GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

Brian Schwalb
Attorney General

June 9, 2023

ADVISORY OPINION OF THE ATTORNEY GENERAL

Re: Proposed Initiative, "The Make All Votes Count Act of 2024"

Ms. Terri Stroud
General Counsel
Board of Elections
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Dear Ms. Stroud:

This memorandum responds to your request, on behalf of the Board of Elections ("Board"), that the Office of the Attorney General (the "Office") provide an advisory opinion on whether the proposed initiative, "The Make All Votes Count Act of 2024" ("Proposed Initiative"), is a proper subject of initiative in the District of Columbia, pursuant to D.C. Official Code § 1-1001.16(b)(1A)(B)(i). For the reasons set forth in this letter, the Proposed Initiative is a proper subject of initiative. Because the Proposed Initiative is a proper subject, as you requested, we have attached recommended technical changes to ensure that it is in the proper legislative form.[1]

STATUTORY BACKGROUND

The District Charter ("Charter") establishes the right of initiative, which is the ability of District electors to "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."[2] In establishing this right, the Charter requires the Council to adopt implementing legislation detailing the initiative process.[3] This legislation allows any registered qualified elector to begin the initiative process by filing the full text of the proposed measure, a summary statement of not more than 100 words, and a short title with the Board.[4] After receiving a proposed initiative, the Board must refuse to accept it if it determines that it is not a "proper subject" of initiative.[5]

[1] If the Board accepts the Proposed Initiative, in accordance with D.C. Official Code § 1-1001.16(c)(3), this Office may provide further recommendations for ensuring that it is prepared in the proper legislative form.
[2] D.C. Official Code § 1-204.101(a).
[3] *Id.* § 1-204.107.
[4] *Id.* § 1-1001.16(a)(1).
[5] *Id.* § 1-1001.16(b)(1).

A measure is not a proper subject for initiative if it is not in the proper form or would:

- Appropriate funds;
- Violate or seek to amend the Home Rule Act;
- Violate the U.S. Constitution;
- Authorize or have the effect of authorizing discrimination prohibited under the Human Rights Act of 1977; or
- Negate or limit an act of the Council enacted pursuant to section 446 of the Home Rule Act.[6]

If the Board determines that a proposed initiative is a proper subject of initiative, it must accept the measure and, within 20 calendar days, prepare and adopt a true and impartial summary statement, prepare a short title, prepare the proposed initiative in the proper legislative form, and request a fiscal impact statement from the Office of the Chief Financial Officer ("OCFO").[7] The Board must then adopt the summary statement, short title, and summary statement at a public meeting.[8] Within 24 hours after adoption, the Board must publish its formulation and the fiscal impact statement.[9] If no registered qualified elector objects to the Board's formulation by seeking review in Superior Court within 10 days after adoption, the Board must certify the measure and provide the proposer with a petition form for use in securing the required signatures to place the proposed initiative on the ballot at an election.[10]

FACTUAL BACKGROUND

The Proposed Initiative would amend the District of Columbia Election Code of 1955[11] to provide for ranked-choice voting for elections in the District for President of the United States and all District elected officials with three or more candidates on the ballot, beginning with the June 2026 primary election. It would also replace the District's closed primary system, in which only voters registered as affiliated with a party may vote in the party's primary election, to a semi-closed primary system, in which unaffiliated voters may choose to vote in one party's primary election.

Specifically, sections 2 and 3 of the Proposed Initiative would establish ranked-choice voting, in which a ballot must allow voters to rank up to five candidates, including a write-in candidate. Each ballot is considered one vote for the highest ranked active candidate on the ballot. Tabulation of ballots proceeds in rounds. If a candidate receives a majority of votes in a round, that candidate is the winner of the election. If no candidate receives a majority, the candidate with the fewest votes is defeated, and that candidate's votes are transferred to the ballot's next-ranked active candidate. Then, a new round of tabulation begins. The rounds continue until a candidate receives a majority of votes. The Proposed Initiative also provides for

