No. 10-A_____

In the Supreme Court of the United States

HARRY R. JACKSON, JR., ROBERT KING, ANTHONY EVANS, DALE E. WAFER, WALTER E. FAUNTROY, JAMES SILVER, MELVIN DUPREE, AND HOWARD BUTLER,
Petitioners

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,
Respondent

and

DISTRICT OF COLUMBIA,
Intervenor-Respondent

Appeal from No. 10-CV-177 in
District of Columbia Court of Appeals

Application of Petitioners for Immediate Stay of the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 Pending Certiorari

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To the Honorable John G. Roberts, Jr.
Chief Justice of the United States Supreme Court and
Circuit Justice for the D.C. Circuit

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Table of Contents

Table of Authorities ii

Introduction 1

Factual and Procedural History of this Case 2

A. The Marriage Initiative of 2009 3

B. The Referendum on the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 5

Jurisdiction 7

Standards for Granting a Stay 9

Application of the Stay Standards to this Case 10

I. The "Reasonable Probability" of Granting Certiorari 10

A. The Limited Nature of the Council's Legislative Authority 11

B. The Council's Improper Amendment to the Home Rule Act 13

II. The "Fair Prospect" that the Decision Below Will Be Found Erroneous 15

III. The Irreparable Harm to Petitioners if a Stay is Denied 19

IV. Balance of the Equities 22

Proof of Service 25

Table of Authorities

CASES:

Adams v. Clinton,
90 F. Supp. 2d 35 (D.D.C. 2000) 10

Arlington Heights v. Metropolitan Housing Dev. Corp.,
429 U.S. 252 (1977) 16

Bishop v. District of Columbia,
411 A.2d 997 (1980) 11

Capitol Hill Restoration Soc'y, Inc. v. Moore,
410 A.2d 184 (D.C. 1979) 11

Chevron U.S.A. Inc. v. Echazabal,
536 U.S. 73 (2002) 17

City of Cuyahoga Falls v. Buckeye Community Hope Found.,
538 U.S. 188 (203) 16

Cleburne v. Cleburne Living Ctr., Inc.,
473 U.S. 432 (1985) 16

Dawson v. Tobin
24 N.W.2d 737, 749 (N.D. 1946) 20

Deaver v. United States
483 U.S. 1301 (1987) 9

Dist. of Columbia v. Greater Washington Cent. Labor Council,
442 A.2d 110 (D.C. 1982) 10

Dist. of Columbia v. Heller,
___ U.S. ___, 128 S. Ct. 2783 (2008) 11

Dist. of Columbia v. Washington Home Ownership Council, Inc.,
415 A.2d 1349 (D.C. 1980) 8

Eastlake v. Forest City Enterprises, Inc.,
426 U.S. 668 (1976) 13, 15, 19, 23

Herman & MacLean v. Huddleston,
459 U.S. 375 (1983) 19

Hunter v. Erickson,
393 U.S. 385 (1969) 16

In re Estate of Thompson
692 P.2d 807 (1984) 21

I.N.S. Legalization Assistance Project of Los Angeles County Federation of Labor, 510 U.S. 1301 (1993) 9

Jackson v. District of Columbia Bd. of Elections & Ethics,
Civ. A. No. 09-8613, slip op. (D.C. Super. Jan. 14, 2010) 2

James v. Valtierra,
402 U.S. 137 (1971) 16, 19, 22, 23

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,
507 U.S. 163 (1993) 18

Morris v. Town of Newington
411 A.2d 939, 945 (Conn. Super. 1979) 21

Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005) 10

N. Pipeline Constr. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982) 11

Oklahoma Tax Comm'n v. Smith
610 P.2d 794, 798 (Okl. 1980) 21

Palmore v. U.S.,
411 U.S. 389 (1973) 11

Pernell v. Southall Realty
416 U.S. 363 (1974) 9

Polhill v. Buckley
923 P.2d 119, 120 n.1 (Colo. 1996) 21

Postema v. Snohomish County
869 P.2d 1107, 1109-10 (Wash Ct. App. 1994) 21

Price v. Dist. of Columbia Bd. of Elections and Ethics,
645 A.2d 594 (D.C. 1994) 15

San Diegans for the Mt. Soledad National War Memorial
548 U.S. 1301 (2006) 9

San Francisco Forty-Niners v. Nishioka
75 Cal. App. 4th 637, 644 n.5 (Cal. Ct. App. 1999) 20

Save Our Streets v. Mitchell
743 A.2d 748, 754 n.6 (Md. 2000) 20

State ex rel. Wefald v. Meier
347 N.W.2d 562, 566 (N.D. 1984) 21

Strauss v. Horton,
207 P.3d 48 (Cal. 2009) 22

Tennessee Valley Auth. v. Hill,
437 U.S. 153 (1978) 18

Thomas v. Barry
729 F.2d 1469 (D.C. Cir. 1984) 9

U.S. v. Wells Fargo Bank,
485 U.S. 351 (1988) 19

Whalen v. U.S.
445 U.S. 684 (1980) 8

Winget v. Holm
244 N.W. 331, 334 (Minn. 1932) 20

Yelle v. Kramer
520 P.2d 927, 934 (Wash. 1974) 20

STATUTES AND RULES

28 U.S.C. § 1257 7

28 U.S.C. § 1651 7

28 U.S.C. § 2101 7

D.C. Code.§ 1-201.01 ..... 5, 7, 12

D.C. Code § 1-203.02 12

D.C. Code § 1-203.03 ..... 8, 10, 12, 13, 15, 18

D.C. Code § 1-204.04 12

D.C. Code § 1-204.46 12

D.C. Code § 1-204.101 ..... 2, 3, 13, 14, 17, 18, 20

D.C. Code § 1-204.102 ..... 1, 5, 22

D.C. Code § 1-204.104 21

D.C. Code § 1-204.107 13

D.C. Code § 1-204.115 13

D.C. Code § 1-206.01 12

D.C. Code § 1-206.02 ..... 5, 12

D.C. Code § 1-207.61 18

D.C. Code § 1-1001.16 ..... 1, 4, 5, 6, 14, 18

D.C. Code § 2-1401.01 4

D.C. Code § 46-401 3

D.C. Code § 46-403 5

D.C. Mun. Regs., tit. 3, § 1000 6

Religious Freedom and Civil Marriage Equality Amendment Act of 2009, Act No. 18-0248, § 2(b) (Dec. 15, 2009), *available at* http://www.dccouncil.washington.dc.us/images/00001/20091218103236.pdf 5

S. Ct. R. 10(b) 10

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 17 11

OTHER AUTHORITIES

H.R. Rep. No. 482 (1973) 12

Julius Hobson, Council of the District of Columbia, Memorandum on the Initiative and Referendum Act, at 1, 3 (Jan. 3, 1977) 20

Application of Petitioners for an Immediate Stay of the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 Pending Certiorari

To the Honorable John G. Roberts, Jr., Chief Justice of the United States Supreme Court and Circuit Justice for the District of Columbia Circuit:

Petitioners respectfully request an immediate stay of the effective date of the Act pending the filing of and final action by this Court on a forthcoming petition for a writ of certiorari seeking review of the judgment of the District of Columbia Court of Appeals in this case preemptively barring the citizens from pursuing a referendum on the Act. The D.C. Council violated the congressionally authorized process for amending the D.C. Charter and, as a result, the citizens of the District are being denied the right to refer the Act to the people. Congress established the D.C. Charter and delineated the specific steps that must be followed to amend it. The D.C. Council's failure to follow this process directly contravenes an act of Congress.

Petitioners are pursuing a referendum on the Act to allow the citizens to vote on whether the District should issue marriage licenses to same-sex couples. Once the Act goes into effect on the projected date of Wednesday, March 3, 2010,[1] Petitioners will be permanently deprived of their ability to pursue a referendum on the Act, D.C. Code § 1-204.102(b)(2); D.C. Code § 1-1001.16(j)(2), thereby mooting important issues of federal law. Therefore, Petitioners request an immediate stay

[1] This is the effective date projected by the District of Columbia, but Petitioners do not concede to its validity.

of the effective date of the Act pending the filing and final disposition of a writ of certiorari.

The petition for certiorari will seek plenary review of the District of Columbia Court of Appeals' judgment in *Jackson v. District of Columbia Board of Elections and Ethics*, No. 10-CV-177 (D.C. Feb. 26, 2010), which summarily affirmed the order and opinion of the District of Columbia Superior Court denying Petitioners a preliminary injunction and an injunction pending appeal. Copies of the Court of Appeals' judgment, together with the Superior Court's order of February 22, 2010 and opinion of February 26, 2010[2] are attached hereto as Exhibits A, B, and C respectively.

Petitioners have exhausted all possibilities of securing a stay of the Act from the District of Columbia Court of Appeals and the District of Columbia Superior Court. Therefore, Petitioners properly seek an immediate stay of the Act from this Court.

Factual and Procedural History of this Case

This case involves Petitioners' efforts to exercise the right to a referendum on the District of Columbia's recent act to redefine marriage. Specifically, Petitioners seek to refer the Act to the people of the District for the purpose of preserving the definition of marriage in the District as between a man and a woman.

In the District of Columbia, the rights of initiative and referendum are guaranteed by the D.C. Charter. *See* D.C. Code § 1-204.101. The referendum power

[2] The fax stamp on the D.C. Court of Appeals' Judgment is 12:07 p.m. on February 26, 2010. The Superior Court's Memorandum Opinion dated February 26, 2010 was released at 2:17 p.m. and, thus, not reviewed or considered by the D.C. Court of Appeals.

permits Petitioners to "suspend acts of the Council . . . until such acts have been presented to the . . . [voters] . . . for their approval or rejection." D.C. Code § 1-204.101(b). And the initiative power allows Petitioners to initiate and submit legislation to the voters on the same basis as the District of Columbia Council. D.C. Code § 1-204.101(a). As established in the D.C. Charter, the citizens of the District may initiate legislation on *any matter* "except laws appropriating funds," and refer for a vote *any legislation* enacted by the D.C. Council "except emergency acts, acts levying taxes, or acts appropriating funds for the general operation budget." D.C. Code § 1-204.101(a)-(b). No other substantive restrictions on these rights of direct democracy exist in the D.C. Charter.

It is Petitioners' referendum on the Act that is directly at issue in this application. However, an explanation of Petitioners' initiative effort is necessary for this Court to understand the full context in which this application arises.

A. The Marriage Initiative of 2009

The events leading to this application began on September 1, 2009, when Petitioners filed the Marriage Initiative of 2009 ("the Initiative") with the District of Columbia Board of Elections and Ethics. The proposed initiative, if approved by the voters of the District of Columbia, would add a simple provision to the District's marriage code, Title 46, Subtitle I, Chapter 4 of the District of Columbia Official Code, D.C. Code § 46-401 *et seq.*, providing that: "Only marriage between a man and a woman is valid or recognized in the District of Columbia." The Initiative was

clearly not a "law[] appropriating funds" and, thus, was a "proper subject" for initiative under the D.C. Charter.

On October 26, 2009, the Board held a public hearing on the Initiative to determine whether it presented a "proper subject" for the initiative process. On November 17, 2009, the Board opined that the Initiative did not present a "proper subject" for the initiative process, because it authorized discrimination prohibited by the District of Columbia Human Rights Act of 1977, D.C. Code § 2-1401.01 *et seq.* (the "HRA"). Prohibitions on initiatives and referendums regarding the HRA do not exist in the D.C. Charter. The Board marked the Initiative as "received but not accepted," and now holds the initiative pending the outcome of the judicial review process. D.C. Code § 1-1001.16(b)(2).

On November 18, 2009, Petitioners filed a petition for review and for a writ in the nature of mandamus in the District of Columbia Superior Court.[3] Following intervention by the District of Columbia, the Superior Court held a hearing on January 6, 2010, and issued its Order Granting District of Columbia's Motion for Summary Judgment and Denying Petitioners' Motion for Summary Judgment on January 14, 2010. On January 15, 2010, Petitioners timely filed their notice of appeal to the District of Columbia Court of Appeals. Petitioners filed their opening brief on February 12, 2010, and the case has been placed on the Court's May 2010 argument calendar.

[3] This is the statutorily designated review process following the denial of an initiative or referendum petition by the D.C. Board of Elections and Ethics. D.C. Code § 1-1001.16(b)(3).

B. The Referendum on the Religious Freedom and Civil Marriage Equality Amendment Act of 2009

On December 15, 2009, the Council passed the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 ("the Act") which, in pertinent part, authorizes the issuance of marriage licenses within the District of Columbia to same-sex couples.[4] *See* Religious Freedom and Civil Marriage Equality Amendment Act of 2009, Act No. 18-0248, § 2(b) (Dec. 15, 2009), *available at* http://www.dccouncil.washington.dc.us/images/00001/20091218103236.pdf. The Council transmitted the Bill to Mayor Adrian M. Fenty on December 17, 2009, and Mayor Fenty signed the Bill on December 18, 2009. D.C. Code § 1-204.04(e).

As required by Congress under the District of Columbia Self-Government and Governmental Reorganization Act of 1973, D.C. Code § 1-201.01 *et seq.* (popularly known as the "Home Rule Act"), the Act was transmitted to the United States Congress on January 5, 2010 for a thirty (30) legislative day review period. D.C. Code § 1-206.02(c)(1). The Act is projected by the District of Columbia to go into effect at the close of the congressional review period on March 3, 2010, [5] and, at such time, the Act will no longer be subject to a referendum by the citizens of the District. D.C. Code § 1-204.102(b)(2); D.C. Code § 1-1001.16(j)(2).

