SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

HARRY JACKSON, *et al.*,	:	
	:	
Petitioners,	:	
	:	**Case No. 2009 CA 004350 B**
v.	:	**Judge Retchin**
	:	**Calendar 14**
DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, *et al.*,	:	
	:	
Respondents.	:	

ORDER
(June 30, 2009)

This matter is before the Court on Petitioners' Petition for Review of Agency Decision, Writ in the Nature of Mandamus, Motion for Preliminary Injunction, and Motion for Summary Judgment; the District of Columbia's ("District") Motion to Dismiss; the Opposition of the District of Columbia Board of Elections and Ethics ("Board") to the Motion for Preliminary Injunction; Petitioners' Reply; and Christopher Boutlier and Aaron Flynn's Motion to Intervene. For the reasons stated below, the Court grants the District's Motion to Dismiss, denies Petitioners' Motions for Summary Judgment and for a Preliminary Injunction, denies Petitioners' Petition for a Writ of Mandamus, and denies Christopher Boutlier and Aaron Flynn's Motion to Intervene.

I. SUMMARY

Petitioners challenge the Board's determination that their proposed referendum presents an improper subject for referendum. Petitioners' referendum would ask the voters to decide whether the District should recognize same-sex marriages from other

jurisdictions. In this action, Petitioners seek a stay of the effective date of the Jury and Marriage Amendment Act of 2009 ("JMA"), which gives full faith and credit to laws of other jurisdictions that recognize same-sex marriages, and an order from the Court directing the Board to accept the subject of their referendum. Because the Court finds the Board correctly concluded that the proposed referendum would violate the District of Columbia Human Rights Act ("DCHRA"), and because Petitioners have failed to establish the necessary prerequisites for staying the legislation, the Court denies Petitioners' requests for relief.

II. BACKGROUND

On May 5, 2009, the District of Columbia City Council ("Council") passed the JMA. The bill was signed by the Mayor on May 6, 2009, and transmitted to Congress on May 11, 2009. Without Congressional action, the parties agree the JMA is projected to become effective on July 6, 2009.

The JMA amends the consanguinity provisions of D.C. Code §§ 46-401(1)–(2) (2005 Repl.), to make the provisions gender-neutral and expressly recognizes same-sex marriages from other jurisdictions. In pertinent part, the JMA provides: "A marriage legally entered into in another jurisdiction between 2 persons of the same sex that is recognized as valid in that jurisdiction, that is not expressly prohibited by sections 1283 through section 1286, and has not been deemed illegal under section 1287, shall be recognized in the District."[1]

[1] Sections 1283–1287 prohibit incestuous marriages, marriages between persons who still are married to others, marriages consented to through fraud, marriages between persons under 16 years old, marriages between certain mentally disabled persons, and marriages between persons who are domiciled in the District but who married in another jurisdiction when that marriage would be deemed illegal in the District. D.C. Code §§ 46-401–405.

Sixteen days after the Council transmitted the JMA to Congress, on May 27, 2009, Petitioners filed their proposed referendum with the Board seeking to have the District's voters decide whether the District should recognize same-sex marriages from other jurisdictions. Petitioners' proposed referendum, which is entitled "A Referendum Concerning the Jury and Marriage Amendment Act of 2009[,]" reads as follows:

> The D.C. Council approved "The Jury and Marriage Amendment Act of 2009." The Act would recognize as valid a marriage legally entered into in another jurisdiction between 2 persons of the same-sex. The "Referendum Concerning the Jury and Marriage Amendment Act of 2009" will allow voters of the District of Columbia the opportunity to decide whether the District of Columbia will recognize as valid a marriage legally entered into in another jurisdiction between 2 persons of the same-sex. A "No" vote to the referendum will continue the current law of recognizing only marriage between persons of the opposite sex.

