SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

HARRY R. JACKSON, JR., ROBERT KING, WALTER E. FAUNTROY, JAMES SILVER, ANTHONY EVANS, DALE E. WAFER, MELVIN DUPREE, AND HOWARD BUTLER Petitioners, v. DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, Respondent.	Civil Action No. 0008613-09 Judge Judith N. Macaluso Calendar 9

INTERVENORS TREVOR S. BLAKE, II, JEFF KREHELY, AMY HINZE-PIFER, REBECCA HINZE-PIFER, VINCENT N. MICONE, III, THOMAS F. METZGER, REGINALD STANLEY, ROCKY GALLOWAY, D.C. CLERGY UNITED, AND, THE CAMPAIGN FOR ALL D.C. FAMILIES' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THEIR CROSS-MOTION FOR SUMARY JUDGMENT

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INTRODUCTION

Marriage is a "fundamental freedom" and one of the "basic civil rights of man." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Today, many lawfully-married same-sex couples enjoy the rights, privileges, and obligations of full legal recognition of their marriages within the District of Columbia. Earlier this year the D.C. Council overwhelmingly voted to recognize the validity of same-sex marriages from other jurisdictions; and, today, Mayor Adrian Fenty signed legislation, passed with overwhelming support by the D.C. Council, which will extend the full right to marry to all otherwise eligible persons, irrespective of their sexual orientation. Petitioners seek to undo those protections and to treat those marriages as inferior **solely** on the basis of those couples' sexual orientation.

Petitioners' proposed "Marriage Initiative of 2009" violates the fundamental tenet of nondiscrimination that has been established in D.C. law for more than thirty years and that has provided for the inclusion of all people within the equal protection of our laws. Because the proposed Initiative would invalidate existing marriages and discriminate against D.C. families – solely on the basis of the affected couples' sexual orientations – the Intervenors oppose the Petition and the Motion for Summary Judgment.

The effect of the proposed initiative would be to deny the full faith and credit which the District of Columbia **now** extends to **all** marriages lawfully entered in other jurisdictions and to block the Council's recent extension of the fundamental right to marry to people regardless of their sexual orientation. Presently, several states and countries celebrate both opposite-sex and same-sex marriages, including the following: Connecticut, Iowa, Massachusetts, Vermont, New Hampshire, Belgium, Canada, the Netherlands, Norway,

South Africa, Spain, and Sweden.[1] Anyone married in those jurisdictions—regardless of sexual orientation—is entitled to have their marriages recognized while in the District of Columbia. And, as a result of the D.C. Council's adoption of a same-sex marriage law earlier this week and the Mayor's subsequent approval, it is expected that the District of Columbia will begin issuing marriage licenses to all eligible couples, regardless of their sexual orientations, within a few months.

The Intervenors' interest in this litigation— as set forth in the Motion to Intervene or in the Alternative to File an Amicus Brief— is substantial and concrete. The individual Intervenors include Trevor S. Blake, II, Jeff Krehely, Amy Hinze-Pifer, Rebecca Hinze-Pifer, Vincent N. Micone, III, Thomas F. Metzger, each of whom are D.C. residents lawfully married in other jurisdictions, as well as Reginald Stanley and Rocky Galloway, who are D.C. residents who wish to be married for the benefit of themselves and their children. Joining these individual Intervenors are D.C. Clergy United, who seek to extend their freedom to practice their religion without legal restrictions on the rights of individual church members to celebrate same-sex marriages; and the Campaign for All D.C. Families, which represents a broad coalition of citizens and community organizations who stand with the D.C. Council and the Mayor in support of marriage equality for all D.C. residents.[2]

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[1] New Hampshire is set to celebrate same-sex marriages beginning in January of 2010.

[2] Organizations affiliated with the Campaign for All D.C. Families include the following: American Civil Liberties Union of the Nation's Capital, The DC Coalition of Black LGBT, DC for Marriage, DC Young Democrats, Dignity Washington, Family Equality Council, the Gay and Lesbian Activist Alliance, Gay District, The Gertrude Stein Democratic Club, The Human Rights Campaign, Log Cabin Republicans, National Black Justice Coalition, National Center for Lesbian Rights, The National Gay and Lesbian Taskforce, The National LGBT Bar Association, the National Organization for Women, PFLAG National, Pride At Work AFL-CIO, The Rainbow Families, and Transgender Health Equality.

This is Petitioners' second attempt to misuse the electoral process in an effort to compel discrimination against gay, lesbian and bisexual couples living in the District of Columbia. While Petitioners try to veil their efforts with the vestments of participatory democracy, their unmistakable goal is to use the initiative process to deprive certain D.C. residents of the rights, duties, and protections conferred by law on married couples and their children because of their sexual orientation. Petitioners' arguments fail for two principal reasons:[3]

First, the Board of Elections and Ethics properly concluded that the proposed Initiative contains an improper subject matter for an initiative because it authorizes, or would have the effect of authorizing, prohibited discrimination. Under D.C. law, such invidious legislation is beyond the proper scope of the initiative power.

Second, Petitioners' new and extraordinary request that the Court invalidate the Human Rights Act restriction of the Initiative, Referendum, and Recall Procedures Act (the "IPA") lacks proper legal support. The legislative power of the Council is plenary, particularly in electoral matters; and this narrow restriction on the referendum and initiative power is supported by the plain text of the statute, its accompanying legislative history, and the applicable case law.

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[3] To the extent the Board of Elections and Ethics and the District of Columbia Office of the Attorney General present additional reasons for denying Plaintiffs' motion for summary judgment and/or dismissing the writ, the Intervenors join them in those arguments.

BACKGROUND

A. Petitioners unsuccessfully tried once already to place the Council's extension of full comity to out-of-state marriages on the ballot.

On May 5, 2009, the District of Columbia Council ("the Council") approved, by a vote of 12-1, the Jury and Marriage Amendment Act of 2009 ("JAMA"). JAMA amended the consanguinity provisions of D.C. Code §§ 46-401(1)-(2) to recognize "marriage legally entered into in another jurisdiction between two persons of the same sex that is recognized as valid in that jurisdiction." Mayor Adrian Fenty signed the JAMA the following day; and, after expiration of the congressional review period, the JAMA became law on July 6, 2009. *See* D.C. Code § 46-405.01.

Three weeks after the Mayor signed the JAMA, Petitioners Harry R. Jackson, Jr., Walter E. Fauntroy, Dale E. Wafer and Melvin Dupree submitted a proposed referendum to the Board, which purported 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." The Board rejected the proposed referendum on June 15, 2009, concluding that it failed to present a proper subject matter "because it would authorize discrimination prohibited under the Human Rights Act." Board Mem. Op. and Order, *In Re: Referendum Concerning the Jury & Marriage Amendment Act of 2009,* 09-004 (June 15, 2009) (Affidavit of Jonathan Herczeg ("Herczeg Aff."), Ex. A).

