act "should . . . be read in harmony with and as supplementing other laws of the District," including the District's marriage laws. Comm. on Public Services and Consumer Affairs, Report on Bill No. 2-179, Human Rights Act of 1977, at 3 (July 5, 1977) (citations and internal quotations omitted).

54. This interpretation of the HRA remains unaltered by the Court of Appeals or the Council.

55. Thus, as a matter of law, the HRA restriction is not applicable to the Referendum, and the Board erred in applying the restriction to the Referendum.

### **COUNT III**

#### **THE REFERENDUM IS CONSISTENT WITH THE HRA**

56. The Referendum does not authorize or have the effect of authorizing discrimination on the basis of “sex and sexual orientation.” (Board Decision at 18).

57. Both the Referendum and the act it seeks to suspend are silent regarding “sexual orientation.” Under current District law, one’s “sexual orientation” is not a determinative factor regarding the issuance of a marriage license, and the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 does not seek to make “sexual orientation” a determinative factor regarding the issuance of a marriage license. *See* Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. Act 18-248, 57 D.C. Reg. 27 (Jan. 1, 2010).

58. The legal impact of the Referendum, if approved by the voters, would also treat men and women equally—restoring the current status of District law—that men and women are all permitted to marry a member of the opposite sex. Thus, the Referendum does not discriminate improperly on the basis of sex.

59. Therefore, the legal effect of the Referendum—which is to preserve the current and legal status quo—does not discriminate in violation of the HRA, and the Board erred in holding that current District law somehow runs afoul of the HRA.

#### **PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, Petitioners request that this Court grant the following relief:

60. Expedite consideration of this matter as required by D.C. Code § 1-1001.16(b)(3).

61. Declare that the subject matter restriction imposed by the IPA, with respect to the application of the HRA to the proposed referendum, is inconsistent and conflicts with the Charter Amendments Act and cannot operate as a bar to the citizens' right to the referendum process in the District of Columbia generally.

62. Declare that the Board improperly relied on the HRA as grounds for denying the Proponents' rights to begin gathering signatures on the Referendum.

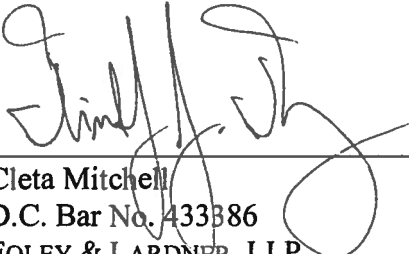
63. Declare that the Referendum does not authorize or have the effect of authorizing discrimination in violation of the HRA.

64. Issue a "writ in the nature of mandamus," pursuant to D.C. Code § 1-1001.16(b)(3), ordering the Board to accept the Referendum.

65. Grant other declaratory relief and permanent and temporary injunctive relief as may be necessary to ensure that the Referendum is accepted by the Board and that the referendum process moves forward.

66. Grant such other and further relief, including attorney's fees and costs, as the Court may deem just and proper under the circumstances.

Respectfully submitted this the 5<sup>th</sup> day of February, 2010.



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**DISTRICT OF COLUMBIA  
BOARD OF ELECTIONS AND ETHICS**

|                                |   |                        |
|--------------------------------|---|------------------------|
| In Re:                         | ) |                        |
|                                | ) |                        |
|                                | ) |                        |
| Referendum on the Religious    | ) | Administrative Hearing |
| Freedom and Civil Marriage     | ) | No. 10-001             |
| Equality Amendment Act of 2009 | ) |                        |
|                                | ) |                        |

**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, January 27, 2010 pursuant to the submission of a proposed measure, the “Referendum on the Religious Freedom and Civil Marriage Equality Amendment Act of 2009” (“the Referendum”). The Referendum seeks to suspend Act 18-0248, the “Religious Freedom and Civil Marriage Equality Amendment Act of 2009,” (“the Civil Marriage Equality 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. The proposers of the Referendum were represented at the hearing by Cleta Mitchell, Esq. of Foley & Lardner, LLP, and Timothy J. Tracey, Esq. of the Alliance Defense Fund. Chairman Errol R. Arthur and Board member Charles R. Lowery, Jr. presided over the hearing.

