


**COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON PUBLIC SAFETY AND THE JUDICIARY
COMMITTEE REPORT**

1350 Pennsylvania Avenue, NW 20004

TO: All Councilmembers
FROM: Councilmember Phil Mendelson, 
Chairman, Committee on Public Safety and the Judiciary
DATE: November 10, 2009
SUBJECT: Report on Bill 18-482, "Religious Freedom and Civil Marriage Equality Amendment Act of 2009"

The Committee on Public Safety and the Judiciary, to which Bill 18-482, "Religious Freedom and Civil Marriage Equality Amendment Act of 2009" was referred, reports favorably thereon with amendments, and recommends approval by the Council.

CONTENTS

I.	Background and Need	1
II.	Legislative Chronology	14
III.	Position of the Executive	15
IV.	Comments of Advisory Neighborhood Commissions	15
V.	Summary of Testimony.....	16
VI.	Impact on Existing Law	17
VII.	Fiscal Impact	17
VIII.	Section-by-Section Analysis	18
IX.	Committee Action	22
X.	Attachments	22

I. BACKGROUND AND NEED

Bill 18-482, the Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 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. In recognizing same-sex marriage in the District, Bill 18-

482 does not redefine any concept in the law (indeed, the Committee maintains same-sex marriage is already permitted under District law), as nowhere in our Code is the institution of marriage reserved to opposite-sex couples. Rather, Bill 18-482 removes the custom, or practice, that marriage is only between a man and a woman. This simple legislative act puts in the law what is already in the law: that the right of marriage applies fully to all in the District.

At the same time, Bill 18-482 preserves religious freedom. While the Committee believes without doubt or reservation that the civil right of marriage should be enjoyed by same-sex couples, it acknowledges that this view is not universally held. In particular, certain religious institutions may have different beliefs on the concept of marriage. Bill 18-482 accommodates the sincerely held objections of such religious leaders and organizations with regard to the solemnization or celebration of same-sex marriages. Provisions in this legislation ensure religious freedom by clearly stating that no religious organization will be required to celebrate marriage for a same-sex couple where doing so violates the tenets of their religious faith.

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.¹

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.

Marriage as a Basic Civil Right

If we are all created equal, then gays and lesbians are entitled to the same rights and privileges, the same fundamental freedoms, mandated for all individuals. Access to equal treatment under the law inevitably includes the freedom to marry. U.S. Supreme Court Chief Justice Earl Warren, in a unanimous 1967 decision striking down Virginia's anti-miscegenation law, wrote: "[t]he freedom to marry has long been one of the vital personal rights essential to the

¹ *Bill 18-482, Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009, at 2 (written testimony of Rev. Dean J. Snyder, Senior Pastor, Foundry United Methodist Church).

orderly pursuit of happiness by free men.”² Marriage, Warren continued, is “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”³

Fairness demands that gays and lesbians are treated equally before the law and permitted access to the universal entitlements of citizenship. Such entitlements, says NAACP Chairman Julian Bond, are the definition of a civil right. In a speech before members of the lesbian, gay, bisexual, and transgender (LGBT), March 2009, he stated:

When someone asks me, “are gay rights civil rights?” my answer is always, “Of course, they are.” Civil rights are positive legal prerogatives: the right to equal treatment before the law. These are the rights shared by everyone. There is no one in the United States who does not, or should not, enjoy or share in enjoying these rights. Gay and lesbian rights are not special rights in any way. It isn’t “special” to be free from discrimination. It is an ordinary, universal entitlement of citizenship.⁴

In a recent op-ed in the *Washington Post*, Mr. Bond repeated this call for equality and argued that “[w]e can no longer pretend that civil rights do not include rights for lesbian, gay, bisexual and transgender Americans.”⁵

Several civil rights leaders from the 1960s have likewise expressed strong support for marriage equality. Coretta Scott King voiced her support for same-sex marriage in 2004 while denouncing a proposed constitutional amendment that would have banned it.⁶ Likewise, Georgia Congressman John Lewis wrote in an op-ed in the *Boston Globe* that:

[i]t is time to say forthrightly that the government's exclusion of our gay and lesbian brothers and sisters from civil marriage officially degrades them and their families. It denies them the basic human right to marry the person they love. It denies them numerous legal protections for their families.⁷

² *Loving v. Virginia*, 388 U.S. 1, 10 (1967).

