SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

HARRY R. JACKSON, JR., *et al.*,	)	
	)	
Petitioners,	)	
	)	Civil Action No. 2009 CA 004350 B
v.	)	Judge Judith E. Retchin
	)	Calendar 14
DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, 441 4th Street, N.W., Suite 250, Washington, D.C. 20001,	)	[Next Court Event: none scheduled]
	)	
Respondent,	)	
	)	
DISTRICT OF COLUMBIA,	)	
	)	
Respondent-Intervenor.	)	
	)	

PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION

Petitioners Harry R. Jackson, Jr., Walter E. Fauntroy, Melvin Dupree, Sandra B. Harris, Bobby Perkins, Sr., and Dale E. Wafer move this Court, pursuant to SCR-Civil 65 and D.C. Code § 1-1001.16(b)(3), for a preliminary injunction staying the July 6, 2009, effective date of the Jury and Marriage Act of 2009, if the Proponents lose on the merits of this litigation, until the termination of this litigation, or if the Proponents prevail on the merits of this litigation, until thirty (30) days after the Board provides the Proponents with the final, original petition form according to D.C. Code § 1-1001.16(g).

Petitioners specifically request that the Court dispense with the requirement in SCR-Civil 65(c) for security, since there is no risk that the Board or the Attorney General will suffer monetary loss by the issuance of a preliminary injunction.

Petitioners show: (1) there is a substantial likelihood that they will prevail on the merits; (2) they are in danger of suffering irreparable harm if an injunction is not issued; (3) more harm

will result to them from the denial of the injunction than will result to the respondents if an injunction is issued; and (4) the issuance of an injunction is in the public interest. In support of their motion, Petitioners rely on the following:

1. The District of Columbia Board of Elections and Ethics does *not* consent to the entry of an injunction in this matter.

2. The factual predicate and legal authority for this Motion are set out in the accompanying Memorandum of Points and Authorities, the Affidavit of Harry R. Jackson, Jr, and accompanying exhibits, and all other pleadings, exhibits, and other documents and materials in the record.

WHEREFORE, the Petitioners respectfully request that the Court grant their motion for preliminary injunction and enter the proposed order staying the July 6, 2009, effective date of the Jury and Marriage Act of 2009, and excusing Petitioners from the obligation to give security. Petitioners further request such additional and other relief as the Court deems just and proper under the circumstances.

Respectfully submitted this 22nd day of June, 2009.

/s/ Steven H. Aden .

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CERTIFICATE OF SERVICE

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	)	
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	)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Petitioners Harry R. Jackson, Jr., Walter E. Fauntroy, Melvin Dupree, Sandra B. Harris, Bobby Perkins, Sr., and Dale E. Wafer (the "Proponents") hereby file their Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction. The Proponents seek an injunction staying the July 6, 2009, effective date of the Jury and Marriage Amendment Act of 2009, if the Proponents lose on the merits of this litigation, until the termination of this litigation, or if the Proponents prevail on the merits of this litigation, until thirty (30) days after the Board provides the Proponents with the final, original petition form according to D.C. Code § 1-1001.16(g).

INTRODUCTION

For over a century, the District of Columbia ("D.C.") has maintained an understanding that marriage "is inherently a male-female relationship." *Dean v. Dist. of Columbia*, 653 A.2d 307, 313 (D.C. 1995). The Referendum Concerning the Jury and Marriage Amendment Act of 2009 (the "Referendum") provides the voters with the opportunity to decide whether D.C. should

continue to adhere to this longstanding definition of marriage as being a legal union between a man and a woman, or instead, whether it should defer to the laws of the states or foreign countries regarding their own respective definitions of what might constitute a marriage.

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 require that the law only go into effect if it is approved by a majority of D.C. 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 the United States Supreme Court has described as "a classic demonstration of 'devotion to democracy,'" *Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 679 (1976), *quoting James v. Valtierra*, 402 U.S. 137, 141 (1971), and the 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). Accordingly, the people of D.C. have a right to utilize this referendum process in order to maintain the fundamental definition of marriage, despite a recent decision of the Council of the District of Columbia ("D.C. Council") intended to overturn more than one hundred years of tradition and legal precedent.

On May 5, 2009, the D.C. Council passed the Jury and Marriage Amendment Act of 2009, No. 18-0070 (the "Act"). The Act would legally recognize same-sex "marriages" entered into in other states and foreign countries as valid under federal law in D.C. The Act is scheduled to go into effect on July 6, 2009. The Proponents filed the Referendum with the D.C. Board of Elections & Ethics (the "Board") on May 27, 2009. On 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 D.C. Human Rights Act of 1977, D.C. Code § 2-1401.01 *et seq.* ("DC-HRA"). Two days later, June 17, 2009, the Proponents petitioned this Court 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.

The Proponents are now moving for a preliminary injunction to stay the July 6, 2009, effective date of the Act in order to allow the people of D.C. the opportunity to exercise their right of referendum. Once the Act goes into effect, it will no longer be subject to referendum. D.C. Code § 1-204.102(b)(2). Given that July 6, 2009, is only two weeks away, it simply is not feasible for the Proponents to complete this judicial review process and all the other required steps for a referendum before the Act becomes law. Accordingly, unless this Court enters an injunction staying the effective date of the Act, the people of D.C. will be deprived of their right to vote on the critical public policy issue of whether D.C. should defer to the laws of states and foreign countries regarding what constitutes a marriage.

STATEMENT OF FACTS

A. The Jury and Marriage Amendment Act of 2009.

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. Report on Bill 18-0066, "Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009," Committee on Public Safety and the Judiciary, at 15 (Mar. 10, 2009). The legislation called for "recogniz[ing] as domestic partnerships, relationships established in accordance with the laws in other jurisdictions that are similar to domestic partnerships in the District," including "same-sex marriages." *Id.*

At the April 7, 2009, legislative session, the D.C. Council dropped this initial legislation and instead proffered an amendment to the "Disclosure to the United States District Court Act of 2009," a bill about the release of D.C. tax information. The amendment added a provision recognizing same-sex "marriages" from other jurisdictions as "marriages" in D.C.. Engrossed Original Bill 18-0010, "Disclosure to the United States District Court Act of 2009," at 2 (Apr. 7, 2009); Engrossed Original Bill 18-0066, "Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009," at 17 (Apr. 7, 2009).

