IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

Reverend Harry Jackson, *et al.*,	
Petitioners,	
v.	**Civil Action No. 2009 CA 004350 B** **Calendar 14** **Judge Judith E. Retchin**
District Of Columbia Board Of Elections And Ethics,	**[Next Court Event: None Scheduled]**
Respondent,	
and	
District of Columbia,	
Intervenor.	

RESPONDENT'S OPPOSITION TO PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The District of Columbia Board of Elections and Ethics ("the Board"), Respondent in this action, by undersigned counsel, herein sets forth the Points and Authorities in Support of its Opposition to Petitioners' Motion for Preliminary Injunction.

The Proponents seek relief that this honorable Court lacks discretion to grant: staying the effective date of legislation passed by the Council because the Petitioners find it impracticable to subject said legislation to a referendum is not within this Court's equitable power. Notwithstanding the long history of understanding what constitutes a marriage in the District of Columbia, the D.C. Council has acted with a specific intent to recognize as valid under D.C. law same-sex marriages performed in other jurisdictions by their passage of Jury and Marriage Amendment Act of 2009 ("the Act"). At the onset, it

is important to note that the Petitioners delayed the processing of the referendum by waiting to file their referendum measure more than two weeks after the Act was submitted for Congressional review.[1] The Council, in passing the referendum right, contemplated the relatively short timeframe for processing a referendum and ultimately decided that the right should be explicitly limited to the corresponding 30-day Congressional review period. Moreover, three prior referendums have made the ballot while subjected to the same time constraints the Petitioners lament in the instant case. The Petitioners' petition has devolved into an attack on the fairness of the time constraints inherent in processing a referendum, and this Court cannot substitute its judgment regarding the effective date of legislation passed pursuant to D.C. CODE § 1-204.04(e) in light of the initiative alternative available to the Petitioners to accomplish their legislative agenda.

While preliminary injunctions are routinely issued by the Superior Court, "[a] preliminary injunction is an extraordinary remedy, and the trial court's power to issue it should be exercised only after careful deliberation has persuaded it of the necessity for the relief." *Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976). This admonition is

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[1] The Proponents were able to submit a referendum measure as early as Monday, May 11, 2009 when the Council Chairman transmitted the Act to the Speaker of the House and the President of the Senate. Pursuant to D.C. CODE § 1-1001.16 (a)(1) in relevant part: "a referendum [may] be held on any act, or on some part or parts of an act, that has completed the course of the legislative process within the District of Columbia government in accordance with § 1-204.04(e)." § 1-204.04(e) details the legislative process:

> An act passed by the Council shall be presented by the Chairman of the Council to the Mayor, who shall, within 10 calendar days (excluding Saturdays, Sundays, and holidays) after the act is presented to him, either approve or disapprove such act. If the Mayor shall approve such act, he shall indicate the same by affixing his signature thereto, and such act shall become law subject to the provisions of § 1-206.02(c).

Accordingly, the Act completed the course of the legislative process within the District when the Chairman transmitted the Act to Congress on May 11, 2009. *See also Atkinson v. DCBOEE*, 597 A.2d 863, 866 (D.C. 1991), "Once the act has been transmitted to Congress, the Legislative process of the District insofar as the Council and Mayor are concerned is at an end."

poignant in this case where the Petitioners seek an unprecedented equitable remedy notwithstanding a legal alternative available to avail any claim of irreparable injury. In the event that the ongoing judicial proceedings extend longer than the Congressional review period--thereby making a proper subject determination moot--the Petitioners still have the initiative right at their disposal to affect the same legislative aims sought by the referendum measure. This Court should prudently deny the Petitioners' equitable relief because their delay in filing the measure attributed to the time constraints they face, and they can utilize the initiative process as they would the referendum process to repeal the portions of the Act they find objectionable.

STATEMENT OF FACTS

The Jury and Marriage Amendment Act of 2009 ("the Act"), approved by the D.C. Council and signed by Mayor Fenty on May 6, 2009, and transmitted to the U.S. Congress for review on May 11, 2009, is projected to become law on July 6, 2009.[2] Section 3(b) of the Act provides that same-sex marriages entered into and recognized as valid in other jurisdictions shall be recognized as valid marriages in the District. It reads as follows:

> Sec. 1287a. Recognition of Marriages from Other Jurisdictions. – 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 sections 1283 through section 1286, and has not been deemed illegal under section 1287, shall be recognized as a marriage in the District.[3]

On Wednesday, May 27, 2009, the Petitioners filed a proposed measure, the

2 *See* D.C. Official Code § 1-204.04(c)(1), (e) (2006 Repl.).

3 The D.C. Code provisions referenced dictate that marriages entered into in other jurisdictions will not be recognized in the District if they are: incestuous or bigamous; have been judicially declared null and void; or contain at least one individual who is not of the age of consent, unable to consent to marriage due to mental incapacity, and/or has been forced or fraudulently tricked into consenting to the marriage.

"Referendum Concerning the Jury and Marriage Amendment Act of 2009" ("the Referendum"), with the Board. The Referendum sought to suspend section 3 of the Act until it has been presented to the registered qualified electors of the District of Columbia for their approval or rejection. Also on May 27, the Petitioners filed a verified statement of contributions with the D.C. Office of Campaign Finance.[4] On Thursday, May 28, 2009, the Board's Office of the General Counsel ("the General Counsel") transmitted a Notice of Public Hearing and Intent to Review regarding the Referendum ("the Notice") to the Office of Documents and Administrative Issuances for publication in the D.C. Register.[5] Also on May 28, the General Counsel sent the Notice to the Mayor, the Chairman of the D.C. Council, the D.C. Attorney General, and the General Counsel for the D.C. Council, inviting them to address the issue of whether the Referendum presents a proper subject for referendum. The Notice was published in the D.C. Register on Friday, June 5, 2009.

The Board held the proper subject hearing on Wednesday, June 10, 2009, with Chairman Errol R. Arthur and Board member Charles R. Lowery, Jr. presiding over the hearing.[6] In response to the Board's invitation to comment on the propriety of the Referendum, the Board received written testimony and heard oral testimony during the hearing from numerous individuals and organizations**,** including testimony from Reverend Harry R. Jackson, Jr., the lead proposer of the Referendum, who appeared *pro*

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4 *See* D.C. Official Code § 1-1001.16 (b)(1)(A) (2006).

