**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**OFFICE OF THE ATTORNEY GENERAL**

**ATTORNEY GENERAL**

October 5, 2009

Kenneth J. McGhie, Esq.
General Counsel
Board of Elections and Ethics
441 4th Street, N.W., Suite 250
Washington, D.C. 20001

Re: "Marriage Initiative of 2009"

Dear Mr. McGhie:

This responds to your September 10, 2009 letter, in which you invited comment on whether the proposed initiative, the "Marriage Initiative of 2009" ("Initiative"), is a proper subject matter for initiative under District law.

The following Summary Statement was contained in the Notice of Public Hearing that accompanied your letter:

> The initiative, if passed, will provide that only marriage between a man and a woman is valid or recognized in the District of Columbia.

Conclusion

The District currently recognizes same-sex marriages validly performed and recognized in other jurisdictions. This recognition reflects the District's commitment to the principle of comity in recognizing marriages validly performed and recognized in other states, as well the District's commitment to equality, as expressed in the District's Human Rights Act. The proposed Initiative seeks to prohibit the District from continuing to recognize these same-sex marriages. Guided by the principles of comity, equality, and the recent *Jackson v. District of Columbia Bd. of Elections and Ethics* case, I find that the proposed Initiative is not a proper subject for initiative under District law, as it discriminates, or has the effect of discriminating, in contravention of the Human Rights Act.

Discussion

An initiative may be used to propose laws directly to the registered voters of the District of Columbia for their approval. *See* the Initiative, Referendum, and Recall Charter Amendments Act of 1977, effective March 10, 1978, D.C. Law 2-46, D.C. Official Code § 1-204.101(a) (2006 Repl.), which defines "initiative" as follows:

> The term "initiative" means the process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval.

Here, the proposed Initiative, if passed, would prevent the District from recognizing same-sex marriages that have been validly entered into in other jurisdictions. This is particularly significant because, given the passage of section 3(b) of the Jury and Marriage Amendment Act of 2009, codified at D.C. Official Code § 46-405.01 (56 DCR 3757) ("Amendment Act"), the District now recognizes marriages "legally entered into in another jurisdiction between 2 persons of the same sex that is recognized as valid in that jurisdiction, that is not expressly prohibited by [D.C. Official Code] §§ 46-401 through 46-404, and has not been deemed illegal under § 46-405[.]"[1]

In view of the prohibition in District law – as more fully discussed below – against any initiative that authorizes, or has the effect of authorizing certain kinds of discrimination, the question the Board of Elections and Ethics ("Board") must decide is this: does a prohibition against recognizing these same-sex marriages violate the District's longstanding policy of comity and – most especially- protection of equal rights. This question must be categorically and emphatically answered in the affirmative.

Comity is the "[c]ourtesy among political entities (as nations, states, or courts of different jurisdictions), involving esp[ecially] mutual recognition of legislative, executive and judicial acts." Black's Law Dictionary 261 (7th ed. 1999). Thus, comity is not a hard and fast rule of law, rather it is a courtesy that promotes cooperation. As such, comity contains something of a public policy exception, where comity "does not require recognition of a foreign decree which contravenes the public policy of the jurisdiction in which recognition is sought." *Butler v. Butler*, 239 A.2d 616, 618 (D.C. 1968).

Far from falling into the public policy exception, under the principle of comity, the District has a longstanding tradition of recognizing marriages valid at their place of celebration. *See Rosenbaum v. Rosenbaum*, 210 A.2d 5, 7 (D.C. 1965); *see also Loughran v. Loughran*, 292 U.S. 216, 233 (1934) ("Marriages 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.") (citation omitted). In fact, the District recognizes all foreign marriages,

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[1] These sections prohibit marriages between family members, polygamous marriages, and marriages where a party is unable to consent due to mental incapacity, force, or infancy.

except if the marriage is between persons domiciled in the District at the time of marriage and the marriage is prohibited by the provisions in D.C. Official Code §§ 46-401 – 404, or if the marriage violates the "strong public policy" of the District. *See Hitchens v. Hitchens*, 47 F. Supp. 73, 74 (D.D.C. 1942); *Jackson v. District of Columbia Bd. of Elections and Ethics*, No. 2009 CA 004350 B slip op. at 8-9 (D.C. Superior Ct. 2009).