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[4] *Inter alia*, the Act provides that "[m]arriage is the legally recognized union of 2 persons. Any person may enter into a marriage in the District of Columbia with another person, regardless of gender, unless the marriage is expressly prohibited by section 1283a or section 1285." Section 1283a is codified at D.C. Code § 46-401 and prohibits marriages within a certain a degrees of consanguinity. Section 1285 is codified at D.C. Code § 46-403 and voids marriages based on mental incapacity, force, fraud, or being under the age of 16.

[5] While the March 2, 2010 effective date is projected by the District of Columbia, Petitioners do not concede to its validity.

On January 6, 2010, the earliest date possible after transmission to Congress, Petitioners filed their referendum on the Act with the District of Columbia Board of Elections and Ethics. D.C. Code § 1-1001.16(a)(1); D.C. Mun. Regs., tit. 3, § 1000. The Board held a public hearing on January 27, 2010 to determine whether the referendum presented a "proper subject" for the referendum process. D.C. Code § 1-1001.16(b)(1). In a Memorandum Opinion and Order issued on February 4, 2010, the Board rejected the Petitioners' referendum on the same basis that it rejected the Initiative—funding that it would authorize discrimination prohibited under the HRA. This was the Board's sole reason for rejecting the referendum. The Board marked the referendum as "received but not accepted," and continues to hold the referendum pending the outcome of the current judicial review process. D.C. Code § 1-1001.16(b)(2).

On February 5, 2010, Petitioners sought judicial review from the Superior Court as well as a preliminary injunction seeking to stay the effective date of the Act to preserve Petitioners' ability to exercise their right of referendum while the review process unfolded. That same day, Petitioners also requested an immediate hearing on the motion for preliminary injunction. Petitioners made additional requests for a hearing on February 8, 11, 12, and 15, 2010. On February 16, 2010, the Superior Court granted intervention to the Attorney General of the District of Columbia. Petitioners were eventually given a hearing on February 19, 2010, *two weeks* following the filing of the Petitioners' lawsuit and motion for preliminary injunction. At the hearing on February 19, 2010, the Superior Court tentatively

denied Petitioners' motion for preliminary injunction and their *ore tenus* motion for an injunction pending appeal. The Superior Court entered a final, formal order denying Petitioners' motions for preliminary injunction and injunction pending appeal on February 22, 2010. On February 26, 2010, the Superior Court issued its memorandum opinion explaining the reasons for its February 22, 2010 order.

The same day the Superior Court entered its written order denying the Petitioners' motion for preliminary injunction, February 22, 2010, Petitioners filed an emergency appeal with the District of Columbia Court of Appeals and requested an injunction pending appeal. Thereafter, the Attorney General for the District of Columbia filed a motion seeking summary affirmance of the Superior Court's order. On February 26, 2010, the Court of Appeals denied Petitioners' request for an injunction pending appeal and summarily affirmed the Superior Court's decision denying Petitioners' motion for preliminary injunction. The Court of Appeals' judgment states, without further explanation, that "appellants failed to meet the test for the issuance of a preliminary injunction."

Jurisdiction

This application is made pursuant to Supreme Court Rules 22 and 23. This Court has jurisdiction under 28 U.S.C. § 1257 and any other applicable provisions of law. The authority of this Court to issue stays and injunctions in aid of its jurisdiction exists under 28 U.S.C. § 1651(a) and 28 U.S.C. § 2101(f).

This case raises an issue of federal law—whether the D.C. Council unlawfully amended Home Rule Act, D.C. Code § 1-201.01 *et seq.* by creating additional limits

on the peoples' right to refer legislation to the voters of the District. The Home Rule Act was enacted by the United States Congress and signed by President Nixon in 1973. Within the Home Rule Act was established the D.C. Charter—the "constitutional analog" of the District of Columbia. *District of Columbia v. Washington Home Ownership Council, Inc.*, 415 A.2d 1349, 1367 (D.C. 1980) (Gallagher, J., Kern, J., Nebeker, J., and Harris, J., concurring). The Home Rule Act also explicitly outlined the manner in which the D.C. Charter could be amended. Congress explicitly provided that "[t]he charter . . . may be amended by an act passed by the Council and ratified by a majority of the registered qualified electors of the District voting in the referendum held for such ratification." D.C. Code § 1-203.03(a).

Without following this process, the D.C. Council subsequently enacted legislation designed which effectively amended the Charter by imposing an additional *substantive* limitation on the citizens' right of initiative and referendum—specifying that a referendum may not authorize discrimination prohibited by the District of Columbia Human Rights Act of 1977. The Board of Elections relied on this unlawful limitation in rejecting both the Petitioners' Initiative and referendum on the Act in question. Because this case addresses issues of federal law and the D.C. Council's subversion of a Congressional mandate, this Court has jurisdiction under Article III of the United States Constitution. *See Whalen v. United States*, 445 U.S. 684, 687-88 (1980) ("Acts of Congress affecting only the District, like other federal laws, certainly come within this Court's Art. III

jurisdiction, and thus we are not prevented from reviewing the decisions of the District of Columbia Court of Appeal interpreting those Acts . . . ."); *Pernell v. Southall Realty*, 416 U.S. 363, 368 (1974) (same). *Cf. Thomas v. Barry*, 729 F.2d 1469, 1471 (D.C. Cir. 1984) (holding that claim "brought under the Home Rule Act, is within [the] court's federal question jurisdiction").

Standards for Granting a Stay

"The standards for granting a stay pending disposition of a petition for certiorari are well settled. A circuit justice is required to determine whether four justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this court." *Deaver v. United States*, 483 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers) (quotation marks omitted); *see also San Diegans for the Mt. Soledad National War Memorial*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) ("a circuit justice must 'try to predict whether four justices would vote to grant certiorari should the court of appeals affirm the district court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.'") (quoting *I.N.S. Legalization Assistance Project of Los Angeles County Federation of Labor*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers).

In deciding whether to grant certiorari, the court considers not only whether the decision of the lower court conflicts with the decision of this Court or a coordinate court, but also whether the lower court "has decided an important question of federal law that has not been, but should be, settled by this Court." S.

Ct. R. 10(b); *see National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (granting certiorari "to settle the important questions of federal law" regarding scope of the Communications Act of 1934).

Application of the Stay Standards to this Case

I. The "Reasonable Probability" of Granting Certiorari.

This case presents a compelling need for a stay because it raises an important and novel question of federal law that should be settled by this Court—whether the D.C. Council can amend the D.C. Charter without following the amendment procedures legislated by the United States Congress. *See* D.C. Code § 1-203.03.

This Court has often noted the unique character of the District of Columbia and the limited authority of the D.C. Council. "[I]t is clear that the ultimate legislature the Constitution envisions for the District is not a city council, but rather Congress itself. The District Clause expressly grants Congress the power to 'exercise exclusive Legislation in all Cases whatsoever' over the district that would become the seat of government." *Adams v. Clinton*, 90 F. Supp. 2d 35, 48 (D.D.C. 2000), *aff'd*, 531 U.S. 941 (2000) (quoting U.S. Const. art. I, § 8, cl. 17). "Congress did not pass the 'home rule' statute creating that entity [the Council] until 1973," and "such a body is not constitutionally required." *Id.* at 47.

Congress vested only "certain specific legislative powers" in the Council. *Dist. of Columbia v. Greater Washington Cent. Labor Council*, 442 A.2d 110, 113 (D.C. 1982), *cert. denied*, 459 U.S. 818 (1982). When the Council seeks to exercise

these powers in a manner inconsistent with its limited legislative authority, its actions are invalid. *See Dist. of Columbia v. Heller*, __ U.S. __, 128 S. Ct. 2783, 2821 (2008) (holding that Council's passage of "ban on handgun possession in the home violates the Second Amendment"); *see also Bishop v. District of Columbia*, 411 A.2d 997, 999 (D.C. 1980) (en banc) (holding that imposition of commuter tax in violation of Home Rule Act was "invalid"); *Capitol Hill Restoration Soc'y v. Moore*, 410 A.2d 184, 188 (D.C. 1979) (nullifying, as contrary to Home Rule Act, Council's effort to confer jurisdiction for direct review of determinations under the Historic Sites Subdivision Act).

A. The Limited Nature of the Council's Legislative Authority.

The District of Columbia operates under the absolute authority of the United States Congress. The United States Constitution vests in Congress the power to legislate for the District "in all cases whatsoever." U.S. Const. art. I, § 8, cl. 17. Pursuant to this authority, Congress exercises for the District "all police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Palmore v. United States*, 411 U.S. 389, 397 (1973); *see also N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982) ("Congress' power over the District of Columbia encompasses the full authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative."). For most of the first 171 years following the District's incorporation in 1802, Congress exercised "exclusive" authority over the District

through direct legislation and appointment of local governors, with virtually no input from residents.

However, in 1973, in response to calls for local self-government, Congress enacted the Home Rule Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code.§ 1-201.01 *et seq.*) The Act's central aim was to provide the District "a system of municipal government similar to that provided in all other cities throughout the United States." H.R. Rep. No. 482, at 2 (1973). To that end, the Act authorized the District to elect a mayor and a city council with limited powers of legislation and finance.

The Home Rule Act delegates to the Council "legislative power" over "all rightful subjects of legislation." D.C. Code §§ 1-203.02, 1-204.04. The Act then lists certain matters that are not rightful subjects. Important to this matter is that the D.C. Council may not enact legislation that seeks to amend or repeal an act of Congress (*e.g.*, the Home Rule Act and amendments thereto). *See id.* at § 1-206.02(a)(3).[6] Thus, the D.C. Council cannot amend the Home Rule Act (D.C. Charter) without such an amendment being ratified by a majority of registered voters by referendum and the approval of the United States Congress. *Id.* at § 1-

[6] Neither may the D.C. Council impose a commuter tax on non-residents' income, *id.* at § 1-206.02(a)(5); regulate federal courts, the District's local courts, or the Commission on Mental Health, *id.* at § 1-206.02(a)(4), (a)(7), and (a)(8); permit the construction of buildings taller than then-existing height restrictions, *id.* at § 1-206.02(a)(6), nor pass legislation that is inconsistent with the United States Constitution, *id.* at § 1-203.02. When the D.C. Council legislates, its enactments become law only if Congress declines to pass a joint resolution of disapproval within thirty (30) legislative days (or sixty (60) days in the case of criminal laws). D.C. Code § 1-206.02(c)(1)-(c)(2). Moreover, Congress expressly reserves the right to enact legislation concerning the District on any subject, and to repeal D.C. Council enactments at any time. *Id.* at § 1-206.01. Finally, the Home Rule Act prohibits District officers and employees from expending any funds unless authorized to do so by Congress. *Id.* at § 1-204.46.

203.03. Any attempt by the Council to amend the Home Rule Act by some other process is invalid.

To date, the Home Rule Act has only been amended once. In 1978, following the proper process authorized by Congress, the D.C. Council and voters of the District amended the Home Rule Act to reserve to themselves the rights of referendum, initiative, and recall. In accordance with the amendment procedures in the Home Rule Act, *id.* at § 1-203.03, the Initiative, Referendum, and Recall Charter Amendments Act, *id.* at §§ 1-204.101 to 1-204.115 (the "Charter Amendments Act"), was passed by the D.C. Council, ratified by a majority of the voters, and approved by the United States Congress.[7]

B. The Council's Improper Amendment to the Home Rule Act.

The Charter Amendments Act directed the Council to pass enabling legislation as "necessary to carry out [its] purpose"—that purpose being to provide the citizens of the District the rights of referendum, initiative, and recall. D.C. Code § 1-204.107. The purpose of the right of referendum, in particular, was clearly delineated within the D.C. Charter itself—to give the registered voters of the District the final say on all items of legislation enacted by the D.C. Council "except emergency acts, acts levying taxes, or acts appropriating funds for the general

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[7] The Charter Amendments Act gave voters a "basic instrument of democratic government"—the referendum. *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 (1976). The power of referendum allows the voters to "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." D.C. Code § 1-204.101(b). The Charter Amendments Act, thus, authorizes the citizens of the District to refer any act of the Council to the voters except for three express limitations—emergency acts, acts levying taxes, and acts appropriating funds for the general operation budget.

operation budget." D.C. Code § 1-204.101(b). In response, the Council passed the Initiative, Referendum, and Recall Procedures Act, D.C. Code § 1-1001.16 (the "Initiative Procedures Act" or the "IPA"), which went into effect on June 7, 1979. The IPA, being a mere act of the Council, could not amend the D.C. Charter, but was designed only to "carry out the purpose" of the right of initiative and referendum.

In large part, the IPA is limited to implementing processes and procedures for the citizenry to exercise their rights of direct democracy. However, through the IPA, the D.C. Council also exceed its authority by altering the enumerated topics upon which the registered voters of the District could exercise their right of initiative and referendum. The IPA added a prohibition on petitions said to "authorize[], or . . . have the effect of authorizing, discrimination prohibited under" the HRA. D.C. Code § 1-1001.16(b)(1)(C). This is commonly known as the "HRA restriction." Thus, although the D.C. Charter had not been amended, the D.C. Council has effectively added to the limited restrictions on referendums beyond those constitution "emergency acts, acts levying taxes, or acts appropriating funds for the general operations budget."