5 *See* D.C. Mun. Regs. tit. 3 § 1001.2 (2007).

6 *See* D.C. Mun. Regs. tit. 3 § 1001.3 (2007).

se.[7] The Board also held the record open until the close of business on Thursday, June 11, 2009 for additional comments. In all, the Board received and considered comments from approximately 75 individuals and/or entities.

Following receipt and consideration of testimony and its own research and consideration on the matter, on Monday, June 15, 2009, the Board issued a written opinion denying acceptance of the Referendum ("the Order").[8] In the Order, the Board ruled that the Referendum was not a proper subject because it would authorize discrimination prohibited by the Human Rights Act ("HRA").[9] The Board's finding that the Referendum posed an improper subject necessarily required rejection of the measure, pursuant to D.C. Official Code § 1-1001.16(b)(1) (2006 Repl.).[10]

On Wednesday, June 17, 2009, Petitioners filed a petition for review and for a writ in the nature of mandamus with this Court. On Thursday, June 18, 2009, the District of Columbia intervened. On Monday, June 20, 2009, Petitioners filed a motion for preliminary injunction asking this Court to stay the projected effective date of the Act either until the termination of this litigation or until thirty (30) days after the Respondent provides the Petitioners with a petition circulation form, whichever is applicable.

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7 Although Rev. Jackson spoke on his own behalf before the Board, David W. New, Esq. is the counsel of record for Rev. Jackson and the other proposers of the Referendum. Brian W. Raum, Esq., of the Alliance Defense Fund, filed a Notice of Appearance on behalf of the proposers on May 27, 2009, and, along with Rev. Jackson, presented the argument on their behalf at the hearing.

8 Order at 4.

9 Order at 4.

10 Order at 4, 12.

ARGUMENT

Applicable Legal Standard

A trial court's discretion to issue a preliminary injunction is proper when the moving party has clearly shown: "(1) that there is a substantial likelihood he will prevail on the merits; (2) that he is in danger of suffering irreparable harm during the pendency of the action; (3) that more harm will result to him from the denial of the injunction than will result to the defendant from its grant; and, in appropriate cases, (4) that the public interest will not be disserved by the issuance of the requested order." *Wieck*, 350 A.2d at 387.

"While it is fundamental to the granting of an injunction that the court make specific findings on all prerequisites for such relief, the most important inquiry is that concerning irreparable injury." *Id.* "This is true because the primary justification for the issuance of a preliminary injunction "is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *Id.* at 387-88 (citing *Canal Authority v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974)). The moving party has the "burden of showing sufficient irreparable harm to command a preliminary injunction from the district court." *See Containers Ltd. V. Stena AB*, 890 F.2d 1205, 1210-11 (D.C. Cir. 1989). "An injunction should not be issued unless the threat of injury is imminent and well-founded, and unless the injury itself would be incapable of being redressed after a final hearing on the merits." *Wieck*, 350 A.2d at 388 (citing *Canal Authority*, *supra* at 573; *Holiday Inns of America v. B & B Corp.* 409 F.2d 614, 618 (3d Cir. 1969).

Additionally, the usual role of a preliminary injunction is to preserve the status quo pending the outcome of litigation." *Fountain v. Kelly*, 630 A.2d 684, 688 (D.C. App.

1993) (citing *District 50, United Mineworkers of America*, 412 F.2d 165, 168 (1969). If, however, the moving party seeks to alter the status quo rather than maintain it, the moving party "must be held to a substantially higher standard than in the usual case." *Fountain*, 630 A.2d at 688 (citing *Doe v. New York University*, 666 F.2d 761, 773 (2d Cir. 1981); *National Ass'n of Rehabilitation Facilities, Inc. v. Schweiker*, 550 F. Supp. 357, 365 (D.D.C. 1982)).

I. The Court's Power to Issue an Injunction Does Not Extend to Staying The Effective Date of Legislation for Purposes of Conducting a Referendum Because the Petitioners Can Utilize the Initiative Right to the Same Effect.

When a petitioner seeks a preliminary injunction to alter the status quo--namely to alter the ordinary course of the legislative process for the benefit of extending the statutorily proscribed time to complete a referendum--that movant must be held to a substantially higher standard than in the usual case. The Board argues the Petitioners have failed to meet that burden in the instant case. The Board recognizes that the Court has equitable jurisdiction to fashion remedies in election-related matters; however, the Petitioners cite no authority where the Courts in the District of Columbia have stayed the effective date of legislation in an effort to provide more time to complete the referendum process. The Petitioners' examples involving election-related matters never raised to the extreme level of staying the effective date of any piece of legislation undergoing the Congressional review period. Furthermore, the Petitioners have aggrandized the Court's traditional role of reviewing the constitutionality of enacted statutes into a power usurping the legislative process proscribed by the District of Columbia Home Rule Act.

A stay of the effective date of the Act would constitute an impermissible encroachment of the District's judicial branch at the expense of not only the D.C. Council, in which "the legislative power granted to the District by the Home Rule Act is

vested[,]" D.C. Official Code § 1-204.04(a) (2006 Repl.), but also the United States Congress, which "ha[s] power … [t]o exercise exclusive legislation in all cases whatsoever, over [the District of Columbia]." U.S. CONST. art. I, § 8. Issuing a stay in this matter would be tantamount to amending the Home Rule Act - which is at once the District's constitution *and* a federal law – by judicial decision.

Moreover, the Petitioners are complaining about the same time constraints faced by the Proponents of three referendums that garnered ballot access. In light of the demonstrated opportunity for referendums to be considered by the electorate--coupled with the availability of the initiative right--this Court should resist granting the Petitioners extra time to complete the referendum process by staying the effective date of the Act.

A. The Local Cases Relied Upon By the Petitioners are Inapplicable Because They Concern Constitutional Challenges of Enacted Statutes.

