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Superior Court
of the District of Columbia

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

DISTRICT OF COLUMBIA DEMOCRATIC PARTY, et al.	:	
Plaintiffs,	:	
vs.	:	**Case Number 2023-CAB-005414**
	:	**The Honorable Carl E. Ross**
	:	**Next Event – Scheduling – 12/01/2023**
MURIEL E. BOWSER, et al.	:	

OPPOSITION OF PLAINTIFFS TO THE MOTION TO DISMISS OF DEFENDANTS

Plaintiffs, by and through Counsel, Oppose the Motion to Dismiss of Defendants, and for reasons refers this Honorable Court to the Accompanying Memorandum of Points and Authorities.

INTRODUCTION

Defendants would have this Honorable Court remove its Sacred Black Robe and step into the wild world of imprecise, political legislators.

As Chief Justice John Roberts observed, "Judges are like umpires. Umpires don't make the rules. They apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ballgame to see the umpire."

BACKGROUND

Ripeness

It is indeed a "fancy dance" for the Defendants to argue that the matter is not *ripe*, because the plain, clear, unambiguous language of the Law governing Initiatives in the District of Columbia strictly prohibits those where, "(c) The measure presented would appropriate funds" to use Defendants' own words, from Page One (1) of its Motion, "*if it were to become law*". Defendants would have this Honorable Court add those words to the Statute that are not there now and were never there. Indeed, the

Chief Financial Officer of the District of Columbia issued a Fiscal Impact Statement, on 11 August 2023, *Plaintiffs' Exhibit 1*, some "**Funds are not sufficient in the fiscal year 2023 budget and the fiscal year 2024 through fiscal year 2027 budget and financial plan to implement the proposed initiative. The Board of Elections (Board) will require additional funding beginning in fiscal year 2025 to implement both ranked choice voting and semi-closed primaries by the June 2026 primary election**." That is the very reason Congress insisted that only the D.C. Council, and not the citizens, had the authority to commit the District of Columbia to spending funds. And that is the very reason the Chief Financial Officer concluded that, "**Funds are not sufficient in the fiscal year 2023 budget and the fiscal year 2024 through fiscal year 2027 budget and financial plan to implement the proposed initiative.**"

Forecasting that which the D.C. council will do with Initiative 83 are three important indicators. First, the Opinion of the General Counsel to the D.C. council, *Defendants' Exhibit 2*, who wrote twice to the D.C. Board of Elections General Counsel stating, on 11 July 2023, that, "… the Proposed Initiative is not a proper subject of an initiative. That view reflects the same view earlier expressed, in a lengthier Opinion, citing the *En Banc* Decision of the D.C. Court of Appeals in *Dorsey v. District of Columbia*, 648 A.2d 675, 677 (1994), finding unlawful Initiatives "that propose laws appropriating funds," as does this Initiative 83, while citing another *En Banc* Decision of the D.C. Court of Appeals in *Hessey v. District of Columbia Bd. of Elections & Ethics*, 601 A.2d 3, 9, 15 (D.C.1991)(*en banc*). The D.C. Court of Appeals, all Judges sitting, in *Dorsey*, concluded that, D.C. Code § 1-1320(b)(1)(D) prohibits any initiative or referendum that "would negate or limit an act of the Council of the District of Columbia pursuant to [D.C. Code] § 47-304 [1990]." The "act" referred to is a Budget Request Act passed by the Council and submitted to the President for transmission to the Congress pursuant to § 47-304.

More recently, an action, even more definitive than the Opinion of the D.C. Council's General Counsel, and the two *En Banc* Decisions of the D.C. Court of Appeals, when the Chair of the D.C. council and Councilmember Anita Bonds introduced Bill B25-0475, The Initiative Amendment Act of 2023. Chairman Mendelson's Statement is so compelling and insightful about the problems Initiative 83 and others could produce that it is repeated in full, below, and a copy of the Statement and the proposed Legislation is annexed, *Defendants' Exhibit 3*.

