SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

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

BRIEF AMICUS CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND UNITED STATES SENATORS JAMES INHOFE AND ROGER WICKER AND UNITED STATES REPRESENTATIVES ROBERT ADERHOLT, TODD AKIN, MICHELE BACHMANN, GRESHAM BARRETT, ROSCOE BARTLETT, MARSHA BLACKBURN, JOHN BOEHNER, JOHN BOOZMAN, ERIC CANTOR, JASON CHAFFETZ, JOHN FLEMING, RANDY FORBES, VIRGINIA FOXX, SCOTT GARRETT, PHIL GINGREY, LOUIE GOHMERT, JEB HENSARLING, WALLY HERGER, WALTER JONES, JIM JORDAN, STEVE KING, JACK KINGSTON, JOHN KLINE, DOUG LAMBORN, ROBERT LATTA, DON MANZULLO, MICHAEL MCCAUL, THADDEUS MCCOTTER, PATRICK MCHENRY, CATHY MCMORRIS ROGERS, JEFF MILLER, JERRY MORAN, RANDY NEUGEBAUER, MIKE PENCE, JOE PITTS, MARK SOUDER, AND TODD TIAHRT IN SUPPORT OF PETITIONERS MOTION FOR SUMMARY JUDGMENT

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INTEREST OF AMICI

Amicus, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law and the overall integrity of the United States Constitution and the rule of law. ACLJ attorneys have argued in numerous cases before the Supreme Court of the United States and other federal and state courts. *See*, *e.g.*, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. Of Educ. V. Mergens*, 496 U.S. 226 (1990); *Bd. Of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987). *Amicus* has expended great time and effort in the defense of the United States' constitutional system of government. This dedication compels ACLJ to support Petitioner's position that the Board of Elections and Ethics wrongfully denied their proposed initiative and its decision should be reversed.

Amici United States Senators James Inhofe and Roger Wicker and Representatives Robert Aderholt, Todd Akin, Michele Bachmann, Gresham Barrett, Roscoe Bartlett, Marsha Blackburn, John Boehner, John Boozman, Eric Cantor, Jason Chaffetz, John Fleming, Randy Forbes, Virginia Foxx, Scott Garrett, Phil Gingrey, Louie Gohmert, Jeb Hensarling, Wally Herger, Walter Jones, Jim Jordan, Steve King, Jack Kingston, John Kline, Doug Lamborn, Robert Latta, Don Manzullo, Michael McCaul, Thaddeus McCotter, Patrick McHenry, Cathy McMorris Rogers, Jeff Miller, Jerry Moran, Randy Neugebauer, Mike Pence, Joe Pitts, Mark Souder, and Todd Tiahrt are currently serving in the One Hundred and Eleventh Congress. Under the United States Constitution, they serve as members of the ultimate legislative authority for the District of Columbia and the very body which delegated to the District its limited legislative

power under home rule. As members of the District's ultimate legislative body, *amici* are concerned about the extent of the District's delegated legislative authority, the preservation of Congress's constitutional authority, and the interpretation of home rule. *Amici* also support the right of the District electors to directly participate in the legislative process pursuant to the initiative and referendum rights, under the Initiative Referendum and Recall Charter Amendments Act of 1977. It is precisely these concerns which lead *amici* to support Petitioners in seeking a reversal of the denial of the proposed initiative.

SUMMARY OF ARGUMENT

The denial of the proposed Marriage Initiative of 2009 was based on an *ultra vires* act by the District of Columbia Council ("the Council") and is, therefore, invalid. The District of Columbia Charter was formally amended to include the right of initiative subject to only one substantive limitation—the forbidding of initiatives respecting appropriations. However, when the District Council implemented the Initiative Referendum and Recall Charter Amendments Act of 1977 it included an additional substantive limitation on the initiative right requiring compliance with the District of Columbia Human Rights Act ("Human Rights Act"). Because the Council lacked the legislative authority to include this additional limitation—effectively a charter amendment, the limitation is necessarily invalid *ab initio* and, thus, cannot be relied upon by the Board of Elections and Ethics to support denial of the proposed initiative.

