SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

HARRY R. JACKSON, JR., *et al*. Petitioner, v. DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, Respondent.	2009 CA 008613 B Judge Judith Macaluso Calendar 9 [Next Court Event: Motions hearing on Jan. 6, 2010, at 9 a.m.]

DISTRICT OF COLUMBIA'S MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Pursuant to SCR-Civil 12(b)(1), 12(b)(6), and 56, Intervenor the District of Columbia ("the District"), by and through counsel, respectfully moves to dismiss the petition herein or, in the alternative, for summary judgment. The grounds and the reasons are set forth in the accompanying Memorandum of Points and Authorities, and alternative proposed Orders. The Memorandum also serves as the District's Opposition to Petitioners' Motion for Summary Judgment. As required by SCR-Civil 12-I(k) and 56, a Statement of Material Facts As to Which There is No Genuine Issue ("SMF") has been provided, as well as the District's Response to Petitioners' Statement of Facts as to Which There is No Genuine Issue.

DATE: December 18, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

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INTERVENOR THE DISTRICT OF COLUMBIA'S
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO
PETITIONERS' MOTION FOR SUMMARY JUDGMENT

Intervenor the District of Columbia, (collectively, "the District") here moves to dismiss petitioners' petition for review of the Board's decision, or, in the alternative, for summary judgment, and opposes petitioners' motion for summary judgment, pursuant to SCR-Civil 12(b)(1), 12(b)(6), and 56.

INTRODUCTION AND SUMMARY OF ARGUMENT

For years, those who have sought marriage equality through judicial enforcement of constitutional rights have been told, including by Judge Terry in *Dean v. District of Columbia*, 653 A.2d 307, 362 (1995), that the "Council and only the Council, can provide" them "with the relief they seek." On December 15, 2009, after decades of struggle, the D.C. Council gave final approval to a law authorizing same-sex marriage. Now, with the race seemingly won, petitioners

ask the Court to move back the finish line and force supporters of marriage equality to clear the considerable hurdle of a legislative initiative. Even if that hurdle is cleared, under the logic of petitioners' argument, the same hurdle could be placed before them next year . . . and then the year after that . . . and then the year after that . . . *ad infinitum*.

Petitioners offer no basis for overturning the Board of Elections' decision that prohibitions on the authorization and recognition of same-sex marriage violate the D.C. Human Rights Act ("HRA"). The HRA prohibits the denial of benefits or services on the basis of gender and sexual orientation, the proposed initiative prohibits recognition of same-sex marriages, and there are at least 200 rights and responsibilities under D.C. law that accompany the marital relationship. In asserting that the proposed initiative does not discriminate on the basis of gender or sexual orientation in violation of the HRA because all may marry individuals of the opposite gender, petitioners rely on the (il)logic of the State of Virginia's unsuccessful position in *Loving v. Virginia* that anti-miscegenation laws left whites and African-Americans free to marry (but not free to marry each other). Further, in putting such heavy and misplaced reliance on *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995), petitioners fail to account, *inter alia*, for (1) the fact that the provision of the HRA prohibiting discrimination in the provision of government benefits did not exist at the time of that decision and (2) the D.C. Council's considerable post-*Dean* modifications of local law to protect the relationships of same-sex couples and their rights to form legally recognized families with the same benefits as heterosexual couples. Moreover, petitioners already raised these arguments in an earlier mandamus petition and lost on the merits, thus precluding them from raising them again.

In their principal argument—which they failed to raise before the D.C. Board of Elections or Judge Retchin in the *Jackson I* case, and over which the Court lacks jurisdiction—

petitioners assert that the District's Charter has, from its inception, precluded the people's elected representatives from protecting any minorities from disfavored treatment, at least where a majority of District voters on a given day express their view that those minorities should be disfavored. In asserting that the only "substantive" limitation on the people's right of initiative relates to their ability to appropriate funds, petitioners disregard, *inter alia*, the Supremacy Clause of the United States Constitution and the fact that the D.C. Human Rights Act both preceded the Charter Amendments Act and was part of the organic law implementing the Charter's initiative provisions from their inception. Moreover, Congress specifically delegated to the Council the authority to enact legislation implementing the "purpose" of the statute with no suggestion that the Council should define the purpose to include permitting the majority to determine what should constitute unlawful discrimination against minorities. Nor is there any indication that Congress intended to give private individuals the right to challenge the Council's conception of the purpose of the statute at any point, let alone 30 years after the fact.

Further, in exalting the people's supposedly fundamental right of initiative above all else (except apparently the prohibition on popular appropriation of funds), petitioners disregard the basic republican principles that have governed the nation since its founding. While petitioners treat the right of initiative as fundamental, the Founding Fathers recognized the threat that an unchecked majority posed to the liberty of disfavored minorities and thus created a republican form of government, even requiring the newly created Congress to "guarantee" that form of government "to every State in the Union." Given that the Congress left it to the City Council to enact legislation to implement the "purpose" of the statute, there is nothing to suggest that Congress in the Home Rule Act intended to abandon this fundamental political principle by

leaving the people's elected officials powerless to protect the District's minorities from discrimination by popular majorities.

Just as the proposed initiative runs afoul of the protections against discrimination enacted by the people's elected representatives, petitioners are asking the Court to order an election that would codify discrimination that violates the federal Constitution. The initiative should be subject to heightened scrutiny because it classifies individuals based on gender, because homosexuals are a discrete and insular minority, and because it infringes upon the fundamental right to marry. Moreover, petitioners' attempt to overturn, through direct initiative, minority protections enacted by the people's representatives merits searching scrutiny because of the absence of the deliberative, procedural, and other protections that republican government affords to minority groups. The Supreme Court made clear in *Lawrence v. Texas*, 539 U.S. 558 (2003), that moral objections are not a sufficient basis for infringing upon the fundamental rights of homosexuals, and there is no other justification for the proposed initiative that meets even minimal constitutional scrutiny. While likely true everywhere, this is particularly true in a jurisdiction such as the District, which has such a strong tradition of prohibiting discrimination based on sexual orientation, and so many provisions of law that protect the fundamental right of homosexuals to form families.

"The right to marry is of fundamental importance to all individuals." *Zablocki v. Redhail*, 434 U.S. 374, 680 (1978) (citing, *inter alia*, *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (marriage is "the most important relation in life")). When the State of Virginia prohibited the plaintiffs in *Loving v. Virginia*, 388 U.S. 1, 2–3, 12 (1967), from marrying, the couple moved to the District of Columbia. For years, same-sex couples and their supporters have worked to secure similar legal recognition of and full equality for themselves and their families, and they have finally

succeeded in convincing their elected representatives to remove these barriers. Petitioners have no legal basis for attempting to restore them, at least without recourse to the same republican process. Accordingly, and for all of the foregoing reasons and those discussed herein, the Court should dismiss their mandamus petition.

FACTUAL AND PROCEDURAL BACKGROUND

The facts in this matter are largely undisputed.[1] On May 5, 2009, the Council of the District of Columbia approved the Jury and Marriage Amendment Act of 2009 ("JAMA"), by a vote of 12 to 1. *See* D.C. Act 18-70; 56 D.C. Reg. 3797 (May 15, 2009). That measure amended District of Columbia law to provide that legal, same-sex marriages entered into in another jurisdiction will be legally recognized in the District of Columbia. The Act was signed by the Mayor on May 6, 2009, transmitted to Congress, and became law on July 6, 2009, when Congress did not disapprove it. *See* D.C. Official Code § 46-405.01 (2009); SMF ¶ 1.

On or about May 27, 2009, a group presented a proposed referendum to respondent, the Board of Elections and Ethics ("BOEE" or "Board"), which sought to present to the voters the issue of whether the District should recognize same-sex marriages from other jurisdictions. SMF¶ 2. After a public hearing and review of the many comments it received, the Board, by Memorandum Opinion and Order dated June 15, 2009 (*In re: Referendum Concerning the Jury and Marriage Amendment Act of 2009*, BOEE No. 09-004), determined that the proposed measure was not a proper subject for referendum, pursuant to D.C. Official Code § 1-1001.16(b)(1)(C), and hence could not be presented to the voters, because it "authorizes, or

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

would have the effect of authorizing, discrimination prohibited under [the District of Columbia Human Rights Act, *codified as amended at* D.C. Official Code §§ 2-1401.01 *et seq*. (2009 Supp.)]." SMF ¶ 3. Two days later, the proposers of the referendum brought suit in Superior Court, under D.C. Official Code § 1-1001.16(b)(3), seeking "a writ in the nature of mandamus to compel the Board to accept" the proposed referendum. SMF ¶ 4.

On June 30, 2009, Judge Retchin issued an order in that matter, *Jackson v. District of Columbia Bd. of Elections & Ethics ("Jackson I")*, 2009 CA 004350 (Super. Ct. of D.C.) ("June Order"), denying the Petition for Review of Agency Action, Writ in the Nature of Mandamus, Motion for Preliminary Injunction, and Motion for Summary Judgment.[2] SMF ¶ 5. Judge Retchin held, *inter alia*, that "the Board correctly concluded that the proposed referendum would violate the District of Columbia Human Rights Act . . . ." June Order at 2; SMF ¶ 6.

On September 1, 2009, another group filed a proposed initiative with the Board.[3] That initiative would establish that "only marriage between a man and a woman is valid or recognized in the District of Columbia." Petition ¶ 3; SMF ¶ 7. The Board scheduled a public hearing on the proposed initiative, *see* 56 D.C. Reg. 7537 (Sept. 18, 2009), which occurred on October 26, 2009. *Id*.; SMF ¶ 7. "In all, the Board heard testimony from 60 witnesses and received and considered comments from approximately 29 individuals and/or organizations." Memorandum Opinion and Order dated November 17, 2009, at 5 (*In re: Marriage Initiative of 2009*, BOEE

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[2] The petitioners in that suit were Harry R. Jackson, Jr., Walter E. Fauntroy, Patricia Johnson, Melvin Dupree, Sandra B. Harris, Bobby Perkins, Sr., and Dale E. Wafer. SMF ¶ 5.

