District of Columbia
Court of Appeals

No. M288-24

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

O R D E R

(FILED – May 13, 2025)

In December 2024, the court sent out for public comment proposed amendments to D.C. App. R. 44, requiring notice to the District of Columbia or the United States when a party raises a constitutional challenge to a statute, or a challenge to the validity of a statute under the District of Columbia Self-Government and Reorganization Act, and the pertinent governmental entity is not party. The proposal was (a) to include language making explicit whether R. 44 applies solely to facial constitutional challenges or also to as-applied constitutional challenges; (b) to clarify that the government in such cases would have party status with respect to the challenge at issue; and (c) to correct some outdated references to "Corporation Counsel" rather than "Attorney General for the District of Columbia."

The court received comments from the Office of the Attorney General for the District of Columbia (DC OAG) and the Public Defender Service (PDS).

In sum, DC OAG largely supported the proposed amendments and made two additional suggestions: (i) that the court specify the timing requirements for a motion to intervene and for the filing of briefs; and (ii) that the court require parties raising challenges subject to R. 44 to themselves provide notice to the pertinent governmental entity, rather than leaving notice to the Clerk's Office, as R. 44 currently does.

PDS largely opposed the proposed amendments, arguing (i) that it can be difficult to distinguish between as-applied and facial challenges; and (ii) according party status to the governmental entity given notice under R. 44 is unnecessary and would raise various complications. PDS also suggested that R. 44 should be limited to civil cases.

The Court has made the following determinations:

(1) Language explicitly referring to as-applied and facial challenges. The intent of the proposed amendment was to be explicit that R. 44 applies to all constitutional challenges. The idea of adding language explicitly referring to as-applied and facial challenges, however, appears to have given rise to a concern that the court and parties might need to draw difficult distinctions between those concepts. The court on balance has decided to make no change here, largely because the court concludes that a change is not necessary given that the current wording of R. 44 indicates with sufficient clarity that the rule applies to all constitutional challenges.

(2) Language conferring limited party status on the governmental entity at issue. The court is of the view that PDS has raised some significant questions about possible complications that might arise from adopting such language, particularly in criminal cases where prosecutorial authority in the District of Columbia is determined by statute. The court also concludes that an amendment is on balance not necessary. Fed. R. App. R. 44 does not include language designating the pertinent governmental entity as a party. The federal circuits also do not appear to have promulgated local rules more concretely explaining the process once notice has been given under the rule. The lack of such provisions does not appear to have generated practical problems, either in this court or in the federal courts. The court has thus determined to leave R. 44 as it is on this point. For similar reasons, the court has decided not to adopt DC OAG's suggestion that the court specify timelines or other procedural requirements governing the participation of the governmental entity.

(3) Limiting R. 44 to civil cases. R. 44 currently applies in both criminal and civil cases, and the court did not ask for comment about the idea of narrowing R. 44 to apply only to criminal cases. Moreover, most of the concerns raised by PDS about the application of R. 44 in criminal cases focus on concerns that would arise if the government entity was treated as a party, which the court has decided not to do. The court therefore has decided not to limit R. 44 to civil cases.

(4) Requiring the parties to directly give notice to the Attorney General of the United States or the DC OAG. Although there is some logic to this suggestion, the court was concerned about the difficulty posed for unrepresented litigants who might not know how to serve the Attorney General of the United States or DC OAG if they were not already parties. The court has thus determined not to amend R. 44 in this respect.

(5) Outdated references to "Corporation Counsel." The court has determined to replace those references in R. 44 and R. 55 with "Attorney General."

Redline and clean versions of R. 44 and R. 55 as amended are attached. These amendments will go into effect sixty days from the date of this order.

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 constitutionality of an Act of Congress, 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.

(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 constitutionality of an act of the Council of the District of Columbia 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~~.

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 constitutionality of an Act of Congress, 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.

(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 constitutionality of an act of the Council of the District of Columbia, 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. .

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.