³ *Id.* at 11 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1992)).

⁴ Chris Johnson, *NAACP National Chairman Julian Bond: It isn't 'special' to be free from discrimination*, HRC Back Story, Mar. 16, 2009, <http://www.hrcbackstory.org/2009/03/julianbond/> (quoting from Julian Bond speech before the 2009 Creating Change Conference).

⁵ Julian Bond, Op-Ed., *Rights still to be won*, WASH. POST., Oct. 9, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/08/AR2009100803292.html> (last visited Nov. 7, 2009). In the same piece, Mr. Bond remarks: “[f]limsy justifications for anti-LGBT bias are giving way to evidence that society is strengthened, not weakened, when LGBT people are given equal protection under the law. Where they are free to marry those they love, the sky has not fallen.” *Id.*

⁶ *Coretta Scott King gives her support to gay marriage*, USA TODAY, Mar. 24, 2004, available at http://www.usatoday.com/news/nation/2004-03-24-king-marriage_x.htm (last visited Nov. 8, 2009) (in a speech before the Richard Stockton College in Pomona, Ms. King stated: “[g]ay and lesbian people have families, and their families should have legal protection, whether by marriage or civil union. A constitutional amendment banning same-sex marriage is a form of gay bashing and it would do nothing at all to protect traditional marriages.”)

⁷ John Lewis, Op-Ed., *At a crossroads on gay unions*, THE BOSTON GLOBE, Oct. 25, 2003, available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2003/10/25/at_a_crossroads_on_gay_unions/ (last visited Nov. 8, 2009).

This call to end the discrimination against gays and lesbians, and to provide equal access to marriage has also been given by Mildred Loving. A person with first-hand experience challenging discriminatory marriage laws, Ms. Loving stated in a speech on the 40th anniversary of the Supreme Court decision that bears her name,⁸ her belief that:

all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. Government has no business imposing some people's religious beliefs over others. Especially if it denies people's civil rights.⁹

The Committee received similar statements of support for marriage equality from witness after witness during two days of public hearings. From these statements, whether delivered by an individual hoping to one day find their better half, or by a couple decades into a relationship and consumed with the responsibilities of raising children, it is clear that marriage *means* something. It means more than what we can delineate in words or encompass in our laws. It is better defined by those two people in an intimate relationship in how they are committed to each other. It envelops not just the relationship of spouses, but their broader family and how they, and their family, are perceived and associate with society. This relationship, then, is fundamental.

To refuse this civil right to same-sex couples is an affront to constitutional principles proclaiming equality for all, and it labels these couples and their families as somehow different. The District has rightfully extended the rights and responsibilities associated with the definition of family to same-sex couples through the domestic partnership law, making such familial relationships equal, all but in name, to that shared by opposite-sex couples. The relationship between same-sex couples, however, is just as real a relationship, and the family on which the relationship is founded is just as real. Perhaps because of growing recognition of this, statements such as the following were echoed repeatedly in testimony on Bill 18-482:

I am convinced that the key to a strong family is not the gender of the parents, but rather the love, commitment, and faithfulness they manifest toward each other and where applicable, toward their children.¹⁰

If, then, our laws and policies dictate that same-sex couples “qualify as a family for certain situations, logic dictates that same-sex couples have the right to consummate that familial relationship with marriage.”¹¹ In addition to the extraordinary number of tangible benefits that extend from marital status,¹² marriage also provides numerous intangible benefits to spouses and

⁸ Loving, *supra* note 2.

⁹ Mildred Loving, “Loving for All,” Prepared for Delivery on June 12, 2007, the 40th Anniversary of the *Loving v Virginia* Announcement, available at http://www.freedomtomarry.org/pdfs/mildred_loving-statement.pdf (last visited Nov. 7, 2009).

¹⁰ Bill 18-482, *Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009, at 2 (written testimony of Rev. Dennis W. Wiley, PhD, Covenant Baptist Church, and co-chair, DC Clergy United for Marriage Equality).

¹¹ Kevin Aloysius Zambowicz, “*To Love and Honor All the Days of Your Life*”: *A Constitutional Right to Same-Sex Marriage?*, 43 CATH. U.L. REV. 907, 928 (1994).