Statement of Introduction "Initiative Amendment Act of 2023

Today I along with Councilmember Anita Bonds am introducing the "Initiative Amendment Act of 2023" in response to a recent ruling by the DC Board of Elections. Ever since Congress approved an amendment to the Home Rule Act in 1978 to permit voter initiatives, it has been the law that "electors of the District of Columbia may propose laws (except laws appropriating funds) ..." (emphasis added). The District of Columbia Court of Appeals has interpreted this limitation on the use of the initiative process very broadly. Nonetheless, earlier this year the proponents of an Initiative crafted a novel approach to circumvent the prohibition: make the Initiative subject to appropriations. No matter how costly a proposal may be, simply make the Initiative "subject to appropriations." The Board of Elections went along with this argument, reversing longstanding practice of rejecting proposals that would have a fiscal cost. The effect of this novel interpretation is either (1) to put before the voters an Initiative proposal that will not be meaningful because it will not be funded; or (2) to seek to bind the Council to appropriate funds, because this is the voters' will. Either outcome is contrary to the clear intent of the Home Rule Act: that the Initiative process may be used to establish laws provided that they do not have a cost. Examples of citizen lawmaking that do not require an appropriation are numerous and include: to legalize some forms of gambling (Initiative #6); to limit campaign contributions (#41); to legalize recreational cannabis (#71);

and to eliminate the tipped minimum wage (#82). We must emphasize, without this bill, the Initiative Amendment Act of 2023, it is possible that the floodgates will open to all kinds of good, but expensive proposals, and policymaking by the Council will become reactive to the Initiative process. While many of the proposals from citizens are good, the Council has an orderly process for consideration. **For 45 years this has worked. But the Board of Elections would now allow Initiative proposals for any law that has a cost – even a substantial cost – so long as it is "subject to appropriation." The Initiative Amendment Act of 2023 would ensure that the original intent of the 1978 Charter amendment is maintained**. (Emphasis supplied).

Here, there is clearly sufficient "hardship to the parties [in] withholding court consideration until there is enforcement action", *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). See also *Farrow v. J. Crew Group Inc*., 12 A.3d 28 (D.C. 2011) and as to why it is important to preserve the policy against piecemeal appeals. *Peoples v. Warfield & Sanford, Inc.*, 660 A.2d 397, 401 (D.C.1995). The Ripeness Doctrine is a legal doctrine that a court will hear a case that is an actual dispute. Initiative 83 is at odds with the District's Chief Financial Officer, the D.C. Council, the D.C. Court of Appeals, and, as will be shown, the United States Congress. There is a dispute. This Case is ripe to be heard.

Jurisdiction

The flaw in Defendants lack of Ripeness claims is related to the flaw in their lack of jurisdiction claims. Defendant D.C. Board of Elections (DCBOE) held a Hearing on 18 July 2023 and received testimony. At the conclusion of the Hearing, DCBOE agreed to keep the record open for written comments until noon on Friday, 21 July 2023. DCBOE continued the matter to review the comments and to meet in executive session. On 19 July 2023, DCBOE posted on its website a notice that it would meet at 2:00 pm on 21 July 2023. DCBOE reconvened on 21 July 2023. On that date, and at that time,

DCBOE announced its ruling that the Measure was "Accepted" as a proper subject matter for an Initiative. It then published its Opinion and Order on 25 July 2023, on its website. In the Complaint, the undersigned Counsel, having checked with the DCBOE continuously --- after said Defendant indicated that the Measure was "Accepted", and after having checked with the D.C. Register as to whether the Decision of DCBOE had been published in the D.C. Register, stated, "**At this writing, it is unclear whether DCBOE has published its 25 July 2023 Decision and Opinion in the D.C. Register, as required**." (Emphasis supplied). Indeed, DCBOE curiously, apparently waited to publish its Decision and Order in the D.C. Register --- even though it had already published on its website --- until the instant action was filed in what seems obvious to the undersigned Counsel an attempt to avoid the mandates of law and frustrate the public. The instant Complaint was not accepted by the Court until 1 September 2023, and the Complaint Package was not made available until 1 September 2023. Using that date, the Complaint was timely in seeking "… review in the Superior Court of the District of Columbia within 10 calendar days from the date the Board publishes the summary statement, short title, and legislative form in the District of Columbia Register. Using the date from which the DCBOE would have this Court measure the ten days to seek review by the 31 August 2023 date, the Complaint was one (1) day early. Early filings are not regarded as untimely. In addition, the language of the Statute is designed to assure expedited consideration of any Protest, and an early filing facilitates that goal.

