No. 10-A- _____

IN THE SUPREME COURT OF THE UNITED STATES

HARRY R. JACKSON, *ET AL.*,

Petitioners,

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,

Respondent,

and

DISTRICT OF COLUMBIA,

Intervenor-Respondent.

On review from the District of Columbia Court of Appeals
(No. 10-CV-177)

THE DISTRICT OF COLUMBIA'S OPPOSITION TO PETITIONERS' APPLICATION FOR IMMEDIATE STAY OF THE RELIGIOUS FREEDOM AND CIVIL MARRIAGE EQUALITY AMENDMENT ACT OF 2009 PENDING CERTIORARI

To the Honorable John G. Roberts, Jr.
Chief Justice of the United States Supreme Court and
Circuit Justice for the District of Columbia Circuit

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States Supreme Court and Circuit Justice for the District of Columbia Circuit:

INTRODUCTION

Absent Congressional disapproval, an act of the Council of the District of Columbia (Council) authorizing same-sex marriages in the District will become law on March 3, 2010. Petitioners sought a preliminary injunction in the Superior Court of the District of Columbia to "stay" the "effective date" of this act. This request was made in the context of petitioners' challenge to a determination by the District of Columbia Board of Elections and Ethics (BOEE or the Board) that, under applicable law, this act was not the proper subject of a voter referendum. The Superior Court denied the injunction because petitioners failed to "demonstrate authority for [that] [c]ourt's interference with the legislative process" and because petitioners otherwise failed to satisfy the criteria for injunctive relief (Application Exhibit B; *accord* Exhibit C). Petitioners appealed, and the District of Columbia Court of Appeals too declined to issue an injunction staying the effective date of the act (Application Exhibit A). This Court should also deny the extraordinary relief requested, for multiple reasons.

First, there is no reasonable probability that this Court will grant certiorari in this proceeding. Petitioners' request for this Court's review is premature. The decision for which review is sought is one denying a preliminary injunction. The District of Columbia Court of Appeals did not reach the merits of the legal issue for which petitioners will seek certiorari. Moreover, the issue is not worthy of certiorari. It raises a matter of local law on which this Court's precedent dictates that the court of appeals should receive deference when it does resolve the issue.

Second, the injunctive relief petitioners need is unavailable as a matter of law. Petitioners' unprecedented request for injunctive relief staying the "effective date" of a statute during or following Congressional review is foreclosed by the District of Columbia Self-Government and

Government Reorganization Act (Home Rule Act), D.C. Code § 1-201.01 *et seq.* (2006). Such relief is also precluded by well-settled separation-of-powers principles, under which the judiciary can neither dictate nor enjoin the passage of legislation.

Third, petitioners will not suffer irreparable harm if a stay is not granted. The question of whether a law banning same-sex marriage or the recognition of such marriages is the proper subject of a voter initiative is, in fact, currently pending before the District of Columbia Court of Appeals in an expedited appeal filed by these same petitioners. *Jackson v. District of Columbia*, No. 10-CV-20 (D.C.). The court will fully consider their legal arguments in that case. If petitioners are correct, they will be able to present the electorate with an initiative to ban same-sex marriage, obviating any claim of irreparable harm here.

PROCEDURAL AND FACTUAL BACKGROUND

A. Facts

On May 5, 2009, the Council of the District of Columbia passed the Jury and Marriage Amendment Act of 2009 (JAMA). *See* D.C. Act 18-70, 56 D.C. Reg. 3797 (May 15, 2009). That measure amended the District's marriage laws to provide that the District will recognize lawful, same-sex marriages from other jurisdictions. The act became law on July 6, when Congress did not disapprove it. *See* D.C. Code § 46-405.01 (2009).