The Board held a public hearing on Petitioners' proposed referendum on June 10, 2009, to determine whether it presented a proper subject for the referendum process under D.C. Code § 1-1001.16(1) (2006 Repl.). The Board received comments from scores of interested persons. Board's Mem. Op. at 3. On June 15, 2009, the Board issued its memorandum opinion and order and declined to accept the referendum because Petitioners' proposed referendum

> would, in contravention of the [DC]HRA, strip same-sex couples of the rights and responsibilities of marriage that they were afforded by virtue of entering into valid marriages elsewhere, and that the Council intends to clearly make available to them here in the District, simply on the basis of their sexual orientation.

Id. at 12.

On June 17, 2009, Petitioners applied to the Court for a writ in the nature of mandamus to compel the Board to accept their proposed referendum. *See* D.C. Code § 1-

1001.16(b)(3).[2] The provision authorizing such an action requires the Court to resolve the matter on an expedited basis. *Id.*

Petitioners also have filed a motion for preliminary injunction to stay the effective date of the JMA until the judicial and referendum processes have been completed and ask the Court to determine that their proposed referendum does not violate the DCHRA. Without injunctive relief, Petitioners conceded at the expedited hearing on June 18, 2009, that there was insufficient time to complete the referendum process prior to the JMA becoming effective.[3]

III. ANALYSIS

A. MANDAMUS

1. DCHRA

Because no proposed referendum may be presented to the electorate if the subject of the proposed referendum violates the DCHRA, D.C. Code § 1-1001.16(b)(1)(C), the Court must determine whether the proposed referendum violates the DCHRA.

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[2] This section provides:

> If the Board refuses to accept any initiative or referendum measure submitted to it, the person or persons submitting such measure may apply, within 10 days after the Board's refusal to accept such measure, to the Superior Court of the District of Columbia for a writ in the nature of a mandamus to compel the Board to accept such measure. The Superior Court . . . shall expedite consideration of the matter. If the Superior Court . . . determines that the issue presented by the measure is a proper subject of . . . referendum, . . . under the terms of Title IV of the District of Columbia Home Rule Act, and that the measure is legal in form, does not authorize discrimination [prohibited under the DCHRA], and would not negate or limit an act of the Council [appropriating funds], it shall issue an order requiring the Board to accept the measure.

[3] Also at the hearing, the Court granted the District's motion to intervene with the consent of all parties and provided Petitioners time to file an opposition to the Gertrude Stein Democratic Club's motion to intervene. On June 23, 2009, the Court denied Gertrude Stein's motion to intervene concluding that its interests were adequately represented by the District. On June 22, 2009, Aaron Flynn and Christopher Boutlier moved to intervene, and Petitioners filed an opposition thereto on June 24. The Court concludes Messrs. Flynn's and Boutlier's interests are too attenuated and denies their motion to intervene.

a. *DEAN v. DISTRICT OF COLUMBIA*

Petitioners contend that case law from the Court of Appeals—specifically, *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995)—precludes the Court from determining that their proposed referendum would violate the DCHRA. The events giving rise to *Dean* occurred in 1990 when a same-sex couple applied for a marriage license in the District of Columbia. The Clerk of the Superior Court denied the application on the basis that District law did not authorize same-sex marriages. The couple filed suit in the Superior Court alleging, among other things, that the Clerk had discriminated against them in violation of the DCHRA. The trial judge entered summary judgment in favor of the District and the Court of Appeals affirmed.

In *Dean*, the Court of Appeals examined the District's marriage laws promulgated in 1901, and concluded the legislature did not intend to permit same-sex marriages. The Court further concluded that the DCHRA, as originally enacted in 1977, did not change the definition of "marriage" reflected in the 1901 laws to include same-sex couples. The Court of Appeals reasoned that "by legislative definition . . . 'marriage' requires persons of opposite sexes; there cannot be discrimination against a same-sex marriage if, by independent statutory definition extended to the Human Rights Act, there can be no such thing." *Id.* at 320. In his concurrence, Judge Terry wrote "the very nature of the relationship that we call marriage, as it has been recognized and defined for centuries—indeed, millennia—necessarily excludes two persons of the same sex from entering into that relationship." *Id.* at 362 n.2 (Terry, J., concurring).