When enacting the HRA restriction, the D.C. Council defied Congress' instructions on how the D.C. Charter can be amended. The imposition of the HRA restriction improperly limits the citizens' right of referendum without following the proper amendment procedures duly legislated by the United States Congress in the Home Rule Act (which created the D.C. Charter). *See Price v. Dist. of Columbia Bd.*

of Elections & Ethics, 645 A.2d 594, 599 (D.C. 1994) ("Nor could the Council amend the Charter Amendments by enacting the IPA since, as the Self-Government Act clearly provides, the Charter may be amended only as provided in [D.C. Code § 1-203.03]").

As an improper attempt to alter the District's "constitutional analog," the HRA restriction is invalid. The HRA restriction defies Congress' authority not only by coming into existence outside the requisite process, but also by expressly conflicting with what Congress provided in the Home Rule Act. Congress mandated in the Home Rule Act that "[t]o the extent that any provisions of this Act are inconsistent with the provisions of any other laws, the provisions of this Act shall prevail and shall be deemed to supersede the provisions of such laws." D.C. Code § 1-207.61. The Council's attempt to exclude a fourth category of laws from the citizens' right of referendum—laws deemed exclusively by the D.C. Council, as provided in the HRA, to be discriminatory—is inconsistent with the right of referendum as reserved in the D.C. Charter. Because the HRA restriction is expressly inconsistent with the terms of the D.C. Charter, it is "superseded" by what Congress established in the D.C. Charter and is, therefore, rendered invalid and it cannot be used as a basis for denying Petitioners the ability to pursue a referendum on the Act.

II. The "Fair Prospect" that the Decision Below Will Be Found Erroneous.

This Court has consistently trumpeted the right of referendum as a "basic instrument of democratic government," *Eastlake*, 426 U.S. at 679, and observed that

"[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice," *James v. Valtierra*, 402 U.S. 137, 141 (1971). For this reason, this Court in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003), unanimously rejected the notion that the referendum process can be preempted by charges that a proposed referendum measure is discriminatory. *Id.* at 196 (rejecting equal protection challenge to referendum because it was "not . . . an enacted referendum"). Instead, the Court held that there is constitutional value in letting the democratic process play out. *Id.* ("In fact, by adhering to charter procedures, city officials enabled public debate on the referendum to take place, thus advancing significant First Amendment interests.").[8] There is every reason to believe that this Court will similarly reject the D.C. Council's improper amendment to the D.C. Charter to preempt the referendum process.

Since November 18, 2009, when the Petitioners' lawsuit was filed regarding the Marriage Initiative of 2009, the argument herein has been made before the Superior Court—Judge Macaluso (January 6, 2010), D.C. Board of Elections and Ethics (January 27, 2010), Superior Court—Judge Holeman (February 19, 2010), and the D.C. Court of Appeals (February 22, 2010). In three of these encounters, the tribunals involved failed to substantively opine this argument.

Only the Superior Court (Judge Macaluso) in the ongoing litigation regarding the Initiative sought to justify the D.C. Council's thwarting of congressional

[8] If a referendum is ultimately enacted by the people, then it may be challenged as discriminatory. *See, e.g., Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268 (1977); *Hunter v. Erickson*, 393 U.S. 385, 392 (1969).

authority regarding amendments to the D.C. Charter. A copy of Judge Macaluso's opinion is attached hereto as Exhibit D. The Superior Court analogized the Charter language for the D.C. Council to "adopt such acts necessary to carry out the purpose of this subchapter" to congressional grants of authority to administrative bodies to promulgate certain regulations. However, the Superior Court's assumption that the Charter's enabling clause is analogous to a provision of the Americans with Disabilities Act ("ADA") regarding affirmative defenses is mistaken.

In the pending litigation regarding the Initiative, the Superior Court relied upon *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002) to reject the Petitioners' claim that the existence of the HRA restriction is an improper amendment of the D.C. Charter. In *Chevron*, this Court held that the list of affirmative defenses in the ADA was illustrative and not exclusive because the language of the Act specifically said that defenses "may include." *Chevron*, 536 U.S. at 80 (emphasis added). This Court explained that "the expansive phrasing of 'may include' points directly away from [any] sort of exclusive specification [] claims." *Id.*

In contrast, the list of restrictions regarding the right of referendum include only "emergency acts, acts levying taxes, or acts appropriating funds for the general operation budget." D.C. Code § 1-204.101(b). There is no language such as "may include," "for instance," or "such as." Rather, the language of the D.C. Charter is plain and unequivocal, identifying the only substantive limitations imposed on the right of the people to refer legislation for a vote. Therefore, the circumstances presented in *Chevron* are vastly different from the case *sub judice*, and nothing in

the D.C. Charter grants the D.C. Council the authority to impose additional substantive limitation on the people's initiative and referendum power.

The United States Congress has legislated a specific procedure for amending the D.C. Charter—"[t]he charter . . . may be amended by an act passed by the Council and ratified by a majority of the registered qualified electors of the District voting in the referendum held for such ratification." *Id.* at § 1-203.03. This procedure was not followed in passing the HRA restriction. The restriction was passed by the D.C. Council, but never ratified by the voters of the District of Columbia. *Id.* at § 1-1001.16. It cannot function as an effective limitation on the referendum right in the D.C. Charter.

The United States Congress provided that laws of the D.C. Council that are "inconsistent with" the D.C. Charter are "superseded" and invalid. *Id.* at § 1-207.61. Under the well-established maxim *expressio unius est exclusio alterius*, the fact that the D.C. Charter expressly includes only three exceptions to the right of referendum—"emergency acts, acts levying taxes, or acts appropriating funds for the general operation budget," *id.* at § 1-204.101(b)—means that no other substantive exceptions are permitted. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (applying *expressio unius est exclusio alterius* to reject argument for additional exemptions to Endangered Species Act of 1973); *see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying *expressio unius est exclusio alterius* to reject claim that Federal Rules of Civil Procedure imposed heightened pleading standard on complaints

alleging municipal liability).[9] Accordingly, the D.C. Council's attempt to exclude a fourth category of laws—those deemed to be discriminatory—is "inconsistent with" the plain language of the D.C. Charter and, therefore, invalid. The D.C. Council's clear violation of the D.C. Charter makes it reasonably likely that this Court will find the decision below erroneous.

III. The Irreparable Harm to Petitioners if a Stay is Denied.

A stay of the Act is necessary to preserve this Court's jurisdiction over a live controversy regarding Petitioners' referendum rights under the D.C. Charter. Without a stay of the effective date of the Act, the people of the District will be permanently deprived of that right.

This Court has observed that "[t]he referendum . . . is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.'" *Eastlake*, 426 U.S. at 673 (1976) (quoting *James*, 402 U.S. at 141). The D.C. Council itself has echoed this same sentiment—the right of referendum "allow[s] the electorate to voice directly its sentiments and make that sentiment public policy." Julius Hobson, Council of the

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[9] This Court has generally only refused to apply the doctrine of *expressio unius est exclusion alterius* where the results would be absurd. *See, e.g., U.S. v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988) (where a strict application of the doctrine would result in federal housing obligations being exempted from virtually all taxes, instead of only the "normal tax"); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983) (where the where the remedial purposes of the Securities Acts Amendments of 1975 would be undermined by application of the doctrine). Here, it cannot be said that the purpose of the D.C. Charter provisions giving the District residents the final say on virtually every piece of legislation enacted by the D.C. Council is undermined by the application of the doctrine of *expressio unius est exclusion alterius*. To the contrary, the application of the doctrine undergirds and fulfills the broad power reserved by the people unto themselves.

District of Columbia, Memorandum on the Initiative and Referendum Act, at 1, 3 (Jan. 3, 1977).

The only way to effectuate the purpose of the right of referendum in this case is to stay the projected March 3, 2010 effective date of the Act. Such a stay will maintain the status quo of the District's definition of marriage until the people of D.C. have had ample opportunity to pursue the referendum process. Without a stay, the Act will go into effect and the people will be deprived of their chance to vote on a critical question of public policy—whether D.C. should hold to its long held understanding of marriage as between a man and a woman or, instead, redefine the institution. Money damages cannot remedy such a deprivation of rights. Accordingly, unless this Court issues a stay the effective date of the Act, Petitioners, and the people of D.C. more broadly, will suffer irreparable harm.

The fact that Petitioners are simultaneously pursuing the Marriage Initiative of 2009 does not ameliorate harm caused the denial of the right of referendum. The rights of referendum and initiative are two separate and distinct rights in the D.C. Charter. *Compare* D.C. Code § 1-204.101(b) *with id.* at § 1-204.101(a). They are by no means interchangeable.[10]

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[10] *See Dawson v. Tobin*, 24 N.W.2d 737, 749 (N.D. 1946) ("The initiative and referendum are both phases of legislative processes, but they are wholly separate and independent powers."); *Winget v. Holm*, 244 N.W. 331, 334 (Minn. 1932) ("Logically the initiative and referendum are separate and independent propositions and different in purpose."); *Yelle v. Kramer*, 520 P.2d 927, 934 (Wash. 1974) ("The initiative and referendum are constitutional means by which the electorate may express legislative intent. They are completely separate powers and may be separately exercised. Each is a distinct process having its own constitutional and statutory 'rules of the road.'"); *Save Our Streets v. Mitchell*, 743 A.2d 748, 754 n.6 (Md. 2000) ("Although the processes of initiative and referendum may both require a petition to submit legislation to the electorate, they are distinct with respect to the role they assign to elected government . . . ."); *San Francisco Forty-Niners v. Nishioka*, 75 Cal. App. 4th 637, 644 n.5 (Cal. Ct. App. 1999) ("initiative and referendum are two distinct procedures");

When a law is rejected by referendum, the D.C. Council may not take action "with regard to the matter presented at referendum for the *365 days* following the date of the District of Columbia Board of Elections and Ethics' certification of the vote concerning the referendum." D.C. Code § 1-204.104 (emphasis added); *see also* D.C. Code § 1-1001.16(j)(2). However, when a law is repealed by initiative, the D.C. Council can pass legislation reversing the repeal *immediately*. D.C. Code § 1-204.104; *see also* D.C. Code § 1-1001.16(j)(2).

Moreover, the Board must hold an election on a referendum approved for the ballot within 114 days of approval, even if this necessitates calling a special election. D.C. Code § 1-1001.16(p)(1). Yet with regard to an initiative, the Board will not call a special election. D.C. Code § 1-1001.16(p)(1). Instead, the initiative measure will simply appear on the ballot at the next election *already scheduled* election "at least 90 days after the date on which the measure has been certified as qualified to appear on the ballot." D.C. Code § 1-1001.16(p)(1). In the case *sub judice*, if the citizens of the District of Columbia are denied their right of

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Polhill v. Buckley, 923 P.2d 119, 120 n.1 (Colo. 1996) ("The initiative and the referendum are two distinct processes by which the people of the State of Colorado may exercise the political power vested in them by the Colorado Constitution."); *Postema v. Snohomish County*, 869 P.2d 1107, 1109-10 (Wash Ct. App. 1994) (quoting *In re Estate of Thompson*, 692 P.2d 807 (1984)) ("[A]s the Supreme Court has recognized, the two procedures have distinct purposes: 'The initiative enables the people to propose and enact laws independently of the Legislature and the referendum enables them to approve or reject laws passed by the Legislature.'"); *State ex rel. Wefald v. Meier*, 347 N.W.2d 562, 566 (N.D. 1984) ("The reserved power, known as the referendum, is negative; it is entirely distinct and fundamentally different from that of the initiative."); *Oklahoma Tax Comm'n v. Smith*, 610 P.2d 794, 798 (Okl. 1980) (holding that referendum "which is historically linked to that of initiative but serves the related but distinct objective of allowing the people to pass upon subjects of legislation approved by the Legislature apart from the preceding provision's reservation of the power to induce legislation"); *Morris v. Town of Newington*, 411 A.2d 939, 945 (Conn. Super. 1979) ("The right of referendum under § 410 is separate and distinct from the right of initiative under § 411 exercised here.").

referendum, they may not get to vote on the issue of the definition of marriage through the initiative process until potentially as late as the fall of 2012 (or even later, depending upon any number of variables). Such a large time delay would open difficult questions concerning the validity of marriage licenses issued between the effective date of the Act and the ultimate passage of the Marriage Initiative of 2009. *Cf. Strauss v. Horton*, 207 P.3d 48, 119-22 (Cal. 2009) (considering validity of marriage licenses issued to same-sex couples before the people passed an initiative restoring the definition of marriage as between a man and a woman). The obvious differences in protections from Council action and in timing show that the rights of referendum and initiative are not fungible. Petitioners' loss of the right of referendum is significant and result in irreparable harm.

IV. Balance of the Equities.

Unless the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 is stayed immediately, later review by this Court will be likely be moot. Without an injunction staying the effective date of the Act, the people of D.C. will suffer a complete loss of their right of referendum. The Act will go into effect and no longer be subject to the referendum process. D.C. Code § 1-204.102(b)(2). But if a stay is granted, the status quo will simply be maintained until the people have had opportunity to circulate referendum petitions and submit the Act for a vote. D.C.'s marriage laws will continue to exist as they have for over a century. The referendum process "gives [the people] a voice in decisions that will affect the future development of their own community." *James*, 402 U.S. at 143. Granting an

injunction, rather than inflicting harm, ensures that the people of D.C. retain this voice.

