SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

HARRY R. JACKSON, JR., a registered, qualified voter in the District of Columbia and proponent of the Marriage Initiative of 2009,

1100 First Street, S.E., Apt. 1310
Washington, D.C. 20003

ROBERT KING, a registered, qualified voter in the District of Columbia and proponent of the Marriage Initiative of 2009,

3102 Apple Road, N.E.
Washington, D.C. 20018

WALTER E. FAUNTROY, a registered, qualified voter in the District of Columbia and proponent of the Marriage Initiative of 2009,

4105 17th Street, N.W.
Washington, D.C. 20011

JAMES SILVER, a registered, qualified voter in the District of Columbia and proponent of the Marriage Initiative of 2009,

7123 Chestnut Street, N.W.
Washington, D.C. 20012

ANTHONY EVANS, a registered, qualified voter in the District of Columbia and proponent of the Marriage Initiative of 2009,

4021 7th Street, N.E., Apt. #4
Washington, D.C. 20017

DALE E. WAFER, a registered, qualified voter in the District of Columbia and proponent of the Marriage Initiative of 2009,

4021 19th Street, N.E.
Washington, D.C. 20018

Civil Action No. 0008613-09

[Next Court Event: none scheduled]

MELVIN DUPREE, a registered, qualified voter in the District of Columbia and proponent of the Marriage Initiative of 2009,

1904 Naylor Road, S.E.
Washington, D.C. 20020

and HOWARD BUTLER, a registered, qualified voter in the District of Columbia and proponent of the Marriage Initiative of 2009,

1301 Whittier Place, N.W.
Washington, D.C. 20012

Petitioners,

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, an agency of the District of Columbia government,

441 4th Street, N.W., Suite 250
Washington, D.C. 20001

Respondent.

PETITION FOR REVIEW OF AGENCY DECISION AND FOR WRIT IN THE NATURE OF MANDAMUS

Petitioners Harry R. Jackson, Jr., Robert King, Walter E. Fauntroy, James Silver, Anthony Evans, Dale E. Wafer, Melvin Dupree, and Howard Butler (the "Proponents") petition this Court, pursuant to D.C. Code § 1-1001.16(b)(3), for review of the decision of the District of Columbia Board of Elections and Ethics ("the Board") rejection of the Marriage Initiative of 2009 ("the Initiative"), for a writ in the nature of mandamus compelling the Board to accept the Proponents' Initiative because the Board lacks the authority to reject the Initiative under the Initiative, Referendum, and Recall Charter Amendments Act of 1978, D.C. Code §§ 1-204.101 to 1-204.115, and for a declaration that the Initiative does not violate the District of Columbia

Human Rights Act of 1977, D.C. Code § 2-1401.01 *et seq.* A true and correct copy of the decision from the Board is attached to this petition.

INTRODUCTION

1. The people of the District of Columbia reserved to themselves the sovereign right of initiative in the Initiative, Referendum, and Recall Charter Amendments Act of 1978, D.C. Code §§ 1-204.101 to 1-204.115 (the "Charter Amendments Act").

2. The right of initiative provides the people with lawmaking authority coextensive with that of the District of Columbia Council, restricting the citizens' lawmaking authority solely on the subject of "appropriations." D.C. Code § 1-204.101(a).[1]

3. The Proponents seek to exercise their right of initiative by placing on the ballot a measure that would affirm the definition of marriage long understood to be the law in the District of Columbia: "Only marriage between a man and a woman is valid or recognized in the District of Columbia."

4. To that end, the Proponents filed the Marriage Initiative of 2009 with the Board on September 1, 2009. It provides the voters of the District of Columbia the opportunity to accept or reject the District's longstanding definition of marriage as being a legal union between a man and a woman – a subject squarely within the lawmaking authority of the citizenry.

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[1] The Charter Amendments Act provides in pertinent part:

> 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 qualified electors of the District of Columbia for their approval or disapproval.

D.C. Code § 1-204.101.

5. The Board held a public hearing on October 26, 2009, to determine whether the Initiative presented a proper subject for the initiative process.

6. Counsel to the Board announced at the October 26, 2009, that the Initiative was in proper legislative form and the Proponents had duly complied with the ministerial requirements of the Initiative, Referendum, and Recall Procedures Act, D.C. Code § 1-1001.16 (the "Initiative Procedures Act" or the "IPA"), having filed their Initiative Committee in accordance with D.C. Code §§ 1-1102.04 and 1-1102.06

7. On November 17, 2009, the Board denied Proponents' Initiative solely on the basis that it "authorizes or would authorize discrimination proscribed by the HRA [District of Columbia Human Rights Act of 1977, D.C. Code § 2-1401.01 *et seq.*] and is therefore not a proper subject for initiative." (*See* District of Columbia Board of Elections and Ethics decision dated November 17, 2009, hereinafter "Board's Decision," at p. 11).

8. The Initiative does not seek to appropriate funds, nor did the Board find in rejecting the Initiative that it constituted an "appropriation" of funds.

9. The Proponents now petition this Court, pursuant to D.C. Code § 1-1001.16(b)(3), for review of the Board's decision and, for a writ in the nature of mandamus compelling the Board to accept the Initiative for the reason that the sole subject matter prohibition for an initiative is "appropriations," which this Initiative does not propose to do.

