No. 10-CV-20

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

HARRY R. JACKSON, *et al.*,

Appellants,

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,

Appellee,

and

DISTRICT OF COLUMBIA,

Intervenor-Appellee.

On Appeal from a Judgment of the Superior Court of the District of Columbia, Civil Division

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BRIEF FOR THE DISTRICT OF COLUMBIA FOR THE *EN BANC* COURT

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STATEMENT OF ISSUES

The amendment to the District of Columbia Charter that established the right of initiative gave the Council of the District of Columbia the authority to enact laws "necessary to carry out [its] purpose." The resulting act included a provision barring initiatives that would authorize discrimination prohibited under the Human Rights Act. Appellants challenge the application of that provision to reject their proposed initiative banning same-sex marriage. The issues are:

1. Whether the political question doctrine prevents the Court from considering whether the Council acted within its discretion in prohibiting initiatives that violate the Human Rights Act, where the Council is committed the authority to enact laws "necessary to carry out the purpose of" the Charter amendment, there are no judicially manageable standards for determining whether the Council properly acted pursuant to that authority, and this Court could not disagree with the Council's choice without itself making inappropriate policy decisions.

2. Whether, in the alternative, this Court should uphold the decision to implement the Charter amendment by prohibiting discriminatory initiatives, where great deference is due because the Council wrote the amendment itself, in the same session in which it devised the prohibition, and the prohibition is wholly consistent with the Charter.

3. Whether an initiative intended to ban and written to ban same-sex marriage discriminates on the basis of sexual orientation or gender within the meaning of the prohibition against initiatives that authorize discrimination under the Human Rights Act.

4. Whether at minimum the Court should remand on a substantial equal protection issue.

STATEMENT OF THE CASE

Appellants challenge a decision by the District of Columbia Board of Elections and Ethics (Board or BOEE) rejecting their proposed initiative, which reads: "Only marriage between a man and a woman is valid or recognized in the District of Columbia." The Board

rejected the initiative because it authorizes or would authorize discrimination proscribed by the District's Human Rights Act and was therefore not a proper subject for initiative pursuant to D.C. Code § 1-1001.16(b)(1)(C) (2006 Repl.). Superior Court Judge Judith Macaluso denied their petition for mandamus based on the District of Columbia's motion for summary judgment.

STATUTORY OVERVIEW

A. The Home Rule Act

The Constitution vests Congress with the authority "[t]o exercise exclusive Legislation" over the District. U.S. Const. art. I, § 8, cl.17. In 1973, Congress passed the District of Columbia Self-Government and Government Reorganization Act (Home Rule Act), Pub. L. No. 93-198, 87 Stat. 777 (Dec. 24, 1973). "[T]he core and primary purpose of the Home Rule Act . . . was to relieve Congress of the burden of legislating upon essentially local matters 'to the greatest extent possible, consistent with the constitutional mandate.'" *McIntosh v. Washington*, 395 A.2d 744, 753 (D.C. 1978), *quoting* D.C. Code § 1-121(a) (1978 Supp.).

Title IV of the Home Rule Act is the District of Columbia Charter, which establishes the organizational structure of the District government. D.C. Code § 1-204.01 *et seq.* (2006 Repl.). The Charter creates a tripartite form of government within the District, vesting the broad legislative power granted to the District in the Council. *Wilson v. Kelly*, 615 A.2d 229, 231-32 (D.C. 1992); D.C. Code § 1-204.04 (2006 Repl.). Council acts generally do not become law, however, until after a thirty-day layover period during which Congress may disapprove them. D.C. Code § 1-206.02(c) (2006 Repl.). Congress also expressly restricted the Council's legislative authority in various specific ways. D.C. Code §§ 1-203.02, 1-206.02(a), 1-206.03(a) (2006 Repl.). At the same time, the Home Rule Act gives the Council broad authority over matters involving elections: "Notwithstanding any other provision of [the Home Rule Act] or of

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 (2006 Repl.).

B. The Charter Amendment Act

When adopted, the District's Charter did not provide for the popular rights of initiative, referendum, or recall. The Charter did, however, provide for its amendment "by an act passed by the Council and ratified by a majority of the registered qualified electors of the District voting in the referendum held for such ratification." D.C. Code § 1-203.03(a) (2006 Repl.). Charter amendments are also subject to disapproval by Congress. D.C. Code § 1-203.03(b) (2006 Repl.).

The Initiative, Referendum, and Recall Charter Amendment Act of 1977 (CAA) was passed on May 17, 1977, during the second Council period. 24 D.C. Reg. 199 (July 8, 1977); 25 D.C. Reg. 244 (July 14, 1978). It provided broadly for the District's electorate to have rights of initiative, referendum, and recall, but did not establish all the particulars of these rights and was not self-executing. *Convention Ctr. Referendum Comm. v. Board of Elections & Ethics (Convention Ctr. I)*, 399 A.2d 550, 552-53 (D.C. 1979). Instead, the CAA affirmatively required the Council to "adopt such acts as are necessary to carry out the purpose of [the act] within 180 days of the effective date of [the act]" and provided that "[n]either a petition initiating an initiative nor a referendum may be presented to the District of Columbia Board of Elections and Ethics prior to October 1, 1978." D.C. Code § 1-204.107 (2006 Repl.). The CAA defines "initiative" as "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) (2006 Repl.). "The term 'referendum' means the process by which the registered qualified electors of the District of Columbia may suspend acts of the Council of the District of Columbia (except emergency acts, acts levying taxes, or acts appropriating funds for the general

operating budget) until such acts have been presented to the registered qualified electors of the District of Columbia for their approval or rejection." D.C. Code § 1-204.101(b) (2006 Repl.). The District's electorate ratified the Charter amendment, each House of Congress affirmatively approved it, and the CAA became effective on March 10, 1978. 25 D.C. Reg. 244 (July 14, 1978); *Convention Ctr. I*, 399 A.2d at 551.

C. The Initiative Procedures Act

A month after the CAA became effective, on April 10, 1978, the same, second Council introduced the Initiative, Referendum, and Recall Procedures Act of 1978 (IPA). Council of the District of Columbia, Committee on Government Operations, Committee Report No. 1 on Bill No. 2-317, Initiative, Referendum, and Recall Procedures Act of 1978, at 1 (May 3, 1978). As amended by the Committee, Bill 2-317 required the Board to refuse to accept an initiative petition if "the petition authorizes, or would have the effect of authorizing, discrimination for any reason other than of individual merit, including, but not limited to discrimination by reason of" sex or sexual orientation, among others. Bill 2-317, § 16(*l*)(6) (Committee Print No. 1). The Committee noted that the anti-discrimination provisions contained in the bill enjoyed significant support. Comm. Rpt. No. 1 on Bill No. 2-317 at 4-6.

In considering the ban on initiatives that discriminate, the Council invoked its plenary authority over "elections in the District," D.C. Code § 1-207.52 (2006 Repl.), as well as *Reitman v. Mulkey*, 387 U.S. 369 (1967), in which the Supreme Court found unconstitutional a voter-initiated provision permitting private individuals to refuse to sell or lease their real property to individuals on any basis, including race. The Council explained:

> The teaching of *Reitman* is that 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 [A]ct of 1977) is removed and a policy of discrimination is imposed, such measures will

fall. Implicit restrictions, not expressly contained in an "initiative charter" are thus supportable. . . . Under applicable case law, it is clear that a community cannot by initiative authorize discrimination as a matter of government policy.

The Supreme Court's reasoning in *Reitman* is particular[l]y relevant to this discussion of an implied restriction on initiative. . . . [W]hat persuaded the Supreme Court . . . was the fact that the initiated measure expressly authorized the private right to discriminate. . . .

. . . [T]he decision did not turn on whether the initiated measure violated a constitutional right to open housing; no such "right" was recognized by the case. Rather the critical issue was whether the state could, through the initiative process, establish a contrary policy in favor of discrimination as a matter of law.

It is an implied restriction to ensure that no initiated measure will establish an affirmative policy in favor of discrimination in this community.

* * *

Under *Reitman v. Mulkey* . . . , the council has authority to refuse to file petitions which authorize discrimination other than on the basis of individual merit. *Reitman* does not require that the Council, or the Board of Elections and Ethics, find that a constitutional right exist in order to afford that protection. Rather the issue is simply whether a proposed initiative measure would authorize discrimination as a policy for this community. In response to an argument made in *Reitman*, that the initiated measure represented the "will of the people", Mr. Justice Douglas quoted the words of James Madison —

> "wherever the real power in a Government lies, there is the danger of oppression. In our governments, the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from the acts of constituents, but from acts in which the government is the mere instrument of the major number of Constituents. This is a truth of great importance . . ." *Reitman, supra*, at 387 (Douglas, J., concurring.)

Further legal support for the provisions of the enabling legislation here presented are founded in D.C. Code, secs. 1-1105a and 1-1193, which grant the Council plenary authority over all election matters.

Comm. Rpt. No. 1 on Bill No. 2-317 at 9-11 (citations omitted).

Bill 2-317 was reintroduced as Bill 3-2 during the third Council session, in January 1979. *Convention Ctr. I*, 399 A.2d at 553; Council of the District of Columbia, Committee on Government Operations, Report on Bill 3-2, "Initiative, Referendum, and Recall Procedures Act

of 1979," at 1 (Jan. 31, 1979). Bill 3-2 was identical to its predecessor except that it referred to the Human Rights Act of 1977 rather than identifying specific types of discrimination that initiatives could not authorize or promote. *Id.* App. A and Approved Committee Print.

The Initiative, Referendum, and Recall Procedures Act of 1979 (IPA) became law in June 1979. The IPA limits what is a proper subject for an initiative or referendum:

> (b)(1) Upon receipt of each proposed initiative or referendum measure, the Board shall refuse to accept the measure if the Board finds that it is not a proper subject of initiative or referendum, whichever is applicable, under the terms of title VI of the District of Columbia Home Rule Act, or upon any of the following grounds:
>
> > (A) The verified state of contributions has not been filed . . . ;
> > (B) The petition is not in the proper form . . . ;
> > (C) The measure authorizes, or would have the effect of authorizing, discrimination prohibited under [the Human Rights Act]; or
> > (D) The measure presented would negate or limit [a budget request] act of the Council . . . .

D.C. Code § 1-1001.16(b)(1) (2006 Repl.). This Council enactment thus imposes the same limitations on initiatives that Congress imposed on Council legislation under D.C. Code §§ 1-203.02, 1-206.02(a), and 1-206.03(a) (2006 Repl.), and bars initiatives that would effect discrimination as defined in the Human Rights Act or negate or limit budget request acts.

D. The Human Rights Act

The pre-Home Rule Council adopted "A Regulation Governing Human Rights" in November 1973. Reg. No. 73-22, 20 D.C. Reg. 345 (Nov. 17, 1973). Its intent was "to secure an end . . . to discrimination for any reason other than that of individual merit, including, but not limited to discrimination by reason of" categories including sexual orientation and sex. *Id.* § 1.1.

Four years later, after Home Rule, the Council was concerned that the earlier police regulation would lack the force of law if not codified. Council of the District of Columbia, Committee on Public Services and Consumer Affairs, Report on Bill 2-179, "The Human Rights Act of 1977," at 2-3 (July 5, 1977). Thus, during the second Council session — the same session

in which the CAA was drafted and enacted and the bill that became the IPA was first introduced — twelve of the thirteen Councilmembers co-sponsored the Human Rights Act of 1977. *Id.* at 1. The act served to "underscore the Council's intent that the elimination of discrimination within the District of Columbia should have the highest priority." *Id.* at 3 (internal quotation marks omitted). The Council wanted to "affirmatively and forcefully convey to the executive and administrative agencies of the District Government the importance which the Council place[d] on vigorous enforcement of its provisions." *Id.* The act banned discrimination based on sexual orientation and gender, among other things. D.C. Code § 6-2201 (1973 Ed., Supp. V (1978)).