Before JAMA became law, on May 27, a group, which included four the eight petitioners here, presented a proposed referendum[1] to the Board. They sought to present to the voters the question of whether the District should recognize same-sex marriages from other jurisdictions. The

[1] "The term 'referendum' means the process by which the registered qualified electors of the District of Columbia may suspend acts of the Council of the District of Columbia (except emergency acts, acts levying taxes, or acts appropriating funds for the general operating budget) until such acts have been presented to the registered qualified electors of the District of Columbia for their approval or rejection." D.C. Code §1-204.101(b) (2006 Repl.).

Board, by Memorandum Opinion and Order dated June 15 (*In re: Referendum Concerning the Jury and Marriage Amendment Act of 2009*, BOEE No. 09-004), determined that the proposed measure was not a proper subject for referendum and could not be presented to the voters because it "authorizes, or would have the effect of authorizing, discrimination prohibited under [the District of Columbia Human Rights Act (HRA), *codified as amended at* D.C. Code § 2-1401.01 *et seq.* (2009 Supp.)]." D.C. Code § 1-1001.16(b)(1)(C) (2006 Repl.). Two days later, those proposing the referendum brought suit in the Superior Court, pursuant to D.C. Code § 1-1001.16(b)(3) (2006 Repl.), seeking "a writ in the nature of mandamus to compel the Board to accept" the proposed referendum.

On June 30, the Superior Court issued an Order in that matter, *Jackson v. District of Columbia Bd. of Elections and Ethics (Jackson I)*, 2009 CA 004350 (Super. Ct. of D.C.), denying relief. The court ruled, *inter alia*, that "the Board correctly concluded that the proposed referendum would violate the District of Columbia Human Rights Act . . ." (Order at 2). The referendum proposers did not appeal.

Instead, petitioners filed a proposed initiative[2] with the Board. It read: "Only marriage between a man and a woman is valid or recognized in the District of Columbia" (*In re: Marriage Initiative of 2009*, BOEE No. 09-006). As with the referendum, the Board found that the proposed initiative "authorizes or would authorize discrimination proscribed by the [HRA] and is therefore not a proper subject for initiative" (Memorandum Opinion and Order dated November 17, 2009, at 11 (*In re: Marriage Initiative of 2009*, BOEE No. 09-006)). Petitioners filed a petition for review

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[2] "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 and qualified electors of the District of Columbia for their approval or disapproval." D.C. Code § 1-204.101(a) (2006 Repl.).

and for a writ of mandamus in the Superior Court on November 18. *Jackson v. District of Columbia Bd. of Elections and Ethics (Jackson II)*, No. 2009 CA 8613 B (Super. Ct. of D.C.).

The Superior Court rejected petitioners' argument that the prohibition against initiatives that violate the HRA was an invalid restriction on the right of initiative, finding that the Council acted well within its authority when adopting this limitation, D.C. Code § 1-1001.16(b)(1)(C) (2006 Repl.) (Application Exhibit D). Petitioners filed a timely notice of appeal from this decision on January 15, which is currently being considered by the court of appeals on an expedited basis in *Jackson v. District of Columbia*, No. 10-CV-20 (D.C.). Briefing will be complete on April 9, and the case will appear on the court's May calendar.

In the meantime, the Council enacted the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 (Marriage Equality Act or Act) on December 15. This legislation, the subject of the instant application, expressly expands the definition of marriage in the District to include same-sex couples. *See* D.C. Act 18-248; 57 D.C. Reg. 27 (Jan. 1, 2010).[3] The Act was signed by the Mayor on December 18 and transmitted to Congress on January 5, 2010. Assuming Congress does not pass a joint resolution disapproving the Act, it will become law on March 3. D.C. Code § 1-206.02(c)(1) (2006 Repl.).