The Petitioners seek more time to complete the referendum process they initiated over two weeks after the Act completed the course of the legislative process within the District of Columbia government. To that end, they raise a triad of cases that examine the constitutionality of enacted statutes to illustrate that Courts can and routinely do hold statutes to be unconstitutional. The traditional role of the courts can not be equated with the relief sought in the instant case because the Petitioners are not raising a constitutional challenge to the referendum right. To the contrary, they are merely attempting to take advantage of an exigent circumstance of their own making. The Petitioners' reliance on *District of Columbia v. Beretta*, *U.S.A., Corp.,* 872 A.2d 633 (D.C. 2005); *Armfield v. United States*, 811 A.2d 792 (D.C. 2002); and *Gary v. United States*, 499 A.2d 815 (D.C. 1985) is sorely misplaced because each statute at issue in those cases was already enacted and the Court was making a determination of constitutionality.

The Board does not argue that this Court is without power to determine the constitutionality of an enacted statute. A prime example of the Court's typical jurisprudence when considering the constitutionality of an enacted statute is clearly illustrated in *Beretta*: "[a]cts of the legislature are presumptively valid, [], and thus a court may invalidate an otherwise lawful enactment []only upon a plain showing that [the legislature] has exceeded its constitutional bounds." *Beretta* at 655. In *Armfield*, the Court examined the petitioner's First and Fifth Amendment claims pertaining to a statute prohibiting disruptions of Congress. *Gary* pertained to an unconstitutional *one House of Congress veto* provision of the Home Rule Act. In each of these cases, the Court had a specific constitutional challenge pertaining to the statute at issue. The Petitioners can not claim that is the case here because there has been no mention of any constitutional attack on the referendum time constraints in these proceedings.

B. The Courts Who Have Exercised Their Equitable Powers in Other Jurisdictions Did so to Remedy the Absence of a Referendum Right.

What can not be lost in the protracted course of this litigation is that the Petitioners are in the midst of the referendum process. Applying to this Court in the event the Board rejects a referendum measure is what every Proponent must do in order to continue the process. The Petitioners have not been denied their referendum right as they claim throughout their papers; rather, they are currently engaged in the referendum process and readily admit that they do not have time to complete it. The present scenario is a far cry from the sequence of events that occurred in both *State ex rel. Ohio General Assembly v. Brunner*, 873 N.E.2d 1232 (Ohio 2007), and *Interior Taxpayers Assoc. v. Fairbanks North Star Borough*, 742 P.2d 781 (Alaska 1987). Both cases turned on the question of the effective date of the statutes at issue. The Courts in *Brunner* and

Taxpayers fashioned narrow remedies to provide the right of referendum that deserve a close examination to fully distinguish them from relief the Petitioners seek in the instant case.

1. *Brunner* is inapplicable to the Instant Case Because the Effective Date of the Act is Clear and the Petitioners are Already Engaged in the Referendum Process.

While this is a case of first impression in this jurisdiction, the Supreme Court of Ohio had occasion to pass upon an issue similar to the one presented here in the case of *State ex rel. Ohio Gen. Assembly v. Brunner*, 873 N.E.2d 1232 (2007) (per curiam) *("Brunner II")*. The Board respectfully argues that *Brunner II*, albeit non-binding on this court, should yet serve to inform this Court's consideration of this matter, and illustrate that this Court does not have the authority to stay the effective date of the Act. In *Brunner II*, the court amended an earlier decision, *State ex rel. Ohio Gen. Assembly v. Brunner*, 872 N.E.2d 912 (2007) (*"Brunner I"*), by changing the date that a particular bill became law to accommodate a possible referendum effort.

The bill had been passed by the Ohio legislature and presented to Governor Bob Taft for approval during the waning days of his administration. Governor Taft neither vetoed nor approved the bill, but instead filed it with the outgoing Secretary of State Kenneth Blackwell on their last official day in office. The new Governor, Ted Strickland, requested that the new Secretary of State, Jennifer Brunner, re-present the bill to him for review, believing that the ten-day presentment period provided for executive review had not expired. Secretary Brunner complied, and Governor Strickland vetoed the bill. Subsequently, the state legislature sought a writ of mandamus to compel Secretary Brunner to ignore Governor Strickland's veto and treat the bill as a valid law. In the resulting matter, *Brunner I*, the court granted the legislature's request, and ruled that the

bill had become a law 90 days after Governor Taft filed it with Secretary Blackwell. Since no one had filed a referendum regarding the bill within 90 days after Governor Taft's filing, the court reasoned, there was no reason to find that the law had not taken effect.

Brunner II involved an unprecedented case in the state of Ohio where a law signed by one governor was subsequently vetoed by his successor—thereby subjecting the law to a legal challenge. The court cogently summarized the set of events that necessitated a remedy:

> Brunner was a unique case, both factually and legally. Governor Taft's filing of Am.Sub.S.B. No. 117 in Secretary of State Blackwell's office would normally start the time for referendum. However, his successor, Governor Strickland, purported to undo this action by requesting that the bill be returned, and subsequently vetoing it. When we invalidated Governor Strickland's action, we proceeded as if the bill had never been vetoed and, pursuant to Section 1c, Article II, made the law effective 90 days from the day Governor Taft filed it in the secretary of state's office. *Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, 872 N.E.2d 912, at ¶ 52. Secretary Brunner did not request that we stay that action.
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> However, this result is problematic under the Constitution, given the unique facts of this case. While courts are to "strictly construe applicable requirements for initiative and referendum," including the time within which a referendum petition must be filed, the backdating of Am.Sub.S.B. No. 117 cannot change the fact that the law was a nullity from the date of the veto, January 8, 2007, until the date of our decision, August 1, 2007. A citizen opposed to Am.Sub.S.B. No. 117 could not know whether the law was valid or invalid. The conduct of one governor made the law valid, then the conduct of a successor governor made the law invalid. Never in Ohio's history has that circumstance been created.

Brunner at 1234. It is important to note that the law went into effect by virtue of the court invalidating Governor Strickland's veto—not protracted litigation concerning the legality of the referendum. Accordingly, the court was well within its authority to interpret the effective date in compliance with Ohio's constitutional guarantee of referendum:

> The simple fact remains that in this case, citizens were not put on notice that Am.Sub.S.B. No. 117 was a valid law subject to referendum until August 1, 2007. In pursuing the proper resolution of the constitutional issue before us, we unintentionally deprived the citizens of the right to referendum that they would have enjoyed were it not for the unavoidable delays associated with judicial review. This result is unacceptable.

