No. 10-CV-20

DISTRICT OF COLUMBIA COURT OF APPEALS

HARRY R. JACKSON, JR., *ET AL.*,

Petitioners-Appellants,

v.

DISTRICT OF COLUMBIA BOARD
OF ELECTIONS AND ETHICS,

Respondent-Appellee,

and

DISTRICT OF COLUMBIA,

Intervenor-Appellee.

ON APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

BRIEF OF TREVOR S. BLAKE, II, JEFF KREHELY, AMY HINZE-PIFER, REBECCA HINZE-PIFER, THOMAS F. METZGER, VINCENT N. MICONE, III, REGINALD STANLEY, ROCKY GALLOWAY, D.C. CLERGY UNITED, LAMBDA LEGAL DEFENSE AND EDUCATIONAL FUND INC., AND THE CAMPAIGN FOR ALL D.C. FAMILIES, AS AMICI CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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March 26, 2010

CORPORATE DISCLOSURE STATEMENT

D.C. Clergy United is a non-profit association organized under the laws of the District of Columbia. It has no parent corporation and has issued no stock at least 10 percent of which is held by any publicly held company.

Lambda Legal Defense and Education Fund Inc. ("Lambda Legal") is a non-profit association organized under the laws of New York. It has no parent corporation and has issued no stock at least 10 percent of which is held by any publicly held company.

The Campaign for All D.C. Families is a non-profit association organized under the laws of the District of Columbia. It has no parent corporation and has issued no stock at least 10 percent of which is held by any publicly held company.

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INTEREST OF AMICI CURIAE

Marriage is a "fundamental freedom" and one of the "basic civil rights of man." *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citation omitted). Today, all couples in the District of Columbia enjoy the same right to marry, irrespective of sexual orientation.[1] Appellants seek to undo the Council's legislative acts by initiative in order to treat same-sex couples as inferior *solely* on the basis of their sexual orientation. Such discriminatory treatment is a gross violation of both the law and public policy of the District.

The individuals and organizations that would be directly affected by the proposed initiative – Trevor S. Blake, II, Jeff Krehely, Amy Hinze-Pifer, Rebecca Hinze-Pifer, Thomas F. Metzger, Vincent N. Micone, III, Reginald Stanley, Rocky Galloway, D.C. Clergy United, Lambda Legal, and the Campaign for All D.C. Families – respectfully submit this brief as *amici curiae* supporting Respondent-Appellee District of Columbia Board of Elections and Ethics and Intervenor-Appellee District of Columbia.[2]

The individual amici are District residents lawfully married in the District and other jurisdictions, who currently enjoy all of the same rights, responsibilities, and status associated with marriage. Through the enactment of Jury and Marriage Amendment Act ("JAMA") and the Religious Freedom and Civil Marriage Equality Amendment Act ("Marriage Equality Act") by the duly-elected Council, the District heralded an end to government-sanctioned discrimination against same-sex couples and fulfilled its commitment

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[1] On March 3, 2010, the District of Columbia joined the several jurisdictions and countries that grant marriage to same-sex couples: Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, the Netherlands, Belgium, Spain, South Africa, Canada, Norway, and Sweden.

[2] All parties have consented to the filing of this amicus brief.

to equality. Individual amici and their families are now equal under District law, and they have a strong personal interest in maintaining the District's laws in support of that equality for *all* marriages and *all* families, irrespective of sexual orientation.

D.C. Clergy United is a nonprofit organization committed to the promotion of interfaith dialogue and social justice issues, including marriage equality. With over 100 members, D.C. Clergy United is comprised of faith-based leaders from religious institutions in all of the District's eight wards. D.C. Clergy United's Declaration of Religious Support for Marriage Equality, which affirms that "our faith calls us to affirm marriage equality for loving same-sex couples," has been signed by leaders of the Christian, Jewish, and Islamic traditions.

Lambda Legal is a national organization dedicated to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender ("LGBT") people and people living with HIV through impact litigation and public policy work. Lambda Legal has appeared as counsel in cases around the country seeking the right to marry for same-sex couples. *See, e.g., Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Hernandez v. Robles*, 7 N.Y.3d 338 (2006). Lambda Legal has also appeared in cases challenging unlawful referenda and initiative efforts attempting to deprive LGBT people of their civil rights. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1995) (holding that state constitutional amendment drawing a classification based on sexual orientation to deny legal protections to gay and lesbian individuals violated the U.S. Constitution); *Doe v. Montgomery County Bd. of Elections*, 962 A.2d 342 (Md. 2008) (invalidating referendum petition aimed at overturning a duly enacted transgender non-discrimination law because it failed to comply with Maryland election laws).