[6] *Id.* §§ 1-1001.16(b)(1), 1-204.101(a); 3 DCMR § 1000.5.
[7] D.C. Official Code § 1-1001.16(c). Because the statute gives the Board 20 days to prepare the legislative form, and the OCFO 15 business days to respond to the Board's request, the Board effectively must request a fiscal impact statement immediately upon accepting an initiative, so that the Board has the fiscal impact statement when it later adopts the legislative form. *See id.* This is necessary so that the Board can comply with its obligation to publish both the adopted legislative form *and* the fiscal impact statement within 24 hours after adoption, which triggers the 10-day judicial challenge period. *Id.* § 1-1001.16(d)(2).
[8] *Id.* § 1-1001.16(d)(1).
[9] *Id.* § 1-1001.16(d)(2).
[10] *Id.* § 1-1001.16(e)–(i); *see also* D.C. Official Code § 1-204.102(a) (requiring, under the District Charter, for an initiative petition to be signed by 5 percent of the registered electors in the District, including 5 percent of registered electors in each of five or more wards).
[11] Approved August 12, 1955 (69 Stat. 699; D.C. Official Code § 1-1001.01 *et seq.*).

specific tabulation procedures to allow for the election of the top two candidates for at-large member of the Council in a general election.

Additionally, section 4 would establish a semi-closed primary in place of the District's current closed primary. It would eliminate the prohibition against a person voting in a primary election held by a political party other than the person's own party. Instead, a voter who is not affiliated with any party must be permitted to vote in a primary held by a party of the voter's choice. However, this would not apply to elections for national committeemen and committee women and alternates, delegates to political party conventions and alternates, and members and officials of local political party committees.

ANALYSIS

The right of initiative "is a power of direct legislation by the electorate."[12] The D.C. Court of Appeals construes this right liberally, and "only those limitations expressed in the law or clear[ly] and compelling[ly] implied" may be imposed on that right.[13] "[A]bsent express or implied limitation, the power of the electorate to act by initiative is coextensive with the power of the [Council] to adopt legislative measures."[14]

The "proper subject" provision most implicated by the Proposed Initiative is the prohibition against initiatives that appropriate funds. Specifically, the Proposed Initiative presents a close question whether its mandatory provisions compel the allocation of funds.[15] It otherwise satisfies the technical requirements to be in the form of legislative text and include a short title and summary statement of no more than 100 words.[16] It also does not draw any distinctions on the basis of any protected characteristic, either by its express terms or in effect, and therefore does not authorize discrimination prohibited by the Human Rights Act. Although political affiliation is a protected characteristic, the Proposed Initiative extends to unaffiliated voters "the ability to participate fully in an important aspect of life in the District"—participating in primary elections.[17] The Proposed Initiative's implications for the other limitations—particularly the prohibition against proposing a law appropriating funds—warrant more detailed discussion.

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[12] *Convention Ctr. Referendum Comm. v. District of Columbia*, 441 A.2d 889, 897 (D.C. 1981) (internal citations and quotations omitted).

[13] *Hessey v. Burden*, 584 A.2d 1, 3 (D.C. 1990) (quoting *Convention Ctr. Referendum Comm.*, 441 A.2d at 913 (internal citations and quotations omitted).

[14] *Convention Ctr. Referendum Comm.*, 441 A.2d at 913.

[15] *See D.C. Bd. of Elections & Ethics v. District of Columbia*, 866 A.2d 788 (D.C. 2005) ("*Campaign for Treatment*").

[16] While an initiative proponent must initially file "legislative text" with the Board, if the Board accepts an initiative, it must "[p]repare, in the proper legislative form, the proposed initiative . . . measure, . . . which shall conform to the legislative drafting style of acts of the Council, and consult experts in legislative drafting, including the Attorney General and the General Counsel of the Council." D.C. Official Code § 1-1001.16(c)(3). This allows the Board to correct any technical deficiencies in a proposed initiative that is otherwise a proper subject of initiative.

As a further technical matter, because we were not provided with the proposer's filing with the Board, we cannot opine on whether the Proposed Initiative was filed in accordance with other administrative requirements. *See id.* § 1-1001.16(a) (requiring a proposed initiative to include the name and address of the proposer, an affidavit that the proposer is a registered qualified elector of the District, and a copy of the verified statement of contributions that the proposer has filed with the Director of Campaign Finance).

[17] *See Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 119 (D.C. 2010); *see also* D.C. Official Code § 2-1401.01 (stating the intent of the Human Rights Act as being to end discrimination by reason of political affiliation, among other characteristics).

I. The Proposed Initiative Does Not Propose A Law Appropriating Funds.

Although the right of initiative must be construed broadly, the D.C. Court of Appeals has stated that "the exclusion from initiatives of laws appropriating funds is 'very broad[] . . . extend[ing] to the full measure of the Council's role in the District's budget process.'"[18] The D.C. Court of Appeals has construed this limitation to prohibit initiatives doing any of the following:

1. Blocking the expenditure of funds requested or appropriated;[19]
2. Directly appropriating funds;[20]
3. Requiring the allocation of revenues to new or existing purposes;[21]
4. Establishing a special fund;[22]
5. Creating an entitlement, enforceable by private right of action;[23]
6. Directly addressing and eliminating any revenue source;[24] or
7. Compelling the allocation of funds to carry out mandatory provisions.[25]

The Proposed Initiative does not implicate the first six scenarios because it does not contain any express terms related to funds. However, it does include various mandatory provisions obligating the Board to take specific actions, which may implicate the seventh restriction.

