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, Respondent.	2009 CA 004350 B Judge Judith E. Retchin Calendar 14 [Next Court Event: none scheduled]

DISTRICT OF COLUMBIA'S MOTION TO DISMISS

Pursuant to SCR-Civil 12(b)(1) and 12(b)(6), Intervenor the District of Columbia ("the District"), by and through counsel, respectfully moves to dismiss the petition herein. The grounds and the reasons are set forth in the accompanying Memorandum of Points and Authorities, and proposed Order. The Memorandum also serves as the District's Opposition to Petitioners' Motion for Preliminary Injunction, pursuant to SCR-Civil 65.

For the reasons set forth herein, the Court should grant this motion because petitioners' challenge is untimely and fails on the merits.

Petitioners have essentially waived their chance to challenge the substance of the disputed legislation by filing their proposed Referendum with the D.C. Board of Elections & Ethics some three weeks after the District approved it. *See* Memorandum Opinion and Order, *In Re Referendum Concerning the Jury and Marriage Amendment Act of 2009*, No. 09-004 (D.C. Bd. of Elections & Ethics, June 15, 2009) ("Mem.Op.").

Petitioners try to "backdoor" their challenge through the vehicle of a preliminary injunction. There is no "emergency" here, however, in any sense of the word, justifying the extraordinary relief demanded.

DATE: June 24, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies filed and served electronically, via e-mail, and through eFiling for Courts, this 24th day of June, 2009, for those so registered; for those not registered, copies were filed and served electronically and/or by U.S. Mail, first-class, postage prepaid:

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INTERVENOR THE DISTRICT OF COLUMBIA'S
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF THE DISTRICT'S MOTION TO DISMISS AND
IN OPPOSITION TO
PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION

Intervenor the District of Columbia, (collectively, "the District") here moves to dismiss petitioners' petition for review of the Board's decision, and opposes petitioners' request for a preliminary injunction, pursuant to SCR-Civil 12(b)(1), 12(b)(6), and 65.

The Court should dismiss the petition and deny petitioners' request for extraordinary injunctive relief because there is no "emergency" here. Petitioners' demand for celerity rings hollow, as the delay in action here is entirely petitioners' fault.

The Council passed the disputed legislation on May 5, 2009, and the Mayor signed it the next day. But petitioners waited *three whole weeks* before they challenged it via a proposed referendum. Despite their untimely challenge, petitioners want this Court to rule on the merits of their challenge under the guise of an emergency motion. The District respectfully urges the Court to decline that invitation.

Petitioners are wrong on the law, and have not presented any evidence of harm at all, much less made the dramatic showing of imminent, irreparable injury necessary to sustain emergency injunctive relief.

Petitioners fail to meet any element of the familiar four-part test for the grant of such relief; an injunction here will *not* preserve the *status quo*, but will enjoin both Congress *and* the District's regular legislative process. Petitioners are thus held to a much higher standard than the traditional prohibitory injunction.[1] Notwithstanding this, petitioners have not presented (and the District is not aware of any) authority for the extraordinary proposition they assert—that a trial court can toll the passing of the congressional review period for District legislation. Petitioners' failure to present any controlling case law, or any evidence of harm, is ultimately fatal to their claim.

I. Factual and Procedural Background

The facts in this matter are largely undisputed.[2] On May 5, 2009, the Council of the District of Columbia approved the Jury and Marriage Amendment Act of 2009 ("Act"), by a vote

[1] Even if petitioners could meet the standards for emergency injunctive relief, the District avers that they could not meet the next hurdle they would face under referendum law, mandamus relief. *See* D.C. Official Code § 1-1001.16(b)(3) (those challenging Board's refusal to accept initiative or referendum may file in Superior Court "for a writ in the nature of mandamus to compel the Board to accept such measure."). Courts apply a "rigorous standard" to mandamus actions. *Banov v. Kennedy*, 694 A.2d 850, 855 (D.C. 1997). "The requirements for issuance of a writ of mandamus are that the party seeking the writ must show that his right is 'clear and indisputable' and that he 'has no other adequate means to obtain relief.'" *Id.* at 857. *See also, e.g., United States ex. rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931) (a writ of mandamus will issue only where "the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable."). The District avers that petitioners cannot come close to meeting this standard, even if the Court reaches the merits here.

[2] The District reserves and does not waive any future defensive motions or pleadings and does not admit the factual allegations of the Petition or petitioners' motions except for purposes of this brief.

of 12 to 1. *See* D.C. Act 18-70; 56 D.C. Reg. 3797 (May 15, 2009). That measure amended District of Columbia law to provide that legal, same-sex marriages entered into in another jurisdiction will be legally recognized in the District of Columbia. The Act was signed by the Mayor on May 6, 2009. It was transmitted to Congress on May 11, and is projected to become law on July 6, 2009. *See* Mem.Op. at 2.

Three weeks after the Mayor signed the Act, on May 27, 2009, the petitioners first filed their proposed Referendum with the Board, pursuant to D.C. Official Code § 1-204.101. P.Mem. at 5; Mem.Op. at 2. "The Referendum seeks to give the people of D.C. the opportunity to decide themselves whether the portions of the Act related to the recognition of same-sex 'marriages' [sic] from other jurisdictions should become the law of D.C." P.Mem. at 5.

The Board immediately gave notice and scheduled a public hearing for June 10, 2009, regarding "the propriety of the Referendum." Mem.Op. at 3. At the hearing, the Board heard testimony from numerous individuals and organizations, and ultimately received and considered 75 written comments from individuals or entities. *Id.*[3]

On June 15, 2009, the Board issued its decision, finding that the Referendum did not present a proper subject matter, "because it would authorize discrimination prohibited under the Human Rights Act ("HRA")." *Id.* at 4 (citing D.C. Official Code § 1-1001.16(b)(1)(C) (2006 Repl.)).

Late in the day, two days later, on June 17, 2009, petitioners filed their Petition for Review of Agency Decision and for Writ in the Nature of Mandamus.

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[3] A copy of many of the comments received on the proposed Referendum, including those of Attorney General Peter J. Nickles, is available online at http://dcboee.org/newsroom/showASPfile.asp?cat=News%20Releases&id=206.