**II. Statement of the Facts**

The Civil Marriage Equality Act, *inter alia*,

clarif[ies] that marriage between 2 people in the District of Columbia shall not be denied or limited on the basis of gender, ... ensure[s] that no minister of any religious society who is authorized to solemnize or celebrate marriages shall be required to solemnize or celebrate any marriage, and ... ensure[s] the protection

of religious freedom with regard to the provision of services, accommodations, facilities, or goods related to the celebration or solemnization of a marriage[.]<sup>1</sup>

The Civil Marriage Equality Act's originating bill, Bill 18-0482 ("the Bill"), was introduced on October 6, 2009 by D.C. Council Chairman Vincent C. Gray and Councilmembers David Catania, Phil Mendelson, Michael Brown, Jack Evans, Muriel Bowser, Kwame R. Brown, Jim Graham, Mary Cheh, and Tommy Wells. The Council approved the Bill at its first reading on December 1, 2009 by a vote of 11-2. The Council approved the Bill again at its final reading on December 15, 2009, also by a vote of 11-2. The Council transmitted the Bill to Mayor Adrian Fenty on December 17, 2009, and Mayor Fenty signed the Bill on December 18, 2009.<sup>2</sup> The resulting Civil Marriage Equality Act was transmitted to the U.S. Congress on January 5, 2010, and is projected to become law on March 2, 2010.<sup>3</sup>

On January 6, 2010, Rev. Harry R. Jackson, Jr., Robert King, Anthony Evans, Rev. Dale E. Wafer, Rev. Walter E. Fauntroy, James Silver, Melvin Dupree, and Howard Butler ("the Proposers") filed the Referendum with the Board.<sup>4</sup> Also on January 6, the Proposers filed a verified statement of contributions with the D.C. Office of Campaign Finance.<sup>5</sup> On January 8, 2010, 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

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1 "Religious Freedom and Civil Marriage Equality Amendment Act of 2009," D.C. Act 18-248, 57 D.C. Reg. 27 (Jan. 1, 2010).

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

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

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

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

Documents and Administrative Issuances for publication in the D.C. Register.<sup>6</sup> On January 7, 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 January 15, 2010.

The Board held the proper subject hearing on January 27, 2010.<sup>7</sup> 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 January 29, 2010 for additional comments. In all, the Board received and considered comments from approximately 68 individuals and/or entities.

### III. ANALYSIS

#### A. Introduction

Referendum is

the process by which the registered qualified electors of the District of Columbia may suspend acts of the Council of the District of Columbia (except emergency acts, acts levying taxes, or acts appropriating funds for the general operation budget) until such acts have been presented to the registered qualified electors of the District of Columbia for their approval or rejection.<sup>8</sup>

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

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6 See D.C. Mun. Regs. tit. 3, § 1001.2 (2007).

7 See D.C. Mun. Regs. tit. 3, § 1001.3 (2007).

8 D.C. Official Code § 1-204.101(b) (2006 Repl.).

IV of the District of Columbia Home Rule Act or upon any of the following grounds:

- (A) The verified statement of contributions has not been filed pursuant to §§ 1-1102.04 and 1-1102.06;<sup>9</sup>
- (B) The petition is not in the proper form established in subsection (a) of this section;<sup>10</sup>
- (C) The measure authorizes, or would have the effect of authorizing, discrimination prohibited under [the District of Columbia Human Rights Act];<sup>11</sup> or
- (D) The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46.<sup>12 13</sup>

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 for referendum because it would authorize discrimination prohibited under the Human Rights Act (“HRA”).

**B. The Referendum Authorizes, or Would Have the Effect of Authorizing, Discrimination in Contravention of the Human Rights Act**

**1. The Board Lacks Authority to Rule that the HRA Restriction on the Right of Referendum is Invalid**

Pursuant to District law, the referendum process may not be used to authorize discrimination prohibited under the HRA.<sup>14</sup> It must be noted at this juncture that the proposers of the Referendum contend that the requirement that a referendum not violate the HRA is an invalid

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<sup>9</sup> 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.

<sup>10</sup> D.C. Official Code § 1-1001.16 (a)(1) 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.”

<sup>11</sup> See D.C. Official Code § 2-1401.01 *et seq.* (2006 Repl.).

<sup>12</sup> D.C. Official Code § 1-204.46 deals with budgetary acts of the D.C. Council.

<sup>13</sup> D.C. Official Code § 1-1001.16 (b)(1) (2006 Repl.).