On June 17, 2009, the petitioners filed a Petition for Review of Agency Decision and for Writ in the Nature of Mandamus in this Court. The petitioners also sought an injunction to stay the effective date of the JAMA. The District intervened in support of the Board and filed a motion to dismiss.

After receiving extensive briefing from the parties on the merits, this Court granted the motion to dismiss and denied the petitioners' various claims for relief on June 30, 2009. *Jackson v. District of Columbia Bd. of Elections & Ethics*, No. 2009 CA 004350 B (D.C. Sup. Ct. 2009) (slip op.) (hereinafter "*Jackson I*") (Herczeg Aff., Ex. B). This Court concluded that the proposed referendum would authorize discrimination in violation of the Human Rights Act because it "asks voters to decide whether the District should recognize same-sex marriages—which are legally indistinguishable from opposite-sex marriages in the jurisdictions in which they were performed—solely on the basis of the person's gender or sexual orientation." *Id.* Accordingly, this Court denied the writ of mandamus, rejected petitioners' request for a preliminary injunction, and affirmed the decision of the Board, holding "that the proposed referendum would violate the District of Columbia Human Rights Act." *Id.* at 2. The *Jackson I* petitioners did not appeal.

B. The Marriage Initiative of 2009 is Petitioners' second attempt to bring discrimination to the District.

Having lost in the courts once already, Petitioners Jackson, Fauntroy, Wafer, and Dupree, and four new petitioners filed a new proposal with the D.C. Board of Elections and Ethics on September 1, 2009, which sought to put an initiative measure on the ballot. That initiative, the "Marriage Initiative of 2009" (hereinafter, "the Initiative") seeks to establish that "only marriage between a man and a woman is valid or recognized in the District of Columbia." Pet'r. Mot., Ex. A. Following the required public notice, the Board held a hearing on October 26, 2009, as to whether the Initiative presented a proper subject for initiative. The Board heard testimony from numerous individuals and organizations, including testimony from 60 witnesses.

The Board issued its decision on November 17, 2009, ruling that the Initiative failed to present a proper subject for initiative because it would authorize discrimination prohibited under the Human Rights Act. Board Mem. Op. and Order, *In Re: Marriage Initiative of 2009,* 09-006 (hereinafter, "Board Opinion") (Herczeg Aff., Ex. C). After a thorough consideration of the legislative history, context, and intent of the Human Rights Act, the Board determined that the Initiative did not meet the "proper subject matter" requirement. *Id.* at 10-11. Additionally, the Board rejected the argument that it was estopped from reaching its conclusion because it had previously, in the context of responding to petitioners' request for an injunction, observed that the petitioners' harm was not irreparable because they could seek redress through an initiative. *Id.* at 11-12.

Petitioners now seek further review by this Court. On November 18, 2009, petitioners filed a Petition for Review of Agency Decision and for Writ in the Nature of Mandamus and, soon thereafter, filed for summary judgment.

ARGUMENT

I. THE PROPOSED INITIATIVE WOULD AUTHORIZE, OR HAVE THE EFFECT OF AUTHORIZING, DISCRIMINATION IN VIOLATION OF THE HUMAN RIGHTS ACT.

There can be no doubt that the Board of Elections and Ethics properly determined that Petitioners' Initiative would authorize, or have the effect of authorizing, discrimination prohibited by the Human Rights Act. Indeed, the only effect of the Initiative, if passed, would be to deny same-sex couples the same legal recognition granted to opposite-sex couples. Accordingly, the Board's determination is consistent with its statutory obligations under the IPA and long-standing law of the District of Columbia. Petitioners' contentions to the contrary are legally and factually unsupportable.

A. The Board properly concluded that the Initiative would authorize, or would have the effect of authorizing, discrimination prohibited under the Human Rights Act.

The statutory obligations of the Board of Elections and Ethics with respect to initiatives are set forth in The Initiative, Referendum, and Recall Procedures Act (the "IPA"). D.C. Code §§ 1-1001.03; 1-1001.16. The IPA delegates to the Board the authority to review proposed initiatives and referenda and requires the Board to refuse to accept any proposed measures which fail to comply with certain requirements:

> The Board shall refuse to accept an initiative measure if it: finds that it is not a proper subject of initiative . . . under the terms of Title IV of the District of Columbia Home Rule Act or upon any of the following grounds: (A) The verified statement of contributions has not been filed pursuant to §§ 1-1102.04 and 1-1102.06; (B) The petition is not in the proper form established in subsection (a) of this section; (C) **The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2 [i.e., the Human Rights Act]**; or (D) The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46.

D.C. Code § 1-1001.16(b)(1)(A)-(D) (emphasis added). Here, the Board properly applied the law and ruled that the Initiative was not a proper subject for initiative.

The Board first observed that "[w]hile neither the HRA nor its legislative history explicitly mentions same-sex marriage, it is without question that the HRA must 'be read broadly to eliminate the many proscribed forms of discrimination in the District.'" Board Op., at 11 (quoting *Dean v. District of Columbia,* 653 A.2d 307, 320 (1995)). The Board's interpretation of the Human Rights Act is consistent with well-established precedent and the legislative history. The Court of Appeals has explained that the District's Human Rights Act is a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds." *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732

(D.C. 2000). And as an expansive and remedial statute, the Human Rights Act is to be expansively construed. *See Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 889 (D.C. 1998) (citing *Simpson v. District of Columbia Office of Human Rights,* 597 A.2d 392, 398 (D.C. 1991)).

The broad reach of the Human Rights Act is reinforced by its legislative history. The Act initially existed in its present form in 1973 as "A Regulation Governing Human Rights." DCRR Tit. 34 (1973). Following passage of the Home Rule Act, the Council sought to ensure the continuing validity of these human rights protections. The Act was described as "**among [the District's] most important laws**" and passage was intended to "underscore the Council's intent that the elimination of discrimination within the District of Columbia should have 'the highest priority' and that the Human Rights Act should therefore be read in harmony with and as supplementing other laws of the District." Comm. on Public Services and Consumer Affairs, Report on Bill No. 2-179, The Human Rights Act of 1977, at 3 (July 5, 1977) (Herczeg Aff., Ex. D) (emphasis added). The Human Rights Act's "importance and noncontroversial character . . . is attested to by the fact that twelve of the thirteen Councilmembers . . . cosponsored the . . . bill." *Id.* at 1.

The Board next observed that "[s]ince JAMA's enactment, the District recognizes same-sex marriages that have been properly entered into, performed, and recognized by other jurisdictions." Board Op., at 11. These marriages are recognized as consistent with well-established principles of comity.[4] With the enactment of the JAMA, the

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[4] *See, e.g., Mitchell v. Mitchell,* 310 A.2d 837 (D.C. 1973); *Jay v. Jay*, 212 A.2d 331 (D.C. 1965); *Rosenbaum v. Rosenbaum*, 210 A.2d 5, 7 (D.C. 1965). This principle of comity exists as a courtesy "among political entities (as nations, states, or courts of different jurisdictions), involving esp[ecially] mutual recognition of legislative, executive and judicial (continued...)