The District filed its Motion to Intervene that same day, which was granted by the Court at the hearing called the next day for 3 p.m. At the hearing, plaintiffs conceded that there was insufficient time for the referendum process to be completed prior to the Act becoming law on or about July 6, 2009. The Court directed briefing on the question of whether the Court had the authority to stay the effective date of District legislation pending congressional review.

Petitioners filed their Motion for Preliminary Injunction on June 22, 2009.

II. Argument

Petitioners' motion should be denied and their case dismissed. The "emergency" here is one of their own making; petitioners concede that there is insufficient time for the referendum process to be completed prior to the Act becoming law. *See* P.Mem. at 3. The Court should not reward petitioners' tardiness.

At bottom, petitioners simply disagree with the Act's provisions legally recognizing same-sex marriages from other jurisdictions. That argument, however, is most appropriately presented to the political branches of government and not the courts.

Petitioners bring this suit because their efforts to influence the political branches were unsuccessful. Ultimately, they challenge the *wisdom* of the proposed Act, but such a challenge is foreclosed.

> [A] strong presumption of constitutionality inheres in legislative enactments, and there is a heavy burden on a party who seeks to overturn one. As we have observed more recently,
>
> > 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 Constitution presumes that even improvident legislative decisions will be rectified by the democratic process, and that "judicial intervention is generally unwarranted no matter

> how unwisely we may think that a political branch has acted." The judiciary cannot encroach on the domain of the popularly elected branches without imperiling our most basic institutions. Indeed, a court "usurps legislative functions when it presumes to adjudge a law void where the repugnancy between the law and the Constitution is not established beyond a reasonable doubt."

In re W.T.L., 656 A.2d 1123, 1131–32 (D.C. 1995) (quoting *Hornstein v. Barry*, 560 A.2d 530, 533 (D.C. 1989) (additional citations omitted)).

Providing the relief petitioners seek here would unquestionably intrude on the domain of the popularly elected branches of government, without *any* showing of the "repugnancy" required.

Dismissal under Rule 12(b)(6) is proper only where it appears beyond doubt that plaintiff can prove no set of facts that would support the claim. *Schiff v. American Ass'n of Retired Persons*, 697 A.2d 1193, 1196 (D.C. 1997). Accordingly, the factual allegations are viewed in the light most favorable to the petitioners and every reasonable doubt concerning those allegations resolved in the petitioners' favor. *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 174 (D.C. 1996).

However, while a complaint challenged by a Rule 12(b)(6) motion "does not need detailed factual allegations, [it] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). *See also Chamberlain v. American Honda Finance Corp.*, 931 A.2d 1018, 1023 (D.C. 2007) ("Factual allegations must be enough to raise a right to relief above the speculative level . . . .") (quoting *Bell Atlantic, supra*).

Moreover, while the complaint is to be construed liberally, courts "need not accept inferences drawn by plaintiff if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept the legal conclusions cast in the form of factual

allegations." *Kowal v. MCI Communications Corp., Inc.*, 305 U.S. App. D.C. 60, 65, 16 F.3d 1271, 1276 (D.C. Cir. 1994) (*citing Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

> The filing of a motion pursuant to Rule 12(b)(6) does not call upon the plaintiff to offer his proof, [h]owever, the pleader must set forth sufficient information to outline the legal elements of a viable claim for relief or to permit inferences to be drawn from the complaint that indicate that these elements exist.

Manago v. District of Columbia, 934 A.2d 925, 926 (D.C. 2007) (citations omitted).[4]

The District avers that the instant Petition fails to meet even this lenient standard, hence petitioners fail to state a claim on which relief may be granted.

A. Petitioners Fail to Meet Any of the Elements Necessary for the Grant of Emergency Injunctive Relief.

Because interim injunctive relief is an extraordinary form of judicial relief, courts should grant such relief sparingly. *See, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emergency injunctive relief is "an extraordinary and drastic remedy" that should not be granted unless the movant carries the burden of persuasion "by a clear showing").

In order to obtain emergency injunctive relief, petitioners must "clearly demonstrate" *each* prong of the following four-part test: (1) that there is a substantial likelihood of success on the merits; (2) that there is an imminent threat of irreparable harm should the relief be denied; (3) that more harm will result to petitioners from the denial of the injunction than will result to the defendants from its grant; and (4) that the public interest will not be disserved by the issuance of the requested order. *Akassy v. Wm. Penn Apartments, L.P.*, 891 A.2d 291, 309 (D.C. 2006)

[4] The reference to public-record documents provided by the District does not convert the instant motion into one for summary judgment. *See, e.g., Baker v. Henderson*, 150 F.Supp.2d 17, 19 n.1 (D.D.C. 2001) (court may consider documents "attached to or incorporated in the complaint . . . without converting the motion to dismiss into one for summary judgment.") (citations omitted).

(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).

The Supreme Court has recently reiterated that a party seeking emergency injunctive relief must show that success on the merits and irreparable harm are *likely*, and not merely possible. *See Winter v. NRDC*, ___ U.S. ___, 129 S.Ct. 365, 375 (Nov. 12, 2008); *Munaf v. Geren*, ___ U.S. ___, 128 S.Ct. 2207, 2219 (Jun. 12, 2008).

Petitioners have utterly failed to meet this difficult burden. Moreover, petitioners are incorrect as a matter of law; they argue that a preliminary injunction here would preserve the *status quo*. P.Mem. at 6. But emergency injunctive relief here will *not* preserve the *status quo*. Rather, it will require *affirmative steps* to prevent a law passed by the elected branches of government from becoming effective. An injunction would, in essence, prohibit Congress from further review of the Act. As such, a preliminary injunction here would be a "mandatory injunction" requiring petitioners to meet an even higher standard than the typical four-part test for the usual "prohibitory" injunction. *Fountain v. Kelly*, 630 A.2d 684, 688–89 (D.C. 1993) ("Since they seek to alter the status quo rather than to maintain it, appellants must be held to a *substantially higher standard* than in the usual case.") (emphasis added). *See also Farris v. Rice*, 453 F.Supp.2d 76, 78 & n.1 (D.D.C. 2006) (same).