The day after the Act was transmitted to Congress, petitioners filed a proposed referendum with the Board seeking to suspend the Act until it had been presented to the District electorate for its approval or rejection (*In re: Referendum on the Religious Freedom and Civil Marriage Equality Amendment Act of 2009*, BOEE No. 10-001). Following a special hearing held on January 27, the Board issued a Memorandum Opinion and Order on February 4 rejecting the proposed referendum

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[3] The Act provides that "[a]ny person may enter into a marriage in the District of Columbia with another person, regardless of gender," unless the marriage is otherwise expressly prohibited by District law. D.C. Act 18-248, sec. 2(b).

as improper in that it "authorizes, or would have the effect of authorizing, discrimination prohibited under [the District's HRA]" – the fifth time the Board or a Superior Court judge has so concluded with regard to the related referendum and initiative proposals (*In re: Referendum on the Religious Freedom and Civil Marriage Equality Amendment Act of 2009*, BOEE No. 10-001, Memorandum Opinion and Order at 18 (Feb. 4, 2010)).

The day after the Board issued its decision, on February 5, petitioners filed a Petition for Review of Agency Decision and for a Writ in Nature of Mandamus and a Motion for Preliminary Injunction in the Superior Court. *Jackson v. District of Columbia Bd. of Elections and Ethics (Jackson III)*, 2010 CA 740 B (Super. Ct. of D.C.). The preliminary injunction they sought was, in particular, an order "staying" the "effective date" of the Act. On February 19, the Superior Court held a hearing on petitioners' motion for a preliminary injunction. During that hearing, the court orally denied injunctive relief. The court issued its written denial on February 22 (Application Exhibit B). That same day, petitioners filed a notice of appeal.

The District moved for summary affirmance of the Superior Court's order on the ground that injunctive relief simply was not available. The District of Columbia Court of Appeals granted that motion, finding that petitioners had "failed to meet the test for an issuance of a preliminary injunction" (Application Exhibit A).

B. Statutory Framework

Article I, section 8, clause 17 of the Constitution empowers Congress to exercise plenary legislative authority over the District of Columbia. *See generally Bliley v. Kelly*, 306 U.S. App. D.C. 199, 23 F.3d 507, 508 (1994). In 1973, Congress passed the Home Rule Act, Pub. L. No. 93-198, *codified at* D.C. Code § 1-201.01 *et seq.* (2005 Supp.). This statute creates a tripartite form of government within the District, vesting the legislative power granted to the District in the Council.

Wilson v. Kelly, 615 A.2d 229, 231 (D.C. 1992); D.C. Code § 1-204.04 (2006 Repl.).

In keeping with its constitutional authority, Congress retained the right to disapprove Council acts. D.C. Code § 1-206.01 (2006 Repl.). Thus, with exceptions that are not relevant here, legislative acts passed by the Council and approved by the Mayor "shall take effect upon the expiration of the 30-calendar-day period (excluding Saturdays, Sundays, and holidays, and any day on which neither House is in session because of an adjournment sine die, a recess of more than 3 days, or an adjournment of more than 3 days) beginning on the day such act is transmitted by the Chairman [of the Council] to the Speaker of the House of Representative and the President of the Senate, or upon the date prescribed by such act, whichever is later, unless during such 30-day period, there has been enacted into law a joint resolution disapproving such act." D.C. Code § 1-206.02(c)(1) (2006 Repl.).

Additionally, voters in the District may directly participate in the legislative process, either by initiative, the process by which voters may present legislation directly to the electorate for approval or disapproval, or by referendum, the process by which voters may "suspend" an act of the Council until that act is presented directly to the electorate. *See* D.C. Code § 1-204.101 (2006 Repl.). These rights are were established in a 1978 amendment to the District's Charter.

The Charter amendment was not self-executing, but required the Council to "adopt such acts as necessary to carry out the purposes of [the act] within 180 days of the effective date of the [act]." D.C. Code § 1-204.107 (2006 Repl.). In addition, the District Charter gives the Council plenary authority over matters involving elections in the District. It provides that "[n]otwithstanding any other provision of [the Home Rule Act] or any other law, the Council shall have authority to enact any act or resolution with respect to matters involving or relating to elections in the District." D.C. Code § 1-207.52 (2006 Repl.).