Moreover, and perhaps most importantly, the DCBOE stated on its website,

"**Pursuant to D.C. Official Code § 1-1001.16(d)(2)(C), which provides that the D.C. Board of Elections shall "[p]ublish the summary statement, short title, legislative form, and, if the measure is an initiative measure, the fiscal impact statement, *on [its] website*", the Board hereby publishes the summary statement, short title, legislative form, and fiscal impact statement1 for Initiative Measure No. 83, the 'Ranked Choice Voting and Open the Primary Elections to Independent Voters Act of 2024**.'"

The two provisions of the D.C. Code would seem to be inapposite and thus misleading. That "Legal Publication" includes the Letter from the Chief Financial Officer of 23 August 2023; thus, it

could have been published in the D.C. Register on Friday, 25 August 2023. The undersigned Counsel did not find the "Legal Publication" in the D.C. Register on that date and understood the "Legal Publication" to be an Interpretive Rule of the DCBOE, and in an abundance of caution submitted the Complaint, so as not to be untimely, late.

In addition, D.C. Official Code § 1-1001.16(d)(1) further states:

"**(d)(1)** After preparing an initiative or referendum measure, the Board shall call a public meeting to adopt the summary statement, short title, and legislative form of the measure.

(2) Within 24 hours after adoption, the Board shall:

(A) Notify the proposer of the measure, via email, of the exact language of the summary statement, short title, and legislative form.

(B) Submit the summary statement, short title, legislative form, and, if the measure is an initiative measure, the fiscal impact statement, to:

(i) The District of Columbia Register for publication; and

(ii) At least one newspaper of general circulation in the District; and

(C) Publish the summary statement, short title, legislative form, and, if the measure is an initiative measure, the fiscal impact statement, on the Board's website.

Defendant DCBOE published the Summary Statement, Short Title, Legislative Form and Fiscal Impact Statement, on its website, after 23 August 2023 and before 1 September 2023. Either date determined to be the trigger date for a Protest, 31 August 2023 or 1 September 2023, according to Statute, was met by Plaintiffs.

Defendants would have this Honorable Court ignore the express provisions of a Statute, quoted by Defendant DCBOE, and step into the legislative shoes of others by announcing, without any legislative foundation, that one Statutory Provision should be given deference, greater weight than the other. Neither Statutory Provision states that, and Plaintiffs are timely in the filing of their Complaint under either.

ARGUMENT

Preference of District of Columbia Courts to dispose of cases on the Merits.

Importantly, the D.C. Court of Appeals reviews questions of law *de novo*; that is, it decides legal issues using its independent judgment without deference to the trial court's resolution of the questions, *In re K.I.*, 735 A.2d 448, 453 (D.C. 1999). D.C. Code § 17-305 (a) establishes the scope of appellate review. All legal issues are considered *de novo*, and the court's findings of fact may be reversed if "… plainly wrong or without evidence to support [them]," *Jemison v. Nat'l Baptist Convention*, 720 A.2d 275, 281 (D.C. 1998). *De Novo* review is "coterminous with independent" review.