District expressly extended that recognition to same-sex marriages. D.C. Code § 46-405.01. Thus, out-of-state marriages of opposite-sex couples and same-sex couples now receive equal treatment in the District. The Initiative, if passed, would result in such couples receiving unequal treatment under District law.

The Board then noted that "couples who fall within JAMA's purview are entitled to the same benefits of marriage that are afforded heterosexual married couples, and the denial of these benefits to married couples on the basis of the sexual orientation of the individuals who comprise the couples now constitutes a 'proscribed form of discrimination.'" Board Op., at 11. The Board, therefore, concluded "that the Initiative authorizes or would authorize discrimination proscribed by the HRA and is therefore not a proper subject for initiative." *Id.*

The Boards' application of the Human Rights Act is consistent with a plain reading of the statute. It 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 reasons of . . . **sexual orientation** ....

D.C. Code § 2-1401.01 (emphasis added). On its face, the Initiative would deny married couples who reside in the District recognition of their out-of-state marriages for no reason other than their sexual orientation. Moreover, the Initiative would result in discrimination

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acts." Black's Law Dictionary 261 (7th ed. 1999); *see also In re Penning*, 930 A.2d 144, 153 n.17 (D.C. 2007) (defining "comity" as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws" (quoting *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895))).

against married same-sex couples with respect to myriad public and private benefits. *See, e.g.*, D.C. Code § 2-1401.02 ("spouse" included in definition of "family member"); D.C. Code § 32-704 (hospital visitation); D.C. Code § 47-1803.02 (tax benefits to employer benefits in health insurance); D.C. Code § 14-306 (spousal testimonial privilege); D.C. §§ 19-101.03-0.5 (spousal rights to inheritance). Such a result cannot be squared with well-established case law holding that the Human Rights Act is a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds." *Executive Sandwich Shoppe*, 749 A.2d at 732.

Petitioners' contention that the Initiative comports with the Human Rights Act lacks merit. Their argument rests upon the obviously faulty premise that there is no discrimination because the Initiative "does not preclude those who define themselves as homosexual from entering a marriage—the union between a man and a woman." Pet'r. Mem. at 35. Petitioners' suggestion that their proposed measure is not discriminatory because gay men, lesbians and bisexuals are free to marry a person of the opposite sex echoes the sophistry of the justifications formerly advanced in defense of anti-miscegenation statutes. *See Loving v. Virginia*, 388 U.S. 1, 8 (1967) (observing that "the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race.").

Petitioners erroneously suggest (at 4) that their ballot measure seeks to preserve the legal status quo. But the realities of marriage and the state of law in the District of Columbia have changed. Same-sex marriages performed in other jurisdictions are recognized by D.C. law – specifically the JAMA. And, as a result of the Mayor's signing of

the Religious Freedom and Marriage Equality Act of 2009, same-sex marriages are expected to be lawfully performed under D.C. law, starting in the next few months. Accordingly, the proposed Initiative would repeal existing legal protections recently enacted on behalf of same-sex married couples living in D.C., as well as same-sex couples aspiring to marry in the District.[5]

Moreover, Petitioners fail to acknowledge—indeed, they **never** address—the discriminatory treatment their proposed initiative would have on same-sex couples in the District of Columbia who were already lawfully married in other jurisdictions. Those couples, including several of the Intervenors, could be stripped of their legal marital status and deprived of their rights and benefits that have lawfully been conferred upon them by those jurisdictions. The only basis for this discrimination is those couples' sexual orientation. The Human Rights Act forbids such a grossly discriminatory and disruptive result.

B. The Board's decision does not conflict with *Dean v. District of Columbia.*

Petitioners contend that the Board Opinion below is inconsistent with *Dean v. District of Columbia,* 653 A.2d 307 (D.C. 1995); this argument is unpersuasive for several reasons. The Court of Appeals in *Dean* faced a very different question concerning whether, in 1990, a court clerk violated the Human Rights Act by refusing to grant a marriage license to a same-sex couple. *See Dean*, 653 A.2d at 320. The Court of Appeals, in a divided plurality opinion, concluded that the Human Rights Act did not require the District to grant a marriage license to a same-sex couple after finding that the Council did not intend for the

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[5] Such marriages will have to await the expiration of the 30-day congressional review before the new legislation becomes fully effective. D.C. Code § 1-1-206.02(c).

Human Rights Act to change the definition of marriage. *Id.* at 319-20. But the court in *Dean* never addressed the circumstances presented here, namely, whether denying recognition to civil marriages lawfully performed in other jurisdictions solely on the basis of the couple's sexual orientation would violate the Human Rights Act. In addition, the court in *Dean* reached its decision in the context of a substantially different factual background and legal framework from that presented today.

Appellants argued in *Dean* that a D.C. government agency "unlawfully denied [them] an 'equal opportunity' to participate in marriage, an important 'aspect of life'" in violation of the Human Rights Act. *Dean,* 653 A.2d at 318. The Court of Appeals rejected this argument, finding that while "the Council undoubtedly intended the Human Rights Act to be read broadly to eliminate the many proscribed forms of discrimination in the District, we cannot conclude that the Council ever intended to change the ordinary meaning of the word 'marriage' simply by enacting the Human Rights Act." *Id.* at 320. In light of the Court's finding that the legislative definition of marriage in the District "requires persons of opposite sexes," it opined that "there cannot be discrimination against a same-sex marriage if, by independent statutory definition extended to the Human Rights Act, there can be no such thing." *Id.* Nowhere did the Court consider whether it would be discriminatory for D.C. not to recognize valid marriages from other jurisdictions.

Fourteen years have passed since *Dean*, and the "common understanding" of the word "marriage" has evolved as have the social understandings and legal implications of being gay, lesbian, bisexual, and transgendered. Shortly after *Dean* was decided, the Supreme Court struck down an initiative passed by Colorado voters which had the effect of excluding gay men, lesbians and bisexuals from the political process. *See Romer v. Evans*,

517 U.S. 620 (1996). A few years later, the Supreme Court struck down a Texas sodomy statute and overturned its holding in *Bowers v. Hardwick,* 478 U.S. 186 (1986), concluding the "right to liberty under the Due Process Clause gives [gay men, lesbians, and bisexuals] the full right to engage in their conduct without intervention of the government." *Lawrence v. Texas,* 539 U.S. 558, 578 (2003).

During the past several years, a number of states have found (legislatively or judicially) that human rights and equal protection under the law compel the conclusion that same-sex couples cannot be excluded from the rights and recognition of civil marriage. *See* Vt. Stat. Ann. tit. 15, § 8 ("Marriage is the legally recognized union of two people."); *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009) ("Consequently, the language in Iowa Code section 595.2 limiting civil marriage to a man and a woman must be stricken from the statute, and the remaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage."); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008) ("Like these once prevalent views, our conventional understanding of marriage must yield to a more contemporary appreciation of the rights entitled to constitutional protection. Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice."); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) ("We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.").