In keeping with this broad authority, the Council adopted a statute the governs the initiative and referendum process in the District. A referendum begins with a registered voter filing a proposed measure with the Board. 3 District of Columbia Municipal Regulations (DCMR) § 1001.1. Upon receipt of a proposed referendum, the Board first determines whether it is a "proper subject" for such action. D.C. Code § 1-1001.16(b)(1) (2006 Repl.); 3 DCMR § 1001.3. One basis for rejecting an initiative or referendum is if it "authorizes, or would have the effect of authorizing, discrimination prohibited under [the HRA]." D.C. Code § 1-1001.16(b)(1)(C) (2006 Repl.). If the Board refuses to accept a referendum because it is not a proper subject, the proposer may apply to the Superior Court "for a writ in the nature of mandamus to compel the Board to accept" it. D.C. Code § 1-1001.16(b)(3) (2006 Repl.); 3 DCMR § 1001.5.

If the Board (or a court) concludes that the subject matter of the referendum is proper, the Board has 20 days to prepare the referendum's official short title and a summary statement regarding the purposes of the proposed measure, and to place the measure in proper legislative form. D.C. Code § 1-1001.16(c) (2006 Repl.); 3 DCMR § 1002.1. This official language is then published in the D.C. Register, which starts a 10-day challenge period during which a registered voter may object to the title, summary, and legislative form of the referendum by filing an expedited action in the Superior Court. D.C. Code § 1-1001.16(d), (e) (2006 Repl.); 3 DCMR § 1002.4.

Upon the expiration of the 10-day challenge period or the favorable resolution of any challenge, the Board prepares and presents at a public hearing a petition form for the collection of the requisite number of signatures necessary for the measure to be placed on the ballot. D.C. Code § 1-1001.16(g) (2006 Repl.); 3 DCMR § 1003.1. The proposer of a referendum must then collect the requisite number of valid signatures before the subject legislation becomes effective pursuant to the provisions of D.C. Code § 1-206.02(c), *i.e.*, before the expiration of the Congressional review

period. D.C. Code § 1-1001.16(j)(2) (2006 Repl.); 3 DCMR § 1005.3 ("The proposer of a referendum measure shall secure the proper number of signatures needed to qualify the measure for the ballot and file the referendum petition with the Board no later than 5:00 p.m. on the last business day before the act . . . has become law. . . .").

Upon receipt of a proper petition containing the requisite number of valid signatures, the Board notifies the appropriate custodian of the act, here the President of the Senate and the Speaker of the House of Representatives, and only then is the custodian obligated to return the act to the Council Chairman, with no further action to be taken upon such act until after a referendum election is held. D.C. Code § 1-204.102(b)(1) (2006 Repl.). In no event may an "act [be] subject to referendum if it has become law . . . ." D.C. Code § 1-204.102(b)(2) (2006 Repl.); *accord* D.C. Code § 1-1001.16(j)(2) (2006 Repl.).

STANDARD FOR GRANTING A STAY

> The principles that control a Circuit Justice's consideration of in-chambers stay applications are well established. Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below – both on the merits and on the proper interim disposition of the case – are correct. In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. Second, the applicant must persuade me that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. While related to the first inquiry, this question may involve somewhat different considerations, especially in cases presented on direct appeal. Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. And fourth, in a close case it may be appropriate to "balance the equities" – to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (internal citations omitted).

ARGUMENT

I. There is no reasonable probability that this Court will grant certiorari in this proceeding.

Petitioners recognize that a major consideration in determining whether a stay is warranted is "whether four justices would vote to grant certiorari." Petitioners' Application for Stay (Application) at 9 (quoting *Deaver v. United States*, 483 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers). The only ground they present for an exercise of certiorari jurisdiction is that the lower court purportedly "has decided an important question of federal law that has not been, but should be, settled by this Court." *Id.* (quoting Rule 10(b)). Petitioners are wrong for two basic, independent reasons. First, the District of Columbia Court of Appeals has not decided the legal issue for which they seek review. Second, even if it had, the legal issue arises under District law only, and this Court defers substantially to an interpretation of District law by the District's local courts.

