NO. _____

IN THE

Supreme Court of the United States

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

Petitioners,

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS and DISTRICT OF COLUMBIA,

Respondents.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Given that the District of Columbia Council cannot legislate in conflict with the District's congressionally enacted Charter, can it limit the people's Charter-based right to initiate laws—a right that Congress affirmatively approved and bestowed upon the people—by unilaterally imposing a substantive restriction on that broad and unambiguous right?

PARTIES TO THE PROCEEDING

Petitioners are Harry R. Jackson, Jr., Robert King, Anthony Evans, Dale E. Wafer, Walter E. Fauntroy, James Silver, Melvin Dupree, and Howard Butler. They are residents and registered voters of the District of Columbia.

Respondents are the District of Columbia Board of Elections and Ethics, which was the only named respondent in this action, and the District of Columbia, which intervened as a respondent.

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STATEMENT OF JURISDICTION

The District of Columbia Court of Appeals issued and entered its decision on July 15, 2010. This Court has jurisdiction under 28 U.S.C. § 1257(a) and (b).

PERTINENT STATUTORY PROVISIONS

Section 752 of the District of Columbia Self-Government and Government Reorganization Act ("Home Rule Act"), which was enacted in 1973 by the United States Congress, and thereafter approved by the voters of the District of Columbia, states: "Notwithstanding any other provision of this chapter or of any other law, the [District of Columbia] 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.

Section 1(a) of Amendment No. 1 of the Initiative, Referendum, and Recall Charter Amendment Act ("Charter Amendment Act" or

"CAA"), which became effective in 1978 after it was jointly approved (as required in the Home Rule Act) by Congress, the District of Columbia voters, and the District of Columbia Council, states: "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(a).

Section 8 of Amendment No. 1 of the Charter Amendment Act provides: "The Council of the District of Columbia shall adopt such acts as are necessary to carry out the purpose of this subpart [dealing with the people's right of initiative] 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.

The Human Rights Act ("HRA") restriction of the Initiative, Referendum, and Recall Procedures Act ("Initiative Procedures Act" or "IPA"), enacted in 1979 by the District of Columbia Council, states:

> (b)(1) Upon receipt of each proposed initiative or referendum measure, the Board shall refuse to accept the measure if the Board finds that it is not a proper subject of initiative or referendum, whichever is applicable, under the terms of title IV of the

> District of Columbia Home Rule Act, or upon any of the following grounds:
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> * * *
>
> (C) The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2 [which is the "Human Rights Act"];
>
> * * *

D.C. Code § 1-1001.16(b)(1)(C).[1]

STATEMENT OF THE CASE

A. Statutory Background

The United States Constitution grants Congress complete legislative power over the District of Columbia. U.S. Const. art. I, § 8, cl. 17. In 1973, Congress enacted the District of Columbia Self-Government and Government Reorganization Act ("Home Rule Act"), Pub. L. No. 93-198, 87 Stat. 777 (1973). Title IV of the Home Rule Act is the District of Columbia Charter, which created a tripartite form of government in the District and "established a Council of the District of Columbia." D.C. Code § 1-204.01(a). Congress granted extensive (but not complete) legislative power to the Council, *see id.* at

[1] The other provisions of the IPA are procedural (rather than substantive) in nature. *See* App. 6a-7a (printing D.C. Code § 1-1001.16(b)(1) in its entirety).

§§ 1-203.02, 1-206.02(a), while simultaneously affirming its own ultimate constitutional authority over the Council, *see id.* at § 1-206.02(c).

The District Charter, as designed by Congress, took effect only after "its acceptance by a majority of the registered qualified electors of the District voting thereon in a charter referendum." D.C. Code § 1-203.01. The people approved the Charter in 1973. It included, as is pertinent here, Section 752 of the Home Rule Act, which granted the Council "authority to enact any act or resolution with respect to matters involving or relating to elections in the District." *Id.* at § 1-207.52.

The Home Rule Act provides a procedure for amending the Charter, requiring congressional approval, following collaboration by the District's voters, the Mayor, and the Council. *See* D.C. Code § 1-203.03. A proposed amendment first must be approved by the Council, signed by the Mayor, and ratified by the District's voters. *Id.* at § 1-203.03(a). Then it must be submitted to Congress.[2]

In 1977, the Council, the Mayor, and the District's voters approved the Initiative, Referendum, and Recall Charter Amendment Act ("Charter Amendment Act" or "CAA"), 24 D.C. Reg. 199 (July 8, 1977). In March 1978, Congress passed a concurrent resolution approving the CAA. *See*

[2] The Home Rule Act originally required Congress to "adopt a concurrent resolution . . . approving" any proposed amendment to the District Charter, D.C. Code § 1-125(b) (1977 Supp.), but the Charter amendment process now requires only a period of congressional review. D.C. Code § 1-203.03(b).

H.R. Con. Res. 464 and 471, 95th Cong. (1978). Without Congress's action, the CAA would not have become law. Thus, Congress, the District's voters, the Mayor, and the Council collectively placed into the Charter the right of initiative for the District voters, enabling them to initiate the enactment of laws.[3]

Section 1 of Charter Amendment No. 1 defines the citizens' substantive right of initiative, providing that "'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[.]" D.C. Code § 1-204.101(a). The Charter thus contains only one express *substantive* limitation on the initiative power—voters may not propose "laws appropriating funds"—a limitation that plainly does not apply to the proposed initiative at issue in this case. *See* App. 19a-20a. So, except as to "laws appropriating funds," the voters and the Council were placed on equal footing as substantive lawmakers for the District.