With the Amendment Act, recognition was explicitly extended to same-sex marriages validly entered into and recognized in other jurisdictions. In fact, the language of the Amendment Act tracks the judicial language cited above, that the District will recognize all foreign same-sex marriages except if the marriage is prohibited by the provisions in D.C. Official Code §§ 46-401 – 404. This explicit recognition necessarily and affirmatively *makes* it the public policy of the District to recognize same-sex marriages validly entered into in other jurisdictions and reflects the District's continued commitment to the policy of equal treatment embodied in the Human Rights Act of 1977 ("HRA"), effective December 13, 1977, D.C. Law 2-38, D.C. Official Code § 2-1401.01 *et seq.* (2007 Repl. & 2009 Supp.). The HRA states:

> It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of… sex… marital status… sexual orientation, gender identity or expression…

The HRA is a broad, remedial statute to be generously construed. *See Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 889 (D.C. 1998) (citing *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392, 398 (D.C. 1991)). It has also been described as a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds," *Dean v. District of Columbia*, 653 A.2d 307, 317 (D.C. 1995) (*per curiam*), designed to "protect from invidious discrimination those persons or groups who have traditionally been subjected to unfair treatment," *Howard Univ. v. Green*, 652 A.2d 41, 49 n.12 (D.C. 1994).

In order to support the eradication of discrimination, the Board is required to refuse to accept an initiative if it finds that it is "not a proper subject of initiative" because it authorizes, or would have the effect of authorizing, discrimination prohibited under the HRA. *See* section 16(b)(1)(C) of the Initiative, Referendum and Recall Procedures Act of 1979 ("Procedures Act"), effective June 7, 1979, D.C. Law 3-1, D.C. Official Code § 1-1001.16(b)(1)(C) (2006 Repl.). The Initiative, if passed, would make it law in the District of Columbia that same-sex marriages validly entered into and recognized in other jurisdictions would not be recognized in the District.

Our analysis of the discriminatory effect of the proposed Initiative is guided by the recent Superior Court decision in *Jackson v. District of Columbia Bd. of Elections and Ethics*, No. 2009 CA 004350 B slip op. (D.C. Superior Ct. 2009). There, the court confronted this same recognition issue when faced with a referendum to suspend the Amendment Act and allow the voters to decide whether the District should recognize same-sex marriages validly entered into and recognized in other jurisdictions. *See id.* at 1-2. In examining the referendum in light of the HRA, the court noted that there are more than 200 rights and responsibilities of civil marriage

that are unavailable to domestic partners, making the debate over recognition more than a "quarrel" over nomenclature. *Id.* at 8. Noting that "different treatment can equate to discrimination whether or not the material benefits and services offered appear uniform," the court held:

> Petitioners' 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. Their measure "authorizes or would have the effect of authorizing discrimination prohibited under [the HRA]," D.C. Code § 1-1001.16(b)(1)(C), and hence is not a proper subject for a referendum. *Id.* at 8.

Given the court's holding in *Jackson* and the breadth of the HRA, it is clear that the proposed Initiative runs afoul of its provisions. The Initiative, just like the referendum in *Jackson*, asks the voters of the District to make a distinction between opposite-sex marriages and same-sex marriages that are legally indistinguishable in the jurisdiction where they were performed. This distinction would necessarily have to be done on the basis of gender and sexual orientation and would have the impermissible effect of authorizing discrimination prohibited under the HRA.

The District is in a unique position in that the HRA is extremely expansive and prohibits a broader range of discriminatory acts than most, if not all, other major jurisdictions in the nation. As many states have moved to clarify their own definition of marriage – specifically whether marriage should be limited to the union of persons of the opposite sex – a number of states have considered the impact of such legislation in light of their human rights protections. *See, e.g., Deane v. Conaway*, 932 A.2d 571 (Md. 2007) (limiting marriage to opposite-sex couples does not violate Maryland's Equal Rights Amendment because it applies to sex as a class and does not include sexual orientation); *Andersen v. King Co.*, 138 P.3d 963 (Wash. 2006) (local Defense of Marriage Act does not violate the Washington Equal Rights Amendment, which prohibits discrimination against either sex, because it treats both sexes equally, in that neither can marry persons of the same sex).

These cases are instructive because of the limited nature of the equal rights amendments adopted by those states. *See, e.g.,* Md. Const. Declaration of Rights art. 46; Wash. Const. art. XXXI, § 1. These amendments protect against discrimination on the basis of sex, but do not go so far as to extend protection against discrimination of the basis of sexual orientation, marital status, or gender identity or expression. Thus, when considering the scope of equal rights protection, the courts were confined to the narrow language of their respective controlling charters. Conversely, the District should be guided by the expansive principles of the HRA and look to other states with similarly expansive protections, particularly New York, which also recognizes same-sex marriages validly entered into in other jurisdictions. *See Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (N.Y. App. Div. 4th Dept. 2008) leave to appeal dismissed, 889 N.E.2d 496 (N.Y. 2008).