Id. at 1235. The court reasoned that the law was a nullity by virtue of the veto until its invalidation on August 1, 2007—thereby granting the right of referendum for 90 days thereafter. This does not equate to staying the effective date of legislation for the purpose of completing a Charter-proscribed referendum process. *Brunner* is wholly inapposite in comparison to the situation the Petitioners find themselves in.

Brunner II can be distinguished from the matter at hand in several ways. First, while legislative acts in Ohio and in the District are both subjected to delays in terms of their effective dates, these delays are for different and entirely unrelated purposes. In Ohio, the 90-day waiting period for enactment, which begins to toll once a bill is filed with the Ohio secretary of state, is for the express purpose of allowing the state's citizens sufficient time to exercise their right to referendum. *See* OH. CONST. art. II, § 01c. It is, therefore, easy to understand why the court in Ohio would be inclined to interpret the bill's effective date; it was attempting to protect the constitutional rights and interests of the citizens of Ohio by granting them an opportunity to file referendum petitions if they so chose.

In the District; however, the *sole* purpose of the statutory 30-day review period - which was in place prior to the granting of the right of referendum—is to enable the Congress to exercise its authority over the District. Although the District's citizens certainly have the right to referendum, they only have the right to avail themselves of that process until such time as the period within which Congress may review acts of the D.C.

Council has concluded. Assuming *arguendo* that this Court *could* alter the effective date of the Act—and the Board argues that it can not—the only legitimate reason to do so would be to protect "Congress's reserved right to review District legislation before it becomes law[,]"*Bliley v. Kelley*, 23 F.3d 507, 511 (D.C. Cir. 1994) ("*Bliley*"); *see also Id*. at 510 ("*it is that such an occurrence would deprive them of their right, as members of Congress, to review the Liability Act before it becomes law."*). There is no claim, nor can there be, that this right is being infringed upon in this matter.

Second, the court in *Brunner II* was concerned about the fact there was great potential for confusion as to when the 90-day waiting period began, or whether it even began at all, because Ohio's "citizens were not put on notice that [the bill] was a valid law subject to referendum until August 1, 2007." *Brunner II*, 873 N.E.2d at 1235.As the court there noted, it believed the law to be:

> [A} nullity from the date of the veto, January 8, 2007, until the date of our decision, August 1, 2007. A citizen opposed to [the bill] could not know whether the law was valid or invalid. The conduct of one governor made the law valid, then the conduct of a successor governor made the law invalid. Never in Ohio's history has that circumstance been created.

Id. at 1234. In the instant matter, there was absolutely no uncertainty whatsoever regarding either the status or validity of the Act. As the Petitioners were certainly aware, the Act was transmitted to the Congress on May 11, 2009, thus tolling the 30-day review period, and it was projected to become law on July 6, 2009. Despite being aware of the timeframe they had to contend with, the Petitioners, for reasons known only to them, waited over two weeks to file the Referendum with the Board.

Finally, and most importantly, in *Brunner II*, while it deemed itself able to effectively amend a *state* constitution's provision regarding the effective date of a law, the court there was not confronted, as this Court is, with the question of whether it had

the authority to alter a *federally-enacted* constitution. The Board respectfully argues that long-standing separation of power principles necessarily render the *Brunner II* court's ruling highly suspect, to say the least, but a similar ruling in this matter would be even more so, where the statutorily-established timeframe for the Congressional review of acts of the D.C. Council was not the product of the local legislature, but rather of the Congress, which has "ultimate legislative authority over the nation's capital granted by article I, § 8, of the Constitution." D.C. Official Code § 1-201.02 (2006 Repl.). Accordingly, a stay of the Act's effective date would not only implicate separation of power concerns, it would also contravene Congress' ultimate authority over the District.

2. *Taxpayers* is Inapposite Because There is No Confusion as to the Effective Date of the Act Necessitating a Judicial Interpretation in the Instant Case.

Like *Brunner, Interior Taxpayers Assoc. v. Fairbanks North Star Borough*, 742 P.2d 781 (Alaska 1987) ("*Taxpayers")* also turned on the question of the effective date of the statute at issue. *Taxpayers* presents a practical question of whether the enactment or the operative date of a statute is operable in calculating the time to file a referendum. The statute authorizing referendums in Alaska was arguably vague: "AS 29.26.180(b) provides: If a petition is certified before the effective date of the matter referred, the ordinance or resolution against which the petition is filed shall be suspended pending the referendum vote." *Taxpayers* at 781. The court reasoned that to give effect to the term "effective date of the matter" the court would have to ascribe to it the meaning of *operative date* as opposed to *enactment date*; otherwise, no legislation would be subject to referendum.

> [T]he referendum process can not start without having an ordinance which has been passed by the municipality in question. Under the Fairbanks North Star Borough procedure, an ordinance takes effect on the first

> business day following the day it is passed. There is obviously no case where AS 29.26.180(b) could operate with respect to Fairbanks North Star Borough ordinances if "effective date" means merely when the ordinance becomes law. Thus, the automatic suspension statute could be made completely meaningless if we interpret "effective date" as did the trial judge.

Id. at 781. Interpreting the Alaskan referendum law required a result giving the referendum right operative effect. The court enjoined the collection of the tax pursuant to AS 29.26.180(b), which suspends the ordinance or resolution pending the referendum vote. It bears highlighting that the proponents of the referendum in *Taxpayers* had secured a certified petition prior to commencing suit whereas the Petitioners here are in the process of determining whether their submitted measure is a proper subject. The District's referendum statute does not work to summarily suspend statutes at a proponent's whim.

The Petitioners can not argue that their referendum right has been denied as was the case in *Brunner* and *Taxpayers* because they are currently undergoing the referendum process in the District of Columbia. This case does not present a constitutional crisis of unprecedented scope as was the case in *Brunner*, nor is this Court at liberty to interpret the effective date of the legislation passed by the Council. The referendum right is clearly proscribed, and to the extent the petitioners seek to toll or enlarge the Congressional review period applicable to Council acts, their redress lies not with this Court or the Council, but with the United States Congress.