For nearly forty years, District law has thus protected gay, lesbian, and bisexual men and women from discrimination. Today, the Human Rights Act provides, *inter alia*:

> Except as otherwise provided for by District law or when otherwise lawfully and reasonably permitted, it shall be an unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility, service, program, or benefit to any individual on the basis of an individual's actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business.

D.C. Code § 2-1402.73 (2006 Repl.).

STATEMENT OF FACTS

On May 5, 2009, the Council passed the Jury and Marriage Amendment Act of 2009 (JAMA). D.C. Act 18-70, 56 D.C. Reg. 3797 (May 15, 2009). That measure amended the District's marriage laws to provide that the District will recognize lawful, same-sex marriages entered in other jurisdictions and became law on July 6 after Congress did not disapprove it. *See* D.C. Code § 46-405.01 (2009).[1]

[1] The statute states: "A marriage legally entered into in another jurisdiction between 2 persons of the same sex that is recognized as valid in that jurisdiction, that is not expressly prohibited by §§ 46-401 through 46-404, and has not been deemed illegal under § 46-405, shall

On May 27, while JAMA was before Congress, a group including four of the eight appellants here presented a proposed referendum to the Board. They sought to present to voters the question whether the District should recognize same-sex marriages from other jurisdictions. The Board on June 15 found that the proposed referendum was improper under D.C. Code § 1-1001.16(b)(1)(C) (2006 Repl.). *In re: Referendum Concerning the Jury and Marriage Amendment Act of 2009,* BOEE No. 09-004. The Board recognized that the proposed referendum "authorizes, or would have the effect of authorizing, discrimination prohibited under [the Human Rights Act]" based on sexual orientation. Mem. Op. at 12 (BOEE No. 09-004).

Those proposing the referendum brought suit in the Superior Court, pursuant to D.C. Code § 1-1001.16(b)(3) (2006 Repl.), seeking "a writ in the nature of mandamus to compel the Board to accept" the proposed referendum. On June 30, Judge Judith Retchin held that the Board correctly rejected the proposed referendum because it would discriminate based on gender or sexual orientation. *Jackson v. D.C. Bd. of Elections & Ethics (Jackson I),* No. 2009 CA 004350, Order at 2, 8 (Super. Ct. of D.C.). There was no appeal.

Instead, on September 1, appellants here — Rev. Harry Jackson, Jr., Rev. Walter Fauntroy, Rev. Dale Wafer, Melvin Dupree, Apostle James Silver, Rev. Anthony Evans, Robert King, and Elder Howard Butler — presented the Board with the proposed initiative that is the subject of the instant appeal. A.A. 49-51. It read: "Only marriage between a man and a woman is valid or recognized in the District of Columbia." A.A. 51. The Board held a public hearing on the initiative on October 26. A.A. 24, 66, 69, 71. "In all, the Board heard testimony from 60

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be recognized as a marriage in the District." D.C. Code § 46-405.01 (2009 Supp.). Marriages prohibited by District law include those that violate specific consanguinity restrictions, marriages between persons who are already married to others, marriages entered by those lacking the capacity to consent or whose consent was obtained by force or fraud, marriages declared void by judicial decree, and marriages entered in other jurisdictions by District residents that would be unlawful if entered in the District. D.C. Code §§ 46-401 to 46-404 (2005 Repl., 2009 Supp.).

witnesses and received and considered comments from approximately 29 individuals and/or organizations." A.A. 28; *see* A.A. vol. II (transcript of hearing).

As with the referendum, the Board found that the proposed initiative "authorizes or would authorize discrimination proscribed by the [Human Rights Act] and [was] therefore not a proper subject for initiative" per D.C. Code § 1-1001.16(b)(1)(C) (2006 Repl.). A.A. 34. Appellants again sought a writ of mandamus in the Superior Court. A.A. 7-23; *Jackson v. D.C. Bd. of Elections & Ethics (Jackson II)*, No. 2009 CA 8613 B (Super. Ct. of D.C.). They moved for summary judgment (A.A. 37-47), while the District as intervenor in support of the Board moved to dismiss the complaint or, in the alternative, for summary judgment (A.A. 98, 99-108).

Judge Macaluso granted the District's motion for summary judgment on January 14, 2010. A.A. 114-36. She rejected appellants' argument that D.C. Code § 1-1001.16(b)(1)(C) (2006 Repl.), the provision prohibiting initiatives and referenda that violate the Human Rights Act, was an invalid restriction on the right of initiative, and held to the contrary that the Council acted well within its authority when adopting this limitation. A.A. 119-27. Likewise, Judge Macaluso agreed with the Board that the proposed initiative violated the Human Rights Act because it "authorizes or would have the effect of authorizing discrimination" based on sexual orientation, rejecting appellants' argument that *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995), was on point and required her to hold that the Human Rights Act does not apply to sexual-orientation discrimination in the context of marriage. A.A. 127-33. Appellants noted this appeal on January 15. A.A. 137-40.

In the meantime, the Council enacted the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 (Marriage Equality Act) on December 15. D.C. Act 18-248, 57 D.C. Reg. 27 (Jan. 1, 2010). This legislation expands the definition of marriage in the District to include same-sex couples: "Any person may enter into a marriage in the District of Columbia

with another person, regardless of gender, unless the marriage is expressly prohibited by" District law. 57 D.C. Reg. 27 (Jan. 1, 2010). The Mayor signed the Marriage Equality Act, and it was transmitted to Congress on January 5, 2010. 57 D.C. Reg. 1833 (Mar. 5, 2010).

Appellants here filed another proposed referendum with the Board and sought to suspend the Marriage Equality Act until it had been presented directly to the District electorate. On February 4, the Board rejected the measure because it "authorizes, or would have the effect of authorizing, discrimination prohibited under [the Human Rights Act]" — the fifth time that the Board or a Superior Court judge had so concluded regarding the related referenda and the instant initiative. *In re: Referendum on the Religious Freedom and Civil Marriage Equality Amendment Act of 2009*, BOEE No. 10-001, Mem. Op. at 18.

Appellants asked the Superior Court to enjoin the "effective date" of the Marriage Equality Act while they challenged the Board's referendum decision. *Jackson v. D.C. Bd. of Elections & Ethics (Jackson III)*, No. 2010 CA 740 B (Super. Ct. of D.C.). Judge Brian Holeman denied the injunction on February 19, and this Court summarily affirmed on February 26. *Jackson v. D.C. Bd. of Elections & Ethics*, No. 10-CV-177 (D.C. Feb. 26, 2010). Chief Justice John Roberts then denied appellants' request for a stay pending a petition for certiorari. *Jackson v. D.C. Bd. of Elections & Ethics*, 130 S. Ct. 1279 (2010) (Roberts, C.J., in chambers).

On March 3, 2010, the Marriage Equality Act became law. Law 18-110, 57 D.C. Reg. 1833 (Mar. 5, 2010); *see* D.C. Code § 1-206.02(c)(1) (2006 Repl.). In the short time since then, several hundred gay and lesbian couples have applied for marriage licenses in the District.

SUMMARY OF THE ARGUMENT

1. The Charter Amendment Act, drafted and enacted by the Council, ratified by the voters, and affirmatively approved by Congress, charged the Council with "adopt[ing] such acts as necessary to carry out [its] purpose." D.C. Code § 1-204.107 (2006 Repl.). The Court should

reject appellants' argument that the Council had no authority in the resulting Initiative Procedures Act to forbid initiatives that discriminate under the Human Rights Act.

The following eight points are undisputed. First, the CAA gave the Council the authority to determine what acts were necessary to carry out its purpose, with no provision for review of that determination by this Court or any other body. Second, the CAA referred to its "purpose" in defining the Council's authority but never defined that purpose. Third, the Council itself wrote the CAA, and it did so in the same Council session in which it devised the IPA, suggesting that it well knew the CAA's purpose. Fourth, the CAA empowered the Council to "carry out" that undefined purpose, suggesting that it gave the Council authority broader than that necessary to ensure merely that mechanical procedures exist for initiatives to proceed. Fifth, the CAA contains no provision affirmatively limiting the Council's authority to proscribe discriminatory initiatives. Sixth, the CAA includes many other implied limitations on the right of initiative. For instance, the electorate by initiative may not enact legislation that the Council itself would lack power to enact under the Home Rule Act. Seventh, the Council justified the recognition of an implied restriction against discriminatory initiatives in part on political principles that are fundamental to our system of representative democracy. Eighth, the Home Rule Act includes a provision establishing: "Notwithstanding any other provision of [the Home Rule Act] 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 (2006 Repl.).

These undisputed points together establish two independent but highly related grounds to reject the suggestion that the Council exceeded its authority in forbidding discriminatory initiatives. First, that suggestion presents a nonjusticiable political question. The CAA textually committed to a co-equal branch the discretion to determine what legislation was "necessary to carry out [its] purpose" but did not define that purpose and did not provide judicially manageable

standards for determining whether the Council has properly exercised its discretion. Deciding what acts are "necessary to carry out" the undefined "purpose" of the CAA requires policy decisions that are properly left to the Council and that this Court cannot make without expressing lack of the respect due coordinate branches of government. That is particularly so because the Council in enacting the IPA acted essentially contemporaneously with the CAA. Analogously, the courts presume that the first Congress knew the true meaning of the Constitution and acted in conformity with that meaning when it legislated early in our Nation's history. Because political questions are nonjusticiable, appellants should seek relief from political fora, not the courts.

Second, assuming the issue is justiciable, this Court should reject that argument on its merits. The Council was given broad authority to adopt legislation to carry out the purpose of the CAA. Moreover, again, the Council itself wrote the CAA, then interpreted it essentially contemporaneously in the IPA. Accordingly, any review should be highly deferential. The Council's conclusion that allowing initiatives that discriminate was not part of the CAA's purpose may be set aside only if it is plainly wrong. The Council's actions were in fact entirely consistent with its authority under the CAA — which contains nothing affirmatively inconsistent with the Council's choice and, to the contrary, includes many other implied limitations on the right of initiative — and its plenary authority over elections under the Home Rule Act.

Appellants' contrary arguments fail. They assert that the CAA gives the Council power to legislate procedures facilitating the right of initiative, but no substantive limitations. But appellants point to no textual support for that position, and there is none. Congress delegated authority to the Council to adopt "acts" that it deemed "necessary" to "carry out the purpose" of the initiative provision with no statutory definition of the purpose and no distinction drawn between procedural and substantive measures. Rather than argue on the basis of the District's own law, appellants rely on authority from other jurisdictions that have legal landscapes that are

different in critical respects. For instance, they rely on authority from other courts that rejected legislative attempts to regulate the right of initiative because, in those jurisdictions, the right was "self-executing." This Court has recognized that the right was *not* self-executing in the District.