On May 5, 2009, the D.C. Council passed by a vote of 12 to 1 the "Disclosure to the United States District Court Act of 2009," including the provision regarding the recognition of same-sex "marriages" from other jurisdictions. Legislative Information Sheet for Bill 18-0010, "Jury and Marriage Amendment Act of 2009," *available at* http://www.dccouncil.washington.dc.us/lims/ legislation.aspx?LegNo=B18-0010. After the bill passed, the D.C. Council changed the bill's name to the "Jury and Marriage Amendment Act of 2009" (the "Act"), and sent it to Mayor Adrian M. Fenty. Mayor 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. Legislative Information Sheet for Bill 18-0010, *supra*.

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. Enrolled Original Bill 18-0010,

"Jury and Marriage Amendment Act of 2009," at 1-2 (May 5, 2009). 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.

Id. at 2. Following the required period of review by the United States Congress, the Act is scheduled to become effective on July 6, 2009.

B. The Proposed Referendum.

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.. (Jackson Aff. ¶¶ 4-5; *see also* Copy of the Referendum attached to Jackson Aff. as Ex. A.) On June 10, 2009, the Board held a public hearing on the Referendum to determine whether the Referendum presents a proper subject for the referendum process. (Jackson Aff. ¶ 12.)

On June 15, 2009, the Board issued a decision ruling 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. (Jackson Aff. ¶ 16; *see also* Copy of Board Decision regarding the Referendum attached to Jackson Aff. as Ex. H.) Pursuant to D.C. Code § 1-1001.16(b)(3), the Proponents filed a petition for review and for a writ in the nature of mandamus with this Court on June 17, 2009. The next day, June 18, 2009, the Attorney General intervened in the case on behalf of the District of Columbia.

The Proponents now file this motion for preliminary injunction asking the Court to stay the July 6, 2009, effective date of the Act, if the Proponents lose on the merits of this litigation,

until the termination of this litigation, or if the Proponents prevail on the merits of this litigation, until thirty (30) days after the Board provides the Proponents with the final, original petition form according to D.C. Code § 1-1001.16(g). Without such an injunction, the Proponents, and the people of D.C. more broadly, will be deprived of their right of referendum provided by the Initiative, Referendum, and Recall Charter Amendments Act of 1978, D.C. Code § 1-204.101 *et seq*. (the "Charter Amendments Act").

ARGUMENT AND CITATION OF AUTHORITY

"The decision to grant or deny preliminary injunctive relief is committed to the sound discretion of the trial court." *Stamenich v. Markovic*, 462 A.2d 452, 456 (D.C. 1983) (citations omitted). A movant is entitled to a preliminary injunction if he has clearly demonstrated: "(1) that there is a substantial likelihood that he will prevail on the merits; (2) that he is in danger of suffering irreparable harm during the pendency of the action; (3) that more harm will result to him from the denial of the injunction than will result to the defendant from its grant; and, in appropriate cases, (4) that the public interest will not be disserved by the issuance of the requested order." *Zirkle v. Dist. of Columbia*, 830 A.2d 1250, 1255-56 (D.C. 2003), *quoting Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976).

"[A] preliminary injunction is issued to preserve the status quo." *Wieck*, 350 A.2d at 388, n.4; *see also Fountain v. Kelly*, 630 A.2d 684, 689 (D.C. 1993) ("The usual role of a preliminary injunction is to preserve the status quo pending the outcome of litigation."). The requested injunction does precisely that. It maintains marriage laws as they have existed for over a century while the people of D.C. have the opportunity to exercise their right of referendum.

I. The Court Has the Power to Issue an Injunction Staying the Effective Date of the Act.

A. The Court Has Jurisdiction to Provide Equitable Remedies in Actions Arising from Decisions of the Board of Elections and Ethics.

This Court has "inherent equitable powers," *Gredone v. Gredone*, 361 A.2d 176, 180 (D.C. 1976), giving it "broad discretion to fashion appropriate equitable relief." *Washington Convention Ctr. Auth. v. Johnson*, 953 A.2d 1064, 1081 (D.C. 2008), *quoting Watkins v. Dist. of Columbia*, 944 A.2d 1077, 1081 (D.C. 2008). These equitable powers extend to matters of agency review. *Dist. of Columbia v. Group Ins. Admin.*, 633 A.2d 2, 14 (D.C. 1993) ("the power to issue preliminary relief also covers cases involving administrative agencies").

D.C. courts regularly issue injunctions and similar equitable remedies in election-related matters. *See, e.g., Scolaro v. Dist. of Columbia Bd. of Elections & Ethics*, 717 A.2d 891, 893 n.3 (D.C. 1998) (ordering recounts and special elections); *Best v. Dist. of Columbia Bd. of Elections & Ethics*, 852 A.2d 915, 921 (D.C. 2004) (ordering tabulation of votes for write-in candidates); *Leckie v. Dist. of Columbia Bd. of Elections & Ethics*, 457 A.2d 388, 390 (D.C. 1983) (ordering Board to allow write-in candidates regardless of party affiliation).

The D.C. courts also routinely consider acts passed by the D.C. Council that have been reviewed by the United States Congress and exercise jurisdiction to consider possible enjoinment. For instance, in *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633 (D.C. 2005), the Court of Appeals took jurisdiction to determine whether the Assault Weapon Manufacturing Strict Liability Act, D.C. Code §§ 7-2551.01 *et seq.*, should be enjoined as violating the Commerce Clause and the Fifth Amendment to the United States Constitution. *Beretta*, 872 A.2d at 655-59. Likewise, in *Armfield v. United States*, 811 A.2d 792 (D.C. 2002), the Court of Appeals considered whether D.C. Code § 10-503.16(b)(4), prohibiting "disruptive

or disorderly conduct" on the United States Capitol Grounds, should be enjoined as violating the First and Fifth Amendments to the United States Congress.[1] *Id.* at 795, 797.