The Initiative, Referendum, and Recall Charter Amendments Act of 1977, effective March 10, 1978 (D.C. Law 2-46; D.C. Official Code ' 1-204.101 et seq.) ("Initiative Act"), was initiated by the Council as a Charter Amendment under section 303 of the Home Rule Act. The Council has no authority to change the Congressional

review period, not even using the section 303 Charter amending process, because the legislative power of the Council is expressly made subject to the limitations of section 602. Section 303(d) expressly provides that [t]he amending procedure provided in this section may not be used to enact any law or affect any law with respect to which the Council may not enact any act, resolution or rule under the limitations specified in sections 601, 602, or 603 (D.C. Official Code "1 206.01, 1 206.02, and 1-206.03). (Emphasis added).

The Congressional review requirement is found in section 602(c) of the Home Rule Act, a section the Council is prohibited from amending or affecting. The Initiative Act was affirmatively approved by Congress. The House of Representatives, with the Senate concurring, adopted concurrent resolutions, H.Con. Res. 464 and 471, 95th Cong. 2d Sess., on February 27, 1978 and March 10, 1978, respectively, approving the provisions of the Initiative, Referendum, and Recall Charter Amendments Act of 1977.

C. The Referendum Process has been Accomplished in the District of Columbia Under These Time Constraints, and Thus the Petitioners Can Not Argue That Their Referendum Right Will be Lost Absent Court Intervention.

Here, there can be no clearer example of a party who slumbers on their rights. Petitioners, for no explainable reason, unreasonably delayed the filing of their referendum measure with the Board for sixteen (16) calendar days. Generally, parties that plan on filing a referendum measure track the D.C. Council and Mayor's actions so that they can file their referendum measure with the Board as soon as the Chairman transmits the legislation for the Congressional review period, which in this case was May 11, 2009.

As the referendum history in the District of Columbia demonstrates, only seven (7) referendums pursuant to D.C. Code §1-1001.16 have been presented to the Board. Of

those referendums, three (3) have been successfully presented to the electorate for a vote. All three of those measures were submitted to the Board within one week of the Mayor's signing of the challenged act. The referendum process was successfully completed in: #001 "Referendum on Certain Provisions of the Rental Housing Act of 1985;" #005 "Referendum on the D.C. Emergency Overnight Shelter Amendment Act of 1990;" and #006 "Referendum on the Assault Weapon Manufacturing Strict Liability Act 1990 Repealer Act of 1991." All three of the proponents were able to successfully navigate through the District's referendum process prior to the expiration of the 30 day Congressional review period and enactment of the challenged legislation. Two of those measures also encountered litigation on the appropriateness of the Board's proper subject determination and/or the formulation of the Board's Short Title and Summary Statement pursuant to D.C. Code §1-1001.16(e)(1)(A).

Referendum #001 was filed three days after the Rental Housing Act of 1985 was transmitted to Congress on May 21, 1985. Opponents challenged the Board's formulation and legislative form in this Court on June 7, 1985, which was decided in the proponent's favor on June 12, 1985. *see James G. Banks, et al. v. DCBOEE,* CA#0457-85. The proponent subsequently filed the requisite amount of signatures for ballot access on July 16, 1985, and the measure passed by a margin of 22,920 to 22,183.

Referendum #005 was filed on the same day that the District of Columbia Emergency Overnight Shelter Amendment Act of 1990 was transmitted to Congress on July, 16, 1990. The Board approved the short title and summary statement on July 18, and public notice was published on July 20, and 27, 1990. The proposed petition was issued on July 30, 1990, and the proponent subsequently filed her petition in support of the referendum on August 14, 1990. The measure was placed on the 1990 Mayoral

General Election ballot and failed by a margin of 62,955 to 66,592.

Referendum #006 was filed on the same day that Assault Weapon Manufacturing Strict Liability Act 1990 Repealer Act of 1991 was transmitted to Congress on May 23, 1991. The referendum was subjected to a proper subject determination by this Court on May 28, 1991, *see Atkinson v. DCBOEE*, CA# 07236-91; (affirmed by *Atkinson v. DCBOEE*, 597 A.2d 863 (D.C. 1991)). The Board formulated a short title and summary statement on May 28, 1991, which was published in the D.C. Register on June 7, 1991. The petition was approved on June 11, 1991 and resubmitted with the requisite number of signatures on July 12, 1991. The measure was presented to the voters at a November 5, 1991 Special Election where it passed by a margin of 40,960 to 11,942.

While the Petitioners urge the impossibility of completing the referendum process before the congressional review period expires, these three Referendums belie their argument. Assuming the Petitioners had filed their referendum on Monday, May 11th instead of Wednesday May 27th the Board could have transmitted the Referendum to the D.C. Register as required under 3 DCMR §1001.2 prior to the Register's Tuesday at Noon deadline for Friday publication that same week.[11]

Instead of the June 5th publication, the measure would have appeared in the May 15th issue (twenty-one (21) days earlier). In fact, if Petitioners had even filed one day earlier on Tuesday May 26th before noon, the Board could have transmitted the Referendum to the D.C. Register in time for the May 29th publication (seven (7) days earlier).

With respect to the remainder of the Petitioner's time schedule, if the measure had

11 1 DCMR § 306.11(g) states: The deadline for submission of verification of documents for publication in each Friday edition of the *D.C. Register* is 12:00 Noon on each of the following days of the week of

appeared in the May 15th *D.C. Register* the Board would have held a "proper subject" hearing on May 18th. Assuming the Board, again takes four days to render a decision from the date of the hearing, the Board Order rejecting the Referendum would have been Friday May 22nd.

If the Petitioner immediately files on Monday May 25th to compel the Board to accept the measure, the Superior Court has generally taken less than one week[12] to render a decision on an initiative or referendum proper subject determination which the court is required to expedite pursuant to D.C. CODE §1-1001.16(b)(3).[13] Assuming the court renders a decision by the end of the week, Petitioner would have had an order on May 29th. If the Court reversed the Board's decision and held that the measure was a proper subject, the Board would have published a "Notice of Meeting" on May 30th for a meeting (in 48 hours) on Monday June 1st to formulate the Short Title, Summary Statement and Legislative Text.

After the June 1st meeting the Board would have published the formulated language in a newspaper of general circulation on June 2nd which would have started the statutory required 10 day challenge period. (D.C. Code §1-1001.16(e)(1)(A).

