

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

HARRY R. JACKSON, JR., *et al.*

Petitioners,

v.

DISTRICT OF COLUMBIA BOARD OF
ELECTIONS AND ETHICS,

Respondent.

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ORAL HEARING REQUESTED

Civil Action No. 2009 CA 008613 B

Judge Judith N. Macaluso

Calendar 9

[Next Court Event: Initial Conference, 9:30
am, Friday, February 26, 2010]

**PETITIONERS' MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Petitioners Harry R. Jackson, Jr., Robert King, Walter E. Fauntroy, James Silver, Anthony Evans, Dale E. Wafer, Melvin Dupree, and Howard Butler (the "Proponents") hereby file their Memorandum of Points and Authorities in Support of Motion for Summary Judgment.

INTRODUCTION

With the recent vote in the State of Maine, voters in thirty-one states have now participated in the initiative and/or referendum process to voice their opinion on the most significant public policy issue of our time: the definition of marriage. The Proponents of the Marriage Initiative of 2009 are seeking to add the District of Columbia to the number of citizens who have been allowed to voice their views through their votes on this important issue. The District of Columbia Board of Elections and Ethics (the "Board"), however, has denied the people of the District their guaranteed right under the District of Columbia's Home Rule Charter to be heard because it contends that the Initiative would "authorize[], or . . . have the effect of authorizing, discrimination prohibited under" the Human Rights Act ("HRA"). D.C. Code § 1-1001.16(b)(1)(C).

The people of the District of Columbia have reserved to themselves the sovereign right of initiative in the Initiative, Referendum, and Recall Charter Amendments Act of 1978, D.C. Code §§ 1-204.101 to 1-204.115 (the “Charter Amendments Act”). The Charter Amendments Act amended the Home Rule Act, reserving to the people the power to adopt initiatives in a manner “coextensive with the power of the legislature to adopt legislative measures.” *Atchison v. District of Columbia*, 585 A.2d 150, 155 (D.C. 1991) (quoting *Convention Ctr. Referendum Comm. v. District of Columbia Bd. of Elections & Ethics*, 441 A.2d 889, 897 (D.C. 1981) (hereinafter “*Convention Ctr. I*”). It is a right that, according to the Court of Appeals, is “virtually unlimited,” *Hessey v. District of Columbia Bd. of Elections & Ethics*, 601 A.2d 3, 12 (D.C. 1991), and “liberally construed,” *Convention Ctr. II*, 441 A.2d at 913.

As spelled out in the Charter Amendments Act, the lone “substantive limitation on the initiative right” is the exception for “laws appropriating funds.” *Id.* at 914. “[M]atters relating to the local budget process . . . remain within the control of the Mayor and Council.” *Hessey*, 601 A.2d at 15. Beyond this limitation though, the “right of initiative with regard to the authorization of programs and activities” is “very broad.” *Id.* at 12.

The Council in 1979 passed the Initiative, Referendum, and Recall Procedures Act, D.C. Code § 1-1001.16 (the “Initiative Procedures Act” or the “IPA”), to facilitate the people’s right of initiative. Importantly, the Council also sought to use the IPA to impose an additional substantive limitation, not found in the Home Rule Act or the Charter Amendments Act, on the people’s right of initiative—the HRA restriction. D.C. Code § 1-1001.16(b)(1)(C). It entirely excludes a subject matter—any measure said to “authorize[], or . . . have the effect of authorizing, discrimination prohibited under” the HRA—from the reach of the people’s right of

initiative. *Id.* The District of Columbia Board of Elections and Ethics (the “Board”) relied on the HRA restriction to deny approval of the Marriage Initiative of 2009.

Because the HRA restriction impermissibly conflicts with the Charter Amendments Act, the restriction is invalid and cannot be used as a basis for disapproving the Marriage Initiative of 2009. “As implementing legislation [of the Charter Amendments Act], the Initiative Procedures Act is valid, of course, only insofar as it conforms to the underlying Charter Amendments.” *Convention Ctr. II*, 441 A.2d at 915; *see also Price v. District of Columbia Bd. of Elections and Ethics*, 645 A.2d 594, 599 (D.C. 1994) (“[T]o the extent any IPA provision is inconsistent with the Charter Amendments, the latter controls.”). The attempted imposition of an additional substantive limitation on the right of initiative seeks to narrow the right in a manner that is plainly inconsistent with the “very broad” right reserved by the people in the Charter Amendments Act. *Hessey*, 601 A.2d at 12.

If the Court nonetheless believes the HRA restriction is valid, the Marriage Initiative of 2009 does not run afoul of the restriction. This Court and the Court of Appeals have both ruled that the “City Council consciously chose not to make the language of the Human Rights Act applicable to the regulation of the marital relationship.” *Dean v. District of Columbia*, No. 90-13892, slip op. at *4-8 (D.C. Super. Dec. 30, 1991), *aff’d*, *Dean v. District of Columbia*, 653 A.2d 307, 318-20 (D.C. 1995) (emphasis added). The text of the HRA and its legislative history demonstrate that the HRA was never intended to implicate the District’s marriage laws. Instead, as the Council has explained, the Act “should . . . be read in harmony with and as supplementing other laws of the District,” which undoubtedly includes the District’s marriage laws. Comm. on Public Services and Consumer Affairs, Report on Bill No. 2-179, Human Rights Act of 1977, at 3 (July 5, 1977) (citations and internal quotations omitted). Because neither the Council nor the

Court of Appeals have altered this interpretation, it remains true that the HRA does not cover the marriage laws. Accordingly, as a matter of law, the Marriage Initiative of 2009 does not authorize[], or . . . have the effect of authorizing, discrimination prohibited under” the HRA and a writ of mandamus should issue compelling the Board to accept the Initiative.

STATEMENT OF FACTS

On September 1, 2009, the Proponents filed the Marriage Initiative of 2009 with the Board. The proposed initiative would add a simple provision to the District’s marriage code, affirming current law that: “Only marriage between a man and a woman is valid or recognized in the District of Columbia.” (Jackson Aff. ¶¶ 3-4; *see also* Copy of the Marriage Initiative of 2009 attached to Jackson Aff. as Ex. A.) The next day, September 2, 2009, the Board published notice on its website that it had received the Marriage Initiative of 2009. (Jackson Aff. ¶ 6.) Eight days later, on September 10, 2009, the Board sent a letter to the Proponents informing them that a hearing on the Initiative had been tentatively scheduled for October 26, 2009, at One Judiciary Square, 441 4th Street, N.W., Suite 280, Washington, D.C. 20001. (Jackson Aff. ¶ 7; *see also* Letter from the Board to Jackson dated September 10, 2009, attached to Jackson Aff. as Ex. B.) The letter further informed the Proponents that if they wished to submit a memorandum in support of the Initiative, they should do so by October 16, 2009. (Jackson Aff. ¶ 7; *see also* Letter from the Board to Jackson dated May 28, 2009, attached to Jackson Aff. as Ex. B.)

On September 18, 2009, the Board published notice in the *D.C. Register* that it had received the Initiative and scheduled a public hearing on the Initiative for October 26, 2009, in the One Judiciary Square Building. (Jackson Aff. ¶ 8; *see also* Pertinent Portions of the *D.C. Register* attached to Jackson Aff. as Ex. C.) On October 15, 2009, the Board posted a “Public Notice” on its website announcing that there would be a Special Board Meeting on Monday,

October 26, 2009 at 10:00 a.m. to determine whether the Marriage Initiative of 2009 was a proper subject for an initiative in the District. (Jackson Aff. ¶ 9; *see also* “Public Notice” October 18, 2009, attached to Jackson Aff. as Ex. D.) A day later, on October 16, 2009, the Proponents filed a memorandum with the Board explaining why the Marriage Initiative presented a proper subject for the initiative process. (Jackson Aff. ¶ 10; *see also* Memorandum filed with the Board on October 16, 2009, attached to Jackson Aff. as Ex. E.)

Just over a week later, on October 26, 2009, the Board held a public hearing on the Marriage Initiative to determine whether it presents a proper subject for the initiative process. (Jackson Aff. ¶ 11.) The Proponents attended the hearing and provided testimony in support of the Initiative. (Jackson Aff. ¶ 11.)

On November 17, 2009, the Board decided that the Marriage Initiative of 2009 did not present a proper subject for the initiative process, because it “authorizes, or would have the effect of authorizing, discrimination” in violation of the HRA. (Jackson Aff. ¶ 12; *see also* Copy of Board Decision regarding the Initiative attached to Jackson Aff. as Ex. F.) The Board marked the Initiative as “received but not accepted,” and now holds the Initiative pending this Court’s review. D.C. Code § 1-1001.16(b)(2). The Board’s rejection of the Initiative began the ten (10) day time period for applying to this Court for a writ of mandamus ordering the Board to accept the Initiative. D.C. Code § 1-1001.16(b)(3). The ten (10) day time period is set to expire on November 27, 2009.