10. The Board's determination that the Initiative is invalid because it "violates the HRA" is erroneous because the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act. This additional subject matter restriction impermissibly conflicts with the broad nature of the right of initiative reserved by the people in the Charter Amendments Act.

11. Proponents further seek the declaration of this Court that the Initiative does not violate the HRA, because this Court and the Court of Appeals have consistently held that the regulation of the marital relationship falls outside the intended scope of the HRA.

12. The citizens' right under the Home Rule Charter to legislate through the initiative is coextensive with that of the District of Columbia Council on all subjects *other* than making appropriations.

13. The Council has enacted laws governing marriage—and is so engaged at the present time. The citizens are likewise entitled to legislate on the subject of the definition of marriage, without the additional impediments ostensibly imposed on their initiative powers by the IPA, D.C. Code § 1-1001.16(b)(1).

14. This Court and the Court of Appeals have consistently held that where the IPA conflicts with the Charter Amendments Act, the Charter Amendments Act prevails. *Price v. District of Columbia Bd. of Elections & Ethics*, 645 A.2d 594, 599 (D.C. 1994) ("[T]o the extent any IPA provision is inconsistent with the Charter Amendments, the latter controls."); *Convention Ctr. Referendum Comm. v. District of Columbia Bd. of Elections & Ethics*, 441 A.2d 889, 915 (D.C. 1981) (en banc) ("As implementing legislation [of the Charter Amendments Act], the Initiative Procedures Act is valid, of course, only insofar as it conforms to the underlying Charter Amendments.").

JURISDICTION

15. This Court has subject matter jurisdiction of this case pursuant to D.C. Code § 11-921 and D.C. Code § 1-1001.16(b)(3), which provides in pertinent part that "[i]f 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."

16. This Court has *in personam* jurisdiction over the Board.

THE PARTIES

17. Petitioner Harry R. Jackson, Jr. is a qualified registered voter in the District and an official proponent of the Initiative. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Initiative does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Initiative.

18. Petitioner Robert King is a qualified registered voter in the District and an official proponent of the Initiative. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Initiative does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Initiative.

19. Petitioner Walter E. Fauntroy is a qualified registered voter in the District and an official proponent of the Initiative. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Initiative does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Initiative.

20. Petitioner James Silver is a qualified registered voter in the District and an official proponent of the Initiative. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Initiative does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Initiative.

21. Petitioner Anthony Evans is a qualified registered voter in the District and an official proponent of the Initiative. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Initiative does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Initiative.

22. Petitioner Dale E. Wafer is a qualified registered voter in the District and an official proponent of the Initiative. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Initiative does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Initiative.

23. Petitioner Melvin Dupree is a qualified registered voter in the District and an official proponent of the Initiative. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the

Charter Amendments Act, a declaration that the Initiative does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Initiative.

24. Petitioner Howard Butler is a qualified registered voter in the District and an official proponent of the Initiative. He has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board's decision, a declaration that the HRA restriction imposed by the Council on the people's right of initiative is an impermissible requirement not authorized by the Charter Amendments Act, a declaration that the Initiative does not violate the HRA, and a writ in the nature of mandamus compelling the Board to accept the Initiative.

25. The respondent in this case is the Board, a three-member body created by statute. D.C. Code § 1-1001.03. Because of a vacancy on the three-member election board, Chairman Errol R. Arthur and Board Member Charles Lowery, Jr. are currently the only sitting members. The Board's duties include overseeing the initiative and referendum process. D.C. Code § 1-1001.16. The Board is specifically tasked with determining whether a proposed initiative presents a proper subject for the initiative process. D.C. Code § 1-1001.16(b)(1).

THE INITIATIVE PROCESS

26. The right of initiative enables five percent of the registered voters in the District to "propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval." D.C. Code §§ 1-204.101(a), 1-204.102.

27. If a majority of the voters participating in an initiative "adopt legislation by initiative, then the adopted initiative . . . shall be an act of the Council upon the certification of the vote on such initiative . . . by the District of Columbia Board of Elections and Ethics, and such act shall become law subject to the provisions of § 1-206.02(c)." D.C. Code § 1-204.105.

28. Under the Initiative Procedures Act, D.C. Code § 1-1001.16 , there are certain ministerial requirements established by the Council for undertaking the people's legislative powers, starting with the requirement that the initiative process begins with a voter or voters filing a proposed initiative measure with the Board. It must include the full text of the initiative measure, a short title of the measure to be proposed, and a summary statement of not more than 100 words. D.C. Code § 1-1001.16(a)(1).

29. Accompanying the proposed initiative measure, the voter or voters must submit an affidavit testifying to their name, address, and status as a registered qualified elector of the District of Columbia. D.C. Code § 1-1001.16(a)(1).

30. Upon receipt of the initiative measure, the Board undertakes a review to determine whether the measure presents a proper subject for an initiative under Title IV of the District's Self-Government and Governmental Reorganization Act, D.C. Code § 1-201.1 *et seq.* (popularly known as the "Home Rule Act"), or under one of four other grounds, including that the measure "authorizes, or would have the effect of authorizing, discrimination" prohibited by the HRA. D.C. Code § 1-1001.16(b)(1).