"A referendum procedure, such as the one at issue here," according to the Supreme Court, "is a classic demonstration of 'devotion to democracy.'" *Eastlake*, 426 U.S. at 679 (quoting *James*, 402 U.S. at 141). It is "a basic instrument of democratic government." *Eastlake*, 426 U.S. at 679. The Referendum permits "the city itself legislating through its voters" to determine "what serves the public interest." *Id.* (internal citations and quotations omitted). It should go without saying that entering an injunction allowing the people of D.C. to make such a determination regarding the definition of marriage is in the public interest.

Most importantly, granting an injunction safeguards the people's right to keep a check on the D.C. Council, as well as the executive branch of D.C. Government. Here, both the Board and the D.C. Council have actively fought against allowing the people of D.C. to have any part in what is likely the biggest public policy debate of our time—same-sex "marriage."

Both the Board and the D.C. Council seek to force same-sex "marriage" upon the people of D.C. without public debate and without a vote. Granting an injunction ensures that the people have the opportunity to be heard, regardless of whether the Referendum ultimately passes. Accordingly, issuing an injunction is in the public interest.

Respectfully submitted this 1st day of March, 2010.

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Proof of Service

I, Timothy J. Tracey, a member of the bar of this Court, certify that on March 1, 2010, I served a copy of the *Application of Petitioners for Immediate Stay of the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 Pending Certiorari* on the following individuals at the addresses listed below by hand delivery, and served a courtesy copy of the same via e-mail:

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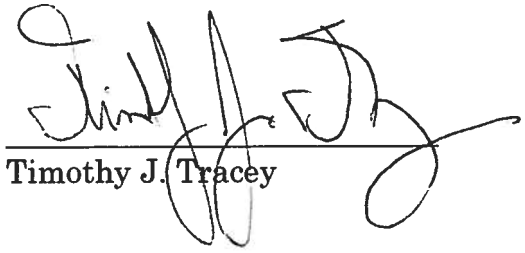
Dated: March 1, 2010.



Timothy J. Tracey

EXHIBIT A

District of Columbia Court of Appeals

No. 10-CV-177

HARRY R. JACKSON, *et al.*

Appellants,

v.

2010 CAB 740

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, *et al.*

Appellees.

BEFORE: Kramer and Thompson, Associate Judges, and Steadman, Senior Judge.

JUDGMENT

On consideration of the notice of appeal that is taken from the trial court's order denying a preliminary injunction, appellants' motion for emergency appeal, construed as motion to expedite, appellants' motion for injunctive relief pending appeal, the District of Columbia's motion for expedited consideration of its motion for summary affirmance, the District of Columbia's motion for summary affirmance and the opposition thereto, it is

ORDERED that the motions for expedited consideration of the motion for injunctive relief and summary affirmance are granted. It is

FURTHER ORDERED that appellants' motion for injunctive relief is denied since appellants have failed to meet the test for the issuance of a preliminary injunction. *See Akassy v. Wm. Penn Apartments, L.P.*, 891 A.2d 291, 309 (D.C. 2006) (citing *In re Antioch Univ.*, 418 A.2d 105, 109 (D.C. 1980)); *Zirkle v. District of Columbia*, 830 A.2d 1250, 1255–56 (D.C. 2003), and *Wieck v. Sterenbuch*, 350 A.2d 384 at 387 (D.C. 1976). (The issuance of a preliminary injunction is proper when the moving party has clearly shown: "(1) that there is a substantial likelihood he will prevail on the merits; (2) that he is in danger of suffering irreparable harm during the pendency of the action; (3) that more harm will result to him from the denial of the injunction than will result to the defendant from its grant; and, in appropriate cases, (4) that the public interest will not be disserved by the issuance of the requested order."). It is

FURTHER ORDERED that the District's motion for summary affirmance of the trial court's order denying a preliminary injunction is hereby granted since appellants failed to meet the test for the issuance of a preliminary injunction. *See* authorities cited above. It is

No. 10-CV-177

FURTHER ORDERED and ADJUDGED that the trial court's order denying a preliminary injunction is hereby affirmed.

FOR THE COURT:

GARLAND PINKSTON, JR.
Clerk of the Court

Copies to:

Honorable Brian Holeman

Clerk, Superior Court

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EXHIBIT B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

HARRY R. JACKSON, JR. *et al.*,	:	
	:	
Petitioners,	:	
	:	
v.	:	
	:	
DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,	:	**Case No. 2010 CA 740 B**
	:	**Calendar 6**
Respondent,	:	**Judge Brian F. Holeman**
	:	
and	:	
	:	
DISTRICT OF COLUMBIA,	:	
	:	
Intervenor.	:	

ORDER

Upon consideration of Petitioners' Motion for Preliminary Injunction, Respondent and Intervenor's Oppositions thereto, and a Hearing on the Preliminary Injunction held on February 19, 2010, it is this 20th day of February 2010, hereby

ORDERED, that Petitioners' Motion for Preliminary Injunction is **DENIED** on grounds of Petitioners' failure to demonstrate authority for this Court's interference in the legislative process and Petitioners' failure to satisfy the criteria required for the grant of injunctive relief; and it is further

ORDERED, that a Memorandum Opinion as to the denial of Petitioners' Motion for Preliminary Injunction shall issue forthwith; and it is further

ORDERED, that Petitioners' request for an injunction pending appeal in this matter is **DENIED**; and it is further

ORDERED, that this matter remains set for a Hearing on **February 26, 2010 at 11:00 a.m. at 515 5th Street, N.W., Building A, Courtroom 49.**

BRIAN F. HOLEMAN
JUDGE

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EXHIBIT C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

HARRY R. JACKSON, JR. *et al.*,	:	
	:	
Petitioners,	:	
	:	
v.	:	
	:	
DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,	:	**Case No. 2010 CA 740 B**
	:	**Calendar 6**
Respondent,	:	**Judge Brian F. Holeman**
	:	
and	:	
	:	
DISTRICT OF COLUMBIA,	:	
	:	
Intervenor.	:	

MEMORANDUM OPINION

This matter comes before the Court upon Petitioners' Motion for Preliminary Injunction, Intervenor the District of Columbia's Memorandum of Points and Authorities in Opposition to Petitioners' Motion for a Preliminary Injunction, Respondent's Opposition to Petitioners' Motion for Preliminary Injunction and Respondent's Memorandum of Points and Authorities in Support thereof, and Movants Reginald Stanley, Rocky Galloway, Dr. Julie Garnier, Charlene Evans, D.C. Clergy United, and the Campaign for All D.C. Families' Memorandum of Points and Authorities in Opposition to Petitioners' Motion for a Preliminary Injunction.[1] A Hearing on the Motion for Preliminary Injunction was held on February 19, 2010, and the Court issued an Order

[1] On February 18, 2010, Movants filed a Motion for Leave to File Memorandum of Points and Authorities in Opposition to Petitioners' Motion for a Preliminary Injunction or, in the Alternative, to File an *Amicus* Brief. At the Preliminary Injunction Hearing on February 19, 2010, the Court held in abeyance its ruling on Movants' pending Motion to Intervene, but granted their request for leave to submit an *amicus curiae* brief. During pendency of the ultimate issue of intervention, the Court granted in part Movants' request to oppose the Motion for Preliminary Injunction and accepted their Memorandum of Points and Authorities in Opposition to Petitioners' Motion for Preliminary Injunction as an *amicus curiae* brief on the issue. Having now heard from all parties in this matter, the Court denies Movants' Motion to Intervene, finding that Respondent and Intervenor adequately represent their interests.

on February 22, 2010 denying the Motion for Preliminary Injunction, with this Memorandum Opinion to follow.

I. Procedural and Factual Background

The instant case is the third in a series of challenges to decisions by Respondent District of Columbia Board of Elections and Ethics relating to same-sex marriage legislation.

A. *Jackson v. District of Columbia Board of Elections and Ethics (Jackson I)*

The first case involved a proposed referendum by which voters would decide whether to accept or reject the Jury and Marriage Amendment Act of 2009 ("JMA"). *Jackson v. D.C. Bd. of Elections & Ethics* (*Jackson I*), 137 Daily Wash. L. Rptr. 2473, 2474 (D.C. Sup. Ct. June 30, 2009) (Retchin, J.). The JMA, *inter alia*, gives full faith and credit to laws of other jurisdictions that recognize same-sex marriages. *Id.* at 2474-75. However, the Board declined to accept the proposed referendum because it would serve to contravene the District of Columbia Human Rights Act ("DCHRA") by stripping same-sex couples of the rights and responsibilities of marriage that they were afforded by entering into valid marriages elsewhere. *Id.* at 2475.

The petitioners in *Jackson I* then applied to the Superior Court for a writ in the nature of mandamus pursuant to D.C. Code § 1-1001.16(b)(3) to compel the Board to accept their proposed referendum. *Id.* They further moved for injunctive relief to stay the effective date of the JMA until the referendum process could be completed, conceding that without such an injunction, there would be insufficient time to complete the referendum process before the JMA became effective. *Id.* The Court ultimately determined that the proposed referendum measure would authorize or have the effect of authorizing discrimination prohibited under the DCHRA, the proposed referendum was not a proper subject for a referendum, and that as a result, the proposed referendum did not warrant issuance of a writ of mandamus. *Id.* at 2476.

In addition, the Court in *Jackson I* denied the petitioners' request for injunctive relief, finding that the petitioners failed to satisfy each of the four criteria for a preliminary injunction, particularly given the higher standard applied to an attempt to change the status quo. *Id.*; *see also Fountain v. Kelley*, 630 A.2d 684, 688-89 (D.C. 1993) (listing the four factors a movant must clearly demonstrate before a preliminary injunction may be granted, and noting a substantially higher standard when the injunction would alter rather than maintain the status quo). In its analysis, the Court also questioned its authority to encroach on the roles of the Council of the District of Columbia and United States Congress by staying the effective date of legislation. *Jackson I, supra*, 137 Daily Wash. L. Rptr. at 2477. In light of the Court's rulings in *Jackson I*, the matter was closed, and JMA went into effect on July 7, 2009. *Jackson II, supra*, 138 Daily Wash. L. Rptr. at 175.

B. *Jackson v. District of Columbia Board of Elections and Ethics (Jackson II)*

Following *Jackson I*, the same group of petitioners[2] as in the instant case presented to the Board a proposed *initiative*[3] to set aside same-sex marriage by adding a new section to the D.C. Code to provide that "[o]nly marriage between a man and a woman is valid or recognized in the

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[2] Petitioners in the instant case are the same as the petitioners in *Jackson II*. However, while Petitioners Harry R. Jackson, Jr., Walter E. Fauntroy, Dale E. Wafer, and Melvin Dupree were among the petitioners in *Jackson I*, Petitioners Robert King, James Silver, Anthony Evans, and Howard Butler were not. *See Jackson v. D.C. Bd. of Elections & Ethics* (*Jackson II*), 138 Daily Wash. L. Rptr. 173, 181 n.3 (D.C. Sup. Ct. Jan. 14, 2010) (Macaluso, J.).

[3] D.C. Code § 1-1001.02 provides a comparison of the initiative process versus the referendum process:

> (10) The term "initiative" means the process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval.
> (11) The term "referendum" means the process by which the registered qualified electors of the District of Columbia may suspend acts, or some part or parts of acts, of the Council of the District of Columbia (except emergency acts, acts levying taxes, or acts appropriating funds for the general operating budget) until such acts or part or parts of acts have been presented to the registered qualified electors of the District of Columbia for their approval or rejection.

Accord D.C. Code § 1-204.101.

District of Columbia." *Id.* (quoting the petitioners' "Marriage Initiative of 2009"). The Board refused to accept the initiative on the basis that it would authorize discrimination in contravention of the DCHRA. *Id.*

The petitioners again sought a writ in the nature of mandamus. *Id.* The Court comprehensively addressed the petitioners' arguments as to the validity of the DCHRA restriction on the initiative process, the proposed initiative's violation of the DCHRA and the application of the DCHRA to marriage, finding that the proposed initiative's violation of the DCHRA further conflicts with an implied exclusion against restrictions that violate the state's law. *Id.* at 175-80. Based on its findings and legal conclusions, the Court granted the intervenor District of Columbia's Motion to Dismiss, or in the Alternative, for Summary Judgment, and denied the petitioners' request for a writ in the nature of mandamus. *Id.* at 181. That decision is now on appeal.

C. *Jackson v. District of Columbia Board of Elections and Ethics (Instant Case)*

At issue in this case is the Board's decision to decline yet another proposed referendum from Petitioners. The subject of the instant proposed referendum is the Religious Freedom and Civil Marriage Equality Amendment Act of 2009, which, *inter alia*, clarifies that marriage between two people in the District of Columbia shall not be denied or limited on the basis of gender, ensures that no minister shall be required to solemnize or celebrate any marriage and protects religious freedom as to the provision of services, accommodations, facilities, or goods related to the celebration or solemnization of a marriage. *In re Referendum on the Religious Freedom & Civil Marriage Equality Amendment Act of 2009*, Admin. Hr'g No. 10-001, at 1-2 (D.C. Bd. of Elections & Ethics Feb. 4, 2010) [hereinafter *Board Order*] (quoting the direct

language of the Act); *see also id.* at 10 (describing how the Act is yet another step taken by the District of Columbia to modify the law to facilitate recognition of same-sex marriage).