1. This request for this Court's review is premature. Petitioners argue that the Council of the District of Columbia overstepped its authority in establishing that certain discriminatory measures would not be subject to popular vote through initiatives and referenda. Application at 10-19. But the District of Columbia Court of Appeals, the highest local court in the District, has not even decided the issue yet. For that reason alone, there is no reasonable probability that the Court would grant certiorari.

The decision under review is one that affirms the denial of a preliminary injunction. The court of appeals did not purport to decide the legal issue of interest to petitioners. The court did not even issue an opinion, and the judgment merely explains as relevant that petitioners "failed to meet the test for the issuance of a preliminary injunction." Ex. A to Application. As far as the court below revealed, it may have agreed with petitioners on the legal issue but found their equitable

showing insufficient. (Indeed, it was, for the reasons below.) This Court, of course, does not ordinarily review case-specific issues regarding the equities in particular cases. The case remains pending in the Superior Court on the merits.

Worse still for petitioners, the same issue is pending before the court of appeals in an expedited appeal from a *final* judgment in a related case. Application at 3-4; *Jackson v. District of Columbia Board of Elections and Ethics*, No. 10-CV-20 (D.C.). If the legal issue on which petitioners seek certiorari were in fact worthy of certiorari, that case—not this one—would be the appropriate one for review.

2. The issue is, in any event, not worthy of certiorari. Long before the District of Columbia Court Reform and Criminal Procedure Act of 1970 (Court Reform Act), Pub. L. No. 91-358, 84 Stat. 473, restructured the local judiciary in 1970, this Court adopted a practice of deferring to interpretations of District law by the District's courts. Its longstanding practice is to refrain from "interfer[ing] with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed." *Fisher v. United States*, 328 U.S. 463, 476 (1946); *see, e.g.*, *Griffin v. United States*, 336 U.S. 704, 712-18 (1949); *District of Columbia v. Pace*, 320 U.S. 698, 702 (1944); *Del Vecchio v. Bowers*, 296 U.S. 280, 285 (1935).

That practice became all the more appropriate with the Court Reform Act. "One of [Congress's] primary purposes . . . was to restructure the District's court system so that 'the District will have a court system comparable to those of the states and other large municipalities.'" *Pernell v. Southall Realty*, 416 U.S. 363, 367 (1974) (quoting H.R. Rep. No. 91-907, at 23 (1970)). "This new structure plainly contemplates that the decisions of the District of Columbia Court of Appeals on matters of local law . . . will be treated by this Court in a manner similar to the way in which we treat decisions of the highest court of a State on questions of state law." *Id.* at 368. Thus, the

principle that the Court should not "overrul[e] the courts of the District on local law matters 'save in exceptional situations where egregious error has been committed'" is both "long embedded in practice and now supported by the clear intent of Congress." *Id.* at 369 (quoting *Fisher*, 328 U.S. at 476); *see Palmore v. United States*, 411 U.S. 389, 409-10 (1973); *Key v. Doyle*, 434 U.S. 59, 64, 67-68 (1977).

Such deference would be due even if the District of Columbia Court of Appeals had decided the issue in question. Review is particularly inappropriate here given that, again, it has not. Even before the Court Reform Act, this Court explained:

> There are cogent reasons why this Court should not undertake to decide questions of local law without the aid of some expression of the views of judges of the local courts who are familiar with the intricacies and trends of local law and practice. We do not ordinarily decide such questions without that aid where they may conveniently be decided in the first instance by the court whose special function it is to resolve questions of the local law of the jurisdiction over which it presides.

Busby v. Electric Util. Employees Union, 323 U.S. 72, 74-75 (1944) (per curiam); *see Griffin*, 336 U.S. at 718.