In other words, a mandatory injunction should not issue "unless the law and the facts *clearly* support the moving party[,]" and that party can demonstrate "the existence of a clear probability that they will prevail on the merits." *Fountain*, 630 A.2d at 689 (emphasis in original) (citations omitted). *See also Akassy*, 891 A.2d at 310 (if movants fail to show irreparable harm by "clear and convincing evidence," they must demonstrate "probable success" on the merits) (citing *Antioch*, 418 A.2d at 110–11).

As demonstrated herein, petitioners fail to make such a dramatic showing. Granting the requested relief would be—literally—an unprecedented intrusion into the legislative process. "[T]he court 'is bound to give serious weight to the obviously disruptive effect which the grant of the temporary relief [is] likely to have on the . . . process,' and not 'routinely apply [ ] . . . the traditional standards governing more orthodox 'stays.'" *Farris*, 453 F.Supp.2d at 78 (quoting *Sampson v. Murray*, 415 U.S. 61, 83–4 (1974)).

1. Petitioners Fail to Establish A Substantial Likelihood of Success On the Merits.

a. The Court Does Not Have the Authority to Toll the Congressional Review Period.

Petitioners present a scant two-and-a-half pages of argument on the *only* issue currently before the Court; whether it has the authority to toll the running of the congressional review period. And petitioners utterly fail to distinguish controlling case law.

The District does not question that this Court has jurisdiction here, *see* n.8, *infra*, and surrounding text, but avers that the Court should *not* exercise whatever authority it has to grant the dramatic relief requested by petitioners. Petitioners have cited to boilerplate provisions on equitable jurisdiction and authority. There is literally no authority for the proposition that the Court could exercise its equitable authority here to enter an order that would contravene not just a statutory provision but a Charter provision, which is what the Court is being asked to do. A court may exercise, in some instances, equitable authority to fill gaps in the law. That is not the case here.

As expected, petitioners have not cited (and the District is not aware of) any cases in which a trial court has "stayed" District legislation currently before Congress for review pursuant to the Home Rule Act. This unprecedented request to extend the Court's authority dooms

petitioners' claims. The Court thus need not (and should not) reach the merits of petitioners' claims as to the Board's decision. *See, e.g., Lewis v. Hotel and Restaurant Employees, Local 25*, 727 A.2d 297, 301 (D.C. 1999) (citing *Abney v. United States*, 451 A.2d 78, 82 n.9 (D.C. 1982) ("policy and practice" of courts is that they "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.") (quoting *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring))).

Unlike the States, the "unique feature" of the legislative process in the District is that legislation duly enacted by the District may not take effect until approved by Congress. *See Atkinson v. District of Columbia Bd. of Elections & Ethics*, 597 A.2d 863, 864 (D.C. 1991).

The Court here need do little more than read *Atkinson* to deny petitioners' request. Petitioners never cite, let alone distinguish, this controlling case.

Article I, section 8, clause 17 of the Constitution empowers Congress to exercise exclusive legislative authority over the District of Columbia. *See, generally, Bliley v. Kelly*, 23 F.3d 507, 508 (D.C. Cir. 1994). In 1973, Congress delegated most of this authority to the District by passing the Home Rule Act, Pub. L. No. 93-198, *codified at* D.C. Official Code §§ 1-201.01 *et seq.* (2005 Supp.). The Home Rule Act allows Congress 30 days to review legislation enacted by the District.[5] If Congress fails to pass a joint resolution of disapproval within that period, the legislation becomes law. D.C. Official Code § 1-204.04.

Additionally, voters in the District may directly affect legislation, either by initiative (*i.e.*, proposed legislation presented directly to the voters for approval or disapproval), or by

[5] Congress has 30 days within which to disapprove most District legislation, and 60 days within which to disapprove legislation affecting the District's criminal law. *Cf.* D.C. Official Code §§ 1-206.02(c)(1), 1-206.02(c)(2).

referendum, a process by which voters may "suspend" an act of the Council until that act is presented directly to the voters. *See* D.C. Official Code § 1-204.101. Both initiatives and referenda may be commenced only by presentation to the Board of a petition containing the signatures of at least 5% of the registered voters in the District. *Id*. at § 1-204.102(a).[6]

On receipt of a proposed initiative or referendum, the Board first determines whether it is a "proper subject" for such action. *Id*. at § 1-1001.16(b)(1). The Board "shall refuse to accept the measure" if it "authorizes, or would have the effect of authorizing, discrimination prohibited" by the Human Rights Act. *Id*., § 1-1001.16(b)(1)(C). *See also Marijuana Policy Project v. United States*, 353 U.S. App. D.C. 267, 304 F.3d 82, 84 (2002) (discussing the Initiative, Referendum, and Recall Charter Act of 1977).[7]

If the Board refuses to accept an initiative or referendum because it is not a proper subject, the proposer may apply to the Superior Court "for a writ in the nature of mandamus to compel the Board to accept" it. *Id*., § 1-1001.16(b)(3). In such circumstances, the Court "shall expedite consideration of the matter." *Id*.[8]

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[6] There have been press reports that lead petitioner Harry R. Jackson, Jr. did not become a District resident until April 22 of this year. *See, e.g.*, Lou Chibbaro, Jr., "Marriage opponent new to D.C.: Minister registered to vote one month before filing referendum," WashingtonBlade.com (June 5, 2009). Only registered District voters may file such challenges to District legislation, or sign any petitions in support of such challenges. *See* D.C. Official Code §§ 1-204.101(b), 1-204.102(a) (2008 Supp.).

[7] The Board must also reject measures that would "negate or limit an act of the Council" regarding appropriations, D.C. Official Code § 1-1001.16(b)(1)(D), or would conflict with "any Act of Congress . . . which is not restricted in its application exclusively in or to the District." *Brizill v. District of Columbia Bd. of Elections & Ethics*, 911 A.2d 1212, 1214 (D.C. 2006) (quoting D.C. Official Code § 1-206.02(a)(3)).