Further distinguishing the holding in *Dean* is fact that, in the interim, **the Council has expressly expanded D.C. law to encompass same-sex relationships.** The

Council has done so directly by adopting both JAMA and the Religious Freedom and Civil Marriage Equality Act of 2009, the latter of which would effectively overrule *Dean* by legislation. The Council has also done so deliberately through amending those portions of the D.C. Code cited in *Dean* for the proposition that the law limited marriage to opposite-sex couples. *See, e.g.*, D.C. Code §§ 16-901 (adding definition of "domestic partner" and "domestic partnership" to definitions of divorce, and substituting "spouse or domestic partner" for "husband and wife" in parallel provision § 14-306), 16-911 (substituting the "spouse or domestic partner" for "husband or wife" in pendent lite relief provisions), 16-912 (repealing provisions related to enforcement of alimony, including references to "husband" and "wife"), 16-913 (substituting "when divorce or legal separation is granted, or when a termination of a domestic partnership becomes effective" for "when a divorce is granted on the application of the husband or the wife"), 16-916 (substituting "spouse or domestic partner" for "husband or wife" in maintenance provisions), 46-601(substituting "spouse or domestic partner" for "husband or wife" for the purposes of enumerated property rights), and 46-718 (repealing provision for "husband and wife as witnesses").

In addition, the Human Rights Act has since been amended to apply to include any "service" and "benefit" provided by any D.C. governmental agency, which would surely include licenses granted by the Marriage License Bureau. *See* DC Code § 2-1402.73; *Seafarers Int'l. Union of North Am. v. U.S. Coast Guard*, 81 F.3d 179, 184, 317 U.S. App. D.C. 84, 89 (D.C. Cir. 1996) (recognizing the "benefits" conferred by a government license). In short, there is no longer support in D.C. law for the proposition that

Dean is a continuing basis for excluding same-sex marriages from the protective scope of the Human Rights Act.[6]

II. THE IPA'S RESTRICTION ON DISCRIMINATORY BALLOT MEASURES IS A PROPER EXERCISE OF THE COUNCIL'S LEGISLATIVE POWER.

Having failed to show both in *Jackson I* and again here that their proposed ballot measures do not violate the Human Rights Act, Petitioners for the first time now launch a facial attack on these long-standing human rights protections. Petitioners invent a conflict between the IPA and the Charter Amendment to advance their recently discovered view that the initiative process grants voters the unfettered right to impose discrimination upon protected classes of people. Neither the Home Rule Act nor the Charter Amendments Act supports this draconian and unprecedented conclusion.

Petitioners suggest (at 14) that the issue here is whether the Charter Amendments Act grants the Council the authority to preclude initiatives that violate the

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6 Petitioners misapply *Nat'l Org. for Women v. Mutual of Omaha In. Co., Inc.*, 531 A.2d 274 (D.C. 1987) ("NOW") and *Evans v. United States*, 682 A.2d 644 (D.C. 1996). The *NOW* case involved a challenge to gender-based differentials in insurance premiums that were established by a law which predated the Human Rights Act. In upholding the challenged law, the court put great weight on the actions of the Council following the enactment of the Human Rights Act wherein the Council considered whether life insurance set-backs for women (which resulted in higher premiums) violated the Human Rights Act; the Council decided that they did not and then actually increased the set-backs for women from three to six years. *Id.* at 278. In *Evans*, the court addressed the question of whether preemptory challenges on the basis of age were a violation of the Human Rights Act. In concluding that they were not, the court again relied on the expressed intent of the Council. *Evans*, 682 A.2d at 648-49.

Contrary to *NOW* and *Evans*, the Council's intent with respect to same-sex marriage has evolved quite significantly since the Court's decision in 1995. During the intervening years, the Council has repeatedly (and clearly) underscored its position in support of the right of all individuals to marry, as most recently demonstrated by the enactment of JAMA and the Religious Freedom and Civil Marriage Equality Act of 2009. Though Petitioners mistakenly focus on the state of the law in 1995 when *Dean* was decided, under the legislative intent-based analysis outlined by the courts in *NOW* and *Evans*, it is the Council's present intention that same-sex marriages be granted protection equal footing under the law that is relevant.

Human Rights Act; they have the legal analysis backward. The correct question before the Court is whether the Charter Amendments Act **restricts** the Council's plenary legislative authority, including the authority to ensure that any initiatives are consistent with long-standing human rights protections in the District of Columbia.

A. Petitioners have waived their challenge to the validity of the IPA's Human Rights Act provision.

As a threshold matter, Petitioners have waived their novel argument because Petitioners never challenged the facial validity of the Human Rights Act restriction in the proceeding before the Board of Elections and Ethics. It is a well-established principle of D.C. law that this Court need not consider any argument that was not raised in the proceeding below. *See Price v. District of Columbia Board of Elections*, 645 A.2d 594, 600 n.17 (D.C. 1994) (declining to consider laches argument not raised by petitioner before the Board of Elections and Ethics); *Daniel v. District of Columbia Ins. Admin.*, 639 A.2d 590 (D.C. 1994) (declining to consider petitioner's argument that the agency had exceeded its statutory authority); *Hughes v. District of Columbia Dep't of Employment Servs.*, 498 A.2d 567, 570 (D.C. 1985) (holding that principles of "[a]dministrative and judicial efficiency require that all claims be first raised at the agency level to allow appropriate development and administrative response before judicial review.").

B. Petitioners cannot show beyond a reasonable doubt that there is direct and irreconcilable conflict between the Charter Amendments Act and the IPA.

To prevail on merits of their new argument, Petitioners carry the heavy burden of proving the existence of a conflict **beyond a reasonable doubt**. *See Oliver v. United States*, 682 A.2d 186, 191 (D.C. 1996). This is because it is a fundamental principle of statutory construction that "[a]cts of the legislature are presumptively valid." *District of*

Columbia v. Beretta, U.S.A., Corp., 872 A.2d 633, 655 (D.C. 2005). Accordingly, "'every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt.'" *Oliver,* 682 A.2d at 191 (quoting *Hornstein v. Barry*, 560 A.2d 530, 533-34, & n.5 (D.C. 1989)). "[T]hus a court may invalidate an otherwise lawful enactment 'only upon a plain showing that [the legislature] has exceeded its constitutional bounds.'" *Beretta*, 872 A.2d at 655 (quoting *United States v. Morrison*, 529 U.S. 598, 607 (2000)) (alterations in original).

D.C. courts consider the Charter Amendments to be the functional equivalent of constitutional amendments. *See Convention Ctr. Referendum Comm. v. District of Columbia Bd. of Elections & Ethics*, 399 A.2d 550, 551 (D.C. 1979) ("*Convention Center I*"). Therefore, the IPA may not be read to amend or contravene the Charter Amendments. *Convention Ctr. Referendum Comm. v. District of Columbia Bd. of Elections & Ethics*, 441 A.2d 889, 915 (D.C. 1981) ("*Convention Center II*"). Nevertheless, basic principles of statutory construction require the Petitioners to persuade the Court that there is a conflict between the Charter Amendment and the IPA and also that no plausible interpretation will save the IPA. *See Oliver,* 682 A.2d at 191.