Indeed, D.C. courts even review and enjoin acts passed by Congress in the first instance. In *Gary v. United States*, 499 A.2d 815 (D.C. 1985), for example, the Court of Appeals reviewed the one house veto provision of the Home Rule Act passed by the United States Congress in 1973. The court held that the veto provision "violated the bicameralism and presentment requirements of art. I of the Constitution." *Id.* at 819. The court permanently enjoined the provision as being unconstitutional. *Id.* at 812.

The Court of Appeals has specifically held that this Court may exercise its equity jurisdiction in actions, like this one, filed pursuant to D.C. Code § 1-1001.16(b)(3). *Hessey v. Burden*, 615 A.2d 562, 570-71 (D.C. 1992). In *Hessey*, the Court of Appeals considered whether this Court may exercise its equity jurisdiction in an action arising from the Board's denial of a proposed initiative—the Taxpayers' Right to Know Act. *Id.* at 565-66. The Court ruled that the parties to the action "could invoke the court's equity jurisdiction." *Id.* at 571. It explained, "The case . . . was not originally brought to the Superior Court under that court's general equity jurisdiction but, rather, under the specific provisions of D.C. Code § 1-1320(b)(3) [now codified at D.C. Code § 1-1001.16(b)(3)]. Once it was there, however, the court had jurisdiction as a court of equity . . . ." *Id.* at 571. Accordingly, the court could hear additional challenges and fashion additional remedies. *Id.*

[1] While the Jury and Marriage Amendment Act of 2009 is being reviewed by Congress, this review process is not unique. All acts passed by the D.C. Council are reviewed by Congress. D.C. Code § 1-206.02. The Act is ultimately a local law. Nothing in the Home Rule Act precludes the Court from reviewing such laws. "The Superior Court is . . . a court of general jurisdiction with the power to adjudicate any civil action at law or in equity involving local law." *Andrade v. Jackson*, 401 A.2d 990, 992 (D.C. 1979).

This Court, thus, has inherent equitable power to issue appropriate injunctive relief in this case. The Board denied the Referendum on June 15, 2009. The Proponents petitioned this Court, pursuant to D.C. Code § 1-1001.16(b)(3), for review of the Board's denial and a writ in the nature of mandamus on June 17, 2009. Under *Hessey*, this Court has jurisdiction of this case not only for the specific, statutory purpose of issuing a writ in the nature of mandamus but also as a "court of equity." Accordingly, this Court may issue an injunction staying the effective date of the Act, if the Proponents lose on the merits of this litigation, until the termination of this litigation, or if the Proponents prevail on the merits of this litigation, until thirty (30) days after the Board provides the Proponents with the final, original petition form according to D.C. Code § 1-1001.16(g).

B. Other Courts Have Exercised Their Equitable Powers to Stay the Effective Date of a Statute or Act to Allow the Citizens to Exercise Their Right of Referendum.

In *State ex rel. Ohio General Assembly v. Brunner*, 873 N.E.2d 1231 (Ohio 2007), the Ohio Supreme Court considered a motion to stay the effective date of a law enacted by the General Assembly to provide the "citizens . . . ample opportunity to circulate [referendum] petitions and seek a vote on the validity of the law." *Id.* at 1232, 1235. As a result of protracted litigation concerning the legality of the referendum, the law went into effect before the people could exercise their "reserved power of referendum." *Id.* at 1233-34. The court held that "[t]his result is unacceptable." *Id.* 1235. "[W]e unintentionally deprived the citizens of the right of referendum that they would have enjoyed were it not for the unavoidable delays associated with judicial review." *Id.* Moving the effective date of the law, according to the court, was "necessary to safeguard the rights reserved to the citizens of this state under the Ohio Constitution." *Id. See also Interior Taxpayers Assoc. v. Fairbanks North Star Borough*, 742 P.2

781, 782 (Alaska 1987) (granting preliminary injunction to stay effective date of law to accommodate citizens' right of referendum).

As in *Brunner*, staying the effective date of the Act in this case is "necessary to safeguard the rights reserved to the citizens." *Brunner*, 873 N.E.2d at 1235. The Act becomes effective on July 6, 2009, just two weeks from the date of this motion. Once the Act becomes effective, it has the force of law and is no longer subject to referendum. D.C. Code § 1-204.102(b)(2) ("No act is subject to referendum if it has become law according to the provisions of § 1-204.04.").

Absent this Court entering an injunction, the only way for the Proponents to stay the effective date of the Act is to submit a referendum petition to the Board with signatures from five percent of the registered voters in D.C. D.C. Code § 1-1001.16(g)-(i). However, the Proponents cannot even begin collecting signatures until this judicial review process is successfully completed, the Board finalizes the summary statement, short title, and legislative form for the Referendum, and all legal challenges to the form of the Referendum are successfully resolved. D.C. Code § 1-1001.16(c)-(e). It simply is not possible for all these steps to be completed before the July 6, 2009, effective date of the Act. Accordingly, an injunction staying the effective date is the only means to provide the people ample opportunity to exercise their right of referendum.

In this particular case, even if the Proponents had filed the Referendum on the earliest allowable date, May 11, 2009, the day the Act was transmitted to the United States Congress, the Proponents still could not have completed the referendum process in advance of the Act's effective date. The referendum statutes impose no time limit for the Board to accept or the reject the Referendum. D.C. Code § 1-1001.16(b). In this case, the Board received the Referendum on May 27, 2009, and the made its decision nineteen days later rejecting the Referendum on June 15, 2009. Supposing the Board always takes about nineteen days to hold a hearing and make a

decision, the Referendum filed on May 11, 2009, would be rejected by the Board on or about May 30, 2009.