Pursuant to D.C. Code § 1-1001.16(b)(3), the Proponents filed contemporaneously with this motion, a petition for review and for a writ of mandamus, well within the ten (10) day time period. The Proponents now file this motion for summary judgment showing that there are no

genuine issues of material fact and that the Proponents are entitled to judgment as a matter of law. This proceeding is to be expedited pursuant to D.C. Code § 1-1001.16(b)(3).

ARGUMENT AND CITATION OF AUTHORITY

The Proponents' petition for review and for a writ of mandamus is properly presented to this Court through a motion for summary judgment. *See District of Columbia Bd. of Elections & Ethics v. Jones*, 481 A.2d 456, 457 (D.C. 1984) (considering summary judgment in appeal from an "action in the nature of mandamus request[ing] the Superior Court to order the Board of Elections and Ethics to accept [] proposed initiative"); *Rest. Ass'n of Metro. Wash. v. District of Columbia Bd. of Elections & Ethics*, 2004 WL 2102203, at *1 (D.C. Super. May 21, 2004) (considering cross-motions for summary judgment in case where "Petition for Writ of Mandamus" had been filed "against the Board claiming that it erred").

"Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Adolph Coors Co. v. Truck Ins. Exchange*, 960 A.2d 617, 620 (D.C. 2008). The parties do not dispute the facts of this case; rather, the issue is purely a question of law: whether the Marriage Initiative of 2009 is a law appropriating funds and is thus excluded from the right of the people to initiate the law. There is no assertion or allegation that the Marriage Initiative of 2009 is a law 'appropriating funds' and, accordingly, the Board acted unlawfully in rejecting the Initiative. Cite. The question the Board addressed was whether the Marriage Initiative of 2009 "authorizes, or would have the effect of authorizing, discrimination" in violation of the HRA. D.C. Code § 1-1001.16(b)(1). Because the HRA restriction conflicts with the right of initiative reserved to the people in the Initiative, Referendum, and Recall Charter Amendments Act, D.C. Code §§ 1-204.101 to 1-204.115 (the "Charter Amendments Act"), the HRA restriction is invalid as a matter of law. Moreover, even

if this Court finds that the HRA restriction imposed on the right of initiative is valid, the subject matter of marriage falls outside the coverage of the HRA and, thus, as a matter of law, a writ of mandamus should issue ordering the Board to accept the Marriage Initiative of 2009.

I. Because the Human Rights Act Restriction in the Initiative, Referendum, and Recall Procedures Act Conflicts with the Broad Right of Initiative Reserved by the People in the Charter Amendments Act, the Human Rights Act Restriction is Invalid.

A. The Right of Initiative Reserved by the People in the Charter Amendments Act Has Only One Exception.

The District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code § 1-201.01 *et seq.* (popularly known as the “Home Rule Act”), originally did not confer the right of initiative upon the voters. The right was granted in 1978 by the Charter Amendments Act, D.C. Code §§ 1-204.101 to 1-204.115. In accordance with the amendment procedures in the Home Rule Act, D.C. Code § 1-203.03, the Charter Amendment Acts was passed by the Council, ratified by a majority of the voters of the District, and approved by the United States Congress.

The Charter Amendments Act amended the Home Rule Act to give the voters the power to adopt initiatives in a manner “coextensive with the power of the legislature to adopt legislative measures.” *Atchison*, 585 A.2d at 155 (quoting *Convention Ctr. II*, 441 A.2d at 897). Once the District voters approve an initiative, “it becomes an ‘act of the Council, . . . and thus ‘law’ through the channel designated for the particular type of act adopted.” *Backman v. United States*, 516 A.2d 923, 926 (D.C. 1986) (quoting *Convention Ctr. II*, 441 A.2d at 896-97).¹

¹ Indeed, even when District of Columbia courts construe laws passed by initiative, they “treat amendment by initiative the same as amendment by Council legislation.” *Abrams v. United States*, 531 A.2d 964, 971 (D.C. 1987) (internal citations omitted). “The manner in which the statute was enacted has no bearing on interpreting the statute. We must hold the

The Charter Amendments Act describes the right of initiative in total by the following:

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. The “right of initiative with regard to the authorization of programs and activities” is “very broad.” *Hessey*, 601 A.2d at 12. “The one exception to this rule, of course, is that the initiative is not available for the proposing of laws ‘appropriating funds.’” *Convention Ctr. Referendum Comm. v. District of Columbia Bd. of Elections & Ethics*, 441 A.2d 871, 878 n.4 (D.C. 1980) (hereinafter “*Convention Ctr. I*”) (emphasis added). The “laws appropriating funds” exception “constitutes an operative, substantive limitation on the initiative right.” *Convention Ctr. II*, 441 A.2d at 914. But it is the only such limitation imposed by the Charter Amendments Act on the people’s right of initiative. Outside this context, the right of initiative reserved to the people in the Charter Amendments Act is “virtually unlimited,” *Hessey*, 601 A.2d at 12, and “liberally construed,” *Convention Ctr. II*, 441 A.2d at 913.

The legislative history of the Charter Amendments Act reinforces this interpretation. During the Council’s debate concerning the Act, Councilmember Arrington Dixon explained, “They [the electorate] can initiate any measure they want to initiate but they cannot initiate the spending of [] money. That is not in their power to do.” *Id.* at 912 (emphasis added).² In correspondence to the then General Counsel of the Council, the Staff Director of the Government Operations Committee, Bruce French, observed that “the only limitation upon the electors’ rights is in the direct appropriation of funds.” *Hessey*, 601 A.2d at 13 n.23 (quoting Bruce French, legislature and the citizenry to the same standards when interpreting the laws they enact.” *Backman*, 516 A.2d at 926.

² The debate concerning the Charter Amendments Act is reprinted, in part, in the plurality opinion and the appendix to the dissenting opinion in *Convention Center II*, 441 A.2d at 911-12, 931-36.

Staff Director, Committee on Government Operations, District of Columbia Council, Bill 2-2, Initiative, Referendum and Recall Charter Amendments Act of 1977, at 2 (June 8, 1977)) (emphasis added). Congressman Walter Fauntroy, one of the Proponents of the Marriage Initiative of 2009, echoed this same sentiment to the United States House of Representatives. Urging Congressional approval of the Charter Amendments Act, he explained that the Act “relates to the initiative right which is the process that allows electors to propose laws which will be voted on by them. This process of course excludes laws relating to the appropriation of funds.” *Convention Ctr. II*, 441 A.2d at 913.

The Charter Amendments Act, thus, “create[d] one exception to the initiative right. Electors may not propose ‘laws appropriating funds.’” *Id.* at 911 (emphasis added). Beyond that one exception, the Charter Amendments Act provided the voters a “very broad” right of initiative. *Hessey*, 601 A.2d at 12.

B. The Council Has Attempted to Impose an Additional Substantive Limitation on the Right of Initiative with the HRA Restriction.

The Charter Amendments Act directed the Council to pass enabling legislation empowering the voters to exercise their new right of initiative.

The Council of the District of Columbia shall adopt such acts as are necessary to carry out the purpose of this subpart within 180 days of the effective date of this subpart. Neither a petition initiating an initiative nor a referendum may be presented to the District of Columbia Board of Elections and Ethics prior to October 1, 1978.

D.C. Code § 1-204.107. In response, the Council passed the Initiative, Referendum, and Recall Procedures Act, D.C. Code § 1-1001.16 (the “Initiative Procedures Act” or the “IPA”), which went into effect on June 7, 1979. The aim of the IPA was to give voters “more specific

procedures” for exercising their right of initiative “than the Charter Amendments themselves provided.” *Convention Ctr. II*, 441 A.2d at 914.

But in addition to simply providing procedures and ministerial guidelines, the Council used the IPA to impose further limitations on the voters’ right of initiative. In its current form, the IPA directs that an initiative should be rejected by the Board if “it is not a proper subject of initiative . . . under the terms of title IV of the District of Columbia Home Rule Act,” or upon any of the following grounds:

- (A) The verified statement of contributions has not been filed pursuant to §§ 1-1102.04 and 1-1102.06;
- (B) The petition is not in the proper form established in subsection (a) of this section;
- (C) The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2; or
- (D) The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46.

D.C. Code § 1-1001.16(b)(1).