The D.C. Court of Appeals expounded on this restriction in *District of Columbia Board of Elections & Ethics v. District of Columbia* ("*Campaign for Treatment*").[26] There, the initiative at issue required that certain offenders charged with drug offenses be permitted to seek substance abuse treatment as an alternative to incarceration.[27] After an individual completed the treatment program, the criminal charges would be dismissed and expunged.[28]

The court noted that this initiative "impose[d] numerous mandatorily-phrased obligations upon trial courts to effectuate its goals."[29] "The initiative's repeated use of the word 'shall' create[d] mandatory provisions, with which the trial court would be obliged to comply."[30] Further, "the initiative establishe[d] strict time constraints within which these obligations must be satisfied."[31] Thus, according to the court, "[t]his mandatory language means, once in effect, the Superior Court would be obliged to comply with the initiative's provisions."[32]

Having established that the initiative included mandatory provisions, the court then concluded that "the courts would be unable to comply with these mandatory duties in the absence of funding to establish and

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[18] *Campaign for Treatment*, 866 A.2d at 795 (quoting *Dorsey v. District of Columbia*, 648 A.2d 675, 677 (D.C. 1994) (internal citations and quotations omitted)).
[19] *Convention Ctr. Referendum Comm.*, 441 A.2d at 913–914.
[20] *D.C. Bd. of Elections & Ethics v. Jones*, 481 A.2d 456, 560 (D.C. 1984).
[21] *Hessey v. D.C. Bd. of Elections & Ethics*, 601 A.2d 3, 18–19 (D.C. 1991) (en banc) ("*Hessey II*").
[22] *Id.* at 19–20.
[23] *Id.* at 20 n.34.
[24] *Campaign for Treatment*, 866 A.2d at 794–795 (citing cases); *Dorsey*, 648 A.2d at 677.
[25] *Campaign for Treatment*, 866 A.2d at 794.
[26] *Id.*
[27] *Id.* at 792.
[28] *Id.*
[29] *Id.* at 796.
[30] *Id.*
[31] *Id.*
[32] *Id.*

operate the treatment programs contemplated by, and indeed at the very heart of, the initiative."[33] The court further noted that the initiative did "not in any way condition the court's compliance with its dictates upon funding by the Council."[34] Although the initiative provided that one provision was subject to funding, the court declined to read such language into the rest of the initiative.[35] The court's reliance on the lack of an express subject-to-appropriations clause was central to, and necessary to explain, its holding that the initiative compelled the allocation of funds.[36] The implication of this holding is that an initiative that *did* "condition . . . compliance with its dictates upon funding by the Council" by being subject to appropriations would render it a proper subject. It is also worth noting that, consistent with this holding, when the court considered whether it could sever the invalid provisions from the valid provisions, it assumed that the section that included a subject-to-appropriations provision—section 6—was valid.[37] At a minimum, then, we read *Campaign for Treatment* to allow an initiative to be a proper subject if it includes an express subject-to-appropriations clause.

Turning to the Proposed Initiative, similar to the *Campaign for Treatment* initiative, it imposes "mandatorily-phrased obligations" on the Board and the District government. Under section 2, "ranked choice voting shall be used" for specified elections; the ballot "shall" be designed to provide instructions to voters and allow voters to rank candidates; ballots "shall" be tabulated using ranked-choice procedures; and the Board "shall" establish automated tiebreaking procedures and issue regulations as necessary. Section 3 requires the Board to arrange the ballot for a presidential preference primary in a particular manner to facilitate ranked-choice voting. Finally, Section 4 requires the Board to prepare additional ballots for unaffiliated voters who opt to participate in a party's primary election, except for the election of certain party offices.

The Proposed Initiative clearly establishes mandatory requirements for the District government. The question, then, is whether these requirements compel the allocation of funds. This Office cannot say as a matter of law that these requirements compel the allocation of funds, as this question depends on the factual issue of whether the Proposed Initiative would have a negative fiscal impact. However, even if the Proposed Initiative would have a negative fiscal impact, under *Campaign for Treatment*, it would nonetheless be a proper subject if it "condition[ed] . . . compliance" on Council funding by being subject to appropriations. Due to statutory changes enacted since that decision, the Proposed Initiative is necessarily subject to appropriations—even without express language to that effect—and accordingly does not compel the allocation of funds.