¹² By way of example, the 1995 *Dean* decision lists approximately 72 provisions in the D.C. Code conferring rights upon married couples. *Dean v. District of Columbia*, 653 A.2d 307, 323 (D.C. App. 1995) (at note 19). In 2003, a

their families. Among them, the universal respect and recognition that comes with being able to refer to one's partner as "my spouse."¹³

Access to this basic civil right of marriage has long been enjoyed by opposite-sex couples; the Committee believes that same-sex couples lay equal claim to this right. Fundamental fairness, for these couples and their families, necessitates that the Council act to adopt marriage equality in the District. Writing in 2004, Peter Gomes, Plummer Professor of Christian Morals and Pusey Minister in the Memorial Church at Harvard University, aptly summarized this sentiment in stating:

To extend the civil right of marriage to homosexuals will neither solve nor complicate the problems already inherent in marriage, but what it will do is permit a whole class of persons, our fellow citizens under the law heretofore irrationally deprived of a civil right, both to benefit from and participate in a valuable yet vulnerable institution which in our changing society needs all the help it can get.¹⁴

The institution of marriage in this country carries an imprimatur of commitment, respect and solemnity that can never be achieved with a "separate but equal" system of rights.

Public Policy of the District to Provide Equality

It has been the longstanding policy of the District to provide equal rights, and equal dignity, to all residents. Since the creation of domestic partnerships in 1992,¹⁵ progress toward equality has been unwavering. The initial establishment of domestic partnerships set up a registration procedure to permit District employees to share health care benefits with their domestic partners.¹⁶ Since enactment, the District has expanded the rights and responsibilities of domestic partnerships to be on par with that of spousal relationships. Most recently, this Committee has brought forward legislation such as the Domestic Partnership Equality Act of

report release by the Gay and Lesbian Activists Alliance found 212 rights and responsibilities of civil marriage in the D.C. Code (only 8 of which were, at the time, extended to domestic partners). Gay and Lesbian Activists Alliance of Washington, D.C., *Marriage Law in the District of Columbia*, 1 (Dec. 2003), available at <http://www.glaa.org/archive/2004/glaamarriagereport.pdf> (last visited Nov. 7, 2009).

¹³ *Bill 18-482, Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009, at 2 (written testimony of Rev. John W. Wimberly, Jr., President, American Civil Liberties Union of the Nation's Capital).

¹⁴ Peter J. Gomes, *For Massachusetts, a chance and a choice*, BOSTON GLOBE, Feb. 4, 2008, available at: http://www.boston.com/news/globe/editorial_opinion/oped/articles/2004/02/08/for_machusetts_a_chance_and_a_choice/ (last visited Nov. 7, 2009).

¹⁵ Health Care Benefits Expansion Act of 1992 (D.C. Law 9-114; D.C. Official Code § 32-701 *et seq.*).

¹⁶ Although created in 1992, the District was prohibited, through the federal government's oversight, from utilizing District or federal funds to implement this law until 2001. It was not until December 6, 2001, when the House of Representatives passed the District of Columbia appropriations bill for fiscal year 2002, that the prohibition was dropped.

2006¹⁷, the Omnibus Domestic Partnership Equality Act of 2008¹⁸, and the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009¹⁹. Collectively, these measures have provided sweeping reform: replacing outdated gender-specific language throughout the Code with gender neutral language, advancing parity in a variety of areas of the law between domestic partners and married couples, and providing one of the nation's most progressive statutes on parentage rights.²⁰

Though the process has been prolonged and incremental, the District has been resolute in its commitment to providing equality in the law for same-sex and opposite-sex couples. Equality, however, is not ultimately achieved until District law explicitly permits same-sex couples to avail themselves of the same system afforded to opposite-sex couples. The first step in realizing this ideal came earlier this year with the Council's adoption of the Jury and Marriage Amendment Act of 2009.²¹ Section 3 of that legislation amended District law to recognize marriages legally entered into in other jurisdictions between two persons of the same sex as marriages in the District. While the change was made explicit in the law, the Council was clear that this recognition was already permitted under existing law.²²

