

No. 10-A- _____

IN THE SUPREME COURT OF THE UNITED STATES

HARRY R. JACKSON, *ET AL.*,

Petitioners,

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,

Respondent,

and

DISTRICT OF COLUMBIA,

Intervenor-Respondent.

On review from the District of Columbia Court of Appeals
(No. 10-CV-177)

THE DISTRICT OF COLUMBIA'S OPPOSITION TO
PETITIONERS' APPLICATION FOR IMMEDIATE STAY OF THE RELIGIOUS FREEDOM
AND CIVIL MARRIAGE EQUALITY AMENDMENT ACT OF 2009 PENDING CERTIORARI

To the Honorable John G. Roberts, Jr.
Chief Justice of the United States Supreme Court and
Circuit Justice for the District of Columbia Circuit

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States Supreme Court and
Circuit Justice for the District of Columbia Circuit:

INTRODUCTION

Absent Congressional disapproval, an act of the Council of the District of Columbia (Council) authorizing same-sex marriages in the District will become law on March 3, 2010. Petitioners sought a preliminary injunction in the Superior Court of the District of Columbia to “stay” the “effective date” of this act. This request was made in the context of petitioners’ challenge to a determination by the District of Columbia Board of Elections and Ethics (BOEE or the Board) that, under applicable law, this act was not the proper subject of a voter referendum. The Superior Court denied the injunction because petitioners failed to “demonstrate authority for [that] [c]ourt’s interference with the legislative process” and because petitioners otherwise failed to satisfy the criteria for injunctive relief (Application Exhibit B; *accord* Exhibit C). Petitioners appealed, and the District of Columbia Court of Appeals too declined to issue an injunction staying the effective date of the act (Application Exhibit A). This Court should also deny the extraordinary relief requested, for multiple reasons.

First, there is no reasonable probability that this Court will grant certiorari in this proceeding. Petitioners’ request for this Court’s review is premature. The decision for which review is sought is one denying a preliminary injunction. The District of Columbia Court of Appeals did not reach the merits of the legal issue for which petitioners will seek certiorari. Moreover, the issue is not worthy of certiorari. It raises a matter of local law on which this Court’s precedent dictates that the court of appeals should receive deference when it does resolve the issue.

Second, the injunctive relief petitioners need is unavailable as a matter of law. Petitioners’ unprecedented request for injunctive relief staying the “effective date” of a statute during or following Congressional review is foreclosed by the District of Columbia Self-Government and

Government Reorganization Act (Home Rule Act), D.C. Code § 1-201.01 *et seq.* (2006). Such relief is also precluded by well-settled separation-of-powers principles, under which the judiciary can neither dictate nor enjoin the passage of legislation.

Third, petitioners will not suffer irreparable harm if a stay is not granted. The question of whether a law banning same-sex marriage or the recognition of such marriages is the proper subject of a voter initiative is, in fact, currently pending before the District of Columbia Court of Appeals in an expedited appeal filed by these same petitioners. *Jackson v. District of Columbia*, No. 10-CV-20 (D.C.). The court will fully consider their legal arguments in that case. If petitioners are correct, they will be able to present the electorate with an initiative to ban same-sex marriage, obviating any claim of irreparable harm here.

PROCEDURAL AND FACTUAL BACKGROUND

A. Facts

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

Before JAMA became law, on May 27, a group, which included four the eight petitioners here, presented a proposed referendum¹ to the Board. They sought to present to the voters the question of whether the District should recognize same-sex marriages from other jurisdictions. The

¹ "The term 'referendum' means the process by which the registered qualified electors of the District of Columbia may suspend acts of the Council of the District of Columbia (except emergency acts, acts levying taxes, or acts appropriating funds for the general operating budget) until such acts have been presented to the registered qualified electors of the District of Columbia for their approval or rejection." D.C. Code §1-204.101(b) (2006 Repl.).