This Case is saturated with facts; facts that have not and likely cannot be refuted by Defendants, facts that are indeed uncontested. Perhaps most importantly, it should be noted that due to the many legal and factual matters that are in dispute, dismissal runs counter to the long-standing "judicial preference for the resolution of disputes on the merits rather than by the harsh sanction of dismissal," *Bond Wilson*, App. D.C., 398 A2d 21 (1979); Schwab *v. Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974); *Tolson v. Hodge*, 411 F.2d 123, 130 (4th Cir. 1969); *Rooks v. American Brass Co.*, 263 F.2d 166, 169 (6th Cir. 1959) (per curiam); *Hiern v. St. Paul-Mercur' Indem. Co.*, 262 F.2d 526, 530 (5th Cir. 1959); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 245 (3d Cir. 1951); and see 6 J. Moore, Federal Practice 55.10[1], at 55-235 to 236 (2d ed. 1976). Furthermore, because D.C. Superior Court Rules track the Federal Rules, this Court may look to the decisions of the Federal Court interpreting the Federal Rules as persuasive authority in interpreting the local rule. See *Puckrein v. Jenkins*, 884 A.2d 46 2005 D.C. App. LEXIS 497 (2005). The finality achieved through entry of dismissal, especially when the private interest of housing loss is involved, should readily give way to the competing interests in reaching the merits of litigation.

has established that it "reviews grants or denials for summary disposition *de novo* and applies the same standard as the trial court in reviewing and assessing the record in the light most favorable to the non-moving party," *Borger Mgmt., Inc. v. Sindram,* 886 A.2d 52, 58 (D.C. 2005). *See Tobin v. John Grotta Co.,* 886 A.2d 87 (D.C. 2005) ("We review orders granting summary judgment *de novo*."); *Parcel One Phase One Assocs., L.L.P. v. Museum Square Tenants Ass'n, Inc.,* 146 A.3d 394 (D.C. 2016) ("Whether summary judgment was properly granted is a question of law that we review de novo."); *William J. Davis, Inc. v. Tuxedo LLC,* 124 A.3d 612 (D.C. 2015) ("The question whether summary judgment was properly granted is one of law and we review *de novo*."); *Joeckel v. Disabled Am. Veterans,* 793 A.2d 1279 (D.C. 2002) ("In reviewing a trial court order granting summary judgment, we conduct an independent review of the record, and our standard of review is the same as the trial court's standard in considering the motion for summary judgment.").

Standard of Review – Motion to Dismiss

Defendants are correct. *Grayson v. AT&T Corp*., 15 A.3d 219, 228 (D.C. 2011) (*en banc*), stands for the proposition that in determining whether a complaint sufficiently sets forth a claim, the Court must construe the complaint in the light most favorable to the plaintiff and must take the facts alleged in the complaint as true, *Casco Marina Dev., L.L.C. v. District of Columbia Redevelopment Land Agency*, 834 A.2d 77, 81 (D.C. 2003).

The District of Columbia follows the Federal Standards. The D.C. Court of Appeals will review *de novo* the dismissal of a complaint. In determining whether a complaint sufficiently sets forth a claim, the court must construe the complaint in the light most favorable to the plaintiff and must take the facts alleged in the complaint as true, *Casco Marina Dev., L.L.C. v. District of Columbia Redevelopment*

Land Agency, 834 A.2d 77, 81 (D.C. 2003); *Jordan Keys and Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 62 (D.C. 2005).

The Role of the Court to Adjudicate not legislate.

Defendant DCBOE interpreted the relevant Statute, when it published its "Legal Publication" to mean that, "Pursuant to D.C. Official Code § 1-1001.16(d)(2)(C), which provides that the D.C. Board of Elections shall "[p]ublish the summary statement, short title, legislative form, and, if the measure is an initiative measure, the fiscal impact statement, **on [its] website**", the Board hereby publishes the summary statement, short title, legislative form, and fiscal impact statement1 for Initiative Measure No. 83, the 'Ranked Choice Voting and Open the Primary Elections to Independent Voters Act of 2024.'" That is an appropriate and correct interpretation of the relevant Statute.