The Proponents then would have had ten days to petition this Court for review of the Board's decision and a writ in the nature of mandamus. D.C. Code § 1-1001.16(b)(3). Counting weekends, the ten day time period would expire on June 9, 2009. Assuming a speedy, and unlikely, two week period to appeal successfully through the Court of Appeals, the Board would be compelled to accept the Referendum on June 23, 2009. The Board then would have twenty days, until about July 13, 2009, to formulate a proposed summary statement, short title, and legislative form for the Referendum. D.C. Code § 1-1001.16(c). Five days later, on July 18, 2009, the Board would hold a public meeting to adopt the proposed summary statement, short title, and legislative form for the Referendum and publish them in the *D.C. Register*. D.C. Code § 1-1001.16(d). After publication, there would be a ten day challenge period, expiring on or about July 23, 2009, in which any registered, qualified voter in D.C. could file a legal challenge to the form of the Referendum in this Court. D.C. Code § 1-1001.16(e). Supposing these legal challenges could all be favorably resolved within one week, the Proponents would begin circulating petitions to collect signatures on July 30, 2009. Only after securing signatures from five percent of registered D.C. voters would the Board then finally notify the Speaker of the House and the President of the Senate that the Act should be placed on hold pending the outcome of the referendum election. D.C. Code §§ 1-1001.16(m), 1-204.102(b)(1). Even if those signatures could be collected in one week, it would be August 6, 2009, before the Act would be placed on hold. But by this time, the Act would have gone into effect on July 6, 2009, and no longer be subject to referendum.

Even if the Proponents had filed the Referendum on the earliest possible date, they still would have been unable to complete the referendum process before the Act's July 6, 2009, effective date. Thus, in this instance, an injunction is necessary to ensure that the purpose of the referendum process is not thwarted. The Court must necessarily have inherent equitable power to enjoin the effective date of the Act in order to uphold the people's right of referendum. Without such an injunction, the time limits imposed by the referendum statute work to defeat the very right the statute was designed to protect and provide.[2]

II. If the Effective Date of the Act is Not Stayed, the Proponents will Suffer Irreparable Harm.

In considering whether to issue a preliminary injunction, "the most important inquiry is that concerning irreparable injury." *Wieck*, 350 A.2d at 387. An injunction should issue if "the threat of injury is imminent and well-founded, and [] the injury itself would be incapable of being redressed after a final hearing on the merits." *Id.* at 388 (citations omitted); *see also Sampson v. Murray*, 415 U.S. 61, 88 (1974) ("the basis of injunctive relief . . . has always been irreparable harm and inadequacy of legal remedies").

Without a stay of the effective date of the Act, the people of D.C. will be deprived of their right of referendum. The right of referendum is "of paramount importance." *Brunner*, 8763 N.E.2d at 1233. According to the Court of Appeals, it is a right that should be "liberally construed." *Convention Ctr.*, 441 A.2d at 913. "[A]cceptance of this principle is virtually universal." *Id.* at 897. Being a reservation of power to the people, the Court should strive to

[2] The issuance of an injunction is also necessary to comply with the dictates of Due Process. D.C. cannot provide the people with a right a referendum and then impose time limits on the exercise of that right that are so onerous in this instance that Proponents are unable to meet them. *Cf. Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 178-79 (1979) (holding in part that "short time for collection of signatures between notice of the [special] election and the filing deadline" was unconstitutional); *People's Party v. Tucker*, 347 F. Supp. 1, 4 (M.D. Pa. 1972) (holding that three week time period for collecting signatures was so short as to be unconstitutional).

effectuate, not thwart, its purpose. *Cf. Citizens Against a New Jail v. Bd. of Supervisors*, 63 Cal. App. 3d 559, 561 (1977) (right of referendum "is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter"); *Klosterman v. Marsh*, 143 N.W.2d 744, 749 (Neb. 1966) ("right of initiative and referendum reserved to the people should be construed to make effective the powers reserved").

The United States Supreme Court has observed, "The referendum . . . is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.'" *Eastlake*, 426 U.S. at 673 (1976), *quoting James*, 402 U.S. at 141.

This reserved power of referendum applies to every law passed in D.C. and provides an important check on actions taken by the D.C. Council. The D.C. Self-Government and Governmental Reorganization Act, D.C. Code § 1-201.1 *et seq.*, popularly known as the Home Rule Act, contained no right of initiative, referendum, or recall. *Convention Ctr.*, 441 A.2d at 896. The Charter Amendments Act amended the Home Rule Act in 1978, providing the voters "these long-recognized instruments of direct control of legislative decisions and decisionmakers." *Id.* The aim of providing these rights to the people was to extend the "power to legislate . . . beyond the thirteen elected members of the Council and the elected Mayor to the citizens of the District of Columbia." *Hessey v. Dist. of Columbia Bd. of Elections & Ethics*, 601 A.2d 3, 11 (D.C. 1991).

The right of referendum, in particular, reserves to the D.C. electorate the "power of direct legislation," *Convention Ctr.*, 441 A.2d at 897, thereby, "allowing the electorate to 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). By

referendum, any group of D.C. voters may 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 voters. D.C. Code § 1-204.101(b). A law is only subject to referendum, however, between the time it is submitted to Congress for review and when it goes into effect thirty legislative days later. D.C. Code §§ 1-204.102(b)(2), 1-204.04.

The only way to effectuate the purpose of the right of referendum in this case is to issue an injunction staying the July 6, 2009, effective date of the Act. Such an injunction will maintain the status quo until the people of D.C. have had ample opportunity to circulate referendum petitions and to seek a vote on the validity of the Act. Without the injunction, the Act will go into effect and the people will be deprived of their chance to vote on a critical question of public policy—whether D.C. should hold to its long held understanding of marriage as between a man and a woman or, instead, defer to the laws of the states and foreign countries concerning the definition of marriage. Money damages cannot remedy such a deprivation of rights. Accordingly, unless the Court issues an injunction staying the effective date of the Act, the Proponents, and the people of D.C. more broadly, will suffer irreparable injury. Therefore, the Proponents' motion for preliminary injunction should be granted and the effective date of the Act stayed, if the Proponents lose on the merits of this litigation, until the termination of this litigation, or if the Proponents prevail on the merits of this litigation, until thirty (30) days after the Board provides the Proponents with the final, original petition form according to D.C. Code § 1-1001.16(g).