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[33] *Id.*
[34] *Id.* at 797.
[35] *Id.*
[36] *See Diamond v. Hogan Lovells US LLP*, 224 A.3d 1007, 1019 (D.C. 2020) ("It is a fundamental principle of appellate review that, 'for purposes of binding precedent, a holding is a narrow concept, a statement of the outcome accompanied by one or more legal steps or conclusions along the way that . . . are 'necessary' to explain the outcome; other observations are dicta.'" (quoting *Parker v. K&L Gates, LLP*, 76 A.3d 859, 873 (D.C. 2013) (Ferren, J., concurring))).
[37] Section 6(d), then codified at D.C. Official Code § 24-7501.06(d), provided that "[s]ubject to proper appropriation and allocation by the District of Columbia Council and Congress, any offender not eligible for treatment under the terms of this act . . . shall be provided with narcotic replacement therapy[] . . . ." Section 6(d) of the Treatment Instead of Jail for Certain Non-Violent Drug Offenders Initiative of 2002, effective June 5, 2003 (D.C. Law 14-308; 50 DCR 186). In *Campaign for Treatment*, the court noted that "after severing invalid provisions," the remaining provisions would be D.C. Official Code "§§ 24–751.01–.04, .05(a)–(d), .05(f), .06, .11, .12." 866 A.2d at 799.

1. *Whether the Proposed Initiative has a negative fiscal impact is a factual question that can only be answered conclusively by the OCFO's fiscal impact statement.*

The Proposed Initiative is distinguishable from the *Campaign for Treatment* initiative in key respects. Importantly, it would not establish any new program. Current District law already requires elections to occur and for the Board to administer them by preparing and tabulating ballots. The Proposed Initiative does not require any additional elections, but it provides for a different method for preparing and tabulating ballots for existing elections. It also modifies who may participate in these elections. In contrast, the *Campaign for Treatment* initiative required the District to provide services to individuals that it was not otherwise required to provide at all. Because the Board is already charged with administering the underlying elections, it is possible that the Proposed Initiative would not impose any additional costs.

It is, however, also possible that the Proposed Initiative would impose additional costs. The Proposed Initiative would require the Board to run multiple tabulations of votes for each election, as opposed to one tabulation. This may require additional staff time, which could increase costs. Additional equipment and technology may be required to run the required multiple tabulations, which also could increase costs. Further, preparing ballots specifically for unaffiliated voters may require additional costs compared with preparing ballots only for voters affiliated with one party. A recent survey by the National Conference of State Legislatures, for example, found that that there was at least a one-time cost to switching to ranked-choice voting.[38] Even still, on the current record, it is not clear that the initiative would unquestionably require additional funds to accomplish its terms.[39] These additional costs might be offset by savings in other areas.

In short, it is not apparent at this stage of the initiative process whether, as a factual matter, the Proposed Initiative would have a negative fiscal impact, meaning that funds would be insufficient in the budget to implement it.[40] This question cannot be answered on the currently available record. The Board may consider any testimony it receives for the proper subject hearing as to the budgetary impact to determine whether the Proposed Initiative's mandates would require the allocation of funds. To be sure, this question may be best answered by a fiscal impact statement by the OCFO, which is required under a recent amendment to the initiative procedures statute.[41] However, the statute only requires the OCFO to provide a fiscal impact statement *after* the Board accepts the Proposed Initiative, so it will not necessarily be available to the Board when it makes its proper subject determination.[42]

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[38] Nat'l Conference of State Legislatures, *Ranked Choice Voting in Practice: Implementation Consideration for Policymakers* (Sept. 28, 2022), https://www.ncsl.org/elections-and-campaigns/ranked-choice-voting-in-practice-implementation-considerations-for-policymakers.

[39] *Campaign for Treatment*, 866 A.2d at 795 (emphasis added); *cf. Hessey II*, 601 A.2d at 19–20 (determining that an initiative proposed a law appropriating funds because it would have "*forc[ed]* the Council to use . . . funds in accordance with the initiative," and the other would have left the Council with "*no discretion* about the allocation of the new revenues raised by the initiative" (emphases added)); *Jones*, 481 A.2d at 460 (determining that initiative proposed a law appropriating funds because it "would *force* the District government into making interest payments and seeking additional appropriations" (emphasis added)).