Additionally, even if the Council had possessed the authority to add the additional human rights limitation on the initiative right, the proposed initiative does not in fact violate the District of Columbia Human Rights Act ("Human Rights Act"). Well-established canons of statutory construction require that both the Human Rights Act and

the marriage laws in existence at the time be presumed valid and that the Council be charged with knowledge of both. Also, in the absence of an explicit provision in the Human Rights Act repealing any portion of the existing marriage laws, no implied alteration of the marriage laws in the District can be presumed by its passage. It is well recognized that, at the time of the passage of the Human Rights Act, the District's marriage laws did not authorize same-sex marriage. Based on the necessary presumptions, it is clear that the Council did not consider the Human Rights Act to conflict with the existing marriage laws. It would violate the requirement against absurdity to conclude that an initiative solidifying the historical and long-standing marriage laws of the District now violates the Human Rights Act.

ARGUMENT

I. THE DISTRICT OF COLUMBIA COUNCIL COMMITTED AN *ULTRA VIRES* ACT BY IMPOSING AN UNAUTHORIZED SUBSTANTIVE LIMITATION ON THE RIGHT OF INITIATIVE AND REFERENDUM, WHICH CANNOT BE RELIED UPON TO DENY THE PROPOSED INITIATIVE.

The District of Columbia Board of Elections and Ethics (the "BoEE") denied the proposed marriage initiative as violative of the Human Rights Act. *In Re Marriage Initiative of 2009*, Admin. Hearing No. 09-006 at 12–13 (D.C. Bd. Of Elections and Ethics Nov. 17, 2009). However, the District of Columbia Council's inclusion of this limitation on the right of initiative exceeded the District's congressionally delegated legislative authority and, thus, cannot be relied upon to invalidate the proposed Marriage Initiative of 2009.

A. Congress Passed the Home Rule Act of 1973 Which Granted Limited Self-Governance to the District of Columbia and Provided a Specific Process for Amending the District Charter.

The United States Constitution specifically empowers the Congress to "exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may . . . become the Seat of the Government of the United States." U.S. CONST. art. I, § 8, cl. 17. The Supreme Court has also recognized the unique nature of the District as "a mere instrumentality of [the Federal] Government." *District of Columbia v. Carter*, 409 U.S. 418, 422 (1973) (overruled on other grounds). Over time, both advocacy for self-government, *Marijuana Policy Project v. United States*, 304 F.3d 82, 83 (D.C. Cir. 2002), and the desire to relieve some of the burden of dealing with certain local matters, *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections and Ethics*, 441 A.2d 889, 903 (D.C. 1981), led Congress to pass the District of Columbia Self-Government and Governmental Reorganization Act, otherwise known as "the Home Rule Act." *Marijuana Policy Project*, 304 F.3d at 83. The Home Rule Act allowed District residents to elect a Mayor and a City Council and granted them certain legislative powers. *Id.* Though the Act extends "'legislative power' over 'all rightful subjects,'" this power remains limited. In compliance with the Constitution, Congress retains ultimate legislative authority, specifically reserving "the right to enact legislation concerning the District on any subject and to repeal D.C. Council enactments at any time." Further, any legislation enacted by the Council "become[s] law only if Congress declines to pass a joint resolution of disapproval within thirty days." *Id.* While, the statute provides broad municipal authority within certain established parameters, Congress retains the authority

to amend, repeal, or refuse any law in the District on any subject, whether within or without the scope of District's legislative power. Thus, even under home rule, Congress retains its recognized constitutional plenary power to legislate for the District in all matters. *Palmore v. United States*, 411 U.S. 389, 413 (1973).

Title VI of the Home Rule Act, the District Charter, specifically "establishes the fundamental 'means of governance of the District,'" *Wilson v. Kelly*, 615 A.2d 229, 230 n. 1 (D.C. 1992), and provides the necessary procedure for its amendment, D.C. CODE § 1-203.03 (LexisNexis 2009). Beyond the absolute legislative power reserved to Congress, *Shook v. D.C. Fin. Responsibility & Mgmt. Ass'n Auth.*, 964 F. Supp. 416, 422 (D.D.C. 1997), the District Charter can only "be amended by an act passed by the Council and ratified by a majority of the registered qualified electors of the District voting in the referendum held for such ratification," D.C. CODE § 1-203.03(a) (LexisNexis 2009). After ratification, the proposed amendment becomes law absent a joint resolution of disapproval from Congress. *Id.* § 1-203.03(b). Once this process is complete, amendments stand "in the nature of constitutional provisions and cannot be amended or contravened by ordinary legislation." *Convention Ctr. Referendum Comm.*, 441 A.2d at 915 (internal citations omitted).