The Campaign for All D.C. Families ("the Campaign") is a nonprofit organization, representing a broad coalition of citizens and community organizations who stand with the Council in support of marriage equality for all of the District's residents. This coalition includes the American Civil Liberties Union of the Nation's Capital, the D.C. Coalition of Black LGBT Men and Women, D.C. for Marriage, the D.C. Young Democrats, Dignity Washington, the Family Equality Council, the Gay and Lesbian Activist Alliance, Gay District, the Gertrude Stein Democratic Club, the Human Rights Campaign, the D.C. Chapter of the Log Cabin Republicans, the National Black Justice Coalition, the National Center for Lesbian Rights, the National Center for Transgender Equality, the National Center for Transgender Rights, the National Gay and Lesbian Taskforce, the National LGBT Bar Association, the National Organization for Women, PFLAG National, Pride at Work AFL-CIO, Rainbow Families, Transgender Health Empowerment, and the Washington Council of Lawyers.

All of the amici have a strong interest in preserving equal access to marriage for *all* couples, whether of the same or opposite sex. If successful, the proposed Marriage Initiative of 2009 would deprive same-sex couples of the tangible and intangible benefits that are associated with full and equal participation in the institution of marriage.

Furthermore, amici have a substantial interest in preventing the abuse of the initiative and referendum procedures that may result from the offering of ballot measures that violate the Human Rights Act. As with race and gender, sexual orientation has historically served as a basis for pernicious discrimination. Representing a diverse and often politically unpopular group that may be subject to an unrestricted universe of discriminatory referenda

and initiatives, amici have a very strong interest in ensuring that the initiative and referendum procedures are not used to undermine the protections granted by the Human Rights Act.

Affirming the Superior Court's order in this case is essential to avoid jeopardizing the existing legal recognitions given to the individuals who are presently married in the District of Columbia. It is also essential to protect the rights of those interested in marrying and enjoying the rights and responsibilities of that institution. And affirming the Superior Court's order is essential to safeguard the legal rights and religious freedoms represented by D.C. Clergy United, Lambda Legal, and the Campaign.

SUMMARY OF ARGUMENT

In response to the discriminatory treatment of same-sex couples within the District, the Council enacted JAMA and the Marriage Equality Act to recognize expressly equal access to marriage for all couples, irrespective of sexual orientation. When *Loving* was decided, the District stood at the forefront of equality, providing a jurisdiction in which the Lovings could legally marry even though 16 states outlawed interracial marriages. 388 U.S. at 6 & n.5. Just as the District, and ultimately the Supreme Court, reached the conclusion that anti-miscegenation statutes – no matter how steeped in historical precedent – offended equal protection, so too has the Council today concluded that denying same-sex couples full legal recognition for their marital relationships is wrongful and discriminatory.[3]

Appellants' proposed "Marriage Initiative of 2009" (hereinafter "the Initiative") violates the fundamental tenet of nondiscrimination that has been established in District law for more than 30 years and that has provided equal protection of our laws for all

[3] Had the question of continuing state anti-miscegenation laws been put to voters in every state, it is doubtful that all would have reached the same constitutional outcome as the Supreme Court.

people. While Appellants try to veil their efforts with the vestments of participatory democracy, their unmistakable goal is to use the initiative process to deprive certain District residents of the rights, duties, and protections conferred by law on married couples and their children because of their sexual orientation. Appellants' arguments lack merit.

Because Appellants' claims that the proposed Initiative does not discriminate are not credible, they urge the Court to invalidate long-standing District law that precludes the use of the initiative power to discriminate against minority groups. But the same Council that drafted the Charter Amendments Act also drafted its implementing legislation, which confirms that there is no statutory conflict and that the Human Rights Act limitation on ballot initiatives is valid and proper.

The Superior Court properly upheld the Board's determination that the Initiative contained an improper subject and would violate the Human Rights Act because it would authorize discrimination by "depriv[ing] only same-sex individuals of the legal status, rights, and privileges they enjoy as married persons."[4] A.A. 127; *Jackson v. D.C. Bd. of Elections & Ethics*, No. 2009 CA 008613 B, slip op. at 14 (D.C. Super. Ct. Jan. 14, 2010). The Superior Court correctly found that the proposed Initiative would preclude equal access to marriage, and thus discriminate against District families – solely on the basis of the affected couples' sexual orientations – in contravention of District law and public policy. The Superior Court also correctly found that the "Human Rights Act provision [of the IPA] is

[4] The Superior Court focused its decision on the discriminatory treatment of same-sex couples married out-of-state because the Marriage Equality Act had not yet taken effect. Now that the Marriage Equality Act is law, the proposed Initiative, if successful, would also discriminate against same-sex couples who desire to marry in the District and may discriminate against those already married in the District.

consistent with the [Charter Amendments Act] and does not impermissibly create a new exception to the initiative right." *Id.*

Accordingly, the Superior Court's decision should be affirmed.

ARGUMENT

I. THE INITIATIVE WOULD AUTHORIZE, OR HAVE THE EFFECT OF AUTHORIZING, DISCRIMINATION IN VIOLATION OF THE HUMAN RIGHTS ACT.