As the Court of Appeals in *Dean* acknowledged, it was the Council's intent in promulgating the DCHRA "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." *Id.* at 319 (citation omitted). In addition, "[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." *Id.* With that interpretive framework controlling here, the Court finds that *Dean* does not support Petitioners' position because *Dean* involved a different factual scenario and presented a different legal question than is before the Court.

Since 1995, when *Dean* was decided, there have been many significant changes in the District's marriage law. As the District points out, seven of the eight gender-specific provisions in the marriage statute cited by *Dean* have been amended to make them gender-neutral. District's Mot. to Dismiss at 20. The sole remaining provision cited by *Dean*, D.C. Code § 46-401, has been changed by the JMA.

Moreover, since *Dean*, the DCHRA has been strengthened to afford more protection against discrimination. The DCHRA now proscribes discrimination based upon a person's "perceived or actual" membership in a protected category. It also is now unlawful for the government to deny services or benefits based on membership in a protected category. The DCHRA now reads:

> Except as otherwise provided for by District law or when otherwise lawfully and reasonably permitted, it shall be an unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility, service, program or benefit to any individual on the basis of an individual's actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business.

D.C. Code § 2-1402.73 (2007 Repl.).

The Court in *Dean* did not 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. Since 1995, however, Connecticut, Iowa, Maine, Massachusetts, New Hampshire and Vermont have decided legislatively or judicially to allow same-sex marriage. In California, same-sex couples who were married between June 2008 and November 2008 are recognized as legally married in that state notwithstanding the subsequent referendum disallowing same-sex marriage. *See Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). Moreover, Belgium, Canada, the Netherlands, Norway, South Africa, Spain and Sweden now allow same-sex marriages. Unlike when *Dean* was decided, therefore, same-sex marriage is not a factual impossibility. Simply put, *Dean* does not support Petitioners' argument that their proposed referendum is consistent with the DCHRA.

b. BENEFITS AND SERVICES

Petitioners also argue that their proposed referendum does not discriminate against same-sex couples—in violation of the DCHRA—because "[t]here is no material D.C. benefit that marriage status affords, that domestic partnership status does not." Pet'rs' Mot. for Prelim. Inj. at 20. Specifically, Petitioners contend that marriage status confers no additional "benefits" or "services" on couples than does a domestic partnership, so any refusal to recognize same-sex marriages would not constitute a denial of "benefits" or "services" as contemplated by the DCHRA. The Court disagrees.

As the District notes, the Gay & Lesbian Activists Alliance has identified more than "200 District rights and responsibilities . . . of civil marriage unavailable to domestic

partners[.]" District's Mot. to Dismiss at 18.[4] Therefore, the dispute over the recognition of same-sex marriages is more than quarrelling over status or nomenclature. Furthermore, even if unmarried same-sex couples could receive the same benefits as married couples, courts have long held that different treatment can equate to discrimination whether or not the material benefits and services offered appear uniform. *See, e.g., Goss v. Bd. of Educ.*, 373 U.S. 683, 688 (1963).

Petitioners' proposed referendum asks the voters to decide whether the District should recognize same-sex marriages—which are legally indistinguishable from opposite-sex marriages in the jurisdictions in which they were performed—solely on the basis of the person's gender or sexual orientation. Their measure "authorizes or would have the effect of authorizing discrimination prohibited under [the DCHRA]," D.C. Code § 1-1001.16(b)(1)(C), and hence is not a proper subject for a referendum. Accordingly, the Court cannot issue a writ of mandamus.

2. PUBLIC POLICY

In a footnote to Petitioners' motion for preliminary injunction, they invite the Court to conclude that the District has a strong public policy against recognizing same-sex marriages.