Of the five limitations in the IPA, the requirement that an initiative not “authorize[], or . . . have the effect of authorizing, discrimination prohibited under” the HRA is unique. *Id.* at § 1-1001.16(b)(1)(C). The requirements that proponents put their initiative in “proper form,” *id.* at § 1-1001.16(b)(1)(B), and file a “verified statement of contributions,” *id.* at § 1-1001.16(b)(1)(B), are simple procedural requirements that facilitate and enable the exercise of the right of initiative.³ They do not impose any substantive limitations on the types of laws that may be passed by initiative or otherwise cutback on the right of initiative granted by the Charter

³ Counsel to the Board announced at the October 26, 2009, public hearing that the Marriage Initiative of 2009 was in proper legislative form and that the Proponents’ committee had been duly filed in accordance with D.C. Code §§ 1-1102.04 and 1-1102.06. *See* Transcript of October 26, 2009 Public Board Hearing, at 4.

Amendments Act. Mandating that an initiative adhere to a certain format ensures efficiency and intelligibility. The filing of a “verified statement of contributions” preserves integrity and transparency in the election process.

These types of procedural requirements have generally been upheld by courts as consistent with protecting and promoting the right of initiative. Such limitations are “said to facilitate the exercise of the initiative power,” rather than “hamper[] or render[] the initiative and referendum power reserved to the people ineffective” 42 Am. Jur. 2d *Initiative and Referendum* § 2 (2009). See, e.g., *State ex rel. Stenberg v. Moore*, 602 N.W.2d 465, 474 (Neb. 1999) (holding that power of legislature “to enact laws to facilitate the operation of the initiative power means that it may enact reasonable legislation to prevent fraud or to render intelligible the purpose of the proposed law or constitutional amendment”); *Colorado Community Health Network v. Colorado General Assembly*, 166 P.3d 280, 284 (Colo. App. 2007) (upholding laws as consistent with right of initiative that “facilitate its operation”).

The IPA requirements that an initiative present a “proper subject” under Title IV of the Home Rule Act, D.C. Code § 1-1001.16(b)(1), and an initiative not “limit or negate” a Budget Request Act, *id.* at § 1-1001.16(b)(1)(D), are mandated by the Home Rule Act itself. 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.” *Hessey*, 601 A.2d at 14. It 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.* The “proper subject” requirement and the Budget Request Act limitation recognize that the right of initiative can be “no more extensive than [the Council’s] own powers” under the Home Rule Act. *Id.* “[A]n initiative, like an act of the Council, could not directly

amend the Charter, and an initiative also could not interfere with the ability of the Council to carry out its responsibilities under the Charter.” *Id.* at 14-15.

The requirement that an initiative not “authorize[], or . . . have the effect of authorizing, discrimination” under the HRA is markedly different from the other limitations imposed by the IPA. D.C. Code § 1-1001.16(b)(1)(C). It is not a mere procedural limitation. It does more than require that an initiative be filed in a certain format or direct that particular financial contributions be disclosed. Moreover, the HRA restriction is not mandated by the Home Rule Act. Nowhere does the Home Rule Act impose a nondiscrimination requirement on the power of the Council to pass laws by legislation or on the co-extensive power of the people to pass laws by initiative.

Instead, the HRA restriction was an “outgrowth of proposals by the Gay Activists Alliance.” Committee on Government Operations Staff Draft Committee Report No. 1 on Bill 2-317, Initiative, Referendum, and Recall Procedures Act of 1978, at 11 (Council of the District of Columbia, April 28, 1978). The Alliance argued that the restriction was “needed to prevent gay rights opponents from attempting to repeal the Human Rights Act’s provision banning discrimination based on sexual orientation.” Lou Chibarro, Jr., *D.C. Marriage Forum Called to Unify Community*, Washington Blade, Dec. 12, 2008, <http://www.washblade.com/2008/12-12/news/localnews/13741.cfm>; *see also* Committee on Government Operations Staff Draft Committee Report No. 1 on Bill 2-317, Initiative, Referendum, and Recall Procedures Act of 1978, at 10-11 (Council of the District of Columbia, April 28, 1978). At the time, similar “sexual orientation” nondiscrimination laws were being repealed through ballot measures in a number of U.S. cities. *See* Lou Chibarro, Jr., *D.C. Marriage Forum*, *supra*.

Thus, unlike the other limitations imposed by the IPA, the HRA restriction is a substantive limitation on the right of initiative. It entirely excludes a subject matter—any measure said to “authorize[], or . . . have the effect of authorizing, discrimination prohibited under” the HRA—from the reach of the people’s right of initiative reserved in the Charter Amendments Act. D.C. Code § 1-1001.16(b)(1)(C).

C. The IPA’s HRA Restriction is Invalid Because It is Inconsistent with Right of Initiative Reserved by the People in the Charter Amendments Act.

“As implementing legislation [of the Charter Amendments Act], the Initiative Procedures Act is valid, of course, only insofar as it conforms to the underlying Charter Amendments.” *Convention Ctr. II*, 441 A.2d at 915. In *Price v. District of Columbia Board of Elections and Ethics*, 645 A.2d 594 (D.C. 1994), the Court of Appeals held that the IPA provision concerning the number of elector signatures required to qualify an initiative was invalid, since it “was in conflict with the language contained in the Charter Amendments.” *Id.* at 600. The IPA and the Charter Amendments Act called for differing numbers of signatures. *Id.* at 600 n.18. The Court explained:

[T]o the extent any IPA provision is inconsistent with the Charter Amendments, the latter controls.

* * * *

While the Charter Amendments grant the Council authority to “adopt such acts as are necessary to carry out [its] purpose,” [D.C. Code § 1-204.107], the plurality concluded in *Convention Center II* that the Council may not enact legislation inconsistent with the Charter Amendments. Nor could the Council amend the Charter Amendments by enacting the IPA since, as the Self-Government Act clearly provides, the Charter may be amended only as provided in [D.C. Code § 1-203.03]. Further, nothing in [D.C. Code § 1-207.52], upon which the Board relies, grants the Council authority to amend the Charter; that provision only grants the Council authority “to enact any act or resolution with respect to matters involving or relating to elections in the District.”

Id. at 599 (internal citations omitted; emphasis in original). Title VII, Section 761 of the Home Rule Act reinforces *Price*: “To the extent that any provisions of this Act are inconsistent with the provisions of any other laws the provisions of this Act shall prevail and shall be deemed to supersede the provisions of such laws.” D.C. Code § 1-207.61. *See also Convention Ctr. II*, 441 A.2d at 915 (The Charter Amendments “to the District Charter, Home Rule Act, are in the nature of constitutional provisions, and cannot be amended or contravened by ordinary legislation.”). In short, the Council has the power to pass legislation facilitating the people’s right of initiative under the Charter Amendments Act, but not the power to pass legislation that in any way curtails or diminishes that right.⁴

This rule regarding legislation implementing the people’s right of initiative is well established and widespread.

Under a state constitutional provision authorizing the state legislature to enact laws to facilitate the initiative and referendum process, the legislature may enact reasonable legislation to prevent fraud or to render intelligible the purpose of the proposed law. However, acts of the legislature that affect the people’s exercise of the right of initiative must further the purpose of the right or facilitate its operation and be narrowly crafted to safeguard the people’s right to initiate legislation. Similarly, a state legislature may not curtail the power of referendum or place an undue burden on the exercise of the power, although it may pass legislation that aids or facilitates such power.

⁴ While the Court of Appeals has noted that the Charter Amendments Act is not self-executing, it has nonetheless held that its provisions have “independent” legal force.

Although we stated in *Convention Center I*, that the Charter Amendments are not self-executing, that ruling held only that electors could not present initiative, referendum, or recall proposals until the Council established more specific procedures than the Charter Amendments themselves provided. The decision did not hold that the substantive aspects of the Charter Amendments lack independent force.

Convention Ctr. II, 441 A.2d at 914. *See also Price*, 645 A.2d at 599-600 (dismissing argument that “the Charter Amendments themselves had no legal effect”).

42 Am. Jur. 2d *Initiative and Referendum* § 16 (2009). “Accordingly, the legislature can and is required to enact legislation that implements and enables the exercise of the people’s right to initiative so long as it does not pass laws that unduly burden or diminish the people’s right to initiate legislation.” *Gallivan v. Walker*, 54 P.3d 1069, 1082 (Utah 2002). *See also McGee v. Secretary of State*, 896 A.2d 933, 940 (Me. 2006) (“In short, the Legislature is authorized to enact implementing legislation, but cannot do so in any way that is inconsistent with the Constitution or that abridges directly or indirectly the people’s right of initiative.”); *Loonan v. Woodley*, 882 P.2d 1380, 1386-87 (Colo. 1994) (stating that legislature’s enactments that will diminish, impair, limit, or destroy constitutional initiative right are impermissible); *Wolverine Golf Club v. Hare*, 180 N.W.2d 820, 830 (Mich. App. 1970) (noting that legislature can enact statutes that “place certain ground rules on the petitioning for initiative in order to facilitate the enormous task of verifying the signatures on petitions,” but it cannot “create unnecessary obstacles to restrict the lawful use of initiative”); *Bernstein Bros., Inc. v. Dept. of Revenue*, 661 P.2d 537, 539 (Or. 1983) (“The only power the legislature has is to pass legislation that aids or facilitates the [initiative power] intended by the constitution.”); *Cobb v. Burress*, 209 S.W.2d 694, 697 (Ark. 1948) (“[A]n enabling act of the legislature, intended to carry into effect a self-executing constitutional provision conferring the right of initiative and referendum, which imposes restrictions on proposed legislation not found in the Constitution, is invalid.”); *Lawing v. Faull*, 227 Cal. App. 2d 23, 26 (1964) (ruling that “legislation may be enacted to facilitate its operation, but in no way limiting or restricting” the right of initiative).

