[NOT YET SCHEDULED FOR ORAL ARGUMENT]
No. 02-5133

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARIJUANA POLICY PROJECT, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant,

D.C. BOARD OF ELECTIONS AND ETHICS,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICUS CURIAE* OF THE DKT LIBERTY PROJECT IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE

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* Authorities upon which we rely chiefly are marked with asterisks.

STATUTES

MISCELLANEOUS

The pertinent statutory provision is contained in the Brief for Defendant-Appellant.

INTEREST OF AMICUS CURIAE[1] AND INTRODUCTION

The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties such as the right to free speech, because such restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. This case presents the possibility that the federal government will unduly restrict those liberties.

At issue here is core political speech involved in the ballot initiative process. Such speech is important to all citizens, but it assumes heightened significance in the District of Columbia, where citizens lack elected federal representation. *Amicus* strongly supports the bedrock principle of freedom to participate in political debate and to engage in self-government through the initiative process.

This Court should affirm the District Court's holding that the Barr Amendment is unconstitutional under the First Amendment. Because of the DKT Liberty Project's strong interest in free speech and in protecting citizens from government overreaching, it is well-situated to provide this Court with additional insight into the issues presented in this case.

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[1]All parties have consented to this filing of the brief. *Amicus* is aware of no other amicus briefs supporting Appellee.

SUMMARY OF ARGUMENT

In 1978, Congress approved the D.C. Council's grant of the initiative right to District of Columbia voters. That grant did not restrict from the initiative process measures relating to drug laws. But when the voters passed an initiative allowing residents to use marijuana for medical purposes without punishment under D.C. law, Congress enacted the Barr Amendment to the D.C. appropriations bill. That amendment forbade the D.C. government from using any funds to "conduct any ballot initiative which seeks to legalize or otherwise reduce the penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act . . ." District of Columbia Appropriations Act, 1999, Pub. L. No. 105-277, § 171, 112 Stat. 2681 (1998). Since that time, Congress has enacted similar amendments for each D.C. appropriations bill.

As a restriction on initiatives, the Barr Amendment is unique among the states. To *amicus'* knowledge, no other state has tried to limit the initiative right as a direct result of an initiative with which the legislature disagreed, perhaps because it is clear that restricting an existing initiative process because of disagreement with speech arising in that process violates the First Amendment. Point I. The ballot initiative process inherently involves core political speech for which First Amendment protection is at its zenith. Thus, especially when the restriction is a clear response to that protected speech, the restriction must be subjected to strict scrutiny. Point II.

As a content-based and a viewpoint-specific restriction, the Barr Amendment violates the First Amendment. First, it cannot survive strict scrutiny because it is not narrowly tailored to further the government's interest in maintaining existing drug laws in the District of Columbia.

Because Congress can legislate directly to accomplish this goal, it need not burden the rights of initiative. Second, even if the Barr Amendment could survive strict scrutiny, it must be invalidated as a viewpoint-specific restriction since it allows proponents of *increasing* penalties to participate in the initiative process, but not proponents of *reducing* penalties. Point III. And finally, because the initiative process is a designated public forum, the government's interest in applying federal drug law to the District of Columbia (which it can accomplish directly through legislation) cannot outweigh the right of D.C. voters to propose, discuss, and debate laws applying to them, especially where those voters cannot appeal to any federal elected representative. Nor can the government discriminate among viewpoints in a designated public forum. Point V.

For all these reasons, the Barr Amendment violates the First Amendment and is invalid.

ARGUMENT

I. Widely-Used Voter Initiatives are Essential Mechanisms of Direct Democracy That Inherently Involve Speech.

As the only laws directly proposed, discussed, debated, and voted on by citizens, rather than the legislature, voter initiatives provide a unique and direct way for citizens to participate in the political debate and to effectively make their views known about the important issues of the day. Because political expression inheres in the voter initiative process, restrictions of that process must be carefully examined "to guard against undue hindrances to political conversations and the exchange of ideas." *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 192 (1999).