A trial court must carefully avoid stepping into a legislative realm when it considers the plain and unambiguous language of a Statute. As the United States Supreme Court has long instructed in the context of statutory interpretation, when the wording of a rule is clear and unambiguous and is not capable of more than one meaning, "the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion," *Caminetti v. United States*, 242 U.S. 470, 485 (1917); see also *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

The Court's task in construing a statute "`is to ascertain and give effect to legislative intent and to give legislative words their natural meaning,'" *Citizens Association of Georgetown v. Zoning Commission of the District of Columbia*, D.C. App., 392 A.2d 1027, 1032 (1978) (en banc) (quoting *Rosenberg v. United States*, D.C. App., 297 A.2d 763, 765 (1972) (citations omitted)). The Court begins this process of course with the language of the statute itself, *Citizens Association of Georgetown, supra; March v. United States*, 165 U.S. App. D.C. 267, 274, 506 F.2d 1306, 1313 (1974). The Court must read these words, however, in their legislative context. *See Citizens Association of*

Georgetown, supra at 1033; *March, supra* at 274-75, 506 F.2d at 1313-14.

FURTHER, RELEVANT LEGAL, HISTORICAL AND PROCEDURAL MATTERS

The D.C. Administrative Procedure Act does govern the DCBOE.

At Section I(B) of their Argument, Defendants assert that, "This Court also lacks jurisdiction over Plaintiffs' DC APA challenges to Initiative Measure No. 83 because the procedure set forth in D.C. Code § 1-1001.16(e)(1)(A) is the exclusive avenue for challenging initiative measures." Nothing could be further from the truth. The D.C. Administrative Procedure Act was enacted by Congress on 21 October 1968, some years before the District of Columbia gained Home Rule. Both the House and Senate Reports noted the main purposes of the Act, as follows: to 1) provide for the computation and publication of all rules and regulations of D.C. agencies, 2) to provide the opportunity for a faoir hearing in contested cases, and 3) to provide a uniform means of review of final agency determinations.

As then and now, D.C. Code § 2–502. Definitions, states and stated,

"As used in this subchapter:

(1)(A) The term "Mayor" means the Mayor of the District of Columbia, or his or her designated agent.

(B) The term "Council" means the Council of the District of Columbia … unless the term "District of Columbia Council" is used in which event it shall mean the District of Columbia Council established by subsection (a) of § 201 of Reorganization Plan No. 3 of 1967 (81 Stat. 948).

(2) The term "District" means the District of Columbia.

(3) The term "agency" includes both subordinate agency and independent agency."

And, as then and now, D.C. Code § 2–510. Judicial review states and stated,

"(a) Any person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of the Mayor or an agency in a contested case, is entitled to a judicial review thereof in accordance with this subchapter upon filing in the District of Columbia Court of Appeals a written petition for review. If the jurisdiction of the Mayor or an agency is challenged at any time in any proceeding and the Mayor or

the agency, as the case may be, takes jurisdiction, the person challenging jurisdiction shall be entitled to an immediate judicial review of that action, unless the Court shall otherwise hold. The reviewing Court may by rule prescribe the forms and contents of the petition and, subject to this subchapter, regulate generally all matters relating to proceedings on such appeals."

An Early Filing is not an Untimely Filing

Apart from the fact that the instant Complaint as discussed above was filed consistent with Statutory mandate by any reading of either Statute, Defendants seek to make much of their claim at Section I(A) of its Argument that Plaintiffs filed early and thus that early filing was untimely. A broad reading of statutes and court rules, at all levels, and in all jurisdictions reveals that "untimely" means late, not early. Such was the ruling in *Stewart v. Iancu*, 912 F.3d 693 (4th Cir. 2019), where the Court ruled that, the 180-day waiting period involved in Title VII's exhaustion requirement for federal employees is "non-jurisdictional". Other jurisdictions, including the District of Columbia Circuit, have reasoned the same, *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 385 (2d Cir. 2015) (holding that the failure to exhaust administrative remedies does not raise a jurisdictional bar); *Artis v. Bernanke*, 630 F. 3d 1031, 1034 n.4 (D.C. Cir. 2011) (same); *Frederique-Alexandre v. Dep't of Nat. & Envtl. Res. of Puerto Rico*, 478 F.3d 433, 440 (1st Cir. 2007). **As here, when an agency fails to timely act, the waiting period is satisfied by agency *inaction, Darby v. Cisneros*, 509 U.S. 137, 155, (1993)**.