Section 8 of Charter Amendment No. 1 contains a "legislative mandate" for the Council to enact procedural "implementing legislation" for the people's newly created initiative right. *See Convention Ctr. Comm. v. Bd. of Elections and*

[3] The District of Columbia had a rich history of congressionally enabled direct democracy before the creation of the CAA. *Referendums in the District of Columbia: Hearing before the Comm. on the District of Columbia*, 95th Cong. 53-61 (1978) (research by Nelson Rimensynder, Staff, Comm. on the District of Columbia).

Ethics, 399 A.2d 550, 553 (D.C. 1979). That provision authorized the Council, "within 180 days of the effective date of [the CAA]," to "adopt such acts as are necessary to carry out the purpose" of the Charter provisions that created the people's initiative right. D.C. Code § 1-204.107.

Although it took longer than 180 days, the Council enacted its implementing legislation, known as the Initiative, Referendum, and Recall Procedures Act of 1979 ("Initiative Procedures Act" or "IPA"). In addition to establishing initiative procedures, the IPA also imposed a substantive limitation on the people's initiative right. That limitation—known as the HRA restriction—states, in pertinent part, that "the Board shall refuse to accept [a proposed initiative] if the Board finds that it . . . authorizes, or would have the effect of authorizing, discrimination prohibited under [the D.C. Code]." D.C. Code § 1-1001.16(b)(1)(C).

The Council may not enact legislation inconsistent with the Charter. *See* D.C. Code § 1-203.02; *id.* at § 1-207.61(a). Thus, before the enactment of the IPA, both Corporation Counsel and the Council's General Counsel informed the Council that it did not have authority to impose the HRA restriction on the people's initiative right.[4] The

[4] *See* Supplemental Memorandum from Louis P. Robbins, Principal Deputy Corporation Counsel, Office of the Corporation Counsel, to Judith W. Rogers, Special Assistant for Legislation (June 2, 1978); 3 Op. C.C.D.C. 102, 103 (1978) ("Any substantive restrictions on the rights of the voters granted by Charter Amendment No. 1 are contrary to that Amendment and, hence, are void and of no effect. Such

Council nevertheless enacted the IPA with the HRA restriction in place.

B. Factual Background

On May 5, 2009, the Council enacted the Jury and Marriage Amendment Act of 2009, recognizing in the District "[a] marriage legally entered into in another jurisdiction between [two] persons of the same sex[.]" D.C. Code § 46-405.01. That legislation became law on July 7, 2009.[5]

On September 1, 2009, Petitioners, who are eight residents and registered voters of the District (hereafter referred to as "Proponents"), filed with the District of Columbia Board of Elections and Ethics (the "Board") the Marriage Initiative of 2009 which, if approved by the voters, would add to the D.C. Code that "[o]nly marriage between a man and a woman is valid or recognized in the District of Columbia." App. 6a. On November 17, 2009, the Board rejected Proponents' initiative because, in its opinion, that measure was barred by the HRA restriction. *See* App. 135a-145a.

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legislation may only be accomplished by the Charter Amending Procedure or by Act of Congress."); Memorandum from Edward B. Webb, Jr., General Counsel, to Council Members (June 7, 1978) (attaching the supplemental memorandum from Corporation Counsel and stating that the Human Rights restriction "engrafts . . . a new requirement not in the Charter amendment" and thus is "an indirect attempt to further amend the Charter and is, therefore, legally without effect").

[5] Petitioners filed a referendum with the Board to enable the people to vote directly on the Council's May 5, 2009 legislation, but the Board rejected the referendum, relying on the HRA restriction for its decision. App. 101a-102a.

On December 15, 2009, the Council approved the Religious Freedom and Civil Marriage Equality Amendment Act of 2009, which states *inter alia* that "[a]ny person may enter into a marriage in the District of Columbia with another person, regardless of gender[.]" D.C. Code § 46-401(a). That enactment became law on March 3, 2010.[6]

C. Procedural Background

On November 18, 2009—the day after the Board rejected the Marriage Initiative of 2009—Proponents filed this lawsuit with the Superior Court of the District of Columbia, seeking a writ in the nature of mandamus compelling the Board to accept the Marriage Initiative of 2009 and present it to the voters. The District of Columbia intervened to defend the Board's decision. The parties then filed cross motions for summary judgment.

In their lawsuit, Proponents made the claim presented here—that the HRA restriction is invalid because it conflicts with the broad right of initiative adopted by Congress, the voters, and the Council. App. 164a-166a. Proponents fully briefed that argument in their motion for summary judgment, *see* Pet'rs Mem. in Supp. of Mot. for Summ. J. at 7-17; and on January 14, 2010, the Superior Court

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[6] Proponents also filed a referendum with the Board to enable the people to vote directly on the Council's December 15, 2009 legislation, but the Board rejected that referendum, again relying on the HRA restriction. Proponents appealed this denial until the legislation became effective which, by operation of law, extinguished Proponents' referendum right and mooted their appeal. *See* D.C. Code § 1-204.102(b)(2)).

addressed their petition in its order granting the District's motion for summary judgment, concluding that "[t]he [HRA restriction] is consistent with the intent of the CAA and does not impermissibly create a new exception to the initiative right." App. 106a-117a. The very next day, January 15, 2010, Proponents filed their notice of appeal to the District of Columbia Court of Appeals.

