American Civil Liberties Union
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June 9, 2009

Kenneth J. McGhie, Esquire
General Counsel
District of Columbia Board of Elections and Ethics
441 4th Street, N.W., Suite 250
Washington, DC 20001

Re: Proposed Referendum Concerning the Jury and Marriage Amendment Act of 2009

Dear Mr. McGhie:

In accordance with the Board's invitation, the American Civil Liberties Union of the National Capital Area ("ACLU") submits these written comments on the above topic.

Section 3 of the Jury and Marriage Amendment Act of 2009 provides that "[a] marriage legally entered into in another jurisdiction between 2 persons of the same sex that is recognized as valid in that jurisdiction, and that is not expressly prohibited by [other District of Columbia law], shall be recognized as a marriage in the District [of Columbia]."

As several members of the D.C. Council stated before voting for this Act, the new statute simply makes explicit what was already implicit under District of Columbia law. For that reason, it will make no legal difference whether the Act is submitted to referendum or whether such a referendum succeeds or fails. In either event, same-sex marriages that have been formalized in other jurisdictions and that are recognized as lawful and valid in those jurisdictions will be recognized as lawful, valid marriages in the District of Columbia.

First, under long-standing and widely shared principles of interstate comity, jurisdictions in the United States recognize marriages validly created in other jurisdictions that are not offensive to their own strong public policy. Considering the mobility of American citizens, it would be absurd and wholly impractical if lawfully

married couples lost their married status as they moved or traveled across state borders. It is therefore hardly surprising that our Court of Appeals has observed:

> It is well settled that "[m]arriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction."

Rosenbaum v. Rosenbaum, 210 A.2d 5, 7 (D.C. 1965) (quoting *Loughran v. Loughran*, 292 U.S. 216, 223 (1934)). This basic principle has been applied in the District on many occasions. *See, e.g., Mitchell v. Mitchell*, 310 A.2d 837 (D.C. 1973); *Jay v. Jay*, 212 A.2d 331 (D.C. 1965); *Riedl v. Riedl*, 153 A.2d 639 (D.C. 1959); *Jwaideh v. Jwaideh*, 140 A.2d 303 (D.C. 1958).

Same sex marriages are neither polygamous nor incestuous, nor are they declared void by any statute of the District of Columbia. Nor would they be declared void by passage of the proposed referendum, which would simply leave the law as it is today. Accordingly, such marriages, when lawfully created and valid in the jurisdiction where entered into, would be recognized as valid by the District of Columbia regardless of the recent action of the D.C. Council and regardless of the outcome of the proposed referendum.

This result was confirmed by a recent decision of the New York Supreme Court, which, applying the general principles summarized above, concluded that a same-sex marriage lawfully performed in Canada was entitled to recognition in New York. *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (App. Div.), *motion for leave to appeal dismissed*, 889 N.E.2d 496 (N.Y. 2008).

Second, the District of Columbia Human Rights Act prohibits the District of Columbia from discriminating against same-sex couples (*vis-à-vis* opposite-sex couples) when it comes to the recognition of marriages lawfully formalized and recognized as valid in other jurisdictions, because that Act prohibits the D.C. government from discriminating on the basis of sexual orientation. *See* D.C. Code § 2-1402.73 ("... it shall be an unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any . . . benefit to any individual on the basis of an individual's actual or perceived . . . sexual orientation . . . ."). As the New York court recognized under a similar legal framework, a refusal to recognize a valid out-of-state marriage because of the sexual orientation of its spouses is unlawful discrimination based upon sexual orientation. *Martinez, 850* N.Y.S.2d at 743.

To be sure, the D.C. Court of Appeals has ruled that the Human Rights Act does not require the District of Columbia to perform same-sex marriages. In *Dean & Gill v. District of Colombia*, 653 A.2d 307 (1995), the court found that the D.C. Marriage Act incorporated the traditional understanding of marriage as being a union of persons of

opposite sexes, based on the fact that an amendment that would have authorized same-sex marriages was withdrawn under heavy fire when the Marriage Act was revised in 1977. From that legislative history, the court reasoned that "there cannot be discrimination against a same-sex marriage if, by independent statutory definition . . . there can be no such thing." *Id.* at 320.

But that very reasoning leads to the opposite conclusion when it comes to the recognition of marriages validly created in other jurisdictions, because there is not "no such thing" as same-sex marriage in those other jurisdictions. To the contrary, there is "such [a] thing," and nothing in *Dean & Gill* suggests that the Council's 1977 amendments to the Marriage Act were intended to, or would have the effect of, limiting the traditional doctrine, long recognized in D.C., that marriages "valid by the law of the state where entered into, be recognized as valid in every other jurisdiction." *Rosenbaum v. Rosenbaum, supra.*

Thus, because section 3 of the Jury and Marriage Amendment Act of 2009 simply clarifies existing law (both the common law of interstate comity and the Human Rights Act) on the subject of recognition of out-of-state marriages, the proposed referendum, if approved, placed on the ballot, and passed, would only block enactment of an unnecessary law; it would not prevent recognition of lawful out-of-state same-sex marriages, nor would it authorize governmental discrimination against such marriages that is already prohibited by the Human Rights Act

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The ACLU does not intend to present oral testimony at the June 10 hearing. We request, however, that this letter be made part of the record.

Respectfully submitted,

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Arthur B. Spitzer
Legal Director

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