Petitioners do not come close to showing that their legal arguments are so strong that no deference would be due the District of Columbia Court of Appeals if it disagreed with them. They claim that the case involves "whether the D.C. Council can amend the D.C. Charter without following the amendment procedures legislated by the United States Congress." Application at 10. That is incorrect. The District's Charter by its plain terms gave the Council authority "to adopt such acts as are necessary to carry out the purpose of [the subpart of the Charter establishing the right to initiatives and referenda]." D.C. Code § 1-204.107 (2006 Repl.). Contrary to petitioners' understanding, the Council had authority to establish by act that certain discriminatory measures would not be subject to popular vote. D.C. Code § 1-1001.16(b)(1)(C) (2006 Repl.). At minimum, any ruling to that extent by the District of Columbia Court of Appeals would not be the "egregious

error" necessary to warrant this Court's review.

II. Injunctive relief is unavailable as a matter of law.

The legislative provisions of the Home Rule Act are "straightforward and clear." *Atkinson v. District of Columbia Bd. of Elections and Ethics*, 597 A.2d 863, 866 (D.C. 1991). The Home Rule Act provides that acts passed by the Council and signed by the Mayor become law when the 30-day congressional review period lapses. It also provides that an act may not be subject to a referendum after it becomes law. D.C. Code § 1-204.102(b)(2) (2006 Repl.). Although petitioners seek an order from this Court staying "the effective date of the Act pending the filing" of their petition for writ of certiorari (Application at 1), that characterization is misleading. What petitioners really seek is an order enjoining the legislative process to prevent an act from becoming law. That relief, however, is unavailable.

Petitioners confuse the date that an act becomes "law" with the date it becomes operative or effective. The referendum statute makes clear that "no act is subject to referendum if has become *law* according to the provisions of § 1-204.04." D.C. Code § 1-204.102(b)(2) (2006 Repl.) (emphasis added). Under the Home Rule Act a Council act becomes "law" at the end of the congressional review period. D.C. Code § 1-204.04(e) ("If the Mayor shall approve such act . . . such act shall become law subject to the provisions of § 1-206.02(c)"); *see, e.g., Franco v. National Capital Revitalization Corp.*, 930 A.2d 160, 163 (D.C. 2007) ("Mayor Williams signed the bill on December 29, 2004, and the act became law after the Congressional review period ended on April 5, 2005."). The effective date of the Act is an entirely separate matter, and is irrelevant to petitioners' request for a stay.[4]

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[4] Unless the Council indicates otherwise, a law becomes operative, applicable, and effective on the same day it becomes law. D.C. Code § 1-206.02(c)(1) (2006 Repl.). In this case, the Marriage Equality Act will become law on March 3, 2010, unless disapproved by Congress. The Council has

As a District court explained in a related context in *Washington Terminal Co. v. District of Columbia*, 36 App. D.C. 186 (1911), the date on which an act becomes "law" is not dictated by the date it becomes "effective," but rather when it receives any requisite approval:

> This, however, is not in conflict with what we regard as an elementary principle, that a legislative act becomes a law when approved by the Executive. The taking effect of the act as a whole, or of parts of it, may be deferred, either by the terms of the act itself, or by another act, in the light of which it is to be construed. *The existence of a law and the time when it shall take effect are two separate and distinct things. The law exists from the date of approval, but its operation is postponed to a future day.* Suppose the legislature, at its session in 1895, had passed an act providing that after the 1st day of January, 1896, the rate of interest should be 8 per cent per annum on all money loaned; it could not be said that the law did not exist until the 1st day of January, 1896, but, on the other hand, it is plain that the law would owe its existence to the date of its approval, but would not go into effect until a future day.
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> The provision of the act before us must be regarded as general legislation. There is no limitation as to how long it shall remain in force. There is nothing in the act of Congress in which this provision appears, stating when general provisions of the act shall take effect. In the absence of such a statement in the act itself, or in some other governing statute, it will be construed to take effect from its approval.