<sup>14</sup> See D.C. Official Code § 1-1001.16 (b)(1)(C); D.C. Official Code § 2-1401.01 *et seq.* (2006 Repl.).

restriction on the right of referendum. They argue that the Initiative, Referendum, and Recall Charter Amendments Act in 1978 (“the Charter Amendments Act”)<sup>15</sup> -- read in conjunction with the Self-Government and Governmental Reorganization Act (“the Home Rule Act”)<sup>16</sup> -- permits the electorate to subject any act to the referendum process except for emergency acts, acts levying taxes, and acts appropriating funds for the general operation budget, provided the proposed referendum measure does not conflict with either the U.S. Constitution or an act of Congress. The Initiative, Referendum, and Recall Procedures Act of 1978 (“the Initiative Procedures Act”, or “IPA”)<sup>17</sup>, the Proposers argued, imposes an additional substantive limitation on the right of initiative and referendum in the form of the HRA restriction, a restriction based in neither the Home Rule Act nor the Charter Amendments Act. Consequently, the HRA provision of the IPA is inconsistent with the Charter Amendments Act, and is, therefore, necessarily invalid because “to the extent that any IPA provision is inconsistent with the Charter Amendments, the latter controls.”<sup>18</sup>

A similar argument was advanced in *Jackson v. District of Columbia Board of Elections and Ethics*.<sup>19</sup> That matter involved an appeal of the Board’s determination that the “Marriage Initiative of 2009”, an initiative which sought to establish that “only marriage between a man and

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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 Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Official Code § 1-201.01 et seq.).

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

18 Letter from Clela Mitchell (Foley & Lardner, LLP), Austin R. Nimocks, and Timothy J. Tracey (Alliance Defense Fund), Attorneys for Referendum Proposers, to Kenneth J. McGhie, General Counsel, D.C. Board of Elections and Ethics at 6 (January 22, 2010)(“Proposers’ Letter”)(citing *Price v. District of Columbia Board of Elections and Ethics*, 645 A.2d 594, 599 (D.C. 1994)).

19 *Jackson v. District of Columbia Bd. of Elections and Ethics*, No. 2009 CA 008613 B, slip op. (D.C. Superior Ct. Jan. 14, 2009)(“*Jackson II*”).

a woman [would be] valid or recognized in the District of Columbia[,]”<sup>20</sup> was not a proper subject for initiative because it would authorize discrimination under the HRA. In response to the assertion that the HRA restriction on the right of initiative and referendum was invalid, the District of Columbia argued that that claim was improperly before the court as it had not been made before the Board. The court held, and the Board agrees, that “the appropriate forum for adjudicating the validity of the Human Rights Provision is the court, not the Board.”<sup>21</sup> Accordingly, the Board is without authority to rule that the HRA restriction on the right of referendum is invalid.

## 2. The Human Rights Act

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.<sup>22</sup>

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 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

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20 Summary Statement, Marriage Initiative of 2009.

21 *Jackson II* at 21 (citing *Debruhl v. District of Columbia Hackers' License Appeal Bd.*, 384 A.2d 421, 425 (D.C. 1978)).

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

place of public accommodations.<sup>23</sup>

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.*<sup>24</sup>

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."<sup>25</sup>

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

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

24 D.C. Official Code § 2-1402.73 (2006 Repl.)(emphasis added).

25 Memorandum from Councilmember Marion Barry, Chairman, Committee of Finance and Revenue, Council of the District of Columbia, to Government Operations Committee Members, Council of the District of Columbia (April 26, 1978).

appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.<sup>26</sup>

In its current form, the amendment simply indicates that measures which would authorize discrimination prohibited under the HRA are impermissible, 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,"<sup>27</sup> must refuse to accept initiative and referendum measures that would thwart legislative efforts to eradicate unlawful discrimination. The Civil Marriage Equality Act constitutes such an effort. Accordingly, the Referendum seeking to subject this legislation to referendum must be denied.