[3] An "initiative" under District law is the process by which District voters may propose laws to be presented directly to the voters for approval or disapproval, and a "referendum" is the process by which certain acts of the Council of the District of Columbia are suspended until such acts have been presented directly to the voters for approval or disapproval. *See* D.C. Official Code §§ 1-204.101(a), (b).

No. 09-006); SMF ¶ 7. The Board held the record open for two more days for additional comments. Mem.Op. (BOEE No. 09-006) at 5.[4]

The Board found that the proposed initiative "authorizes or would authorize discrimination proscribed by the [HRA] and is therefore not a proper subject for initiative." Mem.Op. (BOEE No. 09-006) at 11; SMF ¶ 8. The proposers of the initiative then commenced the instant matter with a Petition for Review of Agency Decision and for Writ in the Nature of Mandamus, filed on November 18, 2009.[5] Petitioners' filed their Motion for Summary Judgment two days later.

The Court granted the District's Consent Motion to Intervene by Order dated December 1, 2009. Also on that day, the Council of the District of Columbia passed—by a vote of 11 to 2—the Religious Freedom and Civil Marriage Equality Amendment Act of 2009, Bill 18-482; SMF ¶ 10.[6] That legislation would expressly expand the definition of marriage in the District to include same-sex couples. SMF ¶ 10. A second and final vote on this legislation occurred on December 15, and it was approved by the same margin. *Id.*

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[4] A copy of many of the comments received on the proposed Initiative is available online at *http://dcboee.org/newsroom/showASPfile.asp?cat=News%20Releases&id=224&mid=10&yid=2009.*

[5] The instant petitioners are Harry R. Jackson, Jr., Robert King, Walter E. Fauntroy, James Silver, Anthony Evans, Dale E. Wafer, Melvin Dupree, and Howard Butler. SMF ¶ 9.

[6] The text of the legislation, and voting and hearing information is available online on the Council's website at *http://www.dccouncil.washington.dc.us/lims/legislation.aspx?LegNo=B18-0482&Description=RELIGIOUS-FREEDOM-AND-CIVIL-MARRIAGE-EQUALITY-AMENDMENT-ACT-OF-2009.&ID=23204.*

ARGUMENT

Petitioners' motion should be denied and their case dismissed. Petitioners are precluded from proceeding here but, even if they were not, their claims fail on the merits. The proposed initiative clearly violates both longstanding District law and the Constitution. Dismissal under Rule 12(b)(6) is proper only where it appears beyond doubt that a plaintiff can prove no set of facts that would support the claim. *Schiff v. American Ass'n of Retired Persons*, 697 A.2d 1193, 1196 (D.C. 1997). Accordingly, the factual allegations are viewed in the light most favorable to the plaintiff and every reasonable doubt concerning those allegations resolved in his favor. *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 174 (D.C. 1996).[7]

When ruling on Rule 12(b)(6) motions, courts may employ a "two-pronged approach." *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1950 (2009). Although courts must assume the veracity of all "well-pleaded factual allegations" in the complaint, *id*., they need not accept as true "legal conclusions cast in the form of factual allegations." *Kowal v. MCI Communications Corp., Inc.*, 305 U.S. App. D.C. 60, 65, 16 F.3d 1271, 1276 (1994). A pleading must offer more than "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action' . . . ." *Iqbal*, 129 S. Ct. at 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

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

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

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[7] Any references to public-record documents provided by petitioners in support of their petition or motions, or by the District herein, do not convert the instant motion into one for summary judgment. *See, e.g., Baker v. Henderson*, 150 F.Supp.2d 17, 19 n.1 (D.D.C. 2001) (court may consider documents "attached to or incorporated in the complaint . . . without converting the motion to dismiss into one for summary judgment.") (citations omitted).

The Petition here fails to meet even this lenient standard, hence petitioners fail to state a claim on which relief may be granted.

Alternatively, according to the standards of SCR-Civil 56(c), summary judgment should be entered in the District's favor as a matter of law. Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Id.* Only disputes over material facts, or facts that might significantly affect the outcome of a suit under governing law, preclude entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). For purposes of considering this motion, the facts in the record must be viewed in the light most favorable to the non-moving party. *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 62 (D.C. 2005); *Colbert v. Georgetown Univ.*, 641 A.2d 469, 472 (D.C. 1994) (*en banc*).

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SCR-Civil 56(c). A "complete failure of proof concerning an essential element of the non-moving party's case necessarily renders other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Petitioners have not identified any disputed, material facts precluding summary judgment for the District and the Board. Petitioners' motion is composed chiefly of conclusory arguments unsupported by controlling case law, and their evidentiary showing is insufficient to meet their burden for summary judgment. *See, e.g., Bailey v. District of Columbia*, 668 A.2d 817, 819 (D.C. 1995) (movant must demonstrate that it is entitled to summary judgment as a matter of law); *Abdullah v. Roach*, 668 A.2d 801, 804 (D.C. 1995) (same).

Petitioners filed suit pursuant to D.C. Official Code § 1-1001.16(b)(3), but fail to meet the standards for such relief. Courts apply a "rigorous standard" to mandamus actions. *Banov v. Kennedy*, 694 A.2d 850, 855 (D.C. 1997). "The requirements for issuance of a writ of mandamus are that the party seeking the writ must show that his right is 'clear and indisputable' and that he 'has no other adequate means to obtain relief.'" *Id.* at 857. *See also, e.g., United States ex. rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931) (a writ of mandamus will issue only where "the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable."). *Cf. Cheney v. United States Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 381 (2004) (even if party meets its burden, courts maintain discretion to reject mandamus if not "appropriate under the circumstances.") (citing *Kerr v. United States Dist. Court for Northern Dist. of Cal.*, 426 U.S. 394, 403 (1976)). Petitioners have failed to meet their burden.

I. PETITIONERS' ARGUMENT THAT THE HRA CANNOT LIMIT THE RIGHT OF INITIATIVE IS NOT PROPERLY BEFORE THE COURT AND IS INCORRECT AS A MATTER OF LAW.

Petitioners' primary argument—that the HRA is not an authorized limitation on the people's right of initiative—is not properly before the Court. As discussed in the following subsections, the Court lacks jurisdiction over the argument, petitioners waived it by not raising it before the Board, and the argument is precluded by the doctrines of collateral estoppel and *res judicata*. There also is no basis for the argument as a substantive matter.

A. Because the Court May Only Order Relief That Does Not Authorize Discrimination, the Court Lacks Jurisdiction to Order Acceptance of the Proposed Initiative Based on the Posited Invalidity of the HRA Limitation on the Right of Initiative.

Under the procedural vehicle utilized by the petitioners in this case, the Court lacks jurisdiction to reach the issue of the validity of District law that prohibits the enactment of initiatives that violate the HRA. As a prerequisite for any such order, the D.C. Code mandates that the proposed initiative "not authorize discrimination." Specifically, the Code provides, in relevant part:

> 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 . . . . If the Superior Court of the District of Columbia determines that the issue presented by the measure is a proper subject of an initiative or referendum, whichever is applicable, under the terms of title IV of the District of Columbia Home Rule Act, and that the measure is legal in form, *does not authorize discrimination as prescribed in paragraph (1)(C) of this subsection*, and would not negate or limit an act of the Council of the District of Columbia as prescribed in paragraph (1)(D) of this subsection, it shall issue an order requiring the Board to accept the measure.

D.C. Official Code § 1-1001.16(b)(3) (2001) (emphasis added). There is no room under this limited grant of authority for the Court to conclude that a measure authorizes discrimination in violation of the HRA, but that the HRA is an improper limitation on the right of initiative. For this reason alone, petitioners' argument must be rejected.

B. Petitioners Have Waived the Argument That the HRA Is An Improper Limitation on the Right of Initiative.

By failing to raise before the BOEE the argument that the HRA is an improper limitation on the right of initiative, petitioners have waived the right to raise that argument here. *See, e.g.*, *Washington Gas Light Co. v. Public Serv. Comm'n of the District of Columbia,* ___ A.2d ____ (D.C. Oct. 8, 2009) (argument not presented to agency is waived) (citing *Jones & Artis Construction Co. v. District of Columbia Contract Appeals Board*, 549 A.2d 315, 324 (D.C. 1988));

Grand Hyatt Washington v. District of Columbia Dep't of Employment Services, 963 A.2d 142, 145 (D.C. 2008) (court's review of administrative agency's decision is limited to record on appeal and court cannot consider issues or evidence not presented to the agency).

The only exception to the rule, *i.e.*, "exceptional circumstances" to avoid "manifest injustice," does not apply here, and petitioners have not even attempted to show otherwise. *Sawyer Property Management of Md., Inc. v. District of Columbia Rental Housing Comm'n*, 877 A.2d 96, 105 (D.C. 2005). Indeed, the D.C. Court of Appeals invoked the waiver doctrine in an initiative challenge, in a case cited repeatedly by petitioners. *See Price v. BOEE*, 645 A.2d 594, 599 n. 17 (D.C. 1994) ("Since that issue was not raised [by petitioner] before the agency, however, the court need not consider it.") (citing, *inter alia*, *Daniel v. District of Columbia Ins. Admin.*, 639 A.2d 590, 593 n.4 (D.C. 1994) (court does not have authority to consider issues raised for the first time on review of agency decision)). Because petitioners failed to raise their HRA "restriction" argument to the Board, they have waived the right to raise it here.

