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**pending pro hac vice admission*

**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 Referendum Concerning the)
Jury and Marriage Act of 2009,)

910 M Street, N.W. #630)
Washington, DC 20001)

WALTER E. FAUNTROY, a registered,)
qualified voter in the District of Columbia and)
proponent of the Referendum Concerning the)
Jury and Marriage Act of 2009,)

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

DOCKET NO. _____

PATRICIA JOHNSON, a registered, qualified)
voter in the District of Columbia and)
proponent of the Referendum Concerning the)
Jury and Marriage Act of 2009,)

18 Quincy Place, N.W.)
Washington, D.C. 20001)

MELVIN DUPREE, a registered, qualified)

voter in the District of Columbia and)
proponent of the Referendum Concerning the)
Jury and Marriage Act of 2009,)
)

1904 Naylor Rd. S.E.)
Washington, D.C. 20020)
)

SANDRA B. HARRIS; a registered, qualified)
voter in the District of Columbia and)
proponent of the Referendum Concerning the)
Jury and Marriage Act of 2009,)
)

3202 Vista St. N.E.)
Washington, D.C. 20018)
)

BOBBY PERKINS, SR.; a registered,)
qualified voter in the District of Columbia and)
proponent of the Referendum Concerning the)
Jury and Marriage Act of 2009,)
)

4712 Fort Totten Dr. N.E.)
Washington,DC. 20011-7508)
)

and DALE E. WAFER, a registered, qualified)
voter in the District of Columbia and)
proponent of the Referendum Concerning the)
Jury and Marriage Act of 2009,)
)

4021 19th Street N.E.)
Washington, DC 20018)
)

Petitioners,)
)

v.)
)

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

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., Walter E. Fauntroy, Patricia Johnson, Melvin Dupree, Sandra B. Harris, Bobby Perkins, Sr., and Dale E. Wafer (collectively the “Proponents”) petition this Court, pursuant to D.C. Code § 1-1001.16(b)(3), for review of the June 15, 2009, decision of the District of Columbia Board of Elections and Ethics (the “Board”) refusing to accept the Referendum Concerning the Jury and Marriage Amendment Act of 2009 (the “Referendum”), for a declaration that the Referendum does not violate the District of Columbia Human Rights Act of 1977, D.C. Code § 2-1401.01 *et seq.* (“DC-HRA”), and for a writ in the nature of mandamus compelling the Board to accept the Referendum. A true and correct copy of the decision from the Board dated June 15, 2009, is attached to this petition.

INTRODUCTION

1. The Referendum provides the voters of the District of Columbia (“D.C.”) the opportunity to decide whether the District should hold to its longstanding definition of marriage as being a legal union between a man and a woman rather than deferring to the laws of the states or foreign countries regarding the definition of marriage.

2. D.C. has always maintained the understanding that marriage “is inherently a male-female relationship.” *Dean v. Dist. of Columbia*, 653 A.2d 307, 313 (D.C. 1995). The people of D.C. have a right to protect the definition despite the acts of the Council of the District of Columbia (“D.C. Council”).

3. D.C. is one of twenty-four jurisdictions in the United States providing citizens a right of referendum. The right of referendum lets the voters of D.C. place a law passed by the D.C. Council on hold and insist that the law only go into effect if it is approved by a majority of the District’s voters. The electorate may “voice directly its sentiments and make that sentiment

public policy.” Julius Hobson, Council of the District of Columbia, Memorandum on the Initiative and Referendum Act, at 1, 3 (Jan. 3, 1977). It is a right that the D.C. Court of Appeals has insisted should be “liberally construed.” *Convention Ctr. Referendum Comm. v. Dist. of Columbia Bd. of Elections & Ethics*, 441 A.2d 889, 913 (D.C. 1981).

4. The D.C. Council passed The Jury and Marriage Amendment Act of 2009, No. 18-0070, on May 5, 2009 (the “Act”). The Act would legally recognize same-sex “marriages” entered into in the states or in foreign countries as valid under federal law in D.C.

5. The Proponents filed the Referendum with the Board on May 27, 2009. The Board held a public hearing on June 10, 2009, to determine whether the Referendum presented a proper subject for referendum. Five days later, June 15, 2009, the Board rejected the Referendum on the basis that it “authorizes, or would have the effect of authorizing, discrimination” in violation of the District of Columbia Human Rights Act of 1977, D.C. Code § 2-1401.01 *et seq.* (“DC-HRA”).

6. The Proponents now petition this Court, pursuant to D.C. Code § 1-1001.16(b)(3), for review of the Board’s decision, for a declaration that the Referendum does not violate the DC-HRA, and for a writ in the nature of mandamus compelling the Board to accept the Referendum.