31. If the Board refuses to accept a proposed initiative, it endorses the measure as being "received but not accepted" and "retain[s] the measure pending appeal." D.C. Code § 1-1001.16(b)(2). At that point, the persons submitting the initiative measure have ten (10) days to apply to this Court "for a writ in the nature of mandamus to compel the Board to accept such measure." D.C. Code § 1-1001.16(b)(3). This Court is to expedite consideration of the matter. D.C. Code § 1-1001.16(b)(3).

32. If an initiative measure is accepted, the Board is responsible for preparing, adopting, and arranging for publication of a proposed summary statement, short title, and

legislative form. During the ten (10) calendar days following publication, a voter who objects to the proposed summary statement, short title, and legislative form may seek expedited review by this Court. Absent such judicial review, the proposed summary statement, short title, and legislative form are deemed to be accepted by the Board. D.C. Code § 1-1001.16(c)-(e).

33. Once the proposed summary statement, short title, and legislative form are accepted by the Board, the Board provides the proposer with an original petition form to be used in printing petition sheets for circulation. The proposer must secure the signatures of five percent of the registered voters in the District, including five percent of the registered voters in at least five of the eight wards, to submit the initiative petition to the Board. D.C. Code § 1-1001.16(g)-(j).

34. Before accepting an initiative petition, the Board checks, among other things, whether the petition is "not in the proper form" or "on its face clearly bears an insufficient number of signatures." However, the Board is not required to certify whether the petition contains the minimum number of "valid" signatures until thirty (30) calendar days after the petition has been accepted. D.C. Code § 1-1001.16(k) & (o).

35. Once the signatures have been verified, the Board certifies that the initiative will appear on the ballot, and schedules an election on the initiative measure at the next primary, general, or city-wide special election held at least 90 days after the date on which the measure was certified as qualified to appear on the ballot. D.C. Code § 1-1001.16(p)(1).

36. An initiative measure which has been ratified by a majority of the registered qualified electors voting on the measure will be sent to the United States Congress for review. If the initiative measure is not disapproved during the thirty day congressional review period, the

initiative measure will then take effect as the law of the District at the end of the review period. D.C. Code § 1-1001.16(r)(1).

MARRIAGE INITIATIVE OF 2009

37. On September 1, 2009, the Proponents filed the Marriage Initiative of 2009 with the Board. The proposed initiative would add a provision to the District's marriage code, affirming that: "Only marriage between a man and a woman is valid or recognized in the District of Columbia."

38. The next day, September 2, 2009, the Board published notice on its website that it had received the Marriage Initiative of 2009.

39. Eight days later, on September 10, 2009, the Board sent a letter to the Proponents informing them that a hearing on the Initiative had been tentatively scheduled for October 26, 2009, at One Judiciary Square, 441 4th Street, N.W., Suite 280, Washington, D.C. 20001. The letter further informed the Proponents that if they wished to submit a memorandum in support of the Initiative, they should do so by October 16, 2009.

40. On September 18, 2009, the Board published notice in the *D.C. Register* that it had received the Initiative and scheduled a public hearing on the Initiative for October 26, 2009, in the One Judiciary Square Building.

41. On October 16, 2009, the Proponents timely filed a legal memorandum with the Board, explaining why the Marriage Initiative of 2009 presented a proper subject for the initiative process.

42. Two days later, on October 18, 2009, the Board posted a "Public Notice" on its website announcing that there would be a Special Board Meeting on Monday, October 26, 2009

at 10:00 a.m. to determine whether the Marriage Initiative of 2009 was a proper subject for an initiative in the District.

43. Just over a week later, on October 26, 2009, the Board held a public hearing on the Marriage Initiative of 2009 to determine whether it presents a proper subject for the initiative process. The Proponents attended the hearing and provided testimony in support of the Initiative.

44. At the hearing, counsel to the Board publicly announced that the Marriage Initiative of 2009 is in proper legislative form and in compliance with the District of Columbia Office of Campaign Finance filing requirements.

45. On November 17, 2009, the Board rejected the Marriage Initiative of 2009 solely on the grounds that it did not present a proper subject for the initiative process under the Initiative Procedures Act because it "authorizes or would authorize discrimination proscribed by the HRA . . . ." (Board's Decision at p. 11). The Board marked the Initiative as "received but not accepted," and now holds the Initiative pending this Court's review. D.C. Code § 1-1001.16(b)(2). (Board's Decision at p. 13).

46. The Board's rejection of the Initiative began the ten (10) day time period for applying to this Court for a writ of mandamus ordering the Board to accept the Initiative. D.C. Code § 1-1001.16(b)(3). By operation of law, the ten (10) day time period is set to expire on or about November 30, 2009.

47. The Proponents now apply to this Court, pursuant to D.C. Code § 1-1001.16(b)(3), for review of the Board's decision and a "writ in the nature of mandamus" compelling the Board to accept the Initiative.

COUNT I

THE HRA RESTRICTION CONTAINED IN THE INITIATIVE PROCEDURES ACT IS AN INVALID AND IMPERMISSIBLE RESTRAINT ON THE PEOPLE'S RIGHT OF INITIATIVE

48. The people of the District of Columbia reserved to themselves the right of initiative in the Charter Amendments Act. The Charter Amendments Act amended the Home Rule Act, reserving to the people the power to adopt initiatives in a manner coextensive with the power of the Council to adopt legislative measures. D.C. Code § 1-204.101(a).