On appeal, Proponents again raised the question presented here—"[w]hether the D.C. Council's use of the [IPA] to impose the Human Rights Act restriction on the citizens' right of initiative[] is invalid when the [CAA] provides the citizens of the District of Columbia co-extensive lawmaking authority with the D.C. Council, except only for 'laws appropriating funds.'" *See* Br. of Appellants to D.C. Ct. of Appeals at 1. Proponents argued, in short, that the Council's attempted use of the IPA to restrict the people's broad initiative right is "an invalid exercise of legislative power." *Id.* at 7-22.

Meanwhile, Proponents sought, through parallel legal proceedings, to allow the people to vote directly on the Council's December 15, 2009 legislation pertaining to marriage. Their appeals culminated in an emergency stay application filed with the Honorable Chief Justice John G. Roberts, Jr. in his role as Circuit Justice, contending that irreparable harm would result were a stay not issued. The Chief Justice recognized that Proponents' substantive "argument has some force," but concluded that "a stay [was] not warranted." *Jackson v. District of Columbia Bd. of Elections & Ethics*, 559 U.S. -- , 130 S. Ct. 1279, 1280 (2010). The Chief Justice rested

his decision, in part, on the fact that the District of Columbia Court of Appeals would eventually consider Petitioners' substantive argument in this case, and that Proponents would "have the right to challenge any adverse decision through a petition for certiorari in this Court at the appropriate time." *Id.* That time has now come, following nearly two years of Proponents pursuing every possible avenue to exercise their rights of direct democracy on this subject.

On July 15, 2010, the D.C. Court of Appeals, in a five-to-four decision, addressed the question presented here, but found that the "[HRA restriction] is consistent with the intent of the CAA." App. 22a-49a. That conclusion rests on thoroughly flawed reasoning that misconstrues the plain language of the initiative right, as well as Congress's specific grant of authority for the Council to merely "implement" the broad grant of initiative powers to the people—not to constrict, much less to eviscerate the power.

Though the collective efforts of Congress, the citizens of the District (through a direct vote), the Mayor, and the Council were required to establish the people's initiative right, the Court of Appeals focused solely on the *Council's* intent concerning the people's initiative power without regard for the intent of Congress or the people. *See, e.g.*, App. 24a-26a. The dissenting opinion indentified this flaw in the majority's decision. App. 88a. The dissenters remarked that the majority "focused single-mindedly on the supposed intent of the Council," but "point[ed] to no evidence that the voters of the District or

members of Congress (all indispensable partners in amending the Charter) thought they were delegating to the Council an undefined power to limit the right of initiative in any way the Council thought necessary." *Id.*

The majority also tortured the Charter's plain language and clear context, taking Congress's simple directive in Section 8 of Charter Amendment No. 1 (which instructed the Council to enact procedural implementing legislation for the initiative process), and transforming it into a far-reaching grant of legislative power enabling the Council to substantively restrict or functionally abolish the people's initiative right. App. 27a-35a; *id.* at 30a n.23 (comparing Section 8 of Charter Amendment No. 1 to the Necessary and Proper Clause of the United States Constitution). The dissenting judges, in contrast, discerned that the "necessary to carry out the purpose" language of Section 8 of Charter Amendment No. 1 "was a mandate to enact implementing legislation," and thus did not grant the Council "any license to restrict [the initiative] right[]," which was "established through the painstaking process of amending the Charter." App. 81a.

The majority additionally conveyed unbounded authority to the Council through Section 752 of the Home Rule Act. Section 752, enacted by Congress years before the initiative right came into existence, gives the Council general powers over "matters involving or relating to elections." D.C. Code § 1-207.52. That provision, the majority reasoned, gave the Council seemingly unfettered "authority to enact

laws giving direction to the Board in the handling of election matters," which included the ability to alter the substance of the people's later-enacted initiative power. According to the court, all the Council did in imposing the HRA restriction was use its authority under Section 752. App. 53a.

Again, the dissent noted the fundamental error with the majority's use of Section 752: "If a Charter amendment was necessary to create the right of initiative, an amendment is equally necessary to limit that right. . . . The Council's authority relating to elections, found in Section 752, did not (and cannot) authorize a restriction amounting to an amendment of the Charter." App. 95a. If the Council's powers under Section 752 are as broad as the majority claims, the dissent remarked, nothing could "preclude the Council from imposing additional subject matter limitations on the right of initiative or, indeed, from extinguishing that right altogether," which, under the system designed by Congress, "may be done only by going through the intentionally[] cumbersome process of amending the Charter." App. 95a-96a.

The majority's expansive reading of the Council's power under Section 752, moreover, suggests that the Council could have created the initiative right without amending the Charter. The dissent, however, flatly rejected that proposition because the initiative "is an exercise of legislative power," which ultimately resides in Congress, and thus "[c]reating that right . . . required a Charter Amendment." App. 95a.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT OF COLUMBIA COURT OF APPEALS INCORRECTLY DECIDED IMPORTANT QUESTIONS CONCERNING CONGRESSIONAL ENACTMENTS.