Notably, the Charter Amendments Act does not expressly preclude the Council from imposing a non-discrimination requirement upon initiatives. The Charter Amendments Act also does not purport to restrict the D.C. Council's plenary legislative authority to prevent discrimination in the District of Columbia. And the Charter Amendments Act does not carve out the initiative process from the Council's authority over all matters relating to elections in the District. Because the Charter Amendments Act

contains no such express limitations on Council's power, the IPA's non-discrimination requirement does not compel a conflict.

The degree and type of statutory inconsistency necessary to establish a conflict between the Charter Amendment Act and the IPA is exemplified by *Price v. District of Columbia Bd. of Elections & Ethics*, 645 A.2d 594 (D.C. 1994), the **only** case where the Court of Appeals has ever found a conflict between the Charter Amendments Act and the IPA. In *Price,* the Court of Appeals found that a proposed ballot initiative would meet the minimum number of signatures requirement under the express terms of the Charter Amendment Act, but would not meet the signature requirement under the terms of the IPA. Accordingly, the Court of Appeals found a direct conflict between the language of the IPA and the Charter Amendments Act because each required a different **number** of signatures in support of the initiative. *Id.* at 598. *Price* stands for the unremarkable—and uncontested—proposition that where it is impossible to give effect to both the express provisions of the Charter Amendments Act and the express provisions of the IPA, the former takes precedence. *Id.* at 598. Here, the Court may give effect to both the provisions of the Charter Amendments Act and the IPA by concluding that a voter proposed initiative may not be used to vitiate the non-discrimination protections conferred by the District's Human Rights Act.[7]

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[7] Although Petitioners rely (at 7-9, 15-16) extensively on dictum from *Convention Center II,* that case underscores the flaw in their argument. At issue in *Convention Center II,* was whether a ballot initiative could halt funding for a program already approved by the D.C. Council. *Convention Center II,* 441 A.2d at 892. The Board rejected the initiative on the basis that it would negate or limit a "budget request act of the Council," which was not a proper subject matter under the IPA. *Id.* at 914. Notwithstanding the ambiguity in the Charter Amendments Act and silence in the legislative history concerning whether such initiatives were excluded from the initiative process, the Court of Appeals found that the IPA did not conflict with the Charter Amendments Act and affirmed the Board's determination that the initiative was improper. *Id.*

C. The Council's restriction of initiatives that would undermine human rights protections in D.C. is a proper exercise of its legislative power.

The Council's legislative power and supremacy was left unaltered by the Council's grant of an initiative right to District voters. The Council's decision to prevent the initiative process from being used to abrogate the protections of the Human Rights Act is well within the Council's legislative discretion. Petitioners' attempt to elevate the initiative process so as to place voters on co-equal legislative footing in every respect with the Council is unsupported by the text of the Charter Amendments and the case law.

Analysis of the Council's authority begins with the Home Rule Act:

> Subject to the limitations specified in §§ 1-206.01 to 1-206.04, **the legislative power granted to the District by this chapter is vested in and shall be exercised by the Council** in accordance with this chapter.

D.C. Code § 1-204.04 (emphasis added). In contrast, the Charter Amendments provide a mechanism by which qualified electors "may propose laws,", "may suspend [certain] acts of the Council," and may recall "[a]ny elected officer of the District of Columbia." D.C. Code §§ 1-204.101(a); *id.*, § 1-204.101(b); *id.*, § 1-204.112. While the Charter Amendment sets forth a framework by which legislative acts may be directly accomplished by voters, **no provision expressly vests or affirmatively reserves legislative power to voters to the same extent as granted to the Council.**[8]

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[8] Notably, this is different from the initiative process of other states where the initiative right is expressly plenary. *See, e.g.*, Utah Const., art. IV, § 1 ("(2)(a)(i) The legal voters of the State of Utah . . . ... may: (A) initiate **any desired legislation** and cause it to be submitted to the people for adoption upon a majority vote of those voting on the legislation..."); Maine Const., art. VI, Pt 3, § 18 (providing that "[t]he electors may propose ... **any** bill, resolve or resolution, including bills to amend or repeal emergency legislation but not an amendment of the State Constitution...) (emphasis added). Virtually every State constitution that grants an initiative right to voters also expressly reserves legislative power (continued...)

No language in the Charter Amendments Act expressly grants voters the unfettered right to propose "any law." No provision in the Charter Amendments Act expressly restricts the Council's authority to place subject matter restrictions on ballot measures. And, with one exception, nothing in the Charter Amendments Act suggests the intent to restrict the Council's otherwise plenary legislative authority in any way. *See Atchison v. District of Columbia*, 585 A.2d 150, 155 (D.C. 1991).

In *Atchison,* the Court of Appeals considered whether the Council could use its legislative powers to amend legislation adopted by initiative that granted certain rights to homeless persons. *Id.* at 151. The Plaintiffs alleged that the D.C. Council lacked the power to repeal or substantially amend laws enacted through the initiative process. The Court of Appeals rejected this argument, holding that "[t]he Charter Amendments Act ... imposed only a single express limitation on the Council's legislative powers." *Id.* at 155. That provision precludes the Council from taking legislative action on a matter where voters, through a **referendum**, rejected permanent legislation passed by the Council. *Id.* However, even with respect to referendums, the Council is only so limited for a period of 365 days. *Id.* (citing D.C. Code § 1-284 and § 1-281(b)). In contrast, the Court of Appeals found no similar limitation on the Council's authority with respect to **initiatives,** opining that the Council's "plenary legislative power ... includes the authority to repeal existing legislation, whether or not derived from an initiative." *Id.*

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to the voters. *See* Ariz. Const, art. IV, § 1; Ark. Const., amend. VII; Cal. Const., art. IV, § 1; Colo. Const. art V, § 1; Idaho Const., art. III, § 1; Me. Const., art. IV, § 1; Mass. Const., art. XLVIII, § 1; Mich. Const., art II, § 9; Mo. Const., art. III, § 49; Mont. Const., art. V, § 1; Neb. Const., art. III, § 1; Nev. Const, art XIX, § 2; N.D. Const., art. III, § 1; Ohio Const., art. II, § 2.01; Okla. Const., art. V, § 1; Ore. Const., art. IV, § 1; S.D. Const., art. III, § 1; Utah Const., art VI, § 1; Wash. Const., art. II, § 1. *But see* Alaska Const., art. IX; Wyo. Const. art. I, § 36. There is no comparable reservation of power under D.C. law.

It is therefore clear that while the Charter Amendments Act provides a framework for voters to participate directly in the legislative process, no provisions of the Charter Amendments Act expressly deprive the Council of its legislative supremacy. Where "the Charter Amendments Act intended to shield citizen legislative action" from the Council's legislative purview, "it knew expressly how to do so." *Atchison,* 585 A2d. at 155. Here, no such intent is evinced.