Petitioner's proposed referendum seeks to suspend the Act until it has been submitted to the voters for their approval or rejection. *Id.* at 1. Once again, the Board concluded that the proposed referendum "does not present a proper subject for referendum because it would authorize discrimination prohibited under the Human Rights Act[.]" *Id.* at 4. The Board elaborated that it was compelled to refuse to accept the proposed referendum because it constituted an effort to thwart legislative efforts to eradicate unlawful discrimination. *Id.* at 8, 11. The Board explicitly recognized the Council's efforts to "eliminate the discriminatory exclusion of same-sex couples from the institution of marriage on the basis of sex and sexual orientation[,]" concluded that the proposed referendum seeks to frustrate those efforts and "would, if successful, have the effect of authorizing discrimination in contravention of the HRA." *Id.* at 17-18.

Consequently, the Board ordered that the proposed referendum was "received but not accepted" pursuant to D.C. Code § 1-1001.16(b)(2). *Id.* at 18. Petitioners then brought this action seeking review of the agency decision and a writ in the nature of mandamus, pursuant to § 1-1001.16(b)(3). Petitioners also seek an injunction staying the effective date of the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 until the issue can be presented to the voters as a referendum measure.

II. Proposed Unauthorized Interference in the Legislative Process

The threshold issue in this case is whether the Superior Court has the authority to grant the injunctive relief that Petitioners seek. Petitioners have brought this case for review of the Board's determination that the proposed referendum violated the HRA and therefore could not

be accepted. The statutory authorization for judicial consideration of this matter provides as follows:

> If the Board refuses to accept any initiative or referendum measure submitted to it, the person or persons submitting such measure may apply, within 10 days after the Board's refusal to accept such measure, to the Superior Court of the District of Columbia for a writ in the nature of mandamus to compel the Board to accept such measure. The Superior Court of the District of Columbia shall expedite consideration of the matter. If the Superior Court of the District of Columbia determines that the issue presented by the measure is a proper subject of initiative or referendum, whichever is applicable, under the terms of title IV of the District of Columbia Home Rule Act, and that the measure is legal in form, does not authorize discrimination as prescribed in paragraph (1)(C) of this subsection, and would not negate or limit an act of the Council of the District of Columbia as prescribed in paragraph (1)(D) of this subsection, it shall issue an order requiring the Board to accept the measure. Should the Superior Court of the District of Columbia hold in favor of the proposer, it may award court costs and reasonable attorneys' fees to the proposer.

D.C. Code § 1-1001.16(b)(3).

Notably absent from the description of this Court's role in the initiative or referendum process is any reference to the Court's statutory authority to issue an injunction pending judicial consideration of the matter or its ultimate disposition.

Examination of the process for Congressional review of acts passed by the Council is also instructive:

> Except acts of the Council which are submitted to the President in accordance with Chapter 11 of Title 31, United States Code, any act which the Council determines, according to § 1-204.12(a), should take effect immediately because of emergency circumstances, and acts proposing amendments to subchapter IV of this chapter and except as provided in § 1-204.62(c) and § 1-204.72(d)(1) the Chairman of the Council shall transmit to the Speaker of the House of Representatives, and the President of the Senate, a copy of each act passed by the Council and signed by the Mayor, or vetoed by the Mayor and repassed by two-thirds of the Council present and voting, each act passed by the Council and

> allowed to become effective by the Mayor without his signature, and each initiated act and act subject to referendum which has been ratified by a majority of the registered qualified electors voting on the initiative or referendum. Except as provided in paragraph (2) of this subsection, *such act shall take effect upon the expiration of the 30-calendar-day period* (excluding Saturdays, Sundays, and holidays, and any day on which neither House is in session because of an adjournment *sine die*, a recess of more than 3 days, or an adjournment of more than 3 days) beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate, or upon the date prescribed by such act, whichever is later, *unless during such 30-day period, there has been enacted into law a joint resolution disapproving such act.*

D.C. Code § 1-206.02(c)(1) (emphasis added).

The Religious Freedom and Civil Marriage Equality Amendment Act of 2009 is currently in the stage of Congressional review and projected to become effective on March 3, 2010.[4] In the absence of a valid referendum or joint resolution by Congress, the Act is to take effect. *See also Atkinson v. D.C. Bd. of Elections & Ethics*, 597 A.2d 863, 866-67 (D.C. 1991); *Convention Ctr. Referendum Comm. V. D.C. Bd. Of Elections & Ethics (Convention Center II)*, 441 A.2d 889, 903 (D.C. 1981) (explaining Congress' retained role in the District of Columbia's legislative process). Further,

> A decent respect for the coordinate branches of government dictates that we exercise sparingly the power to strike down laws which have been duly passed by the elected representatives of the people. . . . The judiciary cannot encroach on the domain of the popularly elected branches without imperiling our most basic institutions.

Id. at 1131-32 (quoting *Hornstein v. Barry*, 560 A.2d 530, 533 (D.C. 1989); *see District of Columbia v. Sierra Club*, 670 A.2d 353, 366 (D.C. 1996) ("Whether for lack of judicial power or for prudential reasons, a court will stay its hand where, *inter alia*, it would be impossible to

[4] According to the various filings in this case, the date was originally March 2, 2010, but possibly due to the winter storms that struck the area, the Council's website now indicates that the date is March 3, 2010.

undertake independent resolution without expressing lack of the respect due coordinate branches of government.") (internal quotations omitted); *see also Bergman v. District of Columbia*, No. 08-CV-859, 2010 D.C. App. LEXIS 3, at *58 (Jan. 14, 2010) (favorably quoting the trial judge's analysis that "overlapping powers only constitute a violation of separation of powers if the intruding branch impermissibly undermines the powers of the other branch or disrupts the proper balance between the coordinate branches by preventing the allegedly intruded on branch from accomplishing its constitutionally assigned functions") (internal quotations omitted). *But cf. District of Columbia v. Wash. Home Ownership Council, Inc.*, 415 A.2d 1349, 1359 (D.C. 1980) (affirming the grant of injunction against implementation of an *emergency* act, based on the trial court's finding that the Council did not have authority to pass successive, substantially identical *emergency* acts in response to the same emergency rather than conform to the process established by statute for implementing *permanent* legislation).

The unauthorized judicial intrusion upon the legislative process as currently sought by Petitioners is a violation of the separation of powers and signifies inappropriate judicial activism. This the Court will not do. For this reason alone, Petitioners' Motion must be denied.

III. Preliminary Injunction Standard

Assuming *arguendo* that this Court were inclined to interpret its broad equitable power to authorize imposition of injunctive relief as requested by Petitioners, the Motion for Preliminary Injunction must be denied based upon Petitioners' failure to satisfy requisite criteria.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008). A proper exercise of discretion requires this Court to consider whether the moving parties have clearly demonstrated: (1) that there is a substantial likelihood that Petitioners will prevail on the merits; (2) that Petitioners are

in danger of suffering irreparable harm during the pendency of the action; (3) that more harm will result to Petitioners from the denial of the injunction than will result to the opposition from its grant; and, in appropriate cases, (4) that the public interest will not be disserved by the issuance of the requested order. *Feaster v. Vance*, 832 A.2d 1277, 1287-88 (D.C. 2003); *Fountain, supra*, 630 A.2d at 688-89.

Preliminarily, as regards Petitioners' argument that an injunction is necessary to preserve the status quo, *Fountain, supra*, 630 A.2d at 688 (observing that "[t]he usual role of a preliminary injunction is to preserve the status quo pending the outcome of litigation"), the analysis in *Jackson I* wherein the Court denied the petitioners' motion for a preliminary injunction is most useful. Significantly, the Court in that case reasoned that issuance of a preliminary injunction would not preserve the status quo, as petitioners argued, rather would be to significantly disrupt the status quo of the District of Columbia's legislative process. *Jackson I, supra*, 137 Daily Wash. L. Rptr. at 2476. The Court adopts the reasoning of *Jackson I* here.

A. Likelihood of Success on the Merits

In their (current) underlying Petition, Petitioners request a writ in the nature of mandamus to compel the Board to accept their proposed referendum on the Religious Freedom and Civil Marriage Equality Amendment Act of 2009, and further seek a declaration that their proposed referendum does not violate the DCHRA. (Pet. for Review of Agency Decision & for Writ in the Nature of Mandamus 3, 17.) In support of their Motion, on the issue of likelihood of success on the merits, Petitioners raise many arguments (pertaining here to a referendum rather than to an initiative) similar in substance to those raised previously in *Jackson II.*

In particular, Petitioners argue that the Initiative, Referendum, and Recall Procedures Act, D.C. Code § 1-1001.16 ("Initiative Procedures Act" or "IPA") impermissibly imposes a

substantive limitation on the people's right of referendum found in neither the D.C. Self-Government and Governmental Reorganization Act (D.C. Code § 1-201.1 *et seq.* ("Home Rule Act")) nor the Initiative, Referendum, and Recall Charter Amendments Act of 1978, D.C. Code §§ 1-204.101 to 1-204.115 ("Charter Amendments Act" or "CAA"), thereby improperly amending the right of referendum. (Mem. P. & A. Supp. Pet'rs' Mot. Prelim. Inj. 8-19.) They further argue that if the DCHRA restriction is valid, the DCHRA does not cover regulation of marital relationships pursuant to the Court of Appeals decision in *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995), and that *Dean* remains controlling authority. (Mem. P. & A. Supp. Pet'rs' Mot. Prelim. Inj. 20-24.)[5]

In their various Oppositions to Petitioners' Motion for Preliminary Injunction, Respondent, Intervenor, and *Amici Curiae* dispute these arguments directly and, notably, direct the Court's attention to the *Jackson I* and *Jackson II* decisions. Both decisions have rejected Petitioners' argument that *Dean* remains controlling authority. *See Jackson I, supra*, 137 Daily Wash. L. Rptr. at 2475 (describing factual distinctions, changes in marriage law in the District of

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[5] In support of their *Dean* analysis and argument that existing marriage laws do not implicate sexual orientation, Petitioners refer to the statute that tasks the Clerk of the Superior Court with acquiring the information necessary for issuance of a marriage license, D.C. Code § 46-410. It states:

> It shall be the duty of the Clerk of the Superior Court of the District of Columbia before issuing any license to solemnize a marriage to examine any applicant for said license under oath and to ascertain the names and ages of the parties desiring to marry, and if they are under age the names of their parents or guardians, whether they were previously married, whether they are related or not, and if so, in what degree, which facts shall appear on the face of the application, of which the Clerk shall provide a printed form, and any false swearing in regard to such matters shall be deemed perjury.

While Petitioners are correct that this statutory provision is silent on its face as to the issues of sex and sexual orientation, their assertion that sexual orientation is not a part of the marriage license process is less accurate. (Mem. P. & A. Supp. Pet'rs' Mot. Prelim. Inj. 29.) Review of the current form available through the Court's website, "Information for Marriage License Application" currently available at http://www.dccourts.gov/dccourts/docs/family/marriage_license.pdf, demonstrates that the form requires applicants to provide information for a groom and a bride. The gender or sex generally ascribed to each of these words suggests at minimum an expectation of only male-female (and therefore inherently non-homosexual) couple

Columbia and other jurisdictions, and strengthening of the DCHRA since the Court of Appeals rendered its decision in *Dean*); *Jackson II*, *supra*, 138 Daily Wash. L. Rptr. at 180 ("Since 1995, the Council has changed the landscape *Dean* surveyed."). Further, following an extensive analysis of the legislative histories of the IPA, CAA, and Home Rule Act, the Court in *Jackson II* expressly found that the IPA validly incorporates the DCHRA. *Jackson II*, *supra*, 138 Daily Wash. L. Rptr. at 175-78.

The legal authority presented and the analysis employed by the Court in *Jackson I* and *Jackson II*, respectively, apply as well to the underlying merits of the instant matter. Petitioners have failed to establish that this Court should not be guided by the prior cases. Petitioners' current challenges to the Board's determination that the proposed referendum would effectively authorize discrimination against same-sex couples, *i.e.*, the merits of the underlying Petition, have been soundly rejected by the Superior Court in two prior cases. As such, Petitioners have failed to demonstrate a likelihood of success on the merits, substantial or otherwise.

B. Danger of Irreparable Harm

Petitioners assert that without judicial intervention staying the effective date of the Act, the citizens of the District of Columbia will be deprived of the important right of referendum. (Mem. P. & A. Supp. Pet'rs' Mot. Prelim. Inj. 5-7.) Petitioners further argue that the loss of this right of referendum cannot be remedied by any amount of money damages. (Mem. P. & A. Supp. Pet'rs' Mot. Prelim. Inj. 5-7.) This argument has been rejected by the Court in *Jackson I* in denying a motion for preliminary injunction sought on similar grounds, and the pertinent analysis applies equally here. In *Jackson I*, the Court found a lack of irreparable harm due to Petitioners' remaining right of initiative (if valid) to repeal a law, as well as the remedy of

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applications. Although the language of the form itself is not expressly addressed by the governing statutory provision, the form's language is implicit to the marriage license *process* as it currently stands.

redress through the political process. *Jackson I, supra*, 137 Daily Wash. L. Rptr. at 2476. It is significant that the Court also found that "Petitioners' right to referendum has not been deprived. The Board did not refuse to consider Petitioners' proposed referendum, and this Court has not declined to exercise jurisdiction." *Id.*

Here, as in *Jackson I*, the Board *did* consider Petitioners' proposed referendum, yet found that it could not be accepted. Further, here, as in *Jackson I*, the Court's refusal to manufacture authority serving to entangle itself in the legislative process is not a refusal to exercise jurisdiction over the underlying Petition in this case. To the contrary, the Court has and does acknowledge its role as set forth in D.C. Code § 1-1001.16(b)(3).