Appellants also suppose that the "purpose" of the CAA was to facilitate direct democracy on any topic, including discriminatory initiatives, or at least everything except those matters expressly excluded. They again cite no statutory text that so indicates or any other legislative statement of overall purpose. Moreover, appellants' *ipse dixit* (and their reliance on the canon *expressio unius est exclusio alterius*) is belied by their recognition of numerous limitations — both express and implied — on the right of initiative and referendum. To the extent this Court can divine what the CAA's purpose was, it is more reasonably thought to be to authorize the electorate to vote on topics generally, but not those inappropriate for direct democracy. One reason why the Framers made the United States a republican democracy was because they thought it inappropriate to allow a majority to make discriminatory choices at the expense of individual rights. One can hardly accuse the Council of acting unreasonably in carrying out the CAA's purpose when it acted consistently with our fundamental political traditions.

2. Appellants' proposed initiative banning same-sex marriage would discriminate in violation of the Human Rights Act. It was the Council's intent when incorporating the Human Rights Act restriction in the IPA to ensure that initiatives would not be a vehicle for discrimination in the District, even in the context of marriage. Appellants' initiative discriminates on the basis of both sexual orientation and gender, as this Court can readily conclude based on both common sense and numerous authorities that have so concluded.

Appellants rely on *Dean*, where the Court, in essence, adopted an exception to the plain language of the Human Rights Act to conclude that the act could not itself be used to effectuate a substantive change in the District's marriage laws. That reliance is misplaced for three

independent reasons. First, *Dean* did not deal with the IPA, which plainly prohibits all initiatives that would discriminate under a plain reading of the Human Rights Act, with no need to apply any implicit exception to the statutory reach. Second, *Dean* was based on an entirely different legal landscape. The District's marriage laws have changed dramatically, and in particular same-sex marriage is now legal. Given the current law, an initiative that would deny anyone the right to enter same-sex marriages in the District would have the effect of authorizing discrimination in violation of the Human Rights Act. Third, *Dean* does not speak at all to whether a decision not to recognize same-sex marriages from other jurisdictions would violate the Human Rights Act. Because appellants' initiative would ban such recognition, it is improper.

STANDARD OF REVIEW

The Court reviews the grant of summary judgment *de novo*. *Joeckel v. Disabled Am. Veterans*, 793 A.2d 1279, 1281 (D.C. 2002). Here, summary judgment was granted on appellants' petition for a writ of mandamus. "Mandamus is an extraordinary remedy used to enforce, as a matter of right, a public officer's performance of his or her public duties where no exercise of discretion on the officer's part is involved." *District of Columbia v. Fitzgerald*, 953 A.2d 288, 292 n.5 (D.C. 2008). Mandamus is available only in those "few cases" where the party seeking the writ establishes a "clear and indisputable" right to relief and "has no other adequate means to obtain relief." *In re M.O.R.*, 851 A.2d 503, 509 (D.C. 2004).

ARGUMENT

I. THE COURT SHOULD NOT RULE ON THE NONJUSTICIABLE POLITICAL QUESTION OF WHETHER THE COUNCIL ACTED PROPERLY IN DETERMINING THAT THE HUMAN RIGHTS ACT RESTRICTION ON THE RIGHT OF INITIATIVE WAS "NECESSARY TO CARRY OUT THE PURPOSE OF THE" CHARTER AMENDMENT ACT.

"The principle that the courts lack jurisdiction over political decisions that are by their nature committed to the political branches . . . is as old as the fundamental principle of judicial

review." *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (internal quotation marks omitted). In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Supreme Court explained: "Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Id.* at 170. In *Baker v. Carr*, 369 U.S. 186 (1962), the Court reaffirmed that "courts may not consider claims that raise issues whose resolution has been committed to the political branches by the text of the Constitution." *Zivotofsky v. Secretary of State*, 571 F.3d 1227, 1230 (D.C. Cir. 2009), *citing Baker*, 369 U.S. at 217. The political question doctrine embodies separation-of-powers principles and reflects that some questions should not be answered by the judicial branch. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). Due respect for the coordinate branches of government requires that these political questions be deemed nonjusticiable. *See id.*

The District's Home Rule Act creates a tripartite government and embraces the principles that underlie these separation-of-powers considerations. *See Hessey v. D.C. Bd. of Elections & Ethics (Hessey I)*, 601 A.2d 3, 14 (D.C. 1991); *Wilson*, 615 A.2d at 231. Thus, "[w]hether for lack of judicial power or for prudential reasons, a [District of Columbia] court will stay its hand where, *inter alia*, it would be impossible to 'undertak[e] independent resolution without expressing lack of the respect due coordinate branches of government.'" *District of Columbia v. Sierra Club*, 670 A.2d 354, 366 (D.C. 1996), *quoting Baker*, 369 U.S. at 217.[2]

[2] Although the political question doctrine arises from separation-of-powers concerns, it finds independent justification in the Article III requirement of a case or controversy. *Baker*, 369 U.S. at 198. While this Court is an Article I court under the Constitution, it nonetheless adheres to the requirement of a case or controversy in every matter. *Washington Teachers' Union, Local #6 v. D.C. Pub. Schools*, 960 A.2d 1123, 1134 n.5 (D.C. 2008); *Riverside Hosp. v. D.C. Dep't of Health*, 944 A.2d 1098, 1104 (D.C. 2008); *see also Banks v. Ferrell*, 411 A.2d 54, 56 n.8 (D.C. 1979) ("Under the case or controversy doctrine, questions sought to be adjudicated have been held nonjusticiable . . . when the parties seek adjudication of only a political question . . . ." (internal quotation marks omitted)).

The Supreme Court identified six independent tests in *Baker* for determining whether a question submitted for judicial resolution is a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. These tests are disjunctive; a court should dismiss rather than rule where "one of these formulations is inextricable" from the question presented. *Id.* Here, multiple *Baker* factors are inextricable from this case and require the Court to refrain from considering this challenge to the Council's adoption of the Human Rights Act restriction in the IPA.

A. The Charter Amendment Act itself textually committed to the Council the discretion to determine what legislation was "necessary to carry out [its] purpose" and did not provide judicially manageable standards for determining whether the Council has properly exercised its discretion.

The first two *Baker* factors demonstrate that the question whether the Council had authority under the CAA to prohibit initiatives that discriminate under the Human Rights Act is a political question. Together, they show that this question is unsuitable for judicial decision.

Under the first *Baker* factor, there is "a textually demonstrable . . . commitment of the issue to a coordinate political department." 369 U.S. at 217. This "dominant consideration in any political question inquiry," *Lamont v. Woods*, 948 F.2d 825, 831 (2d Cir. 1991), "recognizes that, under separation of powers, certain decisions have been exclusively committed to the legislative and executive branches . . . , and are therefore not subject to judicial review," *McMahon v. Presidential Airways*, 502 F.3d 1331, 1358-59 (11th Cir. 2007).

As this Court has held, the Charter Amendment Act is not self-executing. *Convention Ctr. I*, 399 A.2d at 552-53. Instead, the District's Charter — the functional equivalent of a constitution for purposes of this analysis — expressly gave the Council the duty and authority to "adopt such acts as necessary to carry out the purpose of [the CAA]." D.C. Code § 1-204.107 (2006 Repl.). This plain language gave the Council discretion to determine what laws *it* deemed necessary to carry out what *it* considered to be the purpose of the CAA. There is no provision in the CAA or the IPA for judicial review of that determination, or even any hint in the statutory text or the legislative history that those who drafted, voted for, and approved the CAA intended to give the courts authority to second-guess the Council's judgment on this point. This Court lacks authority to review that judgment just as it lacks authority normally to consider whether the Council acted wisely in enacting other legislation.[3]

Thus, courts have repeatedly declined to consider whether the political branches have acted properly pursuant to laws that by their terms gave them discretion to act and did not suggest that their exercise of discretion was subject to judicial review. Such political questions have included: whether a state legislature set the proper age limits for children starting and completing school pursuant to a constitutional mandate to "provide that every child of *appropriate age* . . . shall attend the public schools," *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 391 (N.C. 2004) (emphasis added; internal quotation marks and citation omitted); whether the issuance of bonds to build medical offices was for a "proper public purpose" or in the "public interest" as required by a state constitution, *County of Stark v. Ferguson*, 440 N.E.2d 816, 821 (Ohio App. 1981); whether a state legislature adhered to its constitutional mandate to

[3] A different analysis would apply if the question were whether an agency had validly promulgated a regulation pursuant to statutory rulemaking authority. Application of the political question doctrine turns on whether a question has been committed to a "coordinate political department" like the Council, not a subordinate agency. *Baker*, 369 U.S. at 217. Moreover, there is a presumption of reviewability of agency action. *Sierra Club*, 670 A.2d at 357-58.

enact "suitable" workers' compensation insurance laws, *Texas Workers' Compensation Comm'n v. City of Bridge City*, 900 S.W.2d 411, 414-15 (Tex. App. 1995); and whether a state legislature had violated a constitutional amendment by failing to enact implementing statutory definitions as the amendment required, *Nielsen v. State*, 670 A.2d 1288 (Conn. 1996).[4]

On a related note, under the second *Baker* factor, there are no "judicially discoverable and manageable standards for resolving" the question appellants present. 369 U.S. at 217. This too is a "dominant consideration" in determining whether a nonjusticiable political question is present. *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939). Whether there are judicially manageable standards for determining if the Council properly exercised its discretion to "adopt such acts as necessary to carry out the purpose of" the CAA logically begins with the plain language of the act. *See, e.g., City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995).

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[4] *See also, e.g., Manshardt v. Federal Judicial Qualifications Comm.*, 408 F.3d 1154, 1158 (9th Cir. 2005) (finding the power to nominate federal judges textually committed to the President by the Constitution); *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1172 (9th Cir. 2007) (finding that the Constitution textually commits the authority to make legislative procedural rules to Congress, and holding that "whether Congress decides to hold a hearing on legislation applicable to the general public is a nonjusticiable political question"); *Schneider*, 412 F.3d at 194-95 ("[D]ecision-making in the fields of foreign policy and national security is textually committed to the political branches of government."); *Nebraska Coalition for Educ. Equality & Adequacy v. Heineman*, 731 N.W.2d 164, 178 (Neb. 2007) (finding a textual commitment where "the duty to adopt the method and means to furnish free instruction has been left by the state Constitution to the Legislature" and where "[t]he plain language of the religious freedom clause also textually commits to the Legislature the duty to encourage schools: 'it shall be the *duty of the Legislature* to pass suitable laws . . . to encourage schools and the means of instruction'" (internal quotation marks omitted)); *Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham*, 912 So. 2d 204, 218 (Ala. 2005) ("We conclude that there is a textually demonstrable constitutional commitment to the legislature of the question of how to determine what constitutes a 'majority of each house . . . voting in [the bill's] favor.'") (brackets in original); *Starr v. Governor*, 910 A.2d 1247, 1250 (N.H. 2006) ("Thus, Part II, Article 5 of the State Constitution plainly constitutes a 'textually demonstrable constitutional commitment' of the authority to make laws to the legislative branch."); *Nielsen*, 670 A.2d at 1292 ("This provision, by its plain and unambiguous terms, commits exclusively to the General Assembly the power to define the spending cap terms and nowhere intimates any role in this process for the judiciary.").