The proposed Initiative would deny same-sex couples all of the marital rights, privileges, and responsibilities now established by District law by virtue only of their sexual orientation. Thus, the only effect of the Initiative would be to force the District to discriminate against same-sex couples. Such an initiative is in violation of the Human Rights Act and, therefore, not a proper subject for a ballot measure.

A. The Initiative discriminates on the basis of sexual orientation in contravention of the District's pursuit of equality.

The Marriage Equality Act is the "culmination of the District of Columbia's long pursuit of equality for same-sex couples in the law." Committee Report on Bill 18-482, Religious Freedom and Civil Marriage Equality Amendment Act of 2009, at 1 (D.C. Nov. 10, 2009) ("Committee Report on Marriage Equality Act"). Recognizing that "excluding certain individuals from this institution [of marriage] . . . brands their relationship as somehow inferior," the Council voted overwhelmingly (11-2) in favor of "remed[ying] the exclusion of same-sex couples from the institution of marriage, allowing them to rightfully claim access to this fundamental human right." *Id.* at 2.

The Initiative seeks to undo this important remedial legislation and would give discrimination against same-sex couples the force of law in the District. This would threaten the legal status and rights of married same-sex couples in the District and deprive unmarried same-sex couples of their freedom to marry, "one of the basic civil rights of man,

fundamental to our very existence and survival." *Loving*, 388 U.S. at 12 (citation and internal quotation marks omitted). If adopted, the Initiative would compel the District to discriminate, dividing District residents (and those traveling within the District) into two groups based on sexual orientation for the purpose of marriage.[5]

A state-mandated disparity in the treatment of persons on the basis of sexual orientation "works a real and appreciable harm upon same-sex couples and their children." *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008). It also violates the express purpose of the Human Rights Act; namely, "to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to discrimination by reasons of . . . *sexual orientation* . . . ." D.C. Code § 2-1401.01 (emphasis added). This relegates same-sex couples to a second-class regime of domestic partnerships and brands their relationships and their families with the mark of inferiority. Our nation's historic civil rights battles have been fought to eliminate the stigmatization caused by such group-based classifications.[6]

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[5] *See, e.g.*, D.C. Code § 2-1401.02 ("spouse" included in definition of "family member"); D.C. Code § 32-704 (hospital visitation); D.C. Code § 47-1803.02 (tax benefits to employer benefits in health insurance); D.C. Code § 14-306 (spousal testimonial privilege); D.C. §§ 19-101.03 to -.05 (spousal rights to inheritance).

[6] *See Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."); *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) (explaining that segregation is based on the assumption that "colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens"), *overruled by Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); *Loving*, 388 U.S. at 7 (describing Virginia's anti-miscegenation laws as an "obvious[] . . . endorsement of the doctrine of White Supremacy"); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 & n.10 (1982) (gender discrimination as based on perceptions of women as "innately inferior"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (observing that the desire to (continued…)

In *Brown v. Board of Education*, the Supreme Court found that the "feeling of inferiority" that accompanies such distinct treatment rendered separate institutions "inherently unequal." 347 U.S. 483, 493-95 (1954). Likewise, maintaining separate institutions for District recognition of committed, personal relationships inflicts the same impermissible harm upon gay and lesbian couples. As the Supreme Judicial Court of Massachusetts properly concluded, "[t]he dissimilitude between the terms 'civil marriage' and '[domestic partnership]' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status." *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004) (rejecting the adequacy of offering same-sex couples a separate "civil union" institution).

The deep historical and social significance associated with marriage further enhances this stigmatization. As described by the Supreme Judicial Court of Massachusetts:

> Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. . . . Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.

Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954-55 (Mass. 2003). The categorical exclusion of same-sex couples from this esteemed civil institution because of their sexual orientation sanctions and perpetuates an animus against these couples and their families. In the District, the Council has remedied this discrimination and erased this mark of inferiority. The Initiative seeks to thrust same-sex couples back to a status of second-class citizenship, a

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separate persons with mental disabilities was rooted in irrational prejudices against the group).

status that cannot be squared with well-established case law holding that the Human Rights Act is a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds." *Executive Sandwich Shoppe, Inc. v. Carr Realty, Corp.*, 749 A.2d 724, 732 (D.C. 2000) (citation omitted).

Appellants contend (at 33) that their Initiative does not discriminate because "a man who considers himself 'gay' and a female who considers herself a 'lesbian' *can* obtain a marriage license, even though they are also not 'sexually oriented' towards each other." (emphasis in original.) This rationale further marginalizes same-sex relationships and echoes the sophistry of the justifications formerly advanced in defense of anti-miscegenation statutes. *See Loving*, 388 U.S. at 8 ("[T]he State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race."). Appellants' argument that their Initiative is non-discriminatory defies common sense.[7]

B. The *Dean* case provides no support for discriminatory ballot measures.

Relying on *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995), Appellants argue (at 22-24) that the Initiative does not implicate the Human Rights Act because the Council did not intend the Act to regulate the marital relationship. This argument misconstrues *Dean* and misinterprets the broad scope of the Human Rights Act.