Moreover, the analysis and discussion of the initiative process in *Convention Center II* is instructive. *Convention Ctr. II, supra*, 441 A.2d at 910 n.38 ("The initiative right . . . includes the right to repeal and amend existing legislation."). Referring to the legislative history for the Charter Amendments, *supra* Part III. A, the Court of Appeals noted that concerns as to the time limitations pertaining to the referendum process were addressed by the constant availability of the initiative process. *Id.*

This awareness of the time restrictions that control the referendum process, together with the express pertinent role of the Superior Court as described in D.C. Code § 1-1001.16(b)(3), strongly suggests that had the Council considered the purported vulnerability of the right to referendum as Petitioners now posit, the legislative body could have expressly provided for injunctive relief, or a comparable non-judicial stay of enactment had it determined that the right of initiative is an inadequate alternative remedy at law. *See United States v. Wash. Post Co.*, 446 F.2d 1322, 1324 (D.C. Cir. 1971) ("[E]quitable relief is inappropriate where there is an adequate

remedy at law."). No such determination by the Council is expressly stated nor, consequently, permissibly inferred. Petitioners have failed to demonstrate irreparable harm.

C. Balancing of Harms

Closely related to the issue of irreparable harm is the weighing of potential harm to Petitioners from the denial of the injunction versus the potential harm that will result to Respondent and Intervenor from its grant. Petitioners maintain that none will suffer harm from the grant of the injunction, but that the complete loss of the right of referendum would result in severe harm to Petitioners and to the citizens of the District of Columbia. (Mem. P. & A. Supp. Pet'rs' Mot. Prelim. Inj. 31.) The Court has found, above, that there is no irreparable harm to Petitioners from the denial of the requested preliminary injunction, which leaves examination of the harm to Respondent and Intervenor.

The potential harms in granting the relief include, at minimum, unauthorized disruption of the legislative process, and the significant harm of upsetting the equilibrium and boundaries of the separation of powers. *See supra* Part II; s*ee also Jackson I*, *supra*, 137 Daily Wash. L. Rptr. at 2477 (reasoning that if the Court were to stay the legislation at issue, "it would open the door for every person unhappy with a law to seek injunctive relief when unable to comply with the statutory requirements for a referendum. Such a remedy would disrupt the statutory scheme created by the legislature.").

Further, harm from a preliminary injunction in this instance would include the severe compromise of efforts to eradicate unlawful discrimination. To grant the requested relief here would be to judicially reject the Board's finding that the proposed referendum presents the opportunity for authorizing discrimination before reaching the underlying merits of this case. When faced with even the *potential* for discrimination occasioned by process, the Court is

particularly sensitive to that risk and is compelled to exercise vigilance against accommodating events or actions that may frustrate the efforts to eliminate that undesired result. This is especially so, given that the efforts of the coordinate branches of government to eradicate unlawful discrimination is a work in progress. The substantial potential for consequential discrimination against members of same-sex couples weighs overwhelmingly against granting injunctive relief here.

D. Public Interest

Briefly, the decision in *Jackson I* provides excellent guidance in the instant case. There, the Court found that it was not in the public interest to "interfere with the Congressionally mandated legislative framework" or to "determine, on a case-by-case basis, the time permitted for the referendum process particularly where, as here, the legislature already has prescribed a strict and explicit time period for all referenda." *Jackson I*, *supra*, 137 Daily Wash. L. Rptr. at 2477.

Here, the Court agrees, and further notes the public interest expressed through the impending legislation to eradicate unlawful discrimination. *Board Order*, *supra*, at 11 ("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."); *cf. Berman v. Parker*, 348 U.S. 26, 31 (1954) ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."). Finally, considerations raised in balancing of the harms, particularly the Court's adherence to the separation of powers and refraining from facilitating even potential discrimination, lead the Court to conclude that the public interest would be disserved if the Court were to issue a preliminary injunction on the facts presented here.

WHEREFORE, based on the foregoing, it is this 26th day of February 2010, hereby

ORDERED, that Petitioners' Motion for Preliminary Injunction is **DENIED**; and it is further

ORDERED, that Movants Reginald Stanley, Rocky Galloway, Dr. Julie Garnier, Charlene Evans, D.C. Clergy United, and the Campaign for All D.C. Families' Motion to Intervene, or, in the Alternative, to File an *Amicus* Brief, which was previously **GRANTED** as to filing an *amicus* brief, is **DENIED** as to intervention.

BRIAN F. HOLEMAN
JUDGE

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EXHIBIT D

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

HARRY R. JACKSON, JR., *et al.*	)	
	)	
Petitioners,	)	
	)	
v.	)	
	)	
DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,	)	**Civil Action No. 2009 CA 008613 B**
	)	**Judge Judith N. Macaluso**
Respondent,	)	**Calendar 9**
	)	
and	)	
	)	
DISTRICT OF COLUMBIA,	)	
	)	
Intervenor.	)	
	)	

ORDER GRANTING DISTRICT OF COLUMBIA'S MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONERS' MOTION FOR SUMMARY JUDGMENT

Before the court are two motions for early disposition of this matter. On November 20, 2009, Harry R. Jackson, Jr., Robert King, Walter E. Fauntroy, James Silver, Anthony Evans, Dale E. Wafer, Melvin Dupree, and Howard Butler filed "Petitioners' Motion for Summary Judgment." On December 18, Respondent District of Columbia Board of Elections and Ethics ("the Board") filed an opposition. Also on December 18, Intervenor the District of Columbia ("the District") filed "District of Columbia's Motion to Dismiss or, in the Alternative, for Summary Judgment." On January 4, 2010, Petitioners filed a combined response to the District's motion and Board's opposition.[1] Argument ensued on January 6, 2010. For the

[1] Participating as *amicus curiae* in support of Petitioners is a group comprised of The American Center for Law and Justice, United States Senators James Inhofe and Roger Wicker, and United States Representatives Robert Aderholt, Todd Akin, Michele Bachmann, Gresham Barrett, Roscoe Bartlett, Marsha Blackburn, John Boehner, John Boozman, Eric Cantor, Jason Chaffetz, John Fleming, Randy Forbes, Virginia Foxx, Scott Garrett, Phil Gingrey,

reasons discussed below, the District's motion for summary judgment is granted, and the Petitioners' is denied.

FACTUAL AND PROCEDURAL BACKGROUND

On May 5, 2009, the District of Columbia City Council ("Council") passed the "Jury and Marriage Amendment Act of 2009" ("JAMA"). This statute amended the consanguinity provisions of D.C. Code §§ 46-401 (1)-(2) (2005) to make the provisions gender neutral. The act also added § 46-405.01 to recognize same-sex marriages that are valid in the place where the marriage was solemnized.

On May 27, 2009, a petition was filed with the District of Columbia Board of Elections and Ethics ("Board") for approval of a referendum on whether the District should recognize same-sex marriages from other jurisdictions.[2] After holding a public hearing and receiving comments, the Board refused to accept the measure because it would contravene the District of Columbia Human Rights Act, D.C. Code § 2-1401.01 *et seq.* ("Human Rights Act"). The Board stated:

> [The referendum] would . . . 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

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Louie Gohmert, Jeb Hensarling, Wally Herger, Walter Jones, Jim Jordan, Steve King, Jack Kingston, John Kline, Doug Lamborn, Robert Latta, Don Manzullo, Michael McCaul, Thaddeus McCotter, Patrick McHenry, Cathy McMorris Rogers, Jeff Miller, Jerry Moran, Randy Neugebauer, Mike Pence, Joe Pitts, Mark Souder, and Todd Tiahrt in support of Petitioners.

Participating as *amicus curiae* in support of the Board and the District is a group comprised of Trevor S. Blake, II, Jeff Krehely, Amy Hinze-Pifer, Rebecca Hinze-Pifer, Thomas F. Metzger, Vincent N. Micone, III, Reginald Stanley, Rocky Galloway, DC Clergy United, and Campaign for All D.C. Families. Their filing of January 6, 2010, will be referred to as "Mem. of *Amicus* Blake *et al.*"

[2] The proposed referendum read as follows:

> The D.C. Council approved "The Jury and Marriage Amendment Act of 2009." The Act would recognize as valid a marriage legally entered into in another jurisdiction and between 2 persons of the same-sex. The "Referendum Concerning the Jury and Marriage Amendment Act of 2009)" will allow voters of the District of Columbia the opportunity to decide whether the District of Columbia will recognize as valid a marriage legally entered into in another jurisdiction between 2 persons of the same-sex. A "No" vote on the referendum will continue the current law of recognizing only marriage between persons of the opposite sex.

> make available to them here in the District, simply on the basis of their sexual orientation.

See Jackson v. District of Columbia Bd. of Elections & Ethics, 113 Daily Wash. L. Rptr. 2473 (D.C. Super. Ct. June 30, 2009) ("*Jackson I*") (Retchin, J.).

Petitioners then filed a petition in the District of Columbia Superior Court seeking a writ in the nature of mandamus to compel the Board to accept the proposed referendum. *See* D.C. Code § 1001.16 (b)(3) (2001). The court denied the petition. *Jackson I.* In support of its decision, the court concluded that *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995), which holds that the Human Rights Act is inapplicable to marriage, is no longer controlling. The court then found that the proposal, if adopted, would violate the act. In addition, the court refused to stay its order denying the application for a writ, because (among other reasons) there was no irreparable harm since the initiative process would permit Petitioners to challenge JAMA's recognition of same-sex marriages after the law became final.

JAMA became effective on July 7, 2009. On September 1, a proposed initiative to set aside same-sex marriage was presented to the Board. Entitled the "Marriage Initiative of 2009," it proposed to amend D.C. Code § 46-401 *et seq.* (2005) by adding a new section providing, "Only marriage between a man and a woman is valid or recognized in the District of Columbia." In a Memorandum Opinion and Order issued November 17, the Board refused to accept the initiative on the ground that it would authorize discrimination prohibited under the Human Rights Act. On November 18, Petitioners filed their "Petition for Review of Agency Decision and for Writ in the Nature of Mandamus" in this case.[3]

[3] Petitioners Harry R. Jackson, Jr., Walter E. Fauntroy, Dale E. Wafer, and Melvin Dupree were also Petitioners in *Jackson I.* Petitioners Robert King, James Silver, Anthony Evans, and Howard Butler were not parties in the earlier case.

STATUTORY PROVISIONS

In 1973 the United States Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act, commonly known as the Home Rule Act. Subchapter IV of the Home Rule Act is known as the "District Charter" or "Charter." It sets forth the basic organization and financial structure of the District of Columbia Government, including the means by which legislation is enacted. D.C. Code §§ 1-204.01 to 204.13 (2001). As originally passed by Congress in 1973, the Charter did not include the right of initiative. The Charter Amendments Act ("CAA") created this right in 1978. D.C. Code §§1-204.101 to 204.107 (2001). Because it amended the Charter, the CAA was enacted through a more rigorous procedure than an ordinary law. An amendment to the Charter requires an act of the Council, approval by a majority vote of the electorate, and Congressional review. D.C. Code § 1-203.03 (2001). The initiative procedure, which was created by an amendment to the Charter, can only be amended through the same procedure. *Convention Ctr. Referendum Comm. v. District of Columbia Bd. of Elections & Ethics*, 441 A.2d 897, 915 (D.C. 1981) ("*Convention Ctr.*") (en banc) (plurality opinion). A mere statute is ineffective to amend the initiative provisions of the CAA.

The right of initiative created by the CAA is defined in one sentence: "'Initiative' means the process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval." D.C. Code § 1-204.101 (a). In addition to creating this right, the CAA directed the Council "to adopt such acts as are necessary to carry out the purpose of this subpart [on initiatives, referendums, and recalls] within 180 days of the effective date." D.C. Code §1-204.107.

In accordance with this directive, the same Council that drafted the CAA (Council Period 2) drafted the Initiative, Referendum and Recall Procedures Act ("IPA") that implemented the CAA.[4] The IPA, however, was enacted in the normal way, solely by the Council. As a result, to the extent the IPA is inconsistent with the CAA, the IPA is invalid. *Convention Ctr.*, 441 A.2d at 915 (IPA valid "only insofar as it conforms to the underlying Charter Amendments"); *Price v. District of Columbia Bd. of Elections & Ethics*, 645 A.2d 594, 599 (D.C. 1994) (to the extent any IPA provision is inconsistent with the CAA, the latter controls).

The IPA authorizes the Board to refuse to accept a proposed initiative for the following reasons:

- It is "not a proper subject";
- The verified statement of contributions has not been filed;
- The petition is not in the correct form;
- "The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2" (the Human Rights Act); or
- "The measure . . . would negate or limit an act of the Council . . . pursuant to § 1-204.46" (appropriations).

D.C. Code § 1-1001.16 (b)(1). The items in quotes are subject-matter exclusions; the others relate merely to procedural requirements.

