

**No. 09A807**

**In the Supreme Court of the United States**

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**HARRY R. JACKSON, JR., ROBERT KING, ANTHONY EVANS, DALE E. WAFER,  
WALTER E. FAUNTROY, JAMES SILVER, MELVIN DUPREE, AND HOWARD BUTLER,  
*Petitioners***

*v.*

**DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,  
*Respondent***

**and**

**DISTRICT OF COLUMBIA,  
*Intervenor-Respondent***

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**Appeal from No. 10-CV-177 in  
District of Columbia Court of Appeals**

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**Reply in Support of Petitioners' Application for Immediate Stay of the  
Religious Freedom and Civil Marriage Equality Amendment Act of 2009  
Pending Certiorari**

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**To the Honorable John G. Roberts, Jr.  
Chief Justice of the United States Supreme Court and  
Circuit Justice for the D.C. Circuit**

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**Reply in Support of Petitioners' Application for  
an Immediate Stay of the Religious Freedom and Civil Marriage  
Equality Amendment Act of 2009 Pending Certiorari**

**I. This Court Has Power to Issue the Requested Stay.**

This Court has broad equitable powers. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (court retains broad equity powers to enter injunctions and stays absent clear statutory restriction); *Missouri v. Jenkins*, 515 U.S. 70, 125 (1995) (“[o]nce a right and a violation have been shown, the scope of a [] court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies”) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)). This is particularly true where the Court is issuing a stay or an injunction in aid of its jurisdiction, as is being requested here. *See* 28 U.S.C. § 1651(a); 28 U.S.C. § 2101(f). Federal courts frequently exercise their equitable power to stay the effective date of laws. *See, e.g., PP v. Rounds*, 530 F.3d 724, (8th Cir. 2008); *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002); *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148 (S.D. Fla. 1998).

Petitioners are requesting that the effective date of the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 (the “Act”) be stayed pending the disposition of a petition for certiorari concerning the District of Columbia Court of Appeals' judgment denying Petitioners' motion for preliminary injunction. The “effective date” of the Act is the same as the date the Act becomes law. The District concedes this point—“In this case, the Marriage Equality Act will become law on



reaching this conclusion that the Court of Appeals stated that acts of the D.C. Council typically become law absent “the passage of a joint resolution by Congress,” “the filing of a valid referendum petition,” or “legislation to amend or repeal.” *Id.* at 867 & n.12. The Court of Appeals’ statement is an observation about the typical legislative pattern, not a rule of law precluding a court from issuing an injunction staying the effective date of an act.

## **II. Petitioners Have Suffered and Continue to Suffer Irreparable Harm.**

At midnight tonight, 12:00 a.m on March 3, 2010, Petitioners’ right to a referendum on the Act will be permanently extinguished. D.C. Code § 1-204.102(b)(2); D.C. Code § 1-1001.16(j)(2).<sup>1</sup> The judicial review of the referendum will be forever moot. Petitioners will never have an opportunity be heard by this Court, the Court of Appeals, or the Superior Court on the merits of their claim that the D.C. Council unlawfully attempted to amend the D.C. Charter by imposing a nondiscrimination requirement. The D.C. Council will have successfully thwarted the Charter amendment procedures legislated by Congress.

That a similar argument concerning the unlawful amendment of the D.C. Charter is being advanced in the proceedings concerning the Marriage Initiative of

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<sup>1</sup> The consensus of the District of Columbia is that the Act goes into effect on March 3, 2010. *See* Religious Freedom and Civil Marriage Equality Amendment Act of 2009, Act No. 18-0248, Status of Bill or Resolution, D.C. Council Website, available at <http://www.dccouncil.washington.dc.us/lims/searchbylegislation.aspx> (listing “Projected D.C. Law Date” as Wednesday, March 03, 2010). The District has consistently argued to the courts below that this is date the law goes into effect. Moreover, according to media reports, the District is poised to begin issuing marriage licenses to same-sex couples tomorrow. *See* Mark Segraves, *Applying for same-sex marriage license? Pack your patience*, WTOP, March 2, 2010, available at <http://www.wtop.com/?nid=25&sid=1901219>.



on the ballot.” D.C. Code § 1-1001.16(p)(1). Given the litigation surrounding the Marriage Initiative of 2009, it likely will not make the ballot until the fall of 2012, since there are *no* scheduled elections for next year.

The dramatic differences between the two rights mean that Petitioners’ pursuit of the Marriage Initiative of 2009 cannot possibly remedy the irreparable harm caused by the District’s unlawful deprivation of Petitioners’ referendum rights.

### **III. Without a Stay, Petitioners Will Be Permanently Deprived of their Right of Appeal.**

The District has repeatedly indicated that the District of Columbia Court of Appeals “did not reach the merits of the legal issue for which petitioners will seek certiorari.” *See* District of Columbia’s Opposition to Petitioners’ Application for Immediate Stay at 1. Moreover, it touts this fact as one of two reasons why this Court should deny Petitioners’ application. *Id.* at 9. The District argues that because the D.C. Court of Appeals “has not even decided the issue yet” there is “no reasonable probability that the Court would grant certiorari.” *Id.* The fact that the D.C. Court of Appeals has not reached the merits of Petitioners appeal, however, supports this application for a stay rather than undermines it.

Explicit in the referendum process, as governed by D.C. law, is the right to appeal a ruling of the Board of Elections to the D.C. Superior Court and then to the D.C. Court of Appeals. D.C. Code § 1-1001.16(b)(3). And for that right to have any substantive meaning, Petitioners must be afforded an opportunity to obtain a decision on the merits of their appeal. Petitioners are not seeking a determination

of the ultimate merits of their claims in this Court but only the *opportunity* to obtain such a ruling from the D.C. Court of Appeals.<sup>2</sup> It is the right to exhaust this appeal and obtain a ruling on the merits which Petitioners seek. But absent a stay from this Court, that right will be lost forever when the Act becomes law at 12:00 am on March 3, 2010.

It is uncontested that Petitioners maintain the right to appeal the Board of Elections rejection of their referendum. Once that right is conferred, it cannot be arbitrarily extinguished prior to a ruling on the merits. Such a deprivation would implicate significant due process considerations. *See Evitts v. Lucey*, 469 U.S. 387 (1985) (“due process concerns [are] involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal”). Petitioners simply desire to exercise and complete the appellate process without having that right prematurely terminated.

### Conclusion

For the foregoing reasons, Petitioners respectfully request an immediate stay of the effective date of the Act pending certiorari.

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<sup>2</sup> Not only have Petitioners not obtained a ruling on the merits from the D.C. Court of Appeals but the D.C. Superior Court has yet to issue a decision the merits.

Respectfully submitted this 2nd day of March, 2010.



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## Proof of Service

I, Timothy J. Tracey, a member of the bar of this Court, certify that on March 2, 2010, I served a copy of the *Reply in Support of Petitioners' Application for Immediate Stay of the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 Pending Certiorari* on the following individuals via handy-delivery and a courtesy copy by electronic mail:

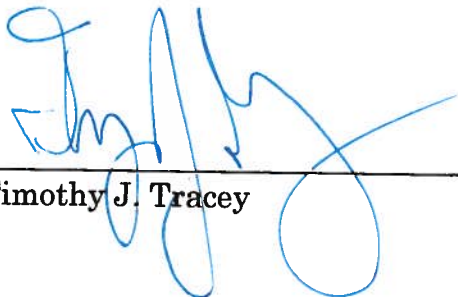
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