A. Broad Rights of Initiative Have Historically Caused Significant Political Change.

Voter initiatives of some form date back to the 1600s where citizens of New England villages gathered to propose and vote on the laws that bound them. *See* Philip L. Dubois & Floyd Feeney, *Lawmaking by Initiative: Issues, Options and Comparisons* 81 (1998). In the late 1800s, the Populists, and later the Progressives, seized on this process of direct democracy for political reforms such as women's suffrage, secret ballots, direct election of United States Senators, and primary elections. Although these notions were once thought of as radical, they became widely accepted, largely through the initiative process, and are now fundamental political realities. More modern, but also divisive, issues that have been debated and resolved through the initiative process include victims' rights, school financing, capital punishment, minimum wages, gambling, taxes, health care, term limits, education, immigration, campaign finance, drug policy, and environmental protection. The modern trend of statewide initiatives was sparked in 1978 with California's Proposition 13 which reduced property taxes and is said to have caused 43 other states to implement some similar form of property tax limitation. *See* M. Dane Waters, *Initiative & Referenda in the United States* (2002).

The local initiative process is available in almost all major cities, including the District of Columbia and many counties and towns. Twenty-four states allow initiatives to be placed on the ballot for statewide issues. But none of them limit the initiative process the way Congress has sought to limit the D.C. process here.

Although many statewide initiative provisions include some limits on the process, those limits are content-neutral and not viewpoint specific. For example, seventeen states restrict

initiatives by requiring that they only encompass a single subject or similar rule. *See* Dubois & Feeney at 81. Twelve restrict the process to only statutes that the legislature could adopt. *See id.* Five impose a waiting period to reapply for an initiative when it has failed in the past. *See id.* Four restrict state-wide initiatives from enacting local or special legislation. *See id.* Four states do not allow constitutional revision via initiative. *See id.* Illinois restricts the initiative process to constitutional amendments affecting the state legislature. *See id.* Nevada requires constitutional amendments be passed by initiative twice. *See id.*[2]

That these initiative provisions do not exclude particular subjects or viewpoints from the process is not surprising, for as the Eleventh Circuit concluded, "We obviously would be concerned about free speech and freedom-of-association rights were a state to enact initiative regulations that were content based or had a disparate impact on certain political viewpoints." *Biddulph v. Mortham*, 89 F.3d 1491, 1500 (11th Cir. 1996). Thus, Congress' attempt in the District of Columbia to prohibit proponents of reducing (but not proponents of increasing) penalties for drug violations from participating in the initiative process is unique. And this content-based removal of a controversial subject from the citizens' existing initiative rights is all

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[2]Even in those states with initiative provisions that appear to have content-related limitations, those limitations are really structural rather than substantive since they generally only prevent an initiative from amending the constitution or changing a right guaranteed in the constitution. *See* Miss. Const. art. 15, § 273 (prohibiting initiatives repealing the Bill of Rights or repealing other rights guaranteed by the Mississippi Constitution); Mass. Const. Amend. art. XLVIII, Init., pt. 2 § 2 (prohibiting initiatives relating to religion or to other individual rights guaranteed in the declaration of rights). And although several states do not allow initiative measures to create courts, change their jurisdiction, or change taxes or appropriations, *see* Dubois & Feeney at 81, these provisions prevent unstable institutions – they do not carve out substantive provisions of law which are beyond the reach of the initiative electorate. Moreover, they are not viewpoint specific. Thus, they offer no support for the notion that a government can remove a subject matter from the initiative right after the electorate proposes or passes an initiative with which the government disagrees.

the more troubling in the District of Columbia where citizens are already deprived of the right to elect congressional representatives.

B. The Initiative Process Both Requires and Encourages Speech and Participation in Democracy.

Once granted, the voter initiative process creates critical opportunities for communication in the political arena. The process itself, from writing down the political idea, to carrying the petition from person to person and discussing the idea with them, *requires* speech.

As between voters, the initiative process directly serves the dual rights of the proponents to speak and the audience of potential voters to hear that information. Indeed, the initiative process and the circulation of initiative petitions "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

The process also creates an avenue of communication with elected representatives. An initiative signed by a significant number of voters can "speak" far more persuasively to an elected representative than isolated phone calls or letters. Moreover, voter initiatives can raise novel solutions and innovative ideas that may undercut entrenched relationships between interest groups and politicians or that may avoid the politics of partisans. *See generally* Elisabeth R. Gerber, *The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation* (1999).

Finally, voter initiatives empower citizens and increase voter turnout. Rooted in the concept of self-government, initiatives involve a unique kind of political speech different from campaigning for and voting for a candidate. Candidates may make promises on many issues they

may not eventually choose to honor. But a vote for or against an initiative directly affects whether it will become law.