Board, by Memorandum Opinion and Order dated June 15 (*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 and could not be presented to the voters because it “authorizes, or would have the effect of authorizing, discrimination prohibited under [the District of Columbia Human Rights Act (HRA), *codified as amended at D.C. Code § 2-1401.01 et seq.* (2009 Supp.)].” D.C. Code § 1-1001.16(b)(1)(C) (2006 Repl.). Two days later, those proposing the referendum brought suit in the Superior Court, pursuant to D.C. Code § 1-1001.16(b)(3) (2006 Repl.), seeking “a writ in the nature of mandamus to compel the Board to accept” the proposed referendum.

On June 30, the Superior Court issued an Order in that matter, *Jackson v. District of Columbia Bd. of Elections and Ethics (Jackson I)*, 2009 CA 004350 (Super. Ct. of D.C.), denying relief. The court ruled, *inter alia*, that “the Board correctly concluded that the proposed referendum would violate the District of Columbia Human Rights Act . . .” (Order at 2). The referendum proposers did not appeal.

Instead, petitioners filed a proposed initiative² with the Board. It read: “Only marriage between a man and a woman is valid or recognized in the District of Columbia” (*In re: Marriage Initiative of 2009*, BOEE No. 09-006). As with the referendum, 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” (Memorandum Opinion and Order dated November 17, 2009, at 11 (*In re: Marriage Initiative of 2009*, BOEE No. 09-006)). Petitioners filed a petition for review

² “The term ‘initiative’ means the process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered and qualified electors of the District of Columbia for their approval or disapproval.” D.C. Code § 1-204.101(a) (2006 Repl.).

and for a writ of mandamus in the Superior Court on November 18. *Jackson v. District of Columbia Bd. of Elections and Ethics (Jackson II)*, No. 2009 CA 8613 B (Super. Ct. of D.C.).

The Superior Court rejected petitioners' argument that the prohibition against initiatives that violate the HRA was an invalid restriction on the right of initiative, finding that the Council acted well within its authority when adopting this limitation, D.C. Code § 1-1001.16(b)(1)(C) (2006 Repl.) (Application Exhibit D). Petitioners filed a timely notice of appeal from this decision on January 15, which is currently being considered by the court of appeals on an expedited basis in *Jackson v. District of Columbia*, No. 10-CV-20 (D.C.). Briefing will be complete on April 9, and the case will appear on the court's May calendar.

In the meantime, the Council enacted the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 (Marriage Equality Act or Act) on December 15. This legislation, the subject of the instant application, expressly expands the definition of marriage in the District to include same-sex couples. *See* D.C. Act 18-248; 57 D.C. Reg. 27 (Jan. 1, 2010).³ The Act was signed by the Mayor on December 18 and transmitted to Congress on January 5, 2010. Assuming Congress does not pass a joint resolution disapproving the Act, it will become law on March 3. D.C. Code § 1-206.02(c)(1) (2006 Repl.).

The day after the Act was transmitted to Congress, petitioners filed a proposed referendum with the Board seeking to suspend the Act until it had been presented to the District electorate for its approval or rejection (*In re: Referendum on the Religious Freedom and Civil Marriage Equality Amendment Act of 2009*, BOEE No. 10-001). Following a special hearing held on January 27, the Board issued a Memorandum Opinion and Order on February 4 rejecting the proposed referendum

³ The Act provides that "[a]ny person may enter into a marriage in the District of Columbia with another person, regardless of gender," unless the marriage is otherwise expressly prohibited by District law. D.C. Act 18-248, sec. 2(b).

as improper in that it “authorizes, or would have the effect of authorizing, discrimination prohibited under [the District’s HRA]” – the fifth time the Board or a Superior Court judge has so concluded with regard to the related referendum and initiative proposals (*In re: Referendum on the Religious Freedom and Civil Marriage Equality Amendment Act of 2009*, BOEE No. 10-001, Memorandum Opinion and Order at 18 (Feb. 4, 2010)).