C. Petitioners' Argument (and Entire Petition) Are Precluded By *Res Judicata* and Collateral Estoppel.

Petitioners' claims are barred because all of the legal issues before the Court either were raised or could have been raised in petitioners' prior challenge. The doctrine of *res judicata* "usually is parsed into claim preclusion and issue preclusion." *I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co.*, 232 U.S. App. D.C. 418, 723 F.2d 944, 946 (1983)). Issue preclusion, or collateral estoppel, prevents the relitigation of an issue of fact or law that has previously been decided as part of a final judgment on the merits. *Newell v. District of Columbia*, 741 A.2d 28, 36 (D.C. 1999) (*quoting Davis v. Davis*, 663 A.2d 499, 501 (D.C. 1995)). Claim preclusion operates after a valid final judgment to bar the parties, or those in privity with them, "from

relitigating the same claim or any claim *that might have been raised* in the first proceeding." *Newell*, 741 A.2d at 36 (emphasis added) (*quoting Washington Med. Ctr. v. Holle*, 573 A.2d 1269, 1280–81 (D.C. 1990)); *Shin v. Portals Confederation Corp.*, 728 A.2d 615, 618 (D.C. 1999). Because Judge Retchin addressed the question of the HRA's applicability to and preclusion of restrictions on the right to marry based on gender or sexual orientation, and because petitioners could have (but did not) assert that the HRA impermissibly restricts the right of initiative, petitioners here are foreclosed from relitigating those issues.

Petitioners' objections to the application of these preclusion doctrines have no merit. *First*, given that four petitioners in the first case are also petitioners in this case, and given that the attorneys are the same, there is no basis for claiming that the parties are different. Petitioners assert that the parties are different because they added four petitioners to their complaint, asserting, "It cannot be that because a handful of District voters sought a referendum on the Jury and Marriage Amendment Act in April 2009 that all voters in the District are now forever precluded from proposing legislation on the subject of marriage." P.Mem. at 26. This is a straw man. Preclusion of the petitioners here would in fact bar *no one* in the District from proposing such an initiative (other than the instant petitioners) so long as they do not file their suit with, in concert with, or at the behest of the four petitioners in this case who lost the initial case. It is undoubtedly no coincidence (nor could it be a function of alphabetical order) that Mr. Jackson is the named petitioner in both actions. Parties cannot keep litigating the same issues simply by finding new individuals to join them.

Second, the issues were the same in the two proceedings—specifically, the applicability of the HRA to prohibitions on the right to marry based on gender and/or sexual orientation. Judge Retchin recognized that *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995), "involved a

different factual scenario and presented a different legal question than is before the Court." June Order at 6. The Court further held that same-sex marriages are "legally indistinguishable from opposite-sex marriages in the jurisdictions in which they were performed . . . ." *Id*. at 8. The Court held that the proposed referendum would, if passed, prevent the District from recognizing such marriages from other jurisdictions "solely on the basis of the person's gender or sexual orientation[,]" hence was "not a proper subject for a referendum" because it would authorize or have the effect of authorizing discrimination prohibited under the HRA. *Id*. at 8. The Court held that, in light of these findings, it could not issue the requested writ of mandamus. *Id*.

These findings foreclose petitioners' attempt to relitigate the issue of whether the HRA applies to marital discrimination. It is immaterial that one case dealt with legislation addressing out-of-state marriages and the other deals with whether to permit same-sex marriage within the District (or a more general definition of marriage that excludes same-sex couples from its ambit) where, as here, the petitioners' argument in both *Jackson I* and *Jackson II* is that the HRA does not apply to marriage at all. *See* P.Mem. at 28–35 (devoting eight pages of their brief to the argument that the HRA does not apply to the regulation of the marital relationship). Petitioners could only argue that the issues were materially different if they were arguing here that, while the HRA applies to out-of-state marriages, it does not apply to the regulation of the marital relationship in the District of Columbia. Petitioners make no such argument, and there would be no basis for doing so. Instead, they argue generally that "the Regulation of the Marital Relationship Falls Outside the Coverage of the HRA." *See id*. at 27. Judge Retchin rejected this argument, and so petitioners are precluded from relitigating the issue.

Third, petitioners argue that the substantive issue was unnecessary to the result in the *Jackson I* case because, they say, the Court dismissed that action as moot. There is nothing to

this assertion, which rests purely on ellipses and elision, combining sentences from different portions of the Court's opinion to misstate the ruling of the Court. Specifically, the Court held as follows:

> Petitioners' proposed referendum asks the voters to decide whether the District should recognize same-sex marriages – which are legally indistinguishable from opposite-sex marriages in the jurisdictions in which they were performed – solely on the basis of the person's gender or sexual orientation. *Their measure 'authorizes or would have the effect of authorizing discrimination prohibited under [the HRA],' D.C. Code § 1-1001.16(b)(1)(C), and hence is not a proper subject for a referendum. Accordingly, the Court cannot issue a writ of mandamus.*

June 30, 2009 Order at 8 (emphasis added and brackets in original). Failing basic logic, petitioners argue that because the District argued, *inter alia*, that the action should be dismissed as moot, and because the Court dismissed the action as moot, then the Court must have dismissed the action because it was moot. P.Mem. at 25. The conclusion does not follow at all and is foreclosed by the quoted paragraph. Further, the referenced discussion as to whether there was still time to complete the referendum came in a discussion of petitioners' request for a stay *after* the portion of the opinion that denied the petition on substantive grounds. *See* June 30, 2009 Order at 10. Petitioners have misstated the Court's ruling.

Fourth and finally, petitioners' "judicial estoppel" argument similarly rests on a mischaracterization of the Court's opinion. According to petitioners, the Court, the Board, and the District promised the petitioners that they could pursue the initiative process, and are contradicting that representation with the instant argument. P.Mem. at 25. To the contrary, the Court agreed with the District's contention that the petitioners "have the right to proceed with the initiative process (*provided the proposed initiative does not violate the HRA*)." June Order at 10 (emphasis added). Nothing about this point suggests that the petitioners could relitigate the same issue or addresses whether collateral estoppel would apply to their attempt to do so. In addition

to noting that petitioners had inexcusably delayed the submission of their proposed referendum, the Court observed that petitioners' "right to referendum has not been deprived. The Board did not refuse to consider Petitioners' proposed referendum, and this Court has not declined to exercise jurisdiction." *Id*. at 10–11. The Court further observed that petitioners "are entitled to the process outlined in D.C. Code § 1-1001.16. They are not entitled to a favorable ruling on whether their proposed referendum meets the legal requirements established by District law." *Id*. at 11. In sum, petitioners had every right to pursue the initiative process, but they did not have a right to a favorable ruling or to relitigate the same issue.

The same arguments that preclude relitigation of the issue of the HRA's applicability to same-sex marriage foreclose petitioners' ability to raise in this proceeding the claim that the HRA is an impermissible limitation on the right of initiative. Claim preclusion operates after a valid final judgment to bar the parties, or those in privity with them, "from relitigating the same claim or any claim *that might have been raised* in the first proceeding." *Newell*, 741 A.2d at 36 (emphasis added).[8] Apart from the jurisdictional bar that applies in both cases (which petitioners obviously have not heeded here), petitioners could have, but did not, assert in the first proceeding the argument that they are raising here. Further, as discussed above, the Court issued a final judgment in denying the petitioners' mandamus petition.

[8] "A privy is one so identified in interest with a party to the former litigation that he or she represents precisely the same legal right in respect to the subject matter of the case." *Modiri v. 1324 Restaurant Group, Inc.*, 904 A.2d 391, 396 (D.C. 2006) (quoting *Smith v. Jenkins*, 562 A.2d 610, 615 (D.C.1989)).

D. The HRA is a Permissible Limitation on the Right of Initiative.

There is no basis for petitioners' assertion that the HRA restriction impermissibly limits the right of initiative in violation of the "Initiative, Referendum, and Recall Charter Amendments Act of 1977," D.C. Law 2-46 (24 D.C. Reg. 199 (eff. Mar. 10, 1978), as amended by Pub. L. 95-526, 92 Stat. 2023 (Oct. 27, 1978)) ("Charter Amendments Act" or "CAA").

This anti-discrimination provision was enacted as part of the original legislation implementing the CAA's direct-initiative provisions—specifically, the "Initiative, Referendum, and Recall Procedures Act," ("IPA"), D.C. Law 3-1, § 2(c), 25 D.C. Reg. 9454 (eff. June 7, 1979), *codified as amended at* D.C. Official Code §§ 1-1001.16 *et seq*. (2006 Repl.). Thus, without even raising the argument before the BOEE or in their first lawsuit before Judge Retchin, petitioners ask this Court to strike down a protection that was part of the original legislation implementing the Charter Amendments Act, and that has therefore been a part of the referendum and initiative process for more than a generation.

1. The Council and BOEE Are Entitled to Deference In Their Interpretation of the Home Rule Act.

As an initial matter, the "D.C. Council's interpretation of its responsibilities under the Home Rule Act is entitled to great deference." *Tenley & Cleveland Park Emergency Comm. v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331, 334 n.10 (D.C. 1988). Further, the BOEE has interpreted the IPA's incorporation of the anti-discrimination standard of the HRA in decisions going back decades. *See, e.g., Convention Ctr. Referendum Comm. v. District of Columbia Bd. of Elections and Ethics*, 441 A.2d 889, 894 (D.C. 1980) (*plurality opinion)* ("*Convention Ctr. II*"). Such a consistent, longstanding interpretation is entitled to great deference. "When faced with a problem of statutory construction, this Court shows great

deference to the interpretation given the statute by the officers or agency charged with its administration." *Bausch v. District of Columbia Police & Firefighters' Retirement and Relief Bd.*, 926 A.2d 125, 129 (D.C. 2007) (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). *See also Majerle Management, Inc. v. District of Columbia Rental Housing Comm'n*, 866 A.2d 41, 46 (D.C. 2004) ("When reviewing an agency interpretation of a statute it administers, . . . we ordinarily give considerable deference to such an interpretation as well as to the agency's own regulations and decisions."). "Indeed, the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Spring Valley v. Wesley Heights Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 644 A.2d 434, 436 (D.C. 1994).[9]

The text and structure of the delegation to the Council to enact implementing legislation, moreover, makes clear that Congress intended the composition of the implementing legislation to be a political question. As an initial matter, Congress made clear that it wanted the legislation enacted in 180 days, and plaintiffs are challenging it 30 years later. Moreover, as discussed *infra* in subsection 3, Congress delegated authority to the Council to enact implementing legislation to implement "the purpose" of the initiative provision with no statutory definition of the purpose. Congress thus left the question of what was necessary to comply with the purpose as an unreviewable "political question" textually committed to the discretion of the Council. While

[9] "Thus, the court's role is not to substitute its construction of the statute for that of [the agency], but to determine whether . . . that interpretation was a reasonable one." *Schlank v. Williams*, 572 A.2d 101, 107 (D.C. 1990). *See also Jerome Management, Inc. v. District of Columbia Rental Housing Comm.*, 682 A.2d 178, 182 (D.C. 1996) (agency's construction will be sustained "even where a party advances another reasonable interpretation of the statute which this court might have accepted if construing the statute in the first instance.") (citations omitted). *See also, e.g., Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 843 n.11 (1984) (A reviewing court "need not conclude that the agency construction was the only one it could permissibly have adopted.").

the Council obviously could not gut the right of initiative, the conclusion that the purpose of the statute did not encompass the majority's right to define when it would be permitted to discriminate against minorities was well within the zone of deference afforded by the CAA's delegation.