[8] The D.C. Court of Appeals ("DCCA") has interpreted these provisions of the Home Rule Act "as giving to the Superior Court the power to conduct its own, independent, *de novo* examination of a proposed [measure] once it has acquired jurisdiction of the case." *Hessey v. Burden*, 615 A.2d 562, 568 (D.C. 1992). As discussed herein, because petitioners failed timely

No act may be subject to a referendum after it has become law. *Id*., § 1-204.102(b)(2).

In *Atkinson*, the DCCA held that "once the act has been transmitted to Congress, the legislative process of the District insofar as the Council and Mayor are concerned *is at an end.* Under the statutory provisions, the *only* circumstances that can prevent the act from becoming law are the passage of a joint resolution by Congress . . . or the filing of a valid referendum petition . . . ." *Atkinson*, 597 A.2d at 867 (emphasis added) (citations and footnote omitted).[9]

The D.C. Circuit, in light of *Atkinson* and the "legislative gap" in the Home Rule Act, expressly noted a third method by which District-enacted legislation could be prevented from becoming law—if the District itself repeals its own legislation while that legislation is pending before Congress. *Bliley*, 23 F.3d at 512.[10] *Cf. McConnell v. United States*, 537 A.2d 211, 215 (D.C. 1988) ("although the Council . . . may repeal a congressionally-enacted statute limited in application to the District of Columbia, the Council may not repeal a federal statute of broader application.") (discussing *District of Columbia v. Greater Washington Central Labor Council*,

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to file their Referendum, the Act will become law and their challenge will become moot on or about July 6, 2009, hence the Court need not now undertake a substantive analysis of the Board's decision.

[9] In addition, Congress may directly enact legislation amending or repealing any provision of District law. *Atkinson*, 597 A.2d at 867 n.12.

[10] Late in 1990, the District enacted the Assault Weapon Manufacturing Strict Liability Act, and transmitted the act to Congress for its review. *See Bliley v. Kelly*, 793 F.Supp. 353, 354 (D.D.C. 1992), *affirmed*, 23 F.3d 507 (D.C. Cir. 1994). Prior to the expiration of the review period, however, the District's new Mayor and Council "arranged with Congress a political solution to the District's urgent need for additional funding." *Bliley*, 793 F.Supp. at 354. In short, Congress agreed to provide the requested funds if the District would repeal the assault-weapons legislation. *Id*. The District duly repealed the law, but before the "permanent repealer" took effect, the Board certified a referendum to reject the repealer (*i.e.*, preserve the assault-weapons law). *Id*. District voters ultimately approved the referendum. *Id*.

442 A.2d 110, 113, *reh'g denied*, 445 A.2d 960 (D.C. 1982), *cert. denied*, 460 U.S. 1016 (1983)).

None of these things have occurred here, hence there is no authority for the Court to toll the running of the congressional review period. There are only three specific actions that may be taken to toll the running of the congressional review period. Absent one of them, the period continues to run.

If the District desires to prevent legislation from becoming law, it must act to repeal the legislation. If Congress desires to prevent District legislation from becoming law, it must take formal action to disapprove the legislation; even Congress cannot *sua sponte* suspend the review period without taking that formal action. *Bliley*, 793 F.Supp. at 356 ("Congress may not, on its own initiative . . . simply suspend its consideration without any formal, statutorily authorized action either by the D.C. Council or Congress itself.").

The few cases petitioners cite do not support the broad proposition for which they were cited, and are easily distinguished, notwithstanding petitioners' vague, unhelpful reference to courts' equity-based powers of injunction in "election-related" matters.

Petitioners cite *District of Columbia v. Beretta U.S.A. Corp.*, 872 A.2d 633 (D.C. 2005) and *Armfield v. United States*, 811 A.2d 792 (D.C. 2002) for the unremarkable proposition that courts may "consider possible enjoinment" of District statutes for constitutional reasons. P.Mem. at 7.[11] Petitioners fail to note, however, that the disputed legislation in those cases had already

[11] Petitioners' last-minute invocation of "due process," *id*. at n.2, need not detain the Court. As noted, petitioners themselves short-circuited the process. Both the Council and Congress have approved the process and timelines with which petitioners disagree. *Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 154 F. Supp. 2d 40, 52 n.10 (D.D.C. 2001) ("As the ultimate legislative authority for the District, Congress could have rejected the plan if it believe that it . . . was otherwise inappropriate. It is telling that in the exercise of governance, Congress declined to do so."). It should be up to *those* bodies to change those timelines, through

passed the congressional review period, and the courts subsequently rejected all the constitutional challenges. *Beretta*, 872 A.2d at 658–59; *Armfield*, 811 A.2d at 797–98.[12]

Moreover, the single case petitioners cite in which the DCCA permanently enjoined an act of Congress as unconstitutional entirely supports the District here. There, the DCCA found a provision of the Home Rule Act unconstitutional, despite Congress' "exclusive" authority over the District, because it allowed for a "veto" of District legislation by one house of Congress.

> [O]nce the Council of the District of Columbia and the Mayor have properly exercised their delegated powers to promulgate new sections of the District of Columbia Code, Congress could not have overridden these new sections of the Code without passing legislation (which was presented to the President) for that purpose.

Gary v. United States, 499 A.2d 815, 819–20 (D.C. 1985) (*en banc*) (citing *INS v. Chadha*, 462 U.S. 919 (1983)), *cert. denied*, 475 U.S. 1086 (1986).

So too here. Because the Council and the Mayor have properly exercised their delegated powers, the Court should not override the normal legislative process, at least without some reason more compelling than petitioners' disagreement with properly enacted legislation.

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the normal political process, not through this purported "emergency." *See, e.g., Tenley and Cleveland Park Emergency Comm. v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331, 334 n.10 (D.C. 1988) ("[T]he D.C. Council's interpretation of its responsibilities under the Home Rule Act is entitled to great deference.").