Not surprisingly, numerous studies have demonstrated that "[i]n election after election, no matter what election cycle is analyzed, voter turnout in states with an initiative on the ballot has been usually 3% to 7% higher than in states without an initiative on the ballot." *See* Waters at 5 (attributing this difference to citizens' belief that their vote can make a difference when voting on initiatives). *See also* Mark A. Smith, *Ballot Initiatives, Voter Interest, and Turnout*, paper presented at Annual Meeting of the Western Political Science Assoc. (1999), available at http://www.iandrinstitute.org/turnout.htm (conducting an empirical study and concluding that there is a recognizable increase in voter turnout when initiatives and/or referenda are on the ballot). In sum, the process of voter initiatives leads to an increase in the public political debate, more voter participation, and more political speech.

II. Because Ballot Initiatives Involve Core Political Speech, Limitations on Existing Rights Are Subject to First Amendment Analysis.

"[T]here is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 299 (1981). The Supreme Court has consistently held that regulations restricting speech in the political process – specifically in the ballot-initiative process – are subject to First Amendment analysis. Thus, where a Colorado regulation reduced the quantum of speech otherwise present by prohibiting ballot-initiative proponents from paying people to circulate the petitions, it was reviewed under strict scrutiny and invalidated. *Buckley*, 525 U.S. at 186-87. Significantly, the restriction need not ban speech to warrant strict scrutiny. Indeed, where

regulations restrict access to "the most effective" avenue of speech, the fact that others are open does not lessen the court's level of scrutiny. "The First Amendment protects appellees' right not only to advocate their cause, but also to select what they believe to be the most effective means for so doing." *Meyer*, 486 U.S. at 424-25. "Appellees seek by petition to achieve political change in Colorado; their right to freely engage in discussions concerning the need for that change is guarded by the First Amendment." *Id.* at 421.

Particularly where, as here, the restriction shrinks an existing process, the restriction's effect on speech must be carefully examined. *See Save Palisade FruitLands v. Todd,* 279 F.3d 1204, 1211-12 (10th Cir. 2002) (recognizing that where initiative schemes already exist, "the exercise of that power is protected by the First Amendment") (internal quotation marks and citation omitted).

More specifically, content-based elections-related provisions are especially suspect. "[A]ny degree of governmental hindrance upon the freedom of a given group of citizens to pursue the initiative petition process with whomever, and concerning whatever they choose must be viewed with some suspicion." *Delgado v. Smith*, 861 F.2d 1489, 1494 (11th Cir. 1988). Where a Massachusetts statute prohibited corporations from spending money to influence the outcome of an initiative vote, specifically a vote about individual income or property tax, "[t]he fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of genuine state interest . . . It suggests instead that the legislature may have been concerned with silencing corporations on a particular subject." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978). *See also McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 345-46 (1995) (finding law requiring identification of authors of any writings

"designed to influence votes" in an election to be content-based and thus, "a limitation on political expression subject to exacting scrutiny") (internal quotations and citations omitted); *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (finding law forbidding campaign-related speech within 100 feet of polling place subject to strict scrutiny because law was "a facially content-based restriction on political speech in a public forum"); *Campbell v. Buckley*, 203 F.3d 738, 746 (10th Cir. 2000) (where requirement that initiative provision relate to a single subject was *not* applied to discriminate "against proponents on the basis of the content of their initiatives," it did not violate the First Amendment and was a valid restriction) *cert. denied*, 531 U.S. 823 (2000). To be sure, the Supreme Court has also recognized that because states have an interest in protecting the reliability and integrity of the election processes, the judgments that separate valid ballot-access restrictions from invalid interactive speech restrictions may be difficult. But, "the First Amendment requires us to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas." *Buckley,* 525 U.S. at 192.

III. The Barr Amendment Is A Content-Based and Viewpoint-Specific Restriction On Core Political Speech.

A regulation is content-based when it restricts speech based on the content of the speech, and not on the time, place, or manner of the speech. As noted above, even a broad regulation covering speech "designed to influence voters" is content-based. *McIntyre*, 514 U.S. at 345-46. *See also Kean v. Clark,* 56 F. Supp. 2d 719 (S.D. Miss. 1999) (statute requiring new residency requirements to apply to then-pending (and only pending) term limit initiative was content-based because it targeted pending initiative).