2. Nothing in the Charter Amendments Act Prohibits the Council From Protecting Minorities from Discrimination As the Result of Legislative Initiatives.

There is nothing in the Charter Amendments Act that prohibits the HRA limitation. The fact that the CAA expressly makes clear 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 or otherwise intended to limit Congress' latitude to define the purpose of the statute. *See* D.C. Code § 1-204.101.[10] If it did, 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

[10] *See, e.g., BOEE v. Jones*, 481 A.2d 456, 460 (D.C. 1984) (a proposed initiative on whether unemployment compensation statute should be further amended to restore many of the benefits reduced by previous amendment was not a proper subject of initiative process, because it was irreconcilable with ban on "laws appropriating funds."). *Cf. Restaurant Ass'n of Metro. Wash. v. BOEE*, 2004 WL 2102203, *4 (Super. Ct. of D.C.) (affirming rejection, as "not a proper subject matter," of proposed initiative prohibiting smoking in all public places, because it would cause "a negative fiscal impact on restaurant tax revenue assumptions heavily relied on by the Council."). The District's Office of the Chief Financial Officer, as part of its fiscal-impact analysis of the Religious Freedom and Civil Marriage Equality Amendment Act of 2009, has submitted to the Council "an analysis of the potential revenue implications of same-sex marriages in the District of Columbia." That analysis (*available online at* www.davidcatania.com/publicdocuments/Financial_Impact_of_Marriage.pdf) estimates that such marriages could add more than $1 million in additional tax revenues per year. Similarly, a recent study conducted at the UCLA School of Law concluded that extending marriage to same-sex couples in the District could boost the economy by upwards of $50 million over three years, generating increases in local tax and fee revenues of over $5 million, and potentially creating approximately 700 new jobs. The Williams Institute, "The Economic Impact of Extending Marriage to Same-Sex Couples in the District of Columbia," (Apr. 2009) (*available online at* http://www.law.ucla.edu/williamsinstitute/pdf/DC%20Econ%20Impact.pdf).

process. It is clear, however, that 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. District of Columbia Bd. of Elections & Ethics*, 911 A.2d 1212, 1214 (D.C. 2006) (quoting D.C. Official Code § 1-206.02(a)(3)).[11] *See also id.* at 1216 ("although the Council [and the voters] may repeal a congressionally-enacted statute limited in application to the District of Columbia, the Council may not repeal a federal statute of broader application.")

Nor may a member of the public propose an initiative that would be unconstitutional or illegal. *Hessey v. Burden*, 615 A.2d 562, 574 (D.C. 1992) (Superior Court has discretion "to consider pre-election challenges to the constitutionality or legality of an initiative."); *id.* at 574 ("[Courts] hold that the initiative right, as closely guarded as it is, does not extend to legislation which violates the United States Constitution or that of the state involved." (citing *Whitson v. Anchorage*, 608 P.2d 759, 762 (Alaska 1980)). *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). Further, a citizen may not propose an initiative that would "limit or negate" a Budget Request Act authorized by the Council. D.C. Official Code § 1-1001.16(b)(1). Petitioners incorrectly inform the Court that this limitation is "mandated by the Home Rule Act itself." P.Mem. at 11. To the contrary, as with the other limitations, there is no such express limitation on the people's right of initiative. Yet no one, petitioners included, has

[11] The court in *Brizill* noted that, while the power of initiative is coextensive with the power of the Council, there were other limitations that applied, including limitations that do not appear in the Charter or the IPA. *Id.* at 1214 (citing, *inter alia*, *Hessey v. Burden*, 615 A.2d 562, 578 (D.C. 1992)). *See also Marijuana Policy Project v. United States*, 353 U.S. App. D.C. 267, 304 F.3d 82, 84 (2002) (noting IPA's requirement that BOEE reject proposed measures that would discriminate in violation of the HRA).

any doubt that it is a proper limitation. *See also Convention Center Referendum Committee v. D.C. Bd. of Elections and Ethics* ("*Convention Ctr I*"), 441 A.2d 871 (upholding the rejection of a petition that related to matters of an executive/administrative nature).

3. Congress Authorized the Council to Enact Legislation to Carry Out the Purpose of the Initiative Provisions, and the Council Reasonably Determined That the Purpose of Those Provisions Did Not Include Enabling a Majority of Voters to Determine What Should Constitute Unlawful Discrimination Against Minorities

Far from limiting the limit the ability of the Council to protect minorities from discrimination by legislative initiative, the CAA specifically authorized the Council to adopt "such acts as are necessary to carry out *the purpose* of this subpart within 180 days of the effective date of this subpart." D.C. Code § 1-204.107 (emphasis added). The Council, however, failed to meet that deadline, and the CAA was subsequently determined to be not self-executing. *Convention Ctr. I*, 441 A.2d at 872–73. By placing no textual limitation on the Council's ability to define the "purpose" of the subpart, Congress demonstrated its intent to afford the Council at least some reasonable degree of latitude in crafting the original organic legislation implementing the right of initiative. While implementation of that purpose could not have omitted the right of initiative entirely, it was eminently reasonable for the Council to conclude that the purpose did not include enabling the majority to define for themselves what constitutes impermissible discrimination against minorities. *See also Tenley & Cleveland Park Emergency Comm. v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d at 334 n.10 ("[T]he D.C. Council's interpretation of its responsibilities under the Home Rule Act is entitled to great deference").

Indeed, while offering general quotations concerning the importance of the right of initiative, petitioners cite no authority (persuasive or otherwise) that exalts the right of initiative over the protection of minorities who have been the historic victims of discrimination. This is unsurprising because our entire system of government is based upon concerns over the danger of majoritarian oppression. The United States is, first and foremost, a republic, and Congress is required to guarantee to each state a republican form of government. *See* U.S. Const. Article IV, Section 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.
>
> . . .
>
> 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.

See also generally Hans Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (Spring 1993). One can hardly accuse the Council of unreasonably redefining the purpose of the statute when it acted consistently with our fundamental political traditions. There is accordingly no reason to believe that Congress

intended to limit the Council's ability to define the purpose of the statute as excluding the right of the majority to define discrimination.

As with other express and implied restrictions to the right of direct citizen legislation, this provision manifests the Council's recognition of the inherent problem in permitting citizens to propose legislation to codify private discrimination under the guise of government policy. Indeed, it was the Supreme Court's proscription on involving the government in private discrimination that helped lead to the Council's decision to incorporate the protections of the HRA into the direct-legislation process. Specifically, in *Reitman v. Mulkey*, 387 U.S. 369 (1967), the Supreme Court affirmed the invalidation of a California Initiative that would have guaranteed the right of citizens to privately discriminate in the sale of their residences based on race. According to the California Supreme Court, the initiative's immediate design and intent were "'to overturn state laws that bore on the right of private sellers and lessors to discriminate,' . . . and 'to forestall future state action that might circumscribe this right.'" *Id.* at 373. Ultimately, the Supreme Court affirmed the lower holding that the initiative would "significantly encourage and involve the State in private discriminations." *Id.* at 380.

> 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 act [sic] 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.

Committee on Government Operations, Committee Report No. 1 on Bill 2-317 (Initiative, Referendum, and Recall Procedures Act of 1978), at 9 (Council of the District of Columbia, May 3, 1978).

The Council, over 20 years ago, anticipated and rejected the argument that petitioners make here. "The Supreme Court's reasoning in *Reitman* is particularly relevant to this discussion of an implied restriction on initiative." *Id*. The Council included the anti-discrimination provisions of the HRA in the IPA for this very reason: "It is [an] implied restriction to ensure that no initiated measure will establish an affirmative policy in favor of discrimination in this community. This language draws both from *Reitman* and from the Human Rights Act of 1977." *Id*. at 10. Petitioners minimize the historical support for the HRA restriction by marginalizing its broad support at the time of the IPA's passage. P.Mem. at 12. The legislative history, in fact, reflects broad support for inclusion of this provision. *See* Committee on Government Operations, Committee Report No. 1 on Bill 2-317, *supra*, at 4–6 (noting support for the anti-discrimination provision by private citizens, the D.C. Chapter of the National Organization for Women, Gay Activists Alliance of Washington, D.C., and an Advisory Neighborhood Commission).

4. In an Effort to Find Support For Their Position, Petitioners Misquote Irrelevant Authority

With no textual support for their position, and no support for the proposition that the basic right of initiative should include the right of the majority to define what constitutes discrimination against minorities, petitioners turn to misleading paraphrasing of D.C. Court of Appeals decisions. For example, petitioners assert that "The 'laws appropriating funds' exception, according to the Court of Appeals, is the *only* 'operative, substantive limitation on the initiative right.'" *See* P.Mem. at 16 (citing *Convention Center II*, 441 A.2d at 914) (emphasis in petitioners' brief). The actual quote from the decision is "As a preliminary matter, we must make clear that the 'laws appropriating funds' exception constitutes an operative, substantive limitation on the initiative right." It does not refer to it as the "only exception."