Accordingly, if the Council has full legislative power to amend or repeal any legislation passed by initiative at any time, a fortiori the Council must also have the power to impose a restriction to preclude initiatives that conflict with the District's most fundamental laws.

D. Petitioners' definitional argument does not suffice to justify preempting the Council's plenary legislative power.

Petitioners invert the legal analysis and attempt to shift the question to whether the Charter Amendments Act expressly permits a substantive restriction on the initiative process. But because the Home Rule Act vests the legislative power in the Council, the proper inquiry is whether the Charter Amendments Act evinces any intent to limit the Council's plenary legislative power. As set forth in *Atchison,* the Charter Amendments Act imposes only one such limitation that is not applicable here.

Petitioners base their argument entirely on the statutory definition of an initiative, rather than any affirmative grant of a statutory right. The Charter Amendments Act defines "initiative" as follows:

> 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.

D.C. Code. § 1-204.101(a). Petitioners presume that because "laws appropriating funds" are excluded from the statutory definition of an "initiative," that it must be necessarily implied that **all** other substantive laws are irrevocably fair game for the initiative process and beyond the Council's power to further restrict. [9] Such a sweeping implied restriction on the Council's legislative power fails to meet the high standard for demonstrating a direct conflict between an act of the Council and the Charter Amendments Act. *See Price*, 645 A.2d at 594 (D.C. 1994) (finding a direct conflict where the IPA and the Charter Amendments Act each required a different number of signatures in support of the initiative). There is a presumption of validity here which is particularly difficult to overcome where the Council's legislative power (except where expressly reserved by Congress) is plenary. *See* D.C. Code §§ 1-201.02, 1-203.02, 1-204.04 (granting the District legislative power over all rightful subjects of legislation).

The initiative rights granted by the Charter Amendments Act stand in stark contrast to the broad recall rights granted by the same legislation. Mirroring the statutory framework for the initiative process, the Charter Amendment Act defines a "recall" as a "process by which the qualified electors of the District of Columbia may call for the holding of an election to remove or retain an elected official of the District of Columbia (except the Delegate to Congress for the District of Columbia) prior to the expiration of his or her term. D.C. Code § 1-204.111. The Charter Amendment Act then expressly grants voters the right

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[9] Petitioners attempt (at 9-12) to distinguish between the Council's authority to enact procedural requirements and its authority to enact substantive requirements by relying on Section 7 of the Charter Amendment, D.C. Code § 1-204.107, which required the Council to implement enabling legislation. But this grant of **additional** authority did not reduce Council's existing general legislative authority under Home Rule Act nor its plenary authority over "matters involving or relating to elections." D.C. Code § 1-207.52.

to recall "**[a]ny** elected officer of the District of Columbia government." *Id.*, § 1-204.112 (emphasis added). This demonstrates that where the drafters of the Charter Amendments sought to put the direct participatory rights given to voters beyond the reach of the Council to restrict further, they knew what language to use. No similar statutory grant is given for initiatives.

Under the Charter Amendments Act, once voters approved an initiative or referendum, "the adopted initiative or the act approved by referendum shall be an act of the Council." D.C. Code § 1-204.105. Petitioners read subsequent judicial dicta discussing this provision to mean that District voters are vested with legislative power **equal** to that of the Council. Pet'r Memo. at 7 (citing *Atchison*, 585 A.2d at 155 and *Convention Ctr. II*, 441 A.2d at 897). But the fact that successful ballot measures have the status of legislative acts cannot fairly be read to vest plenary legislative power with the voters. This is confirmed by both *Atchison* and *Convention Ctr. II* in which the Court of Appeals affirmed the Council's ultimate authority over initiatives. In *Atchison*, the Court of Appeals recognized that "legislative power given the Council includes the authority to repeal existing legislation, whether or not derived from an initiative." 585 A.2d at 155. And in *Convention Ctr. II*, the Court of Appeals concluded that the Board's rejection of a proposed initiative was proper because "[i]n contrast with the Council, ... the electorate, by way of initiative, cannot enact every kind of law." 441 A.2d at 893.

The Council's authority to remove a subject matter from the scope of the initiative process is further confirmed by the fact that Congress (which retains independent legislative authority over the District) has similarly imposed restrictions. For example, in *Marijuana Policy Project v. United States*, 304 F.3d 82, 85, 353 U.S. App. D.C. 267, 270

(D.C. Cir. 2002), the D.C. Circuit Court of Appeals upheld the validity of a federal law that precluded D.C. voters from presenting ballot initiatives that would reduce criminal penalties under D.C. law associated with the possession of marijuana. Because neither the Home Rule Act nor the Charter Amendment Act expressly denies the Council this same legislative authority, the Council retains the authority. *See Atchison v. District of Columbia*, 585 A.2d 150, 155 (D.C. 1991) (finding that the Council had the authority to repeal law passed by initiative because "nothing on the face of either the Home Rule Act or the Charter Amendments Act purports to deny the Council that authority.").[10]

Given the absence of any express conflict between the Charter Amendments Act and the IPA, it is not surprising that for more than thirty years District of Columbia courts have respected and applied this restriction on the initiative and referendum process. For example, in *Hessey v. Burden*, 615 A.2d 562, 579 (D.C. 1992), the Court of Appeals affirmed the Board's determination that an initiative states a proper subject matter because holders of income-producing properties were not a protected class and the initiative also would not result in improper discrimination against such a class. However, at no point in *Hessey* did the Court of Appeals call into question the facial validity of the IPA's Human Rights Act restriction on the initiative power. *See also Comm. for Voluntary Prayer v.*

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[10] Frustrated with the requirement that an initiative cannot authorize discrimination, Petitioners argue that the IPA's requirement infringes on the people's right to vote. Pet'r. Mem. at 13-17. Petitioners' logic is flawed. If Petitioners believe the IPA unduly restrains the initiative right, Petitioners could have sought to repeal or amend the Human Rights Act restriction in the IPA, either through an initiative or the political process. Moreover, to the extent Petitioners believe that the Council has gone too far in granting equal rights to gay and lesbian couples, it is ultimately the electoral process or the recall right that "can be relied on to curb the defiance of the popular will." *Atchison*, 585 A.2d at 156. But Petitioners should not be permitted to thwart the legislative process by restricting the Council's authority to limit initiatives that would violate the Human Rights Act if adopted.

Wimberly, 704 A.2d 1199, 1203 n.9 (D.C. 1997) (noting availability of HRA restriction as argument for initiative's invalidity, but deciding on alternative grounds). Petitioners would effectively undo these protections not only on the basis of a person's sexual orientation, but also for all other classes protected by long-established D.C. law, including: race, color, religion, national origin, sex, age, marital status, personal appearance, family responsibilities, matriculation, political affiliation, physical handicap, source of income, and place of residence or business. D.C. Code § 2-1401.101. *See* Pet'r. Mem. at 16-17.