The Committee likewise believes that the changes made by Bill 18-482 clarify what is already provided for in the law. In 1990, the District of Columbia Superior Court's denial of a marriage license to a same-sex couple prompted the couple to litigate, resulting in the District of Columbia Court of Appeals decision in *Dean v. District of Columbia*.²³ In ruling that District law did not require the Clerk of the Superior Court to issue a marriage license to same-sex couples, the court relied upon gender-specific language found in the D.C. Code and the definition of marriage in contemporary (as well as much older) dictionaries. While the Committee believes same-sex marriage was authorized by the law in 1995 when *Dean* was decided, those factors relied upon by the court in *Dean* have since been methodically, and

¹⁷ D.C. Law 16-79 (marked up by the Committee on November 8, 2005, the legislation allows domestic partners to protect themselves and their families, particularly in times of crisis).

¹⁸ D.C. Law 17-231 (marked up by the Committee on March 11, 2008, the legislation overhauls numerous provisions in the Code so that District law recognizes rights and responsibilities for domestic partners that currently exist for spouses).

¹⁹ D.C. Law 18-33 (marked up by the Committee on October 14, 2008, the legislation provides legal recognition of the parent-child relationship for children born to domestic partners).

²⁰ As was noted in testimony provided to the Committee during the October 19, 2007 hearing, terms such as "husband," "wife," "widow," and "widower" refer "back to the days before marriage was an equal partnership when a man owned a woman. In that archaic legal context, the gender specific terms were appropriate. With the significant changes to marriage law in the past century, those archaic ideas were purged, but not all of the language has been modernized." *Bill 17-135, Omnibus Domestic Partnership Equality Amendment Act of 2007: Hearing Before the D.C. Council Committee on Public Safety and the Judiciary*, Oct. 19, 2007, at 1 (written testimony of Bob Summersgill, public witness).

²¹ D.C. Law 18-9.

²² See e.g., Amendment to Committee Print: Bill 18-10, the Disclosure to the United States District Court Act of 2009 (Apr. 7, 2009) (the rationale stated for the amendment notes: "[t]his amendment makes explicit what is already the law: to recognize marriages duly performed in other jurisdictions, including officially sanctioned marriages between persons of the same-sex.>").

²³ 653 A.2d 307 (D.C. App. 1995).

purposefully, reversed by the Council or have become obsolete through societal and cultural changes. The court, for instance, gave considerable attention to the gender specific terminology in the District's consanguinity provision to conclude that the legislature intended to limit marriage to a male-female relationship.²⁴ Section 3(a) of the Jury and Marriage Amendment Act of 2009 replaces this gender-specific language with gender-neutral terms.

While the *Dean* court consulted several dictionaries in making a determination that marriage is confined to couples of the opposite-sex, it also acknowledged that "the meaning of words are continually evolving".²⁵ The lexicon with regard to personal relationships has indeed evolved since that decision, mirroring the recognition in society and other legal systems that same-sex unions are included in the term "marriage." Even the publications relied upon in *Dean* -- namely *Webster's* and *Black's Law Dictionary*²⁶ -- have since been revised. In its eighth edition, published in 2004, *Black's*²⁷ includes "same-sex marriage" in its entry for marriage and *Webster's* too has been updated to include same-sex marriages in its definition of marriage.²⁸ Interestingly, the *Oxford English Dictionary*, long revered as authoritative in this regard, even includes "long term relationships between partners of the same sex" in its definition of marriage.²⁹

The evolution in the definition of marriage tracks the evolution in society toward more widespread acceptance of same-sex marriage. The laws in the District, as well as throughout the country, exhibit progress toward the rightful recognition of same-sex couples as equal to that of opposite-sex couples. In testimony before this Committee, Reverend Paul Roberts Abernathy remarked of this progress that:

[t]hroughout history we have changed our laws to reflect our ever deepening consciousness about what promotes a productive stable society. This legislation addresses an issue that in our day does exist and, more importantly, acknowledges the reality that same-sex relationships are a part of the rich tapestry of life in our beloved District of Columbia.³⁰

²⁴ *Id.* at 313 (discussing D.C. Official Code § 30-101, re-codified as § 46-401).

²⁵ *Dean*, *supra* note 23, at 315.