Petitioners also quote the same opinion for the proposition that "the Charter Amendments Act 'create[d] *one exception* to the initiative right.'" P.Mem. 15 (quoting *Convention Center II*, 441 A.2d at 911)) (emphasis in petitioners' brief). The correct quotation is that the "the Charter Amendments *expressly* creates one exception to the initiative right." *Id*. (emphasis added). That same opinion specifically acknowledges the availability of implied limitations. *See Convention Ctr. II*, 441 A.2d at 897 ("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.") (emphasis added). Petitioners' only other reference in a case to the supposed exclusivity of the "appropriation of funds" exception is as an exception to the "rule" that the right of initiative is broad with respect to "the authorization of programs and activities." *See* P.Mem. at 8. Petitioners also put misplaced reliance on *Price v. BOEE*, 645 A.2d 594 (D.C. 1994), which involved a direct conflict between signature requirements adopted by the Board and the express requirements of the Act. *See* P. Mem. at 13. Finally, none of the decisions cited by petitioners would be relevant under any circumstances given that none of them address the HRA limitation.

II. THE PROPOSED INITIATIVE AUTHORIZES DISCRIMINATION IN VIOLATION OF THE HRA

As the Board found, the proposed initiative would have the effect of authorizing discrimination in violation of the HRA. It would limit the ability to marry based on one's gender and thereby deprive homosexuals of the right to marry the person of their choice. The HRA law states:

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

D.C. Official Code § 2-1402.01. The Human Rights Act is a broad, remedial statute to be generously construed. *Wallace v. Skadden, Arps, Slate Meagher & Flom*, 715 A.2d 873, 889 (D.C. 1998); *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392, 398 (D.C. 1991).[12] Indeed, the D.C. Court of Appeals has described the Human Rights Act as a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds." *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000) (citation and internal quotations omitted).

> The Human Rights Act was primarily designed to protect from invidious discrimination those persons or groups who have traditionally been subjected to unfair treatment. Although heterosexuals are and should be covered too, *the main purpose of the sexual orientation provision was to ensure that homosexuals enjoy equal rights previously denied to them*.

Howard Univ. v. Green, 652 A.2d 41, 49 n.11 (D.C. 1994) (emphasis added).

As Judge Retchin explained, asking voters to decide whether the District should recognize legal, same-sex marriages from other jurisdictions "'authorizes or would have the effect of authorizing discrimination prohibited under [the HRA],' D.C. Code § 1-1001.16(b)(1)(C), and hence is not a proper subject for a referendum." *See* June Order at 8. Judge Retchin further explained that "the Gay & Lesbian Activists Alliance has identified more than '200 District rights and responsibilities . . . of civil marriage unavailable to domestic partners[.]" *Id*. at 7-8 (brackets and ellipses in original).[13] D.C. Code § 2-1402.73 prohibits discrimination regarding any District government "facility, program, service, or benefit." This

[12] The Human Rights Act grew out of regulations enacted to implement Mayor's Order No. 75-230 (Oct. 31, 1975), which covered discrimination based on sexual orientation. *Kennedy v. District of Columbia*, 654 A.2d 847, 863 (D.C. 1995). "The sole purpose of reenacting [the regulations] as a statute was to give [their] provisions greater stature and force." *Id*. at n.4 (citing Committee on Public Services and Consumer Affairs, Committee Report on Bill 2-179, July 5, 1977, at 1–3).

finding, and this provision (which was not in effect at the time of the *Dean* decision on which petitioners place such heavy reliance), alone require the denial of the petition.

In response, petitioners offer two arguments. *First*, they assert that their proposed initiative does not discriminate on the basis of sexual orientation or gender at all. *Second*, they assert that the HRA does not apply to marriage, placing heavy reliance on the Court of Appeals' decision in the *Dean* case. Both are meritless.

A. The Proposed Initiative Discriminates on the Basis of Gender and Sexual Orientation.

As Judge Retchin previously held, "Petitioners' proposed referendum asks the voters to decide whether the District should recognize same-sex marriages—which are legally indistinguishable from opposite-sex marriages in the jurisdictions in which they are performed—solely on the basis of the person's gender and sexual orientation." *See* June Order at 8. Petitioners assert that the initiative does not discriminate on the basis of sexual orientation because it permits all to marry someone of the opposite sex. *See* P.Mem. at 36 They further assert in a footnote that the initiative does not discriminate on the basis of gender because it does not put men and women in different classes, but rather permits all to marry individuals of the opposite sex. *See id*. at 38 n.13.

These arguments are no more convincing than the argument of the State of Virginia in the *Loving* case that anti-miscegenation laws were constitutional because they left whites and African-Americans free to marry (but not free to marry each other, see next subsection). The proposed initiative at issue determines whether one individual can marry another individual (and

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[13] The report detailing those rights and responsibilities may be found online at http://www.glaa.org/archive/2004/glaamarriagereport.pdf.

thus claim the more than 200 rights and responsibilities that are attendant to that status) "based on" the gender of that individual. *See, e.g.*, D.C. Code § 2-1402.73 (defining as "an unlawful discriminatory practice" the refusal to provide "any facility, service, program, or benefit to any individual on the basis of an individual's actual or perceived . . . sex" or "sexual orientation.") The initiative also forecloses individuals of a particular sexual orientation from marrying their desired partner, again "based on" the gender of that individual. Try as they might, even the petitioners cannot avoid referring to this proposed state of affairs as a "discriminatory practice." *See* P.Mem. at 36 ("It may well be that a person who identifies as homosexual may not want to marry someone of the opposite sex, but that does not amount to unlawful discrimination. The HRA can not be read to mean that every *discriminatory practice* is prohibited.")

The Supreme Court also unanimously recognized the error of this position in its recognition that Title VII's prohibitions on gender discrimination extend to same-sex sexual harassment, even though Title VII does not prohibit discrimination based on sexual orientation. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."). The case here is of course even stronger given that the HRA prohibits both gender discrimination *and* discrimination based on sexual orientation. Moreover, while Title VII requires construction of the word "discriminate," the HRA specifically defines discrimination broadly as the denial of "any facility, service, program, or benefit" that is "based on" gender or sexual orientation. Petitioners' discussion of this issue does not even address the actual language of the HRA, resting on general and conclusory assertions that what they are trying to do would

not amount to "discrimination" generally, ignoring the definition of discriminatory practice in the HRA. *See* P.Mem. at 35–38.

B. The HRA Implicates the Denial of the Right to Marry (With All of Its Attendant Benefits) "Based On" the Gender and Sexual Orientation of an Individual.

Petitioners' argument that the HRA does not apply to marriage disregards the text of that statute, the structure of rights and responsibilities that are attendant to marriage under D.C. law, the reasoning of the *Dean* decision, and the amendments to the HRA and developments in District marriage law that have occurred since that decision. As indicated, the HRA prohibits the denial of any "any facility, service, program, or benefit" based on the "gender" or "sexual orientation" of an individual. *See, e.g.*, D.C. Code § 2-1402.73. The "Gay & Lesbian Activists Alliance has identified more than '200 District rights and responsibilities . . . of civil marriage unavailable to domestic partners[.]" June Order at 7–8 (brackets and ellipses in original). Further, as noted by Judge Retchin, "even if unmarried same-sex couples could receive the same benefits as married couples, courts have long held that different treatment can equate to discrimination whether or not the material benefits and services offered appear uniform." *Id*. at 8 (citing *Goss v. Bd. of Educ.*, 373 U.S. 683, 688 (1963)); *see also* June Order at 5–7 (rejecting the applicability of *Dean*). For these reasons alone, petitioners' position has no merit.

Petitioners' near-exclusive reliance on *Dean v. District of Columbia*, 653 A.2d 307, 318–320 (1995), *see* P.Mem. at 27–35, thus makes no sense given that the broad statutory provision referred to above did not exist at the time of the *Dean* decision. Petitioners' footnoted assertion that the "the applicability of the HRA to government services was already assumed" is incorrect. The statute at issue dealt with places of public accommodation, not all government benefits. Dean, 653 A.2d at 318–20. The Court in *Dean* did not address a statute was nearly as broad as

the one at issue here. There have been a number of other relevant amendments to *Dean* since the HRA, including the Domestic Partnership Protection Amendment Act of 2004, effective April 8, 2005 (D.C. Law 15-309).[14]

Apart from the language of the statute, the reasoning that led the *Dean* court to reject the petitioners' claim under the HRA would lead to the opposite result today. In *Dean*, the DCCA rejected the petitioners' claim under the far narrower HRA because of the absence of any indication that the Council intended the definition of marriage to encompass same-sex couples. *Id*. The decision in *Dean*, therefore, was predicated on the court's 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.

That of course is no longer the case. *First*, District law now explicitly recognizes legal, same-sex marriages from other jurisdictions. *See* JAMA; D.C. Official Code § 46-405.01. Thus, *Dean*'s notion that, under District law, marriage of a same-sex couple is an impossibility is no longer accurate. The recognition of same-sex marriages is not only possible now in the District, it is *required* by law, and any law that would deny recognition to those marriages has the effect of authorizing discrimination in violation of the HRA. The Council has unequivocally demonstrated its view that there should be no distinction whatever among married couples on the basis of the parties' sex or sexual orientation.

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

Further, every one of the laws cited by the *Dean* court has fundamentally changed. For example, seven of the eight gender-specific statutory provisions cited by the DCCA in *Dean* have been amended to *remove* those gender-specific references. *See* D.C. Official Code §§ 16-901, 16-911, 16-912, 16-913, 16-916, 46-601, and 46-718. The lone remaining provision cited by the *Dean* court (and the only provision of the Marriage Act cited by that court), D.C. Official Code § 46-401, was changed by JAMA. This occurred as part of a systemic effort by the Council to employ gender-neutral language throughout the D.C. Code, and especially as that language pertains to marriage and the rights, benefits, and obligations incident to that institution. The factual predicate and the statutory underpinnings of *Dean* no longer exist.