The District of Columbia initiative right was granted in 1978 and did not prohibit initiatives seeking to reduce penalties for drug offenses. Twenty years later, in 1998, proponents of decriminalizing the use of marijuana for medical purposes filed an initiative, circulated petitions, obtained sufficient signatures, and got the initiative on the ballot where it was approved by 69% of voters. In response, Congress enacted an appropriations provision that effectively prohibited further initiatives relating to the subject of legalizing marijuana or reducing penalties for drug offenses. District of Columbia Appropriations Act, 1999, Pub. L. No. 105-277, § 171, 112 Stat. 2681 (1998). It has enacted essentially the same provision every year since the medical marijuana initiative was passed, including the one at issue here. Pub. L. No. 107-96, § 127, 115 Stat. 923 (2001). There is no dispute that the Barr Amendment targets only initiatives with particular content, or that it is specifically directed at the very initiative that proponents advance here. Accordingly, it essentially defines the term "content-based."

Worse, the Barr Amendment precludes only initiatives that seek to "legalize or otherwise reduce penalties associated with" the use or possession of illegal drugs. Pub. L. No. 105-277, § 171. But anyone who wants to introduce an initiative presenting the *opposite* view on the *very same subject* is free to do so. Thus, proponents could seek, by initiative, to *increase* penalties for illegal drug offenses. It is well established that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

The United States responds that the Barr Amendment is not a content-based regulation because Congress is merely "setting the legislative agenda." Brief for the Appellant at 16-21. But this argument fails for two reasons. First, even if Congress could have carved one viewpoint

as to this substantive content out of the initial grant of the initiative right, the government ignores the fact that here, Congress enacted the provision only *after* an initiative it disliked was passed. Moreover, if the government's argument were accepted, then no action by Congress could ever be a content-based regulation of District of Columbia voters. Indeed, under the government's argument Congress could grant the initiative right, and every time any D.C. voter submitted a proposed initiative measure that was disagreeable to it, Congress could simply pass an appropriations amendment forbidding the use of money to enact laws that relate to the subject of the proposed initiative. It could thus prevent the Board of Elections from providing the petitions required for the process, prevent proponents from circulating petitions and engaging in discussion about the political idea, and prevent D.C. voters from expressing their approval or disapproval of the idea at the polls. This is a classic example of the government suppressing ideas it disagrees with and is flatly contrary to the First Amendment. The Barr Amendment does not set an agenda, it suppresses inconvenient political speech.

It is certainly true that Congress was not constitutionally required to approve the D.C. Council's grant of the right of initiative to D.C. citizens. Nevertheless, once the right is granted, Congress cannot interfere with it just because it objects to the content of an initiative. *Meyer*, 486 U.S. at 424-25 (rejecting argument that state-created right is subject to any state limitation, and holding that power to ban initiatives entirely does not include the power to limit discussion of political issues raised in initiative petitions); *Campbell*, 203 F.3d at 742 (state not free to condition use of initiative by impermissible restraints of First Amendment activity). Similarly, there is no constitutional requirement that Congress create and fund a program providing civil legal services, either, but once Congress created that program, it could not constitutionally

restrain the speech of the lawyers who participated in it. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548-49 (2001) (statute prohibiting federally-paid Legal Services lawyers from challenging the constitutionality of welfare statute was invalid as a content-based and a viewpoint-specific restriction of speech) *cert. denied*, 532 U.S. 903 (2001).

Nor does Congress' plenary authority over the District of Columbia mean that the Barr Amendment is not a content-based restriction of political expression. As the D.C. District Court observed in the first challenge to the Barr Amendment, "[u]nder our Constitutional structure, the way government accomplished it[s] purposes matters." *Turner v. District of Columbia Board of Elections and Ethics*, 77 F. Supp. 2d 25, 34 (D.D.C. 1999). Thus, Congress' authority to decide that an initiative with which it disagrees shall not take effect cannot justify Congress in limiting access to the initiative process only to those initiatives with which it agrees.

IV. The Barr Amendment Fails Strict Scrutiny.

Whether the Barr Amendment is a content-based restriction of core political speech, or whether it "severely burdens" speech by denying access to the initiative process – the most effective speech – for proponents of drug reform, it is subject to strict (or "exacting") scrutiny and must be narrowly tailored to serve a compelling state interest. *Burson*, 504 U.S. at 198; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). It cannot survive that test.

The only possible government interest here is to prevent legalizing or reducing penalties for drug offenses. Significantly, this interest is merely Congress' preference for existing law over the law approved by the D.C. voters. It is not the typical procedural interest in avoiding fraud and insuring a fair election outcome that governments usually assert in restricting initiatives. But even if this preference could be a compelling interest, the Barr Amendment is not narrowly

tailored to accomplish that interest. Congress has the direct authority to legislate for the District, and it can thus accomplish its goal directly. It need not burden the right of D.C. citizens to propose, debate, and vote on measures of local law.