E. The Council has plenary authority over election matters.

Although the Council's plenary legislative authority provides a sufficient basis to uphold the Human Rights Act restriction, the Council's specific authority with respect to elections independently supports the propriety of this subject matter restriction. *See* D.C. Code § 1-207.52. Relying **expressly** its authority over elections, the Council enacted the IPA and the subject matter restriction contained therein. Committee Report on Bill 2-317, Initiative, Referendum, and Recall Procedures Act of 1978, at 11-12 (Council of the District of Columbia, May 3, 1978).

Section 752 of the Home Rule Act grants the Council broad authority with respect to all matters relating to elections:

> **Notwithstanding any other provision of this chapter or any other law,** the Council shall have authority to enact any act or resolution with respect to matters involving or relating to elections in the District.

D.C. Code § 1-207.52 (emphasis added).

The scope of Section 752 is both clear and broad. With respect to "matters involving or relating to elections," the Council has authority to pass "any act or resolution." The use of the statutory phrase "related to" is consistently found by courts as signaling a

broad relationship. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). Thus, a "law 'relates to' the [subject matter], in the normal sense of the phrase, if it has a connection with or reference to [the subject matter]." Because the subject matter of a proposed ballot initiative is a matter that has a connection with or refers to an election, such subject matter is within the plain scope of authority granted to the Council under § 752. This Court "must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw*, 463 U.S. at 97. Here, there is no good reason to suggest that Congress intended for Section 752 to mean something more restrictive.

Supporting the plain meaning of Section 752 is the fact that, even though Congress initially contemplated several limitations on the Council's authority over elections, (including limitations pertaining to the qualifications and compensation of councilmembers and the Mayor), Congress ultimately chose to give the Council unrestricted authority over all matters involving or relating to elections. *See* S. 1435, 93rd Cong. § 802 (1973); S. 1435, 93rd Cong. § 752 (as amended by the House on Oct. 10, 1973).

As the Council retains plenary authority to enact any laws that involve or relate to elections, its decision to preclude ballot measures that would authorize, or have the effect of authorizing, discrimination was proper.

F. The Council's consideration of the IPA confirms that it may be read consistently with the Charter Amendments Act and the Home Rule Act.

The legislative history behind the IPA confirms that the Council intended to use its authority under Section 752 to ensure that ballot measures did not run afoul of the civil rights protections afforded by the Human Rights Act. The IPA (with the Human Rights Act provision) was adopted unanimously in 1979 by the Council, which included ten of the

thirteen members who had served on the Council during the enactment of the Charter Amendments Act. Importantly, much of the original text of the IPA, including the Human Rights Act restriction, was drafted and debated during the 1978 Council session – the same session the Charter Amendments Act was passed. *See* Committee Report on Bill 2-317, Initiative, Referendum, and Recall Procedures Act of 1978 (Council of the District of Columbia, May 3, 1978) (Herczeg Aff., Ex. E).

The legislative history of the original 1978 bill includes extensive evidence that the Council was strongly committed to incorporating the Human Rights Act protections into the IPA. For example, the Council recognized the overarching importance of protecting civil rights from the initiative process and explained specifically why the IPA nondiscrimination restriction was consistent with the Charter Amendments:

> The . . . initiative process may not be used to place the Government in the posture of affirmatively condoning discrimination. Thus, when the Government's official position of neutrality toward protected minority classifications (such as those identified in the Human Rights Act of 1977) is removed and a policy of discrimination is imposed, such measures will fail. Implicit restrictions, not expressly contained in an "initiative charter" are thus supportable. That restriction has been implied by the Courts. Under applicable case law, it is clear that a community cannot by initiative authorize discrimination as a matter of government policy. *See Reitman v. Mulkey,* [387 U.S. 369 (1967)]*; Otey v. Common Council of City of Milwaukee*, 281 F. Supp. 264 (E.D. Wis. 1968); *Holmes v. Ledbetter*, 294 F. Supp. 991 (E.D. Mich. 1968).

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) (Herczeg Aff., Ex. E).

The Council's decision to incorporate protections of the Human Rights Act into the initiative process is not surprising in view of the important role played by the Human Rights Act in the District. Enacted contemporaneously with the Charter Amendments Act,

the Human Rights Act was a re-codification of a law that predated the Home Rule Act. Concerned that the Home Rule Act might jeopardize the continuing vitality and strength of the Regulation Governing Human Rights, DCCR Tit. 34 (1973), the Council enacted the Human Rights Act in order to "make it a permanent part of the District of Columbia Code." Committee Report on Bill 2-179, The Human Rights Act of 1977, at 1 (Council of the District of Columbia, July 5, 1977) (Herczeg Aff., Ex. D). The Council further explained that "the Human Rights Act is among our most important laws and is to be vigorously enforced by all agencies and officials of the District Government . . . [the Act] underscore[d] the Council's intent that the elimination of discrimination within the District of Columbia should have 'the highest priority' and that the Human Rights Act should therefore be read in harmony with and as supplementing other laws in the District." *Id.*

Recognizing that their argument would effectively allow the initiative process to be used to eviscerate the Human Rights Act's protections, Petitioners assert: "Nowhere does the Home Rule Act impose a nondiscrimination requirement." Pet'r Mem. at 12. They ignore— and would have the District obliterate—the basic principles of nondiscrimination, equality, and liberty that inform the District's laws. Worse, Petitioners draw on this misguided proposition to brush casually aside a fundamental freedom of an unpopular minority, namely marriage. *Loving,* 388 U.S. at 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Lawrence*, 539 U.S. at 562 ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."); *Turner v. Safley*, 482 U.S. 78, 95 (1987) (concluding that a state law that prohibited incarcerated persons from marrying was unconstitutional because "the decision to marry is a fundamental right");

Romer, 517 U.S. at 635 (concluding that a state ballot initiative, which classified gay, lesbian and bisexual persons and precluded them from advocating for legislation on their behalf, was was unconstitutional because it was not enacted to "further a proper legislative end but to make them unequal to everyone else. ... A State cannot so deem a class of persons a stranger to its laws.").

In challenging the IPA, the Petitioners seek to eliminate this important provision and allow discriminatory ballot initiatives to come to a vote. Presumably, Petitioners would endorse the view, for example, that an initiative that would exclude African-Americans, Christians, women, or persons with disabilities from the protection of the Human Rights Act would all be legally permissible subject matters in the District. Petitioners' arguments offend the basic premise of the Human Rights Act; moreover, their underlying assumption that the initiative power may be wielded as a weapon to undermine the District's protections of its residents against discriminatory denial of a fundamental right lacks support in the law. Courts have long recognized that the initiative power may not be used as a tool to authorize such discrimination. *See Reitman v. Mulkey*, 387 U.S. 369, 378-81 (1967) (prohibiting the use of the initiative process to place the Government in a position of affirmatively condoning discrimination).[11] Here, the Council's explicit codification of this long-standing judicial principle was well within the scope of its legislative prerogative.