49. The lone substantive limitation on the people's right of initiative provided by the Charter Amendments Act is the exception for "laws appropriating funds." D.C. Code § 1-204.101(a). Matters relating to the budget process remain within the control of the Mayor and the Council.

50. The Council in 1979 passed Initiative Procedures Act, D.C. Code § 1-1001.16, to facilitate and regulate the people's right of initiative. Because the people's right of initiative is codified within the Charter, and is not merely a creature of statute, the Council cannot substantively alter or amend the initiative right. Rather, that right can only be substantively altered through an amendment of the Charter.

51. However, the IPA improperly imposes an additional substantive limitation, not found in the Home Rule Act or the Charter Amendments Act, on the people's right of initiative—the HRA restriction. D.C. Code § 1-1001.16(b)(1)(C). It purports to entirely exclude from the people's right of initiative any measure said to "authorize[], or . . . have the effect of authorizing, discrimination prohibited under" the HRA. D.C. Code § 1-1001.16(b)(1)(C).

52. The Board relied upon this legally impermissible additional subject matter restriction to deny approval of the Marriage Initiative of 2009.

53. The Council's attempted imposition of an additional substantive limitation on the right of initiative seeks to improperly narrow the right of initiative in a manner inconsistent with the broad nature of the right reserved by the people to themselves in the Charter Amendments Act.

54. Because the HRA restriction impermissibly conflicts with the right reserved in the Charter Amendments Act, the restriction is invalid and the Board erred in relying on the restriction to disapprove the Marriage Initiative of 2009.

55. This Court and the Court of Appeals have both ruled that the Charter Amendments control over inconsistent provision of the IPA. *Price*, 645 A.2d at 599 ("[T]o the extent any IPA provision is inconsistent with the Charter Amendments, the latter controls."); *Convention Ctr.*, 441 A.2d at 915 ("As implementing legislation [of the Charter Amendments Act], the Initiative Procedures Act is valid, of course, only insofar as it conforms to the underlying Charter Amendments."). Thus, to the extent any IPA provision is inconsistent with the Charter Amendments, the latter controls.

COUNT II

THE MARRIAGE INITIATIVE OF 2009 DOES NOT VIOLATE THE HRA BECAUSE REGULATION OF THE MARITAL RELATIONSHIP FALLS OUTSIDE THE INTENDED AND ACTUAL SCOPE OF THE HRA

56. This Court and the Court of Appeals have both ruled that the "City Council consciously chose not to make the language of the Human Rights Act applicable to the regulation of the marital relationship." *Dean v. District of Columbia*, No. 90-13892, slip op. at *4-8 (D.C. Super. Dec. 30, 1991), *aff'd*, *Dean v. District of Columbia*, 653 A.2d 307, 318-20 (D.C. 1995) (emphasis added).

57. The text of the HRA and its legislative history demonstrate that the HRA was never intended to implicate the District's marriage laws. Instead, as the Council has explained, the Act "should . . . be read in harmony with and as supplementing other laws of the District," including the District's marriage laws. Comm. on Public Services and Consumer Affairs, Report on Bill No. 2-179, Human Rights Act of 1977, at 3 (July 5, 1977) (citations and internal quotations omitted).

58. This interpretation of the HRA remains unaltered by the Court of Appeals or the Council.

59. Thus, as a matter of law, the HRA restriction is not applicable to the Marriage Initiative of 2009, and the Board erred in applying the restriction to the Initiative.

COUNT III

THE MARRIAGE INITIATIVE OF 2009 IS CONSISTENT WITH THE HRA

60. The Marriage Initiative of 2009 does not authorize or have the effect of authorizing discrimination on the basis of sexual orientation and/or sex in violation of the HRA.

61. The Initiative is silent with regard to sexual orientation. No couples of the same-sex, regardless of their declared sexual orientation, can be issued a marriage license.

62. The Initiative also treats men and women alike—they are permitted to marry people of the opposite sex, but not people of their own sex.

63. Thus, the Marriage Initiative of 2009 does not discriminate in violation of the HRA, and the Board erred in holding that the Initiative runs afoul of the HRA.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Petitioners request that this Court grant the following relief:

64. Expedite consideration of this matter as required by D.C. Code § 1-1001.16(b)(3).

65. Declare that the additional subject matter restriction imposed by the IPA with respect to the application of the HRA to proposed initiatives is inconsistent and conflicts with the Charter Amendments Act and cannot operate as a bar to the citizens' right to the initiative in the District of Columbia generally.

66. Declare that the Board improperly relied on the HRA as grounds for denying the Proponents' rights to begin gathering signatures on the Marriage Initiative of 2009, thus allowing the definition of marriage to ultimately be decided by the voters of the District of Columbia exercising their legislative powers.

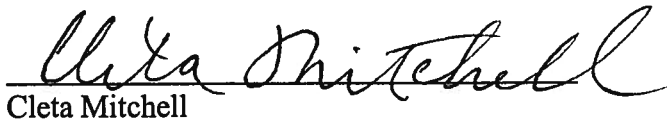
67. Declare that the Initiative does not authorize or have the effect of authorizing discrimination in violation of the HRA.