²⁶ *Id.* The D.C. Court of Appeals, relying on the publications available at the time, cites *Black's Law Dictionary* (6th ed. 1990) and two versions of *Webster's* dictionary: *Webster's Modern Dictionary* (1902) and *Webster's Third New International Dictionary* (1986).

²⁷ BLACK'S LAW DICTIONARY (8th ed. 2004).

²⁸ See e.g., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 761 (11th ed. 2003) (including in the definition of marriage "the state of being united to a person of the same sex in a relationship like that of a traditional marriage"). See also Daniel Redman, *Noah Webster gives his blessing: Dictionaries recognize same-sex marriage—who knew?*, SLATE, Apr. 7, 2009, available at <http://www.slate.com/id/2215628/> (last visited Nov. 6, 2009) (noting that the 2008 *Webster's Contemporary School and Office Dictionary* uses gender-neutral language in its definition of marriage).

²⁹ See Redman, *supra* note 28; see also, *Gay marriage gets recognition in the dictionary*, USA TODAY, Mar. 18, 2009, available at http://www.usatoday.com/news/nation/2009-03-18-gay-marriage_N.htm (last visited Nov. 8, 2009).

³⁰ Bill 18-482, *Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009, (written testimony of Rev. Paul Roberts Abernathy, Rector, St. Mark's Episcopal Church)

Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire legally recognize same-sex marriages.³¹ Seven foreign countries also sanction same-sex marriages: Netherlands, Belgium, Spain, South Africa, Canada, Norway, and Sweden.³² While recognition of same-sex marriage in this jurisdiction a decade ago would have been unprecedented, “like it or not, [] customs change with an evolving social order.”³³ So, too, must the law change -- to reflect and support current social customs. The District cannot justify the continued discrimination of same-sex couples on account of the historical discrimination gays and lesbians have experienced. As one witness stated at the hearing, “[w]e must not allow history and tradition to shackle freedom and justice.”³⁴

Marriage and Religious Freedom

While there is currently division among different religious institutions over the recognition of same-sex marriage, the Council must recognize that the legislature cannot dictate the beliefs of any religious institution.³⁵ Testimony received on Bill 18-482 demonstrates that certain religious denominations have sincerely held objections to the recognition of same-sex marriage.³⁶ The Committee has neither the intention nor desire to force any religious leader to perform a marriage in contradiction of his or her religious beliefs.

Over the course of two days of testimony, and through comments submitted for the record, the Committee has heard from numerous religious leaders and institutions expressing strong support for same-sex marriage. Witnesses testified how same-sex marriage is not only consistent with their faith, but that their faith teaches them that such equality is required. Stressing this ideal, Reverend Dennis Wiley testified that:

[the recognition of same-sex marriage] is theologically right because we are all created equal in the image of God, it is historically right because those of use who have been the victims of

³¹ While the California Supreme Court ruled in May 2008 that same-sex couples have the right to marry, Proposition 8, limiting marriage to one man and one woman, was subsequently passed in November. The approximately 18,000 same-sex marriages previously performed in California remain valid.

³² See Human Rights Campaign website, Questions about Same-Sex Marriage, available at <http://www.hrc.org/issues/5517.htm> (last visited Nov. 7, 2009). In addition, a number of countries extend rights to same-sex couples, although more limited than marriage: Croatia, Denmark, Finland, France, Germany, Iceland, Israel, New Zealand, Portugal, Slovenia, Switzerland, and the United Kingdom. *Id.* See also, *Norway passes law approving gay marriage*, L.A. TIMES, Jun. 17, 2008, available at <http://www.latimes.com/news/local/la-on-norwaymarriage18-2008jun18,0,402614.story> (last visited Nov. 10, 2009), and *Sweden allows same-sex marriage*, BBC NEWS, Apr. 2, 2009, available at <http://news.bbc.co.uk/2/hi/7978495.stm> (last visited Nov. 10, 2009).

³³ *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993).

³⁴ *Bill 18-482, Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009, at 2 (written testimony of Philip E. Pannell, DC Coalition of Black Lesbians, Gays, Bisexuals, and Transsexuals).

³⁵ Wimberly, *supra* note 13, at 3.

³⁶ See e.g., *Bill 18-482, Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the DC Council Committee on Public Safety and the Judiciary*, Oct. 26, 2009 (written testimony of the Archdiocese of Washington).

