SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

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

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

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

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

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

FACTUAL AND PROCEDURAL BACKGROUND

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

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

> [The referendum] would . . . strip same-sex couples of the rights and responsibilities of marriage that they were afforded by virtue of entering into valid marriages elsewhere, and that the Council intends to clearly

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

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

[2] The proposed referendum read as follows:

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

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

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

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

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

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

STATUTORY PROVISIONS

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

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

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

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

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

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

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

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

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

ANALYSIS

1. The IPA validly incorporates the Human Rights Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 1068 (internal citations omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The proposed initiative violates the Human Rights Act

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

The proposed initiative would invalidate D.C. Code § 46-405.01 by establishing that "only marriage between a man and a woman is valid or recognized in the District of Columbia." Petrs.' Mot. for Summ. J., Ex. A. If enacted, the initiative would deprive only same-sex individuals of the legal status, rights, and privileges they enjoy as married persons. Such an initiative patently "authorizes or would have the effect of authorizing discrimination based upon

. . . actual or perceived . . . sexual orientation [or] gender identity." The Board properly rejected the proposed initiative on this ground.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Other issues

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

(a) Dean

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

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

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

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

(b) Preclusion

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

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

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

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

(c) Exhaustion

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

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

CONCLUSION

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

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

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

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

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

Judge Judith N. Macaluso

(Signed in Chambers)

Copies to:

Cleta Mitchell
Foley & Lardner, LLP
3000 K Street, N.W., #500
Washington, DC 20007

Steven H. Aden
Austin R. Nimocks
Timothy J. Tracey
Alliance Defense Fund
801 G Street, N.W., Suite 509
Washington, D.C. 20001

Kenneth J. McGhie
Rudolph McGann
District of Columbia Board of Elections and Ethics
One Judiciary Square
441 4th Street, N.W., Suite 270
Washington, D.C. 20001

Andrew Saindon
Chad Copeland
Samuel Kaplan
Office of the Attorney General for the District of Columbia
441 4th Street, N.W., 6th Floor South
Washington, D.C. 20001

Paul A. Ainsworth
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Colby M. May
American Center for Law and Justice
201 Maryland Avenue, N.E.
Washington, DC 20002