Additionally, when *Dean* was decided, no state had legalized same-sex marriages, so the issue of District recognition of out-of-state same sex marriages could not have been considered.[15] As of the date of this filing, however, a number of states have recognized same-sex marriages, either as a result of a judicial decision or legislative action: Iowa, Connecticut, Massachusetts, New Hampshire, and Vermont. SMF ¶ 11.[16] Additionally, California same-sex marriages enacted prior to a state constitutional amendment are valid, as are, presumably, any recently performed in Maine.[17] In other words, the "fundamental definition of marriage" referenced in *Dean* has

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

[16] *See Varnum*, *supra* (Iowa 2009); *Kerrigan*, 957 A.2d at 482 (Conn. 2008); *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003); N.H. Stat. § 457:1-a (approved Jun. 3, 2009); Vt. Act No. 3, S. 115 (2009-2010 Legis. Sess., eff. Sept. 1, 2009).

[17] *Compare In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) *with Strauss v. Horton*, 46 Cal. 4th 164 (Cal. 2009). On November 3, 2009, Maine's same-sex marriage law was repealed by voter referendum. *See, e.g.*, Ashley Surdin, "Gay Marriage Proponents Regroup After Loss in Maine," WASHINGTON POST (Nov. 4, 2009).

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

The actions of other states are particularly significant given that District law requires recognition of marriages valid at their place of celebration. Since 1901, the District has recognized marriages valid in the state in which they were solemnized, unless the marriage was between persons domiciled in the District at the time of the marriage and the marriage would have been expressly prohibited by one of the provisions contained in D.C. Official Code §§ 46-401 through 46-404, or unless the marriage was in violation of the "strong public policy" of the District. *See, e.g.*, *Hitchens v. Hitchens*, 47 F. Supp. 73, 74 (D.D.C. 1942); *see also Rhodes v. Rhodes*, 68 App. D.C. 313, 96 F.2d 715, 716–17 (1938); *McConnell v. McConnell*, 99 F. Supp. 493, 494 (D.D.C. 1951); *Carr v. Carr*, 82 F. Supp. 398, 398–99 (D.D.C. 1949).

Far from violating the strong public policy of the District, the District continues to adopt policies moving in the direction of conferring greater equality upon gay and lesbian couples and their families. "The District has continuously sought to expand the rights and responsibilities of same-sex couples and has methodically revised its laws to make them gender neutral in anticipation of the eventual recognition of same-sex marriages." The Honorable Phil Mendelson, Councilmember At-Large, to the BOEE (Oct. 16, 2009) (*available online at* http://dcboee.org/pdf_files/Phil_Mendelson.pdf). *See also* the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009 (D.C. Act 18-84; 56 D.C. Reg. 6135 (Aug.

7, 2009)) (equalizing treatment of spouses and domestic partners under District law by providing legal recognition of the parent-child relationship for children born to domestic partners). In sum, petitioners have offered no basis for rejecting the decisions of the BOEE and Judge Retchin that denial of the right to marry has the effect of authorizing discrimination under the HRA.

III. THE PROPOSED INITIATIVE AUTHORIZES UNCONSTITUTIONAL DISCRIMINATION

While the Court need not reach the constitutionality of the proposed initiative given the ample alternative bases for denying the petition, the proposed initiative is unconstitutional on its face and therefore improper for that reason well. *See also Wimberly*, 702 A.2d at 1202 (upholding the trial court's decision to address the constitutionality of a proposed initiative).

A. The Proposed Initiative Is Subject to Heightened Scrutiny.

For a number of reasons, the proposed initiative should be subject to heightened scrutiny. *First*, the Supreme Court has long held that gender classifications are subject to intermediate scrutiny and, as indicated above, the proposed initiative denying the right of same-sex marriage classifies individuals on the basis of gender. Under that standard, the challenged classification must further "important" governmental objectives, and the discriminatory means employed must be "substantially related" to achieving those goals. *United States v. Virginia*, 518 U.S. 515, 533 (1996). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations . . . ." *Id*. (citations omitted). This intermediate level of scrutiny has been applied to classifications based on gender or illegitimacy, often called "quasi-suspect" groups. *See id*. at 531 ("Parties who seek to defend gender-based

government action must demonstrate an "exceedingly persuasive justification" for that action.") (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

The District explains above that the classification at issue is a gender classification because it determines whether one individual can marry another based on the gender of that individual. Petitioners argue that it is not a gender classification because it "'does not put men and women in different classes, and give one class a benefit not given to the other. Women and men are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex.'" *See* P.Mem. at 38 n.13. As explained, this logic makes no more sense than the suggestion in *Loving* that anti-miscegenation statutes do not classify on the basis of race because they permit each to marry within their own race. Nor would it make sense to assert that a hypothetical statute requiring cross-racial marriages is not a race-based classification. All three statutes foreclose individuals from marrying an entire set of the population based on a suspect classification. Arguments that prohibitions on same-sex marriage are not gender classifications also blink reality in denying the gender assumptions that at least in part underlie the support of such prohibitions. The assertion that a marriage should be between a man and a woman, or that such a relationship is inherently superior in some fashion, is almost *per se* rooted in assumptions about "traditional" gender and family roles. *See, e.g., Centola v. Potter*, 183 F.Supp.2d 403, 410 (D. Mass. 2002) ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women."). Under the Supreme Court's jurisprudence, such assumptions must be justified.

Indeed, the early Supreme Court decisions evaluated classifications that actually advantaged the traditionally disadvantaged gender. *See Craig v. Boren*, 429 U.S. 190 (1976)

(striking down lower drinking age for women). The Court nonetheless has consistently struck such classifications down, however, because of the concern that they are rooted in outdated or unjustified gender stereotypes. *See, e.g.*, *Virginia*, 518 U.S. at 533 (justification for classification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.")); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31 (1994) (gender-based classifications may not "serv[e] to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."); *Mississippi Univ.*, 458 U.S. at 725 ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.") (citing *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (*plurality opinion*) ("As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes . . . .")); *Orr v. Orr*, 440 U.S. 268, 283 (1979) ("Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the "proper place" of women and their need for special protection.").

> [A] traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship other than pure prejudicial discrimination to the stated purpose for which the classification is being made.

Mathews v. Lucas, 427 U.S. 495, 520–21 (1976) (Stevens, J., dissenting).

Second, the proposed initiative should be subject to heightened scrutiny because it involves a group that has been the subject of historic discrimination in a political context that

lacks the traditional checks associated with republican government and thus poses the greatest risk of unjustified discrimination by the majority. As the Supreme Court recognized more than 70 years ago, heightened scrutiny is justified if there are any reasons to suspect "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4, (1938).

There is no doubt that homosexuals have been the historic victims of discrimination. The concern of the Court in *Carolene Products* was that prejudice would be so strong as to overcome the protections of republican government. In the case of an initiative, the protections of republican government are absent altogether, thus making the need for scrutiny that much more pronounced. Such legislation is not subject to veto, giving proponents in some sense *more* power than the legislature, which subjects legislation to an important "filtering process" missing in ballot measures, through public hearings, staff review, and considered debate. *See, e.g., Berent v. City of Iowa City*, 738 N.W.2d 193, 205 (Iowa 2007) (courts note that more searching review is appropriate because, *inter alia*, citizen initiatives "are not subject to amendment prior to enactment and involve direct and indirect costs associated with the holding of elections."); *Fine v. Firestone*, 448 So.2d 984, 988 (Fla. 1984); *see also* William E. Adams, Jr., *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 Ohio St. L. J. 583, 594–96 (1994) (certain complex and emotional issues are best addressed after careful study, deliberation, and debate, and the consensus building inherent in the legislative process, little of which is available in a simple, up-or-down plebiscite). Legislation directly proposed by the citizens can also raise special dangers to minorities. Indeed, use of ballot measures was common during the early years of the Civil Rights movement, in attempts to

defeat laws aimed at eliminating racial discrimination. *See, e.g.*, Derrick A. Bell, Jr., *The Referendum Democracy's Barrier to Racial Equality,* 54 Wash. L. Rev. 1, at 1 (1978) ("[T]he experience of blacks with the referendum has proved ironically that the more direct democracy becomes, the more threatening it is.") (quoted in Adams, *supra*, at 605).

The Supreme Court has repeatedly struck down discriminatory ballot measures, directing courts to carefully examine such legislation for infringements on the rights of minorities. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 462 (1982) (striking down statute enacted by initiative that would have terminated mandatory busing); *Hunter v. Erickson*, 393 U.S. 385, 392–93 (1969) (invalidating city charter amendment repealing existing anti-discrimination ordinances and requiring direct voter approval of any subsequent ordinance concerning racial, religious, or ancestral discrimination in housing); *Reitman*, 387 U.S. at 378–90 (discussed *supra*); *see also Jones v. Gale*, 470 F.3d 1261, 1269 (8th Cir. 2006) (Nebraska initiative prohibit farming or ranching by out-of-state interests was unconstitutional because of its "discriminatory intent" and "discriminatory purpose.").

Further, in 1996, the Supreme Court issued its landmark decision *Romer v. Evans*, 517 U.S. 620 (1996), in which it struck down a voter-approved referendum amending the Colorado Constitution to specifically prohibit "all legislative, executive or judicial action at any level of state or local government designed to protect" homosexuals. *Id*. at 624. The *Romer* Court found that the Colorado amendment did not meet even the "rational basis" test under traditional equal-protection principles. *Id*. at 632 (the amendment "fails, indeed defies, even this conventional inquiry.") (citing, *inter alia*, *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)). The amendment was "inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Id*. The Colorado amendment and related laws, said the Court, raise

> the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."

Id. at 634–35 (emphasis in original) (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

Third, the classification here is even more suspect than in the case of a standard initiative authorizing discrimination against minorities because it would overturn protections against discrimination that are the product of the republican process and that have been endorsed by virtually all of the people's elected representatives. The concern that a majority or determined and very sizeable minority is seeking to impose unjustified discriminatory classifications on a traditionally disadvantaged group is at its pinnacle under the current circumstances.