B. The District of Columbia Board of Elections and Ethics Cannot Rely Upon an *Ultra Vires* Act of the Council to Deny the Proposed Initiative.

The right of initiative did not exist in the original District Charter. Instead, the process was a product of the Initiative Referendum and Recall Charter Amendments Act of 1977 ("Charter Amendments Act"). *Hessey v. D.C. Bd. of Elections and Ethics*, 601 A.2d 3, 12 (D.C. 1991); D.C. CODE § 1-204.101 (LexisNexis 2009). Though original proposals called for initiative and referendum rights to be nearly limitless, the final text

of the amendments contained at least one substantive limitation. *Hessey*, 601 A.2d at 12. The Charter Amendments Act defined the term initiative as "the process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval." D.C. CODE § 1-204.101 (LexisNexis 2009). With the exception of "laws appropriating funds," the right of initiative is "coextensive" with the legislative powers of the District Council. *Convention Ctr. Referendum Comm.*, 441 A.2d at 897. Other than this explicit limitation, properly enacted initiatives are considered acts of the District Council and are "subject to the same legislative restrictions," such as ultimate congressional legislative authority. *Marijuana Policy Project*, 304 F.3d at 83; D.C. CODE § 1-204.105 (LexisNexis 2009).

The Charter Amendments Act explicitly names the BoEE as the administrator of the initiative process, D.C. CODE § 1-204.102 (LexisNexis 2009), and directs the District Council to "adopt such acts as are necessary to carry out the [Amendment's] purpose." *Id*. § 1-204.107. Consequently, the Council passed the Initiative Procedures Act, D.C. CODE § 1-1001.16 (LexisNexis 2009), setting out the specific administrative steps in the initiative process. However, "[a]s implementing legislation, the Initiative Procedures Act is valid, of course, only insofar as it conforms to the underlying Charter Amendments [Act]." As mere ordinary legislation, it is incapable of "amend[ing] or contraven[ing]" amendments to the Charter. *Convention Ctr. Referendum Comm.*, 441 A.2d at 914–15.

The Initiative Procedures Act charges the BoEE with determining whether each proposed initiative constitutes a "proper subject" before proceeding with the initiative process. The Initiative Procedures Act purports to establish certain criteria for rejection.

These include proposed initiatives which fail to comply with established form, filing, and other procedural requirements and those which offend the established "laws appropriating funds" limitations. D.C. CODE § 1-1001.16 (b)(1) (LexisNexis 2009). However, the Initiative Procedures Act also contains another substantive limitation requiring rejection of any proposal which "authorizes, or would have the effect of authorizing, discrimination prohibited under [the Human Rights Act]." *Id.* § 1-1001.16 (b)(1)(C) (LexisNexis 2009). It is this added substantive limitation which the BoEE mistakenly cites as justification for denying the proposed marriage initiative, *In Re Marriage Initiative of 2009*, Admin. Hearing No. 09-006 at 12–13.

The Council lacked any authority to include this additional limitation within the Initiative Procedures Act and the BoEE cannot properly rely upon this *ultra vires* act of the Council to deny the present initiative. First, no explicit grant can be interpreted to provide the authority for the Human Rights Act limitation. As previously discussed, the Charter Amendments Act, which established the right of initiative, are the equivalent of constitutional enactments and cannot be expanded or restricted by mere legislation. As noted, legislation passed pursuant to these amendments is only valid to the degree it comports with them, *Convention Ctr. Referendum Comm.*, 441 A.2d at 915. Here, the only authorized limitation on the right of initiative is with regard to the prohibition against those dealing with "laws appropriating funds." Therefore, in the absence of a specific grant allowing the Council to enact further substantive limitations in its implementation of the Charter Amendments Act, no authority exists to support the imposition of the additional limitation in the Initiative Procedures Act respecting the Human Rights Act.