Thus, although the CAA defines an initiative as being an electoral process with only one subject-matter exclusion (appropriations), the IPA adds two other subject-matter exclusions. The first, pertaining to initiatives that are "not a proper subject," refers to acts forbidden under the Home Rule Act. *See* D.C. Code § 1-1001.16 (b)(3) (referring to a determination that "the

[4] Although drafted during Council Period 2, the IPA was not passed until Council Period 3. *See also*, n.6 in this order.

measure is a proper subject of initiative . . . under the terms of title IV of the District of Columbia Home Rule Act"). In effect, this is a constitutional limitation and did not need to be repeated in the IPA to limit the initiative right. *See Shook v. District of Columbia Fin. Responsibility & Mgmt. Assistance Auth.*, 328 U.S. App. D.C. 74, 75, 132 F.3d 775, 776 (1998) (District Charter established by Home Rule Act is "similar in certain respects to a state constitution"). The IPA's other subject-matter exclusion is the provision barring initiatives that authorize or would have the effect of authorizing discrimination prohibited under the Human Rights Act.

ANALYSIS

1. The IPA validly incorporates the Human Rights Act

A central issue in this case is whether the IPA's addition of a requirement that initiatives not violate the Human Rights Act implemented the CAA or amended it. If the IPA merely carried out the purpose of the CAA when requiring initiatives to comply with the Human Rights Act, the requirement is valid. If, on the contrary, the Human Rights Act provision was an amendment to the CAA, the provision is unenforceable.

Petitioners argue that the Human Rights Act provision amends the CAA because that act authorizes the electorate "to propose laws (except laws appropriating funds)." The expression of only one subject-matter exclusion, indicates that all other subjects are proper for initiatives. This argument has a surface appeal, but it reads too narrowly the grant of authority provided by the CAA's direction that the Council enact legislation "necessary to carry out the purpose" of the initiative process. It is instructive to examine the latitude given implementing regulations promulgated by an administrative agency in response to Congressional legislation. Although such regulations are accorded less deference than the enactments of a legislative body, the

analogy seems useful because the difference in legislative weight between a Charter amendment and an ordinary statute implementing it is suggestive of the difference between a congressional act and implementing regulations.

In *Echazabal v. Chevron U.S.A, Inc.*, 226 F.3d 1063 (9th Cir. 2000), the court was faced with a situation remarkably similar in significant respects to the instant case. The Ninth Circuit followed a line of reasoning echoed by Petitioners in this case and invalidated the implementing regulations. This led to a 9-0 reversal by the United States Supreme Court in *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 153 L. Ed. 2d 82, 122 S. Ct. 2045 (2002). Because of its significance, the case will be discussed at length (using *Echazabal* to describe the case when it was before the Ninth Circuit and *Chevron U.S.A.* to describe the Supreme Court opinion).

Echazabal involved efforts by Mario Echazabal to obtain employment at a Chevron oil refinery. He had a liver ailment and was denied employment because Chevron's doctor concluded that exposure to solvents and other chemicals at the workplace could damage his liver. He sued under the Americans with Disabilities Act ("ADA"), and the case turned on the validity of the regulations implementing the act.

Although the ADA broadly proscribes screening out from employment individuals who have disabilities, in the statute's "Defenses" section, the act provides that an employer may impose a "qualification standard" that "may include a requirement that an individual shall not pose a direct threat to the health or safety of *other individuals* in the workplace." *Echazabal*, 226 F.3d at 1066 (emphasis added). The statute directs the Equal Employment Opportunity Commission ("EEOC") to issue implementing regulations. *Id.* at 1069 n. 8. The EEOC's regulations state that the defense may exclude from employment a person who poses "a direct threat to the health or safety *of the individual* or others in the workplace." *Id.* at 1066. The

Ninth Circuit concluded that the EEOC invalidly amended, rather than merely implemented, the statute when the regulations added a defense linked to the potential employee's own health.

In reaching this conclusion, the Ninth Circuit looked first to the clear language of the statute.

> Here, that language is dispositive . . . . On its face, the provision does not include direct threats to the health or safety of the disabled individual himself. Moreover, by specifying only threats to "other individuals in the workplace," the statute makes it clear that threats to other persons -- including the disabled individual himself -- are not included within the scope of the defense. *Expressio unius est exclusio alterius.* Finally, the obvious reading of the direct threat defense as not including threats to oneself is supported by the definitional section of Title I, which states that the term "direct threat" *means* a significant risk to the health or safety *of others* that cannot be eliminated by reasonable accommodation . . . . The fact that the statute consistently defines the direct threat defense to include only threats to others eliminates any possibility that Congress committed a drafting error when it omitted from the defense threats to the disabled individual himself.

Echazabal, 266 F.3d at 1066-67 (footnotes and internal citations omitted; emphasis in original).

The court also considered the statute's legislative history and found it consistent with the clear language of the act. The court stated:

> Although we need not rely on it, the legislative history of the ADA also supports the conclusion that the direct threat provision does not include threats to oneself. The term "direct threat" is used hundreds of times throughout the ADA's legislative history -- in the final conference report, the various committee reports and hearings, and the floor debate. In nearly every instance in which the term appears, it is accompanied by a reference to the threat to "others" or to "other individuals in the

> workplace." Not once is the term accompanied by a reference to threats to the disabled person himself. In addition, both the Report of the House Judiciary in [sic] the Report of the Committee on Education and Labor explain that the direct threat provision is intended to codify the Supreme Court's holding in *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1987) -- a case that defines "the term 'direct threat' [to] mean[] a significant risk to the health or safety *of others* that cannot be eliminated by reasonable accommodation . . . . In short, the legislative history convincingly supports the unambiguous wording of the direct threat defense.

Id. at 1067-68 (brackets (except for [sic]) and emphasis in original).

The court considered the policies underlying the ADA and concluded that the regulatory provision was inconsistent with those goals. Again, quoting the court:

> Congress's decision not to include threats to one's own health or safety in the direct threat defense makes good sense in light of the principles that underlie the ADA . . . . As Senator Kennedy noted . . . the ADA was designed in part to prohibit discrimination against individuals with disabilities that takes the form of paternalism. This goal is codified in the Act itself: in the "Findings" section of the ADA, Congress concluded that "overprotective rules and policies" are one form of discrimination confronting individuals with disabilities.

Id. at 1068 (internal citations omitted).

Having concluded that the regulation was contrary to Congress's clear intention, the court declined to give deference to the EEOC's interpretation of the "direct threat" provision. "Accordingly," said the court, "we reject the EEOC's contrary interpretation." *Id.* at 1069.

The reasoning of the Ninth Circuit is consistent with Petitioners' arguments in the instant case: the CAA expresses only one exception to the initiative procedure; the statute is clear and

should be enforced by its terms; any ambiguity should be resolved by application of the doctrine, *expressio unius est exclusio alterius*; Petitioner's interpretation is consistent with the policy that the right to initiative should be broadly interpreted; deference should not be accorded the Council's interpretation of the CAA; and the implementing legislation, which added another requirement beyond the one expressed in the act, invalidly amends the statute.

In *Chevron U.S.A.*, the United States Supreme Court found the similar assertions in *Echazabal* unpersuasive. The Supreme Court acknowledged that the EEOC's regulation "carries the defense one step further, in allowing an employer to screen out a potential worker with a disability not only for risks that he would pose to others in the workplace but for risks on the job to his own health or safety as well." 536 U.S. at 78. The Court rejected, however, Mr. Echazabal's argument that this overstepped limitations imposed by the clear language of the act. The Court noted:

> The argument follows the reliance of the Ninth Circuit majority on the interpretive canon, *expressio unius exclusio alterius*, "expressing one item of [an] associated group or series excludes another left unmentioned." . . . . The rule is fine when it applies, but this case joins some others in showing when it does not.

Id. at 80 (brackets in original; internal citation omitted).

In declining to apply *expressio unius*, the Supreme Court first noted that the statutory text suggests an absence of exclusiveness. The ADA, in describing the "qualification standard" defense, states that the standard "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* at 78. The phrase "may include," said the Court, points toward "spacious defensive categories, which seem to give

an agency (or in the absence of agency action, a court) a good deal of discretion in setting the limits of permissible qualification standards." *Id.* at 80.

"Strike two," in the Court's phrase, was that the limited scope of *expressio unius* rendered it inapplicable to the case. *Id.* at 81. The mere inclusion of only one eligible category does not bring a statute within the canon. As the court explained:

> [An] essential extrastatutory ingredient of an expression-exclusion demonstration [is] the series of terms from which an omission bespeaks a negative implication. The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which are abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded. E. Crawford, Construction of Statutes 337 (1940) (*expressio unius* "properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference.". . . Strike two in this case is the failure to identify any such established series, including both threats to others and threats to self, from which Congress appears to have made a deliberate choice to omit the latter item as a signal of the affirmative defense's scope.

Id. (bracketed content added; internal citation deleted).

The Court went on to note "even a third strike" against applying *expressio unius*: "It is simply that there is no apparent stopping point to the argument that by specifying a threat to others defense Congress intended a negative implication about those whose safety could be considered." *Id.* at 83. What, the Court wondered, would an employer do under such an

interpretation if a potential employee posed a threat to the health of the general public.[5] *Id.* at 83-84.

The *Echazabal/Chevron U.S.A.* case has been discussed at length because the following parallels are compelling and instructive:

- In that case, as in the instant case, a statute creating a right named only one category. The ADA's "qualification standard" defense encompassed only threats as affecting only "other individuals." In the CAA, the initiative expressly excluded only appropriations measures.
- Both statutes include language that invites the exercise of discretion. The ADA provides that the "qualification standard" defense "may include" the named category. The CAA directs the Council to enact legislation "necessary to carry out the purpose" of the initiative provisions.
- In neither statute does the legislative history manifest consideration of a series of potentially included items that were "abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." *Chevron U.S.A.*, 536 U.S. at 81.
- Both statutes directed a named entity to develop implementing provisions: in the ADA, the EEOC; in the CAA, the Council. Both entities are due a degree of deference shared with other interpretive bodies. *Chevron U.S.A.*, 536 U.S. at 82; *Hessey v. District of Columbia Bd. of Elections & Ethics*, 601 A.2d 3, 9 (D.C. 1991) (en banc) ("*Hessey I*") ("Because the Charter Amendment is in the form of an act passed by the Council, and because the Charter Amendment on the right of initiative included authority for the Council to adopt implementing legislation, the court must address the intent of the Council," as well as the intent of Congress.).
- With respect to both statutes, if the implementing provisions were restricted to the single category included in the express statutory language, this could lead to results contrary to the intent of the legislature. Under

[5] "If Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?" *Id.* at 84.

the ADA, a disease carrier working in a food plant could infect the public. Under the CAA, the majority could ostracize a disfavored minority in violation of District of Columbia law.

- The implementing provisions for both statutes expanded the act beyond the one named category.

The task addressed by the Supreme Court was to determine the intention of the legislature in enacting the statute and to consider this intention when evaluating the validity of the implementing regulation. Because the implementing regulation in *Chevron U.S.A.* was consistent with the legislature's intent in enacting the ADA, Supreme Court upheld the regulation.

The Council's action is equally valid. Moreover, a clinching consideration in the instant case, which is absent in *Chevron U.S.A.,* is that here the same body, Council Period 2, drafted the CAA; the Human Rights Act; and the IPA, which implemented the CAA and incorporated the Human Rights Act.[6] The most reasonable interpretation of events is that Council Period 2 knew what it intended when it directed itself "to adopt such acts as are necessary to carry out the purpose of this subpart within 180 days" and that this intention included protection of minorities from the possibility of discriminatory initiatives. In the Committee Report on the bill that became the IPA, this intention was expressed in strong terms:

> The . . . initiative process may not be used to place the Government in the posture of affirmatively condoning discrimination . . . . Implicit restrictions, not expressly contained in an "initiative charter" are thus supportable. That restriction has been implied by the Courts. Under

[6] Although the IPA's Human Rights Act provision was drafted in Counsel Period 2, the IPA was enacted in Counsel Period 3. The vote was unanimous, and 10 of the 12 votes were from Councilmembers who had served in Council Period 2. *See* Intervenor's Resp. to *Amicus Curiae* Br. of Am. Ctr. for Law and Justice *et al.;* Mem. of *Amicus* Blake *et al.*, pp. 26-27.

> applicable case law, it is clear that a community cannot by initiative authorize discrimination as a matter of government policy.

Committee Report on Bill 2-317, Initiative, Referendum, and Recall Procedures Act of 1978, at 9 (Council of the District of Columbia, May 3, 1978). It strains credulity to conclude that these strongly held views did not inform the same Council when, a few months prior, it authorized itself to "enact legislation to carry out the purpose" of the CAA.

For the above reasons, the court is constrained to reject Petitioners' facially appealing argument. *Chevron U.S.A.* demonstrates that implementing provisions need not be as narrowly confined as Petitioners argue. The IPA's Human Rights Act provision is consistent with the intent of the CAA and does not impermissibly create a new exception to the initiative right.

2. The proposed initiative violates the Human Rights Act

The Human Rights Act provides, in pertinent part, that "It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived . . . sexual orientation [or] gender identity . . . of any individual." D.C. Code § 2-1402.11 (2001). Under current law, same-sex individuals in the District of Columbia who were validly married in other states are considered validly married in the District of Columbia. D.C. Code § 46-405.01 (2009 Supp.).