III. The Proponents are Likely to Succeed on the Merits.

"A party seeking temporary equitable relief need not show a mathematical probability of success on the merits." *In re Estate of Reilly*, 933 A.2d 830, 837 (D.C. 2007), *quoting Akassy v.*

William Penn Apartments, Ltd. P'ship, 891 A.2d 291, 309-10 (D.C.2006). "Rather, the level of probability of success that must be demonstrated will vary according to the court's assessment of the other factors pertinent to the analysis." *Id.* Thus, in a case like this one, where "irreparable harm is clearly shown," the Proponents may prevail simply by demonstrating that they have "a substantial case on the merits." *Id.* Here, Proponents have demonstrated more than a "substantial case on the merits" and therefore, have met this burden as demonstrated below.

A. The Board Erroneously Determined that the Referendum Runs Afoul of the DC-HRA.

The Board rejected the Referendum on the sole basis that it "authorizes, or would have the effect of authorizing, discrimination" prohibited by the DC-HRA. D.C. Code § 1001.16(b)(1)(D). The DC-HRA was passed in 1977 for the purpose of:

> [S]ecur[ing] 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 reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.

D.C. Code § 2-1401.01.

The DC-HRA extends only to an individual's "equal opportunity to participate fully in the economic, cultural and intellectual life of the District." *Id.* It covers discrimination "in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations." *Id.*

The Council amended the DC-HRA in 2002 to clarify its application to the provision of government services:

> Except as otherwise provided for by District law or when otherwise lawfully and reasonably permitted, it shall be an unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility, service, program, or benefit to any individual on the basis of an individual's actual or perceived: race, color, religion, national origin, sex, age, marital status, personal

> appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business.

D.C. Code § 2-1402.73.

1. The Court of Appeals Has Already Ruled that the Refusal to Afford Same-Sex Couples the Status of "Marriage" Does Not Violate the DC-HRA.

The Court of Appeals' decision in *Dean v. District of Columbia*, *supra*, controls the question of whether the Referendum violates the DC-HRA. In *Dean*, the court 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. *Id.* at 309. The court held that the Clerk's refusal was consistent with DC-HRA because, by its very definition 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. In other words, the "exclusion" of same-sex couples from marriage does not violate the DC-HRA, because, in D.C. "by legislative definition . . . 'marriage' requires persons of opposite sexes." *Id.*

In reaching its conclusion, the *Dean* court examined what the United States Congress intended by the word "marriage" when it enacted D.C.'s marriage statute in 1901. The court concluded that the history of the statute "reflects a legislative understanding that marriage, as understood by Congress at the time of the original enactment and thereafter, is inherently a male-female relationship." *Id.* at 313. Likewise, "the common societal understanding of marriage, reflected in legal and ordinary dictionary definitions from the last century until today presupposes a heterosexual union." *Id.* at 318; *see also id*. at 315 ("ordinary understanding of the word 'marriage'—both at the turn of the century when the marriage statute was enacted and in modern times . . . means the union of two members of the opposite sex").

The passage of the DC-HRA in 1977, according to the court, did nothing "to change the fundamental definition of marriage" either as established by the United States Congress in 1901, or as defined by society more broadly. *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, 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."[3] *Id.*

Likewise, the Referendum cannot be deemed to violate the DC-HRA. 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. *Id.* It is true that the Jury and Marriage Act of 2009, at issue here, addresses 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 that are called "marriages" in other jurisdictions is not. *Cf. Chambers v. Ormiston*, 935 A.2d 956, 966-67 (R.I. 2007) (refusing to recognize same-sex "marriage" from Massachusetts for purposes of divorce proceeding because marriage statutes "had in mind only marriages between people of different sexes"). Either way the issue is the same: whether refusing to afford same-sex couples the status of "marriage"

[3] To the extent the Board suggested in its Memorandum Opinion and Order that the *Dean* court believed the DC-HRA "was clearly not intended to prohibit discrimination on the basis of sexual orientation," this suggestion is flatly wrong. (Mem. Op. & Order 11.) The Court of Appeals in *Dean*, 653 A.2d at 319, explained, "The Council undoubtedly intended the Human Rights Act to be a powerful, flexible, and far-reaching prohibition against discrimination of many kinds, including sex and sexual orientation." Yet the court still held that "the Council [n]ever intended to change the ordinary meaning of the word 'marriage' simply by enacting the Human Rights Act." *Id.* at 320.

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 likely to succeed on the merits.

2. The Status of Marriage is at Issue in this Case, Not the Benefits.

The legislative history of the Jury and Marriage Amendment Act of 2009 demonstrates that the Act is about the "status" of marriage, rather than the benefits. The law initially provided that same-sex "marriages" from other jurisdictions would be recognized as domestic partnerships in D.C.. According to the Report from the Committee on Public Safety and the Judiciary, the law would have "establish[ed] that a marriage recognized under the laws of another jurisdiction—whether in another state or country— . . . is recognized as a domestic partnership as defined under District law." Report on Bill 18-0066, *supra,* at 5. By way of example, the Committee explained, "a same-sex marriage in, for example, Massachusetts, would be recognized as a domestic partnership in the District regardless of the Mayor's actions." *Id* at 5. The law, however, was amended in response to pressure from Councilmember Catania to require that same-sex "marriages" from other jurisdictions be given the same status as traditional marriages solemnized in D.C., rather than domestic partnership status. Consequently, the council has attempted to do indirectly what the law prohibits directly–namely same-sex "marriage" within D.C. A Timeline on Marriage Recognition, *supra*. The concern was the label or status attached to the recognition, not the available benefits.

D.C. has a very broad domestic partnership law. The D.C. Council originally established domestic partnerships in the Healthcare Benefits Expansion Act of 1992, D.C. Code §§ 32-701 to 32-710. Because, for years, the United States Congress placed a rider on the D.C.

appropriations bill that prohibited the use of federal and local funds to implement the Healthcare Benefits Expansion Act, the Act did not go into effect until 2002.