In evaluating a motion to dismiss, the Court must "treat the complaint's factual allegations as true and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged. The United States Supreme Court has stated that the plaintiff must allege a "plausible entitlement to relief" by setting forth "a set of facts consistent with the allegations. Plaintiffs do that. Again, the D.C. Court of Appeals will review *de novo* the dismissal of a complaint under D.C. Superior Court Civil Rule 12, *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543 (D.C. 2011); *Grayson v. AT&T Corp.*, 15

A.3d 219, 228 (D.C. 2011) (*en banc*); *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1022–23 (D.C.2007).

Plaintiffs seem to frame their Motion to Dismiss in reliance on the principle of Exhaustion of Administrative Remedies. Exhaustion and Ripeness are complementary doctrines, designed to prevent unnecessary or untimely judicial involvement in the administrative process. Neither of those doctrines are here present, and the Trial Court has subject matter jurisdiction over this Case. For years, the United States Supreme Court and other courts have carved out exceptions to the Exhaustion and ripeness Doctrines. In 1969, in *McKart v. United States*, 395 U.S. 185 (1969), the court saw no risk in impeding the agency through premature intervention because the passage of time had foreclosed further administrative remedies. The same is true here. Similarly in *Stephens v. Retirement Income*, 464 F.3d 606 (6th Cir. 2006), our Circuit Court joined with five other Circuit Courts in finding that the internal remedial procedures of an agency need not be exhausted before a lawsuit can be filed, *Stephens v. Pension Benefit Guaranty Corporation*, No. 13-5129 (D. C. Cir. June 24, 2014). Indeed, that is why reliance on *Burton v. District of Columbia*, 835 A.2d 1076 (D.C. 2003) is misplaced because in *Burton* the Court stated that, **"the Supreme Court has made clear that exhaustion is not a 'jurisdictional prerequisite' to a court proceeding"**, citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Even in *Dano Resource Recovery v. District of Columbia*, 566 A.2d 483, 485 (D.C. 1989), also, the D.C. Court of Appeals stated that, "Courts in this jurisdiction have recognized a number of interrelated exceptions to the exhaustion doctrine, among them inadequate remedy, unavailable remedy, and futility", citing *Crown Coat Front Co. v. United States*, 386 U.S. 503, 512 (1967), (quoting *United States v. Holpuch Co.*, 328 U.S. 234, 240 (1946) and *Randolph Sheppard Vendors of America v. Weinberger*, 254 U.S. App. D.C., 45, 62 (1986). Similarly, in *Fisher v. District of Columbia*, 803 A.2d 962, 964 (D.C. 2002) that Court's statement that the Exhaustion Doctrine is not without exceptions, with

a "strong showing" of "exceptional circumstances", as here, citing *Barnett v. District of Columbia Dep't of Employment Services*, 491 A.2d 1156, 1161 (D.C. 1985). The Exhaustion Doctrine is inapplicable here.

As indicated, Defendant D.C. Board of Elections (hereafter DCBOE) held a Hearing on 18 July 2023 and received testimony. At the conclusion of the Hearing, DCBOE agreed to keep the record open for written comments until noon on Friday, 21 July 2023. DCBOE continued the matter to review the comments and to meet in executive session. On 19 July 2023, DCBOE posted on its website a notice that it would meet at 2:00 pm on 21 July 2023. DCBOE reconvened on 21 July 2023. On that date, and at that time, DCBOE announced, without adequate findings of fact and conclusions of law as required by the D.C. Administrative Procedure Act (D.C. APA), its ruling that the Measure was "Accepted" as a proper subject matter for an Initiative. It then published its Opinion and Order on 25 July 2023, on its website. At this writing, it is unclear whether DCBOE has published its 25 July 2023 Decision and Opinion in the D.C. Register, as required.