68. Issue a "writ in the nature of mandamus," pursuant to D.C. Code § 1-1001.16(b)(3), ordering the Board to accept the Initiative.

69. Grant other declaratory relief and permanent and temporary injunctive relief as may be necessary to ensure that the Initiative is accepted by the Board and that the initiative process moves forward.

70. Grant such other and further relief, including attorney's fees and costs, as the Court may deem just and proper under the circumstances.

Respectfully submitted this the 18th day of November, 2009.



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DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

In Re:	)	
	)	
Marriage Initiative of 2009	)	Administrative Hearing
	)	No. 09-006
	)	
	)	

MEMORANDUM OPINION AND ORDER

I. Introduction

This matter came before the District of Columbia Board of Elections and Ethics (hereinafter "the Board") during a special hearing on Monday, October 26, 2009 pursuant to the submission of a proposed initiative measure, the "Marriage Initiative of 2009" ("the Initiative"). The Initiative, if passed, would establish that "only marriage between a man and a woman is valid or recognized in the District of Columbia."[1] The purpose of the special hearing was to determine whether or not the Initiative presents a proper subject matter for initiative in the District. Reverend Harry R. Jackson, Jr. ("Rev. Jackson"), the lead proposer of the Initiative, appeared before the Board, and was also represented at the hearing by Cleta Mitchell, Esq. of Foley & Lardner LLP, and Austin R. Nimocks, Esq. of the Alliance Defense Fund.[2] Chairman Errol R. Arthur and Board member Charles R. Lowery, Jr. presided over the hearing.

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[1] Summary Statement, Initiative.

[2] Brian W. Raum, Esq. and Timothy J. Tracey, Esq. also filed Notices of Appearance with the Board on behalf of Rev. Jackson and the other proponents.

II. Statement of the Facts

On July 7, 2009, the "Jury and Marriage Amendment Act of 2009" ("JAMA") was enacted. As a result of JAMA's passage, same-sex marriages entered into and recognized as valid in other jurisdictions are now recognized as valid marriages in the District.[3]

JAMA was the target of an unsuccessful referendum attempt. Sixteen days after the Council of the District of Columbia ("the Council") submitted JAMA to Congress,[4] Rev. Jackson and others submitted to the Board a referendum entitled the "Referendum Concerning the Jury and Marriage Amendment Act of 2009" ("the Referendum"), which sought to suspend the section of JAMA pertaining to same-sex marriages until it had been presented to the registered qualified electors of the District of Columbia for their approval or rejection. On June 15, 2009, the Board ruled that the Referendum was not a proper subject for referendum because it

> would, in contravention of the [Human Rights Act ("HRA")], strip same-sex couples of the rights and responsibilities of marriage that they were afforded by virtue of entering into valid marriages elsewhere, and that the Council intends to clearly make available to them here in the District, simply on the basis of their sexual orientation. Because the Referendum would authorize discrimination prohibited by the HRA, it is not a proper subject for referendum, and may not be accepted by the Board.[5]

On June 17, 2009, the proposers of the Referendum filed with the D.C. Superior Court a petition for review of the Board's decision and for a writ in the nature of mandamus to compel the Board to accept the Referendum. The proposers subsequently filed a motion for preliminary injunction to stay the effective date of JAMA until either the end of litigation, in the event that

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3 *See* D.C. Official Code § 46-405.01.

4 *See* D.C. Official Code § 1-206.02(c)(1) (2006).

5 Board Memorandum Opinion and Order, "In Re: Referendum Concerning the Jury And Marriage Amendment Act of 2009, 09-004 (June 15, 2009) ("Board Referendum Order")

they lost on the merits, or thirty (30) days after the Board provided them with an original petition form for signature collection if they won on the merits. The proposers sought this injunctive relief because it was clear that, in light of the litigation, there was insufficient time for the Referendum to complete the entire referendum process prior to JAMA becoming effective.[6]

In its opposition to the proposers' motion for preliminary injunction, the Board argued, *inter alia*, that the proposers would not be irreparably harmed in the absence of a stay of JAMA's effective date because, even if JAMA were enacted, the proposers "could still avail themselves of the initiative process."[7] The Board referenced the legislative history of the Initiative, Referendum, and Recall Charter Amendments Act of 1978 ("the Charter Amendments Act"),[8] which created the right of initiative and referendum. This legislative history clarified that "[s]hould the citizens desire, basically, to reverse a decision of the Council which has already become law, they would then have the ability to initiate through the initiative process the same measure to the ballot," provided the initiative at issue is a proper subject for initiative pursuant to D.C. Official Code § 1-1001.16(b)(1).[9]

On June 30, 2009, the court issued an order denying the proposers' requests for relief, finding that the "Board correctly concluded that the proposed referendum would violate the District of Columbia Human Rights Act[.]"[10] Specifically, the court determined that, because the

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6 JAMA was scheduled to, and did, complete the Congressional review period on July 6, 2009.

7 Respondent District of Columbia Board of Elections and Ethics' Opposition to Petitioners' Motion for Preliminary Injunction ("Board Preliminary Injunction Opposition") at 21, *Jackson v. District of Columbia Bd. of Elections and Ethics*, No. 2009 CA 004350 B slip op. (D.C. Superior Ct. 2009)("*Jackson*").