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[7] Even if the Court accepted Appellants strained contention (at 32) that the proposed Initiative is "facially neutral" with respect to sexual orientation, it nonetheless violates the Human Rights Act because it "bear[s] disproportionately on a protect class and [is] not independent justified for some nondiscriminatory reason." *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 29 (D.C. 1987) (en banc).

1. *Dean* addressed a different question of law.

In *Dean*, a panel of this Court faced a very different question concerning whether, in 1990, a court clerk violated the Human Rights Act by refusing to grant a marriage license to a same-sex couple. *See* 653 A.2d at 320. In *Dean*, the court concluded that the Human Rights Act did not require the District to grant a marriage license to a same-sex couple after finding that the Council did not intend for the Human Rights Act to change the discriminatory practice of limiting marriage to opposite-sex couples. *Id.* at 319-20. Because the law expressly provided only for opposite-sex marriages at the time the Human Rights Act was enacted, the court concluded that the Council did not intend to end that discrimination "simply by enacting the Human Rights Act." *Id.* at 320.

Through JAMA and the Marriage Equality Act, the Council has now clearly ended the discriminatory practice of limiting marriage to opposite-sex couples. Same-sex couples today are in an entirely different legal position than they were in 1995: they currently enjoy *all* of the same legal and social rights, benefits, and privileges of marriage in the District. Unlike in *Dean*, this Court is not presented with the question of whether the Human Rights Act alone mandates the recognition of marriages of same-sex couples because District law now recognizes the marriages of all sex couples. Thus, *Dean* offers no support to Appellants' contention that rescinding a government benefit on the basis of sexual orientation is consistent with the Human Rights Act. Simply put, the Human Rights Act makes explicit that such discriminatory treatment on the basis of sexual orientation is prohibited, and the Council's legislative acts over the last 15 years have made clear that the kind of discrimination addressed in *Dean* is no longer permissible.

2. Changes over the last 15 years have transformed the legal landscape regarding marriages for same-sex couples.

Appellants mistakenly focus on the state of the law in 1995 when *Dean* was decided, ignoring the clear changes in the law and the Council's unequivocal intention today that same-sex marriages be granted protection and equal footing under the law. They argue (at 25) that "the 'common understanding' and 'legislative definition' of marriage" that existed at the time the Council passed the Human Rights Act supports Appellants' interpretation of the Human Rights Act.[8] But Appellants' all but ignore the changes in law and understanding over the past 15 years.

Today, nearly all of the definitional sources cited in *Dean* now include a union of two members of the same sex within the definition of marriage. With the passage of JAMA and the Marriage Equality Act, the Council has thus articulated a clear intent to eliminate discrimination within District law: "While the Committee believes same-sex marriage was authorized by the law in 1995 when *Dean* was decided, those factors relied upon by the court in *Dean* have since been methodically, and purposefully, reversed by the Council." Committee Report on Marriage Equality Act at 7. In the time since *Dean*, the Council has expressly expanded District law to encompass same-sex relationships, thereby reversing the very "definitional source" relied on by Appellants and the court in *Dean*.[9]

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[8] Appellants' assertion that "marriage" is not protected under the Human Rights Act is overbroad and baseless. A prohibition on marriage between persons of certain races or socio-economic classes would clearly be deemed impermissible discrimination under the Human Rights Act.

[9] In addition to the enactment of JAMA and the Marriage Equality Act, the Council has also amended those portions of the D.C. Code cited in *Dean* for the proposition that the law limited marriage to opposite-sex couples, *e.g.*, by making the District's consanguinity laws universally gender-neutral. *See, e.g.*, D.C. Code §§ 16-901 (adding definition of "domestic partner" and "domestic partnership" to definitions of divorce, and substituting "spouse or (continued…)

Dean's reliance on decisions from other state appellate courts and dictionary definitions is also no longer persuasive. During the past several years, a number of states have found (legislatively or judicially) that human rights and equal protection under the law compel the conclusion that same-sex couples cannot be excluded from the rights and recognition of civil marriage.[10] Likewise, the dictionary definitions cited in *Dean* have changed. *See, e.g., Merriam-Webster's Collegiate Dictionary* 761 (11th ed. 2003) (including same-sex relationships in the definition of marriage); *Black's Law Dictionary* 994 (8th ed. 2004) (same).

To eliminate any doubt that the Human Rights Act extended its nondiscrimination principles to all District government activities, the Council in 2002 amended the Act to include any "service" and "benefit" provided by any District

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domestic partner" for "husband and wife" in parallel provision § 14-306), 16-911 (substituting the "spouse or domestic partner" for "husband or wife" in pendent lite relief provisions), 16-912 (repealing provisions related to enforcement of alimony, including references to "husband" and "wife"), 16-913 (substitution "when divorce or legal separation is granted or when a termination of a domestic partnership becomes effective" for "when a divorce is granted on the application of the husband or the wife"), 16-916 (substitution "spouse or domestic partner" for "husband or wife" in maintenance provisions), 46-601 (substituting "spouse or domestic partner" for "husband or wife" for the purposes of enumerated property rights), and 46-718 (repealing provision for "husband and wife as witnesses").