B. The Initiative at Issue Fails Any Level of Scrutiny.

The initiative at issue cannot be constitutionally justified under any level of scrutiny, heightened or otherwise. As an initial matter, it is clear in light of *Lawrence v. Texas*, 539 U.S. 558 (2003), that classifications that disadvantage homosexuals may not be justified based on moral disagreement with their behavior. In that case, the Court struck down a Texas statute which criminalized same-sex sodomy. The Court expressly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had sustained a Georgia law criminalizing sodomy. *Id*. at 578; *id*. at 575 ("Its continuance as precedent demeans the lives of homosexual persons.").

The Court rejected the assertion that "longstanding history" supported such laws criminalizing homosexual behavior, noting that "far from possessing 'ancient roots,' *Bowers*, 478 U.S. at 192, American laws targeting same-sex couples did not develop until the last third of

the 20th century." *Id*. at 570. The Court further explained that those historical laws were not directed at "homosexual conduct as a distinct matter[,]" but at "nonprocreative sexual activity more generally." *Id*. at 568.

> It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. *These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society* through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."

Id. at 571 (emphasis added) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992)). *See In re Levenson*, ___ F.3d ___, 2009 WL 3878233 (9th Cir. Nov. 18, 2009) (*Romer* and *Lawrence* "strongly suggest that the [legislature] cannot justify discrimination against gays and lesbians or same-sex couples based on 'traditional notions of morality' alone.").

At this point, the petitioners have not articulated any constitutional justifications for the proposed initiative although they will undoubtedly attempt to do so in reply. Prior to addressing the justifications offered in other jurisdictions, however, it bears emphasis that those justifications are particularly inadequate in a jurisdiction such as the District whose elected representatives have "continuously sought to expand the rights and responsibilities of same-sex couples and has methodically revised its laws to make them gender neutral in anticipation of the eventual recognition of same-sex marriages." The Honorable Phil Mendelson, Councilmember At-Large, to the BOEE (Oct. 16, 2009) (*available online at* http://dcboee.org/pdf_files/Phil_Mendelson.pdf). *See also* the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009 (D.C. Act 18-84; 56 D.C. Reg. 6135 (Aug. 7, 2009))

(equalizing treatment of spouses and domestic partners under District law by providing legal recognition of the parent-child relationship for children born to domestic partners). *See also* Report of the Committee on Public Safety and Judiciary on Bill 18-66, Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, at 1 (Council of the District of Columbia March 10, 2009) ("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."). Under the law as it exists in the District, there is no apparent justification for denying same-sex couples the right to marry, let alone a justification that would stand up to heightened scrutiny.

The legal framework governing homosexual rights in the District has, for example, eliminated the rationales for upholding same-sex marriage on which Judges Terry and Steadman rested in *Dean*. (In an extremely detailed opinion, Judge Ferren would have held an evidentiary hearing on various issues related to the petitioners' equal protection argument.) Judge Terry reasoned that defining marriage as between a man and a woman could not be constitutional because "if it is impossible for two persons of the same sex to 'marry,' then surely no court can say that a refusal to allow a same-sex couple to 'marry' could ever be a denial of equal protection." *Dean*, 653 A.2d at 361. According to Judge Terry, the "Council, and only the Council," could provide the petitioners "with the relief they seek." *Id*. at 362. In light of the recent actions of the Council, it is no longer impossible for same-sex couples to marry, and the supporters of same-sex marriage have turned to the Council as Judge Terry advised. Similarly, Judge Steadman's view that the marriage statute is a statute of inclusion rather than exclusion does not apply to an initiative designed to repeal a legislative enactment protecting the right of individuals to marry members of the same sex. *Id*. at 362–363. Similarly, the conclusion that

discouraging same-sex marriage substantially advances the vital procreative interests that make it a fundamental right no longer applies in light of the substantial steps that the Council has taken to protect the right of homosexuals to form families and raise children. *Id*. at 362.

Other jurisdictions where the initiative at issue would be less anomalous and more consistent with the other laws of the state have found such prohibitions to be unconstitutional. For example, in a detailed, comprehensive, and persuasively reasoned decision earlier this year, the Supreme Court of Iowa struck down a state law limiting marriage to opposite-sex couples. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). The court found that the statute violated the equal-protection clause of the Iowa Constitution and other state law, because it was not substantially related to *any* important government objective. *Id.* at 904.[18]

The *Varnum* court began with the seemingly obvious proposition that "courts, free from the political influences in the other two branches of government, are better suited to protect individual rights . . . ." *Id*. at 875. The government in *Varnum*, just like the petitioners here, argued that the challenged provision does not explicitly reference "sexual orientation," hence does not discriminate on that basis. *Cf. id.* at 885 and P.Mem. at 35. The *Varnum* court properly rejected this argument:

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[18] As noted, the instant petitioners have presented no objectives at all which would arguably be furthered by enactment of the proposed initiative. The court in *Varnum* discussed at great length most of the typical reasons advanced in these cases, in an analysis that this Court should use in the event the petitioners belatedly identify any interests. The *Varnum* court utilized intermediate scrutiny in striking down the prohibition on same-sex marriage. In comparison, the Supreme Judicial Court of Massachusetts found that that state's limitation of marriage to opposite-sex couples had no rational basis. *Goodridge*, 798 N.E.2d at 968 ("The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason."). The Vermont Supreme Court employed this same test. *Baker*, 744 A.2d at 886 ("none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law."). *Cf. Baehr*, 852 P.2d at 67–68 (marriage-statute distinction between opposite-sex couples and same-sex couples subject to heightened scrutiny).

> The benefit denied by the [provision]—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.
>
> * * *
>
> 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.

Varnum, 763 N.W.2d at 885 (citations omitted).

The court noted that Iowa, in its Civil Rights Act (just like the District's HRA) recognized the need to address sexual-orientation discrimination by including that characteristic as one protected by the legislation. *Id*. at 889–90.[19] The court ultimately determined that the classification at issue should be subject to the "intermediate scrutiny" standard. *Id*. at 897. *Cf. Zablocki*, 434 U.S. at 388 ("When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.").

The objectives purportedly advanced by the disputed classification in *Varnum* included support for the "traditional" institution of marriage, the promotion of procreation and the optimal environment to raise children, and financial considerations. *Id*. The court rejected *all* of these justifications.

> We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective. The legislature has excluded a historically disfavored class of persons from a supremely important civil institution without a constitutionally sufficient justification. There is no material fact, genuinely in dispute, that can affect this determination.

Id. at 906.

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[19] The *Varnum* decision also makes repeated use of Judge Ferren's eloquent dissent in *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ*., 536 A.2d 1 (D.C. 1987) (*en banc*). *See, e.g.*, 763 N.W.2d at 888 & n.16, 893.

Various other courts have concluded in similarly well-reasoned opinions that prohibitions on same-sex marriage violate state constitutional guarantees of equal protection. *See In re Marriage Cases*, 183 P.3d 384, 442–43 (Cal. 2008); *Kerrigan v. Commission of Public Health*, 957 A.2d 407, 426–27 (Conn. 2008); *Baker v. State*, 744 A.2d 864, 878–79 (Vt. 1999); *see also Tanner v. Oregon Health Sci. Univ.*, 971 P.2d 435 (Or. App. 1998) (sexual orientation is a suspect classification), *review denied*, 994 P.2d 129 (Or. 1999)); *Kerrigan*, 957 A.2d at 424–30 (discussing state cases finding homosexuals to be a suspect or quasi-suspect class for equal-protection purposes). The logic of these state-court decisions demonstrate that intermediate scrutiny is appropriate for classifications based on sexual orientation, like that at issue here. The history of discrimination against gays and lesbians is well-established and not reasonably subject to debate. *See Varnum*, 763 N.W.2d at 889–90 (citing, *inter alia*, *Lawrence*, 539 U.S. at 578–79, and *Dean*, 653 A.2d at 344–45 ("Discrimination against homosexuals has been pervasive in both the public and the private sectors.")).

Moreover, there can be no legitimate contention that sexual orientation has any relationship to a person's ability to contribute to society. This factor reflects the reality that, if the challenged classification is unrelated to a person's ability to contribute, it is "likely based on irrelevant stereotypes and prejudice." *Varnum*, 763 N.W.2d at 890 (citing *Kerrigan*, 957 A.2d at 453).[20] *See also Cleburne*, 473 U.S. at 440–41 (classifications unrelated to ability to perform typically reflect "prejudice and antipathy" or "outmoded notions of the relative capabilities of persons with the characteristic."); *Mississippi Univ.*, 458 U.S. at 725 (classification "reflects

[20] "The characteristic that defines the members of this group—attraction to persons of the same sex—bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens." *Kerrigan*, 957 A.2d at 432.

archaic and stereotypic notions."). The District is not aware of any same-sex marriage decisions finding otherwise, at least as to this factor.

In the District of Columbia, the longstanding policy is that sexual orientation is irrelevant to a person's ability to contribute to society in a number of ways. *See, e.g.*, *Gay Rights Coalition*, 536 A.2d at 5, 27 (sexual orientation—like other characteristics specified in HRA—is unrelated to and irrelevant to individual merit).[21]

> The Council determined that a person's sexual orientation, like a person's race and sex, for example, tells nothing of value about his or her attitudes, characteristics, abilities or limitations. It is a false measure of individual worth, one unfair and oppressive to the person concerned, one harmful to others because discrimination inflicts a grave and recurring injury upon society as a whole.

Id. at 32.

Similarly, while it is not universally acknowledged that sexual orientation is "immutable," *see, e.g.*, *Kerrigan*, 957 A.2d at 427–28 (citing conflicting sources), this factor is not invariably required in the analysis. *See id*. at n.20 ("Indeed, not infrequently, the United States Supreme Court has omitted any reference to immutability in discussing the identifying or distinguishing characteristic of a particular class.") (citing, *inter alia*, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313–14 (1976) (age); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 20, 25 (1973) (poverty)). *Cf. Dean*, 653 A.2d at 346 (Ferren, J., dissenting) ("The degree to which an individual controls, or cannot avoid, the acquisition of the defining trait, and the relative ease or difficulty with which a trait can be changed, are relevant to whether a classification is 'suspect' or 'quasi-suspect' . . . .").

[21] Sexual orientation was on the original list of characteristics protected by the Human Rights Act. *See* D.C. Law 2-38, 24 D.C. Reg. 6038 (eff. Dec. 13, 1977).