Since the 2002 implementation of domestic partnerships, the D.C. Council has repeatedly expanded the rights and benefits attached to domestic partnership status. Numerous examples of these rights and benefits are as follows:

- Domestic partners have hospital visitation rights, D.C. Code § 32-704;
- Domestic partners may make medical decisions if their partners are incapacitated, D.C. Code § 21-2210;
- Domestic partners have rights of guardianship and power of attorney, D.C. Code §§ 21-2043, 21-2065, 21-2068, & 21-2113;
- If a domestic partner dies, the survivor may claim the partner's remains, D.C. Code § 3-413;
- Domestic partners have rights as surviving partners, D.C. Code §§ 19-114, 19-115;
- Domestic partner may inherit by intestate succession, D.C. Code §§ 19-112, 19-113, 19-301, 19-302, 19-305, 19-602.11, 19-602.12, 19-602.15, 19-904, 20-303;
- Domestic partners may jointly file their D.C. taxes, D.C. Code §§ 47-1801.04, 47-1805.01, 47-1806, 47-1812.08, 47-4212, 47-4432, 47-4440, 47-4509;
- Employer contributions to health insurance for a domestic partner are not taxable income for D.C. taxes, D.C. Code § 47-1803.02;
- Domestic partners may add each other to the title on their cars, D.C. Code § 50-1501.02(e)(4);
- Domestic partners may add each other to the deed of their homes, D.C. Code § 42-1102;
- The transfer of real property between domestic partners is exempt from taxation by the D.C. government, D.C. Code § 47-902;
- Domestic partners are protected under the D.C. domestic violence law, D.C. Code § 16-1001;
- Domestic partners are considered family and have standing to sue whoever willfully or maliciously destroys, alters, conceals, or tampers with evidence or

records that are being preserved and retained in crimes against their partners, D.C. Code §§ 5-113.31, 5-113.33;

- Domestic partners have immunity from testifying against each other, D.C. Code §§ 14-306, 14-309, 22-3001(10), 22-3019, 22-3024;
- Domestic partners have standing to sue for negligence causing death, D.C. Code § 16-2701;
- Domestic partners of D.C. public officials receive protection from violence as family members, D.C. Code § 22-851;
- Disclosure of HIV tests of certain criminal offenders may be made to domestic partners of the victims, D.C. Code § 22-3901;
- Domestic partners may contract binding pre-marital agreements, D.C. Code §§ 46-501, 46-504, 46-505, 46-506, 46-507, 45-508; and
- Domestic partners have rules for distribution of property, alimony, and support in the event of dissolution. D.C. Code §§ 16-910, 16-911, 16-913, 16-916.

This comprises only a portion of the rights and benefits afforded domestic partners. Councilmember Evans has rightly described domestic partnership status in D.C. as "de facto civil unions." Lou Chibbaro J., *D.C. Council Expands DP Law*, Washington Blade, May 16, 2009, http://www.washblade.com/2008/5-16/news/localnews/12599.cfm.

There is no material D.C. benefit that marriage status affords, that domestic partnership status does not. Thus, the D.C. Council's decision to provide same-sex "marriages" from other jurisdictions the status of "marriage" in D.C. was in no way about benefits. It was purely about granting the status of "marriage." Because *Dean* says that limiting the status of "marriage" to opposite-sex couples is consistent with the DC-HRA, the Proponents' Referendum does not "authorize[], or . . . have the effect of authorizing, discrimination" prohibited by the DC-HRA. Accordingly, the Proponents are likely to succeed on the merits and the Court should grant their motion for preliminary injunction.

3. The 2002 Amendment to the DC-HRA did not Change the Law Established by *Dean*.

While the DC-HRA was amended in 2002 to clarify its application to the provision of government benefits and services, the amendment did nothing to alter the Court of Appeals' analysis in *Dean*. The court in *Dean* assumed that the DC-HRA was applicable to the provision of marriage licenses even if that was unclear under the act. "We, too, assume . . . the Marriage License Bureau is a place of public accommodation for purposes of our analysis." *Id.* at 319. The court's analysis turned on "the fundamental definition of marriage" as a "heterosexual union," not on the non-applicability of the DC-HRA to the D.C. government's issuance of marriage licenses. Even assuming the DC-HRA applied, the Court of Appeals held that the Clerk's refusal to provide licenses to same-sex couples did not violate the DC-HRA.

The D.C. Council also expressly prefaced the 2002 amendment with the proviso "[e]xcept as otherwise provided for by District law," making clear that the amendment did not alter the current law in D.C. concerning the provision of government services and benefits, including the Court of Appeals' decision in *Dean*. D.C. Code § 2-1402.73.

Moreover, the legislative history of the 2002 amendment says nothing about the definition of marriage or the recognition of same-sex "marriages." The amendment was passed in response to an August 1995 incident where an emergency medical technician refused medical care to an individual for "being transgendered." Report of the Subcommittee on Human Rights, Latino Affairs and Property Management, D.C. Council, at 5 (Mar. 29, 2002). The Subcommittee explained that "the behavior was *not* prohibited by the Act" since the DC-HRA did not cover the government's provision of emergency medical services. *Id.* (emphasis added). The 2002 amendment sought only to rectify this sort of injustice. The amendment was in no way intended to undermine *Dean* or to jettison the definition of marriage as a union between a man

and woman as established by the United States Congress in 1901. Because *Dean* remains the law of the District, the Referendum does not "authorize[], or . . . have the effect of authorizing, discrimination" prohibited by the DC-HRA, and the Proponents are likely to succeed on the merits.

4. *Dean* Rested on D.C.'s Own Understanding of Marriage, Not the Understanding of Foreign Jurisdictions.