7. The Board’s determination that the Referendum violates the DC-HRA is erroneous because the determination directly contradicts the D.C. Court of Appeals’ decision in *Dean*, 653 A.2d 307, holding that the current D.C. law limiting marriage to opposite-sex couples does *not* violate the DC-HRA.

JURISDICTION

8. 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.”

9. This Court has personal jurisdiction over the Board.

THE PARTIES

10. Petitioner Harry R. Jackson, Jr. is a qualified registered voter in D.C. and an official proponent of the Referendum. 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 Referendum does not violate the DC-HRA, and a writ in the nature of mandamus compelling the Board to accept the Referendum.

11. Petitioner Walter E. Fauntroy is a qualified registered voter in D.C. and an official proponent of the Referendum. 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 Referendum does not violate the DC-HRA, and a writ in the nature of mandamus compelling the Board to accept the Referendum.

12. Petitioner Patricia Johnson is a qualified registered voter in D.C. and an official proponent of the Referendum. She has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board’s decision, a declaration that the Referendum does not violate the DC-HRA, and a writ in the nature of mandamus compelling the Board to accept the Referendum.

13. Petitioner Melvin Dupree is a qualified registered voter in D.C. and an official proponent of the Referendum. 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 Referendum does not violate the DC-HRA, and a writ in the nature of mandamus compelling the Board to accept the Referendum.

14. Petitioner Sandra B. Harris is a qualified registered voter in D.C. and an official proponent of the Referendum. She has standing pursuant to D.C. Code § 1-1001.16(b)(3) to seek review of the Board’s decision, a declaration that the Referendum does not violate the DC-HRA, and a writ in the nature of mandamus compelling the Board to accept the Referendum.

15. Petitioner Bobby Perkins, Sr. is a qualified registered voter in D.C. and an official proponent of the Referendum. 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 Referendum does not violate the DC-HRA, and a writ in the nature of mandamus compelling the Board to accept the Referendum.

16. Petitioner Dale E. Wafer is a qualified registered voter in D.C. and an official proponent of the Referendum. 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 Referendum does not violate the DC-HRA, and a writ in the nature of mandamus compelling the Board to accept the Referendum.

17. 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, Errol R. Arthur and Charles Lowery Jr. are currently the only sitting members. The Board’s duties include overseeing the initiative and referendum process. D.C. Code § 1001.16. The Board is specifically tasked with determining whether a proposed referendum presents a proper subject for the referendum process. D.C. Code § 1001.16(b)(1).

18. Except as provided in the D.C. Government Comprehensive Merit Personnel Act of 1978, D.C. Code § 1-601.01 *et seq.*, the Board, in the performance of its duties, is not “subject to the direction of any nonjudicial officer of the District.” D.C. Code § 1-1001.06(a).

THE REFERENDUM PROCESS

19. The right of referendum makes it possible for five percent of the registered voters in D.C. to “suspend acts of the Council of the District of Columbia (except emergency acts, acts levying taxes, or acts appropriating funds for the general operation budget) until such acts have been presented to the registered qualified electors of the District of Columbia for their approval or rejection.” D.C. Code § 1-204.101(b).

20. If a majority of the voters participating in a referendum disapprove of an act (or portion of an act), then the act is deemed rejected and “no action may be taken by the Council of the District of Columbia with regard to the matter presented at referendum for the 365 days following the date of the [Board’s] certification of the vote concerning the referendum.” D.C. Code § 1-204.104.

21. The referendum process begins with a voter or voters filing a referendum measure with the Board. The measure must include a short title and a summary statement of not more than 100 words. It also must designate “the act or part thereof on which a referendum is desired.” D.C. Code § 1-1001.16(a)(1).

22. Upon receipt of the referendum measure, the Board undertakes a review to determine whether the measure presents a proper subject for a referendum 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”). Part of the determination rests on whether the measure “authorizes, or would have the effect of authorizing, discrimination” prohibited by DC-HRA.

23. If the Board refuses to accept a proposed referendum, 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 referendum 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)

24. If a referendum 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).

25. 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 referendum petition to the Board. D.C. Code § 1-1001.16(g)-(i).

26. Before accepting a referendum 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).

27. Upon accepting the submitted referendum petition, the Board must notify the President of the Senate and the Speaker of the House, who are then to return the act (or part thereof) to the Chairman of the D.C. Council. “No further action may be taken upon such act

until after a referendum election is held” or after the Board determines that the petition does not in fact contain the requisite number of signatures. D.C. Code §§ 1-1001.16(m), 1-204.102(b)(1).

28. The referendum process applies only to acts that have been passed by the D.C. Council but have not yet taken effect following the required period of congressional review. Once an act takes effect, it is no longer subject to referendum. D.C. Code § 1-204.102(b)(2).