[12] Petitioners also cite cases from other jurisdictions that are neither controlling or persuasive, and easily distinguishable on the facts, the law, or both. For instance, the impermissible delay in *State ex rel. Ohio Gen. Assembly v. Brunner*, 873 N.E.2d 1232 (Ohio 2007), was due to the "unavoidable delays associated with judicial review" of the "unique" factual and legal case presented, *not* the normal operation of the legislative process. *See id*. at 1233–34 ("[t]he parties did not request a stay of the effective date of the law to allow for circulation of referendum petitions, and we express no opinion on whether a stay may be permissible."). Similarly, in *Interior Taxpayers Ass'n, Inc. v. Fairbanks North Star Borough*, 742 P.2d 781 (Alaska 1987), the challenged municipal ordinance had already become law (unlike here), and a qualifying petition had already been certified, but the town was apparently confused as to the difference between the "effective date" of the ordinance and the "operative" date. *See id*. at 782. No such confusion exists here.

The Court should be especially wary of acting in these circumstances, where there is no "emergency," and the executive and legislative branches have made their positions crystal clear, notwithstanding the inaction of Congress itself.[13] *See In the Matter of an Inquiry into Allegations of Misconduct Against Juveniles Detained at and Committed at Cedar Knoll Institution*, 430 A.2d 1087, 1091 (D.C. 1981) ("Under our tripartite system of government, courts must be careful not to encroach on the prerogatives of another department of the government. At the very least there must be no question as to the court's jurisdiction to act in the particular case.") (citations omitted). *See also Gorham v. United States*, 339 A.2d 401, 406 (D.C. 1975) ("Courts are not empowered to supersede the legislative will.").

Here, Congress—through the Home Rule Act—has specified the exact methods by which District legislation may be prevented from becoming law and the running of the congressional review period may be tolled. The Court should not create an additional method solely on the basis of petitioners' flimsy showing here. *Cf. Mack v. United States*, 637 A.2d 430, 433 (D.C. 1994) ("Where, as here, the legislature has specified the relief which is appropriate to redress a violation, courts are not authorized to devise different . . . remedies; *expression unius est exclusion alterius*.") (citations omitted). *Cf. In re J.J.*, 431 A.2d 587, 590 (D.C. 1981) ("the court's power over an agency is at least in part defined by the agency's own authority; the court cannot order an agency to act beyond the agency's own powers.").

The Court does not have the authority to enjoin the legislative process here and, thus, petitioners fail to demonstrate a substantial likelihood of success on the merits of their claim, much less meeting the higher standard required for a mandatory injunction.

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[13] As noted, the Act passed with near-unanimous support, *see* 56 D.C. Reg. at 3797, and the Mayor signed it the next day. *Id*.

b. Petitioners' Challenge is Untimely.

The Act is expected to become law on or about July 6, 2009. P.Mem. at 5. The petitioners did not file their proposed Referendum until three weeks after the Mayor signed the Act. That three-week delay is entirely the fault of petitioners, and vitiates their challenge here.

Even assuming that the proposed Referendum was a proper subject, or that this Court overturns the Board's decision immediately, there would *still* not be sufficient time for the Board to fulfill its statutory duties prior to the Act becoming law. *See id.* at 3.

On its acceptance (voluntary or not) of a proposed Referendum, the Board is required to give notice and hold a public meeting to "adopt the summary statement, short title, and legislative form" of the measure. D.C. Official Code § 1-1001.16(d); 3 DCMR § 102.4. Once the Referendum language is formulated, the Board must publish the proposed Referendum in the D.C. Register and "at least one newspaper of general circulation . . . ." D.C. Official Code § 1-1001.16(e)(1)(B). Once published, *any* registered voter may object to the proposed language of the Referendum within 10 calendar days, and seek review in the Superior Court. *Id*.

If there are no such objections, the Board must then certify the language, and prepare and present (at another public meeting) to the proposer the original petition form. *Id*., § 1-1001.16(g). The proposer then uses that original form to gather signatures from registered District voters; if at least 5% of the registered voters sign the petition (as subsequently certified by the Board), the measure qualifies for the ballot. *Id*., § 1-1001.16(i). Proponents may not begin gathering signatures until the Board has accepted the measure as a "proper subject" and approved the language of the petition. *Marijuana Policy Project*, 304 F.3d at 84 (citing D.C. Official Code § 1-1001.16(c)(1)–.16(j)).

As the General Counsel for the Board indicated at the hearing in this matter on June 18, 2009, this process would take—at a minimum—about 15 days, assuming no objections to the Referendum's language. Because petitioners waited three weeks before filing their proposed Referendum, they short-circuited the process. Even if the Court *sua sponte* reverses the Board *today*, there is simply not enough time for the Board to comply with the statute before the Act becomes law (on or about July 6, 2009), not to mention the time minimally required for petitioners to circulate the proposed Referendum and obtain approximately 20,000 signatures. Once District legislation has become law, it is *not* subject to the referendum process. D.C. Official Code §§ 1-204.102(b)(2), 1-1001.16(j)(2).

Consequently, the petitioners' challenge will become moot on or about July 6.

"A case is moot when the legal issues are no longer 'live' or when the parties lack a legally cognizable interest in the outcome." *N Street Follies, L.P. v. District of Columbia Bd. of Zoning Adjustment*, 949 A.2d 584, 588 (D.C. 2008) (quoting *Thorn v. Walker*, 912 A.2d 1192, 1195 (D.C. 2006) (case moot because "there is now no actual controversy between the parties—no issue on the merits which this Court can properly decide.") (quoting *Brownlow v. Schwartz*, 261 U.S. 216, 217 (1923)). *See also Clarke v. United States*, 286 U.S. App. D.C. 256, 258, 915 F.2d 699, 701 (1990) (courts should refrain from deciding cases if "events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.")).

Moreover, if a court cannot provide effective relief, the case is moot. *Thorn*, 912 A.2d at 1195 ("an event that renders relief impossible or unnecessary also renders that appeal moot.") (quoting *Settlemire v. District of Columbia Office of Employee Appeals*, 898 A.2d 902, 905 (D.C.

2006)); *Evans v. Family Savings & Loan Ass'n of Virginia*, 481 A.2d 1309, 1310 (D.C. 1984) (case is "moot because there is no way we can grant effective relief.").