[40] *See* D.C. Official Code § 1-301.47a(b).

[41] Section 2(l)(3)(D) of the Initiative and Referendum Process Improvement Amendment Act of 2020, effective March 16, 2021 (D.C. Law 23-192; 68 DCR 1073) (codified at D.C. Official Code § 1-1001.16(c)(4)).

[42] *Id.* § 1-1001.16(c)(4).

2. *If the Proposed Initiative has a negative fiscal impact, it is necessarily subject to appropriations, pursuant to D.C. Official Code § 1-301.47a(b), and thus does not compel the allocation of funds.*

If the Proposed Initiative does have a negative fiscal impact, it does not follow that the measure compels the allocation of funds, due to legislative developments after *Campaign for Treatment*. Under section 4a(b) of the General Legislative Procedures Act ("Section 4a(b)"), which was enacted by Congress, permanent acts "which are accompanied by fiscal impact statements which reflect unbudgeted costs, shall be subject to appropriations prior to becoming effective."[43] Although this section is found in the part of the Code pertaining to the Council, it applies equally to initiatives because, under the Charter, an initiative that is approved by the voters "shall be an act of the Council upon the certification of the vote" by the Board.[44] Further, under the Initiative and Referendum Process Improvement Amendment Act of 2020 ("2020 Amendments"), a fiscal impact statement must be issued for any initiative accepted by the Board.[45] It also must be published alongside the adopted initiative language.[46] Thus, an initiative is a "[p]ermanent . . . act[] which [is] accompanied by [a] fiscal impact statement," triggering Section 4a(b) in the event that the fiscal impact statement determines it would result in unbudgeted costs.

Accordingly, to the extent the Proposed Initiative has unbudgeted costs, by law, it would not become effective unless and until the Council chooses to fund it. Due to Section 4a(b), the Proposed Initiative cannot by itself force the implementation of ranked-choice voting and semi-closed primaries, if this would have a fiscal impact. It instead *authorizes* the Council to fund these changes to the law, if it so chooses. It does not, and cannot, require the Council to allocate funds to implement the changes, because Section 4a(b) precludes the Proposed Initiative from taking effect at all until the Council allocates funding. So, "the final decision about allocating funds [remains] the Council's," in keeping with the fundamental purpose of the appropriations limitation on the initiative right.[47]

It is critical that Section 4a(b) and the 2020 Amendments were enacted after *Campaign for Treatment*. The court's admonishment that it would not "read 'subject to the allocation of funds' into every initiative" made sense under the legal landscape at that time:[48] there was no congressional prohibition against acts with unbudgeted costs taking effect, and the Board was not required to obtain a fiscal impact statement for an initiative. So, in the absence of Section 4a(b), or a subject-to-appropriations clause in the legislative text, the initiative in *Campaign for Treatment* "would, if to be effective in accordance with its terms, compel the allocation of funds," rendering it an improper subject.[49] The Proposed Initiative, in contrast, if accepted by the Board, now requires a fiscal impact statement and is subject to Section 4a(b). Under Section 4a(b), if the Proposed Initiative has a negative fiscal impact, then it is necessarily subject to appropriations. And because it is subject to appropriations, "compliance with its dictates" is conditioned "upon funding by the Council," which is what is required in order to avoid being a law appropriating funds.[50] No court has considered whether Section 4a(b) applies to initiatives, and therefore saves an initiative with otherwise

[43] Effective October 6, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a(b)).
[44] D.C. Official Code § 1-204.105.
[45] Section 2(l)(2)(D), effective March 16, 2021 (D.C. Law 23-192; 68 DCR 1073) (codified at D.C. Official Code § 1-1001.16(c)(4)).
[46] D.C. Official Code § 1-1001.16(d)(2).
[47] *See Hessey II*, 601 A.2d at 13.
[48] *See Campaign for Treatment*, 886 A.2d at 797.
[49] *Id.* at 795.
[50] *Campaign for Treatment*, 886 A.2d at 797.

unbudgeted costs from improperly allocating funds. However, we conclude that it is the best reading of the text of the relevant statutes.

To be sure, there are plausible arguments on the other side. For instance, it might be argued that Section 4a(b) applies only to acts passed by the Council. This is plausible, given that it is codified within a subdivision relating to the Council, and the preceding subsection (a) requires fiscal impact statements for all bills, a term that refers only to legislation introduced in the Council. So, it might be maintained that subsection (b) simply provides that when those Council bills become acts, they are subject to appropriations if they have unbudgeted costs. It may also be true that when Congress drafted these provisions, it did not contemplate that subsection (b) would apply to initiatives, particularly because initiatives at that time were not accompanied by fiscal impact statements.