Assuming the measure is challenged on the 10th day, June 12th and the Court again upholds the referendum and finalizes the referendum language a week later on June

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publication: (g) Other Agency Notices and Documents …. Noon Tuesday.

12 See *Mary Spencer v. D.C. Board of Elections and Ethics* CA No. 3831-07, (Judge Leibovitz) Petiton for writ in the nature of mandamus to compel the Board to accept "Referendum on Certain Provisions of the Public Education Reform Amendment Act of 2007 as a proper subject of referendum filed June 6, 2007 denied June 7, 2007

13 D.C. Code §1-1001.16(b)(3) states: If the Board refuses to accept any initiative or referendum measure submitted to it, the person or persons submitting such measure may apply, within 10 days after the Board's refusal to accept such measure, to the Superior Court of the District of Columbia for a writ in the nature of mandamus to compel the Board to accept such measure. *The Superior Court of the District of Columbia shall expedite consideration of the matter.*

19, the Board would have been able to provide Petitioners with petition sheets to begin circulating on June 22nd.

Therefore, even under Petitioner's March 11, 2009 filing scenario, which assumes two court litigations, the Petitioners would have had at least fourteen (14) calendar days to circulate their petitions before the projected July 6th expiration of the Congressional review period.

These cases illustrate that when a referendum measure is filed as soon as practicable after the transmittal of the subject legislation, the proponent is able to complete the process and submit their measure to the electorate. While the 30-day Congressional review period creates onerous time constraints, the Court can not substitute its judgment to change the right of referendum by judicial fiat. This is especially true in light of legislative history specifically proscribing the Council's intent to limit the timing of the referendum right to the 30-day Congressional review period:

> The referendum process authorized the people to halt an action of their legislature, and usually, prohibit the legislature's further consideration of the matter for a period of time. In the District of Columbia, your Committee has proposed that referendum measures must be initiated and sufficient signatures to place an item on the ballot must be garnered during the period of Congressional review of acts of the Council. Thus, no action of the Council, allowed to become law by inaction of the Congress, will be directly subject to referendum by the people. Of course, the people could undertake to have an initiative item placed on the ballot which would have substantially the same impact.

(Emphasis in original).[14] This legislative history reflects that proponents of rejected referendum measures are not without a legal remedy, and thus, suffer no irreparable harm. A proponent of a rejected referendum measure retains the option of proposing the

[14] Committee on Government Operations Committee Report No. 1 on Bill 2-2, Initiative, and Referendum Amendments act of 1977, renamed Initiative, Referendum, and Recall Charter Amendments of 1977 and Bill No. 2-94, Recall of Elected Official Amendments act, renamed Charter Amendments Procedures act of 1977, at 2.

measure as an initiative.

II. The Petitioners Will Not Be Irreparably Harmed If the Act Is Allowed to Proceed Through the Ordinary Course of Legislative Process, Because They Can Fulfill Their Legislative Objectives Through an Initiative.

Petitioners argue that, in the absence of a stay of the Act's effective date, they will be irreparably harmed because "the Act will go into effect and the people will be deprived of their chance to vote on a critical question of public policy[.]"[15] This is simply not the case. If the Court denies the Petitioners' request for injunctive relief and the Act becomes law by way of the expiration of the Congressional review period, they may still avail themselves of the initiative process. The Petitioners have cast their plight as being denied their right of referendum absent a stay of the effective date of the Act, but this assertion misapprehends the inextricable relationship between initiatives and referendums in the District of Columbia. An injunction of such extraordinary measure as requested can not issue in a case where there is an alternative legal remedy to effectuate the Petitioners' legislative aims. The Court of Appeals noted the overlap of the initiative and referendum process:

> The initiative right conferred by the Charter Amendments, D.C. CODE 1980 Supp., § 1-181(a), includes the right to repeal and amend existing legislation. The statute gives the electorate the right to propose "laws," and the word "laws" includes both new legislation and the amendment and repeal of existing legislation. See 6 E. McQuillin, supra §§ 21.02, .10.
>
> The legislative history of the charter amendments reinforces the generic meaning of this term. During the hearings of the Council Committee on Government Operations, the late Councilmember Julius Hobson, ***the author of the original Charter Amendment bill, wondered whether "30 working days ... is enough time for a citizen to get a referendum on the ballot?" The Committee Clerk responded that the thirty-day time frame corresponded to the congressional layover period. See D.C.Code 1978***

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[15] Petitioner's Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction at 14.

> ***Supp., s 1-147(c). He continued, "Should the citizens desire, basically, to reverse a decision of the Council which has already become law, they would then have the ability to initiate through the initiative process the same measure to the ballot."*** Reflecting the same view, the Committee Report on the bill stated that the referendum right would attach only during the layover period; however, "(o)f course, the people could undertake to have an initiative item placed on the ballot which would have substantially the same impact."
>
> As this **legislative history** makes clear, the mere existence of a **referendum** right to approve or disapprove acts of the Council, see D.C. CODE 1980 Supp., § 1-181(b), does not imply that the electorate cannot use the initiative to repeal or amend existing legislation. Rather than being mutually exclusive, the two processes of initiative and referendum overlap.

Convention Center Referendum Committee v. DCBOEE, 441 A2d. 889, 910 fn38 (D.C. 1991) (Emphasis added). Clearly the Petitioners will have at their disposal the right of Initiative as the Council contemplated should their time run on the referendum process. Accordingly, the Petitioners will not be irreparably harmed in the event that the Act passes and is no longer subject to referendum.

III. The Petitioners Can Not Demonstrate A Substantial Likelihood That They Will Prevail On The Merits Because The Board Correctly Ruled That The Referendum Does Not Present A Proper Subject Matter For Referendum.

The only question before this Court is whether or not the Board correctly ruled that a referendum seeking to prevent the District from recognizing same-sex marriages entered into and recognized as valid in other jurisdictions was invalid. The Board argues that this question must be answered in the affirmative: the Referendum would authorize discrimination prohibited by the D.C. Human Rights Act ("HRA"), and accordingly does not present a proper subject for referendum.

A. The Statutory History of the Referendum Right Militates in Favor of a Finding That the Referendum at Issue Authorizes Discrimination.