Here, because this Court cannot toll the running of the congressional review period, petitioners' challenge will be moot on or about July 6. *See Thorn*, 912 A.2d at 1197 (the "desire for vindication is . . . inadequate to show that [the] appeal is not moot. The 'legal interest' at stake 'must be more than simply the satisfaction of a declaration that a person was wronged.'" (quoting *Settlemire*, 898 A.2d at 907)). By virtue of petitioners' own inaction and delay, the Court can provide no relief here.

c. Petitioners' Claim Fails on the Merits.

Although the District believes that the other arguments it presents are more than sufficient for the Court to dismiss the challenge here, it briefly presents argument on the merits. Due to the expedited nature of these proceedings, these arguments are drawn largely from the cogent analysis of Brian K. Flowers, the General Counsel to the Council of the District of Columbia, which he provided at the request of the Board. *See* Mem.Op. at n.32.

The proposed Referendum would have the effect of authorizing discrimination, a result explicitly prohibited by the Human Rights Act. D.C. Official Code § 2-1401.01, *et. seq.* That law states:

> It is the intent of the Council of the District of Columbia, in enacting this act, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of . . . sex, . . . , sexual orientation, gender identity or expression.

D.C. Official Code § 2-1402.01. The Human Rights Act is a broad remedial statute to be generously construed. *Wallace v. Skadden, Arps, Slate Meagher & Flom*, 715 A.2d 873, 889 (D.C. 1998); *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392, 398 (D.C.

1991). Indeed, the DCCA has described the Human Rights Act as a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds." *Executive Sandwich Shoppe, Inc. v. Carr Reaolty Corp.*, 749 A.2d 724, 732 (D.C. 2000) (citation and internal quotations omitted).

At minimum, there are two sections of the Human Rights Act that would be violated by the proposed referendum: (1) D.C. Official Code § 2-1402.31 (prohibiting discrimination in public accommodations); and (2) D.C. Official Code § 2-1402.73 (prohibiting discrimination to limit or refuse to provide District government benefits). Any practice having "the effect or consequence" of violating any of the provisions of the Act is deemed an unlawful discriminatory practice. D.C. Official Code § 2-1402.68. This "effects clause" obviates the need to show discriminatory intent, so long as the practice at issue has a discriminatory effect. *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 29–30 (D.C. 1987); *Ramirez v. District of Columbia*, 2000 U.S. Dist. LEXIS 4161 (D.D.C. Mar. 27, 2000).

Undeniably, there are significant rights and responsibilities that inure to married persons that would be denied by failure to recognize lawful marriages performed in other states. *See, e.g.*, Gay & Lesbian Activists Alliance, "Marriage Law in the District of Columbia," (noting over 200 District rights and responsibilities—and more than 1,000 federal rights and responsibilities—of civil marriage unavailable to domestic partners) (*available online at* http://www.glaa.org/archive/2004/glaamarriagereport.pdf). The denial of those rights and responsibilities by the District government on the basis of the individuals' sexual orientation is patently contrary to the Human Rights Act.

Petitioners' argument on the merits is based, nearly exclusively, on *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995). In *Dean*, the DCCA held that the Human Rights Act did not require the Superior Court to grant a marriage license to a same-sex couple. *Id.*, at 319–20.

The court reasoned that, although the general prohibitions against discrimination based on sexual orientation found in the Human Rights Act *could* apply to the refusal to issue a marriage license to a same-sex couple, the court would not presume that the Council intended to effect such a "dramatic change" in the law without an express provision in the Human Rights Act reflecting that intent. *Id*.

> [W]e cannot conclude that the Council ever intended to change the ordinary meaning of the word "marriage" simply by enacting the Human Rights Act. Had the Council intended to effect such a major definitional change, . . . we would expect some mention of it in the Human Rights Act of at least in its legislative history. . . . We therefore cannot conclude that the Council intended the Human Rights Act to change the fundamental definition of marriage.

Id., at 320.

The current question is distinct from that raised in *Dean* because the Court here is not considering whether the District may decline to *create* a same-sex marriage. Instead, the question is whether the government (or in this case, the electorate) may refuse to recognize the legal right of persons to remain married solely because of the individuals' sexual orientation. The same reasoning employed in *Dean*—lack of an explicit legislative mandate—is also present here, which changes the analysis. The general prohibitions of the Human Rights Act apply because this Court should not presume that the Council intended to "effect such a dramatic change" as to refuse recognition of lawful marriages recognized in other jurisdictions, without the Council having expressly stated its intent to do so. To find otherwise would *assume* that the Council intended to restrict the broad protections against discrimination afforded by the Human Rights Act. There is no support, however, for the proposition that when the Council enacted a statutory provision extending full faith and credit to marriages legally entered into and recognized by other jurisdictions, it restricted that to only heterosexual marriages.

Moreover, the District's marriage laws have fundamentally changed in the fourteen years since *Dean*. The "common understanding" of the word "marriage" gleaned by the court from the District's statutory scheme no longer exists. Indeed, the alteration has been so comprehensive that the current scheme cannot accurately be described as the one on which the DCCA relied in *Dean*. For example, seven of the eight gender-specific statutory provisions cited by the DCCA in *Dean* have been amended to remove those gender-specific references. *See* D.C. Official Code §§ 16-901, 16-911, 16-912, 16-913, 16-916, 46-601, and 46-718. The lone remaining provision cited by the *Dean* court, D.C. Official Code § 46-401, would be changed by the Jury and Marriage Amendment Act of 2009. Thus, the "corroborative" statutory underpinnings of *Dean* no longer exist.

The Human Rights Act has also undergone significant expansive amendments since *Dean* was decided.[14] D.C. Official Code § 2-1402.31, at issue in *Dean*, was amended to add language including persons within a protected class even, whether his or her inclusion be "actual or perceived." In addition, D.C. Official Code § 2-1402.73 expressly made the provisions of the Human Rights Act applicable to the District government.