In addition to the absence of explicit authority, no reasonably implied authority exists for the Council to add limitations regarding the Human Rights Act. As discussed, with the exception of appropriations measures, the people's right of initiative is coextensive with the legislative powers of the Council and nothing prohibits the Council from altering the District's human rights law, including the Human Rights Act, within constitutional limitations. In the same way, because the people's initiative right is considered coextensive, no prohibition exists against an initiative to the same effect. Thus, no implied authority exists for the Council to prohibit the proposal of such an initiative.

In sum, without any express or implied authority, the Council's attempt to impose the additional human rights limitation on the initiative process amounts to nothing more than an improper attempt to unilaterally amend the District Charter, an action which is clearly prohibited and violative of the limited nature of home rule. Because of the *ultra vires* nature of the additional limitation imposed by the Council within the Initiative Procedures Act, denial of an initiative on these grounds is necessarily invalid. *See Woodruff v. Mississippi*, 162 U.S. 291, 306 (1896). The Council is always refrained from exercising more power than Congress has afforded to it. Beyond the expressed appropriations limitation and those implied by the limited parameters of home rule, the Charter Amendments Act is Congress' determination that the will of the electorate in the District may properly be expressed through initiatives and referendums. The BoEE may not deny that right by relying upon those parts of the Initiative Procedures Act which exceed the power afforded to the Council under the Charter Amendments Act.

II. WELL-ESTABLISHED CANNONS OF STATUTORY CONSTRUCTION DICTATE THAT THE PROPOSED INITIATIVE DOES NOT VIOLATE THE HUMAN RIGHTS ACT.

Even if the human rights limitation on the initiative right were valid, the BoEE's denial on those grounds is nevertheless in error. Before passage of the Human Rights Act, it was understood that marriage in the District did not authorize same-sex marriage. Relevant canons of statutory construction dictate that the subsequent passage of the Human Rights Act did not alter the state of marriage in the District and that the existing marriage law remained valid. It is absurd to hold that an initiative solidifying the existing marriage laws contravenes the Human Rights Act, when existing marriage laws did not.

A. Established Cannons of Construction Require that Legislative Bodies are Assumed to Know the Law and Legislation Must be Construed to Avoid Absurdity.

It is axiomatic that legislative entities are presumed to have acted validly and courts are rightfully reluctant to second guess them. *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U.S. 96, 104 (1899); *see Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (noting the presumption of validity in the Equal Protection context).

It is also well-established that legislative bodies are presumed to have full knowledge of existing law, *See Albernaz v. United States*, 450 U.S. 333, 342 (1981); *United States Parole Comm'n v. Noble*, 693 A.2d 1084, 1109 (D.C. 1997), and that subsequent enactments do not impliedly repeal established laws, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 (2007). Specifically, when a legislative body enacts a particular statute, it is assumed to be fully abreast of the whole body of relevant law and existing interpretations. *United States v. Wright*, 819 F.2d 318 (D.C. Cir. 1987); *United States v. Green*, 331 F. Supp. 44, 47 (D.D.C. 1971); *Wilson v.*

Arrick, 1 D.C. (MacArth. & M.) 228, 233 (D.C. 1879). The D.C. Court of Appeals has precisely characterized the complete presumption:

> when a legislature contemplates passing a new statute it is careful to search the statute book for any statute that might overlap the new one, and if it finds any such older statute . . . in force it repeals it explicitly when passing the new one. 'The presumption against implied repeals is founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation.'

United States Parole Comm'n, 693 A.2d at 1109. This presumes both that the enacting body is aware of the relevant law and if it intends to repeal existing law by subsequent enactment, it will do so explicitly.

Where questions are left unanswered by the plain language of an enactment, any necessary construction or interpretation should be accomplished so as to avoid absurdity. *George v. Dade*, 769 A.2d 760, 762–63 (D.C. 2001); *Durham v. United States*, 743 A.2d 196, 211 (D.C. 1999). In other words, statutory language, which leaves room for interpretation should not be read in a manner which produces an absurd result. When these well-established tools of construction are applied in this case, the decision rendered by the BoEE cannot stand.

B. Contrary to the Decision of the Board of Elections and Ethics, the Proposed Initiative Does Not Violate the District's Human Rights Act.