The *Dean* decision is not undermined because same-sex "marriages" are now deemed to exist in six states.[4] When the *Dean* court held that the DC-HRA was *not* violated because "by independent statutory definition extended to the Human Rights Act, there can be no such thing" as same-sex "marriage," the court was referring to D.C. law, not to whether same-sex "marriages" might exist in some other part of the country or the world. *Dean*, 652 A.2d at 320. The court had already analyzed D.C.'s marriage statute and determined that D.C.'s "legislative definition" of "'marriage' requires persons of opposite sexes." *Id.* The court concluded that in passing the DC-HRA, the D.C. Council never intended "to expand the marriage statute to authorize same-sex unions." *Id.* It was for this reason, and not the existence or non-existence of same-sex "marriages' in some other jurisdiction, the court held "there cannot be discrimination against a same-sex marriage." *Id.* The issue for the Court of Appeals was that D.C. law itself did *not* recognize same-sex "marriages." Regardless of what states or foreign countries may do, it continues to be the case that D.C. law makes no provision for the recognition of same-sex "marriages." Accordingly, *Dean* remains binding precedent and mandates that the Proponents are likely to succeed on the merits.

[4] Massachusetts, Connecticut, Iowa, Maine, Vermont, and New Hampshire.

B. The Referendum Satisfies the Remaining Criteria for Acceptance by the Board.

The Board made no contention in its decision that the Referendum is excludable on some other ground listed in D.C. Code § 1-1001.16(b)(1); nor could the Board make such a contention.

1. The Referendum is Consistent with Title IV of the Home Rule Act.

Title IV of the Home Rule Act is the District Charter. It "establishes a tripartite form of government for the District of Columbia, with an elected Council and Mayor, and a judicial system established by Congress in 1971." *Hessey*, 601 A.2d at 14. Title IV also "addresses the District's budget process as well as financial management policies and responsibilities and borrowing authority, bonds and notes, and the independent agencies." *Id.*

For a proposed referendum measure to be a "proper subject" under Title IV, it must not "directly amend the [District] Charter," "change the structure of government and the procedures and responsibilities assigned by the Charter," or relate to "acts appropriating funds." *Id.* at 12, 14. Moreover, the act must *not* yet have become law. D.C. Code § 1-204.102(b)(2).

The Proponents' Referendum in no way touches on the structure or procedures for government established by Title IV of the Home Rule Act. Instead, the Referendum provides the voters the opportunity to decide whether D.C. should recognize same-sex "marriages" entered into in other jurisdictions or whether the D.C. should hold to its longstanding commitment to recognize only marriages between one man and one woman. Neither the structure nor the procedures of the District's government as set out in the Title IV are implicated by the Referendum.

Moreover, the Act does not relate to "acts appropriating funds." D.C. Code § 1-204.101(b). The Court of Appeals has interpreted "acts appropriating funds" to refer to "'the discretionary process by which revenues are identified and allocated among competing programs

and activities.'" *Dorsey v. Dist. of Columbia Bd. of Elections & Ethics*, 648 A.2d 675, 677 (D.C. 1994), *quoting Hessey*, 601 A.2d at 19. The Referendum does not interfere with the collection or allocation of revenues. The Council's fiscal impact statement regarding the Act provides that "the legislation requires no additional funds or staff." Report of the Committee on Public Safety and the Judiciary, D.C. Council, at 4 (Mar. 10, 2009). The Act passed by the D.C. Council would grant legal recognition to same-sex "marriages" from other jurisdictions; it would not identify or allocate revenues.

The Act has also yet to become law. It was transmitted to the United States Congress on May 11, 2009, and it is not set to become effective until July 6, 2009. Proponents filed the Referendum on May 27, 2009, well in advance of the effective date of the Act. Assuming this Court enters the requested injunction, the Act will continue to be amenable to the referendum process. Accordingly, the Referendum is a "proper subject" for the referendum process under Title IV of the Home Rule Act.

2. The Referendum is Otherwise in Proper Form under D.C. Code § 1001.16(b)(1).

The Proponents filed the verified statement of contributions required by D.C. Code §§ 1-1102.04 and 1-1102.06, with the Office of Campaign Finance on May 29, 2009. (Jackson Aff. ¶ 7; *see also* Copy of the Verified Statement of Contributions attached to Jackson Aff. as Ex. C.)

The Proponents also submitted the Referendum in proper form. D.C. Code § 1001.16(b)(1)(B). The Referendum included the requisite short title and the summary statement of not more than 100 words, and designated "the act or part thereof on which a referendum is desired." D.C. Code § 1-1001.16(a)(1). (Jackson Aff. Ex. A.) The Proponents accompanied the Referendum with an affidavit listing their names and addresses and affirming their status as a "registered qualified elector[s] of the District of Columbia." D.C. Code § 1-

1001.16(a)(2). Finally, the Proponents' Referendum does not "negate or limit" a Budget Request Act passed by the D.C. Council. D.C. Code § 1001.16(b)(1)(D). The subject of the Referendum is *not* a Budget Request Act; rather, the subject is the Act passed by the D.C. Council relating to the recognition of same-sex "marriages" entered into in other jurisdictions. As established above, nothing in the Act pertains to the identification or allocation of revenues. Accordingly, the Referendum satisfies all the criteria for acceptance by the Board and the Proponents are likely to succeed on the merits.

IV. No One Suffers Harm from Granting the Requested Injunction.

Without an injunction staying the effective date of the Act, the people of D.C. will suffer a complete loss of their right of referendum. The Act will go into effect and no longer be subject to the referendum process. D.C. Code § 1-204.102(b)(2). However, if the injunction is granted, the status quo will simply be maintained until the people have had opportunity to circulate referendum petitions and to submit the Act for a vote. D.C.'s marriage laws will continue to exist as they have for over a century. The referendum process "gives [the people] a voice in decisions that will affect the future development of their own community." *James*, 402 U.S. at 143. Granting an injunction, rather than inflicting harm, ensures that the people of D.C. retain this voice.[5]