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

9 *Convention Center Referendum Committee v. District of Columbia Bd. of Elections*, 449 A.2d 889, 910 n.38 (D.C. 1991).

10 *Jackson* at 2.

> 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[, the] measure 'authorizes or would have the effect of authorizing discrimination prohibited under the [DCHRA],' and hence is not a proper subject for referendum.[11]

Moreover, the court agreed that the proposers would not be irreparably harmed if the court did not grant a stay of JAMA's effective date, noting that

> the District's Home Rule Act provides the right of initiative for voters to repeal a law. *Moreover, 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.* Petitioners' proposed referendum has followed the course contemplated for all referenda pursuant to D.C. Code § 1-1001.16—a course successfully charted by others who have sought to submit District legislation to a direct vote. *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.*[12]

On September 1, 2009, Rev. Jackson, Howard Butler, Melvin Dupree, Rev. Anthony Evans, Rev. Walter E. Fauntroy, Robert King, James Silver, and Rev. Dale E. Wafer ("the Proposers") filed the Initiative with the Board.[13] Also on September 1, the Proposers filed a verified statement of contributions with the D.C. Office of Campaign Finance.[14] On September 10, 2009, the Board's Office of the General Counsel ("the General Counsel") transmitted a Notice of Public Hearing and Intent to Review regarding the Initiative ("the Notice") to the Office of Documents and Administrative Issuances for publication in the D.C. Register.[15] On

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11 *Id.* at 8.

12 *Jackson* at 2 (emphasis added).

13 *See* D.C. Official Code § 1-1001.16(a) (2006).

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

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

September 10, the General Counsel also sent the Notice to the Mayor, the Chairman of the D.C. Council, the D.C. Attorney General, and the General Counsel for the Council, inviting them to address the issue of whether the Initiative presents a proper subject for initiative. The Notice was published in the D.C. Register on September 18, 2009.

The Board held the proper subject hearing on October 26, 2009.[16] In response to the Board's invitation to comment on the propriety of the Initiative, the Board received written testimony and heard oral testimony during the hearing from numerous individuals and organizations. The Board also held the record open for additional comments until the close of business on October 28, 2009. In all, the Board heard testimony from 60 witnesses and received and considered comments from approximately 29 individuals and/or organizations.

III. Analysis

A. Introduction

The Board shall refuse to accept an initiative measure if it:

> finds that it is not a proper subject of initiative ... under the terms of Title IV of the District of Columbia Home Rule Act or upon any of the following grounds:
>
> (A) The verified statement of contributions has not been filed pursuant to §§ 1-1102.04 and 1-1102.06;[17]
> (B) The petition is not in the proper form established in subsection (a) of this section;[18]
> (C) The measure authorizes, or would have the effect of authorizing, discrimination

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[16] *See* D.C. Mun. Regs. tit. 3 § 1001.3 (2007).

[17] The verified statement of contributions consists of the statement of organization required by D.C. Official Code § 1-1102.04 and the report of receipts and expenditures required by D.C. Official Code § 1-1102.06.

[18] D.C. Official Code § 1-1001.16 (a) provides that initiative measure proposers must file with the Board "5 printed or typewritten copies of the full text of the measure, a summary statement of not more than 100 words, and a short title of the measure to be proposed in an initiative."

prohibited under Chapter 14 of Title 2;[19] or

(D) The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46.[20] [21]

Based upon the written and oral opinions submitted to the Board regarding the propriety of the Initiative, the Board's own research and consideration of the matter, and the D.C. Superior Court's ruling in *Jackson*, the Board now concludes that the Initiative does not present a proper subject of initiative because it would authorize discrimination prohibited under the Human Rights Act ("HRA").

B. JAMA and the Referendum

As of July 2009, the District now recognizes same-sex marriages entered into and recognized as valid in other jurisdictions. Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire currently permit, or are set to permit, same-sex marriages. From June 2008 until November 2008, California also authorized same-sex marriages. In November of 2008, California voters voted in favor of Proposition 8, an initiative constitutional amendment banning same-sex marriages. However, same-sex marriages performed prior to the enactment of the proposition are still recognized as valid in California. Additionally, Belgium, Canada, the Netherlands, Norway, South Africa, Spain, and Sweden allow same-sex marriages. Accordingly, if a same-sex couple entered into a marriage in any one of the aforementioned jurisdictions during a time when same-sex marriage was recognized as valid in that jurisdiction, that marriage

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[19] Chapter 14 of Title 2 of the D.C. Official Code contains the District of Columbia Human Rights Act. *See* D.C. Official Code § 2-1401.01 *et seq.* (2006 Repl.).

[20] D.C. Official Code § 1-204.46 deals with budgetary acts of the D.C. Council.