[10] *See* Vt. Stat. Ann. tit. 15, § 8 ("Marriage is the legally recognized union of two people."); *Varnum*, 763 N.W.2d at 907 ("Consequently, the language in Iowa Code section 595.2 limiting civil marriage to a man and a woman must be stricken from the statute, and the remaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage."); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008) ("Like these once prevalent views, our conventional understanding of marriage must yield to a more contemporary appreciation of the rights entitled to constitutional protection. Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same-sex partner of their choice."); *Goodridge*, 798 N.E.2d at 969 ("We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.").

governmental agency. This language expanded the scope of the Human Rights Act, which at the time of *Dean*, covered only public accommodations. *See* D.C. Code § 2-1402.73. Surely, the granting of marriage licenses is included among the "benefits" protected under the Human Rights Act. *See Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 184 (D.C. Cir. 1996) (recognizing the "benefits" conferred by a government license). Appellants ignore this amendment to the Human Rights Act, and instead rely on the statutory language existing *before* the Council amended the marriage laws and the Human Rights Act.

In sum, 15 years have passed since *Dean*, and the "common understanding" of the word "marriage" has evolved as have the social understandings and legal implications of being gay, lesbian, bisexual, and transgender.[11] Likewise, the Council's intent with respect to marriage for same-sex couples has evolved significantly since 1995, and the Council has repeatedly underscored its support of the right of all individuals to marry.

II. THE IPA'S RESTRICTION ON DISCRIMINATORY BALLOT MEASURES IS A PROPER AND REASONABLE EXERCISE OF THE COUNCIL'S LEGISLATIVE POWER.

On appeal, Appellants suggest (at 15) that the inquiry is whether the Charter Amendments Act grants the Council the authority to preclude initiatives that violate the Human Rights Act; they have the legal analysis backward. The correct question before the Court is whether the Charter Amendments Act *restricts* the Council's plenary legislative

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[11] Shortly after *Dean* was decided, the Supreme Court struck down an initiative passed by Colorado voters which had the effect of excluding gay men, lesbians and bisexuals from the political process. *See Romer v. Evans*, 517 U.S. 620 (1996). A few years later, the Supreme Court struck down a Texas sodomy statute and overturned its holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986), concluding the "right to liberty under the Due Process Clause gives [gay men, lesbians, and bisexuals] the full right to engage in their conduct without intervention of the government." *Lawrence*, 539 U.S. at 578.

authority, including the authority to ensure that any initiatives are consistent with long-standing human rights protections in the District of Columbia.

A. The Council has the authority to restrict initiatives that authorize discrimination against minorities.

The Council's legislative power and supremacy were left unaltered by the Council's grant of an initiative right to District voters. The Council's decision to prevent the initiative process from being used to abrogate the protections of the Human Rights Act is well within the Council's legislative discretion, and nothing in the Charter Amendments Act prohibits the Council from exercising its discretion in this way. Appellants' attempt to elevate the initiative process on an equal legislative footing in every respect with the Council is unsupported by the text of the Charter Amendments Act and the case law.

1. The Human Rights Act restriction is consistent with the purpose of the Charter Amendments Act.

Analysis of the Council's authority begins with the Home Rule Act:

> Subject to the limitations specified in §§ 1-206.01 to 1-206.04, *the legislative power granted to the District by this chapter is vested in and shall be exercised by the Council* in accordance with this chapter.

D.C. Code § 1-204.04 (emphasis added). The Council – and the Council alone – is *vested* with legislative power under the Home Rule Act. In contrast, the Charter Amendments Act provides only a blueprint of the initiative process and is not self-executing. *See Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 871, 872-73 (D.C. 1980).

Although the Charter Amendments Act defines a framework by which legislative acts may be directly accomplished by voters, no provision of the Charter Amendments Act expressly vests or affirmatively reserves legislative power with voters to

the same extent as granted to the Council by the Home Rule Act. At most the Charter Amendments Act provides the following definition of "initiative":

> 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(a). It then instructs the Council to enact "such acts as are necessary to carry out the purpose of this subpart within 180 days of the effective date of this subpart." *Id.* § 1-204.107 (emphasis added). In accordance with this instruction, the Council passed the Initiative, Referendum, and Recall Procedures Act of 1978 ("IPA"), which outlined the contours of the initiative and referendum process and prohibited ballot measures that would violate the Human Rights Act.

The Charter Amendments Act's delegation of authority to the Council to pass implementing legislation is constrained only by the requirement that such legislation must be consistent with "the purpose" of the Act. *See* D.C. Code § 1-204.107. Nothing in the Act limits the Council to establishing only "procedural" restrictions. The nondiscrimination requirement presents no conflict because it is entirely consistent with the Charter Amendments Act and the purpose of the statutory right.[12] Importantly, over the last 30 years, neither Congress nor the voters of the District have ever challenged the IPA's Human Rights Act restriction.