This Court may grant certiorari when a lower court has decided an important question of federal law that should be settled by this Court. That is appropriate here, where the D.C. Court of Appeals allowed the Council to usurp a congressional grant of power.

Multiple congressional enactments—specifically, the Home Rule Act and the concurrent resolution approving the CAA—created provisions in the District's Charter that divide legislative power in the District among Congress, the people, and the Council, with the ultimate power over all matters residing in Congress. That division of legislative power, then, while approved by the people and the Council, ultimately rests upon federal law and congressional approval.

In this case, the D.C. Court of Appeals has allowed the Council to unilaterally impose a substantive restriction on the people's initiative right, thereby effectuating an unauthorized change in the division of legislative power. Moreover, the D.C. Court of Appeals' interpretation of the Charter—particularly Section 752 of the Home Rule Act and Section 8 of Charter Amendment No. 1—bestows unapproved and extensive authority upon the Council to further erode the people's initiative

power, or otherwise alter Congress's division of legislative power within the District of Columbia.

A. Congressional Enactments Creating and Amending the District's Charter Are Central in this Case and Supreme in the District.

This case requires the interpretation of multiple congressional enactments. Respondents claim, and the D.C. Court of Appeals found, that Section 752 of the Home Rule Act, Pub. L. 93-198, 87 Stat. 777 (1973)—an Act of Congress ratified by the District's voters—permitted the Council's creation of the legislative restriction on the people's Charter-based initiative right. This appeal also directly implicates Sections 1 and 8 of Charter Amendment No. 1, which required affirmative approval by a concurrent resolution of Congress. *See* H.R. Con. Res. 464 and 471, 95th Cong. (1978); *cf. Stevenson v. District of Columbia Bd. of Elections and Ethics*, 683 A.2d 1371, 1375 (D.C. 1996) ("[I]t is not without significance that Congress affirmatively approved the Charter Amendments Act after passage by the Council."); D.C. Code § 1-125(b) (1977 Supp.).

In establishing the home-rule governance within the District of Columbia, Congress designed a system that prohibited the Council from contradicting or undermining congressionally enacted Charter provisions, like the CAA. *See* D.C. Code § 1-203.02 (noting that "the legislative power of the District" must be "consistent with . . . the provisions of [the Home Rule Act]," which includes the Charter); *id.* at § 1-207.61(a) ("To the extent that

any provisions of [the Home Rule Act] are inconsistent with the provisions of any other laws, the provisions of [the Home Rule Act] shall prevail"). Thus, in the District, congressional enactments establishing and amending the Charter reign supreme over mere Council-enacted laws. At bottom, then, this case involves the primacy of congressional enactments in the District.

The centrality and supremacy of congressional enactments here warrant this Court's review.

B. This Case Implicates Important Federal and Congressional Interests.

Congress is the source of *all* legislative power over the District. U.S. Const. art. I, § 8, cl. 17; D.C. Code §§ 1-201.02(a), 1-203.03(b), 1-206.01. It has shared some of that power with the citizens of the District, permitting both the Council and the people to enact legislation for the District. But here, the Council has arrogated authority to abrogate the people's direct legislative power—a power that only Congress could bestow or withdraw. Accordingly, congressional and federal interests are directly involved in this case.

Congress has a significant federal interest in granting legislative power—including the people's right of initiative—to various custodians so that, to the extent practicable, the District's people and their local officials can manage their own affairs. That delegation of authority enables the District's citizens and their Council to solve most of their own legislative questions, thus freeing congressional

resources to focus on federal issues of nationwide scope. Indeed, when enacting the Home Rule Act, Congress's stated intent was, among other things, to "grant to the inhabitants of the District of Columbia powers of local self-government" and to "relieve Congress of the burden of legislating upon essentially local District matters." D.C. Code § 1-201.02(a).

The people's initiative right, in particular, plays a vital role in achieving that important federal objective. In the absence of that power, when the citizens' views conflict with the Council's, their sole recourse (other than electing new Council members) is to lobby Congress to intervene and exercise its power over the District. *See* D.C. Code §§ 1-201.02(a), 1-206.01. But when the people possess direct power to enact their own legislation or refer Council-enacted legislation for a popular vote, their need to trouble Congress is significantly diminished. The initiative power thus furthers this federal interest.

Recent events prove the point. The collective actions of the Respondents and D.C. courts have left the District's citizens without immediate recourse on the issue of marriage. The people have thus urged congressional representatives to address this situation, prompting a flurry of congressional action to address the repeated denial of the citizens' right to vote.[7] Additionally, the District's citizens who are

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[7] *See* H.R. 2608, 111th Cong. (1st Sess. 2009) ("To define marriage for all legal purposes in the District of Columbia to consist of the union of one man and one woman."); H.J. Res. 54,

concerned about this issue (and any other issue purportedly precluded by the HRA restriction) will continue to lobby Congress for action—both on this topic and any other matters that the Council excludes—consuming important congressional resources.

The important federal and congressional interests in the vitality of the District's delegated legislative power warrant this Court's review.

C. The D.C. Court of Appeals Ratified the Council's Unauthorized Alteration of the District's Congressionally Approved Division of Legislative Power.

By affirming the HRA restriction, the D.C. Court of Appeals approved a Council-imposed limitation on the people's Charter-based initiative power. This significant restriction on the people's right of initiative materially altered the congressionally approved division of legislative power in the District.