In *Martinez*, an employer refused to extend health care benefits to an employee's same-sex spouse after their valid foreign marriage. *See id.* at 741-42. The court found that recognizing valid foreign same-sex marriages does not contravene any strong public policy and is consistent with the state's tradition of recognizing marriages solemnized outside the state of New York. *See id.* at 742-43. As such, the refusal to extend benefits constituted a violation of Exec. Law § 296(1)(a), which prohibits discrimination "because of an individual's sexual orientation… sex…martial status…". The court concluded that "[d]efendants' contention that the discrimination to which plaintiff was subject is based not on her sexual orientation but on her marital status is circular reasoning. The sole reason for defendants' rejection of the marital status of plaintiff is her sexual orientation, and defendants thus violated Exec. Law § 296(1)(a)." *Id.* at 743; *see also Lewis v. New York Dep't of Civil Serv.*, 872 N.Y.S.2d 578 (N.Y. App. Div. 3rd Dept. 2009) (affirming recognition of valid foreign same-sex marriages), leave to appeal granted, 906 N.E.2d 1086 (N.Y. 2009).

Relying on *Martinez*, New York Governor David Paterson issued an Executive Directive dated May 14, 2008, stating that "agencies that do not afford comity or full faith and credit to same-sex marriages that are legally performed in other jurisdictions could be subject to liability. In addition, extension of such recognition is consistent with State policy…". The courts upheld this Directive. *See Golden v. Paterson*, 877 N.Y.S.2d 822 (N.Y. Sup. Ct. 2008).

Similar to New York, the District has an affirmative policy of prohibiting discrimination on the basis of sexual orientation. This is given full effect by the provisions of the HRA prohibiting discrimination on the basis of sex, sexual orientation, marital status, or gender identity or expression and changes in District law using gender neutral terms and conferring greater equality on same-sex couples, including the Domestic Partnership Equality Amendment Act of 2006, effective April 4, 2006, D.C. Law 16-79, 53 DCR 1035; the Omnibus Domestic Partnership Equality Act of 2008, effective Sept. 12, 2008, D.C. Law 17-231, 55 DCR 6758; and the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, D.C. Law 18-33, 56 DCR 4269. The Initiative would undermine this protection by authorizing, or having the effect of authorizing, unlawful discrimination. As noted in *Jackson*, asking voters to distinguish between same-sex and opposite-sex marriages, which are legally indistinguishable in the jurisdictions where the marriages were performed, authorizes, or has the effect of authorizing, discrimination on the basis of gender and sexual orientation. For these reasons, the Initiative is not a proper subject matter for initiative.

Finally, if the Board refuses to accept the Initiative, reasoning that it is an improper subject matter, and the proponent turns to the court to seek expedited review, the Board's decision would be protected by the procedural doctrines of *res judicata* and collateral estoppel. These doctrines "serve to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication.'" *United States v. Mendoza*, 464 U.S. 154, 158 (1984) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

Specifically, under the doctrine of *res judicata*, "when a valid final judgment has been entered on the merits, the parties or those in privity with them are barred, in a subsequent proceeding, from

relitigating the same claim or any claim that might have been raised in the first proceeding." *Newell v. District of Columbia*, 741 A.2d 28, 36 (D.C. 1999) (quoting *Washington Med. Cent. v. Holle*, 573 A.2d 1269, 1283 (D.C. 1990)). Collateral estoppel "renders conclusive in the same or subsequent action determination of an issue of fact or law when (1) the issue is actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not merely dictum." *Newell*, 741 A.2d at 36 (quoting *Davis v. Davis*, 663 A.2d 499, 501 (D.C. 1995) (citations omitted)).

If the proponent of the Initiative seeks expedited judicial review of the Board's refusal, per section 16(b)(3) of the Procedures Act (D.C. Official Code § 1-1001.16(b)(3)), the review would likely be controlled by the doctrine of collateral estoppel.[2] In *Jackson*, the court considered the Board's rejection of a referendum submitted by the proponent of the Initiative. As discussed above, the referendum sought to suspend the Amendment Act and allow the voters to decide whether the District should recognize same-sex marriages validly entered into and recognized in other jurisdictions. *See* slip op. at 1-2. In examining the referendum in light of the HRA, the court took note of more than 200 rights and responsibilities of civil marriage that are unavailable to domestic partners and found "different treatment can equate to discrimination whether or not the material benefits and services offered appear uniform." *Id.* at 7-8. In light of these observations, the court held:

> Petitioners' 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. Their measure "authorizes or would have the effect of authorizing discrimination prohibited under [the HRA]," D.C. Code § 1-1001.16(b)(1)(C), and hence is not a proper subject for a referendum. *Id.* at 8.