The HRA restriction imposed by the IPA on the right of initiative impermissibly conflicts with the Charter Amendments Act. As detailed above, the Charter Amendments Act “create[d] one exception to the initiative right. Electors may not propose ‘laws appropriating funds.’”

Convention Ctr. II, 441 A.2d at 911 (emphasis added); see also *Convention Ctr. I*, 441 A.2d at 878 n.4 (same). The “laws appropriating funds” exception, according to the Court of Appeals, is the only “operative, substantive limitation on the initiative right.” *Convention Ctr. II*, 441 A.2d at 914. Otherwise, the right reserved to the people in the Charter Amendments Act is “very broad,” *Hessey*, 601 A.2d at 12, and “liberally construed,” *Convention Ctr. II*, 441 A.2d at 913. The Council’s attempt to impose an additional “operative, substantive limitation on the initiative right” through the IPA—the HRA restriction—is inconsistent with the broad right reserved in the Charter Amendments Act. Because “to the extent [a provision of the IPA] conflicts with the Charter Amendments, the latter controls,” *Price*, 645 A.2d at 600, the HRA restriction is invalid, *id.* at 599 (“legislation implementing the Charter Amendments is valid only if it does not conflict with the Charter Amendments”) (emphasis added).

The HRA restriction removes from the reach of the people’s right of initiative any measure said to “authorize[], or . . . have the effect of authorizing, discrimination prohibited under” the HRA. D.C. Code § 1-1001.16(b)(1)(C). But “the power of the electorate to act by initiative,” as reserved to the people in the Charter Amendments Act, “is coextensive with the power of the legislature to adopt legislative measures.” *Brizill v. District of Columbia Bd. of Elections & Ethics*, 911 A.2d 1212, 1214 (D.C. 2006) (quoting *Convention Ctr. II*, 441 A.2d at 897). The Council clearly has the power to modify the HRA. It has done so on multiple occasions. See, e.g., Human Rights Amendment Act of 1998, effective April 20, 1999 (D.C. Law 12-242); Human Rights Amendment Act of 2002, effective October 1, 2002 (D.C. Law 14-189); Domestic Partnership Protection Amendment Act of 2004, effective April 8, 2005 (D.C. Law 15-309); Human Rights Clarification Amendment Act of 2005, effective March 8, 2008 (D.C. Law 16-58); Prohibition of Discrimination on the Basis of Gender Identity and Expression

Amendment Act of 2009, effective June 25, 2008 (D.C. Law 17-177). Likewise, the Council has power to enact legislation that disadvantages some segment of District citizens in a manner inconsistent with the HRA. *See, e.g., Evans v. United States*, 682 A.2d 644, 648-49 (D.C. 1996) (holding that statute permitting age discriminatory use of peremptory challenges was consistent with HRA); *NOW v. Mutual of Omaha Ins. Co.*, 531 A.2d 274, 277 (D.C. 1987) (holding that legislation allowing gender discriminatory actuarial pricing was consistent with HRA). The HRA restriction prohibits the District voters from legislating in the same manner. It prevents the voters from having truly “coextensive” legislative power as guaranteed by the Charter Amendments Act. The HRA restriction, thus, is inconsistent with the Charter Amendments Act and invalid.

II. The Proponents’ Earlier Pursuit of a Referendum Does Not Preclude Their Pursuit of an Initiative Now.

A. In Accordance with the Opinions of this Board and the District of Columbia, this Court Specifically Instructed the Proponents to Pursue an Initiative.

In May of this year, some, but not all, of the current Initiative Proponents sought a referendum on the Jury and Marriage Amendment Act of 2009, D.C. Code § 46-405.01. Because the timeframe imposed on the referendum process made it virtually impossible for them to exercise fully their right of referendum, the Proponents asked this Court to stay the effective date of the Act to provide more time.

This Court denied this request, holding that the Proponents’ inability to pursue a referendum “would not result in irreparable harm” since the “the District’s Home Rule Act provides the right of initiative for voters to repeal a law.” *Jackson v. District of Columbia Bd. of Elecs. & Ethics*, Civ. A. No. 09-004350, slip op. at 10 (D.C. Super. June 30, 2009). The Court

explained that the Proponents' "remedy is to pursue an initiative or to seek redress through the political process by lobbying the Council and by exercising their right to vote." *Id.* at 12.

That is precisely what the Initiative Proponents are now doing—pursuing an initiative to give the voters the chance to affirm or reject the definition of marriage in the District. Both the Board and the District of Columbia argued to this Court in the aforementioned proceeding "that there would be no irreparable harm because even if [the Proponents] are too late to complete a referendum, they nonetheless have the right to proceed with the initiative process (provided the proposed initiative does not violate the DCHRA)." *Id.* at 10. The Board, in particular, argued:

If the Court denies the [Proponents'] request for injunctive relief and the Act becomes law by way of the expiration of the Congressional review period, they may still avail themselves of the initiative process.

* * * *

Clearly the [Proponents] will have at their disposal the right of Initiative as the Council contemplated should their time run on the referendum process.

(Bd.'s Opp. to Pets.' Mot. for Prelim. Inj., at 21-22.) The Board, the District, and this Court all maintained that denying the Proponents their right of referendum caused no injury, since the initiative process is open to them. This Court then directed the Proponents to abandon the referendum and pursue an initiative. Thus, the Proponents are following the directions of this Court, in reliance upon the representations made by both the Board and the District of Columbia.

The Board reaffirmed these representations at the October 26, 2009, public hearing on the Marriage Initiative of 2009. While the Board disagreed that its arguments to this Court regarding the availability of the initiative process compelled it to approve the Marriage Initiative of 2009, it acknowledged that the Proponents were entitled to pursue the initiative process to completion, including the judicial review process of which they are now availing themselves. The Board explained:

[The judge] said you have the initiative process, which you have more than enough time to complete, which would entail if the Board decides it is not a proper subject, you can appeal it to Superior Court, and you can appeal it to the Court of Appeals, and all this is the initiative process.

Transcript of October 26, 2009, Public Board Hearing, at 33-34. Accordingly, it would be contradictory to now hold that the Initiative Proponents are somehow legally precluded from availing themselves of the initiative process.

The Court of Appeals affirmed in *Convention Center II*, *supra*, that voters may use the initiative process to repeal legislation that was unsuccessfully subjected to referendum. *Id.* at 910 n.38. The Court explained:

The initiative right conferred by the Charter Amendments includes the right to repeal and amend existing legislation. The statute gives the electorate the right to propose “laws,” and the word “laws” includes both new legislation and the amendment and repeal of existing legislation.

The legislative history of the charter amendments reinforces the generic meaning of this term. During the hearings of the Council Committee on Government Operations, the late Councilmember Julius Hobson, the author of the original Charter Amendment bill, wondered whether “30 working days . . . is enough time for a citizen to get a referendum on the ballot?” The Committee Clerk responded that the thirty-day time frame corresponded to the congressional layover period. He continued, “Should the citizens desire, basically, to reverse a decision of the Council which has already become law, they would then have the ability to initiate through the initiative process the same measure to the ballot.” Reflecting the same view, the Committee Report on the bill stated that the referendum right would attach only during the layover period; however, “[o]f course, the people could undertake to have an initiative item placed on the ballot which would have substantially the same impact.”

As this legislative history makes clear, the mere existence of a referendum right to approve or disapprove acts of the Council does not imply that the electorate cannot use the initiative to repeal or amend existing legislation. Rather than being mutually exclusive, the two processes of initiative and referendum overlap.

Id. (internal citations omitted). *See also Atchison*, 585 A.2d at 154 (acknowledging that initiative and referendum process allows for “‘legislative ping-pong’ whereby each legislature [the Council and the voters] passes legislation only to be amended or repealed by the other

legislature, leading to reenactment and so forth.”); *Referendum Comm. v. City of Hermosa Beach*, 184 Cal. App. 3d 152, 160 (1986) (upholding pursuit of initiative after unsuccessful use of referendum). Thus, the fact that some of the Initiative Proponents unsuccessfully pursued a referendum on the Jury and Marriage Amendment Act of 2009 does not preclude them from pursuing the current initiative.

