

**Mark H. Levine**, counsel on behalf of the **Gertrude Stein Democratic Club**, respectfully submits the following Memorandum of Points and Authorities in support of the proposition that the Referendum concerning the Jury and Marriage Amendment Act of 2009 is not a proper subject for a referendum in the District of Columbia because it authorizes discrimination in violation of the DC Human Rights Act.

I. BACKGROUND OF "JURY AND MARRIAGE AMENDMENT ACT OF 2009"

On May 6, 2009, District of Columbia Mayor Adrian M. Fenty signed into law the Jury and Marriage Amendment Act of 2009 ("JAMA"), which the DC City Council approved by a vote of 12 to 1. JAMA will become law in the District of Columbia following the decline of Congress to exercise its 30-day right to review the legislation under section 602(c)(1) of the District of Columbia Home Rule Act.

JAMA was a clarification of DC law. Under JAMA, the District of Columbia expressly recognizes the valid marriages of DC residents legally entered into in another jurisdiction, without regard to the sex or sexual orientation of the married parties.<sup>1</sup>

Prior to JAMA, DC law was unclear on the question of recognition of out-of-state marriages. Although in 1995 the DC Court of Appeals did interpret the gender-neutral DC Code as making illegal any same-sex marriages performed in the District,<sup>2</sup> the court

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<sup>1</sup> See JAMA, Section 3(b) and *passim*. The law also modified the section banning incestuous marriages (Section 1283, D.C. Code §46-101) to make the section gender-neutral. JAMA, Section 3(a).

<sup>2</sup> *Dean v. District of Columbia*, 653 A.2d. 307 (DC. 1995). The plain statutory language of current DC law then and now is gender-neutral on marriages performed in DC, neither expressly prohibiting nor authorizing such marriages between individuals of the same gender. See Title 46, Chapter 4, D.C. Official Code §§ 46-401 et seq. But the Court in *Dean* found that the DC Council would not have intended such a "major definitional change" in 1977 as allowing its gay residents to marry without expressly mentioning it, *Dean*, 653 A.2d at 320, given the legislative history of the statute, the incest definitions therein, the "traditional understanding of 'marriage'," and case-law from other states, none of which allowed same-sex marriage back in 1995. *Dean, passim*. The court noted, for example, that the current DC marriage statute stemmed from a Congressional law that, at one time, regulated "slave marriages" using the term "husband" and "wife." 653 A.2d. at 313 n. 10 (referencing former D.C. Code §30-116).