111th Cong. (1st Sess. 2009) ("Disapproving the action of the District of Columbia Council in approving the Jury and Marriage Amendment Act of 2009."); H.R. 4430, 111th Cong. (2nd Sess. 2010) ("District of Columbia Referendum on Marriage Act of 2010"); S. 2980, 111th Cong. (2nd Sess. 2010) ("A bill to protect the democratic process and the right of the people of the District of Columbia to define marriage."); H.J. Res. 72, 111th Cong. (2nd Sess. 2010) ("Disapproving the action of the District of Columbia Council in approving the Religious Freedom and Civil Marriage Equality Amendment Act of 2009."), S. Amdt. 3568 to H.R. 4872, 111th Cong. (2nd Sess. 2010) ("To protect the democratic process and the right of the people of the District of Columbia to define marriage.").

The HRA, as the D.C. Court of Appeals has recognized, is a constantly evolving[8] and "far-reaching prohibition against discrimination of many kinds." *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 732 (D.C. 2000). Its numerous protected classifications make it one of the broadest nondiscrimination laws in the nation, outlawing differential treatment based on many nontraditional classifications such as "source of income[] or place of residence or business of any individual." *See, e.g.*, D.C. Code § 2-1402.31(a). Since the Act's inception, the Council has continually added new classifications and will undoubtedly add more in the future. *See Blodgett v. University Club*, 930 A.2d 210, 218 n.4 (D.C. 2007).

That "far-reaching" legislation, as incorporated through the IPA, significantly restricts the people's initiative power. Nearly all statutes, including those enacted by the people through the initiative process, create classifications. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963). And the HRA restriction, a mere legislative enactment of limitless elasticity, prohibits the people from proposing any initiative that, in the Board's opinion, distinguishes or could have the effect of distinguishing based on any of the current and *future* classifications in the Act. *See* D.C. Code § 1-1001.16(b)(1)(C). The myriad of classifications

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[8] The D.C. Council has modified the HRA on multiple occasions since its original enactment. *See*, *e.g.*, D.C. Law 12-242, 46 D.C. Reg. 952 (April 20, 1999); D.C. Law 14-189, 49 D.C. Reg. 6523 (October 1, 2002); D.C. Law 15-309, 52 D.C. Reg 1718 (April 8, 2005); D.C. Law 16-58, 53 D.C. Reg. 14 (March 8, 2006); D.C. Law 17-177, 55 D.C. Reg. 3696 (June 25, 2008).

contained in the HRA remove legislative power from the people to enact many legitimate, non-invidious measures.[9] This restriction, therefore, significantly alters the congressionally approved division of legislative power in the District.

The rationale employed by the D.C. Court of Appeals now affords multiple avenues for the Council (without affirmative approval from Congress or the District's voters) to further erode or even practically abolish the people's initiative right. *First*, as described, the Council could (and likely will) add other classifications to its constantly expanding Human Rights Act, thereby enlarging that statutory provision to further stifle the people's legislative power.

Second, the Council may impose additional restrictions on the people's initiative power through Section 8 of Charter Amendment No. 1, as that congressionally approved provision has been construed by the D.C. Court of Appeals in this case. But Section 8, on its face, simply authorizes the Council to enact *procedural* implementing legislation for the initiative process. *See* D.C. Code § 1-204.107. Indeed, that was Congress's understanding of Section 8. *See* H.R. REP. NO. 95-890, at 17 (1978). Yet, the D.C. Court of Appeals has now authorized the Council to use that provision to impose

[9] The HRA restriction, for example, would likely prevent the people from proposing any statute that treats homeowners more favorably than renters, or persons residing in the District more favorably than persons residing outside the District, because such a law would discriminate on the basis of "place of residence."

substantive restrictions on the people's initiative right. App. 27a-35a.

Third, the Council may impose additional restrictions on (or conceivably eliminate) the people's initiative power by citing to the D.C. Court of Appeals' interpretation of Section 752 of the Home Rule Act. Section 752 grants authority to the Council "to enact any act or resolution with respect to matters involving or relating to elections in the District." D.C. Code § 1-207.52. That provision, according to the D.C. Court of Appeals, provides the Council with seemingly unbounded "authority to enact laws giving direction to the Board in the handling of election matters" (even, as in this case, laws that impose a substantive restriction on the people's initiative power). App. 53a.

In sum, the D.C. Court of Appeals' decision drastically transforms the congressionally approved division of legislative power in the District. This Court should now intervene to restore the proper legislative design.

D. Congress's Failure to Act Legislatively Does Not Foreclose This Court's Obligation to Interpret and Enforce the Charter.

It is the federal judiciary's function to construe congressional enactments. Congress should not be relied upon to "re-legislate" or fix misapplications of the law, as that is the role that the judiciary is designed to fulfill. Thus, although Congress has reserved ultimate legislative authority over the

District, *see* D.C. Code §§ 1-201.02(a), 1-203.03(b), 1-206.01, and can repeal the HRA restriction, or otherwise enact legislation removing substantive impediments to the people's initiative power, these considerations do not support this Court's denying review. To the contrary, when faced with the D.C. Court of Appeals' erroneous construction of congressional enactments, this Court should intervene and relieve the burden from Congress to rectify the Council's unauthorized actions.

