District of Columbia
Court of Appeals

No. M288-24

BEFORE: Blackburne-Rigsby, Chief Judge, and Beckwith, Easterly, McLeese, Deahl, Howard, and Shanker, Associate Judges.

N O T I C E

(FILED – December 10, 2024)

The court is considering amending D.C. App. R. 44, which lays out procedures for notification of the United States and the District of Columbia where they are not a party and the constitutionality of a statute is being questioned. Specifically, the court is considering two substantive changes to R. 44.

First, the court is considering clarifying whether R. 44 applies solely to claims that a statute is facially unconstitutional or applies also to claims that a statute is unconstitutional as applied. Courts with similar rules have reached differing conclusions on that issue. *Compare, e.g.*, *Benet v. Commonwealth*, 253 S.W.3d 528, 532-33 (Ky. 2008) (notice provision "contains no exception for 'as applied' challenges"), *with, e.g.*, *Rucki v. Evavold*, No. A18-1423, 2019 Minn. App. Unpub. LEXIS 664, *6-7 (Ct. App. 2019) ("No notice, however, is required for an as-applied challenge.") (citing *Welsh v. Johnson*, 508 N.W.2d 212, 215 n.1 (Minn. Ct. App. 1993) (providing that appellant's lack of notice to the attorney general of a facial constitutional challenge limited him to "arguing the constitutionality of the statute on an 'as applied' basis")). The court could clarify that point by (1) expressly limiting the notice requirement to facial challenges; or (2) expressly stating that the notice requirement applies to both facial and as-applied constitutional challenges. (Both alternatives are reflected, in brackets, in the attached clean and redlined versions of the amendments to R. 44 under consideration.)

Second, the court is considering clarifying that in cases governed by R. 44, the United States or the District is an intervenor but has the rights of a party with respect to the constitutional question at issue. The notice requirement in R. 44 is derived from Fed. R. App. P. 44, which in turn is derived from 28 U.S.C. § 2403. The latter provision refers to the United States as "interven[ing]," as do D.C. Super. Ct. Civ. R. 5.1-I (referring to both U.S. and D.C. as "interven[ing]," but providing that they have of the all rights of a party . . . to the extent necessary for a proper

presentation of the facts and law relating to the question of constitutionality") and Fed. R. Civ. P. 5.1 (referring to U.S. as "interven[ing]").

Finally, on a more technical topic, the court is considering making technical revisions to R. 44(b) and R. 55(b)(5), to replace remaining references to "Corporation Counsel" with "Attorney General for the District of Columbia."

This notice is published to afford interested parties an opportunity to submit written comments concerning the amendments under consideration by the Court. Clean and redlined versions of the affected rules are attached.

Comments must be submitted by February 10, 2025. Comments may be submitted electronically to rules@dcappeals.gov, or in writing, addressed to the Clerk, D.C. Court of Appeals, 430 E Street, N.W., Washington, D.C. 20001. All comments submitted pursuant to this notice will be available to the public.

PER CURIAM

Rule 44. Challenges to Statutes of the United States or the District of Columbia (redline)

(a) Constitutional Challenge to a Federal Statute. If, in a proceeding in this court in which the United States, or its agency, officer, or employee is not a party in an official capacity, a party questions the [facial] constitutionality of an Act of Congress[, whether facially or as applied], the questioning party must give written notice to the Clerk immediately upon the filing of the record or as soon as the question is raised in this court. The Clerk must then certify that fact to the Attorney General. If the United States elects to intervene in this court, it shall have all the rights of a party to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(b) Challenge to a District of Columbia Statute. If, in a proceeding in this court in which the District of Columbia or its agency, officer, or employee is not a party in an official capacity, a party questions the [facial] constitutionality of an act of the Council of the District of Columbia[, whether facially or as applied], or the validity of such an act under the District of Columbia Self-Government and Reorganization Act, the questioning party must give written notice to the Clerk immediately upon the filing of the record or as soon as the question is raised in this court. The Clerk must then certify this fact to the Office of the Attorney General for the District of Columbia. For purposes of this rule, the District of Columbia or its agency, officer, or employee will not be considered a party to the proceedings unless represented by the Attorney General~~Corporation Counsel~~. If the District of Columbia elects to intervene in this court, it shall have all of the rights of a party to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Rule 44. Challenges to Statutes of the United States or the District of Columbia (clean)

(a) Constitutional Challenge to a Federal Statute. If, in a proceeding in this court in which the United States, or its agency, officer, or employee is not a party in an official capacity, a party questions the [facial] constitutionality of an Act of Congress[, whether facially or as applied], the questioning party must give written notice to the Clerk immediately upon the filing of the record or as soon as the question is raised in this court. The Clerk must then certify that fact to the Attorney General. If the United States elects to intervene in this court, it shall have all of the

rights of a party to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(b) Challenge to a District of Columbia Statute. If, in a proceeding in this court in which the District of Columbia or its agency, officer, or employee is not a party in an official capacity, a party questions the [facial] constitutionality of an act of the Council of the District of Columbia[, whether facially or as applied], or the validity of such an act under the District of Columbia Self-Government and Reorganization Act, the questioning party must give written notice to the Clerk immediately upon the filing of the record or as soon as the question is raised in this court. The Clerk must then certify this fact to the Office of the Attorney General for the District of Columbia. For purposes of this rule, the District of Columbia or its agency, officer, or employee will not be considered a party to the proceedings unless represented by the Attorney General. If the District of Columbia elects to intervene in this court, it shall have all of the rights of a party to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Rule 55(b)(5) (redline): The ~~Corporation Counsel for~~ Attorney General for the District of Columbia.

Rule 55(b)(5) (clean): The Attorney General for the District of Columbia.