COUNCIL OF THE DISTRICT OF COLUMBIA
1350 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004

Phil Mendelson
Councilmember At-Large

Office: (202) 724-8064
Fax: (202) 724-8099

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

Re: "Marriage Initiative of 2009"

Dear Mr. Mcghie:

I write regarding the District of Columbia Board of Elections and Ethics (Board) consideration of whether the proposed measure "Marriage Initiative of 2009" is a proper subject for initiative. This initiative would provide that only marriages between a man and a woman are valid or recognized in the District. Given the Human Rights Act of 1977[1] and District's commitment to equal rights, rejection of the proposed initiative would be consistent with the Board's rejection of "A Referendum Concerning the Jury and Marriage Amendment Act of 2009" as an improper subject for a referendum (and the subsequent District of Columbia Superior Court decision upholding that ruling[2]). The proposed initiative should be rejected by the Board.

As you are aware, the Board is required to reject any initiative that authorizes, or would have the effect of authorizing, discrimination prohibited by the Human Rights Act of 1977 (HRA).[3] This is rooted in the policy inherent in the HRA, and the longstanding policy of the District, to provide equal rights, and equal dignity, to all residents. Since the creation of domestic partnerships in 1992,[4] progress toward equality has resulted in a vast expansion of rights and responsibilities for same-sex couples.[5] Most recently this progress lead the Council to adopt a provision I authored in the Jury and Marriage Amendment Act of 2009[6] recognizing same-sex marriages performed in other jurisdictions. Though progress since 1992 has been incremental, the District has been resolute in its commitment to providing parity in the law for same-sex and opposite-sex couples.

In addition to the public policy considerations, the HRA's prohibition against discrimination based on sexual orientation permits no avenue other than the rejection of this proposed initiative. As the District currently recognizes same-sex marriages performed in other jurisdictions, couples

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[1] D.C. Law 2-38; D.C. OFFICIAL CODE § 2-1401.01 *et seq.* (2007 Repl.).

[2] Jackson v. District of Columbia Board of Elections and Ethics, No. 2009 CA 004350 B (D.C. Superior Ct. 2009).

[3] D.C. OFFICIAL CODE § 1-1001.16(b)(1)(C) (2006 Repl.).

[4] The Health Care Benefits Expansion Act of 1992 (D.C. Law 9-114; D.C. Official Code § 32-701 *et seq.*).

[5] The District has continuously sought to expand the rights and responsibilities of same-sex couples, and has methodically revised its laws to make them gender neutral in anticipation of the eventual recognition of same-sex marriages. *See, e.g.,* D.C. Law 17-231, the Omnibus Domestic Partnership Equality Amendment Act of 2008, and D.C. Law 18-33, the Domestic Partner Judicial Determination of Parentage Amendment Act of 2009.

[6] *See* section 3 of D.C. Law 18-9, the Jury and Marriage Amendment Act of 2009.

married in one of those jurisdictions[7] -- and so, under current law, also married in the District -- could be denied their marital status through passage of the proposed initiative. This initiative seeks to redefine what is discriminatory, contravening the District policy of continued expansion of rights for same-sex couples and the recognition that discrimination against an individual because of their sexual orientation is intolerable.

In June, proponents of the referendum argued that the proposed referendum would not discriminate in violation of the HRA because same-sex couples are able to avail themselves of the District's domestic partnership laws. The Board correctly rejected this argument. In upholding the Board's decision the Superior Court noted:

> [E]ven if unmarried same-sex couples could receive the same benefits as married couples, courts have long held that different treatment can equate to discrimination whether or not the material benefits and services offered appear uniform.[8]

While the District has continuously sought to expand the rights and responsibilities of same-sex couples through the domestic partnership law, ultimately equal rights will not be achieved until the District permits same-sex couples to avail themselves of the same system afforded to opposite-sex couples.

The Committee on Public Safety and the Judiciary, which I chair, will hold a hearing on Bill 18-482, the Religious Freedom and Civil Marriage Equality Amendment Act of 2009, this month. The legislation would permit same-sex couples to marry in the District of Columbia. This legislation is not only about fundamental fairness, but also the recognition of basic civil rights for all District residents in keeping with the HRA. The proposed initiative would prevent the expansion of rights provided by Bill 18-482. This is in contravention of the policy behind the HRA as it would sanction the discrimination of individuals because of their sexual orientation.

As a matter of fairness and equity, a civil right should not be subject to an initiative. The District's current recognition of same-sex marriages performed in other jurisdictions, as well as the proposed legislation to permit same-sex couples to marry in the District, is in keeping with fundamental fairness and recognition of basic civil rights for all District residents. For the reasons cited above, the Board should reject the proposed "Marriage Initiative of 2009."

Thank you for consideration. Please contact me if you have any questions.

Sincerely,

Phil Mendelson, Chairperson
Committee on Public Safety & the Judiciary

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[7]Currently, Massachusetts, Connecticut, Iowa, Maine, Vermont, and New Hampshire legally recognize same-sex marriages. While the California Supreme Court ruled in May 2008 that same-sex couples have the right to marry, Proposition 8, limiting marriage to one man and one woman, was subsequently passed in November. The approximately 18,000 same-sex marriages previously performed in California remain valid.

[8] *Jackson* at 8 (citing Goss v. Bd. Of Educ., 373 U.S. 683, 688 (1963)).