The CAA itself provides no judicially manageable standards for determining whether the Council properly exercised its discretion here. Nothing in the CAA expressly forbade the limitation the Council adopted in the IPA on initiatives that violate the Human Rights Act. *Cf. Price v. D.C. Bd. of Elections & Ethics*, 645 A.2d 594, 599-600 (D.C. 1994) (recognizing that, in the case of an express conflict, the Charter will control). Nor did the CAA establish standards for deciding what "acts" are "necessary" to "carry out" the undefined "purpose" of the CAA. If those who drafted the CAA had meant to create a standard amenable to judicial application, they would have written the statutory language differently. At minimum, if they expected the courts would have the authority to judge the validity of any particular act by reference to the CAA's purpose, they would have explained with precision what that purpose was. Neither the CAA nor its legislative history, however, contains any direct statement of statutory purpose. Because this Court cannot divine the statutory purpose with the necessary confidence, it lacks a legitimate basis to overturn the act for lack of conformity with the statutory purpose. Thus, the statutory terms do not create any judicially manageable standard, as numerous other courts have found under similar circumstances.[5] Not only does the absence of such a standard provide an independent basis for finding nonjusticiability, but it also serves to "strengthen the conclusion

[5] *See, e.g.*, *Kromko v. Arizona Bd. of Regents*, 165 P.3d 168, 171-72 (Ariz. 2007) (*en banc*) (holding that the court could "conceive of no judicially discoverable and manageable standards" for judging whether the legislature had complied with its constitutional mandate to ensure an "as nearly free as possible" college education for state residents); *Committee for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1189-91 (Ill. 1996) (finding no judicially discoverable standards for defining a constitutional mandate for a "high quality" education and observing that "[i]t would be transparent to conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense"); *Nielsen*, 670 A.2d at 1294 (declining to define terms in the face of the legislature's failure to do so where the terms have "no inherent meanings that are reliably discernable through judicial process" and where it "requires the exercise of political judgment rather than the application of judicial scrutiny").

that there is a textually demonstrable commitment to a coordinate branch." *Nixon v. United States*, 506 U.S. 224, 228 (1993).[6]

Appellants incorrectly claim that the CAA limits the Council to enacting procedural rules rather than substantive restrictions, and that this Court can apply that standard. Appellants' Brief (Br.) 11-12. This assertion has no textual support in the CAA, which contains neither the word "procedural" nor the word "substantive." Moreover, the legislative history undermines this assertion. No one knew better the intent of the Council that drafted and adopted the CAA than those enacting that legislation. Ten of the twelve Councilmembers who unanimously voted for the IPA had also voted for the CAA. Judge Macaluso was correct that "[t]he most reasonable interpretation of events is that Council Period 2 knew what it intended when it directed itself 'to adopt such acts as 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." A.A. 126. The same Council that enacted the CAA also adopted the Human Rights Act, with its stated purpose of reinforcing "the Council's view that the Human Rights Act is among our most important laws and is to be vigorously enforced." Comm. Rpt. on Bill 2-179 at 1.

That the Council was acting so close in time to the CAA when it enacted the IPA is itself reason to conclude that its actions were fully consistent with the CAA. *See* 2B Norman J. Singer, Sutherland Statutes and Statutory Construction § 49.01 (6th ed.). In analogous circumstances, the Supreme Court "has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs,

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[6] Similarly, courts have recognized that matters committed to agency discretion without any meaningful standards for defining the scope of their discretion are unreviewable under the federal Administrative Procedure Act and the District's counterpart. *Coker v. Sullivan*, 902 F.2d 84, 88 (D.C. Cir. 1990), *citing Heckler v. Chaney*, 470 U.S. 821, 831, 834 (1985); *Washington Teachers' Union, Local #6*, 960 A.2d at 1131-32.

acquiesced in for a long number of years, fixes the construction to be given [the Constitution's] provisions." *Eldred v. Ashcroft*, 537 U.S. 186, 213 (2003) (brackets in original), *quoting Myers v. United States*, 272 U.S. 52, 175 (1926). Although the first Congress could not change the Constitution through ordinary legislation, its unique insight into what the Constitution meant gave its interpretation, through legislation, presumptive validity. *Id.*; *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888). Similarly, although the second Council could not change the Charter through ordinary legislation, its unique insight into what the CAA meant gave its interpretation through the IPA presumptive validity.

Rather than confronting this question in terms of District law, appellants rely primarily on general propositions of law and cases from other jurisdictions with very different legal landscapes to support the notion that legislatively-imposed substantive restrictions on the right of initiative are invalid. Br. 13-15. They fail to heed this Court's caution regarding the relevance of such authority when construing the District's unique law:

> A careful focus on the initiative measure, as it relates to our governmental structure, is especially important because the District of Columbia is constitutionally unique. It has characteristics of a number of governmental entities. Therefore, despite the fact that home rule of the District and the initiative right for its electors have received only limited judicial interpretation, we must be cautious in drawing on precedent from other jurisdictions, to test it against our own special context here.

Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections and Ethics (Convention Ctr. II), 441 A.2d 889, 897 n.15 (D.C. 1981) (*en banc*) (plurality op.).

Appellants critically fail to show that the law in other jurisdictions resembles District law in relevant respects. They identify no state with a provision comparable to the Charter provision allowing the Council to adopt acts necessary to carry out the CAA's purpose. Betraying the fallacy of their approach, they rely primarily on states where the initiative right has been deemed self-executing and where that feature of law was an essential reason why courts determined that

particular legislative attempts to regulate the right were invalid. Br. 13. In *Cobb v. Burress*, 209 S.W.2d 694 (Ark. 1948), the court explained, the relevant constitutional amendment plainly stated: "No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people." *Id.* at 181. In *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994) (*en banc*), the court similarly emphasized that legislative authority to regulate the right of initiative was sharply limited "*because* the initiative power is self-executing." *Id.* at 1386 (emphasis added). Because the CAA was *not* self-executing in the District, *Convention Ctr. I*, 399 A.2d at 552-53, these cases undermine rather than support appellants' argument. The fact that the CAA does not have the features that persuaded other courts to exercise the power of review is powerful evidence that judicial review is not appropriate here.

Indeed, because the initiative right takes many forms, generalizations do not serve the analysis well. For example, of the twenty-four states that have initiatives, eight have an indirect, rather than direct, initiative process, under which proposed measures are first presented to the legislature and placed on the ballot only if not then adopted. *Initiative and Referendum in the 21st Century*, Final Report and Recommendation of the National Conference of State Legislatures Initiative and Referendum Task Force at 7, 63 (July 2002) (available at http://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/IandR_report.pdf (last visited Mar. 7, 2010)). Ten states restrict the power of the legislature to amend or repeal law enacted by initiative, but fourteen allow the legislature to do so at any time. *Id.* at 11. It is also common for states to place subject-matter limitations on the right of initiative. *Id*. at 15, 17-18. Half of the states with initiatives have a single-subject rule, *id.* at 16, and sixteen have identified specific areas in which the voters may not legislate, *id.* at 17-18. Appellants' suggestion that the right of

initiative is uniform in scope and generally unrestrained is thus incorrect. Instead, the right of initiative varies from state to state and is controlled by each jurisdiction's unique laws.[7]

[7] The following state constitutional provisions show the varying role that the legislature plays in other initiative states: Ariz. Const. art. 4, pt. 1 § 1 ("This section of the Constitution shall be, in all respects, self-executing."); Ark. Const. amend. 7 ("This section shall be self-executing, and all its provisions shall be treated as mandatory, but laws may be enacted to facilitate its operation. No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people."); Colo. Const. art. 5, § 1 ("This section of the constitution shall be in all respects self-executing; except that the form of the initiative or referendum petition may be prescribed pursuant to law."); Me. Const. art. 4, pt. 3, § 22 (" . . . the Legislature shall enact further laws not inconsistent with the Constitution for applying the people's veto and direct initiative . . . , supplemented by such reasonable action as may be necessary to render the preceding sections self executing. The Legislature may enact laws not inconsistent with the Constitution to establish procedures for determination of the validity of written petitions."); Mass. Const. amend. art. 48, Gen. Prov., pt. 7 ("This article of amendment to the constitution is self-executing, but legislation not inconsistent with anything herein contained may be enacted to facilitate the operation of its provisions."); Mich. Const. art. 2, § 9 ("The legislature shall implement the provisions of this section."); Miss. Const. art. 15, § 273 ("The Legislature shall provide by law the manner in which initiative petitions shall be circulated, presented and certified. . . . The Legislature may enact laws to carry out the provisions of this section but shall in no way restrict or impair the provisions of this section or the powers herein reserved to the people."); Neb. Const. art. III, § 4 ("The provisions with respect to the initiative and referendum shall be self-executing, but legislation may be enacted to facilitate their operation."); Nev. Const. art. 19, § 5 ("The provisions of this article are self-executing but the legislature may provide by law for procedures to facilitate the operation thereof."); N.D. Const. art. 3, § 1 ("This article is self-executing and all of its provisions are mandatory. Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers."); Ohio Const. art. II, § 1g ("The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved."); Okla. Const. art. 5, § 3 ("The Legislature shall make suitable provisions for carrying into effect the provisions of this article."); Or. Const. art. IV, § 1 ("The Legislative Assembly shall provide by law for the manner in which the Secretary of State shall determine whether a petition contains the required number of signatures of qualified voters."); Utah 1953 Const. art. 6, § 1 ("The legal voters of the State of Utah in the numbers, under the conditions, in the manner, and within the time provided by statute, may . . . initiate any desired legislation . . . ."); Wyo. Const. art. 3, § 52 ("Additional procedures for the initiative and referendum may be prescribed by law.").

A comparison to the law of Idaho is instructive. Although its enabling language is not as broad as the CAA, Idaho's initiative provision in the state constitution textually committed to the legislature significant control over the initiative process. When adopted in 1912, Article III, § 1 provided that "legal voters may, under such conditions and such manner as may be provided by acts of the legislature, initiate any desired legislation . . . ." *Luker v. Curtis*, 136 P.2d 978, 979 (Idaho 1943). Unlike the CAA, which directed the Council to implement the right of initiative

An unstated, essential premise of appellants' argument, then, must be that it is categorically impermissible to confer upon the legislative branch the power to place substantive limitations on the right of initiative. There is no authority for that proposition. Appellants identify nothing that would prevent the Council, in the exercise of its Home Rule authority, from drafting and passing a Charter amendment that granted the electorate the right of initiative while reserving the power to exclude discriminatory initiatives; that would prevent the voters from ratifying such a Charter amendment; or that would prevent Congress from approving it.

To the contrary, appellants' arguments are precluded by the plain language of not only the CAA, but also the Home Rule Act provision giving the Council plenary authority over elections in the District. "*Notwithstanding any other provision* of [the Home Rule Act] 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 (2006 Repl.) (emphasis added). The Council properly could, and in fact did, rely on this provision when adopting the IPA, which governs initiative, referendum, and recall elections. Comm. Rpt. No. 1 on Bill No. 2-317 at 9-11. Again, the provision does not make the Council's authority depend on whether the act in question is "procedural" or "substantive" in nature.