Moreover, Congress's failure to reject or overturn the HRA restriction does not amount to implicit congressional approval of that measure. In similar situations, where Congress has not acted against local overreaching, this Court's precedent indicates that an "inference of [] approval by Congress from its mere failure to act . . . cannot reasonably be indulged." *Springer v. Government of Philippine Islands*, 277 U.S. 189, 208-09 (1928) (involving a United States territory's enactment of a law conflicting with Congress's organic act distributing governmental power in that territory); *Clayton v. Utah*, 132 U.S. 632, 642 (1890) ("[I]t can hardly be admitted, as a general proposition, that, under the power of congress reserved in the organic acts of the territories to annul the acts of their legislatures, the absence of any action by congress is to be construed to be a recognition of the power of the legislature to pass laws in conflict with the act of congress under which they were created."). "To justify the conclusion that Congress has consented to the violation of one of its own acts [delineating the division of power for a territorial government] will

require something more than such inaction upon its part[.]" *Springer*, 277 U.S. at 208.

Finally, forcing Congress to correct the D.C. Court of Appeals' decision and restore the agreed-upon balance of legislative power in the District thwarts the federal interest in jointly empowering the District's citizens and Council so that Congress is free to focus on federal matters. This consideration thus weighs in favor of this Court's granting review, affirming the proper construction of the congressionally approved Home Rule Act and CAA, and furthering Congress's overriding federal interest in focusing on federal matters.

II. THIS COURT SHOULD NOT DEFER TO THE DISTRICT OF COLUMBIA COURT OF APPEALS ON THIS QUESTION.

This case involves the interpretation of congressional enactments applicable specifically within the District. "[I]t has been the practice of th[is] Court to defer to the decisions of the courts of the District of Columbia on matters of exclusively local concern." *Whalen v. United States*, 445 U.S. 684, 687 (1980). But as this Court has recognized:

> [I]t is clear that [this practice] is a matter of judicial policy, not a matter of judicial power. Acts of Congress affecting only the District, like other federal laws, certainly come within this Court's Art. III jurisdiction, and thus we are not prevented from reviewing the decisions of the District of Columbia Court of Appeals interpreting

> those Acts in the same jurisdictional sense that we are barred from reviewing a state court's interpretation of a state statute.

Id. at 687-88.

This Court, therefore, has properly stepped in when the D.C. courts have gone astray. *See, e.g.*, *id.*, 445 U.S. at 688 (refusing to defer because the federal claim could not "be separated entirely from a resolution of the question of statutory construction"); *id.* at 695-96 (White, J., concurring) (refusing to defer because the D.C. court committed significant error in its statutory interpretation); *id.* at 696-97 (Blackmun, J., concurring) (refusing to defer because the D.C. court's decision fell within the class of "exceptional situations where egregious error has been committed"); *Kent v. United States*, 383 U.S. 541, 557 n.27 (1966) (refusing to defer because the D.C. court's decision was "self-contradictory"); *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 117-18 (1953) (reversing the D.C. court's decision despite the general policy of deference).[10]

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[10] The United States Court of Appeals for the District of Columbia Circuit similarly defers to D.C. courts on matters of exclusively local concern, but the D.C. Circuit, like this Court, has deviated at times from that general practice. *See, e.g.*, *United States v. Edmond*, 924 F.2d 261, 264, 268 (D.C. Cir. 1991) (recognizing that deference to D.C. courts is usually appropriate, but concluding that "whatever deference we gave, we would still be constrained to set aside the court's judgment"); *Tutt v. Doby*, 459 F.2d 1195, 1200-01 (D.C. Cir. 1972) (recognizing that deference to D.C. courts is usually appropriate, but finding that the D.C. court's flawed ruling had "fundamental import" and thus mandated reversal).

This Court should likewise refuse to defer here. *First*, as explained herein, this case does not present matters of exclusively local concern; it implicates important congressional and federal interests. *Second*, even if this case involved only matters of exclusively local concern, deference is inappropriate because the D.C. Court of Appeals committed egregious error. *Third*, this Court should not defer because this is an exceptional case regarding a fundamentally flawed construction of the Home Rule Act—Congress's enabling act for the District—a statute in which Congress has an enduring concern.

A. Deference is Unwarranted Because this Case Does Not Present Matters of Exclusively Local Concern.

This Court's practice of deferring to the D.C. courts applies only to "matters of exclusively local concern." *Whalen*, 445 U.S. at 687. But this case involves more than matters of exclusively local concern, so deference is not warranted here.

First, the congressional enactments at issue here further important federal interests, *see* Section I.B., *supra*, and thus, this case does not involve matters of exclusively local concern. In *Limtiaco v. Camacho*, 549 U.S. 483 (2007), for example, this Court construed a debt-limitation provision of Guam's Organic Act, which, like the Home Rule Act at issue here, is a congressional enactment governing that United States territory. This Court overruled the Guam Supreme Court's interpretation of that Act of Congress. *Id.* at 492. Resisting that outcome, the respondent argued that this Court should "defer[] to

the Guam Supreme Court's interpretation of the Organic Act" because the case involved "matters of purely local concern." *Id.* at 491. But the *Limtiaco* Court rejected that argument, reasoning that "[t]he debt-limitation provision protects both Guamanians and the United States from the potential consequences of territorial insolvency," and thus concluded that the "case [was] not a matter of purely local concern." *Id.* at 491-92.