### **3. Legislative Efforts Regarding Marriage Equality in the District**

This is the third time in less than a year that the Board has had the opportunity to determine the propriety of proposed ballot measures concerning same-sex marriage in the District of Columbia. In June 2009, the Board ruled that the referendum on the Jury and Marriage Amendment Act of 2009 ("JAMA"), an act that provided that same-sex marriages entered into and recognized as valid in other jurisdictions shall be recognized as valid marriages in the District, did not present a proper subject for referendum because it

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.<sup>28</sup>

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26 *Id.*

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

28 Board Memorandum Opinion and Order, "In Re: Referendum Concerning the Jury And Marriage

In response to the Board's ruling, the JAMA referendum's proposers filed with the D.C. Superior Court a petition for review of the Board's decision and for a Writ in the Nature of Mandamus to compel the Board to accept the Referendum. The court upheld the Board's decision, finding that the "Board correctly concluded that the proposed referendum would violate the District of Columbia Human Rights Act[.]"<sup>29</sup> Specifically, the court determined that, because the

proposed referendum asks the voters to decide whether the District should recognize same-sex marriages - which are legally indistinguishable from opposite-sex marriages in the jurisdictions in which they were performed - solely on the basis of the person's gender or sexual orientation[, the] measure 'authorizes or would have the effect of authorizing discrimination prohibited under the [DCHRA],' and hence is not a proper subject for referendum.<sup>30</sup>

The Board then considered the Marriage Initiative of 2009. The purpose of the proposed initiative measure was to establish that "only marriage between a man and a woman is valid or recognized in the District of Columbia."<sup>31</sup> The Board declared this measure invalid on the grounds that, if passed, it would have "strip[ped] same-sex couples [whose marriages were recognized in the District as a result of the passage of JAMA] of the rights and responsibilities of marriages currently recognized in the District" in violation of the HRA.<sup>32</sup> The Superior Court affirmed this ruling, finding that

[i]f enacted, the initiative would deprive only same-sex individuals of the legal status, rights, and privileges they enjoy as married persons. Such an initiative patently

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Amendment Act of 2009, 09-004 (June 15, 2009) ("*Board Marriage Referendum Order I*").

29 *Jackson v. District of Columbia Bd. of Elections and Ethics*, No. 2009 CA 004350 B, slip op. at 2 (D.C. Superior Ct. June 30, 2009) ("*Jackson I*").

30 *Id.* at 8.

31 Summary Statement, Marriage Initiative of 2009.

32 Board Memorandum Opinion and Order, "In Re: Marriage Initiative of 2009, 09-006 (Nov. 17, 2009) ("*Board Marriage Initiative Order*").

'authorizes or would have the effect of authorizing discrimination based upon ... actual or perceived ... sexual orientation [or] gender identity. The Board properly rejected the proposed initiative on this ground.<sup>33</sup>

At issue now is the Civil Marriage Equality Act, which provides, *inter alia*, that the ability to marry in the District shall not be denied or limited on the basis of gender. This legislation now explicitly establishes that District residents may enter into same-sex marriages, and that such marriages will be recognized as valid.

Throughout the course of each of the three aforementioned proceedings, it has become clear to the Board that the Council has, in recent years, consistently taken steps to modify District law in a manner that facilitates, among other things, the recognition of same-sex marriage in the District. For example, the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009 "formally acknowledge[d] that families created by same-sex couples are not distinguishable from any other family currently recognized under District law[.]"<sup>34</sup> Efforts to remove gender-specific references in statutes pertaining to marriage and/or the rights and responsibilities thereof are another.<sup>35</sup> JAMA was yet another illustration of the Council's intent to "move in the direction of conferring greater equality upon gay and lesbian couples."<sup>36</sup>

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33 *Jackson II* at 14-15.

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

35 Letter from Brian Flowers, General Counsel, Council of the District of Columbia, to Kenneth J. McGhie, General Counsel, D.C. Board of Elections and Ethics (June 9, 2009)("Flowers' JAMA 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.").

36 Letter from Brian Flowers, General Counsel, Council of the District of Columbia, to Kenneth J. McGhie, General Counsel, D.C. Board of Elections and Ethics at 10 (Jan. 22, 2010)("Flowers Letter").