With the passage of the Initiative, Referendum, and Recall Charter Amendments Act in 1978 ("the Charter Amendments Act"),[16] electors in the District of Columbia were granted the "power of direct legislation",[17] putting them on a par with the District's legislative body, the Council of the District of Columbia ("the Council").[18] As a result of the Charter Amendments Act, any registered qualified elector may use the initiative process to propose a law by presenting it to the electorate for its approval or disapproval. Upon voter approval, a proposed initiative measure will become "an act of the Council," and, if it survives the Congressional review period to which acts of the Council are subjected, a law in the District of Columbia.[19] Moreover, the District's registered qualified electors may use the referendum process to propose to suspend an act of the D.C. Council, or some part(s) thereof, until such act has been presented to the electorate for its approval or disapproval.

The D.C. Board of Elections and Ethics ("the Board") may not accept a referendum measure if it: "finds that it is not a proper subject of … referendum … under the terms of Title IV of the District of Columbia Home Rule Act or upon any of the following grounds: "(C) *The measure authorizes, or would have the effect of authorizing,*

16 D.C. Law 2-46, 24 D.C. Reg. 199 (1978) (*codified as amended* at D.C. Official Code § 1-204.101 *et seq*.).

17 *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002) ("Marijuana Policy Project").

18 *See Convention Ctr. Comm. v. D.C. Board of Elections and Ethics*, 441 A.2d 889, 897 (D.C. 1981)("Absent express or implied limitation, the power of the electorate to act by initiative is coextensive with the power of the legislature to adopt legislative measures.").

19 *See* D.C. Official Code §§1-204.105, 1-206.02(c) (2006 Repl.).

discrimination prohibited under [the HRA[20]]." [21]

The HRA exception was included in the Charter Amendment Acts' enabling legislation as the result of an amendment – offered by Councilmember Marion Barry - that reflected the Council's intent that "the initiative and referendum process would never be used to interfere with basic civil and human rights."[22] In its earliest form, the amendment provided that initiative and referendum petitions must be rejected if they authorize[], or would have the effect of authorizing, discrimination for any reason other than individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, *sexual orientation*, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.[23]

In its current form, the amendment simply indicates that measures which would authorize discrimination prohibited under the HRA are prohibited. The HRA prevents discrimination in public accommodations, among other areas. Specifically, section 231 of the HRA provides that

> [i]t shall be an unlawful discriminatory practice to do any of the following

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20 The stated purpose of the HRA is to

> secure an end in the District of Columbia to discrimination for any reason other than individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, *sexual orientation*, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.

D.C. Official Code § 2-1401.01 (2006 Repl.) (emphasis added).

21 D.C. Official Code § 1-1001.16 (b)(1) (2006 Repl.) (emphasis added).

22 Memorandum from Councilmember Marion Barry to D.C. Council Government Operations Committee members regarding Proposed Amendment to 2-317, the "Initiative, Referendum, and Recall Procedures Act of 1978" (April 26, 1978).

23 *Id.* (emphasis added).

> acts, wholly or partially for a discriminatory reason based on the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, *sexual orientation*, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual:
>
> (1) To deny, directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations.[24]

In 2002, the HRA was amended to make plain its application to the District of Columbia government:

> 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.[25]

B. *Dean* ia Inapposite Because the Same-Sex Marriage Landscape has Changed Since the Decision was Rendered, and the D.C. Council Has Enacted Legislation Reflecting that Change.

In light of this statutory background, it is clear that the Board may not accept referendum measures that would authorize discriminatory practices by, *inter alia*, either the District government or any place of public accommodation. The Petitioners' sole argument on appeal is that the Referendum is not such a measure because a case decided in 1995 - *Dean v. District of Columbia ("Dean")*[26] - "says" it is not. The Petitioners are mistaken; *Dean*, while certainly very informative, is not controlling in this matter.

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24 D.C Official Code § 2-1402.31 (2006 Repl.)(emphasis added)

25 D.C. Official Code § 2-1401.73 (2006 Repl.)(emphasis added).

26 653 A.2d 307 (D.C. 1995).

In *Dean*, the D.C. Court of Appeals ruled that there was no violation of the HRA when the Clerk of the Superior Court denied a marriage license to a same-sex couple. The court reasoned that the HRA, though intended to prohibit discrimination of many kinds, was not intended to prohibit discrimination of *every* kind, and was clearly not intended to prohibit discrimination on the basis of sexual orientation such that the long-standing definition of marriage was now altered to include same-sex couples. In reaching this conclusion, the court stated that,

> [h]ad the Council intended to effect such a major definitional change, counter to common understanding, we would expect some mention of it in the [HRA] 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 [HRA], there can be no such thing.*[27]

This passage from *Dean* sheds light on its significance in this matter. Firstly, the "legislative definition" of marriage is not now what it was in 1995. Since then, there have been extensive efforts "by the Council to remove … gender-specific references as part of a systemic effort to employ gender-neutral language throughout the D.C. Official Code statutes pertaining to marriage and the rights, benefits, and obligations incident to marriage."[28] Indeed, the Act is the most recent example of this legislative effort; section 3(a), which was not subjected to a request for a referendum, repeals certain statutory provisions concerning consanguinity that contain gender-based expressions, and replaces

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27 *Dean*, 653 A.2d at 320 (emphasis added).

28 Letter from Brian Flowers, General Counsel, Council of the District of Columbia, to Kenneth J. McGhie, General Council, D.C. Board of Elections and Ethics regarding the Referendum on Jury and Marriage Amendment Act of 2009 (June 9, 2009)("Flowers' Letter") at 8.

them with a provision that contains gender-neutral terminology.[29] A significant result of the Act, therefore, is that provisions which, because of their gender-based terms, had been cited by *Dean* as evidence of "a legislative understanding that marriage, as understood by Congress at the time of original enactment and thereafter, is inherently a male-female relationship,"[30] are no more.