Finally, even if the Barr Amendment were narrowly tailored to further a compelling interest, it must still be invalidated as a viewpoint-specific restriction. While regulations of speech based on content are strictly scrutinized by the courts, viewpoint discriminatory regulations are forbidden. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Within a given context, the government may not pick and choose among ideas. Rather, it must only enact viewpoint neutral laws. *See also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."). Thus, like the statute restricting lawyers from advising their clients to challenge welfare statutes, but not from supporting them, *Legal Services Corp.*, 531 U.S. at 538, the Barr Amendment is invalid because it allows persons who want to increase penalties for drug offenses to use the initiative process, but prohibits those who seek to reduce penalties through that process. The Barr Amendment is expressly and exclusively directed toward speech seeking to legalize or reduce penalties for controlled substances. Congress' disagreement with that viewpoint cannot justify abridging those speakers' constitutional rights to speak and to vote on an otherwise valid topic of legislation. Accordingly, the Barr Amendment is unconstitutional as applied to Plaintiffs' ballot initiative. The District Court's conclusion that the Barr Amendment is a viewpoint discriminatory restriction on political speech in violation of the First Amendment should be affirmed.

V. The Initiative Process is a Designated Public Forum Subject to First Amendment Protection.

Designated public fora – places for public expression and speech – "are created by purposeful governmental action." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998). Here, Congress specifically granted the District of Columbia access to the legislative fora by providing for home rule. The District of Columbia Council, in turn, empowered the citizens to enact laws through the initiative process, and Congress approved that action. *See* District of Columbia Self-Governance and Reorganization Act of 1974, D.C. Code § 1-201, et. seq., as amended by the Charter Amendments Act, D.C. Code §§ 1-281 to -195. This legislation demonstrates the government's intent to make the mechanism available to citizens of the District. *See Widmar v. Vincent*, 454 U.S. 263, 264 (1981). Once the citizens are included in the class to which the designated forum is made available, any attempt by the government to exclude a speaker will be reviewed under strict scrutiny. *See Forbes*, 523 U.S. at 677.

Under a First Amendment forum analysis, the question is whether the government's interest in limiting the forum (the initiative process) outweighs the interest of District of Columbia citizens to use the forum (the initiative process). *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 799-800 (1985). Here, the only legitimate governmental interest in passing the Barr Amendment is to preserve the status quo of federal drug policy.[3] While that interest may be legitimate, or even substantial, it is clearly outweighed by the First Amendment rights of citizens – particularly D.C. citizens who have no federal

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[3]For example, Congress' interest in avoiding the publicity relating to a vote in favor of medical marijuana in the District of Columbia, or in avoiding political pressure to make similar laws in the federal arena would not be a legitimate grounds for limiting the forum.

elected officials to petition – to speak in the designated forum. This is especially true since the government can accomplish its goal through direct legislation, and need not restrict the forum to accomplish the goal.

Even if the Court determines that the initiative process is a nonpublic forum, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject. *See Cornelius*, 473 U.S. at 806 (remanding nonpublic forum issue to trial court to determine whether government excluded respondents because it disagreed with their viewpoints). Since the Barr Amendment was enacted specifically to deny access only to speakers who seek to *reduce* penalties for drug offenses, it is unconstitutional regardless of the forum category applied.

CONCLUSION

Amicus submits that District of Columbia voters deserve the same constitutional protection as all American citizens. Under established principles of Supreme Court precedent, D.C. citizens are entitled to the full First Amendment protection of their right to participate in self-government and to engage in core political speech by the circulation of petitions for initiatives. Accordingly, this Court should affirm the District Court's conclusion that the Barr Amendment is an unconstitutional encumbrance in violation of the First Amendment.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(c) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify pursuant to Fed. R. App. P. 32 (a) (7) that the foregoing brief contains 4,272 words, according to the count of Corel WordPerfect 9.

Kristine J. Lucius

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2002, I caused copies of the foregoing brief to be sent to the Court and to the following counsel by hand delivery:

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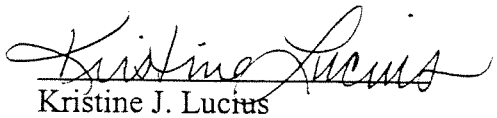

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