The proposed initiative would invalidate D.C. Code § 46-405.01 by establishing that "only marriage between a man and a woman is valid or recognized in the District of Columbia." Petrs.' Mot. for Summ. J., Ex. A. If 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 "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.

3. The proposed initiative transgresses the implied restriction against violations of law

The fact that the proposed initiative, if passed, would violate the Human Rights Act provides an independent basis for upholding the Board's decision: the initiative runs afoul of an implied exclusion barring provisions that violates the state's law.[7] As noted, the right of initiative established by the CAA has one only one express exclusion, which relates to appropriations. Petitioners do not argue that this is the only exclusion imposed upon the initiative right, however. They acknowledge that there are implied exclusions, as well. Petitioners would limit these implied exclusions to those found in the Home Rule Act, D.C. Code §§ 1-201.01 *et seq.*

The Home Rule Act is the District of Columbia's analog to a State constitution. *See Shook*, 132 F.3d at 776 (1998) (District Charter established by Home Rule Act is "similar in certain respects to a state constitution"); *District of Columbia v. Washington Home Ownership Council, Inc.*, 415 A.2d 1349, 1367 (D.C. 1980) (deference to City Council "is not appropriate . . . when the issue is interpretation of the 'constitution'" (i.e., the Home Rule Act)). Under the Home Rule Act, the City Council may not pass legislation that would --

- violate the United States Constitution (D.C Code § 1-203.02 (2001));
- violate an act of Congress (D.C. Code § 1-206.01 (2001));
- violate any provisions of the Home Rule Act (D.C. Code § 1-206.02 (2001));
- tax the property of the United States or any State (*id.*);

[7] Even if the IPA's reference to the Human Rights Act were stricken, the initiative would still be improper as violative of this implied restriction. The prohibition against violating state law should not be conflated with the concepts of amending or repealing legislation, which are properly within the initiative power. *See generally, Convention. Ctr.*, 441 A.2d at 896-97 (discussing "The Scope of the Initiative Power").

- lend the public credit for support of any private undertaking (*id.*);
- tax the personal income of any person who is not a resident of the District (*id.*);
- permit the construction of any building exceeding height limitations (*id.*);
- legislate with respect to the Commission on Mental Health (*id.*);
- legislate with respect to the United States Courts, United States Attorney, or United States Marshal for the District of Columbia (*id.*);
- legislate with respect to the District of Columbia Financial Responsibility and Management Assistance Authority (*id.*);
- enlarge existing District of Columbia authority over the National Zoological Park, National Guard of the District of Columbia, Washington Aqueduct, National Capital Planning Commission, or any federal agency (*id.*);
- issue bonds in excess of allowed amounts (D.C. Code § 1-206.03 (b)(1) (2001)); or
- approve a budget that would result in expenditures during any fiscal year in excess of available resources (D.C. Code § 1-206.03 (c) (2001)).[8]

The Home Rule Act does not forbid the Council from enacting discriminatory legislation, except to the extent such legislation falls within the above restrictions. Petitioners argue that the right of initiative is "coextensive" with the Council's power to enact laws. Accordingly, they assert, because the Council's direct legislation does not have to survive a preliminary Human Rights Act analysis, neither do initiatives. This argument fails because its premise is faulty. The rule expressed by the District of Columbia Court of Appeals is, "*absent express or implied limitation*, the power of the electorate to act by initiative is coextensive with the power of the legislature to adopt legislative measures." *Convention Ctr.*, 441 A.2d at 897 (emphasis added).

[8] An additional limitation, which is not currently applicable, pertains to Council action during any fiscal year designated a "control year." See D.C. Code § 1-206.03 (f) (2001).

Our Court of Appeals has recognized on more than one occasion that initiatives may be barred by implied limitations that are not included in the Home Rule Act. In *Hessey v. District of Columbia Bd. of Elections & Ethics*, 615 A.2d 562, 578 (D.C. 1992) (*Hessey II*), the Court of Appeals held that an implied restriction bars initiatives that are "administrative," as distinguished from "legislative." *Hessey II* considered whether an initiative that would allow any taxpayer to appeal specific property tax assessments was administrative or legislative in character because "an initiative cannot extend to administrative matters." *Id.* (quoting *Convention Ctr.*, 441 A.2d at 907). An administrative measure is defined as one that "merely proposes to execute a law already in existence." *Hessey II*, 615 A.2d at 578. Such an initiative is invalid because it is not within the Initiative Act's grant of the power to make "laws." *Id.*

This restriction against administrative acts is not expressly set forth in the CAA, which broadly states that the electorate has the power to "propose laws (except laws appropriating funds)." D.C. Code § 1-104.101. Rather, this prohibition is an implied restriction found by the Court. Of course, the Council has the power to enact administrative measures designed to "execute a law already in existence" -- the IPA is such an act. Thus, *Hessey II* illustrates both that implied restrictions exist which are not expressed in the Home Rule Act and that the power of initiative is not coextensive with the Council's power to legislate.

Decisive in the instant case is another implied restriction recognized by our Court of Appeals: an initiative may not violate state law. In *Hessey II*, the Court considered whether to adjudicate the challenge to the proposed initiative before it was submitted to the voters. Opponents of the initiative argued that pre-election review was appropriate because, if passed, the initiative would violate the Fourteenth Amendment. The Court favorably quoted *Whitson v. Anchorage*, 608 P.2d 759, 762 (Alaska 1980) for the proposition that pre-election review would

be appropriate where it "is in clear conflict with a *state statute*" because any election would therefore be useless (emphasis added). *Hessey II*, 615 A.2d at 574. *Whitson* was also favorably cited in *Convention Ctr*, 441 A.2d at 899, for the proposition that states have permitted review pre-election review of initiatives that are "wholly *illegal* or unconstitutional" (emphasis added).

Although our Court of Appeals has not otherwise had occasion to refer to the implied restriction barring initiatives that violate state law, the highest courts in other jurisdictions have considered this issue. In *Berent v. City of Iowa City, 738 N.W.2d 193* (Iowa 2007), the Iowa Supreme Court held that an initiative that would subject the city manager and police chief to retention elections violated state law and, accordingly, refused to permit the initiative to be presented to the voters. In *R.G. Moore Bldg. Corp. v. Comm. for the Repeal of Ordinance R(C)-88-13*, 391 S.E.2d 587 (Va. 1990), the court considered whether a referendum to change a zoning decision should be kept from the voters because it violated state law. The court concluded that the referendum was "compatible, and not in conflict, with state statutes" and permitted it to go forward. *Id.*, at 590, 592. In *Von Staich v. Briggs*, 2006 U.S. Dist. LEXIS 5262 (N.D. Cal. 2006), the court rejected a prisoner's challenge to an initiative, holding that the initiative did not violate state law by failing to require parole boards to set a maximum term when denying a prisoner a parole date. *See also Haumant v. Griffin*, 699 N.W.2d 774 (Minn. 2005) (initiative to amend Minneapolis's charter by authorizing medical marijuana use is invalid as violative of state law and state public policy).

Although not binding, this persuasive authority has an accumulated weight. Our Court of Appeals has favorably cited *Whitson*, considered the leading case for this issue, twice. *Hessey II*, 615 A.2d at 574; *Convention Ctr*, 441 A.2d at 899. The undersigned judge is persuaded that, if it

considers the issue, our supervisory court will conclude that an implied limitation exists barring initiatives from violating existing statutes.

4. Other issues

The court will summarily discuss other issues, in the interest of adherence to the IPA's direction that the Superior Court expedite consideration of the petition. D.C. Code § 1-1001.16 (b)(3).

(a) Dean

Petitioners argue that application of the Human Rights Act to the proposed initiative is precluded by the District of Columbia Court of Appeals decision in *Dean*. There, the Court of Appeals held that the Human Rights Act does not apply to marriage. Petitioners assert that, because the proposed initiative defines marriage and because *Dean* has never been overruled, the decision is binding. This would compel the conclusion that the Board could not apply the Human Rights Act to bar the proposed initiative.

As applicable to this case, *Dean* considered whether the Clerk of the District of Columbia Superior Court violated the Human Rights Act in refusing to issue a marriage license to a same-sex couple. The Court of Appeals considered the legislative history of the Human Rights Act, the statutory context in which it was passed, and the law as it existed at the time of the decision. It is significant that the case was decided in 1995. At that time, the Council had not enacted any legislation that called into question the continuing vitality of the "fundamental legislative understanding that 'marriage' is limited to opposite-sex couples." *Dean*, 653 A.2d at 314.

Since 1995, the Council has changed the landscape *Dean* surveyed. Indeed, all of the statutory provisions upon which *Dean* relied have been repealed or amended to allow for same-sex marriages. *See* Intervenor's Mot. to Dismiss or in the Alternative for Summ. J., p. 31 and

chart provided at hearing of January 6, 2010. Most pertinently for this case, JAMA became effective on July 7, 2009. This act (i) amended the consanguinity provisions of the D.C. Code §§ 46-401 (1)-(2) (2005) to make the provisions gender neutral and (ii) added § 46-405.01 to recognize same-sex marriages that are valid in the place where the marriage was solemnized. These clear manifestations of intent to alter the traditional definition of marriage did not exist when *Dean* was decided. *Dean* expressly relied upon the absence of such indications in concluding that the Council intended to retain the definition of marriage as occurring only between a man and a woman. Under these circumstances, *Dean's* holding is no longer controlling.

(b) Preclusion

The government argues that the petition seeking to overturn the Board's decision in this case is barred by the doctrines of *res judicata* and/or collateral estoppel. The District would accord preclusive effect to the related case of *Jackson I.* For either doctrine to apply, however, there must be privity between the parties in *Jackson I* and this case. Four of the Petitioners in this case did not participate in *Jackson I*, and there is no showing that they were in privity with those who did. Thus, even if the other elements of *res judicata* or collateral estoppel are established with respect to the Petitioners who participated in *Jackson I*, this case would still go forward because of the presence of the four who did not.

Even with respect to the Petitioners who participated in both cases, however, the elements of *res judicata* or collateral estoppel are not met. *Res judicata* is inapplicable because both the claim and judgment in *Jackson I* involved different issues from those in the instant case. *Jackson I* concerned the Board's denial of a proposed referendum, while the instant case

involves a separate action by the Board with respect to a proposed initiative with different text from the proposed referendum.

Collateral estoppel is inapplicable because *Jackson I* did not decide the same issues as are raised in this case. *Jackson I* did not consider (i) the validity of the IPA's incorporation of the Human Rights Act into the initiative review process and (ii) the applicability of *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) to the proposed initiative. *See Patton v. Klein,* 746 A.2d 866, 869 (D.C. 1999) (quoting *Short v. District of Columbia Dep't of Employment Servs.*, 723 A.2d 845, 849-50 (D.C. 1998)) ("Collateral estoppel does not apply if the issues are not identical, even if the issues are similar.")

(c) Exhaustion

The District asserts that Petitioners may not challenge the IPA's incorporation of the Human Rights Act into the CAA because they did not exhaust their administrative remedies by raising this issue before the Board. The District's argument fails for two reasons. First, exhaustion was not required because the appropriate forum for adjudicating the validity of the Human Rights Provision is the court, not the Board. *See Debruhl v. District of Columbia Hackers' License Appeal Bd.*, 384 A.2d 421, 425 (D.C. 1978) (assumes, without deciding, that an administrative agency is without authority to invalidate the statutory scheme under which it operates); *Rhema Christian Ctr. v. District of Columbia Bd. of Zoning Adjustment*, 515 A.2d 189, 197 (D.C. 1986) (notes that it is "a dubious proposition" that the zoning board has subject matter jurisdiction to rule on the constitutionality of zoning regulations); *Barnett v. District of Columbia Dept. of Employment Servs.*, 491 A.2d 156, 1159 n. 4 (D.C. 1985) (citing *Matthews v. Diaz,* 426 U.S. 67, 76-77, 96 S.Ct 1883, 1889-90, 48 L.Ed.2d 478 (1976)) ("agency had no authority to make determination of constitutionality").

Second, as the District recognizes, exhaustion of administrative remedies is not a jurisdictional prerequisite to bringing an action before the court. *Burton v. District of Columbia*, 835 A.2d 1076, 1079 (D.C. 2003). The requirement is a rule of judicial administration that may be waived for compelling circumstances. *Id.* Compelling circumstances are present in this case because (i) the court is the appropriate forum for resolution of the issue; (ii) there is no prejudice to the District, which has fully briefed the issue; and (iii) resolution of the issue now, instead of awaiting the result of a remand, will serve the IPA's direction that the "Superior Court . . . shall expedite consideration" of challenges to the Board's initiative decisions (D.C. Code § 1-1001.16 (b)(3)).

CONCLUSION

ACCORDINGLY, for the reasons stated above, it is this 14th day of January 2010, hereby

ORDERED, that "Petitioners' Motion for Summary Judgment," filed November 20, 2009, is DENIED. It is further

ORDERED, that Petitioners' request for a writ in the nature of mandamus is DENIED. It is further

ORDERED, that "District of Columbia's Motion to Dismiss, or in the Alternative, for Summary Judgment," filed December 18, 2009, is GRANTED. It is further

ORDERED, that Summary Judgment is entered in favor of the District of Columbia Board of Elections and Ethics and the District of Columbia.

Judge Judith N. Macaluso

(Signed in Chambers)

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