As was explained in the Committee Report on the Civil Marriage Equality Act, this legislation

is the culmination of the District of Columbia's long pursuit of equality for same-sex couples in the law. The District, resolute in its conviction to provide equal rights and equal dignity to all residents, has, through domestic partnership laws, made parallel the rights and responsibilities of same-sex couples to those of opposite-sex spouses. True equality, however, is not obtained until same-sex couples are afforded the same rights, the same responsibilities, and are included in the same, single system of law for all. Bill 18-482, by affirmatively stating in the law that same-sex couples can legally refer to one another as "married," realizes this ideal of true equality sought after in the District. The Committee believes that it is impermissible to continue requiring gay and lesbian individuals to operate as a separate, purportedly equal, class of citizens in the District. This legislation will remedy that inequity.<sup>37</sup>

In his testimony before the Board, Councilmember Phil Mendelson reiterated the sentiments expressed in the Committee Report when he stated that the Civil Marriage Equality Act was not only about "fundamental fairness," but also about "the recognition of basic civil rights for all District residents in keeping with the HRA." Moreover, Mendelson stated that "Bill 18-482 remedies the exclusion of same-sex couples from the institution of marriage, allowing them to rightfully claim access to this fundamental human right."<sup>38</sup> The Civil Marriage Equality Act, then, is clearly a legislative effort on the part of the Council to eradicate what it deems to be unlawful discrimination under the HRA. Because the Referendum would thwart this effort, it is not a proper subject of referendum.

Like the proposers of the previous same-sex ballot measures, the Referendum

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37 Committee on Public Safety and the Judiciary, Council of the District of Columbia, Report on Bill 18-482, "Religious Freedom and Civil Marriage Equality Amendment Act of 2009," at 1 (Nov. 10, 2009).

38 Proper Subject Hearing on Referendum on Religious Freedom and Civil Marriage Equality Amendment Act of 2009, January 27, 2010 (statement of Councilmember Phil Mendelson, at 2).

proposers argue that *Dean v. District of Columbia*<sup>39</sup> precludes a finding that limiting marriage to heterosexual couples is an unlawful discriminatory practice that constitutes violation of the HRA. The Board continues to disagree with this argument. As the Board previously determined, the current statutory context as it pertains to the recognition of marriage in the District, and the legislative intent of the current Council to explicitly establish that the denial of the fundamental right to marry on the basis of sex or sexual orientation is unlawful, renders *Dean* outdated and inapplicable.<sup>40</sup>

**C. The Referendum Does Not Violate the “Acts Appropriating Funds for the General Operation Budget” Restriction on the Right of Referendum**

The Board received several comments which argue that the Referendum does not present a proper subject for referendum because it violates the prohibition against referenda on acts that appropriate funds for the general operation budget. The comments reference two separate analyses, both of which were considered by the Council during its deliberations on the Civil Marriage Equality Act. Each analysis indicates that implementation of the Civil Marriage Equality Act would generate revenue for the District.<sup>41</sup> The Referendum’s opponents argue that, because the Referendum would prevent the District from realizing this increased revenue, it is therefore not a proper subject for referendum.

Those who claim that the Referendum appropriates funds for the general budget primarily

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39 653 A.2d 307 (D.C. 1995) (“*Dean*”).

40 See Board Marriage Referendum Order I at 10-11; see also Board Marriage Initiative Order at 8-11.

41 See Office of the Chief Financial Officer, Analysis of Potential Revenue Implications of Same-Sex marriages in the District of Columbia (2009); see also The Williams Institute, The Economic Impact of Extending Marriage to Same-Sex Couples in the District of Columbia (Apr. 2009) (available at <http://www.law.ucla.edu/williamsinstitute/pdf/DC%20Econ%20Impact.pdf>).

cite *Hessey v. District of Columbia Bd. of Elections & Ethics*.<sup>42</sup> In that case, the D.C. Court of Appeals' declared that: 1) the "appropriating funds" restriction is to be construed broadly, such that it "extend[s] to the full measure of the Council's role in the District's budget process[.]"<sup>43</sup> that process being the discretionary [one] by which revenues are identified and allocated among competing programs and activities[.]"<sup>44</sup> and; 2) any "measure which would intrude upon the discretion of the Council to allocate District government revenues in the budget process is not a proper subject for initiative."<sup>45</sup> According to its opponents, the Referendum is such a measure because it "would result in a reduction of revenue for the District."<sup>46</sup>

The D.C. Court of Appeals has not considered whether a proposed referendum measure violated the "appropriating funds for the general operation budget" restriction. Consequently, all of the cases cited in support of the argument that the Referendum violates this restriction necessarily involve initiative measures, i.e., proposals to establish new laws. In each of these matters, the D.C. Court of Appeals had to analyze the proposed law in order to determine not only the substantive policy or program its drafters sought to establish, but also the impact of that policy or program on the role of the District's elected officials in the budget process. In *D.C. Board of Elections and Ethics v. District of Columbia*,<sup>47</sup> the court reviewed the rulings in its "law appropriating funds" jurisprudence up to that point:

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42 601 A.2d 3 (D.C. 1991) ("*Hessey*").

