

Testimony on the Referendum on the Religious Freedom and Civil Marriage Equality Amendment Act of 2009

Bob Summersgill [

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To: Kenneth McGhie

Attachments: Catania.SameSex.1209.pdf (75 KB)

To: D.C. Board of Elections and Ethics
One Judiciary Square,
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Washington, D.C. 20001

From: Bob Summersgill
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Date: January 27, 2010

Re: Referendum on the Religious Freedom and Civil Marriage Equality Amendment Act of 2009

Please find that the Measure, "Referendum on the Religious Freedom and Civil Marriage Equality Amendment Act of 2009," is not a proper subject as it "authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2", as described in D.C. Official Code § 1-1001.16(b)(1)(C).

Please also find the measure improper as D.C. Code § 1-204.101(b) excludes "acts levying taxes, or acts appropriating funds for the general operation budget" from referendum. This is essentially the same prohibition on referendums appropriating funds found in D.C. Official Code § 1-1001.16(b)(1)(D), "The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46."

This is the third hearing in seven months on essentially the same issue. In the previous two hearings, the Board correctly found that the measures proposing a referendum and an initiative to prohibit same-sex couples from being recognized as married or marrying would result in authorizing discrimination prohibited under the Human Rights Act. Both of those decisions were upheld as correct by different judges.

Chapter 14 of Title 2, commonly known as the Human Rights Act, is very broad and prohibits discrimination in 19 different categories for almost every reason, other than merit. The stated intent of the Council in passing the law in 1974, and reaffirmed by the elected Council under Home Rule in 1977 is stated in § 2-1401.01:

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 race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, and place of residence or business.

The Measure would prohibit the D.C. Government from providing services, programs, and benefits to same-sex couples married couples that are provided to other married couples. There are more than 250 rights and responsibilities of marriage in the D.C. Code, <http://www.glaa.org/archive/2004/glaamarriagereport.pdf>. Denial of any one of these rights would be sufficient to render the Measure an improper subject referendum per § 1-1001.16(b)(1)(C).

The purpose of the measure is to treat one class of citizens differently from another. Homosexuals would be treated as different and less than heterosexuals for a fundamental right. Justice Warren in *Loving v. Virginia* (1967) wrote, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of

happiness by free men.”

Justice Kennedy wrote about another ballot initiative, “We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else... A State cannot so deem a class of persons a stranger to its laws,” in *Romer, Governor of Colorado, et al. v. Evans et al.* (1996)

In addition to violating the Human Rights Act on the basis sexual orientation, the Measure would violate the HRA on the basis of religion.

As noted in the bill’s title, the Religious Freedom and Civil Marriage Equality Amendment Act of 2009, protects the rights of religious groups who wish to perform marriages. Without the law, those churches and clergy would be forbidden to exercise their rights. The organization Clergy United for Marriage Equality make this point on their website <http://www.clergyformarriage.com/read.html> “...the state also should not favor the convictions of one religious group over another by denying individuals their fundamental civil right to marry whom they love.”

The bill's Committee Report states:

Bill 18-482 also enhances religious freedom by giving religious organizations the *right* to solemnize same-sex marriages. The Committee received extensive testimony from religious leaders who argued that their inability to marry same-sex couples hampered their ability to fully practice their faith. For instance, Dean Snyder, Senior Pastor of Foundry United Methodist Church in DC, in arguing for the right to allow his church to marry same sex couples, stated that:

[i]f there are religions that choose to discriminate against gay and lesbian people, that may be their right. But we should not use the law to force those clergy who believe that God blesses same-sex marriage to discriminate.

In the same way, the freedom to marry, or not to marry, is an individual choice reflecting one person's commitment to another. By excluding certain individuals from this institution, 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. 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.

The Religious Freedom and Civil Marriage Equality Amendment Act of 2009 allows churches and clergy to make their own determinations of which marriages to perform or not perform. The Measure would violate that freedom.

The supporters of the Measure will once again argue that *Dean & Gill v. District of Columbia*, 1995 WL 21117 invalidates § 1-1001.16(b)(1)(C) as it relates to same-sex marriages. The BOEE and the D.C. Superior Court have twice found this argument to be baseless.

The Court in *Dean* found that same-sex marriage existed nowhere in the laws world; that the laws of the District did not anticipate them; that the legislative intent was not to include them. The Court found that it was not their role to create such a legal union. The remedy for Craig Dean and Patrick Gill and other couples was to seek redress from the D.C. Council.

Since that decision, all of the District laws that *Dean* were based on have been systematically changed by the Council and the Mayor to allow for same-sex marriages. Seven countries and five states have changed their laws to allow same-sex couples to marry. The U.S. Supreme Court case *Bowers v. Hardwick* referenced in *Dean* was wiped away by *Lawrence v. Texas*. Even dictionary definitions referenced in *Dean* have been updated to include same-sex couples. The Religious Freedom and Civil Marriage Equality Amendment Act of 2009 explicitly creates the right of same-sex couples to marry as a fundamental right protected under the Human Rights Act.

The logic of *Dean* still applies. The Court should look at the laws of the District and other jurisdictions, the history of the HRA, and examine the legislative intent of the D.C. Council. They would find that prohibiting same-sex couples to marry would now be in clear violation of the HRA.

Supporters of the Measure will likely claim that the law excluding referendums and initiatives that violate the HRA is not valid, specifically D.C. Official Code § 1-1001.16(b)(1)(C). This argument was soundly rejected by the Court. It

should not be entertained by the BOEE, especially in light of the BOEE's defense of the law in court.

The Measure is also improper because it would cause a loss of revenue depended upon by the Council to balance the budget. The D.C. Office of the Chief Financial Officer provided a report [see attached] to Councilmember David Catania on the tax implications of the Religious Freedom and Civil Marriage Equality Amendment Act of 2009. The OFCO found that the average annual fee and tax benefit of the legislation would range from \$14,790 to a high of \$1,080,537. At the low end, the assumptions are that no taxable expenses are made for weddings other than licenses by D.C. residents. An independent study by the Williams Institute at UCLA found:

"Extending marriage to same-sex couples will boost the District of Columbia's economy by over \$52.2 million over three years, which would generate increases in local government tax and fee revenues by \$5.4 million and create approximately 700 new jobs." <http://www.law.ucla.edu/williamsinstitute/pdf/DC%20Econ%20Impact.pdf>

The Measure would have the impact of cutting the fees and tax revenues of the law. The Council therefore will need to raise taxes or cut programs to make up for the loss. This is expressly prohibited by the referendum law.

As Mark Levine explains at length in his testimony, any fiscal impact makes a referendum or initiative an improper subject.

"However modestly, appellant's proposed initiative 'would intrude upon the discretion of the Council to allocate District government revenues in the budget process,' *id.* at 19, in the manner forbidden by § 1-281(a) [now § 1-204.101(a)]. . . ." *Dorsey v. District of Columbia Bd. of Elections & Ethics*, 648 A.2d 675, 677 (D.C. 1994)

In *Restaurant Ass'n of Metro. Wash. v. BOEE*, 2004 WL 2102203, *4 (Super. Ct. of D.C.), the Court rejected a proposed initiative to prohibit smoking in all public places, because it would cause "a negative fiscal impact on restaurant tax revenue assumptions heavily relied on by the Council."

I ask that you find that the Measure, Religious Freedom and Civil Marriage Equality Amendment Act of 2009, is not a proper subject of referendum as it "authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2. and would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46."

Please let me know if you have any questions.

Thank you.