Even if the additional substantive limitation on the initiative right specified in the Initiative Procedures Act were valid, the BoEE was clearly mistaken in rejecting the proposed initiative as authorizing prohibited discrimination and thus violating the Human Rights Act.

The first District of Columbia Code was enacted by Congress in 1901. This Code contained marriage provisions derived from early Maryland law, which were amended in

minor fashion, but remained largely intact through the 1970's. *Dean v. District of Columbia.*, 653 A.2d 307, 310–11 (D.C. 1995) (Ferren, J., dissenting). The first attempts at notable change to the 1901 marriage provision occurred through the Marriage and Divorce Act of 1977. *Id.* at 311.

As originally proposed, the 1977 Act would have significantly redrafted the District's marriage provisions to permit same-sex marriage. Though, even as originally proposed, the 1977 Act would not have explicitly authorized same-sex marriages, Council members admitted during the debates over the measure that the intention was to do so by reference, due to a provision in the original bill which forbade the courts from declaring that same-sex marriages were invalid due to a lack of capacity. *Id*. at 311–312. However, as a consequence of the debate which ensued, the 1977 bill was altered and, as enacted, included no reference to same-sex marriage. *Id*. at 312. Moreover, the failure of the 1977 amendment to provide for same-sex marriages was specifically recognized by the Court of Appeals. *Id*. at 308 (Terry, J., concurring).

In December of 1977, the District of Columbia Council also enacted the Human Rights Act, D.C. CODE § 2-1401.01 (LexisNexis 2009). The 1977 Human Rights Act prohibited certain acts of discrimination based on any characteristic besides "individual merit," specifically on the basis of several characteristics, including "sexual orientation." D.C. CODE § 2-1401.01 (LexisNexis 2009). It is particularly noteworthy that the debates regarding the inclusion of same-sex marriage in the 1977 marriage amendments occurred prior to the enactment of the 1977 Human Rights Act. *Dean*, 653 A.2d at 311.

In light of the history of both the 1977 Human Rights Act and the District of Columbia's marriage laws, proper canons of construction dictate that the BoEE's

decision holding the proposed initiative in violation of the Human Rights Act is obviously incorrect.

First, the Human Rights Act, as a legislative enactment of the Council, must be presumed valid and it must also be presumed that the Council knew of the amendments to the marriage provisions and the removal of any reference to same-sex marriage. The very fact that the debates resulted in the removal of language authorizing same-sex marriage demonstrates the absence of any intention to allow such unions under District marriage laws. *Id*. at 311–12. Consequently, when the Council enacted the Human Rights Act, it must (and is assumed as a matter of law to) have been aware that District marriage laws did not authorize same-sex marriage and considered these laws valid and compatible with the Human Rights Act. Indeed, at the time the Human Rights Act was passed, there was no argument that the existing District marriage laws, which did not provide for same-sex marriage, violated the Human Rights Act.

Second, the Human Rights Act did not repeal any portion of the District's marriage laws as they existed at the time. Nothing in the Human Rights Act explicitly repeals or even supports repeal of any provision of the existing marriage laws. In fact, it has been recognized that the "City Council consciously chose not to make the language of the Human Rights Act applicable to the regulation of the marital relationship." *Id.* at 310. In the absence of any specific provision repealing or altering the marriage laws, or making any reference to them at all, the strong presumption against implied repeals clearly supports the conclusion that the Human Rights Act did not alter the District's marriage laws.

Finally, the necessary avoidance of absurd results forecloses the BoEE's rejection of the proposed initiative as violative of the Human Rights Act. The proposed initiative would effectively limit marriage to the union of one man and one woman, *In Re Marriage Initiative of 2009*, Admin. Hearing No. 09-006 at 12, precisely the state of marriage before the enactment of the Human Rights Act and later confirmed in *Dean*, 653 A.2d at 308. Given that this distinction did not violate the Human Rights Act when enacted, it would be absurd to conclude that an initiative affirming this distinction would now violate the Human Rights Act. Because only opposite-sex marriage was permitted within the District at the time the Human Rights Act was enacted (and for more than thirty years thereafter), it would be absurd to uphold the BoEE's decision that the proposed initiative now violates the Human Rights Act.

CONCLUSION

The decision of the District of Columbia Board of Elections and Ethics denying the proposed initiative should be reversed.

Respectfully submitted,

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