Moreover, any apparent inconsistency between the Marriage Initiative of 2009 and the Jury and Marriage Amendment Act of 2009 is irrelevant to this proceeding. The Court of Appeals has specifically held “that a proposed initiative’s inconsistency with the current District of Columbia Code has no bearing on the question of whether the proposed initiative is a ‘proper subject.’” *Hessey*, 615 A.2d at 579 (emphasis added). Section 1-1001.16(b)(1) of the IPA “provides only that an initiative must be consistent with the District of Columbia Charter.” *Id.*; *see also* D.C. Code § 1-1001.16(b)(1). The Jury and Marriage Amendment Act of 2009 is not part of the District of Columbia Charter. Accordingly, “[a]ny conflict between the terms of the initiative and any statute not part of the Charter is . . . irrelevant to the ‘proper subject’ inquiry.” *Hessey*, 615 A.2d at 579.

B. The Board and the District are Estopped from Arguing that the Initiative Proponents are Precluded from Pursuing the Initiative Process.

“[J]udicial estoppel applies when a litigant switches positions from one proceeding to another.” *Ivey v. District of Columbia*, 949 A.2d 607, 611 (D.C. 2008). The doctrine applies equally against the government as against a private litigant. *New Hampshire v. Maine*, 532 U.S. 742, 749, 755-56 (2001); *see also County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 73 (D.D.C. 2008). As explained above, the Board and the District represented to this Court in the referendum proceeding that the Proponents may avail themselves of the initiative process. Thus,

they are estopped from now claiming in this proceeding that the initiative process is closed to the Proponents.

The Board and the District should not be permitted to be two-faced with this Court. “The independent doctrine of judicial estoppel precludes a litigant from playing fast and loose with a court of justice by changing his position according to the vicissitudes of self interest.” *Porter Novelli, Inc. v. Bender*, 817 A.2d 185, 188 (D.C. 2003). To prevent the entry of a preliminary injunction in the Referendum proceeding, the Board and the District argued to this Court that Proponents had not suffered “irreparable harm” since they “have the right to proceed with the initiative process.” *Jackson*, slip op. at 10. That argument was accepted by this Court: “The Court agrees that a denial of injunctive relief would not result in irreparable harm,” because “the District’s Home Rule Act provides the right of initiative for voters to repeal a law.” *Id.* The Board and the District are now making the exact opposite argument in an attempt to bar the Proponents from pursuing their right of review under D.C. Code § 1-1001.16(b)(3). The doctrine of judicial estoppel precludes them from making such an argument.

C. This Court’s Decision in the Referendum Proceeding Does Not Preclude the Proponents from Seeking Judicial Review of the Board’s Denial of the Initiative.

The Board and the District suggested in the proceeding below that the doctrine of collateral estoppel may preclude the Proponents from seeking judicial review of the Board’s denial of the Marriage Initiative of 2009.⁵

⁵ Attorney General for the District of Columbia, Peter J. Nickles, argued to the Board that “[i]f the proponent of the Initiative seeks expedited judicial review of the Board’s refusal, per section 16(b)(3) of the Procedures Act (D.C. Official Code § 1-1001.16(b)(3)), the review would likely be controlled by the doctrine of collateral estoppel.” (Letter from Attorney General Peter J. Nickles to General Counsel for the Board of Elections and Ethics, Kenneth J. McGhie, dated Oct. 5, 2009, at 6).

Collateral estoppel, or issue preclusion, “renders conclusive in the same or a subsequent action determination of an issue of fact or law when (1) the issue is actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not merely dictum.”

Davis v. Davis, 663 A.2d 499, 501 (D.C. 1995) (quoting *Washington Med. Ctr. v. Holle*, 573 A.2d 1269, 1283 (D.C.1990)).⁶

1. The Issues Raised by the Initiative Were Not Litigated or Determined in the Referendum Proceeding.

The Marriage Initiative of 2009 primarily reaffirms District law that prohibits the issuance of marriage licenses to same-sex couples or the solemnization of same-sex “marriages” within the District of Columbia. In contrast, the Referendum addressed the Jury and Marriage Amendment Act of 2009, which provided some recognition of marriage licenses issued to same-sex couples in other jurisdictions. The issue of whether affirming District law that limits marriage licenses to opposite-sex couples is consistent with the HRA was not considered by this Court. Indeed, this Court distinguished *Dean v. District of Columbia*, 653 A.2d 307, 313 (D.C. 1995), on the basis that the case addressed whether the District discriminated “on the grounds of sex or sexual orientation in violation of the [HRA]” by refusing to provide marriage licenses to same-sex couples from the District, not with the propriety of recognizing same-sex “marriages” from other jurisdictions. *Id.* at 309. This Court reasoned that “the Court in *Dean* did not

⁶ The doctrine of *res judicata*, or claim preclusion, has rightly not been raised. The doctrine only applies “when a valid final judgment has been entered on the merits, the parties or those in privity with them are barred, in a subsequent proceeding, from relitigating the same claim or any claim that might have been raised in the first proceeding.” *Newell v. District of Columbia*, 741 A.2d 28, 36 (D.C. 1999) (quoting *Holle*, 573 A.2d at 1280-81). Attorney General Nickles correctly observed in his letter to the Board that the doctrine of *res judicata* is likely inapplicable to this proceeding because “the denial of an initiative is a different ‘claim’ or cause of action than the denial of a referendum.” (Letter from Attorney General Peter J. Nickles to General Counsel for the Board of Elections and Ethics, Kenneth J. McGhie, dated Oct. 5, 2009, at 6).

consider whether the government could refuse to recognize the legal right of persons to remain married solely because of their sexual orientation. In fact, the Court in *Dean* could not have addressed this issue because when *Dean* was decided in 1995, no state had legalized same-sex marriage.” *Jackson*, slip op. at 7. The Court thus specifically held that the issue raised by this Initiative proceeding—the propriety of denying marriage licenses to same-sex couples within the District—was not before it in the Referendum proceeding. Accordingly, the issues raised by this proceeding were, by the Court’s own reasoning, not litigated or determined in the Referendum proceeding.

Initiatives and referenda are also fundamentally different in character. They “widely differ in their terminology” *Convention Ctr. I*, 441 A.2d at 874 (internal quotations and citations omitted). The referendum power permits voters to “suspend acts of the Council . . . until such acts have been presented to the . . . [voters] . . . for their approval or rejection.” D.C. Code § 1-204.101(b). Whereas the initiative power allows qualified electors to initiate and submit legislation to the voters. *Id.* at § 1-204.101(a). The issue of whether the people may exercise their power of initiative to legislate affirmatively on the subject of marriage was not considered by the Court in the Referendum proceeding. The Referendum sought to suspend a particular bill of the Council—the Jury and Marriage Amendment Act of 2009. Assuming it was necessary to address the merits of the Referendum at all (which the Proponents contend it was not, *see* discussion *infra* Part II.C.2), the Court determined only the narrow issue of whether the particular “proposed referendum . . . violate[d] the DCHRA.” *Jackson*, slip op. at 4. The Court did not, and could not properly, make a general ruling that the people cannot legislate on the subject of marriage at all. Accordingly, the issues raised by this Initiative proceeding were not litigated or determined by the Court in the Referendum proceeding.

2. **To the Extent the Current Initiative Can Be Viewed as Raising Any of the Same Issues as the Referendum Proceeding, this Court's Determination that the Referendum Violated the HRA was Not Necessary and Essential to the Judgment in the Referendum Proceeding.**

For collateral estoppel to apply “‘the issue must have been material and relevant to the disposition of the prior action,’ and ‘the determination made of the issue . . . must have been necessary and essential to the resulting judgment.’” *Newell*, 741 A.2d at 36 (quoting *Ali Baba Co., Inc. v. WILCO, Inc.*, 482 A.2d 418, 421 (D.C. 1984)).

This Court disposed of the Referendum proceeding by granting the District’s motion to dismiss. *Jackson*, slip op. at 15. The District argued that the Proponents’ challenge to the Board’s denial of the Referendum should be dismissed because it was “untimely.” (District’s Mot. to Dismiss, at 1). “Because petitioners failed timely to file their Referendum, the Act will become law and their challenge will become moot on or about July 6, 2009, hence the Court need not now undertake a substantive analysis of the Board’s decision.” (District’s Mot. to Dismiss, at 10 n.8). This Court agreed that “it is not feasible to complete the referendum process before the JMA becomes effective,” and “**ORDERED** that the District’s Motion to Dismiss is **GRANTED**.” *Jackson*, slip op. at 9, 15 (emphasis in original); *see also id.* at 4 (observing that there was “insufficient time to complete the referendum process prior to the JMA becoming effective”); *id.* at 1 (“the Court grants the District’s Motion to Dismiss”). The Court’s decision to grant the District’s motion to dismiss for mootness means that any determination of the merits of the Proponents’ challenge was unnecessary and nonessential to the judgment.