[21] D.C. Official Code § 1-1001.16 (b)(1) (2006 Repl.).

is now recognized as valid in the District, provided it is otherwise lawful under District law.[22]

As discussed above, the Board had occasion to consider whether or not the section of JAMA pertaining to same-sex marriages was susceptible to referendum. In its Board Referendum Order, which the D.C. Superior Court affirmed, the Board held that it was not because it represented a legislative effort to abolish in the District distinctions between valid marriages entered into in other jurisdictions on the basis of sexual orientation. As such, JAMA was covered by the HRA, the stated purpose of which is to

> secure an end in the District of Columbia to discrimination for any reason other than individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.[23]

The Board further noted that JAMA comported with "[e]xisting District law [which] requires the recognition of marriages that were valid at their place of celebration,"[24] and that it

> unequivocally declares that the District is a jurisdiction that affords full faith and credit to valid same-sex marriages[;] [25] [that it was] consistent with recent efforts by the Council to eradicate impermissible discrimination on the basis of same-sex discrimination by putting same-sex couples on a par with heterosexual couples in

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22 *See* D.C. Official Code §§ 46-401 – 403. Marriages are not lawful in the District if they are: incestuous or bigamous; have been judicially declared null and void; or contain at least one individual who is not of the age of consent, is unable to consent to marriage due to mental incapacity, and/or has been forced or fraudulently tricked into consenting to the marriage.

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

24 Letter from Brian Flowers, General Counsel, Council of the District of Columbia, to Kenneth J. McGhie, General Council, D.C. Board of Elections and Ethics regarding the Referendum on Jury and Marriage Amendment Act of 2009 (June 9, 2009)("Flowers Letter") at 6 (discussing laws and cases supporting proposition that "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 the marriage is in violation of the 'strong public policy' of the District.").

25 "This amendment makes clear what is already the law: to recognize marriages duly performed in other jurisdictions, including officially sanctioned marriages between persons of the same-sex." Amendment offered by Councilmember Phil Mendelson to Bill 18-10, Disclosure to the United States District Court Act of 2009 (Committee Print) (April 7, 2009).

> numerous provisions of District law[, for *e.g.*, the] Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, a partial aim of which was to "formally acknowledge that families created by same-sex couples are not distinguishable from any other family currently recognized under District law,"[26] [and] ... Council efforts to remove gender-specific references in statutes pertaining to marriage and/or the rights and responsibilities thereof[.][27] [28]

Finally, the Board considered the impact of *Dean v. District of Columbia ("Dean")*[29], a case cited by both proposers and opponents of the Initiative, on the matter. In *Dean*, the D.C. Court of Appeals ruled, *inter alia*, that the practice of denying marriage licenses to same-sex couples did not violate the HRA. The court reasoned that the HRA, though "a powerful, flexible, and far-reaching prohibition against discrimination of many kinds, including sex and sexual orientation,"[30] was not intended to prohibit discrimination of *every* kind. Specifically, it was not intended to "change the ordinary meaning of the word 'marriage'"[31] such that impermissible discrimination occurred when marriage licenses were not granted to same-sex couples along with heterosexual couples.

In reaching this conclusion, the *Dean* court engaged in the analysis it had employed in *National Organization for Women v. Mutual of Omaha Insurance Co., Inc.*[32] In *NOW*, the court

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26 Report of the Committee on Public Safety and the Judiciary on Bill 18-66, the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009 at 9 (Council of the District of Columbia, March 10, 2009).

27 Flowers Letter at 8 (discussing fact that several statutory provisions "have been amended by the Council to remove the gender-specific references as part of a systemic effort to employ gender-neutral language throughout the D.C. Official Code statutes pertaining to marriage and the rights, benefits, and obligations incident to marriage.").

28 Board Referendum Order at 10.

29 653 A.2d 307 (D.C. 1995).

30 *Id.* at 319.

31 *Id.* at 320.

32 531 A.2d 274 (D.C. 1987) ("*NOW*").

considered whether or not the defendant insurer's practice of charging higher health premiums for women violated the HRA. The court noted that

> [i]t is true that it can be argued with some persuasion that the "plain language" of the [HRA] prohibits discrimination based on gender in the services offered by insurance companies. Significantly, however, the [HRA] contains no language purporting explicitly to regulate insurance premium practices. If the Council had intended to effect such a dramatic change in insurance rate-setting practices, it is reasonable to assume that there would have been at least some specific reference to it in the language of the [HRA] or, at least, within its legislative history. Under the circumstances, therefore, we think it appropriate to look to the [HRA's] statutory context and its legislative history to ascertain whether its scope extends to actuarial pricing practices.[33]

The court further observed that, in instances where the legislative history of the HRA is silent as to a particular topic, "courts can sometimes find guidance by reading it in conjunction with other statutes relating to the same subject."[34] Accordingly, the court read the HRA in conjunction with the statute that allowed the gender-based differential in insurance rates that the *NOW* petitioners alleged violated the HRA, and which had existed prior to the HRA, and examined its relationship with the same.

In reaching the conclusion that the insurance practice was not in conflict with the HRA, the court afforded "great weight"[35] to the fact that the District's Corporation Counsel[36] had advised the D.C. Council, pursuant to a request for an opinion on the matter, that life insurance set-backs for women did not violate the HRA, as well as the fact that the Council relied upon this opinion when it subsequently increased life insurance set-backs for women from three years to

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33 *Id.* at 276 (citations omitted).

34 *Id.* at 277.

35 "We add that the Corporation Counsel's interpretation of the [HRA], while not binding on this court, is entitled to great weight." *NOW*, 531 A.2d at 278 (*citing Jordan v. District of Columbia*, 362 A.2d 114, 118 (D.C. 1976).