29. Once the signatures have been verified, the Board certifies that the referendum will appear on the ballot, and schedules an election to occur within 114 days after the date the measure was certified. D.C. Code § 1-1001.16(p)(1).

THE JURY AND MARRIAGE AMENDMENT ACT OF 2009

30. The D.C. Council’s initial legislation regarding the recognition of same-sex “marriages” from other jurisdictions was part of the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, Bill No. 18-0066. The bill was introduced by Councilmembers Phil Mendelson and Jack Evans on January 6, 2009.

31. In March 2009, the D.C. Council’s Committee on Public Safety and the Judiciary amended the bill to provide that same-sex “marriages” from other jurisdictions would be recognized as domestic partnerships in D.C..

32. On March 17, 2009, the Committee of the Whole placed the amended bill on the D.C. Council’s legislative agenda for the April 7, 2009. After the Committee of the Whole meeting, however, Councilmember David Catania raised objections to Councilmember Mendelson about recognizing same-sex “marriages” from other jurisdictions as anything less than “marriages” in the District.

33. In apparent response to these objections, Councilmember Mendelson proposed on April 2, 2009, recognizing same-sex “marriages” from other jurisdictions as “marriages” in D.C. through amending an unrelated bill.

34. At the April 7, 2009, legislative session, the D.C. Council amended a bill about the release of D.C.’s tax information to include a provision recognizing same-sex “marriages” from other jurisdictions as “marriages” in D.C.. At the same time, the D.C. Council removed the section relating to recognition of same-sex “marriages” as domestic partnerships from the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009.

35. On May 5, 2009, the D.C. Council took up Bill No. 18-0010 regarding the disclosure of D.C. tax information to federal courts. The bill included the newly added provision recognizing same-sex “marriages” from other jurisdictions as “marriages” in D.C. . The D.C. Council’s legislative agenda for the day advertised the bill as the “Disclosure to the United States District Court Amendment Act of 2009,” making no mention of recognizing same-sex “marriages.”

36. The D.C. Council hastily passed the bill as part of its “consent agenda”—a package of typically uncontroversial bills considered together without objection. The bill initially passed without any discussion and no dissenting votes.

37. Only after Councilmember Marion Barry realized what had happened and moved for reconsideration was there any debate. Even then the debate about the recognition of same-sex “marriages” lasted a mere forty minutes—beginning at about 11:20 a.m. and ending at noon.

38. The D.C. Council then voted 12 to 1 to recognize same-sex “marriages” from other jurisdictions with Councilmember Marion Barry casting the lone dissenting vote.

39. After the bill passed, its name was changed to The Jury and Marriage Amendment Act of 2009.

40. Mayor Adrian M. Fenty signed the Act on May 6, 2009, and the D.C. Council transmitted the Act to the United States Congress on May 11, 2009.

41. The Act would add a new section to the D.C. Code, Section 1287a, recognizing same-sex “marriages” entered into in other jurisdictions, such as the states and foreign countries. Unrelated to this proceeding, the Act would also amend the consanguinity provision enacted by the United States Congress in 1901, D.C. Code § 46-401, to make the list of marriages void *ab initio* gender neutral and amend certain disclosure provisions in D.C. Code § 47-1805.04 pertaining to the release of tax information to federal courts.

42. The Act provides in pertinent part:

A marriage legally entered into in another jurisdiction between 2 persons of the same sex that is recognized as valid in that jurisdiction, that is not expressly prohibited by sections 1283 through section 1286, and has not been deemed illegal under section 1287, shall be recognized as a marriage in the District.

43. Following the required period of review by the United States Congress, the Act is scheduled to become effective on July 6, 2009.

THE PROPOSED REFERENDUM

44. On May 27, 2009, the Proponents filed the Referendum with the Board. The Referendum seeks to give the people of D.C. the opportunity to decide themselves whether the portions of the Act related to the recognition of same-sex “marriages” from other jurisdictions should become the law of D.C..

45. The next day, May 28, 2009, the Board sent a letter to Bishop Harry R. Jackson, Jr., the primary proponent of the Referendum, informing him that a hearing on the Referendum had been tentatively scheduled for June 10, 2009. The letter further informed Bishop Jackson

that if he wished to submit a memorandum in support of the Referendum, he should do so by June 9, 2009.

46. On June 5, 2009, the Board gave public notice in the D.C. Register that it had received the Proponents' Referendum and scheduled a public hearing on the Referendum for 10:30 a.m. on Wednesday, June 10, 2009.

47. On June 9, 2009, the Proponents filed a memorandum with the Board explaining why the Referendum presented a proper subject for the referendum process under D.C. Code § 1-1001.16(b)(1).