While the Court may have had to determine the Proponents’ “likelihood of success on the merits” to dispose of their motion for preliminary injunction, *Zirkle v. District of Columbia*, 830 A.2d 1250, 1255–56 (D.C. 2003), such a determination was not an actual adjudication on the

merits of the question of whether the Referendum “authorize[d], or would have [had] the effect of authorizing, discrimination prohibited under” the HRA, D.C. Code § 1-1001.16(b)(1)(C). “A preliminary injunction is not a preliminary adjudication on the merits, but a device for preserving the status quo and preventing the irreparable loss of rights before judgment.” *Textile Unlimited, Inc. v. A.BMH & Co., Inc.*, 240 F.3d 781, 786 (9th Cir. 2001); *see also Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976) (“At a hearing on a request for preliminary relief, only the likelihood of success on the merits is to be considered. An adjudication of the merits must await a full and final hearing on the merits.”); *Energy Action Ed. Foundation v. Andrus*, 516 F. Supp. 90, 96-97 (D.D.C. 1980) (“Upon consideration of a motion for preliminary injunction, the Court need only consider the likelihood of success on the merits, for adjudication of the merits must await a full hearing.”). Any determination of the actual merits of the Proponents’ challenge was unnecessary to the disposition of their motion for preliminary injunction and the dismissal for mootness.⁷

Indeed, the only determinations that were essential to this Court’s judgment were the denial of the Proponents’ motion for preliminary injunction and the granting of the District’s motion to dismiss for mootness. Once the Court determined that it would not enjoin the effective date of the Jury and Marriage Amendment Act of 2009, it was clear that it was “not feasible to complete the referendum process before the JMA [became] effective,” and the case was moot. *Jackson*, slip op. at 9. At that point, reaching the merits was flatly unnecessary and nonessential

⁷ This same understanding of this Court’s decision was affirmed by the Board at the October 26, 2009, public hearing. The Board explained:

So, the Court -- well, the proposers, rather than having the Court directly address the proper subject, requested a stay, and the Court said, well, even if -- whether I grant this or whether I say it’s a proper subject or not, you are still not going to be able to complete it, but you still have the initiative process

Transcript of October 26, 2009, Public Board Hearing, at 33.

to disposing of the case. Accordingly, the Proponents are not collaterally estopped from seeking judicial review of the current initiative.

3. The Proponents of the Initiative Differ from those of the Referendum.

Collateral estoppel “prevents repetitious litigation of the same issue by the same parties.” *United States v. McMillian*, 898 A.2d 922, 931 (D.C. 2006) (quoting *Laughlin v. United States*, 344 F.2d 187, 189 (D.C. Cir. 1965)) (emphasis added). Only four of the eight Proponents of the Marriage Initiative of 2009 participated in the Referendum.⁸ The other four Proponents were not involved at all.⁹ Because four of the Proponents are clearly not “the same parties” from the Referendum proceeding, collateral estoppel does not preclude the Court’s review of the Board’s denial of the Initiative.

Any one of the Proponents is sufficient to propose an initiative. “Any registered qualified elector” may “submit a proposed initiative measure.” D.C. Code § 1-1001.01(a)(1) (emphasis added); *see also* D.C. Mun. Regs., tit. 3, § 1001.1 (“In order to commence the initiative or referendum process, a registered qualified elector(s) shall file”) (emphasis added). Thus, if the Court surmises that some of the Proponents are estopped from seeking review of the Initiative because they are “the same parties” from the Referendum proceeding, the remaining Proponents are entitled to this Court’s review. The rule could not be otherwise. It cannot be that because a handful of District voters sought a referendum on the Jury and Marriage Amendment Act in April 2009 that all voters in the District are now forever precluded from proposing legislation on the subject of marriage. Accordingly, the doctrine of collateral estoppel is inapplicable.

⁸ Harry R. Jackson, Jr., Walter E. Fauntroy, Dale E. Wafer, and Melvin Dupree.

⁹ Robert King, James Silver, Anthony Evans, and Howard Butler.

III. Even if the Court Concludes that the HRA Restriction on the People's Right of Initiative is Valid, the Regulation of the Marital Relationship Falls Outside the Coverage of the HRA.

When the HRA was passed in 1977, the Council was clear that the Act "should . . . be read in harmony with and as supplementing other laws of the District." Comm. on Public Services and Consumer Affairs, Report on Bill No. 2-179, Human Rights Act of 1977, at 3 (July 5, 1977) (citations and internal quotations omitted). While "[t]he 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," it "did not intend the Act to prohibit every discriminatory practice." *Dean v. District of Columbia*, 653 A.2d 307, 319 (D.C. 1995) (emphasis added). In other words, some areas of the law were intended to fall outside the coverage of the HRA.

For example, in *NOW*, 531 A.2d at 277-78, the Court of Appeals concluded that the Council did not intend the HRA to apply to the gender-discriminatory actuarial pricing practices of insurance companies. The Court explained:

It is true that it can be argued with some persuasion that the "plain language" of the Act prohibits discrimination based on gender in the services offered by insurance companies. Significantly, however, the statute contains no language purporting explicitly to regulate insurance premium practices. If the Council had intended to effect such a dramatic change in insurance rate-setting practices, it is reasonable to assume that there would have been at least some specific reference to it in the language of the Act or, at least, within its legislative history.

Id. at 276. Thus, the Court held that the HRA does reach the regulation of insurance premiums even when premium pricing may be discriminatory.

Likewise, in *Evans*, 682 A.2d at 648-49, the Court of Appeals rejected Evans's argument that a statute permitting peremptory challenges based on age ran afoul of the HRA. The Court reasoned much like it did in *NOW*:

We note that there is no specific language in the DCHRA or commentary in its legislative history limiting peremptory challenges based on age or indeed, based on any characteristic prohibited in the DCHRA. Indeed, there is no mention at all regarding jury selection or peremptory challenges in the DCHRA. Evans contends that jury duty is included in the phrase “public service” in § 1-2511. The statute, however, does not define “public service,” and the legislative history is similarly silent. Thus, general language forbidding discrimination in “public service” is too ambiguous a mandate to be interpreted to clearly include a limitation on statutorily-granted peremptory challenges. The language of the DCHRA simply does not support Evans’s interpretation.

Nothing revealed in the legislative history of the DCHRA persuades us that Evans’s interpretation is correct. The DCHRA was passed to “underscore the Council’s intent that the elimination of discrimination within the District of Columbia should have the highest priority and that the Human Rights Act should therefore be read in harmony with and as supplementing other laws of the District.” (Comm. on Public Services and Consumer Affairs, Report on Bill No. 2-179, The Human Rights Act of 1977, at 3 (July 5, 1977)).

* * * *

[W]ithout any specific mention or reference in the language of the DCHRA or legislative history to the specific act claimed to be prohibited by the DCHRA, we cannot assume that the Council intended to cut back on the previously-existing, statutorily-permitted practice of exercising peremptory challenges on the basis of age.

Id. at 648.

Just as the District courts have held that gender discriminatory actuarial pricing and age discriminatory use of peremptory challenges fall outside the purview of the HRA, the courts have held that the marriage too is not covered by HRA. This Court in *Dean* specifically held that the “City Council consciously chose not to make the language of the Human Rights Act applicable to the regulation of the marital relationship.” *Dean v. District of Columbia*, No. 90-13892, slip op. at *4-8 (D.C. Super. Dec. 30, 1991), *aff’d*, *Dean*, 653 A.2d at 318-20 (emphasis added). The court reasoned that “only a few months before the Council enacted the Human Rights Act, it had rejected a proposal expressly to permit same-sex marriages.” *Dean*, 653 A.2d at 310. The HRA was signed into law by the Mayor on September 28, 1977. *See* Legislative

History of Laws, D.C. Official Code § 2-1401.01. The Marriage and Divorce Act was signed by the Mayor only about eight months earlier, on January 4, 1977. *See* Legislative History of Laws, D.C. Official Code § 46-410.