36 The District's Attorney General was formerly referred to as the Corporation Counsel.

six years. Clearly, the court wrote,

> the Council did not enact the insurance set-back provisions in ignorance of their potential conflict with the [HRA]. ... Rather, it did so only after consulting the Corporation Counsel and expressly considering the potential impact of the [HRA] on those provisions. In such a situation, it is proper to view the later act "as a legislative interpretation of the earlier act ... in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting." ...We should construe the two statutes to be in harmony if reasonably possible. ...To do so requires us to conclude that the Council did not intend the Act to include gender-based insurance pricing within its scope.[37]

Applying the analysis in *NOW*, the court in *Dean* looked at the legislative history of the HRA in conjunction with District laws concerning marriage as they existed when *Dean* was decided. The court determined that same-sex marriage could not possibly be within the scope of the HRA, and would necessarily be missing from its legislative history, because "by legislative definition – as we have seen – 'marriage' requires persons of opposite sexes; there cannot be discrimination against a same-sex marriage if, by independent statutory definition extended to the [HRA], there can be no such thing."[38] The court held that it could not "conclude that the Council ever intended to change the ordinary meaning of the word 'marriage' simply by enacting the [HRA],"[39] and that, therefore, the denial of marriage licenses to same-sex couples did not contravene the HRA.

The decisions in *Dean* and *NOW* are instructive. They both clarify that, in order to determine whether or not a particular form of discrimination is of the kind that the HRA is intended to prohibit, both the Board and the courts should consider the legislative history of the HRA, the current statutory context, and legislative intent. A consideration of these factors

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37 *Id.* at 278 (citations omitted).

38 *Dean*, 653 A.2d at 320.

39 *Id.*

demonstrates that the Initiative is not a proper subject for initiative in the District.

While neither the HRA nor its legislative history explicitly mentions same-sex marriage, it is without question that the HRA must "be read broadly to eliminate the many proscribed forms of discrimination in the District."[40] Since JAMA's enactment, the District recognizes same-sex marriages that have been properly entered into, performed, and recognized by other jurisdictions. This did not exist when *Dean* was decided. Consequently, couples who fall within JAMA's purview are entitled to the same benefits of marriage that are afforded heterosexual married couples, and the denial of these benefits to married couples on the basis of the sexual orientation of the individuals who comprise the couples now constitutes a "proscribed form of discrimination." It is clear that this result is the intent of the Council, which voted 12-1 to pass JAMA. The Initiative seeks to deny recognition to JAMA marriages on the basis of the sexual orientation of the individuals who comprise the couples. As a result, the Board finds, and both the District's Attorney General and the General Counsel for the Council agree, that the Initiative authorizes or would authorize discrimination proscribed by the HRA and is therefore not a proper subject for initiative.

Counsel for the Proposers have argued before the Board that the Board is collaterally estopped from finding that the Initiative is not a proper subject for initiative because the Board argued in the D.C. Superior Court that "[i]f the Court denies the Petitioners' request for injunctive relief and [JAMA] becomes law by way of the expiration of the Congressional review period, they may still avail themselves of the initiative process."[41] This argument is without merit. Stating that a party may avail themselves of the initiative process is not the equivalent of

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40 *Id.*

41 Board Preliminary Injunction Opposition at 21.

asserting that the party is entitled to actually have the initiative appear on the ballot; in addition to meeting all other prerequisites for ballot access, a proposed initiative measure must be a proper subject for initiative or it must be refused by the Board. The Proposers have done exactly what the Board said they may do – they have availed themselves of the initiative process. They submitted a proposed initiative measure that the Board considered in its customary fashion. Because "the Board did not refuse to consider" the Initiative, the Proposers' "right to [initiative] has not been deprived."[42]

IV. Conclusion

Under current law, the District recognizes same-sex marriages validly performed in other jurisdictions[43]. The proposed Initiative seeks to prohibit the District from continuing to recognize these same-sex marriages. The Initiative instructs that "only marriage between a man and a woman is valid or recognized in the District of Columbia."[44] If passed, the Initiative would, in contravention of the HRA, strip same-sex couples of the rights and responsibilities of marriages currently recognized in the District.

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42 *Jackson* at 2.

43 D.C. Code §46-405.01 (added by §3(b) of the Jury and Marriage Amendment Act of 2009).

44 Summary Statement, Initiative.

The District's Initiative, Referendum and Recall Procedures Act requires the Board to refuse to accept referenda and initiatives which violate the HRA. Because the Initiative would authorize discrimination prohibited by the HRA, it is not a proper subject for initiative, and may not be accepted by the Board.[45]

Accordingly, it is hereby:

ORDERED that the Initiative is **RECEIVED BUT NOT ACCEPTED** pursuant to D.C. Official Code § 1-1001.16(b)(2).

November 17, 2009
Date

Errol R. Arthur
Chairman, Board of Elections and Ethics

Charles R. Lowery, Jr.
Member, Board of Elections and Ethics

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[45] The Proposers and other supporters of the Initiative have requested that the Board accept the Initiative and thereby allow voters to be heard on the issue of the recognition of same-sex marriage in the District. As it stated during the proceedings concerning the Referendum, the Board, as an entity responsible for ensuring the integrity of a very critical aspect of the democratic process, is particularly sensitive to issues of fairness and due process. However, the Board must also act in a manner which adheres to its statutory obligations.