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[11] *See also Hunter v. Erickson,* 393 U.S. 385, 392 (1969) ("[I]nsisting a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which would otherwise violate the Fourteenth Amendment."); *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997) ("The state retains the authority to interpret [the] scope and availability of any state-conferred right or interest.") (alteration in original; internal citations and quotations omitted); *Gibson v. Firestone*, 741 F.2d 1268, 1273 (11th Cir. 1984) (stating that the initiative and referendum (continued...)

Remarkably, Petitioners imply that because voters in some states have mandated discrimination in marriage, the Council is without power to protect the fundamental rights of similar minorities within the District. Pet'r Mot. at 1. But the fact that other states have seen fit to allow voters to perpetuate a discriminatory practice is no justification for the District to emulate such conduct. *See Loving,* 388 U.S. at 3 (observing that interracial marriages were void in 16 states and also subject to criminal penalty in many of those states). Just as many state legislatures and ultimately the Supreme Court reached the conclusion that anti-miscegenation statutes—no matter how steeped in historical precedent they were—offended equal protection, so too has the Council concluded that denying same-sex couples full legal recognition for their marital relationships is also wrongful and discriminatory.[12]

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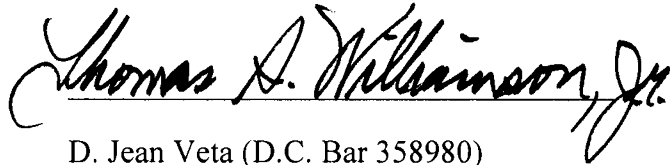
rights "derived from wholly state-created procedures by which issues that might otherwise be considered by elected representatives may be put to the voting populace . . . [T]he state, having created such a procedure, retains the authority to interpret its scope and availability.").

[12] Had the question of continuing state anti-miscegenation laws been put to voters in every state, it is doubtful that all would have reached the same constitutional outcome as the Supreme Court.

CONCLUSION

For the reasons set forth herein and in the briefs filed by the Board of Elections and the District of Columbia, the Court should deny the Petitioners' motion for summary judgment, grant the Intervenor's cross-motion for summary judgment, and dismiss the action.

Respectfully submitted,



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Dated: December 18, 2009

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I hereby certify that on December 18, 2009, I caused a true and correct copy of the foregoing opposition to be served via e-filing upon the following counsel:

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

HARRY R. JACKSON, JR., ROBERT KING, WALTER E. FAUNTROY, JAMES SILVER, ANTHONY EVANS, DALE E. WAFER, MELVIN DUPREE, AND HOWARD BUTLER Petitioners, v. DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, Respondent.	Civil Action No. 0008613-09 Judge Judith N. Macaluso

INTERVENORS TREVOR S. BLAKE, II, JEFF KREHELY, AMY HINZE-PIFER, REBECCA HINZE-PIFER, VINCENT N. MICONE, III, THOMAS F. METZGER, REGINALD STANLEY, ROCKY GALLOWAY, D.C. CLERGY UNITED, AND THE CAMPAIGN FOR ALL D.C. FAMILIES' STATEMENT OF FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Intervenors Trevor S. Blake, II, Jeff Krehely, Amy Hinze-Pifer, Rebecca Hinze-Pifer, Vincent N. Micone, III, Thomas F. Metzger, Reginald Stanley, Rocky Galloway, D.C. Clergy United, and the Campaign for All D.C. Families (collectively "Intervenors"), pursuant to Super. Ct. Civ. R. 56, hereby file this Statement of Facts as to which there is No Genuine Issue.

1. On May 5, 2009, the District of Columbia Council approved by a vote of 12-1 the Jury and Marriage Amendment Act of 2009 ("JAMA"). (Aff. of Jonathan Herczeg, Dec. 18, 2009 ("Herczeg Aff.), ¶ 2).

2. On May 6, 2009, Mayor Adrian Fenty signed the JAMA. (Herczeg Aff., ¶ 2).

3. On May 27, 2009, Proponents Harry R. Jackson, Jr., Walter E. Fauntroy, Patricia Johnson, Melvin Dupree, Sandra B. Harris, Bobby Perkins, Sr., Dale E. Wafer filed a referendum with the Board of Elections and Ethics ("the Board"), which, if successful, would have suspended the JAMA from taking effect. (Herczeg Aff., ¶ 3).

4. On June 15, 2009, the Board rejected the referendum as an improper subject because it authorized discrimination in violation of the Human Rights Act. (Herczeg Aff., ¶ 3).

5. On June 17, 2009, Proponents of the referendum filed a petition for review of agency review and a writ in the nature of mandamus in D.C. Superior Court. (Herczeg Aff., ¶ 3).

6. On June 30, 2009, the Superior Court denied the referendum proponents' various claims for relief. (Herczeg Aff., ¶3, Ex. B).

7. Referendum proponents did not appeal. (Herczeg Aff., ¶ 3).

8. On July 6, 2009, JAMA became law in the District. (Herczeg Aff., ¶ 2).

9. On September 1, 2009, the Proponents in the present action filed the Marriage Initiative of 2009 with the District of Columbia Board of Elections and Ethics. (Aff. of Harry R. Jackson, Jackson Aff., Nov. 20, 2009 ("Jackson Aff.) ¶¶ 3-4).

10. The propose initiative would add a provision to the District's marriage code defining marriage as: "Only marriage between a man and a woman is valid or recognized in the District of Columbia." (Herczeg Aff., ¶ 4; *see also* Copy of the Marriage Initiative of 2009, Jackson Aff., Ex. A).

11. On October 16, 2009, Petitioners filed a memorandum with the Board in support of the Marriage Initiative of 2009. (*see* Memorandum filed with the Board of October 16, 2009, Jackson Aff., Ex. E).

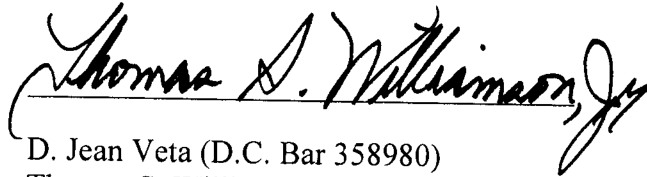
12. On November 17, 2009, the Board issued its order that the Marriage Initiative of 2009 did not present a proper subject for initiative because it "authorized, or would have the effect of authorizing, discrimination" in violation of the Human Rights Act. (Herczeg Aff., Ex. C).

13. The Board marked the initiative as received "but not accepted" pursuant to D.C. Code § 1-1001.16(b)(2). (Herczeg Aff., Ex. C).

14. On December 15, 2009, the Council passed the the Religious Freedom and Civil Marriage Equality Act of 2009. (Herczeg Aff., ¶ 5).

15. On December 18, 2009, Mayor Fenty signed the Religious Freedom and Civil Marriage Equality Act of 2009. (Herczeg Aff., ¶ 5).

Respectfully submitted,



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Dated: December 18, 2009

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