Nonetheless, we believe the text of Section 4a(b) applies to initiatives by its own terms. Under the Charter, adopted initiatives are permanent acts of the Council.[51] And the Council now requires that accepted initiatives, just like bills, be accompanied by fiscal impact statements.[52] Even if this is not precisely what Congress envisioned, there is no reason to think that it intended for acts passed by the Council—but not by the voters—to be funded before going into effect, given that the electorate's initiative power is generally "coextensive" with the Council's legislative power, subject to limits imposed by the Constitution, Congress, and the Council."[53] Therefore, initiatives fall within the express terms of Section 4a(b) and are necessarily subject to appropriations, if they have unbudgeted costs.

It also might be argued that the Council did not intend for the 2020 Amendments to subject adopted initiatives to Section 4a(b). Although the Council may not have specifically intended to make all initiatives subject to appropriations by passing the 2020 Amendments, the amendments appear to have had that effect, of which the Council is presumed to have been aware.[54] The Council's stated purpose for the 2020 Amendments, according to the committee report, was to "help voters make a more educated decision about the proposal in terms of their priorities for spending taxpayer funds," because while an initiative may not "appropriate funds, a measure can authorize government spending."[55] In other words, the Council seems to have implicitly acknowledged that an initiative may have a fiscal impact, so long as the Council retains the discretion to appropriate funds to account for this fiscal impact.

In short, while it is unsettled, we believe Section 4a(b) by its terms applies to adopted initiatives. We note that, for purposes of the Board's proper subject determination, the practical significance of whether or not Section 4a(b) applies is relatively minimal. As discussed above, *Campaign for Treatment* makes clear that an initiative does not impermissibly compel the allocation of funds if compliance with its dictates is conditioned on Council funding, by being subject to appropriations. If the Board determines that Section 4a(b) applies, then it must accept the initiative and, in the event of a negative fiscal impact statement, insert a subject-to-appropriations clause in the adopted legislative form, as discussed below. If the Board determines that Section 4a(b) does not apply and that the initiative would result in unbudgeted costs, it must reject the Proposed Initiative, and the proposers may simply submit a new proposed initiative with a subject-

[51] D.C. Official Code § 1-204.105.
[52] *Id.* § 1-1001.16(c)(4).
[53] *See Convention Ctr. Referendum Comm.*, 441 A.2d at 897.
[54] *See Miles v. Apex Marine Corps*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").
[55] Comm. on the Judiciary & Pub. Safety, Report on B24-0165, the "Initiative and Referendum Process Improvement Amendment Act of 2020" 9–10 (Nov. 23, 2020), https://lims.dccouncil.gov/downloads/LIMS/41954/Committee_Report/B23-0165-Committee_Report2.pdf?Id=114190.

to-appropriations clause. Ultimately, this opinion affirms that, "absent express or implied limitation, the power of the electorate to act by initiative is coextensive with the power of the legislature to adopt legislative measures."[56] Just as the Council may adopt legislation subject to appropriations, so may the electorate.

3. After accepting the Proposed Initiative, the Board must ensure conformance to Council drafting style by inserting a subject-to-appropriations clause as a technical edit.

We believe Section 4a(b) renders the Proposed Initiative a proper subject even if it is not expressly provided to be subject to appropriations. However, after the Board accepts the Proposed Initiative—if the initiative would result in unbudgeted costs—it must insert a subject-to-appropriations clause as part of its obligation to "[p]repare, in the proper legislative form, the proposed initiative . . . measure, . . . *which shall conform to the legislative drafting style of acts of the Council*, and consult experts in legislative drafting, including the Attorney General and the General Counsel of the Council."[57] The "legislative drafting style of acts of the Council" is set forth in the Council's *Legislative Drafting Manual*, which expressly "provide[s] technical guidance" and "is a guide to the correct form for bills and resolutions and provides information on style and legal limitations on legislation."[58] It specifically requires the inclusion of a "subject to appropriations" provision "where proposed legislation has a negative fiscal impact, and therefore cannot be effective until the legislation has been budgeted for," to comply with Section 4a(b).[59] This is a technical change that merely restates what is already required by Section 4a(b) and simply makes clear in the Proposed Initiative's text that it is subject to appropriations, as required by Section 4a(b).[60]

Under this statutory scheme, the Board may not reject a proposed initiative at the proper subject phase solely because it may require additional funds to implement. Section 4a(b) makes clear that such a measure does not *require* the allocation of funds at all, because it may not become effective unless and until the Council decides to fund it. To make this clear in the legislative text itself, the Board must add a subject-to-appropriations clause when it prepares the measure in the proper legislative form. This is precisely the type of technical change that the Board is charged with making when it prepares a proposed initiative in the proper legislative form and in conformance to the Council's drafting style. Accordingly, in our attached drafting recommendations, we have included a subject-to-appropriations provision, which would be required in the event of a negative fiscal impact statement.