The fact that appellants present a nonjusticiable political question does not mean that they are without a remedy. Rather, their remedy is a political one. In the District, appellants have

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within 180 days, the Idaho constitution did not impose a timeframe for the legislature to establish the conditions and manner for enacting initiatives, and the Idaho legislature did not act immediately. Instead, "[t]he initiative and referendum provision of the amendment to the constitution lay dormant for more than twenty years until the legislature by chap. 210 of the 1933 session enacted the provisions of the chapter, prescribing the manner and method of exercising the initiative and referendum privileges." *Id.* at 980. In resolving whether the legislature could repeal or amend an initiative, the *Luker* court observed that "the manner, method and instrumentalities, through which the people of a state determine to *legislate,* are *political and not judicial* questions; and . . . the courts can not consider the wisdom or unwisdom of the methods or instrumentalities by which the people of a state determine to accomplish legislation." *Id.* at 983 (emphasis in original; citations omitted).

two different legislatures that could grant them relief even though this Court may not; they may try to influence those legislatures or have new legislators elected with views more congenial to their own. *See United States v. Richardson*, 418 U.S. 166, 179 (1974) (noting that the lack of Article III jurisdiction does not "impair the right to assert . . . views in the political forum at the polls"); *Sensing v. Harris*, 172 P.3d 856, 860 (Ariz. App. 2008) (holding that mandamus was unavailable where the enforcement of an ordinance was a political question, the proper remedy being "to influence the City's policymakers to change the City's policy and practices regarding enforcement of the Ordinance"). As then-Judge Warren Burger emphasized in finding a case nonjusticiable, "the basic and important corollary is that the people may remove their elected representatives as they cannot dismiss the United States Judges. This elementary fact about the nature of our system, which seems to have escaped notice occasionally must make manifest to judges that we are neither gods nor godlike, but judicial officers with narrow and limited authority." *Pauling v. McNamara*, 331 F.2d 796, 799 (D.C. Cir. 1963); *accord Richardson*, 418 U.S. at 179 ("our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them").[8]

B. Deciding what acts are "necessary to carry out" the undefined "purpose" of the CAA requires policy decisions that are properly left to the Council and that this Court cannot make without expressing lack of the respect due coordinate branches of government.

The conclusion that this appeal presents a nonjusticiable question also follows under the next three *Baker* factors. Under the third factor, the Court cannot decide whether the IPA restriction on initiatives and referenda that violate the Human Rights Act was "necessary to carry

[8] The District does not suggest that this case involves a political question because the issue of same-sex marriage is politically charged. Rather, this case presents a "political question" because the Council — not the courts — has been charged with determining what laws are necessary to carry out the purpose of the CAA.

out the purpose of the CAA" without making "an initial policy determination of a kind clearly for nonjudicial discretion." 369 U.S. at 217. A political question exists "when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis." *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009), *quoting EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 784 (9th Cir. 2005). "This factor is aimed at preventing a court from removing an important policy determination from the Legislature." *Id.* (internal quotation marks omitted).

As discussed above, it is impossible to determine the Council's overall purpose in the CAA with precision and confidence, but at a minimum the Court can conclude that the Council decided as a matter of legislative judgment that initiatives and referenda should not be vehicles for government-sanctioned discrimination. In crafting and enacting the IPA, the Council explained: "The teaching of [the Supreme Court's decision in] *Reitman* is that the initiative process may not be used to place the Government in the posture of affirmatively condoning discrimination." Comm. Rpt. No. 1 on Bill No. 2-317 at 9. Whether or not that reading of *Reitman* is the only possible one is beside the point. The point, rather, is that the Council itself understood the CAA (which followed *Reitman* by a decade) to include an implied restriction against initiatives that discriminate, and understood the IPA restriction on such initiatives to carry out the CAA's purpose. *Id.* at 9-11. This decision was a political one — the second Council decided that the CAA should not facilitate discriminatory initiatives and referenda — and this Court "cannot substitute its own judgment of what is wise or unwise for that of the legislature." *Cobb v. Bynum*, 387 A.2d 1095, 1097 (D.C. 1978).

The contrary assertion that the purpose of the initiative and referendum process is to facilitate direct democracy even on discriminatory initiatives and referenda is unsupported by any reference to statutory text or other legislative statement of overall purpose. Moreover,

appellants' *ipse dixit* is belied by their recognition of numerous limitations — both express and implied — on the right of initiative and referendum. The CAA expressly removes at least some subject matters from the direct authority of the electorate. D.C. Code § 1-204.101(b) (2006 Repl.). Similarly, the Home Rule Act itself shows that Congress meant to reserve to itself all authority to legislate in certain areas. D.C. Code §§ 1-203.02, 1-206.02(a), 1-206.03(a) (2006 Repl.). Thus, the purpose of the CAA could not have been to allow any type of initiative and referendum whatsoever.

Although appellants suppose that the "purpose" of the CAA was to let the voters vote on everything except those matters expressly excluded (Br. 4, 9-10), that too is speculative and indeed cannot be true given this Court's repeated recognition of implied restrictions on the rights of initiative and referendum. The right of initiative does not extend to any proposed initiative that would conflict with "any Act of Congress . . . which is not restricted in its application exclusively in or to the District." *Brizill v. D.C. Bd. of Elections & Ethics*, 911 A.2d 1212, 1214 (D.C. 2006), *quoting* D.C. Code § 1-206.02(a)(3) (2006 Repl.). Nor may a voter propose an initiative that would be unconstitutional. *Hessey v. Burden (Hessey II)*, 615 A.2d 562, 574 (D.C. 1992) (recognizing judicial discretion "to consider pre-election challenges to the constitutionality or legality of an initiative"); *see also Committee for Voluntary Prayer v. Wimberly*, 704 A.2d 1199, 1202 (D.C. 1997) (upholding the trial court's decision to address the constitutionality of a proposed initiative). Likewise, a voter may not propose an initiative that relates to matters of an executive or administrative nature. *Convention Ctr. II*, 441 A.2d at 907-09 (plurality op.).

Given such authority, the most reasonable conclusion is that the CAA was intended to authorize the electorate to vote on topics generally, but not those inappropriate for direct democracy. Direct democracy is the exception in the American tradition. The United States is,

first and foremost, a republican democracy, and Congress must guarantee each state a republican form of government. U.S. Const. art. IV, § 4. As James Madison wrote in Federalist No. 10:

> When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.
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> * * *
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> From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.
>
> A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking.

One can hardly accuse the Council of acting unreasonably in carrying out the purpose of the CAA when it acted consistently with our fundamental political traditions by concluding that proposals to authorize discrimination should be the subject of deliberative, representative lawmaking rather than popular politics. To conclude otherwise would require the Court to decide a matter of policy, the determination of which has been left to the legislature.

On a related note, under the fourth *Baker* factor, it is impossible for this Court to undertake independent resolution of the issue without "expressing lack of the respect due coordinate branches of government." 369 U.S. at 217. The Court may not substitute its

judgment on a policy matter for that of the Council. *Simpson v. D.C. Office of Human Rights*, 597 A.2d 392, 400 (D.C. 1991) ("A decent respect for the separation of powers between the three branches of government precludes us from undertaking . . . a legislative (or at least non-adjudicative) task.").

That the Court should not intrude into the legislative domain is particularly clear here for reasons related to those underlying the fifth *Baker* factor — whether there is an "unusual need for unquestioning adherence to a political decision already made." 369 U.S. at 217. The IPA's inclusion of the Human Rights Act's anti-discrimination provisions has functioned successfully in the initiative and referendum process for more than thirty years. *Cf. Hessey II*, 615 A.2d at 578-80 (applying the Human Rights Act restriction of the IPA without questioning the Council's authority to adopt it). More importantly, the statutory scheme as a whole has successfully served thirty years worth of initiatives and referenda. Both the government and the public have relied on this established framework repeatedly since the passage of the IPA. Reliance on this well-settled process weighs in favor of adhering to the Council's policy decision banning discriminatory initiatives and referenda. *Cf. Atwater v. D.C. Dep't of Consumer & Regulatory Affairs*, 566 A.2d 462, 468 (D.C. 1989) ("In construing a statute, courts normally accord great deference to the interpretation of the agency charged with its administration, particularly if the interpretation is of long standing and has been consistently applied.").

Finally, the District has a long and unwavering tradition of non-discrimination. For more than forty years, the District has provided protection to a wide range of minorities who would not otherwise have been protected against discrimination, including, from the beginning, gays and lesbians. Indeed, long before Home Rule, the District was committed to protecting those people other jurisdictions would not, as demonstrated by the facts of *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court's landmark anti-miscegenation case. Mildred Jeter, an African-

American woman, and Richard Loving, a white man, were married in the District of Columbia in June 1958. *Id.* at 2. When they returned to Virginia to establish their home, they were criminally charged for violating Virginia's ban on interracial marriage. *Id.* at 2-3. They pled guilty, and in exchange for their leaving Virginia, their one-year jail sentences were suspended. *Id*. at 3. That the Lovings found refuge in the District until the Supreme Court struck down Virginia's anti-miscegenation law eight years later, in 1967, is a testament to the District's long-standing policy of non-discrimination. *Id.*

When enacting the Human Rights Act, the Council "underscore[d] . . . that the elimination of discrimination within the District of Columbia should have 'the highest priority.'" Comm. Rpt. of Bill 2-179 at 3. The Council's commitment to eliminating discrimination is reflected both in its adoption of the restriction on discriminatory initiatives and referenda as well as in the scope of the Human Rights Act itself. Appellants present no reason justifying a retreat in the District's historic fight against discrimination and the embrace of discrimination as an official policy for the District through the initiative process.[9]

II. IN THE ALTERNATIVE, FOR SIMILAR REASONS, THE COURT SHOULD DEFER TO THE COUNCIL AND UPHOLD THE PROHIBITION ON INITIATIVES THAT VIOLATE THE HUMAN RIGHTS ACT.

A. The Court should pay the Council extreme deference in considering whether the Council properly interpreted the CAA, which the Council itself wrote in the same session in which it devised the IPA.

Even if the question appellants present here were justiciable, the Court's review nonetheless would be highly constrained. As the Court has observed, the Council's

[9] The District below notified the Superior Court of a potential jurisdictional issue in that appellants sought review under D.C. Code § 1-1001.16(b)(3) (2001), but that provision on its face empowers a court only to rule on whether a measure authorizes discrimination in violation of the Human Rights Act, not to rule that the Human Rights Act limitation on the right of initiative is improper. District's Memorandum of Points and Authorities 10-11 (filed Dec. 18, 2009). The Superior Court did not reach the issue.

understanding of its responsibilities under the Home Rule Act is entitled to deference that is "great," *Tenley & Cleveland Parker Emergency Comm. v. D.C. Bd. of Zoning Adjustment*, 550 A.2d 331, 334 n.10 (D.C. 1988), and "substantial," *American Fed'n of Gov't Employees (AFGE) v. Barry*, 459 A.2d 1045, 1051 (D.C. 1983). Moreover, in the IPA, the Council was interpreting the Charter Amendment Act, an act that originated with it — in the same session in which it devised the IPA — applies directly to it, and was affirmatively approved by Congress:

> Since amendments to the Charter required Congressional approval when the initiative right was approved by Congress, D.C. Code § 1-1320 (1991 Repl.), the court must consider Congressional intent in approving the amendment. 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.

Hessey I, 601 A.2d at 7. To the extent the Council was interpreting its own intent, the highest deference is due — deference at least equal in degree to the deference given agencies when interpreting their own regulations. *See, e.g.*, *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."); *Watergate West, Inc. v. D.C. Bd. of Zoning Adjustment*, 815 A.2d 762, 765 (D.C. 2003) ("When [an agency's] decision turns on its interpretation of a regulation that agency is charged with implementing, that interpretation must be upheld unless it is plainly erroneous or inconsistent with the regulation." (internal quotation marks omitted)). That is particularly true given that, again, the interpretation of the CAA at issue was essentially contemporaneous to the CAA. *See supra* pages 20-21.[10]

[10] Appellants see "no principled basis for deferring to the Council's interpretation of the Home Rule Act," but they cite a case applying Home Rule Act provisions that Congress wrote and enacted, not any Charter amendment initiated by the Council. Br. 12 n.9, *quoting District of Columbia v. Washington Home Ownership Council*, 415 A.2d 1349, 1351 n.5 (D.C. 1980).