Secondly, unlike in 1995 when *Dean* was decided, there is now "such a thing" as a valid same-sex marriage. Presently, Massachusetts, Connecticut, Iowa, Maine, Vermont, New Hampshire currently permit, or are set to permit, same-sex marriages. From June 2008 until November 2008, California also authorized same-sex marriages. In November of 2008, California voters voted in favor of Proposition 8, an initiative

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29 Prior to the Act, D.C. Official Code § 46-401 provided that

> [t]he following marriages are prohibited in the District of Columbia and shall be absolutely void *ab initio*, without being so decreed, and their nullity may be shown in any collateral proceedings, namely:
>
> (1) The marriage of a man with his grandmother, grandfather's wife, wife's grandmother, father's sister, mother's sister, mother, stepmother, wife's mother, daughter, wife's daughter, son's wife, sister, son's daughter, daughter's daughter, son's son's wife, daughter's son's wife, wife's son's daughter, wife's daughter's daughter, brother's daughter, sister's daughter;
>
> (2) The marriage of a woman with her grandfather, grandmother's husband, husband's grandfather, father's brother, mother's brother, father, stepfather, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, husband's son's son, husband's daughter's son, brother's son, sister's son;
>
> (3) The marriage of any persons either of whom has been previously married and whose previous marriage has not been terminated by death or a decree of divorce.

The Act repeals D.C. Official Code § 46-401(1) and (2) and adds a new section (2A) which reads as follows:

> The marriage of a person with the person's grandparent, grandparent's spouse, spouse's grandparent, parent's sibling, parent, step-parent, spouse's parent, child, spouse's child, child's spouse, sibling, child's child, child's child's spouse, spouse's child's child, sibling's child.

30 Dean, 653 A.2d at 313.

constitutional amendment banning same-sex marriages.[31] However, same-sex marriages performed prior to the enactment of the proposition are still recognized as valid in California. Additionally, Belgium, Canada, the Netherlands, Norway, South Africa, Spain, and Sweden allow same-sex marriages. Accordingly, contrary to times past, valid same-sex marriages do exist.

The Council, being fully aware of this phenomenon, has acted to insure that individuals who are validly married to persons of the same sex are treated the same as individuals who are validly married to persons of the opposite sex. If they are subjected to discrimination based upon either gender or sexual orientation, vis-à-vis the benefits and obligations of marriage – at *least* as they pertain to those provided by District government and public accommodations – such discrimination is prohibited by the HRA. The Petitioners' Referendum instructs that "[a] 'NO' vote … will continue the current law of recognizing only marriage between persons of the opposite sex."[32] Notwithstanding the incorrect statement of existing law, it is clear that the Petitioners' Referendum would, in contravention of the HRA, strip same-sex couples of the rights and responsibilities of marriage that they were afforded by virtue of entering into valid marriages elsewhere, and that the Council intends to clearly make available to them here in the District, simply on the basis of their sexual orientation. Because the Referendum would authorize discrimination prohibited by the HRA, it is not a proper subject for referendum, and was appropriately rejected by the Board.

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31 The formal title of Proposition 8 was "Eliminates Right of Same–Sex Couples to Marry. Initiative Constitutional Amendment".

32 The Referendum Summary Statement.

CONCLUSION

This Court lacks the authority to grant the Petitioners the extraordinary relief they seek in this matter, which amounts to the amending of a federal act. Moreover, the Petitioners have not demonstrated that they are entitled to such relief because they can show neither a substantial likelihood of success on the merits, nor irreparable harm in the absence of the relief they seek. For the foregoing reasons, the Respondent Board respectfully requests that this Court deny Petitioners' Motion for Preliminary Injunction.

Respectfully submitted,

__/s/ Kenneth J. McGhie _____
Kenneth J. McGhie (D.C. Bar No. 385313)
Email: kmcghie@dcboee.org

__/s/ Terri D. Stroud_____ _____
Terri D. Stroud (D.C. Bar No. 465884)
Email: tstroud@dcboee.org

__/s/ Rudolph McGann____ _____
Rudolph McGann (D.C. Bar No. 471731)
Email: rmcgann@dcboee.org

__/s/ Renee Christensen_____
Renee Christensen (Law Clerk)
Email: rchristensen@dcboee.org

D.C. Board of Elections and Ethics
441 Fourth Street, NW, Suite 270
Washington D.C. 20001
(202) 727-2194

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition were filed and served electronically through e-filing for Courts this 18th day of June 2009 to:

Steven H. Aden, Esq.
Brian W. Raum, Esq.
Austin R. Nimocks, Esq.
Alliance Defense Fund
801 G Street, NW, Suite 509
Washington, DC 20004

Peter J. Nickles, Esq.
George C. Valentine, Esq.
Ellen A. Efros, Esq.
Andrew J. Saindon, Esq.
Chad Copeland, Esq.
Office of the Attorney General
441 4th Street, NW, 6th Floor South
Washington, DC 20001

/s/ Rudolph McGann
Rudolph McGann (D.C. Bar No. 471731)

PARTIES TO BE NOTICED:

Steven H. Aden, Esq.
D.C. Bar No. 466777
ALLIANCE DEFENSE FUND
801 G Street NW, Suite 509
Washington, D.C. 20001
Attorney for Petitioners

Brian W. Raum, Esq.
Austin R. Nimocks, Esq.
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, AZ 85260

Ellen A. Efros, Esq.
Andrew J. Saindon, Esq.
Chad Copeland, Esq.
Chief, Equity Section I
441 Fourth Street, N.W., 6th Floor South
Washington, D.C. 20001
Attorneys for Respondent-Intervenor

Howard A. Newman, Esq.
Newman Law Offices
888 16th Street, N.W., Suite 800
Washington, D.C. 20006
Attorney for Proposed Intervenors

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

Reverend Harry Jackson, *et al.*,	)	
	)	
Petitioners,	)	
	)	**Civil Action No. 2009 CA 004350 B**
v.	)	**Calendar 14**
	)	**Judge Judith E. Retchin**
District Of Columbia Board Of Elections And Ethics,	)	**[Next Court Event: None Scheduled]**
	)	
Respondent,	)	
	)	
and	)	
	)	
District of Columbia,	)	
	)	
Intervenor.	)	

ORDER

Upon consideration of the District of Columbia Board of Elections and Ethics' Opposition to the Petitioners' Motion for Preliminary Injunction, and the entire record herein, it is hereby:

ORDERED that Petitioners' Motion for Preliminary Injunction is DENIED.

SO ORDERED.

DATE: _____ _____

JUDITH E. RETCHIN
Associate Judge
Superior Court of the District of Columbia