The initial version of the Marriage and Divorce Act, Bill No. 1-89, proposed by Councilmember Arrington Dixon, “would [have] permit[ted] marriages between persons of the same sex.” *Dean*, 653 A.2d at 311. The bill generated a “fervent debate” and the Council persuaded Councilmember Dixon to withdraw the bill and provide a substitute. *Id.* at 312. The substitute bill became the final Marriage and Divorce Act and it “contained no references to same-sex marriages.” *Id.* Because the Council had expressly rejected the issuance of marriage licenses to same-sex couples only eight months earlier,¹⁰ and neither the language of the HRA nor its legislative history made any mention of redefining marriage, the Superior Court ruled that the HRA was not “applicable to the regulation of the marital relationship.” *Dean*, slip op. at *4-8.

The Superior Court, thus, held that the denial of a marriage license to a same-sex couple did not run afoul of the HRA, because the HRA was never intended to regulate marriage in the first instance.

[P]laintiffs were denied a marriage license because of the nature of marriage itself, requiring, as it does, that the parties thereto be a male and a female. What the plaintiffs herein sought a license to enter into, by definition, simply was not a “marriage.” Any change in that definition must come from the legislature—not this Court.

Id.

¹⁰ The composition of the Council that enacted the HRA and rejected making marriage licenses available to same-sex couples was identical, with all the same members participating in both actions. *See Dean*, 653 A.2d at 320 (“[T]he same Council was considering both the Human Rights Act and the Marriage and Divorce Act legislation.”).

The Court of Appeals affirmed this Court's ruling, holding that when the Council passed the HRA in 1977, it did not intend the Act to reach the regulation of the marital relationship.

Dean, 653 A.2d at 313, 318-20. The court explained:

Although the Council undoubtedly intended the Human Rights Act to be read broadly to eliminate the many proscribed forms of discrimination in the District, we cannot conclude that the Council ever intended to change the ordinary meaning of the word "marriage" simply by enacting the Human Rights Act. 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.

* * * *

Furthermore, in 1977, the same Council was considering both the Human Rights Act and the Marriage and Divorce Act legislation. Councilmembers were keenly aware of the gay marriage debate and presumably would have stated their intentions expressly if they had wanted the Human Rights Act, instead of the Marriage and Divorce Act, to expand the marriage statute to authorize same-sex unions. We therefore cannot conclude that the Council intended the Human Rights Act to change the fundamental definition of marriage.

Id. at 320. The Court of Appeals concluded that the HRA was not violated since the District's regulation of the marital relationship falls outside the coverage of the Act. *Id.* Nothing has changed; the HRA still does not implicate the definition of marriage.

The Court of Appeals has since affirmed *Dean*. In *Evans*, 682 A.2d 644, the Court of Appeals explained its decision in *Dean* this way:

In *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995), this court rejected a discrimination claim based on the DCHRA, finding that the statute contained no language or legislative history supporting the broad interpretation necessary to uphold the claim. The appellant in *Dean* contended that the government's refusal to issue marriage licenses to same-sex couples unlawfully denied the couple "equal opportunity" to participate in an important aspect of life protected by the DCHRA, and more specifically, contravened the prohibition against discrimination in public accommodations. The court recognized that the District of Columbia Council passed the DCHRA intending it to be a "powerful, flexible, and far-reaching prohibition against discrimination of many kinds, including sex and sexual orientation." Nevertheless, the court held that the statute could not be read to mean that every discriminatory practice is prohibited.

* * * *

[F]inding no mention of such intent in the specific language or the legislative history of the DCHRA, *Dean* concluded that the Council had no intention, in passing the DCHRA, of changing the ordinary meaning of marriage, as understood in the marriage statute to apply only to heterosexual couples.

Id. at 648 (quoting *Dean*, 653 A.2d at 319) (internal citations omitted). *See also NOW*, 531 A.2d at 277 (holding that Council did not intend the HRA to apply to gender distinctions in actuarial pricing policies, even though the Council intended the Act to prohibit denial of “full and equal enjoyment” of the goods, services, and privileges provided by insurance companies generally). Thus, the HRA is not designed to be broadly construed to encompass any item that may touch upon a protected category.

In ruling that same-sex couples may adopt children, the Court of Appeals in *In re M.M.D.*, 662 A.2d 837 (D.C. 1995), specifically distinguished *Dean*, observing:

Recently we noted that a “marriage,” according to “the ordinary sense and meaning traditionally attributed to the word,” does not include a same-sex couple, and thus partly for this reason we concluded that Congress, in enacting the marriage statute without specific limitation to heterosexual couples, could not have intended to include same-sex couples. In contrast, the idea of “adoption” does not suggest an inherent, traditional limitation on who may adopt; we cannot use an “ordinary” meaning of “adoption” to say that Congress assuredly made unmarried couples ineligible to adopt.

Id. at 848. The Court of Appeals’ repeated reaffirmation of *Dean* makes clear that the regulation of the marital relationship does not fall within the ambit of the HRA.

In only the last few years, the Court of Appeals has continued to reiterate that “marriage” in the District means a “husband and a wife.” In *Coleman v. United States*, 948 A.2d 534 (D.C. 2008), the Court of Appeals reaffirmed that “common law marriage” requires “cohabitation as husband and wife.” *Id.* at 544 (emphasis added). Similarly, in *Mesa v. United States*, 875 A.2d 79 (D.C. 2005), the Court of Appeals explained that “common law marriage in this jurisdiction

[necessarily entails] cohabitation as *husband and wife*.” *Id.* at 83 (emphasis added). *See also Dean*, 653 A.2d at 364 n.8 (Steadman, J., concurring) (citing *DeSanto v. Barnsley*, 476 A.2d 952, 955-56 (Pa. Super. 1984), for proposition that “two persons of the same sex cannot enter a common law marriage”).

Accordingly, as a matter of law, the Marriage Initiative of 2009 does not “authorize[], or . . . have the effect of authorizing, discrimination” prohibited by the HRA, D.C. Code § 1-1001.16(b)(1)(D). The Council never intended the HRA to regulate the marital relationship. Accordingly, the Board erred in determining that the Initiative runs afoul of the HRA and a writ of mandamus should issue ordering the Board to accept the Initiative.

A. The HRA Has Not Been Amended Since *Dean* to Make the Act Applicable to the Marital Relationship.

This Court is bound by *Dean*. While the Council could attempt to amend the HRA to minimize *Dean*’s applicability, this has not been done. The only significant amendment to the HRA since *Dean* is the 2002 amendment clarifying the Act’s application to the provision of government services. D.C. Code § 2-1402.73.¹¹ The Council passed the amendment to address a particular circumstance—a tragic incident of discrimination by an Emergency Medical Technician employed by the District Fire Department—not to expand the HRA to cover the regulation of the marital relationship. Subcomm. on Human Rights, Latino Affairs and Property Management, Report on Bill 14-132, Human Rights Amendment Act of 2002, at 5 (Mar. 29,

¹¹ The applicability of the HRA to government services was already assumed by the Court of Appeals in *Dean*. “We, too, assume . . . the Marriage License Bureau is a place of public accommodation for purposes of our analysis.” *Dean*, 653 A.2d at 319. Even assuming the HRA applied, the Court of Appeals still held that the refusal to recognize same-sex “marriages” did *not* violate the HRA, because the District’s “legislative definition” of “‘marriage’ requires persons of opposite sexes,” and, in passing the HRA, the Council never intended “to expand the marriage statute to authorize same-sex unions.” *Id.*

2002). Accordingly, the 2002 amendment to the HRA did not undermine the *Dean* court's conclusion that the HRA does not implicate marriage.

The HRA and the District's marriage laws have existed side-by-side for thirty-two years. In passing the HRA in 1977, the Council specifically stated that it "should . . . be read in harmony with and as supplementing other laws of the District," which undoubtedly includes the District's marriage laws. Comm. on Public Services and Consumer Affairs, Report on Bill No. 2-179, Human Rights Act of 1977, at 3 (July 5, 1977) (citations and internal quotations omitted). In 1995, the Court of Appeals affirmed that the HRA and the District's marriage laws do not conflict—that the passage of the HRA in no way changed the fundamental definition of "marriage" in the District. It cannot be, therefore, reasonably contended that the Marriage Initiative of 2009, which merely offers the citizens the chance to *accept or reject* the District's longstanding definition of "'marriage' [as] requir[ing] persons of opposite sexes," now runs afoul of the HRA. *Dean*, 653 A.2d at 320. *Dean* still stands as clear and controlling precedent in the District and, as a matter of law, the Marriage Initiative of 2009 does not violate the HRA. Accordingly, the Court should issue a writ of mandamus ordering the Board to accept the Marriage Initiative of 2009.

B. The Jury and Marriage Amendment Act of 2009 Did Not Undermine *Dean*.

The Jury and Marriage Amendment Act of 2009, which went into effect on July 7, 2009, changed District law in two distinct ways, neither of which affect the definition of marriage. First, it provided some recognition to marriage licenses issued to same-sex couples in other jurisdictions. Second, some of the nomenclature was amended in the consanguinity provision in the District's marriage statutes. D.C. Code §§ 46-405.01, 46-401. Neither of these changes permits the District to issue marriage licenses to same-sex couples or allows the solemnization of

same-sex “marriages” in the District. Moreover, a resident same-sex couple cannot evade District law by going to another jurisdiction to obtain a marriage license. *Cf.* D.C. Code § 46-405.