43 *Id.* at 20.

44 *Id.* at 19.

45 *Id.*

46 Flowers Letter at 12.

47 866 A.2d 788 (D.C. 2005).

Consistent with our interpretation of "laws appropriating funds", we have deemed unlawful any initiative that: 1) "block[s] the expenditure of funds requested or appropriated[]"; 2) directly appropriates funds[]; 3) requires the allocation of revenues to new or existing purposes[]; 4) establishes a special fund[]; 5) creates an entitlement, enforceable by private right of action[]; or 6) directly addresses and eliminates a source of revenue[.]<sup>48</sup>

In each of the cases noted, the court found that the substantive program at the heart of the proposed initiative measure was not merely related directly to revenue or funding, but also represented an affirmative effort to take away elected officials' control over the District's financial management. Each initiative measure invalidated was found to be an attempt to tie the Council's hands vis-à-vis its Charter-given responsibility to fiscally "formulat[e] a set of governmental priorities[,]"<sup>49</sup>, and thereby was determined to impermissibly "intrude upon the discretion of the Council to allocate District government revenues in the budget process."

Whereas the proper subject inquiry directed at proposed initiative measures scrutinizes the "laws" proposed by members of the electorate, and asks whether or not the law would intrude upon the Council's discretion to allocate funds, the inquiry aimed at proposed *referendum* measures is altogether different. First, this analysis examines the "acts" of the Council that the electorate seeks to suspend. This distinction is key: as the appellate court stated in *Hessey*,

[D.C. Official Code § 1-204.101(a)] defines "initiative" in terms of proposing "laws" while the Council of the District of Columbia, under the Self-Government Act, enacts "acts." ... *The legislative history of the Charter Amendments Act indicates that the choice of the term "laws" was deliberate, in order to distinguish between legislation passed by the Council and legislation passed by initiative.*<sup>50</sup>

Second, the question posed is whether or not the act is one of the three types of Council

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48 *Id.* at 794-5 (citations omitted).

49 *Convention Center Referendum Committee v. District of Columbia Board of Elections and Ethics*, 441 A.2d 889, 910 (D.C. 1981) ("Convention Center").

50 *Hessey*, 601 A.2d at 16 n.27 (emphasis added).

acts that are immune to referendum: emergency acts, acts levying taxes, and acts appropriating funds for the general operation budget. If an act that is the subject of a proposed referendum measure falls into one of these categories, the measure must fail. The Civil Marriage Equality Act is clearly neither an emergency act nor an act levying taxes. Moreover, notwithstanding the arguments that the Civil Marriage Equality Act will result in increased revenue for the District, such prospective fiscal impact is insufficient to transform the Civil Marriage Equality Act into an act appropriating funds for the general operation budget, i.e., budget request act.<sup>51</sup>

Lest there be any doubt that the term “acts appropriating funds for the general operation budget” is synonymous with the term “budget request acts,” an analysis of statutory provisions and precedent that illuminates the accuracy of this proposition is useful. In *Convention Center Referendum Committee v. District of Columbia Board of Elections and Ethics*, the D.C. Court of Appeals rendered a brief synopsis of the District’s unique and complex process by which funds are appropriated for the general operation budget:

The Mayor initially proposes the budget and submits it to the Council. ... The Council then has fifty days in which to consider and "adopt" a District budget by "act." ... The Council then transmits this "budget request act" back to the Mayor, ... who has line-item veto power. ... The Mayor then submits the final budget request act to the President. ... After the federal Office of Management and Budget has reviewed the District budget, ... the President submits the final version to Congress. ... After committee consideration, Congress passes and transmits to the President the annual D.C. Appropriations Act.<sup>52</sup>

The court in *Convention Center* noted that, “although the Council requests funds [via the budget request act], it is Congress, not the Council, that actually does the

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51 This finding does not save the Referendum; as discussed herein, it does not present a proper subject because it authorizes, or would have the effect of authorizing, discrimination under the Human Rights Act.