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We close by emphasizing that the foregoing analysis does not mean that Section 4a(b) eviscerates the appropriations limitation and opens the floodgates to initiatives impinging on the Council's appropriations authority. A proposed initiative would, of course, be an improper subject as a matter of law if it constrained the Council's discretion to determine how funds are to be allocated or expended. However, an initiative that otherwise qualifies but is subject to appropriations does not and cannot compel the allocation funds. This has been true at least since *Campaign for Treatment* was decided, and it follows from a long line of D.C.

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[56] *Convention Ctr. Referendum Comm.*, 441 A.2d at 897.

[57] D.C. Official Code § 1-1001.16(c)(3) (emphasis added). Of course, no clause to this effect would be required if the Proposed Initiative does not result in unbudgeted costs.

[58] Council of the Dist. of Columbia, *Legislative Drafting Manual* 1 (2019 ed.), https://dccouncil.gov/wp-content/uploads/2019/02/Legislative-Drafting-Manual-2019-Edition-FINAL.pdf ("*Legislative Drafting Manual*").

[59] *Id.* at 42.

[60] *See In re Chateaugay Corp.*, 89 F.3d 942, 954 (2d Cir. 1996) (noting that "technical" amendments "did not purport to change the substantive meaning of the law"); (*Whalen v. United States*, 826 U.S. 668, 669 (7th Cir. 1987) (finding that amendment "did not change but merely clarified preexisting law").

Court of Appeals precedent. And now, given Section 4a(b) and the 2020 Amendments, we believe any initiative that has a negative fiscal impact is necessarily subject to appropriations even if the proposed text does not expressly say so.

II. The Proposed Initiative Satisfies Other Proper Subject Criteria.

1. The Proposed Initiative Does Not Violate or Seek to Amend the Home Rule Act.

The Proposed Initiative would not violate or amend the Home Rule Act. The Home Rule Act requires the Mayor, members of the Council, and Attorney General to be elected on a partisan basis.[61] It also requires there to be two at-large members elected in each election cycle, and limits a political party to not more than one nominee for at-large member in one election cycle.[62] The Home Rule Act does not require first-past-the-post, as opposed to ranked-choice, voting. It also does not require closed primaries. The same is true with the law establishing the District's Delegate to the House of Representatives.[63]

The Proposed Initiative makes no change to the partisan elections required by the Home Rule Act, but simply provides for the votes in these elections to be tabulated under a ranked-choice system, rather than a first-past-the-post system and allows unaffiliated voters to choose to participate in one party's primary election.

2. The Proposed Initiative Does Not Violate the Constitution.

The Proposed Initiative also does not violate the Constitution because it does not impose a severe burden on First Amendment or due process rights. Voting regulations that impose a severe burden on these rights "must be narrowly tailored and advance a compelling state interest."[64] If a regulation "imposes only modest burdens, however, then 'the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions' on election procedures."[65]

Ranked-choice voting has consistently been upheld by federal courts against constitutional challenges. In *Dudum v. Arntz*, the U. S. Court of Appeals for the Ninth Circuit rejected arguments that San Francisco's instant-runoff system violated the First Amendment and Equal Protection and Due Process clauses of the Fourteenth Amendment.[66] It rejected claims that the multiple rounds of tabulation provided disparate opportunities to vote, effectively discarded votes, and diluted votes, thereby placing a severe burden on voting rights.[67] Instead, the "extremely limited burdens—if any—" were far outweighed by important governmental interests.[68] Subsequently, in *Baber v. Dunlap*, the U.S. District Court of the District of Maine upheld Maine's ranked-choice voting law against a similar challenge.[69]

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[61] D.C. Official Code § 1-204.01(b); *id*. § 1-204.21(b); *id.* § 1-204.35(a).
[62] *Id.* § 1-204.01(b)(2), (4).
[63] *See id.* § 1-401 (establishing the Delegate).
[64] *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).
[65] *Wash State. Grange v. Wash. State Republican Party*, 552 U.S. 442, 452 (2008) (quoting *Anderson v. Celebrezze*, 460 U.S. 70, 788 (1983)).
[66] *Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011).
[67] *Id.* at 1112–1113.
[68] *Id.* at 1117.
[69] *Baber v. Dunlap*, 376 F. Supp. 3d 125 (2018) (D. Me. 2018); *see also Minn. Voter Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009) (holding that city's instant runoff voting system did not violate the United States or state constitutions).