Substantial deference would be due, moreover, even if the Court were considering whether the Council was properly interpreting a grant of legislative authority given directly by Congress rather than a Charter amendment. In considering whether the Council has properly carried out its delegated authority, the Court is "mindful that ordinary considerations of deference and comity between the judicial and other branches of government are, in the unique framework of our self-government structure, significantly altered." *AFGE*, 459 A.2d at 1050. Although separation-of-powers considerations govern political questions *vis-à-vis* co-equal branches of the District government, different considerations apply when the Court is considering whether the Council has adhered to the authority conferred on it by Congress. In this context, and under the District's unique framework, the Court "seek[s] only to assure [itself] that the act is facially valid, *i.e.*, consistent with Council legislative authority in partnership with Congress." *Id.* at 1051. Thus, for example, the Court has explained:

> As our decision in *AFGE* made plain, court review of emergency legislation is necessary only — but importantly — to safeguard Congress' reservation to itself of a substantial role in the legislative process through the 'layover' provision permitting congressional [disapproval] or amendment of Council legislation. When, as in this case, the Council has acted to address concerns about public safety [or welfare] by enacting legislation which Congress has had the opportunity to review, the risk of an ero[sion of] congressional prerogatives by the interim enactment of emergency legislation is greatly reduced.

Atchison v. District of Columbia, 585 A.2d 150, 157-58 (D.C. 1991) (internal quotation marks and citations omitted). There is no suggestion here that the Council's action in the IPA in any way eroded Congressional authority. Significantly, Congress was given the opportunity to disapprove the IPA but did not. *See Jackson*, 130 S. Ct. 1279 (Roberts, C.J., in chambers).

B. The IPA's prohibition on initiatives and referenda that violate the Human Rights Act is consistent with the text and purpose of the CAA.

Given the deference due the Council, or even the lesser deference that would be due under *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984),[11] and its progeny in this Court if the Council were merely an agency exercising rulemaking authority rather than a legislature with Home Rule authority, the Court should uphold the decision to enact a restriction on discriminatory initiatives and referenda. As discussed above, there is no tension between the Human Rights Act restriction in the IPA and the text or the purposes of the CAA at all, much less the facial inconsistency that would be required to mandate invalidating the restriction. *AFGE*, 459 A.2d at 1051; *Smith v. D.C. Dep't of Employment Servs.*, 934 A.2d 428, 437 (D.C. 2007). Appellants do not come close to showing such inconsistency.

The text of the relevant CAA provision bears repeating: "The Council of the District of Columbia shall adopt such acts as are necessary to carry out the purpose of this subpart within 180 days of the effective date of [the CAA]." D.C. Code § 1-204.107 (2006 Repl.). For the reasons above, that text commits to the Council the authority to decide what acts are necessary and leaves the Court no appropriate standard for considering whether a particular act is actually "necessary" to "carry out" the CAA's undefined "purpose." At minimum, the provision gives the Council broad discretion, and the Court cannot find that the Council abused it to the extent necessary to overturn the IPA. In particular, assuming justiciability, the Court should reject the argument that the provision allows only those acts that directly "facilitate" the exercise of the rights of initiative, referendum, and recall. Br. 16. The words "carry out" show otherwise. The choice of these words signifies that the CAA gave the Council authority beyond that minimally

[11] Judge Macaluso also found it "instructive to examine the latitude given implementing regulations promulgated by an administrative agency in response to Congressional legislation," while recognizing that "such regulations are accorded less deference than the enactments of a legislative body." A.A. 119-20.

necessary to ensure that there would be a process in place for initiatives, referenda, and recalls. Rather, the words "carry out" imply that the Council was given authority to establish that process, while also reasonably accounting for its potential consequences. And, for the reasons above, to the extent the word "purpose" is amenable to judicial definition in this context, the Council was right to conclude that the purpose did not include the facilitation of initiatives on topics inappropriate for direct democracy, and in particular initiatives intended to discriminate.

Appellants rely primarily on their repeated but fallacious assertion that the right of initiative is "co-extensive" with the Council's right to legislate. Br. 7-10. The fact that appropriations laws are beyond the reach of initiatives conclusively disproves this, as does the fact that only the Council can initiate Charter amendments. D.C. Code §§ 1-203.03(a), 1-204.101(a) (2006 Repl.). Appellants are wrong to claim that the statutory text establishes that the CAA's purpose was to allow the electorate "to act as a coextensive legislative authority with the Council" (Br. 11) and wrong to claim that the Court has so held (Br. 10 n.7). Moreover, the dicta upon which they rely is of no relevance. To the extent that the Court has suggested that the rights are "co-extensive," it has indicated that the rights are so only in the "absence of an express or implied restriction on the right of initiative," and has used the word "co-extensive" only in the context of deciding whether the electorate had *more* power than the Council, not less. *Convention Ctr. II*, 441 A.2d at 897; *see id.* at 878 (rights are "essentially co-extensive"); *Brizill*, 911 A.2d at 1214 (rejecting a voter initiative seeking to repeal or amend an act of Congress). That is, as the Court has clarified: "The initiative power regarding 'laws' is co-extensive with the Council's power to pass 'acts' *except to the extent that the right of initiative is otherwise limited beyond limitations on the legislative authority of the D.C. Council*." *Hessey I*, 601 A.2d at 16 n.27 (emphasis added).

Inconsistently, appellants also rely on one way in which the right of initiative is undisputedly lesser than the Council's right to legislate — the restriction on initiatives regarding appropriation of funds, D.C. Code § 1-204.101(a) — and assert that the CAA established that this was the *only* way in which the right of initiative could be limited. Br. 17-19. But the fact that the CAA expressly makes clear that in the definition of "initiatives" that initiatives may not involve the appropriation of funds does not mean that the Council or Congress intended that exception to be the only limitation on the right of initiative. If that were so, then the electors could adopt laws inconsistent with Acts of Congress or the Constitution, inasmuch as those limitations do not appear in the definition of initiative or anywhere else in the CAA provisions that govern that process. Again, however, it is clear that the right of initiative does not extend to such initiatives. *Brizill*, 911 A.2d at 1214; *Hessey II*, 615 A.2d at 574.

Indeed the Council understood such limitations to be implicit when adopting the IPA. Thus, the IPA provides that a citizen may not propose an initiative that would "limit or negate" a budget request act authorized by the Council or initiate laws that the Council could not enact under the authority of the Home Rule Act. D.C. Code § 1-1001.16(b)(1) (2006 Repl.). Yet no one, appellants included, has (or, in more than thirty years since its enactment, has ever had) any doubt that these substantive limitations imposed by the Council in the IPA are entirely proper.[12]

[12] Appellants readily concede that the right of initiative is "subject to the same legislative restrictions as the D.C. Council" (Br. 10) even though there is no express provision in the CAA that mandates as much and "the list of restrictions that the people imposed on their right of initiative only includes 'laws appropriating funds'" (Br. 12 n.8). Given this concession, this Court should ignore their repeated assertions that there is but one substantive limitation on the right of initiative. *E.g.*, Br. 4, 10 n.6 (quoting Councilmember Arrington Dixon — who chaired the Council committee that introduced the IPA's anti-discrimination provisions — for the proposition that the electorate can "initiate any measure they want" except the spending of money), 10 n.7 (citing *Convention Ctr. I*, 441 A.2d at 878 n.4, for the proposition that "[t]he one exception" to the right of initiative is laws appropriating funds), 12 n.8.

The Human Rights Act restriction is no different. It is no more contrary to the plain language of the CAA than are "the substantive limits on taxing commuters, amending or repealing acts of Congress, authorizing tall buildings, regulating federal and local courts, and consistency with the United States Constitution," which appellants acknowledge are proper substantive restraints on the right of initiative beyond the one express limitation in the CAA. Br. 10; *see* D.C. Code §§ 1-203.02, 1-206.02(a), 1-206.03(a) (2006 Repl.). Their acknowledgment of these limitations is an implicit concession of the Council's ability to codify implied subject-matter limitations into the initiative regime.

For these reasons, Judge Macaluso correctly found (A.A. 123-25) that appellants' reliance on the Latin maxim *expressio unius est exclusio alterius*, which means that when the legislature expressly mentions one thing, the exclusion of others is implied, is misplaced. *Council of the District of Columbia v. Clay*, 683 A.2d 1385, 1390 (D.C. 1996). While this maxim may be an aid to statutory construction, it is not a rule of law. *Id.* Furthermore, it "must be applied with a considerable measure of caution." *Id.* In particular, it is "subordinate 'to clear and contrary evidence of [legislative] intent.'" *Id.*, *quoting Neuberger v. C.I.R.*, 311 U.S. 83, 88 (1940) (brackets in original). It cannot be said that either the Council in enacting the CAA or Congress in approving it intended that the right of initiative would be unrestrained by the scope of legislative authority granted to the District in the Home Rule Act or the Constitution, and that the *only* limitation on the right of initiative that was intended would be that regarding laws appropriating funds.

Moreover, it does not follow *ipso facto* from the recognition of any one express or implied restraint on the right of initiative that all restraints are proper. Contrary to appellants' assertion, upholding the Human Rights Act restriction on initiatives does not mandate the conclusion that "no boundaries . . . exist on the ways the Council could curtail" the right of

initiative. Br. 20-21. There can be no doubt that an attempt by the Council to do away with the right altogether would be contrary to the express provisions of the CAA and "facially [in]valid." *AFGE*, 459 A.2d at 1051; *see Price*, 645 A.2d at 599-600. Moreover, it was the Council's mandate to enact implementing legislation within 180 days of the CAA's adoption, and the Council was to carry out this mandate more than thirty years ago. The intervening thirty years of Council silence on the question of what is a proper subject for initiative suggests that the hypothetical threat of unrestrained future subject-matter restrictions on initiatives is imaginary.

III. THE PROPOSED INITIATIVE VIOLATES THE HUMAN RIGHTS ACT RESTRICTION IN THE INITIATIVE PROCEDURES ACT.

The Board and Judge Macaluso both found that the initiative violated the Human Rights Act because it would limit the ability to marry based on one's sexual orientation and thereby deprive gays and lesbians the right to marry the person of their choice. A.A. 34, 127-28. In response, appellants offer two arguments. First, they argue that the Human Rights Act does not apply to marriage, placing heavy reliance on this Court's decision in *Dean*. Br. 22-24. That both misses the point, because the question here is what initiatives the IPA prohibits rather than what existing government practices the Human Rights Act directly would proscribe, and fails on its merits. Second, they argue that their proposed initiative does not discriminate at all. Br. 29-34. That too is incorrect.

A. The IPA prohibition on initiatives that violate the Human Rights Act reaches discrimination in the context of marriage.

1. The IPA prohibits all initiatives that discriminate under the broadest possible reading of the Human Rights Act.

Appellants rely on *Dean* but ignore an essential difference between the application of the Human Rights Act there and its application here. The *Dean* Court was considering an attempt to apply the Human Rights Act directly to proscribe an existing government practice; there was no

issue regarding initiatives or the IPA. 653 A.2d at 318. Here, the question is whether the IPA's prohibition on any initiative that "authorizes, or would have the effect of authorizing, discrimination prohibited under" the Human Rights Act applies to appellants' attempt to change existing government practice. D.C. Code § 1-1001.16(b)(1) (2006 Repl.). Properly read, the IPA's prohibition covers all discriminatory practices in proposed direct legislation under the broadest possible reading of the Human Rights Act, without resort to an exception to the plain statutory language that this Court applies when considering whether the Human Rights Act itself would apply directly to such practices under existing law. The IPA thus prohibits appellants' initiative based on Human Rights Act principles.

