DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

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

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[.][1]

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.[2] 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.[3]

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.[4] Also on January 6, the Proposers filed a verified statement of contributions with the D.C. Office of Campaign Finance.[5] 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

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.[6] 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.[7] 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.[8]

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

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

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.[14] 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

9 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.

10 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."

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

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

13 D.C. Official Code § 1-1001.16 (b)(1) (2006 Repl.).

14 *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")[15] -- read in conjunction with the Self-Government and Governmental Reorganization Act ("the Home Rule Act")[16] -- 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")[17], 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."[18]

A similar argument was advanced in *Jackson v. District of Columbia Board of Elections and Ethics.*[19] 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

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 Cleta 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[,]" [20] 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."[21] 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.[22]

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

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.[23]

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.[24]

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."[25]

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

---

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.[26]

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,"[27] 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.[28]

---

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[.]"[29] 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.[30]

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."[31] 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.[32] 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

---

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.[33]

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[.]"[34] Efforts to remove gender-specific references in statutes pertaining to marriage and/or the rights and responsibilities thereof are another.[35] JAMA was yet another illustration of the Council's intent to "move in the direction of conferring greater equality upon gay and lesbian couples."[36]

---

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 Council, 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.[37]

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."[38] 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

---

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* [39] 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.[40]

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.[41] 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

---

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.*[42] 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[,]"[43] that process being the discretionary [one] by which revenues are identified and allocated among competing programs and activities[,]"[44] 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."[45] According to its opponents, the Referendum is such a measure because it "would result in a reduction of revenue for the District."[46]

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*,[47] the court reviewed the rulings in its "law appropriating funds" jurisprudence up to that point:

---

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[.][48]

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[,]"[49], 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.*[50]

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

---

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.[51]

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.[52]

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

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.'"[53] 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 "encompasse[d] both the Council's budget request acts and Congress' appropriations acts."[54] 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."[55] In other words, "budget request acts represent the formulation of a set of governmental priorities by the elected representatives of the public."[56] 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

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."[57] 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."[58] 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).[59] 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."[60] 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.[61] 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

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.[62]

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

62 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.