[5] Existing D.C. law denies "marriages in violation of [] strong public policy." *Hitchens v. Hitchens*, 47 F. Supp. 73, 74 (D.D.C. 1942); *see also Simmons v. Simmons*, 19 F.2d 690, 692 (D.C. Cir. 1927) (marriage decree will "not be sustained in this instance on any principle of full faith and credit" since it is "against the law and public policy of the District of Columbia"). The General Counsel Brian Flowers, Attorney General Peter Nickles, and the ACLU also stated in their letters to the Board that D.C. does not recognize marriages that contravene public policy. *See* Letter from Brian Flowers, General Counsel, D.C. Council, to Kenneth J. McGhie, General Counsel, D.C. Board of Elections and Ethics regarding the Referendum on Jury and Marriage Amendment Act of 2009 (June 9, 2009) (stating that D.C. may deny recognition when "marriage is in violation of the 'strong public policy' of the District"); Letter from Peter Nickles, Attorney General, to Kenneth J. McGhie, General Counsel, D.C. Board of Elections and Ethics regarding the Referendum on Jury and Marriage Amendment Act of 2009 (June 11, 2009) (observing that D.C. denies recognition to marriages from other jurisdiction when they "contravene public policy"); Letter from Arthur Spitzer and Sharon McGowan, ACLU of National Capital Area, to

V. Granting an Injunction is in the Public Interest.

"A referendum procedure, such as the one at issue here," according to the Supreme Court, "is a classic demonstration of 'devotion to democracy.'" *Eastlake*, 426 U.S. at 679, *quoting James*, 402 U.S. at 141. It is "a basic instrument of democratic government." *Eastlake*, 426 U.S. at 679. The Referendum permits "the city itself legislating through its voters" to determine "what serves the public interest." *Id.* (internal citations and quotations omitted). It should go without saying that entering an injunction allowing the people of D.C. to make such a determination regarding the definition of marriage is in the public interest.

Most importantly, granting an injunction safeguards the people's right to keep a check on the D.C. Council. Here, the D.C. Council has actively fought against allowing the people of D.C. to have any part in what is likely the biggest public policy debate of our time—the propriety of recognizing of same-sex "marriages." When the bill recognizing same-sex "marriages" from other jurisdictions came up for a vote, the D.C. Council advertised the bill on its agenda as the "Disclosure to the United States District Court Amendment Act of 2009," making no mention of recognizing same-sex "marriages." Engrossed Original Bill 18-0010, *supra*, at 2. The D.C. Council 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. Only after Councilmember Marion Barry realized what had happened and moved for reconsideration was there debate. Even then the debate on the bill lasted only forty minutes. The D.C. Council passed by the bill 12 to 1, receiving no input from the people of D.C.. D.C. Council Votes 12-1 to Recognize Other States'

Kenneth J. McGhie, General Counsel, D.C. Board of Elections and Ethics regarding the Referendum on Jury and Marriage Amendment Act of 2009 (June 9, 2009) (explaining that D.C. will not recognize marriages "offensive to [its] strong public policy").

Gay Marriages, *Washington Post* (May 5, 2009), http://voices.washingtonpost.com/dc/2009/05/dc_council_votes_to_recognize.html.

Councilmember Mendelson, who sponsored the bill, took the unusual step of showing up at the hearing on the Referendum and testifying against it (Jackson Aff. ¶ 13), even though he approved the appointments of the very people he was testifying before. D.C. Mun. Regs. Tit. 3, § 100.3.

The D.C. Council has sought to force the recognition of same-sex "marriages" on the people of D.C. without public debate and without a vote. Granting an injunction ensures that the people have the opportunity to be heard, regardless of whether the Referendum ultimately passes. Accordingly, issuing an injunction is in the public interest.

VI. The Proponents Should Be Excused from the Requirement to Give Security.

SCR-Civil 65(c) generally requires that "[n]o restraining order or preliminary injunction issue except upon the giving of security by the applicant." This Court, however, has discretion in setting the amount of that security. *L'Enfant Plaza Propes., Inc. v. Fitness Systems, Inc.*, 354 A.2d 233, 237 (D.C. 1976). Indeed, "if there is no risk of monetary loss to the party enjoined," the Court of Appeals has suggested that "security is not required" at all. *Id.* Here, the issuance of an injunction would not cause monetary loss. Rather, the issuance of an injunction would vindicate the people's right of referendum. The injunction would stay the effective date of the Act and maintain D.C.'s marriage laws as they have been for over a hundred years. Accordingly, the Court should dispense with the requirement for posting security.

CONCLUSION

For the foregoing reasons, the Proponents respectfully request that this Court grant their motion for preliminary injunction and enter an order staying the July 6, 2009, effective date of

the Jury and Marriage Amendment Act of 2009, if the Proponents lose on the merits of this litigation, until the termination of this litigation, or if the Proponents prevail on the merits of this litigation, until thirty (30) days after the Board provides the Proponents with the final, original petition form according to D.C. Code § 1-1001.16(g). Absent the entry of an injunction, the Proponents will suffer an irreparable loss of their right of referendum. The Referendum does not "authorize[], or . . . have the effect of authorizing, discrimination" prohibited by the DC-HRA. Moreover, maintaining the status quo until the people of D.C. have had the opportunity to vote is in the public interest and does no harm to the Board or to D.C. more broadly.

Respectfully submitted this 22nd day of June, 2009.

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

HARRY R. JACKSON, JR., *et al.*,	)	
	)	
Petitioners,	)	
	)	Civil Action No. 2009 CA 004350 B
v.	)	Judge Judith E. Retchin
	)	Calendar 14
DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,	)	
	)	
	)	[Next Court Event: none scheduled]
Respondent,	)	
	)	
DISTRICT OF COLUMBIA,	)	
	)	
Respondent-Intervenor.	)	
	)	

NOTICE OF VOLUNTARY DISMISSAL OF PATRICIA JOHNSON

Petitioners Patricia Johnson, through counsel, provides notice, pursuant to SCR-Civil 41, that she voluntarily dismisses all claims against the Respondent and Respondent-Intervenor. No answer or motion for summary judgment has been served by the D.C. Board of Elections and Ethics or the Attorney General. All other Petitioners remain in the case and do not dismiss or otherwise waive any claims.

Respectfully submitted this 22nd day of June, 2009.

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