In the IPA, the Council intended to disallow the entire category of initiatives that discriminate. The underlying report explains: "the initiative process may not be used to place the Government in the posture of affirmatively condoning discrimination." Comm. Rpt. No. 1 on Bill 2-317 at 9. "It is an implied restriction to ensure that *no initiated measure will establish an affirmative policy in favor of discrimination in this community*. . . ." *Id.* at 10 (emphasis added). The IPA thus includes a reference to the Human Rights Act, which has the express purpose of securing the end of discrimination in the District for any reason other than individual merit, including discrimination by reason of sexual orientation, gender identity or expression, and sex. D.C. Code § 2-1401.01 (2007 Repl.).

The Human Rights Act is a broad, remedial statute to be generously construed. *Wallace v. Skadden, Arps, Slate Meagher & Flom*, 715 A.2d 873, 889 (D.C. 1998). It is a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds." *Executive Sandwich Shoppe v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000) (internal quotation marks omitted). Its prohibition against discrimination extends to discrimination related to any District government "facility, program, service, or benefit." D.C. Code § 2-1402.73 (2007 Repl.).

Appellants do not and could not dispute that civil marriage is a government program, service, or benefit. Straightforwardly read, the Human Rights Act would apply to appellants' initiative. More clearly, given the IPA's legislative history, appellants' initiative violates the prohibition on initiatives that "authorize[], or would have the effect of authorizing, discrimination prohibited under" the Human Rights Act. D.C. Code § 1-1001.16(b)(1)(C) (2006 Repl.).

Appellants' attempt to escape this conclusion based on *Dean* is misguided. To be sure, *Dean* recognized that the Council "did not intend the [Human Rights] Act to prohibit every discriminatory practice" and concluded that the Human Rights Act standing alone did not constitute legislative authorization for same-sex marriage, but it did so by recognizing an exception to the plain statutory language. 653 A.2d at 319-20. *Dean* and related cases stand, in essence, for the proposition that the Human Rights Act reaches discrimination generally, but not certain specific instances of discrimination embedded in the status quo except when the Council has shown a clear intent to displace that practice. *Id.*; *see Evans v. United States*, 682 A.2d 644, 648-49 (D.C. 1996); *National Org. for Women (NOW) v. Mutual of Omaha Ins. Co.*, 531 A.2d 274, 276 (D.C. 1987). This is supported by the provision of the Human Rights Act added after *Dean* that prohibits discriminatory practices with respect to government facilities, services, programs, or benefits "[e]xcept as otherwise provided for by District law or when otherwise lawfully and reasonably permitted . . . ." D.C. Code § 2-1402.73 (2006 Repl.).

The Court in *Dean* did not decide, and was not asked to decide, what the *IPA* means and in particular whether an initiative of the sort appellants propose would be permitted under that statute. Even if the Human Rights Act, directly applied, would not prohibit an existing government practice, the Court should read the IPA in light of that statute's own text and legislative history, including the express statement by the Council that "no initiated measure will establish an affirmative policy in favor of discrimination in this community. . . ." Comm. Rpt.

No. 1 on Bill 2-317 at 10. There is no need to apply an exception to the plain statutory language as in *Dean*. To state the obvious, the purpose of an initiative is to change the status quo. That fundamental difference fully justifies the Council's choice to apply the IPA prohibition to all discriminatory practices, including those the Human Rights Act, applied directly, would not reach because of a concern for maintaining the status quo. That the Human Rights Act cannot be used as a sword to alter substantive law does not mean that the IPA and Human Rights Act together cannot be used as a shield when efforts are made to alter substantive law in a discriminatory manner. Properly read, then, the IPA prohibits all initiatives that discriminate under the broadest possible reading of the Human Rights Act, including appellants' initiative.

2. *Dean* was based on an entirely different legal landscape.

Appellants' reliance on *Dean* also fails on its own terms. Appellants repeatedly assert that this Court "conclusively held in *Dean* . . . that the [Human Rights Act] does *not* reach the regulation of the marital relationship." *E.g.*, Br. 22. They misstate *Dean*, and even quote its recitation of the trial court's opinion as if it were part of the Court's own holding. Br. 24, 26-27 (quoting *Dean*, 653 A.2d at 310, where the Court recited the trial court's view that the "Council consciously chose not to make the language of the Human Rights Act applicable to the regulation of the marital relationship"). The *Dean* Court actually held that the Human Rights Act standing alone did not change the definition of marriage and require the Superior Court to grant a marriage license to a same-sex couple where District law did not otherwise allow such marriages. 653 A.2d at 319-20. The Court's decision was predicated upon its inability to find any evidence within District law that the definition of "marriage" meant anything other than a union between a man and a woman. *Id*. at 310-16. The Court would not presume that by enacting the Human Rights Act, the Council intended to effect such a "dramatic change" in the

law without an express indication reflecting an intent to alter the definition of marriage. *Id.* at 319, *quoting NOW*, 531 A.2d at 276. The Court explained:

> Although the Council undoubtedly intended the Human Rights Act to be read broadly to eliminate the many prescribed 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. Had the Council intended to effect such a major definitional change, counter to common understanding, we would expect some mention of it in the Human Rights Act or at least in its legislative history. There is none. This is not surprising, however, for by legislative definition — as we have seen — "marriage" requires persons of opposite sexes; 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. at 320 (citations omitted). The Court thus rejected the notion that the Human Rights Act was meant "to expand the marriage statute to authorize same-sex unions." *Id.*

The holding of *Dean* was, obviously, based on the state of the District's marriage laws as they existed at the time of that decision, in particular the "legislative definition" of marriage. *Id.* The conclusion that the Council did not then intend to redefine marriage does not suggest that the Council never intended the Human Rights Act to apply to marriage (in any context, as appellants suggest[13]) or to afford gays and lesbians the protections of the Human Rights Act in the event that the definition of marriage changed to permit and recognize same-sex marriages.

Much has changed in the fifteen years since *Dean* was decided. Most importantly, District law now permits same-sex marriages and explicitly recognizes legal, same-sex marriages from other jurisdictions. D.C. Code § 45-405.01 (2009); Marriage Equality Act, 57 D.C. Reg. 1833 (Mar. 5, 2010). The predicate to the reasoning in *Dean* — the notion that, under District law, same-sex marriage is an impossibility — no longer holds true. Appellants' reliance on *Dean* thus fails. *Dean* was about whether the Human Rights Act displaced the Council's tacit

[13] The statute surely would be violated if, for instance, an initiative proposed or a District official decided that only persons of a particular race or physical appearance could marry.

legislative decision *not* to allow same-sex marriage. Appellants seek to use *Dean*, though, to protect an attempt to displace the Council's *explicit* legislative decision to *allow* same-sex marriage. Given the current status quo, an initiative that would deny anyone the right to enter same-sex marriages in the District, or to have same-sex marriages from other jurisdictions recognized in the District, would have the effect of authorizing discrimination in violation of the Human Rights Act.

Reaching this conclusion would not require the Court first to conclude that the Human Rights Act itself has been amended or that it always required the District to allow same-sex marriage, as appellants argue. Br. 25-26. Again, the reasoning in *Dean* was motivated by the recognition that the Council should not be presumed to have displaced certain instances of discrimination embedded in the status quo absent a showing of clear intent. 653 A.2d at 319-20. But the Council clearly has displaced the historic ban on same-sex marriage in the District. By operation of law, the *reach* of the Human Rights Act also has changed even though its *meaning* remains the same. Neither *Dean* nor logic suggests that the Court should apply an unwritten exception to the straightforward application of the plain language of that statute where the Council has removed any reason to do so.

Indeed, every one of the District's marriage laws has fundamentally changed since *Dean*. For example, seven of the eight gender-specific statutory provisions cited in *Dean* have been amended to remove gender-specific references. *See* 653 A.2d at 313-14; D.C. Code §§ 16-904(d)(1), 16-911, 16-912, 16-913, 16-916, 46-601, 46-718. JAMA changed the eighth provision, D.C. Code § 46-401. These changes were part of the Council's systematic effort to

employ gender-neutral language throughout the D.C. Code, especially as that language pertains to marriage and the rights, benefits, and obligations incident to that institution.[14]

Notably, the Human Rights Act has also undergone significant amendments since *Dean* was decided, expanding its protections.[15] D.C. Code § 2-1402.31 (2007 Repl.), at issue in *Dean*, was amended to add language including persons within a protected class regardless of whether his or her characteristic is "actual or perceived." In addition, D.C. Code § 2-1402.73 (2007 Repl.) expressly made the provisions of the Human Rights Act applicable to all District government services and benefits. *See* D.C. Code § 2-1430.73 (2007 Repl.) (prohibiting discrimination regarding any District government "facility, program, service, or benefit.").

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[14] The District has continued to confer greater equality on gay and lesbian couples and their families. In the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, D.C. Law 18-33, 56 D.C. Reg. 4269 (July 18, 2009), for instance, the Council provided legal recognition to the parent-child relationship for children born to domestic partners. The committee report states: "The purpose of this legislation is to formally acknowledge that families created by same-sex couples are not distinguishable from any other family currently recognized under District law." Council of the District of Columbia, Committee on Public Safety and Judiciary, Report on Bill 18-66, Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, at 1 (Mar. 10, 2009).

[15] While the specific incorporation of a statute by reference generally freezes the meaning of the incorporated statute in time, that rule yields where the legislature has shown its intention to incorporate subsequent amendments. 2B Norman J. Singer, Sutherland Statutes and Statutory Construction § 51.08 (6th ed.). Although the Council expressly incorporated the "Human Rights Act of 1977" in the IPA, the best reading is that the Council intended subsequent amendments to the Human Rights Act to apply to the IPA. First, the reference in context can be read as a general reference to the District's anti-discrimination laws as a whole because the Human Rights Act was the District's only anti-discrimination statute. Second, the legislative history shows that the Council intended the maximum possible protection against discrimination. Third, as originally proposed, the IPA prohibited initiatives that discriminated based on a set list of proscribed categories. Bill 2-317, § 16(*l*)(6) (Committee Print No. 1). Rather than retain this static definition of what constitutes discrimination, the IPA incorporated the Human Rights Act by reference, ensuring that the IPA will fully protect the District's citizens as understandings of what constitutes discrimination develop.

Dean, by contrast, dealt with discrimination only in public accommodations. 653 A.2d at 318-19; *see* D.C. Code § 2-1402.31 (2007 Repl.).[16]

The legal landscape upon which *Dean* rests thus no longer exists. Judge Terry observed in his concurrence in *Dean* that "the Council, and only the Council, can provide" gays and lesbians with the relief they seek. 653 A.2d at 362 (Terry, J., concurring). The Council has now provided that relief, and there is nothing in *Dean* that forecloses the Human Rights Act's application to marriage as it is now defined.

3. *Dean* does not speak at all to whether a decision not to recognize same-sex marriages from other jurisdictions would violate the Human Rights Act.