*Jackson* stands for the proposition that creating a distinction between opposite-sex and same-sex marriages for the purpose of recognizing, or not recognizing, valid foreign same-sex marriages is necessarily done on the basis of gender and sexual orientation and authorizes discrimination in violation of the HRA. This, then, renders attempts to create such distinctions improper for initiative and referendum in the District.[3]

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[2] The application of collateral estoppel, rather than *res judicata*, assumes that the denial of an initiative is a different "claim" or cause of action than the denial of a referendum. Here, the proponent of the Initiative was previously denied a referendum on the same topic. However, if the claim is determined to be the same, it would be barred under the doctrine of *res judicata* per the decision in *Jackson v. District of Columbia Bd. of Elections and Ethics*, No. 2009 CA 004350 B slip op. (D.C. Superior Ct. 2009).

[3] The standard by which the Board reviews measures to determine the propriety of their subject matter is the same for both referendums and initiatives. *See* D.C. Code § 1-1001.16(b)(1).

Importantly, *Jackson* also satisfies all the elements of collateral estoppel with respect to this issue.[4] First, the issue was litigated in the D.C. Superior Court pursuant to D.C. Code § 1-1001.16(b)(3) after both parties offered substantial memoranda in support of their respective positions. Second, the issue was determined in a valid, final judgment on the merits, where the court declared the issue to be improper for referendum after concluding that creating distinctions between same-sex and opposite-sex marriages for the purpose of denying recognition would be done via discrimination, in contravention of the HRA. Third, the parties in *Jackson* had a fair and full opportunity litigate the issue, where the petitioner was even able to take advantage of expedited review of the issue. Finally, the finding that the subject matter was not proper was essential to the judgment and not merely dicta. The petitioner sought both review of the Board's decision denying the referendum and a writ of mandamus to compel the Board to accept the referendum. In denying that request, the court conducted an extensive analysis of the referendum before finding it not to be proper. Thus, because the issue of creating distinctions between opposite-sex and valid same-sex marriages for the purpose of denying recognition to valid foreign same-sex marriage has already been found not to be a proper subject matter for referendum, the proponent of the Initiative will be collaterally estopped from re-trying that issue in future litigation.

As a note, it is probably impossible for the Board to conclude that, under the doctrine of administrative *res judicata*, the subject matter of the Initiative has already been found not to be a proper subject matter for initiative or referendum within the District. Specifically, in its opinion, Memorandum Opinion and Order, *In Re Referendum Concerning the Jury and Marriage Amendment Act of 2009*, No. 09-004 (D.C. Bd. of Elections & Ethics, June 15, 2009), the Board found that the referendum at issue in *Jackson* was not a proper subject for referendum. *See id.* at 4, 12. This conclusion was based on the finding that it would authorize discrimination and "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 a valid marriage elsewhere." *Id.* at 12.

The D.C. Court of Appeals has ruled that the doctrines of *res judicata* and collateral estoppel are applicable to administrative law proceedings. *See Gallothom, Inc. v. D.C. Alcoholic Bev. Control Bd.*, 820 A.2d 530 (D.C. 2003). However, the doctrines apply only "when the agency is acting in a judicial capacity, resolving disputed issues of fact properly before it which the parties have an adequate opportunity to litigate. *See id.* at 533 (quoting *Oubre v. District of Columbia*, 630 A.2d 699, 703 (D.C. 1993) (citation omitted)). Furthermore, the doctrines do not apply where the legislature has either expressly or impliedly indicated that it intends otherwise. *See id.* (quoting *Texas Inst. Inc v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1568 (Fed. Cir. 1996) (citation omitted)).

Within this framework, it is unlikely that administrative *res judicata* will apply. Although the Board held a special hearing prior to issuing its decision, the hearing does not rise to the level of a full adjudicative proceeding. Further, because the initiative process expressly provides for

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[4] As a preliminary matter, the parties to *Jackson* would also be the parties to a judicial review of the Initiative, as Jackson was the proponent of the failed referendum and is also the proponent of the current Initiative. Thus, the parties are in privity with the previous decision.

expedited judicial review of Board decisions, a review process which ultimately led to the *Jackson* decision, it is unlikely that the Board's decisions were intended to have a preclusive effect. *See* D.C. Code § 1-1001.16(b)(3). Rather, it is more likely that the collateral estoppel application discussed above will control any judicial review of the Initiative.

Sincerely,

Peter J. Nickles
Attorney General for the District of Columbia

cc: The Honorable Adrian M. Fenty, Mayor
Bridget Davis, Director, Office of Policy and Legislative Affairs
The Honorable Vincent C. Gray, Chairman
The Honorable Phil Mendelson
The Honorable Jim Graham
The Honorable Jack Evans
The Honorable David Catania
The Honorable Tommy Wells
The Honorable Yvette Alexander
The Honorable Muriel Bowser
The Honorable Kwame R. Brown
The Honorable Harry Thomas, Jr.
The Honorable Marion Barry
The Honorable Michael Brown
The Honorable Mary Cheh