As a general matter, District law recognizes marriages valid at their place of celebration. *Rosenbaum v. Rosenbaum*, 210 A.2d 5, 7 (D.C. 1965). Indeed, the District recognizes all foreign marriages except in two situations: (1) if the marriage was between persons domiciled in the District at the time of their marriage and the marriage would have been prohibited by one of the provisions in D.C. Code §§ 46-401–404; or (2) if the

[4] The report detailing that information can be found at http://www.glaa.org/archive/2004/glaamarriagereport.pdf

marriage was in violation of the "strong public policy" of the District. *Hitchens v. Hitchens*, 47 F. Supp. 73 (D.D.C. 1942); *Rhodes v. Rhodes*, 96 F.2d 715 (D.C. Cir. 1938); *McConnell v. McConnell*, 99 F. Supp. 493 (D.D.C. 1951).

Contrary to Petitioners' argument, the JMA's enactment necessarily means the public policy in this jurisdiction is to recognize same-sex marriages performed in other jurisdictions. *See, e.g., Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 357 (1931) (recognizing that "it is for the lawmakers to determine the public policy of the State") (citations omitted); *see also, e.g., Bond v. Serano*, 566 A.2d 47, 54 (D.C. 1989) (Farrell, J., concurring) (acknowledging that the legislature decides questions of public policy).

B. INJUNCTIVE RELIEF

Petitioners recognize that once the JMA becomes effective, presumably on July 6, 2009, it is no longer subject to referendum. D.C. Code § 1-204.102(b)(2). Petitioners concede it is not feasible to complete the referendum process before the JMA becomes effective. Therefore, Petitioners ask the Court to stay the effective date of the JMA until judicial review (presumably before this Court and the Court of Appeals) has been completed or until thirty days after the Board provides them with the necessary referendum papers.

The standards for injunctive relief are well known. To be entitled to injunctive relief, Petitioners must clearly demonstrate (1) a substantial likelihood of success on the merits; (2) danger of suffering irreparable harm; (3) that more harm will result to them from the denial of the injunction than from granting it; and (4) that the public interest will

not be disserved by issuance of the injunction. *Zirkle v. District of Columbia*, 830 A.2d 1250, 1255–56 (D.C. 2003) (citation omitted).

Where a party seeks to change the status quo, that party "must be held to a substantially higher standard than in the usual case. *Fountain v. Kelly*, 630 A.2d 684, 688 (D.C. 1993) (citation omitted). Contrary to Petitioners' claim that they are merely seeking to maintain the status quo until a referendum has been held and to "ensure that the people of D.C. retain [their] voice," Pet'rs' Mot. for Prelim. Inj. at 25, Petitioners are attempting to alter the status quo by changing the ordinary course of the legislative process.

1. IRREPARABLE HARM

"An injunction should not be issued unless the threat of injury is imminent and well-founded, and unless the injury itself would be incapable of being redressed after a final hearing on the merits." *Wieck v. Sterenbuch*, 350 A.2d 384, 388 (D.C. 1976) (citations omitted). Petitioners argue that a denial of injunctive relief would result in irreparable harm because they (and/or the citizens of the District generally) would be denied their right to referendum. The Board and the District respond that there would be no irreparable harm because even if Petitioners 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).

The Court agrees that a denial of injunctive relief would not result in irreparable harm. First, the District's Home Rule Act provides the right of initiative for voters to repeal a law. Moreover, Petitioners' right to referendum has not been deprived. The Board did not refuse to consider Petitioners' proposed referendum, and this Court has not

declined to exercise jurisdiction. Petitioners' proposed referendum has followed the course contemplated for all referenda pursuant to D.C. Code § 1-1001.16—a course successfully charted by others who have sought to submit District legislation to a direct vote.[5] Petitioners are entitled to the process outlined in D.C. Code § 1-1001.16. They are not entitled to a favorable ruling on whether their proposed referendum meets the legal requirements established by District law.