(emphasis added and internal quotation and citation omitted). In this case, absent a congressional resolution disproving the Act, it will become law at the end of the congressional review period.[5]

To secure the relief they seek, it is not enough for petitioners to ask that the Court stay the

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not provided for another operative date.

[5] An example of where the Council did provide for an alternative effective date is the initiative and referendum statute underlying the claims here. The Charter amendment creating the right to initiative and referendum became "law" on March 10, 1978. *Convention Center Referendum Committee v. District of Columbia Bd. of Elections and Ethics*, 441 A.2d 871, 872 (D.C. 1980) ("The Charter Amendments Act became law on March 10, 1978"), *on rehearing*, 441 A.2d 889, 921 (D.C. 1981) (Newman, J., concurring). The Council, however, delayed its implementation in D.C. Code § 1-204.107 (2006 Repl.), which provided that "[n]either 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." That fact that the effective date of initiative and referendum was delayed did not mean that the Charter amendment act conferring these rights was not "law" between March 28 and October 1, 1978.

"effective" date of the Marriage Equality Act. Instead, under D.C. Code § 1-204.102(b)(2), petitioners must obtain a stay of the date upon which the Marriage Equality Act will become law. In other words, the relief that petitioners must seek is an order enjoining the enactment of a law, not merely enjoining its post-enactment effectiveness. But petitioners cite no authority for enjoining the legislative process (whether to give individuals time to complete the referendum process or for any other purpose). Petitioners have cited no case, and the District is aware of none, in which a court has "stayed" District legislation currently before Congress for review pursuant to the Home Rule Act.

Indeed, aside from being unauthorized, petitioners' request for injunctive relief fails to identify any act on the part of a District official that should be mandated or prohibited by injunction. Petitioners invoke the All Writs Act, 28 U.S.C. § 1651, which authorizes courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." A "writ" is "[a] court's written order, in the name of a state or other competent legal authority, *commanding the addressee to do or refrain from doing some specified act.*" Black's Law Dictionary at 1602 (7th Ed.) (emphasis added); *see United States v. New York Telephone Co.*, 434 U.S. 159, 174 (1977) ("The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice" (internal citation omitted)). Petitioners have failed to identify any person or entity to whom a writ should be addressed to effectuate the relief they request. As the District of Columbia Court of Appeals has observed, "once the act has been transmitted to Congress, the legislative process of the District insofar as the Council and Mayor are concerned is at an end." *Atkinson*, 597 A.2d at 867.

At this point, it is only Congress that can prevent the Act from becoming law. Petitioners do not suggest, however, that this Court has authority to prohibit Congress from reviewing the legislation, or that it has authority to demand that Congress return the legislation to the Council or the Board in order to halt the review process. Indeed, petitioners expressly disavowed any such request for relief below.

In any event, Congress is not a party to this action and, under the Home Rule Act, Congress is obligated to return legislation to the Council only if a valid petition for referendum, *i.e.* one with the requisite signatures, has been filed before the expiration of the Congressional layover period. D.C. Code § 204.102(b)(1) (2006 Repl.). Thus, the Distrist of Columbia Court of Appeals has held that "[u]nder the statutory provisions, the *only* circumstances that can prevent the act from becoming law are the passage of a joint resolution by Congress . . . or the filing of a valid referendum petition . . . ." *Atkinson*, 597 A.2d at 867 (emphasis added) (citations and footnote omitted). Neither circumstance has occurred here.