48. The Board held a public hearing on the Referendum on June 10, 2009, to determine whether the Referendum presents a proper subject for the referendum process under D.C. Code §1-1001.16(1).

49. Councilmember Mendelson, who sponsored the bill to recognize same-sex "marriages" performed in other jurisdictions, provided testimony at the hearing opposing the Referendum. The members of the Board commented to Councilmember Mendelson that they had never before had a D.C. Councilmember appear before to offer testimony.

50. All appointments to the Board are nominated by the Mayor and approved by the D.C. Council, including Councilmember Mendelson.

51. On June 15, 2009, the Board decided that the Referendum did not present a proper subject for referendum, because it "authorizes, or would have the effect of authorizing, discrimination" in violation of the DC-HRA. D.C. Code § 1-1001.16(b)(1). The Board marked the Referendum as "received but not accepted," and now holds the Referendum pending this Court's review. D.C. Code § 1-1001.16(b)(2). *See* Decision of the Board dated June 15, 2009, attached to this petition.

52. The Board's rejection of the Referendum began the ten (10) day time period for applying to this Court for a "writ in the nature of mandamus" ordering the Board to accept the Referendum. D.C. Code § 1-1001.16(b)(3). The ten (10) day time period is set to expire on June 26, 2009.

53. 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 Referendum.

THE BOARD'S DECISION CONTRADICTS CONTROLLING PRECEDENT

54. The D.C. Court of Appeals' decision in *Dean*, 653 A.2d 307, controls the question of whether the Referendum violates the DC-HRA.

55. In *Dean*, the Court of Appeals considered whether the Clerk of the Superior Court unlawfully discriminated in violation of the DC-HRA by refusing to issue a marriage license to a same-sex couple. The court held that the Clerk's refusal did not violate the DC-HRA because in D.C. "marriage requires persons of opposite sexes" and the Council "[n]ever intended to change the ordinary meaning of the word 'marriage' simply by enacting" the DC-HRA. *Id.* at 320.

56. The passage of the DC-HRA in 1977, according to the court, did nothing "to change the fundamental definition of marriage." *Id.* at 320. "Had the Council intended to effect such a major definitional change, counter to common understanding, we would expect some mention of it in the Human Rights Act or at least in its legislative history. There is none." *Id.* The Court of Appeals, thus, ruled that "there cannot be discrimination against a same-sex marriage if, by independent statutory definition extended to the Human Rights Act, there can be no such thing." *Id.*

57. The Board’s denial of the Referendum directly contradicts *Dean*. The Court of Appeals in *Dean* conclusively determined that the refusal to afford same-sex couples the status of “marriage” does *not* run afoul of the DC-HRA. It is true that the Jury and Marriage Act of 2009, at issue here, purports to address only the recognition of same-sex “marriages” from other jurisdictions, rather than, as in *Dean*, authorizing same-sex “marriages” in D.C. in the first instance. But that is a distinction without a difference. It is illogical to say that, under *Dean*, limiting the status of “marriage” in D.C. to opposite-sex couples in the first instance is consistent with the DC-HRA, but that denying the very same status to same-sex unions deemed “marriages” in other jurisdictions is not. Either way the issue is the same: whether refusing to afford same-sex couples the status of “marriage” contravenes the DC-HRA. *Dean* clearly holds it does not. Because *Dean* controls, the Referendum does not “authorize[, or . . . have the effect of authorizing, discrimination” prohibited by the DC-HRA and the Proponents are entitled to summary judgment.

58. Thus, the Board erroneously rejected the Referendum on the basis that it “authorizes, or would have the effect of authorizing, discrimination” prohibited by the DC-HRA, and the Proponents request that the Court declare that the Referendum does not violate the DC-HRA and issue a “writ in the nature of mandamus”, pursuant to D.C. Code § 1-1001.6(b)(3), compelling the Board to accept the Referendum.

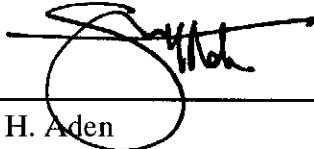
PRAYER FOR RELIEF

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

1. Expedite consideration of this matter as required by D.C. Code § 1-1001.6(b)(3).
2. Declare that the Referendum does not authorize or have the effect of authorizing discrimination in violation of the DC-HRA.

3. Issue a “writ in the nature of mandamus,” pursuant to D.C. Code § 1-1001.6(b)(3), ordering the Board to accept the Referendum.
4. Grant other declaratory relief and permanent and temporary injunctive relief as may be necessary to ensure that the Referendum is accepted by the Board and that the referendum process moves forward.
5. Grant such other and further relief as the Court may deem just and proper under the circumstances.

Respectfully submitted this 17th day of June, 2009.



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