Similarly, the congressional measures at issue here—the Home Rule Act and the concurrent resolution approving Charter Amendment No. 1—further both local and federal interests: (1) the local interest of "grant[ing] to the inhabitants of the District of Columbia powers of local self-government"; and (2) the federal interest of "reliev[ing] Congress of the burden of legislating upon essentially local District matters." *See* D.C. Code § 1-201.02(a). Thus, this case is not a matter of exclusively local concern, and just as in *Limtiaco*, this Court should not defer.

Second, the precise legal task at issue here—statutory construction of congressional enactments—does not fall under the rubric of local law. *In re Sawyer*, 360 U.S. 622 (1959), involved this Court's reversal of an attorney-disciplinary ruling from the Supreme Court of Hawai'i which, at that time, was a territorial court. Though the "regulation of lawyers has been left exclusively to the States" and territories, *see Leis v. Flynt*, 439 U.S. 438, 442 (1979), the *Sawyer* Court reasoned that it need not defer because the particular legal task required there—ascertaining the "[]sufficiency of . . . evidence

to sustain a serious charge of professional misconduct"—"is not one which can be subsumed under the headings of local practice, customs, or law," *see Sawyer*, 360 U.S. at 640. Likewise, this Court should find that the precise legal task at issue here—statutory construction of congressional enactments—does not constitute a question of local law and, thus, does not warrant deference.

B. Deference is Unwarranted Because Egregious Error Has Been Committed.

The patently flawed decision of the D.C. Court of Appeals places this case within the well-established "egregious error" exception, which provides that deference is inappropriate when "egregious" or "obvious" error has been committed. *Pernell v. Southall Realty*, 416 U.S. 363, 369 (1974); *accord Whalen*, 445 U.S. at 696-97 (Blackmun, J., concurring) (refusing to defer because "egregious error ha[d] been committed"); *Fisher v. United States*, 328 U.S. 463, 476 (1946) (noting that this Court does not defer "where egregious error has been committed"); *see also Kent*, 383 U.S. at 557 n.27 (refusing to defer where the D.C. court's decision was "self-contradictory").

The D.C. Court of Appeals' dissenting opinion cogently explains the egregious errors in the majority's decision. We briefly highlight the worst of the lot.

First, the D.C. Court of Appeals supplanted the clear intent of Congress and the people for the exclusive intent of the Council, declaring that "the

Council's intent . . . is paramount." *See* App. 23a, 91a-92a. But it is paradoxical to look only to the Council to construe the scope of the people's initiative right—a right that is naturally antagonistic to the Council and its authority to legislate.[11] The Council, after all, is innately inclined to minimize direct democracy, and thus focusing on its intent when interpreting the initiative power is flawed as a matter of common sense, essentially looking to the fox to determine how to guard the hen house. *Cf. CLEAN v. State*, 928 P.2d 1054, 1076 (Wash. 1996).

Such an exclusive focus on the Council's intent is wrong as a matter of law. As the D.C. Court of Appeals has elsewhere recognized, "[s]ince amendments to the Charter required [c]ongressional approval when the initiative right was approved by Congress, the court must consider [c]ongressional intent in approving the amendment." *Hessey v. D.C. Bd. of Elections & Ethics*, 601 A.2d 3, 7 (D.C. 1991) (citation omitted).

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[11] The initiative is "designed to provide direct and continual accountability of public officials to the electorate." The Charter Amendments "are direct descendants from the Progressive Movement . . . . Each measure in its own way strengthened the direct accountability of elected officials to the people who elected them, by subjecting . . . their legislative action (or lack of action) to account through the referendum and initiative." Home Rule Act Amendments: Hearings and Markups on H. Con. Res. 436 & 438—Initiative and Referendum, Before the Subcomm. on Fiscal and Government Affairs of the Comm. on D.C., 95th Cong. at 157, 160 (1978) (App. A).

Congress's intent is indeed telling here. Congress viewed the initiative right as propelled by and the product of the people, not the Council. In that regard, Congress specifically stated:

> The overwhelming margin (more than 4 to 1) with which the amendment was approved in the November election represented a *ground swell of support for strengthening home rule through more direct voter participation in local governmental matters*. In 1973, when Congress was considering and debating home rule, the possibility of including initiative and referendum was discussed and they were included in the House-passed bill. [But] these petition rights were dropped in conference and *left to the voters in the District to decide for themselves under home rule*. Neighborhood and community groups, business associations and labor unions, political parties and local media all supported the amendment through approval by the District Council, then the Mayor, and finally, the voters in 1977.

S. Rep. No. 95-673, at 2 (1978) (emphasis added). Congress thus exhibited a vastly different understanding of the initiative right from that adopted by the D.C. Court of Appeals.

Second, the D.C. Court of Appeals converted Section 8 of Charter Amendment No. 1—which is intended to authorize the Council to enact only procedural implementing legislation, *see Convention Ctr. Comm.*, 399 A.2d at 553—into a grant of broad

authority permitting the Council to shrink or alter the people's initiative right. App. 27a-35a.

Third, the D.C. Court of Appeals declared that Section 752 of the Home Rule Act afforded the Council seemingly unlimited "authority to enact laws giving direction to the Board in the handling of election matters." App. 53a. That ill-defined and unconstrained power, the court reasoned, could be used by the Council to minimize the people's initiative power and thereby alter the congressionally orchestrated balance of legislative power in the District.