Additionally, when *Dean* was decided, no state had legalized same-sex marriages, so the issue of District recognition of out-of-state same sex marriages could not have been

[14] These amendments include the Human Rights Amendment Act of 1998, effective April 20, 1999 (D.C. Law 12-242); the Human Rights Amendment Act of 2002, effective October 1, 2002 (D.C. Law 14-189); the Domestic Partnership Protection Amendment Act of 2004, effective April 8, 2005 (D.C. Law 15-309); the Human Rights Clarification Amendment Act of 2005, effective March 8, 2006 (D.C. Law 16-58); and the Prohibition of Discrimination on the Basis of Gender Identity and Expression Amendment Act of 2008, effective June 25, 2008 (D.C. Law 17-177). Additionally, the Omnibus Domestic Partnership Equality Amendment Act of 2008, effective September 12, 2008 (D.C. Law 17-231) amended Title 16 of the District of Columbia Official Code to remove gender specific references.

considered.[15] As of the date of this filing, however, a number of states now recognize same-sex marriages, either as a result of a judicial decision or legislative action: Iowa, Connecticut, Massachusetts, Vermont, and Maine.[16] Additionally, California same-sex marriages enacted prior to a state constitutional amendment are valid.[17] In other words, the "fundamental definition of marriage" referenced in *Dean* has undeniably changed.[18]

The current lesson of *Dean* is that this Court should not read the Human Rights Act to support a refusal to recognize certain lawful marriages performed elsewhere, without express legislative intent to that effect. Regarding same-sex marriage specifically, the underpinnings of *Dean* have fundamentally changed in the fourteen years since it was decided. The District's statutory scheme has evolved by eliminating gender-specific references on which the *Dean* court relied, while simultaneously expanding the scope of the Human Rights Act. Also, same-sex marriages have been adopted by multiple jurisdictions nationwide. As such, *Dean*'s applicability, to the extent that petitioners seek to have it control, no longer exists.

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[15] The *Dean* court did, however, note that the Supreme Court of Hawaii had recently reversed a trial court decision barring same-sex marriages. *Dean*, 653 A.2d at 316, *referencing Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

[16] *See Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Commission of Public Health*, 957 A.2d 407 (Conn. 2008); *Goodidge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003); Vt. Act No. 3, S. 115 (2009-2010 Legis. Sess., eff. Sept. 1, 2009); Me. L.D. No. 1020, S.P. No. 384 (124th Leg., 1st Sess., enacted May 6, 2009).

[17] *Compare In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) *with Strauss v. Horton*, 46 Cal. 4th 164 (Cal. 2009).

[18] Similarly, in *Martinez v. County of Monroe*, 2008 NY Slip Op. 909, 1 (N.Y. App. Div. 4th Dep't 2008), *appeal dismissed* 889 N.E.2d 496 (2008), the Supreme Court of New York, Appellate Division, distinguished the New York case of *Hernandez v. Robles*, 7 N.Y.3d 338 (2006) (finding no right for same sex couples to marry in New York), and held that the refusal to recognize same sex marriages that were solemnized in other jurisdictions was a violation of the New York Human Rights Law (NY CLS Exec § 296).

District law requires recognition of marriages valid at their place of celebration. Since 1901, the District has recognized marriages valid in the state in which they were solemnized, unless the marriage was between persons domiciled in the District at the time of the marriage and the marriage would have been expressly prohibited by one of the provisions contained in D.C. Official Code §§ 46-401 through 46-404 or unless the marriage was in violation of the "strong public policy" of the District. *Hitchens v. Hitchens*, 47 F. Supp. 73, 74 (D.D.C. 1942); *see also Rhodes v. Rhodes*, 96 F.2d 715, 716-17 (D.C. Cir. 1938); *McConnell v. McConnell*, 99 F. Supp. 493, 494 (D.D.C. 1951); *Carr v. Carr*, 82 F. Supp. 398, 398-99 (D.D.C. 1949).

The District does not, in fact, have a "strong public policy" against same sex marriage. None of the express prohibitions in the Marriage Act apply to a same-sex marriage, and courts do not make public policy. Moreover, the one provision of the Marriage Act cited by the *Dean* court as potentially applicable was subsequently repealed. *See*, Section 2 of the Marriage Amendment Act of 2008, effective September 11, 2008 (D.C. Law 17-222; D.C. Official Code § 46-403) (eliminating a provision that made illegal "(a)ny marriage either of the parties to which shall be incapable, from physical causes, of entering into the married state.").

To the contrary, the District continues to adopt policies moving in the direction of conferring greater equality upon gay and lesbian couples, as well as others who qualify as domestic partners. *See, e.g.*, Domestic Partnership Equality Amendment Act of 2006, effective April 4, 2006 (D.C. Law 16-79), and the Omnibus Domestic Partnership Equality Amendment Act of 2008, effective September 12, 2008 (D.C. Law 17-231). Of specific note is the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, signed by the Mayor on May 21, 2009 (D.C. Act 18-84; 56 DCR 4269), which equalized treatment of spouses and domestic partners under District law by providing legal recognition of the parent-child

relationship for children born to domestic partners. The committee report for the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009 states plainly, "The purpose of this legislation is to formally acknowledge that families created by same-sex couples are not distinguishable from any other family currently recognized under District law." Report of the Committee on Public Safety and Judiciary on Bill 18-66, Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, at 1 (Council of the District of Columbia March 10, 2009).

In sum, petitioners do not demonstrate a likelihood of success on the merits of their appeal. The proposed Referendum itself violates the District's Human Rights Act, as the Board correctly found. Petitioners' reliance on *Dean* is misplaced and ignores the fundamental changes in the law since 1995. Finally, the District's policies do not illustrate a strong public policy opposing recognition of same sex marriages.

2. Petitioners Have Failed to Establish Irreparable Harm As A Matter of Law.

Petitioners have failed to show irreparable injury, and, in fact, have submitted *no evidence at all* in support of their demand for emergency injunctive relief. As such, the Court may deny petitioners' request without examination of the other factors. *CityFed Fin. Corp. v. Office of Thrift Supervision*, 313 U.S. App. D.C. 178, 58 F.3d 738, 746 (1995).