The day after the Board issued its decision, on February 5, petitioners filed a Petition for Review of Agency Decision and for a Writ in Nature of Mandamus and a Motion for Preliminary Injunction in the Superior Court. *Jackson v. District of Columbia Bd. of Elections and Ethics (Jackson III)*, 2010 CA 740 B (Super. Ct. of D.C.). The preliminary injunction they sought was, in particular, an order “staying” the “effective date” of the Act. On February 19, the Superior Court held a hearing on petitioners’ motion for a preliminary injunction. During that hearing, the court orally denied injunctive relief. The court issued its written denial on February 22 (Application Exhibit B). That same day, petitioners filed a notice of appeal.

The District moved for summary affirmance of the Superior Court’s order on the ground that injunctive relief simply was not available. The District of Columbia Court of Appeals granted that motion, finding that petitioners had “failed to meet the test for an issuance of a preliminary injunction” (Application Exhibit A).

B. Statutory Framework

Article I, section 8, clause 17 of the Constitution empowers Congress to exercise plenary legislative authority over the District of Columbia. *See generally Bliley v. Kelly*, 306 U.S. App. D.C. 199, 23 F.3d 507, 508 (1994). In 1973, Congress passed the Home Rule Act, Pub. L. No. 93-198, *codified at* D.C. Code § 1-201.01 *et seq.* (2005 Supp.). This statute creates a tripartite form of government within the District, vesting the legislative power granted to the District in the Council.

Wilson v. Kelly, 615 A.2d 229, 231 (D.C. 1992); D.C. Code § 1-204.04 (2006 Repl.).

In keeping with its constitutional authority, Congress retained the right to disapprove Council acts. D.C. Code § 1-206.01 (2006 Repl.). Thus, with exceptions that are not relevant here, legislative acts passed by the Council and approved by the Mayor “shall take effect upon the expiration of the 30-calendar-day period (excluding Saturdays, Sundays, and holidays, and any day on which neither House is in session because of an adjournment sine die, a recess of more than 3 days, or an adjournment of more than 3 days) beginning on the day such act is transmitted by the Chairman [of the Council] to the Speaker of the House of Representative and the President of the Senate, or upon the date prescribed by such act, whichever is later, unless during such 30-day period, there has been enacted into law a joint resolution disapproving such act.” D.C. Code § 1-206.02(c)(1) (2006 Repl.).

Additionally, voters in the District may directly participate in the legislative process, either by initiative, the process by which voters may present legislation directly to the electorate for approval or disapproval, or by referendum, the process by which voters may “suspend” an act of the Council until that act is presented directly to the electorate. *See* D.C. Code § 1-204.101 (2006 Repl.). These rights were established in a 1978 amendment to the District’s Charter.

The Charter amendment was not self-executing, but required the Council to “adopt such acts as necessary to carry out the purposes of [the act] within 180 days of the effective date of the [act].” D.C. Code § 1-204.107 (2006 Repl.). In addition, the District Charter gives the Council plenary authority over matters involving elections in the District. It provides that “[n]otwithstanding any other provision of [the Home Rule Act] or any other law, the Council shall have authority to enact any act or resolution with respect to matters involving or relating to elections in the District.” D.C. Code § 1-207.52 (2006 Repl.).

In keeping with this broad authority, the Council adopted a statute that governs the initiative and referendum process in the District. A referendum begins with a registered voter filing a proposed measure with the Board. 3 District of Columbia Municipal Regulations (DCMR) § 1001.1. Upon receipt of a proposed referendum, the Board first determines whether it is a “proper subject” for such action. D.C. Code § 1-1001.16(b)(1) (2006 Repl.); 3 DCMR § 1001.3. One basis for rejecting an initiative or referendum is if it “authorizes, or would have the effect of authorizing, discrimination prohibited under [the HRA].” D.C. Code § 1-1001.16(b)(1)(C) (2006 Repl.). If the Board refuses to accept a referendum because it is not a proper subject, the proposer may apply to the Superior Court “for a writ in the nature of mandamus to compel the Board to accept” it. D.C. Code § 1-1001.16(b)(3) (2006 Repl.); 3 DCMR § 1001.5.