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[12] Of course, Council legislation that eliminates or contravenes the initiative, referendum, or recall powers would be inconsistent with the purpose of the Act. The present appeal, however, does not require the Court to delineate that line between such categorical restrictions and those within the Council's authority.

The degree and type of statutory inconsistency necessary to establish an actual conflict between the Charter Amendments Act and the IPA is exemplified by *Price v. District of Columbia Board of Elections & Ethics*, 645 A.2d 594 (D.C. 1994), the *only* case where this Court has ever found a conflict between the Charter Amendments Act and the IPA. In *Price*, this Court found that a proposed ballot initiative would meet the minimum number of signatures requirement under the express terms of the Charter Amendments Act, but would not meet the signature requirement under the terms of the IPA. Accordingly, the Court found a direct conflict between the language of the IPA and the Charter Amendments Act because each required a different number of signatures in support of the initiative. *Id.* at 598. *Price* stands for the unremarkable – and uncontested – proposition that only where it is impossible to give effect to both the express provisions of the Charter Amendments Act and the express provisions of the IPA, the former takes precedence. *Id.* Here, the Court may give effect to *both* the provisions of the Charter Amendments Act and the IPA by concluding that a voter proposed initiative may not be used to vitiate the non-discrimination protections conferred by the District's Human Rights Act.

Moreover, no language in the Charter Amendments Act expressly grants voters the unfettered right to propose "any law." While the Charter Amendments Act provides a framework for voters to participate directly in the legislative process, no provision of the Charter Amendments Act expressly deprives the Council of its legislative supremacy or limits its authority to impose subject matter restrictions on ballot measures.

In fact, the Charter Amendments Act "impose[s] only a single express limitation on the Council's legislative powers." *Atchison v. District of Columbia*, 585 A.2d 150, 155 (D.C. 1991). That provision precludes the Council from taking legislative action

for a period for 365 days on a matter where voters, through a *referendum*, rejected permanent legislation passed by the Council. *Id.* (citing D.C. Code §§ 1-281(b), -284). This Court refused to impute that limitation to the Council's authority with respect to *initiatives*, opining that the Council's "plenary legislative power . . . includes the authority to repeal existing legislation, whether or not derived from an initiative." *Id.* Where "the Charter Amendments Act intended to shield citizen legislative action" from the Council's legislative purview, "it knew expressly how to do so." *Id.* Here, no such intent is evinced.[13]

The Council imposes few restrictions on the power of initiative, including the requirement that ballot measures not perpetrate discrimination in violation of the District's Human Rights Act. This restriction against discrimination preserves the proper uses of the initiative and referendum power and prevents majoritarian abuses.

2. The IPA's legislative history confirms that the Human Rights Act restriction is consistent with the legislative purpose of the Charter Amendments Act.

In this case, the exercise of ascertaining whether the IPA's nondiscrimination provision comports with the Charter Amendments Act is simplified by the unique legislative history: ten of the thirteen members who served on the Council in 1978 during the enactment of the Charter Amendments Act also served on the Council in the subsequent year when the Council voted unanimously in favor of the IPA (with the Human Rights Act provision). In

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[13] The initiative right granted by the Charter Amendments Act stands in stark contrast to the grant of broad recall rights provided by the same legislation. The Charter Amendments Act expressly grants voters the right to recall "*[a]ny* elected officer of the District of Columbia government." D.C. Code § 1-204.112 (emphasis added). This demonstrates that where the drafters of the Charter Amendments sought to put the direct participatory rights given to voters beyond the reach of the Council to restrict further, they knew what language to use. No similar statutory authority to propose "any laws" is expressly granted for initiatives.

fact, much of the original text of the IPA, including the Human Rights Act restriction, was drafted and debated during the 1978 Council session – the same session the Charter Amendments Act was passed. *See* Committee Report on Bill 2-317, Initiative, Referendum and Recall Procedures Act of 1978 (D.C., May 3, 1978) ("Committee Report on IPA").

The Council that drafted both the Charter Amendments Act and the IPA was acutely aware of the risks associated with the initiative and referendum power and was strongly committed to incorporating the Human Rights Act protections into the IPA. As the Council recognized, the civil rights of minorities are vulnerable to harms from abuse of the initiative process. The Council specifically considered the risk that the initiative power would be abused, explained the necessity for the IPA nondiscrimination restriction, and made clear that the IPA is consistent with the Charter Amendments Act:

> The . . . initiative process may not be used to place the Government in the posture of affirmatively condoning discrimination. Thus, when the Government's official position of neutrality toward protected minority classifications (such as those identified in the Human Rights Act of 1977) is removed and a policy of discrimination is imposed, such measures will fail. Implicit restrictions, not expressly contained in an "initiative charter" are thus supportable. That restriction has been implied by the Courts. Under applicable case law, it is clear that a community cannot by initiative authorize discrimination as a matter of government policy. *See Reitman v. Mulkey*, [387 U.S. 369 (1967)]; *Otey v. Common Council of City of Milwaukee*, 281 F. Supp. 264 (E.D. Wis. 1968); *Holmes v. Ledbetter*, 294 F. Supp. 991 (E.D. Mich. 1968).