Additionally, the semi-closed primary system contemplated by section 4 does not appear to present constitutional concerns. Laws governing who may participate in a party's selection of nominees for candidates for public office may implicate associational rights under the First Amendment. The Supreme Court has observed that there is "no heavier burden on a political party's associational freedom" than opening up its candidate-selection process "to persons wholly unaffiliated with the party."[70] Thus, it struck down California's blanket primary system that allowed every voter to vote for a candidate from a ballot listing every candidate regardless of party affiliation, and provided that the candidate of each party with the greatest number of votes is that party's nominee.[71] However, the Court distinguished this system from a primary in which, "even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to 'crossover,'" and to vote in another party's primary, "at least he must formally *become a member of the party*; and once he does so, he is limited to voting for candidates of that party."[72] A Court plurality subsequently upheld a semi-closed primary system in which, "[i]n general, 'anyone can "join" a political party merely by asking for the appropriate ballot at the appropriate time or (at most) by registering within a state-defined reasonable period of time before an election.'"[73]

Under that test, section 4 does not appear to impose a severe burden on associational rights. Unaffiliated voters are limited to voting in only one party's primary election. By requesting a primary ballot for one party, to the exclusion of any other, they formally affiliate with that party. Further, District law prohibits a voter from changing their party affiliation fewer than 21 days prior to the election.[74] This presents another barrier to voters from one party "crossing over" to affect the message of another party. Thus, within the framework of current District election law, it is unlikely that it could be shown that the Proposed Initiative creates "a 'clear and present danger' that a party's nominee would be 'determined by adherents of an opposing party.'"[75]

III. If The Board Determines That Any One Provision Of The Proposed Initiative Is Not A Proper Subject, It Must Reject The Proposed Initiative In Its Entirety.

Because the Proposed Initiative includes two distinct subjects, we also address the question of severability. Severability is typically an inquiry for a court. The Supreme Court observed long ago that it is "well settled" that "[i]f different sections are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced."[76]

The Board, however, is not a court and must act within the bounds of its statutory authority. Its statutory obligation is to "refuse to accept *the measure* if the Board finds that it is not a proper subject of initiative."[77] Thus, if the Board finds any single provision of the Proposed Initiative to not be a proper subject, it must reject the measure in its entirety. In this case, of course, the proposer may redraft and resubmit the measure, if they so choose.

CONCLUSION

[70] *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581–82 (2000).
[71] *Id.* at 570.
[72] *Id.* at 577 (emphasis in original).
[73] *Clingman v. Beaver*, 544 U.S. 581, 590 (plurality op.) (internal citation omitted); *see also Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1125 (9th Cir. 2016) (noting that, under certain circumstances, "choosing to vote in only one party's party may constitute a valid form of party affiliation").
[74] D.C. Official Code § 1-1001.07(g)(4), (5).
[75] *See Democratic Party of Haw.*, 833 F.3d at 1123 (quoting *Cal. Democratic Party*, 530 U.S. at 578).
[76] *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 565 (1902).
[77] D.C. Official Code § 1-1001.16(b)(1) (emphasis added).

It is the opinion of this Office that the *Make All Votes Count Act of 2024* is a proper subject of initiative. The only proper subject limitation that merits detailed discussion is the prohibition against initiatives proposing laws appropriating funds by compelling the allocation of funds. Whether the Proposed Initiative has a negative fiscal impact, and therefore requires additional funds to implement, is a factual question that cannot be resolved by this Office at this stage of the initiative process and on the record available. Instead, the question may be answered only by the OCFO's required fiscal impact statement. In the event of a negative fiscal impact statement, the Proposed Initiative is necessarily subject to appropriations, pursuant to section 4a(b) of the General Legislative Procedures Act, *see* D.C. Official Code § 1-301.47a(b), and the Board must insert a subject-to-appropriations provision when it prepares the Proposed Initiative in the proper legislative form and in conformance with the Council's drafting style. Thus, the Proposed Initiative is not a law appropriating funds and is a proper subject of initiative.

Sincerely,

Brian L. Schwalb
Attorney General for the District of Columbia