Moreover, even if the reasoning in *Dean* were helpful to appellants, it did not even purport to rule on an issue essential to appellants' argument. *Dean* dealt only with whether same-sex couples could enter marriages in the District, not whether same-sex marriages from other jurisdictions should be recognized. 653 A.2d at 309. Indeed, at the time (unlike now[17]), no state had legalized same-sex marriages, so the issue of District recognition of same-sex marriages from other states could not have been considered then. *Dean* thus is not binding authority on the question whether the initiative appellants propose, which would prohibit

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[16] Appellants, relying on D.C. Code § 2-1411.03(3) (2007 Repl.), assert that the Human Rights Act does not extend to marriage because it extends only to contexts in which the Office of Human Rights is involved, where that office has been tasked with receiving, reviewing, and investigating complaints of unlawful discrimination only in "employment, housing, public accommodations, or educational institutions." Br. 22. This reasoning fails. Again, the prohibition against discrimination extends to discrimination related to any District government "facility, program, service, or benefit." D.C. Code § 2-1402.73 (2007 Repl.). Complaints filed against the District government are investigated by the Commission on Human Rights pursuant to D.C. Code §§ 2-1403.01(b), 2-1403.03 (2007 Repl.), or they may be brought directly in the Superior Court, D.C. Code §§ 2-1403.03(b), 2-1403.16(a) (2007 Repl.). The scope of the Office of Human Rights' jurisdiction does not define the scope of the Human Rights Act's protections.

[17] *E.g.*, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); Conn. Gen. Stat. §§ 1-1m, 46b-20, 46b-20(a) (2009); Vt. Stat. Ann. Tit. 15, § 8 (2009); N.H. Rev. Stat. Ann. § 457:1-a (2010).

recognition of such marriages, violates the Human Rights Act. Because, again, there is no reason not to apply the plain statutory language with regard to recognition of same-sex marriages from other jurisdictions, appellants' proposed initiative violates the Human Rights Act for this independent reason.

4. Appellants' argument that application of the Human Rights Act in the marriage context will lead to absurd results is unpersuasive.

Finally, the conclusion that the Human Rights Act's anti-discrimination provisions apply to efforts to deny the benefit of civil marriage to some based on gender or sexual orientation will not lead down a slippery slope of absurdity, as appellants contend. Br. 27-29. Because the Council has not acted to displace the historic bans on polygamy and marriage between relatives in the District, the reasons for distinguishing *Dean* as to same-sex marriage do not apply as to polygamy and marriage between relatives. For that simple reason, the Court need not fear the horrible consequences that appellants envision from affirmance.[18]

[18] Moreover, there is some question whether these bans would constitute discrimination under the Human Rights Act even assuming that statute applies. Appellants assert that the ban on polygamy would discriminate on the basis of "marital status," and that the ban on marriage between relatives would discriminate on the bases of "family status" and "genetic information." They misunderstand these terms, however, by failing to account for their statutory definitions. The Human Rights Act defines "marital status" as "the state of being married, in a domestic partnership, single, divorced, separated or widowed and the usual conditions associated therewith, including pregnancy or parenthood." D.C. Code § 2-1401.02(17) (2009 Supp.). Because being married to a single person and being married to multiple people thus constitute the same marital status for purposes of the Human Rights Act, the refusal to recognize polygamous as opposed to monogamous marriages is not discrimination based on marital status. Nor does a law banning marriage between relatives discriminate based on "familial status" or "genetic information." "'Familial status' means one or more individuals under 18 years of age being domiciled with: (1) a parent or other person having legal custody of the individual; or (2) the designee, with written authorization of the parent, or other persons having legal custody of individuals under 18 years of age. The protection afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or in the process of securing legal custody of any individual under 18 years of age." D.C. Code § 2-1401.02(11A) (2009 Supp.). "'Genetic information' means information about the presence of any gene, chromosome, protein, or certain metabolites that indicate or confirm that an individual or an individual's family member has a mutation or other genotype that is scientifically or medically believed to cause a

B. The initiative discriminates on the basis of sexual orientation and gender.

Appellants' proposed initiative seeks to prohibit same-sex marriages, which are legally indistinguishable from opposite-sex marriages, on the basis of both sexual orientation and gender. Discrimination on either basis would be sufficient to conclude that the Board properly rejected the initiative.

The proposed initiative discriminates based on sexual orientation. Appellants' argument that there is no discrimination because there is no textual prohibition on gays and lesbians marrying members of the opposite sex blinks reality and reduces the concept of marriage to nothing more than a contract between two strangers. It ignores the reasons why "[t]he right to marry is of fundamental importance to all individuals," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), and it demonstrates a fundamental misunderstanding of sexual orientation and how discrimination based on sexual orientation manifests itself.

The Supreme Court of Iowa recently rejected the very same argument appellants raise here in *Varnum, supra*. There, in defending a state law that limited marriage to opposite-sex couples, the state government argued that the challenged provision did not violate the equal protection provisions of Iowa's constitution because it did not explicitly reference "sexual orientation." 763 N.W.2d at 885. The court disagreed:

> It is true the marriage statute does not expressly prohibit gay and lesbian persons from marrying; it does, however, require that if they marry, it must be to someone of the opposite sex. Viewed in the complete context of marriage, including intimacy, civil marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual. Thus, the right of a gay or lesbian person under the marriage statute to enter into a civil marriage only with a person of the opposite sex is no right at all. Under such a law, gay or lesbian individuals cannot simultaneously fulfill their deeply felt need for a committed personal relationship, as influenced by their sexual orientation, and gain the civil status and attendant

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disease, disorder, or syndrome, if the information is obtained from a genetic test." D.C. Code § 2-1401.02(12A-i) (2009 Supp.).

> benefits granted by the statute. Instead, a gay or lesbian person can only gain the same rights under the statute as a heterosexual person by negating the very trait that defines gay and lesbian people as a class — their sexual orientation. *In re Marriage Cases*, 183 P.3d [384, 441 (Cal. 2008)] . The benefit denied by the marriage statute — the status of civil marriage for same-sex couples — is so "closely correlated with being homosexual" as to make it apparent the law is targeted at gay and lesbian people as a class. *See Lawrence v. Texas*, 539 U.S. [558,] 583, 123 S.Ct. [2472,] 2486, 156 L.Ed.2d [508,] 529 [(2003)] (O'Connor, J., concurring) (reviewing criminalization of homosexual sodomy and concluding that "[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."). The Court's decision in *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), supports this conclusion. *Romer* can be read to imply that sexual orientation is a trait that defines an individual and is not merely a means to associate a group with a type of behavior. *See Romer*, 517 U.S. at 632, 116 S.Ct. at 1627, 134 L.Ed.2d at 865-66 (holding an amendment to a state constitution pertaining to "homosexual . . . orientation" expresses "animus toward the class that it affects").
>
> By purposefully placing civil marriage outside the realistic reach of gay and lesbian individuals, the ban on same-sex civil marriages differentiates implicitly on the basis of sexual orientation. *See Kerrigan* [*v. Commissioner of Pub. Health*], 957 A.2d [407,] 431 n. 24 [(Conn. 2008)]; *Conaway v. Deane*, 401 Md. 219, 932 A.2d 571, 605 (2007).

Id. The Supreme Judicial Court of Massachusetts has ruled likewise:

> [T]he right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare. In this case, as in *Perez* [*v. Lippold*, 198 P.2d 17 (Cal. 1948) (*en banc*),] and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance — the institution of marriage — because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination.

Goodridge, 798 N.E.2d at 958 (citations omitted). For the same reasons, this Court should hold that the proposed initiative defining marriage as between a man and a woman has the effect of discriminating against gays and lesbians based on their sexual orientation.

Appellants' arguments denying gender discrimination also fail, and are no more convincing than the arguments of the State of Virginia, rejected in *Loving*, that anti-

miscegenation laws were constitutional because they left whites and African-Americans free to marry (but not free to marry each other). 388 U.S. at 8; *see also Johnson v. California*, 543 U.S. 499, 506 (2005) (rejecting an analogous argument in the context of racial segregation of prisoners). Here, the proposed initiative determines whether one individual can marry another individual "based on" the gender of that individual. The Human Rights Act prohibits the denial of a government "facility, service, program, or benefit to any individual *on the basis of* an individual's actual or perceived . . . sex" or "sexual orientation." D.C. Code § 2-1402.73 (2007 Repl.) (emphasis added).

Appellants' discussion of this issue does not address the statutory language. Instead, appellants rely on non-binding authority from other jurisdictions construing their own laws, federal law, or the Fourteenth Amendment's Equal Protection Clause. "A state court may, of course, apply a more stringent standard of review as a matter of state law under the State's equivalent to the Equal Protection or Due Process Clauses." *Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456, 463 n.6 (1981). Appellants point to no authority that would preclude this Court from finding that denying civil marriages to same-sex partners because of their gender is unlawful discrimination based on sex within the meaning of the Human Rights Act.

IV. IF THIS COURT DOES NOT AFFIRM THE REJECTION OF THE PROPOSED INITIATIVE UNDER DISTRICT LAW, IT SHOULD REMAND FOR FURTHER PROCEEDINGS UNDER THE CONSTITUTION.

The proposed initiative presents a significant issue under equal protection principles, as the District argued below and as Judge Ferren's dissenting opinion in *Dean* elucidates. District's Memorandum of Points and Authorities 33-45 (filed Dec. 18, 2009); *Dean*, 653 A.2d at 321-31 (Ferren, J., dissenting). Neither the Board nor Judge Macaluso, however, reached the question whether the initiative should be rejected because it is unconstitutional, instead resolving the issue as a matter of statutory construction.

If the Court determines that the judgment below may not be affirmed under District law, it should remand so the trial court can develop an appropriate record and then rule upon the constitutional issue. Although "pre-election review of constitutional challenges" is disfavored, it is not forbidden and is available in the "truly extreme" case. *Hessey II*, 615 A.2d at 574. Pre-election review is justified here. The electorate has no right to enact unconstitutional laws (as appellants concede, Br. 19 n.14), and it would be efficient and fiscally responsible to resolve the matter before holding an election on what could prove to be an unconstitutional law. *Hessey II*, 615 A.2d at 573. More importantly, the issue in this case involves marriage, "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12. But not just marriage in the abstract. The District now recognizes same-sex marriages from other jurisdictions and permits same-sex marriages within its own jurisdiction. Maintaining the status quo rather than allowing a vote on a measure that could be stricken if enacted will prevent the unnecessary disruption of a particularly meaningful and intimate aspect of many District citizens' lives. That the constitutional challenge turns on a question of discrimination is an equally compelling reason to resolve the issue now. The District's strong tradition of fighting discriminatory practices warrants consideration of the issue at this juncture, if necessary, rather than after the effects of the legislation are felt.[19]

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[19] The Court should not reach appellants' contention (Br. 22 n.16) that review of this constitutional issue is foreclosed by the Supreme Court's summary disposition in *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972). The issue has been joined only in footnotes, and the Superior Court on remand could consider whether *Baker* disposes of any constitutional issue.

In any event, appellants' contention is incorrect. First, the precedential effect of such a summary disposition "can extend no farther than 'the precise issues presented and necessarily decided by those actions.'" *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182 (1979). Among other differences between this case and *Baker*, appellants here seek to overturn a statute protecting a minority group via a legislative initiative. Further, unlike in *Baker*, appellants apparently would allow same-sex couples within this jurisdiction to continue

CONCLUSION

This Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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having the benefits of domestic partnership but deny those same benefits to same-sex couples who are married in other jurisdictions and thus cannot become domestic partners. Second, "if the Court has branded a question unsubstantial, it remains so except when doctrinal developments indicate otherwise." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). Supreme Court precedent has developed considerably since *Baker*. *See, e.g.*, *Lawrence*, 539 U.S. 558 (ruling that criminal prohibitions on sodomy are unconstitutional); *Romer*, 517 U.S. 620 (striking down a state referendum targeting homosexuals for disfavored treatment).

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the District of Columbia for the *En Banc* Court was mailed, proper first class postage prepaid, this 19th day of March, 2010, and e-mailed (per the agreement of the parties in lieu of hand delivery) to:

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