Committee Report on IPA, at 9. This discussion occurred only a few months after the same Council enacted the Charter Amendments Act and authorized itself to enact appropriate legislation to carry out its purpose. As Judge Macaluso observed, "[t]he most reasonable interpretation of events is that Council Period 2 knew what it intended when it directed itself 'to adopt such acts as are necessary to carry out the purpose of this subpart within 180 days'

and that this intention included protection of minorities from the possibility of discriminatory initiatives." A.A. 126; *Jackson*, slip op. at 13.[14]

For more than thirty years, District of Columbia courts have respected and applied this Human Rights Act restriction to the initiative and referendum process. For example, in *Hessey v. Burden*, 615 A.2d 562, 579-80 (D.C. 1992), this Court affirmed the Board's determination that a ballot measure stated a proper subject matter because holders of income-producing properties were not a protected class and the initiative also would not result in improper discrimination against such a class. *See also Comm. for Voluntary Prayer v. Wimberly*, 704 A.2d 1199, 1203 n.9 (D.C. 1997) (noting availability of Human Rights Act restriction as argument for initiative's invalidity, but deciding on alternative grounds). Similarly, courts have long recognized that voters may not use ballot measures as a tool to authorize such discrimination. *See Reitman v. Mulkey*, 387 U.S. 369, 378-81 (1967) (prohibiting the use of the initiative process to place the Government in a position of affirmatively condoning discrimination).[15]

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[14] At the very same time that the Council drafted and adopted the Charter Amendments Act, a civil rights battle erupted in Miami-Dade County, Florida, over basic non-discrimination protections for the LGBT community. This battle showed the nation the discriminatory power of ballot measures. On January 18, 1977, the Dade County Commission amended its human rights ordinance to prohibit discrimination based on sexual orientation. Bruce J. Winick, *The Dade County Human Rights Ordinance of 1977: Testimony Revisited in Commemoration of Its Twenty-Fifth Anniversary*, 11 Law & Sexuality 1, 3 (2002). This protection was short-lived. Opponents of basic protections for the LGBT community, led by singer Anita Bryant, "mounted an extensive campaign in opposition to the ordinance, . . . gathering sufficient signatures to force a county referendum on the repeal of the ordinance." *Id.* In June 1977, the referendum passed and effectively authorized discrimination against the LGBT people living in Dade County, Florida.

[15] *See also Hunted v. Erickson*, 393 U.S. 385, 392 (1969) ("[I]nsisting a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth (continued…)

Appellants would effectively undo these reasonable and important protections not only on the basis of a person's sexual orientation, but also for all other classes protected by long-established District law, including: race, color, religion, national origin, sex, age, marital status, personal appearance, family responsibilities, matriculation, political affiliation, physical handicap, source of income, and place of residence or business.[16] D.C. Code § 2-1401.101. To the extent certain of these classifications do not fall within the protections of the federal Constitution or other federal law, Appellants' argument would allow voters to eviscerate the Human Rights Act's protections. Thus, under Appellants' reading of the Charter Amendments Act, ballot measures motivated by animus and that discriminate on the basis of sexual orientation or any other protected classification would now be welcome in the District. Such a strained reading of the Charter Amendments Act is illogical and fundamentally at odds with the Council's broad legislative authority and the District's deep commitment to equality, as exemplified in its Human Rights Act.

3. The Human Rights Act restriction is reasonable.

Moreover, the Human Rights Act exclusion is eminently reasonable in light of the District's fundamental premise of equality for all. From the founding fathers to the

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Amendment."); *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997) ("The state retains the authority to interpret [the] scope and availability of any state-conferred right or interest.") (alteration in original; internal citations and quotation marks omitted); *Gibson v. Firestone*, 741 F.2d 1268, 1273 (11th Cir. 1984) (stating that the initiative and referendum rights "derived from wholly state-created procedures by which issues that might otherwise be considered by elected representatives may be put to the voting populace. The state, having created such procedures, retains the authority to interpret its scope and availability.").

[16] Appellants are not without democratic remedies to their political complaints. To the extent Appellants believe that the Council has gone too far in granting equal rights to same-sex couples, it is ultimately the electoral process or the recall right that "can be relied on to curb the defiance of the popular will." *Atchison*, 585 A.2d at 156. But, Appellants should not be permitted to thwart the legislative process by restricting the Council's authority to limit initiatives that would violate the Human Rights Act if adopted.

scholars of today, there is clear recognition of the potential for majoritarian abuse of unpopular minorities' rights through the popular vote.