Furthermore, Petitioners waited until sixteen days after the JMA was transmitted to Congress before submitting their proposed referendum to the Board. In their reply, Petitioners proffer their delay was excusable because they did not know the District was considering the legislation because the Council's bad faith prevented the public from learning that the legislation was under consideration. Pet'rs' Reply at 3–5. Petitioners invite the Court to conclude the Council acted in bad faith because, among other things, the Council briefly debated the bill, held no hearings, changed the name of the bill after its passage, and immediately sent the Act to the Mayor for his signature after its passage. *Id.* at 4.

The Court concludes that Petitioners' delay was inexcusable. As to the Council's alleged bad faith, the Court is in no position to make a legal determination that the JMA's legislative history provides clear evidence of its creators' bad faith particularly because Petitioners concede the JMA is lawful. *See* Pet'rs' Reply at 2. Additionally, there is no reason to believe that an interested citizen diligently following the issue could not have learned about its consideration by the Council. Indeed, Petitioners' summary of the

[5] Petitioners' reply makes clear their argument "is not that the referendum process can never be successfully completed," Pet'rs' Reply at 8, but that in this particular case, the time constraints have deprived Petitioners of their rights.

JMA's legislative history suggests they knew of its existence before it was signed by the Mayor and certainly days before it was transmitted to Congress.

At bottom, the harm about which Petitioners complain is not based on a denial of the right to referendum. Rather, they simply disagree with legislation enacted by our duly-elected Council. A citizen's disagreement with constitutionally sound legislation, whether based on political, religious or moral views, does not rise to the level of an actionable harm. *See, e.g.*, *Serv. Employees Int'l Union, Local 82 v. D.C. Gov't*, 608 F. Supp. 1434, 1448 (D.D.C. 1985) (noting that although plaintiffs may be "dissatisfied with the results of the legislative process, . . . scores of cases . . . have made it clear beyond any doubt that the judiciary is without authority to substitute its judgment for that of the legislature"). Petitioners' 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.

2. SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

In light of the discussion above, the Court finds that Petitioners have not established a substantial likelihood of success on the merits.

3. BALANCING OF HARMS

The Court finds no harm to Petitioners from a denial of their request for injunctive relief. No tangible or cognizable right of theirs is affected. Petitioners' wish to have the voters decide whether the District will recognize same-sex marriages from other jurisdictions still is preserved, provided their initiative is a proper subject for an initiative within the meaning of D.C. Code § 1-1001.16(b)(1). On the other hand, if the Court were to stay the JMA it would open the door for every person unhappy with a law to seek injunctive relief when unable to comply with the statutory requirements for a referendum.

Such a remedy would disrupt the statutory scheme created by the legislature. Thus, the balance of harms weighs against granting injunctive relief.

4. PUBLIC INTEREST

There is a substantial public interest in ensuring that each branch of government acts in accordance with its constitutional role and/or statutorily prescribed mandate; and here, the roles of the judiciary and the legislature have come into question.

In this case, where Petitioners have acknowledged they are not challenging the constitutionality of the JMA, *see* Pet'rs' Reply at 2, there is a question as to whether this Court has the authority to stay the effective date of legislation so that they may complete the referendum process. This appears to be a case of first impression in the District. Although Petitioners have found no authoritative case law from this jurisdiction, they argue the Court has the power to stay based on: (1) the Court's inherent equitable powers; (2) the Court's judicial-review authority; and (3) case law from other jurisdictions, specifically Ohio and Alaska, in which courts have stayed the effective date of laws to provide citizens the opportunity to vote on their validity.[6]

The Court questions whether it has the authority to stay the effective date of the JMA. To do so may encroach on the well-defined role of the Council and Congress. The United States Constitution gives the United States Congress the "power . . . to exercise exclusive legislation in all cases whatsoever, over [the District of Columbia.]" U.S. Const. Art. I, § 8. Congress delegated some of its power to legislate for the District of Columbia to the Council when it enacted the Home Rule Act, D.C. Code § 1-206.01 *et*