The small changes to the terminology of the consanguinity provision, D.C. Code § 46-401, also do not alter the force and weight of *Dean*. The *Dean* court’s decision that it “cannot [be] conclude[d] that the Council intended the Human Rights Act to change the fundamental definition of marriage” did not turn on the gender specific terms of the consanguinity provision or on any other provision of the District’s marriage laws. *Dean*, 653 A.2d at 320. Rather the decision turned on the fact that both the language and the legislative history of the HRA demonstrate, as this Court concluded, that the “City Council consciously chose not to make the language of the Human Rights Act applicable to the regulation of the marital relationship.” *Dean*, slip op. at *4-8 (emphasis added). Regardless of how the District’s marriage laws are changed, the *Dean* court’s affirmation that the HRA does not cover the marital relationship remains the law until the Council amends the HRA to cover marriage expressly or the Court of Appeals overrules its interpretation of the HRA.

The *Dean* court’s discussion of the consanguinity provision was in the context of the consideration of whether “the Clerk should be required to issue [a same-sex couple] a marriage license because the marriage statute is gender-neutral and does not expressly prohibit same-sex marriages.” *Dean*, 653 A.2d at 310. The Court was, thus, examining whether the language of the marriage statute already permitted the issuance of marriage licenses to same-sex couples. After examining all the definitional sources for the term “marriage”—the legislative history of the Marriage and Divorce Act, *id.* at 311-12; the numerous references to “husband and wife” in the marriage and divorce statutes, *id.* at 314-15; the common law of the District, *id.* at 315;

decisions of appellate courts in other states, *id.* at 315-16; and dictionary definitions of “marriage,” *id.* at 315—the Court concluded that the marriage statute was “[n]ever intended to sanction same-sex marriages,” *id.* at 318.¹² Thus, the discussion of the terms of the consanguinity provision, and the language of the marriage statute more broadly, had nothing to do with the interpretation of the HRA. As such, that the consanguinity provision, or any other provision of the marriage laws, no longer employs certain terms does nothing to affect the HRA analysis laid out by the Court in *Dean*.

C. The Marriage Initiative of 2009 Does Not Discriminate on the Basis of “Sexual Orientation.”

The Marriage Initiative of 2009 does not preclude those who define themselves as homosexual from entering a marriage—the union between a man and a woman. *Dean*, 653 A.2d at 320. As such, the proposed initiative does not discriminate on the basis of “sexual orientation.”

The HRA defines “sexual orientation” as “male or female homosexuality, heterosexuality and bisexuality, by preference or practice.” D.C. Code § 2-1401.02(28). The Marriage Initiative of 2009 is facially neutral with regard to “sexual orientation.” It makes no mention of “sexual orientation” whatsoever. It reaffirms that only marriage between a man and a woman is valid or recognized in the District, but it does not mandate that either the man or the woman have a particular “sexual orientation.”

¹² Even with the recent changes to the terminology of the marriage statute, the statute still does not sanction same-sex “marriages.” Councilmember David Catania introduced same-sex “marriage” legislation on October 6, 2009. Tim Craig, *Gay Marriage Bill Unveiled Before Packed D.C. Council Chambers*, Washington Post, Oct. 6, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/06/AR2009100602259.html>. Such legislation would be unnecessary if in fact the terms of the marriage statute had been already been sufficiently altered to recognize same-sex “marriages.”

Moreover, the existing marriage laws in the District, which the initiative seeks to affirm, also do not implicate “sexual orientation.” The Clerk of the Superior Court is tasked by statute with acquiring the information necessary for issuance of a marriage license.

It shall be the duty of the Clerk of the Superior Court of the District of Columbia before issuing any license to solemnize a marriage to examine any applicant for said license under oath and to ascertain the names and ages of the parties desiring to marry, and if they are under age the names of their parents or guardians, whether they were previously married, whether they are related or not, and if so, in what degree, which facts shall appear on the face of the application, of which the Clerk shall provide a printed form, and any false swearing in regard to such matters shall be deemed perjury.

D.C. Code § 46-410 (emphasis added). “Sexual orientation” is *not* part of the marriage license process. Accordingly, the criteria for a marriage license has nothing to do with “sexual orientation” and cannot constitute “sexual orientation” discrimination.

Here, a person’s “sexual orientation,” or a change in one’s declared “sexual orientation,” has no affect on his or her ability to marry. A same-sex couple cannot be issued a marriage license in the District whether one or both is heterosexual, homosexual, or bisexual. How can there be “sexual orientation” discrimination under the HRA when a change in “sexual orientation” does not change the alleged discriminatory result? Like current District law, the Marriage Initiative of 2009 does not preclude persons from entering into matrimony based on their “sexual orientation.”

It may well be that a person who identifies as homosexual may not want to marry someone of the opposite sex, but that does not amount to unlawful discrimination. The HRA can “not be read to mean that every discriminatory practice is prohibited.” *Evan*, 682 A.2d at 648; *see also Dean*, 653 A.2d at 319 (“The Council . . . did not intend the [HRA] to prohibit every discriminatory practice.”). District laws draw distinctions all the time that do not run afoul of the HRA. As explained above, laws allowing for the age discriminatory use of peremptory

challenges, *Evan*, 682 A.2d at 649, and laws permitting gender discriminatory pricing practices for insurance companies, *NOW*, 531 A.2d at 278-79, have been upheld as consistent with the HRA, even though the laws were clearly making distinctions that implicate the HRA. The mere fact that the District's marriage laws distinguish between same-sex and opposite-sex couples does not make the laws impermissibly discriminatory. See *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) ("The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination."); *Singer v. Hara*, 522 P.2d 1187, 1194-95 (Wash. App. 1974) (limiting marriage to opposite-sex couples was not gender discrimination because "differentiat[ions] between the sexes are permissible so long as they are based upon the unique physical characteristics of a particular sex"); *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004) ("There is no evidence, from the voluminous legislative history or otherwise, that DOMA's purpose is to discriminate against men or women as a class."); *Hernandez v. Robles*, 855 N.E.2d 1, 10-12 (N.Y. 2006) (holding that "[b]y limiting marriage to opposite-sex couples, New York is not engaging in sex discrimination" and that the "distinction between opposite-sex and same-sex couples enacted by the Legislature does not violate the Equal Protection Clause"); *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007) (holding that Maryland's marriage law "does not discriminate on the basis of sex in violation of Article 46, and does not otherwise implicate a suspect or quasi-suspect class"). The *Dean* court affirmed that by refusing to issue a marriage license to a same-sex couple, "the Clerk did not unlawfully discriminate against appellants under the District of Columbia Human Rights Act." *Dean*, 653 A.2d at 309. Thus, the Marriage Initiative of 2009 does not unlawfully discriminate on the basis of "sexual orientation," or any

other basis, and this Court should issue a writ of mandamus ordering the accept the initiative as proper under D.C. Code § 1-1001.16(b)(1).¹³

IV. The Marriage Initiative of 2009 Satisfies the Remaining Criteria for Approval.

The Initiative Proponents submitted the Marriage Initiative of 2009 in proper form, and they filed the verified statement of contributions, required by D.C. Code §§ 1-1102.04 and 1-1102.06, with the Office of Campaign Finance. D.C. Code § 1001.16(b)(1). Moreover, the initiative itself does 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.” *Hessey*, 601 A.2d at 12.

CONCLUSION

For the foregoing reasons, the Proponents respectfully request that this Court grant their motion for summary judgment and declare that the Board erred in rejecting the Marriage Initiative of 2009 because it is not a law appropriating funds and the Board, therefore, lacks the authority under the Charter to refuse to issue Proponents’ requested petitions. Further, the Marriage Amendment Act does not “authorize[], or . . . have the effect of authorizing, discrimination” prohibited by the HRA and the Court, accordingly, should issue a writ of mandamus compelling the Board to accept the Initiative.

¹³ The Marriage Initiative of 2009 also does not discriminate on the basis of “sex.” It “does not put men and women in different classes, and give one class a benefit not given to the other. Women and men are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex.” *Hernandez*, 855 N.E.2d at 10-12.

Respectfully submitted this 20th day of November, 2009.

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CERTIFICATE OF SERVICE

I certify that the foregoing Petitioners' Memorandum of Points and Authorities in Support of Motion for Summary Judgment was served by mail on the following parties and their attorneys who are not registered in eFiling for Courts, this 20th day of November, 2009:

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