In 1787, James Madison warned of the dangers inherent in ruling by plebiscite: "A common passion or interest will, in almost every case, be felt by the majority of the whole; . . . and there is nothing to check the inducements to sacrifice the weaker party . . . ." *Federalist No. 10*. Madison further explained,

> Wherever the real power in a Government lies, there is the danger of oppression. In our Governments, the real power lies in the majority of the Community, and *the invasion of private rights is chiefly to be apprehended* not from acts of Government contrary to the sense of its constituents, but *from acts in which the Government is the mere instrument of the major number of the Constituents*. This is a truth of great importance, but not yet sufficiently attended to. . . .

5 Writings of James Madison 272 (Hunt ed. 1904) (emphasis added).

Contemporaneously with the passing of the Charter Amendments Act and the drafting of the IPA, Professor Derrick Bell (then of Harvard Law School) noted that "Madison's eighteenth-century fears became nineteenth-[and twentieth-] century reality." Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 Wash. L. Rev. 1, 16 (1978). "[T]he growing reliance on the referendum and initiative . . . creates a crisis for the rights of racial and other discrete minorities." *Id.* at 2. Through "the privacy of the voting booth," voters could enact laws that elected officials could not publicly support because of social pressures. *Id.* at 14. By allowing the codification of "the voters' racial beliefs and fears," the ballot measure became "a most effective facilitator of that bias,

discrimination, and prejudice which has marred American democracy from its earliest days." *Id.* at 14-15.[17]

Given the potential for ballot measure abuse, the Council reasonably concluded that protecting minority rights from majoritarian abuse is fully consistent with the purpose of the Charter Amendments Act and the extension of an initiative right to District voters.

B. Appellants' argument is inconsistent with the Council's plenary authority over election matters.

The Council's specific authority with respect to elections, as outlined in Section 752 of the Home Rule Act, independently supports the propriety of the IPA subject matter restriction. *See* D.C. Code § 1-207.52. This contradicts Appellants' assertion that the Council lacks the authority to impose reasonable restrictions on the initiative and referendum process, because the express terms of Section 752 grant the Council broad authority with respect to all matters relating to elections: "*Notwithstanding any other provision of this chapter 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 (emphasis added). The Council expressly relied upon this authority when it enacted the IPA and the subject matter restriction contained therein. Committee Report on IPA, at 11-12. Appellants have no response to this argument and authority.

The scope of Section 752 is both clear and broad. With respect to "matters involving or relating to elections," the Council has authority to pass "any act or resolution."

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[17] S*ee also* David Butler & Austin Ranney, Referendums: A Comparative Study of Practice and Theory 36 (AEI Press 1978) ("It is no accident . . . that in many American states in recent years the legislatures have tended to adopt laws that prohibit discrimination against blacks and women, while referendums have tended to overturn them.").

Given that the subject matter of a proposed ballot initiative is a matter that has a connection with or refers to an election, it falls within the purview of Section 752. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-98 (1983) ("[L]aw 'relates to' the [subject matter], in the normal sense of the phrase, if it has a connection with or reference to [the subject matter]."). In the absence of good reason to suggest that Congress intended Section 752 to mean something more circumscribed, this Court "must give effect to this plain language." *Id.* at 97. The legislative history reveals that although Congress had initially contemplated several limitations on this authority over elections, Congress ultimately chose to give the Council unrestricted authority over all matters involving or relating to elections. *See* S. 1435, 93rd Cong. § 802 (1973); S. 1435, 93rd Cong. § 752 (as amended by the House on Oct. 10, 1973).

As the Council retains plenary authority to enact any laws that involve or relate to elections, its decision to preclude ballot measures that would authorize, or have the effect of authorizing, discrimination was proper. The legislative history behind the IPA confirms that the Council sought to exercise its authority under Section 752 to ensure that ballot measures did not run afoul of the civil rights protections afforded by the Human Rights Act. Committee Report on IPA, at 11-12.

CONCLUSION

Appellants ignore – and would have this Court obliterate – the basic principles of nondiscrimination, equality, and liberty that inform the District's laws. In challenging the IPA, the Appellants seek to eliminate this important provision and allow discriminatory ballot initiatives to come to a vote. Appellants endorse a view contrary to fundamental principles of equality – having identified discrimination against a minority group, it is the responsibility of the Council, and the mandate of the Human Rights Act, that such inequality be rectified. The Council has done so here.

Appellants' arguments offend the basic premise of the Human Rights Act; moreover, their underlying assumption that the initiative power may be wielded as a weapon to undermine the District's protections of its residents against discriminatory denial of a fundamental right lacks support in the law. Here, the Council's explicit codification of this long-standing judicial principle was well within the scope of its legislative prerogative.

For the reasons set forth herein and in the briefs filed by the Board of Elections and the District of Columbia, the Superior Court's decision should be affirmed.

Respectfully submitted,

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Dated: March 26, 2010

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I hereby certify that on March 26, 2010, I caused a true and correct copy of the brief of *amici curiae* to be served by Federal Express (overnight delivery) upon the following counsel:

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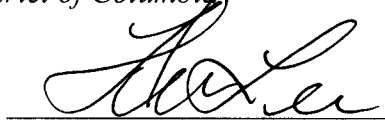

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