Moreover, separation-of-powers considerations embodied in the District's Home Rule Act also foreclose the relief petitioners request. *See Wilson v. Kelly*, 615 A.2d at 231 (noting that Congress adopted separation-of-powers principles generally, though not universally). While it is the province of courts to pass upon the validity of statutes after they are enacted, the judiciary may not enjoin the legislative branch from performing its core function, enacting laws. *State ex rel. Morrison v. Sebelius*, 179 P.3d 366, 383 (Kan. 2008) ("[W]hen the legislature is considering legislation, a court cannot enjoin the legislature from passing a law."); *City of Pheonix v. Superior Court of Maricopa County*, 175 P.2d 811, 814 (Ariz. 1946) ("Courts have no power to enjoin legislative functions."); *City of Houston v. Houston Gulf Coast Bldg.*, 697 S.W.2d 850, 851 (Tex. App. 1985) ("The Texas Constitution provides for three separate, distinct branches of government

whose spheres of power are clearly defined. Tex. Const. art. II, sec. 1. No one branch may properly invade the province of another. It is the general rule in Texas that the courts will not enjoin the enactment, as opposed to the enforcement, of an invalid or even void rule, ordinance, or order of another branch of government."); *Fletcher v. City of Paris*, 35 N.E.2d 329, 332 (Ill. 1941) ("By the constitution, the powers of government are divided between three distinct branches of the government created by that instrument. The judiciary has no supervision over the legislative branch of the government. The courts can neither dictate nor enjoin the passage of legislation."); *Goodland v. Zimmerman,* 10 N.W.2d 180, 183 (Wis. 1943) ("Because under our system of constitutional government, no one of the coordinate departments can interfere with the discharge of the constitutional duties of one of the other departments, no court has jurisdiction to enjoin the legislative process at any point."). That the legislative process in the District is split into phases, one at the Council and one at Congress, does not alter the fact that petitioners are impermissibly seeking to enjoin that process.

III. Petitioners do not face irreparable harm.

Finally, petitioners have not established they will suffer irreparable harm – let alone sufficient irreparable harm to outweigh the indefinite harms they would impose on the District, the public, and in particular, third parties who may soon seek to use an indisputably *lawful* process to get married. Petitioners present no reason to take the extraordinary step of stay the legal effect of an act enacted properly by the District's elected representatives.

It is undisputed that, even if petitioner's referendum proposal becomes moot by operation of law, their initiative proposal on the same topic remains live before the District of Columbia Court of Appeals. As the Council explained when adopting the Charter amendment for referenda, the right of initiative provides sufficient protection if a referendum cannot be proposed prior to the expiration

of the congressional review period:

> In the District of Columbia, your Committee has proposed that referendum measures must be initiated and sufficient signatures to place an item on the ballot must be garnered *during* the period of Congressional review of acts of the Council. Thus, no action of the Council, allowed to become law by inaction of the Congress, will be directly subject to referendum by the people. Of course, the people could undertake to have an initiative item placed on the ballot which would have substantially the same impact.

District of Columbia Council, Committee on Government Operations, Committee Report No. 1, Bill No. 2-2, Initiative and Referendum [A]ct of 1977, *renamed*, Initiative, Referendum, and Recall Charter Amendments of 1977 and Bill No. 2-94, Recall of Elected Officials Amendments Act, *renamed*, Charter Amendments Procedures [A]ct of 1977 at 2 (March 16, 1977) (emphasis in original).

The unavailability of injunctive relief in this case thus does not mean that petitioners will suffer *irreparable* harm. Any harm is plainly reparable, and imminently so. Assuming petitioners are correct in their assertion that the issue of same-sex marriage is a proper subject under District law for direct voter legislation, then appellants have a remedy – the initiative process. The question is presently before the District of Columbia Court of Appeals for expedited consideration in *Jackson II*. If petitioners ultimately prevail, then the people will be permitted to vote on the issue. If petitioners do not prevail because same-sex marriage discrimination is not a proper subject for an initiative, then they will have been deprived of nothing.

CONCLUSION

Petitioners' application for an immediate stay of the Religious Freedom and Civil Marriage Equality Act of 2009 pending the filing a petition for writ of certiorari should be denied.

Respectfully submitted,

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