



COUNCIL OF THE DISTRICT OF COLUMBIA
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TESTIMONY OF COUNCILMEMBER PHIL MENDELSON

Special Board Meeting of the DC Board of Elections & Ethics
"Preservation of Traditional Marriage One Man One Woman 2009"

Good afternoon, and thank you for the opportunity to appear before you to testify on whether the proposed measure *"Preservation of Traditional Marriage One Man One Woman 2009"* is a proper subject for an initiative. In my view, it is not.

This initiative, if approved by the Board, would ask voters to amend current District law to limit marriage as between one man and one woman. This initiative would ask voters to repeal D.C. Law 18-9, the "Jury and Marriage Amendment Act of 2009," which has been the law in the District since July 7, 2009, as well as repeal D.C. Act 18-248, the "Religious Freedom and Civil Marriage Equality Amendment Act of 2009," which was approved by the Council on December 15, 2009 and signed by the Mayor on December 18, 2009. As I have testified previously before the Board, I do not believe that a civil right should be the subject of a vote. Regardless, the law is clear that a matter integral to the Human Rights Act of 1977 shall not be subject to the initiative and referendum process. Thus, rejection is compelled, and rejection of the proposed referendum would be consistent with the Board's previous rulings, including a rejection of both a proposed initiative and a proposed referendum on D.C. Law 18-9, and the rejection earlier this month regarding the proposed referendum on D.C. Act 18-248.

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). 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, progress toward equality has resulted in a vast expansion of rights and responsibilities for same-sex couples. Though progress has been incremental, the District has been resolute in its commitment to provide parity in the law for same-sex and opposite-sex couples.

The Human Rights Act'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, the effect of this referendum would be to undo the marriage of couples currently residing in the District -- and for only one reason: their sexual orientation. That is discriminatory and unequal treatment under the law.

In June, proponents of a similar, earlier referendum argued that repeal of “Jury and Marriage Amendment Act of 2009” 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.

It is impermissible to continue requiring gay and lesbian individuals to operate as a separate but equal class of citizens in the District. D.C. Law 18-9 and D.C. Act 18-248 remedies this inequity, achieving equal rights by ensuring that same-sex couples can avail themselves of the same system afforded to opposite-sex couples.

This initiative would repeal the achievement of equal rights, and institute a discriminatory system based on sexual orientation. The legislation that is the subject of this initiative, then, is about fundamental fairness. But it is also about the recognition of basic civil rights for all District residents in keeping with the HRA. During consideration of the “Religious Freedom and Civil Marriage Equality Act of 2009, the Council heard from opponents that we were wrong to consider this a civil rights issue. But this has long been the case. The Committee Report I authored on this legislation, addresses this, quoting former U.S. Supreme Court Justice Earl Warren in *Loving v. Virginia*:

“The freedom to marry has long been one of the vital personal rights essential to the orderly pursuit of happiness by free men. ...[It is] one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”

This initiative would exclude certain individuals from the institution of marriage; it not only makes this choice for them but also brands their relationship as somehow inferior. This basic civil right is truly the choice of each individual, not the choice of the state. D.C. Law 18-9 and D.C. Act 18-248 remedies the exclusion of same-sex couples from the institution of marriage, allowing them to rightfully claim access to this fundamental human right.

At the January 27, 2010 hearing before the Board on a similar proposed referendum, I testified on the Council’s understanding of the fiscal impact of this legislation at the time it was adopted. The discussion of this was prompted by comments received by the Board regarding whether your consideration is limited solely to the question whether a referendum violates the prohibition against referenda on acts that appropriate funds for the general operation budget.

As the Board considers the current proposed initiative, I would like to explain for the record the fiscal analysis that was considered by the Council during deliberation of the “Religious Freedom and Civil Marriage Equality Amendment Act.” The Committee Report, which I drafted and presented to the Council on November 17th, included an analysis of the fiscal impact of the legislation which specifically cites a 2004 Congressional Budget Office report noting the positive fiscal impact to recognizing same-sex unions. This analysis was buttressed

by a fiscal analysis undertaken later by the District's Office of the Chief Financial Officer (OCFO). I submitted this second analysis to the Council at its December 15th meeting before its final vote and reading of the legislation. Like the federal analysis, the OCFO found that a significant positive fiscal impact would result from this legislation. This potential for an increase in revenue was considered by the Council during its deliberation and votes.

In closing, I reiterate that as a matter of fairness and equity, a civil right should not be subject to an initiative. The Council has sought to eradicate what it has found to be unlawful discrimination under the Human Rights Act, and the Council's legislation are important steps in that direction. It is clear that marriage, like all civil rights, is a universal entitlement of citizenship. Because of this, and because it has long been the goal of the District to bring equal treatment of same-sex couples and their families under the law, the Board should reject this proposed initiative.