If the Board (or a court) concludes that the subject matter of the referendum is proper, the Board has 20 days to prepare the referendum’s official short title and a summary statement regarding the purposes of the proposed measure, and to place the measure in proper legislative form. D.C. Code § 1-1001.16(c) (2006 Repl.); 3 DCMR § 1002.1. This official language is then published in the D.C. Register, which starts a 10-day challenge period during which a registered voter may object to the title, summary, and legislative form of the referendum by filing an expedited action in the Superior Court. D.C. Code § 1-1001.16(d), (e) (2006 Repl.); 3 DCMR § 1002.4.

Upon the expiration of the 10-day challenge period or the favorable resolution of any challenge, the Board prepares and presents at a public hearing a petition form for the collection of the requisite number of signatures necessary for the measure to be placed on the ballot. D.C. Code § 1-1001.16(g) (2006 Repl.); 3 DCMR § 1003.1. The proposer of a referendum must then collect the requisite number of valid signatures before the subject legislation becomes effective pursuant to the provisions of D.C. Code § 1-206.02(c), *i.e.*, before the expiration of the Congressional review

period. D.C. Code § 1-1001.16(j)(2) (2006 Repl.); 3 DCMR § 1005.3 (“The proposer of a referendum measure shall secure the proper number of signatures needed to qualify the measure for the ballot and file the referendum petition with the Board no later than 5:00 p.m. on the last business day before the act . . . has become law. . .”).

Upon receipt of a proper petition containing the requisite number of valid signatures, the Board notifies the appropriate custodian of the act, here the President of the Senate and the Speaker of the House of Representatives, and only then is the custodian obligated to return the act to the Council Chairman, with no further action to be taken upon such act until after a referendum election is held. D.C. Code § 1-204.102(b)(1) (2006 Repl.). In no event may an “act [be] subject to referendum if it has become law . . .” D.C. Code § 1-204.102(b)(2) (2006 Repl.); *accord* D.C. Code § 1-1001.16(j)(2) (2006 Repl.).

STANDARD FOR GRANTING A STAY

The principles that control a Circuit Justice’s consideration of in-chambers stay applications are well established. Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below – both on the merits and on the proper interim disposition of the case – are correct. In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a “reasonable probability” that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. Second, the applicant must persuade me that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. While related to the first inquiry, this question may involve somewhat different considerations, especially in cases presented on direct appeal. Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. And fourth, in a close case it may be appropriate to “balance the equities” – to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (internal citations omitted).

ARGUMENT

I. There is no reasonable probability that this Court will grant certiorari in this proceeding.

Petitioners recognize that a major consideration in determining whether a stay is warranted is “whether four justices would vote to grant certiorari.” Petitioners’ Application for Stay (Application) at 9 (quoting *Deaver v. United States*, 483 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers)). The only ground they present for an exercise of certiorari jurisdiction is that the lower court purportedly “has decided an important question of federal law that has not been, but should be, settled by this Court.” *Id.* (quoting Rule 10(b)). Petitioners are wrong for two basic, independent reasons. First, the District of Columbia Court of Appeals has not decided the legal issue for which they seek review. Second, even if it had, the legal issue arises under District law only, and this Court defers substantially to an interpretation of District law by the District’s local courts.

1. This request for this Court’s review is premature. Petitioners argue that the Council of the District of Columbia overstepped its authority in establishing that certain discriminatory measures would not be subject to popular vote through initiatives and referenda. Application at 10-19. But the District of Columbia Court of Appeals, the highest local court in the District, has not even decided the issue yet. For that reason alone, there is no reasonable probability that the Court would grant certiorari.

The decision under review is one that affirms the denial of a preliminary injunction. The court of appeals did not purport to decide the legal issue of interest to petitioners. The court did not even issue an opinion, and the judgment merely explains as relevant that petitioners “failed to meet the test for the issuance of a preliminary injunction.” Ex. A to Application. As far as the court below revealed, it may have agreed with petitioners on the legal issue but found their equitable