52 441 A.2d 889, 904 (citing, *inter alia*, the 1981 version of current D.C. Official Code § 1-204.46, titled “Enactment of Appropriations by Congress,” which now provides that “[t]he Council, within 56 calendar days after receipt of the budget proposal from the Mayor, and after public hearing, shall by act adopt the annual budget for the District of Columbia government.”).

'appropriating.'"<sup>53</sup> It is clear that, along with the Congressional appropriations act, the budget request act is one of the two types of legislation that result in the appropriation of funds for the District's annual operating budget. When the D.C. Court of Appeals attempted to clarify the "laws appropriating funds" limitation on the right of initiative, it declared that that phrase "encompass[e] both the Council's budget request acts and Congress' appropriations acts."<sup>54</sup> Both are required to appropriate funds for the District's operating budget.

As the D.C. Court of Appeals stated in *Hessey*, the budget request act is "an important document" because it "perform[s] the function of forcing the locally elected officials to determine how they want Congress to authorize the spending of government revenues among competing programs and activities in a fiscal year."<sup>55</sup> In other words, "budget request acts represent the formulation of a set of governmental priorities by the elected representatives of the public."<sup>56</sup> For this reason, the Council -- the entity to which the fiscal management of the District was entrusted -- saw fit to ensure that budget request acts would not be subject to referendum. Accordingly, the Board believes that the Civil Marriage Equality Act is not a budget request act.

**D. The Proper Subject Proceeding Is Not the Proper Forum In Which To Object to the Referendum Summary Statement**

Finally, the General Counsel for the D.C. Council asserts that the Referendum has

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53 *Id.* at 911.

54 *Id.* at 912.

55 *Hessey*, 601 A.2d at 9.

56 *Convention Center*, 441 A.2d at 910.

“drafting deficiencies ... that may prohibit [the Board] from accepting it as a referendum.”<sup>57</sup> Specifically, the General Counsel for the D.C. Council argues that the Referendum’s Summary Statement unjustifiably mischaracterizes the Act as one that would “deny protections to religious groups, individuals and organizations concerning their beliefs and teachings about marriage.”<sup>58</sup> The Board may not address this claim during this proceeding, the purpose of which is solely to determine whether or not the Referendum presents a proper subject under the criteria set forth in D.C. Official Code § 1-1001.16(b)(1).<sup>59</sup> After a referendum measure has been found to present a proper subject and is accepted by the Board, the Board “prepare[s] a true and impartial statement [that] express[es] the purpose of the measure.”<sup>60</sup> The Board’s formulation of the summary statement takes place at a public meeting during which members of the public who are present at the hearing may offer input. Thereafter, voters have the opportunity to object to the Board’s formulations in the Superior Court of the District of Columbia.<sup>61</sup> In sum, the objection raised to the Referendum’s Summary Statement is premature at this stage of the referendum process.

#### **IV. Conclusion**

The District’s Initiative, Referendum and Recall Procedures Act requires the Board to refuse to accept referendum measures that would violate the HRA. Referendum measures that would thwart the Council’s efforts to eradicate unlawful discrimination violate the HRA. The Civil Marriage Equality Act represents the Council’s effort to eliminate the

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57 Flowers Letter at 12.

58 *Id.* at 12 (*citing* Religious Freedom and Civil Marriage Equality Amendment Act of 2009 Summary Statement).

59 *See supra* Part III.A.

60 D.C. Official Code § 1-1001.16 (c)(1) (2006 Repl.).

61 *See* D.C. Official Code § 1-1001.16 (e)(1)(B) (2006 Repl.).

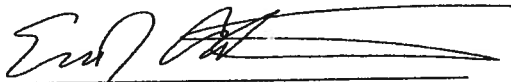
discriminatory exclusion of same-sex couples from the institution of marriage on the basis of sex and sexual orientation. The Referendum seeks to frustrate this effort, and would, if successful, have the effect of authorizing discrimination in contravention of the HRA. Accordingly, it does not present a proper subject for referendum, and may not be accepted by the Board.<sup>62</sup>

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).

February 4, 2009  
Date



Errol R. Arthur  
Chairman, Board of Elections and Ethics

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

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<sup>62</sup> 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.