[6] For the reasons stated in the Board's opposition, the Court concludes that *State ex rel. Ohio Gen. Assembly v. Brunner*, 873 N.E. 2d 1231 (Ohio 2007), and *Interior Taxpayer Ass'n, Inc. v. Fairbanks N. Star Borough*, 742 P.2d 781 (Alaska 1987), are distinguishable and provide the Court no authority to grant Petitioners' request.

seq. (2006 Repl.), but reserved authority to reject legislation enacted by the Council within 30 days (60 days for criminal statutes) after it is transmitted to Congress. D.C. Code §§ 1-206.02(c)(1)–(2). If Congress does not act within that timeframe, the legislation becomes effective.[7] D.C. Code §§ 1-206.02(c)(1)–(2). Although Congress has provided explicitly that any law enacted by the District shall become effective within 30 days absent Congressional disapproval, Petitioners ask this Court to interfere with the Congressionally mandated legislative framework here.[8] It is not in the public interest for courts to determine, on a case-by-case basis, the time permitted for the referendum process particularly where, as here, the legislature already has prescribed a strict and explicit time period for all referenda.

Petitioners cannot satisfy the elements for a stay of the effective date of the JMA. Accordingly, the Court denies Petitioners' motion for injunctive relief.

IV. CONCLUSION

Based on the foregoing, it is this 30th day of June, 2009,

ORDERED that Petitioners' Petition for Review of Agency Decision is **DENIED**; it is further

[7] The Home Rule Act also provides District voters the right of referendum during the Congressional-review period. D.C. Code §§ 1-204.101–107 (2006 Repl.). The referendum right is limited to the period before the law becomes effective. D.C. Code § 1-1001.16(j)(2) (2006 Repl.). After a law has become effective, voters may proceed with the right of initiative. D.C. Code § 1-1001.16(a)(1). An initiative also must be a "proper subject" according to the statute.

[8] In a footnote, Petitioners suggest the District's statute providing for referenda may raise a due-process concern, because the statute "impose[s] time limits on the exercise of that right that are so onerous . . . that Proponents are unable to meet them." Pet'rs' Mot. for Prelim. Inj. at 12 n.2. Petitioners' argument is unpersuasive for two reasons. First, the referendum statute's time restrictions are not too onerous because other proponents have met the time requirements. Perhaps more importantly, however, the right to referendum is a right created by statute; it is not a constitutional right. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (recognizing "a critical difference between rights created by . . . statute and rights recognized by the Constitution"); *see also United States v. Bushert*, 997 F.2d 1343, 1351 n.20 (11th Cir. 1993); *Cox Commc'ns PCS, LP v. City of San Marcos*, 204 F. Supp. 2d 1272, 1281 (S.D. Cal. 2002).

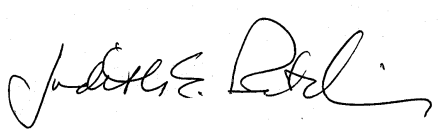
ORDERED that Petitioners' request for a Writ in the Nature of Mandamus is **DENIED**; it is further

ORDERED that Petitioners' Motion for Preliminary Injunction is **DENIED**; it is further

ORDERED that Petitioners' Motion for Summary Judgment is **DENIED**; it is further

ORDERED that the District's Motion to Dismiss is **GRANTED**; and it is further

ORDERED that Aaron Flynn and Christopher Boutlier's Motion to Intervene is **DENIED**.



Judith E. Retchin
Associate Judge

Copies sent to:

Steven Aden, Esq.
D.C. Bar No. 466777

Kenneth McGhie, Esq.
D.C. Bar No. 385313

Andrew Saindon, Esq.
D.C. Bar No. 456987

Chad Copeland, Esq.
D.C. Bar No. 982119

Ellen Efros, Esq.
D.C. Bar No. 250746

Allison Wood, Esq.
D.C. Bar No. 466928

Brian Raum, Esq.
Austin Nimocks, Esq.
801 G Street NW Suite 509
Washington DC 20009