The "political powerlessness" factor is similarly difficult to define and apply. *See Varnum*, 763 N.W.2d at 893. Ultimately, however, this factor inclines in favor of intermediate scrutiny for classifications based on sexual orientation:

> [T]he political power of gays and lesbians, while responsible for greater acceptance and decreased discrimination, has done little to remove barriers to civil marriage. Although a small number of state legislatures have approved civil *unions* for gay and lesbian people without judicial intervention, no legislature has secured the right to civil *marriage* for gay and lesbian people without court order.
>
> * * *
>
> Thus, although equal rights for gays and lesbians have been increasingly recognized in the political arena, the right to civil marriage is a notable exception to this trend. Consequently, the specific right sought in this case has largely lacked any extensive political support and has actually experienced an affirmative backlash.

Varnum, 763 N.W.2d at 894–95 (emphasis in original) (footnote omitted).

As noted herein, petitioners have advanced no interests at all here, to say nothing of their failure to show how the proposed initiative would be substantially related to the achievement of those interests. The instant petitioners, when they do get around to attempting to justify the classification in their initiative, have a very heavy burden indeed. *See, e.g.*, *Virginia*, 518 U.S. at 533 ("The burden of justification is demanding and it rests entirely on the [proponents]."); *id*. at 531 (reasons for classification must be "exceedingly persuasive"). Under any standard, let alone a standard of heightened scrutiny in a jurisdiction whose elected representatives have so strongly endorsed the right of same-sex individuals to form families, petitioners cannot establish the constitutionality of denying the right to marry (and all of its attendant benefits) to same-sex couples.

CONCLUSION

For the foregoing reasons, the District moves to dismiss the Petition or, in the alternative, for summary judgment. Alternative proposed Orders are attached hereto.

DATE: December 18, 2009

Respectfully submitted,

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

HARRY R. JACKSON, JR., *et al*. Petitioner, v. DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, Respondent.	2009 CA 008613 B Judge Judith Macaluso Calendar 9

ORDER

Upon consideration of the District's Motion To Dismiss Or, In The Alternative, For Summary Judgment, the Memorandum of Points and Authorities in Support thereof and in opposition thereto, the entire record herein, and it appearing that the relief should be granted, it is hereby:

ORDERED, that the District's Motion To Dismiss Or, In The Alternative, For Summary Judgment be, and hereby is, GRANTED, and it is

FURTHER ORDERED, that the Petition is hereby DISMISSED with prejudice.

SO ORDERED.

DATE: _____

_____
JUDITH MACALUSO
Associate Judge
D.C. Superior Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

HARRY R. JACKSON, JR., *et al*. Petitioner, v. DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, Respondent.	2009 CA 008613 B Judge Judith Macaluso Calendar 9

ORDER

Upon consideration of the District's Motion To Dismiss Or, In The Alternative, For Summary Judgment, the Memorandum of Points and Authorities in Support thereof and in opposition thereto, the entire record herein, and it appearing that the relief should be granted, it is hereby:

ORDERED, that the District's Motion To Dismiss Or, In The Alternative, For Summary Judgment be, and hereby is, GRANTED, and it is

FURTHER ORDERED, that summary judgment is hereby GRANTED to the District on all counts of the Petition.

SO ORDERED.

DATE: _____

_____
JUDITH MACALUSO
Associate Judge
D.C. Superior Court

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

HARRY R. JACKSON, JR., *et al*. Petitioner, v. DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, Respondent.	2009 CA 008613 B Judge Judith Macaluso Calendar 9 [Next Court Event: Motions hearing on Jan. 6, 2010, at 9 a.m.]

DISTRICT OF COLUMBIA'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. On May 5, 2009, the Council of the District of Columbia approved the Jury and Marriage Amendment Act of 2009 ("JAMA"), by a vote of 12 to 1. *See* D.C. Act 18-70; 56 D.C. Reg. 3797 (May 15, 2009). The Act was signed by the Mayor on May 6, 2009, transmitted to Congress, and became law on July 6, 2009. *See* D.C. Official Code § 46-405.01 (2009).

2. On or about May 27, 2009, a group presented a proposed referendum to the Board of Elections and Ethics ("BOEE" or "Board"), which sought to present to the voters the issue of whether the District should recognize same-sex marriages from other jurisdictions.

3. After a public hearing and review of the many comments it received, the Board, by Memorandum Opinion and Order dated June 15, 2009 (*In re: Referendum Concerning the Jury and Marriage Amendment Act of 2009*, BOEE No. 09-004), determined that the proposed measure was not a proper subject for referendum, pursuant to D.C. Official Code § 1-1001.16(b)(1)(C).

4. Two days later, the proposers of the referendum brought suit in Superior Court, under D.C. Official Code § 1-1001.16(b)(3), seeking "a writ in the nature of mandamus to compel the Board to accept" the proposed referendum. *Id*.

5. On June 30, 2009, Judge Retchin issued an Order in that matter, *Jackson v. District of Columbia Bd. of Elections & Ethics*, 2009 CA 004350 (Super. Ct. of D.C.) ("June Order"), denying the petitioners' Petition for Review of Agency Action, Writ in the Nature of Mandamus, Motion for Preliminary Injunction, and Motion for Summary Judgment. The petitioners in the suit were Harry R. Jackson, Jr., Walter E. Fauntroy, Patricia Johnson, Melvin Dupree, Sandra B. Harris, Bobby Perkins, Sr., and Dale E. Wafer.

6. Judge Retchin affirmed the BOEE decision, holding, *inter alia*, that "the Board correctly concluded that the proposed referendum would violate the District of Columbia Human Rights Act . . . ." June Order at 2.

7. On September 1, 2009, another group filed a proposed initiative with the Board. That initiative would establish that "only marriage between a man and a woman is valid or recognized in the District of Columbia." The Board scheduled a public hearing on the proposed initiative, *see* 56 D.C. Reg. 7537 (Sept. 18, 2009), which occurred on October 26, 2009. *Id*. "In all, the Board heard testimony from 60 witnesses and received and considered comments from approximately 29 individuals and/or organizations." Memorandum Opinion and Order dated November 17, 2009, at 5 (*In re: Marriage Initiative of 2009*, BOEE No. 09-006).

8. The Board found that the proposed initiative "authorizes or would authorize discrimination proscribed by the District of Columbia Human Rights Act and is therefore not a proper subject for initiative." *Id*. at 11.

9. The instant petitioners are Harry R. Jackson, Jr., Robert King, Walter E. Fauntroy, James Silver, Anthony Evans, Dale E. Wafer, Melvin Dupree, and Howard Butler.

10. On December 1, 2009, the Council of the District of Columbia passed—by a vote of 11 to 2—the Religious Freedom and Civil Marriage Equality Amendment Act of 2009, Bill 18-482. That legislation expands the definition of marriage in the District to include same-sex couples.[1] A second and final vote on this legislation occurred on December 15, and it was approved by the same margin. *Id*.

11. Iowa, Connecticut, Massachusetts, New Hampshire, and Vermont recognize same-sex marriages.

DATE: December 18, 2009

Respectfully submitted,

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[1] The text of the legislation, and voting and hearing information is available online at *http://www.dccouncil.washington.dc.us/lims/legislation.aspx?LegNo=B18-0482&Description=RELIGIOUS-FREEDOM-AND-CIVIL-MARRIAGE-EQUALITY-AMENDMENT-ACT-OF-2009.&ID=23204.*

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

HARRY R. JACKSON, JR., *et al*. Petitioner, v. DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, Respondent.	2009 CA 008613 B Judge Judith Macaluso Calendar 9 [Next Court Event: Motions hearing on Jan. 6, 2010, at 9 a.m.]

THE DISTRICT'S OPPOSITION TO
PETITIONERS' STATEMENT OF FACTS AS TO WHICH
THERE IS NO GENUINE ISSUE

In accordance with SCR-Civil 56(c), intervenor the District, by and through undersigned counsel, herein respectfully submits this Opposition to Petitioners' Statement of Facts as to Which There is No Genuine Issue ("PSF") in the above-captioned case.

The PSF is improper because it consists largely of "facts" that are immaterial to the resolution of the legal questions in dispute, and is replete with argument and legal conclusions masquerading as facts. *See Robertson v. American Airlines, Inc.*, 239 F.Supp. 2d 5, 8–9 (D.D.C. 2002) (statement of undisputed material facts should "logically and efficiently" review relevant background facts, cite to the record, and should *not* "contain argument") (emphasis added) (*citing Jackson v. Finnegan, Henderson*, 322 U.S. App. D.C. 35, 101 F.3d 145, 153 n.6 (1996)). *See also Jackson*, 101 F.3d at 148 (statement impermissibly "[b]lend[ed] factual assertions with arguments regarding their legal significance").

Notwithstanding the above, in response to the numbered paragraphs of the PSF, the District responds as follows:

1. The District does not dispute paragraph 1 of the PSF.

2. The District objects to paragraph 2 of the PSF because it contains argument.

3. The District objects to paragraph 3 of the PSF because it is not a material fact.

4. The District objects to paragraph 4 of the PSF because it is not a material fact.

5. The District objects to paragraph 5 of the PSF because it is not a material fact.

6. The District objects to paragraph 6 of the PSF because it is not a material fact.

7. The District objects to paragraph 7 of the PSF because it is not a material fact.

8. The District objects to paragraph 8 of the PSF because it is not a material fact, and contains argument.

9. The District does not dispute paragraph 9 of the PSF.

10. The District does not dispute paragraph 10 of the PSF, but avers that the text of the Board's Order is the best evidence of its content.

11. The District objects to paragraph 11 of the PSF because it is not a material fact, but a legal conclusion.

12. The District objects to paragraph 12 of the PSF because it is not a material fact, but a legal conclusion.

13. The District objects to paragraph 13 of the PSF because it is not a material fact, but a legal conclusion.

DATE: December 18, 2009

Respectfully submitted,

PETER J. NICKLES
Attorney General for the District of Columbia

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