Fourth, even though the plain language of the Home Rule Act, as amended, imposes only one substantive restriction on the people's initiative power (by prohibiting "laws appropriating funds"), *see* D.C. Code § 1-204.101(a), the D.C. Court of Appeals upheld the Council-created substantive (and remarkably elastic) limitation—the HRA restriction—on the people's power. This method of statutory construction—searching beyond the unequivocal text and finding a non-enumerated restriction—is similar to an interpretive approach recently rejected by this Court. *See District of Columbia v. Heller*, 554 U.S. -- , 128 S. Ct. 2783, 2818-19 (2008) ("The District argues that we should interpret . . . the statute to contain an exception for self-defense. But we think that is precluded by the unequivocal text, and by the presence of certain other enumerated exceptions.") (citation omitted).

C. Deference is Unwarranted Because the Home Rule Act as Amended Is a Congressional Organic Act That Demands Review by this Court.

This Court does not defer in "exceptional cases," *see Griffin v. United States*, 336 U.S. 704, 717 (1949) such as when a D.C. court misconstrues the congressional organic act for the District. *Cf. John R. Thompson Co.*, 346 U.S. at 117-18 (construing prior congressionally enacted organic acts for the District and reversing the D.C. court's decision despite the general policy of deference). This is one such exceptional case because it involves a fundamentally flawed construction of the Home Rule Act—Congress's most recent organic act for the District—a statute in which Congress has an enduring interest.

An organic act (also known as an enabling act) is a law, like the Home Rule Act and its amendments, "that establishes . . . [a] local government." BLACK'S LAW DICTIONARY 1449 (8th ed. 2004). In light of the enduring federal interests at stake whenever Congress creates a local government, this Court regularly grants review in cases involving judicial construction of Congress's organic and enabling acts. *See, e.g.*, *Limtiaco*, 549 U.S. at 491-92 (reversing the Guam Supreme Court's interpretation of the Guam Organic Act); *Lassen v. Arizona*, 385 U.S. 458, 460-61, 469-70 (1967) (granting review "because of the importance of the issues presented" and reversing the Arizona Supreme Court's interpretation of the New Mexico-Arizona Enabling Act).

Indeed, this "'Court's concern for the integrity of the conditions imposed by [Congress's organic acts] has long been evident.'" *ASARCO Inc. v. Kadish*, 490 U.S. 605, 633 (1989) (quoting *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 302 (1976)). Here, the D.C. Court of Appeals compromised the integrity of the most fundamental condition in the District's most recent organic act (the Home Rule Act)—that the Council may not enact legislation conflicting with the congressionally approved Home Rule Act. *See* D.C. Code § 1-203.02; *id.* at § 1-207.61(a). The court flaunted that bedrock requirement by affirming the Council's HRA restriction, an evolving and substantive reduction of the people's initiative right, even though that restriction is patently inconsistent with the broad initiative power contained in the amended Home Rule Act. This judicial compromise of the most fundamental condition in the congressionally approved Home Rule Act demands review by this Court.

Finally, this Court has often granted review where local legislative bodies have disregarded limitations imposed by congressional enabling or organic acts. *See, e.g.*, *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4 (1955) (granting certiorari to review whether a Virgin Islands law altering the territory's divorce laws conflicted with its organic act, reasoning that certiorari was necessary because of "the obvious importance of the issue" and the law's potential for "far-reaching consequences on domestic relations throughout the United States," and invalidating the Virgin Islands' divorce law as unauthorized under the organic act); *Puerto Rico v.*

Russell & Co., 315 U.S. 610, 614 (1942) (granting certiorari on the "important question" of whether Puerto Rico law violates the governing organic act, and invalidating the Puerto Rico law because it conflicted with the organic act); *Springer*, 277 U.S. at 198-200 (granting certiorari to consider whether Philippine laws conflicted with the organic act's separation of governmental powers, and invalidating the Philippine laws because they conflicted with the organic act). This Court should likewise grant review here and declare that the Council's HRA restriction violates the amended Home Rule Act approved by Congress.

D. Extending Deference on a Local Matter Does Not Require That this Court Deny Review.

Even if the Court disagrees with the foregoing reasons why deference to the D.C. Court of Appeals is not warranted here, this Court's practice of deferring to local courts is not a definitive basis to deny review. Instead, that deference is a factor for this Court to consider when assessing the merits as part of a full review of the important issues raised in this case.

This Court has said the following about its affording deference to local courts:

> [That deference] is not a mere mechanical device which requires or admits . . . of the summary disposition of appeals . . . . Nor does it minimize the importance or dignity of the appellate function in such cases. On

> the contrary, we think that it imposes . . . on this Court the peculiarly delicate task of examining and appraising the local law in its setting . . . . It is one which ordinarily cannot be performed summarily or without full argument and examination of the legal questions involved.

De Castro v. Bd. of Comm'rs of San Juan, 322 U.S. 451, 458 (1944). Hence, even if deference were appropriate here (which it is not), this Court should not summarily deny review, but instead, should grant certiorari and consider that deference when carefully reviewing the important legal questions involved in this case.

CONCLUSION

For the foregoing reasons, Proponents respectfully request that this Court grant review.

Respectfully submitted,

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