Notwithstanding this fatal flaw, in determining whether to grant emergency relief, the most important inquiry is that concerning irreparable injury. *Akassy*, 891 A.2d at 309 (*citing Antioch*, 418 A.2d at 109); *Zirkle*, 830 A.2d at 1256 (same). "An injunction should not be issued unless the threat of injury is *imminent and well-founded . . . .*" *Id.* at 1256 (emphasis added). *Cf. Cuomo v. U.S. Nuclear Reg. Comm'n*, 249 U.S. App. D.C. 54, 772 F.2d 972, 974 (1985) (*per*

curiam) ("[a] stay may be granted with either a high probability of success and some injury, or *vice versa*."). *But cf. American Bankers Ass'n v. National Credit Union Admin.*, 38 F.Supp.2d 114, 141 (D.D.C. 1999) (absent a "substantial likelihood" of success on the merits, "there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review.") (quoting *Holiday Tours, Inc.*, 559 F.2d at 843).

Petitioners claim that without a preliminary injunction here, "the people of D.C. will be deprived of their right of referendum." P.Mem. at 12. Regardless of whether that "right" is understood in constitutional terms (and regardless of petitioners' lofty pronouncements on the "paramount importance" of the right of referenda), as codified in the District it is subject to more substantial limitations than other jurisdictions. *See, e.g.*, Mem.Op. at n.23; *Atchison v. District of Columbia*, 585 A.2d 150, 156 (D.C. 1991) ("[T]he electorate's power to adopt initiatives is coextensive with the power of the legislature to adopt legislative measures, but it is not more than that." (internal quotations and citations omitted)).

To the extent petitioners' claim may be read to imply an infringement of any constitutional rights, they have similarly failed to meet their burden. *See, e.g.*, *Wagner v. Taylor*, 266 U.S. App. D.C. 402, 836 F.2d 566, 577 n. 76 (1987) ("[I]n cases involving a claim by movant of interference with protected freedoms or other constitutional rights, . . . the finding of irreparable injury cannot meaningfully be rested on a mere contention of a litigant."); *Veitch*, 135 F.Supp.2d at 37 (violation of constitutional rights is not itself an irreparable harm) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Ashland Oil, Inc. v. FTC*, 409 F.Supp. 297, 307 (D.D.C. 1976) ("[T]he required showing of irreparable injury is not eliminated simply by virtue of a claim alleging violation of statutory or constitutional rights."), *aff'd*, 548 F.2d 977 (D.C.Cir.1976).

Moreover, imminent violation of constitutional rights—even if proven—does not, by itself, constitute irreparable injury. *Chaplaincy of Full Gospel Churches v. England*, 372 U.S. App. D.C. 94, 454 F.3d 290, 301 (2006) (holding that, "in this court, as in several others, there is no *per se* rule that a violation of freedom of expression *automatically* constitutes irreparable harm.") (emphasis in original). *See also Mills v. District of Columbia*, 584 F.Supp.2d 47, 62 (D.D.C. 2008) ("Our Circuit has provided that in cases involving plaintiffs seeking injunctive relief for alleged constitutional violations the plaintiffs' claim for irreparable harm is directly contingent on their showing a substantial likelihood of success on the merits.") (citations omitted).

Petitioners have failed to meet the dramatic burden of showing irreparable harm, and therefore their motion for a preliminary injunction must fail.

3. The Balance of Equities Favors the Denial of the Injunctive Relief Sought.

Petitioners here seek to enjoin Congress and the District's normal legislative process.

The balance of equities tips decidedly in favor of the District here.

"[A]ny time a State [or local government] is enjoined by a court from effectuating statutes enacted by the representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). *See also Greene*, 806 A.2d at 223 (*quoting New Motor Vehicle Bd.*).

If petitioners' relief were to be granted, the door would be opened to allow every person unhappy with the results of the political process to simply ignore that process and go straight into this Court. In these circumstances, the District enjoys the balance of the equities in its favor.

4. The Public Interest Favors the Defendants.

It is petitioners' self-interest, not the public interest, which is at the root of the Complaint. The public interest favors denying the motion for emergency injunctive relief.

The public interest lies with the District, and allowing legislation approved by the elected branches of government to become law.

While for "several hundred years" courts sitting in equity have had the discretion to weigh the public interest in granting or denying injunctive relief, such courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 496 (2001) (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944) and *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

As noted, the public consequences of an injunction here would be particularly ill-received, as any citizen would then be encouraged to ignore the mandated methods of overturning District law (and the political process) and run straight into court.

Notwithstanding that petitioners has proffered no proof at all of any injury, "[w]here an injunction may adversely affect a public interest, the Court, in its exercise of discretion, may withhold such relief even though such denial may prove burdensome and cause hardship to the petitioner." *Marine Transport Lines, Inc. v. Lehman*, 623 F.Supp. 330, 334–35 (D.D.C. 1985) ("The award of such relief is not a matter of right, even though the petitioner claims and may incur irreparable injury.").

For the reasons discussed herein, "[i]t is in the public interest to deny injunctive relief when the relief is not likely deserved under the law." *Hubbard v. United States*, 496 F.Supp.2d 194, 203 (D.D.C. 2007) (quoting *Qualls v. Rumsfeld*, 357 F.Supp.2d 274, 287 (D.D.C. 2005)).

III. Conclusion

For the foregoing reasons, the District moves to deny petitioners' Motion for a Preliminary Injunction and dismiss the Petition. A proposed Order is attached hereto.

DATE: June 24, 2009

Respectfully submitted,

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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, Respondent.	2009 CA 004350 B Judge Judith E. Retchin Calendar 14

ORDER

Upon consideration of the Petitioner for Review of Agency Decision, Petitioners' Motion For Preliminary Injunction, the Memoranda of Points and Authorities in Support thereof and in opposition thereto, the District of Columbia's Motion to Dismiss, the entire record herein, and it appearing that the relief should be denied, it is hereby:

ORDERED, that the Motion for a Preliminary Injunction be, and hereby is, DENIED, for the reasons stated in the District's Memorandum of Points and Authorities in Opposition, and it is

FURTHER ORDERED, that the Petition for Review of Agency Decision is hereby DENIED, for the reasons stated in the District of Columbia's Motion to Dismiss.

SO ORDERED.

DATE: _____

_____
JUDITH E. RETCHIN
Associate Judge
D.C. Superior Court