While both the General Counsel of the Council of the District of Columbia and the Attorney General of the District of Columbia have opined, as they must, on the appropriateness and permissibility of the Initiative "Make All Votes Count Act of 2024" (hereafter, "The Initiative"), their Opinions are antipodal and diametrically opposite. Both agree on the legal limitations of Initiatives. No Initiative should be accepted and approved by DCBOE if 1) it appropriates funds,[1] 2) it violates or seeks to amend the D.C. Home Rule Act (formally Titled "The District of Columbia Self-Government and Governmental Reorganization Act" (which Plaintiffs will continue to refer to hereafter as the "D.C. Home Rule Act"), 3) it violates the United States Constitution, 4) it authorizes discrimination prohibited

[1] The General Counsel of the Council of the District of Columbia's Advisory Opinion puts laser focus on this legal limitation imposed on the Initiative, and Plaintiffs quite agree; thus, in the interest of compendiousness and brevity, that Advisory Opinion is annexed, as *Plaintiffs' Exhibit 2*.

by the D.C. Human Rights Act, 5) it vitiates and negates an Act of the D.C. Council, D.C. Code §§ 1-204.101(a) and 1–1001.16(b)(1). For the reasons that follow, this initiative violates all of those legal limitations and more.

Further, Relevant Legal, Historical and Procedural Matters

The several states in the United States have sovereign power. By comparison, Washington, D.C. does not. The Federal Government is the holder of the sovereign power for the Seat of Government. Any local power that exists must be expressly and explicitly delegated to the District of Columbia by the Congress of the United States. Such delegation was done by Congress in 1973, through the enactment of the D.C. Home Rule Charter (hereafter, "The Charter"). The Charter is superior to the laws enacted by the D.C. Council, Jason Newman and Jacques DePuy, *Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act*, 24 A.U. L. Rev. 537 at 576 (1975). **"Changes [to the Charter] from an elected Mayor-Council form of government can be initiated by the Congress and approved by the President. Any other changes in the Charter [with the exceptions of 401, 402, matters related to the Judiciary, and sections 601, 602 and 603, regarding explicit exemptions from Council authority] may be originated by the Council by act and then must be referred to a referendum of the citizens of the District. A majority of the citizens must approve the Amendment …"** and then, ultimately, it goes to Congress, Jason Newman, Director and Johnny Barnes, Deputy Director and others, *The District of Columbia, Its History, Its Government, its: People,* Page 484, published by the D.C. Project: Community Legal Assistance, Georgetown University Law Center (September 1975).

While the Home Rule Act gave District residents the right to vote for a local elected government, Congress has placed severe restraints on that right. Many liken District residents to Native Americans, commenting that with Home Rule, District residents were given "the reservation without the buffalo."

This label is particularly poignant at times when the District government seeks to manage and conduct its financial affairs. Congress must pass an appropriations bill for the District, as it does for every federal agency. Thus, from local budget formulation to implementation the process can take as many as eighteen months … The form and structure of the District makes it very different from any state and makes it difficult to conduct an efficient government," 13 U. D.C. L. Rev. 1, 3, University of the District of Columbia Law Review (Spring 2010) *TOWARDS EQUAL FOOTING: RESPONDING TO THE PERCEIVED CONSTITUTIONAL, LEGAL AND PRACTICAL IMPEDIMENTS TO STATEHOOD FOR THE DISTRICT OF COLUMBIA*, Johnny Barnes. That difficulty raises its ugly head when the District of Columbia and its citizens seek to do that which all other citizens of the states can. As here, they cannot.

The "Accepted" Initiative Violates the D.C. Home Rule Act – The Hechinger Case Precedent

In *Hechinger v. Martin*, 411 F. Supp. 650 (D.D.C. 1976), John Hechinger, of Hechinger Hardware Stores and a former District of Columbia Democratic National Committeeman, challenged a provision in the Home Rule Charter. Circuit Judge J. Skelly Wright led the three-judge panel. Plaintiffs sought a judgment declaring Sections 401(b) (2) and 401(d)(3) of the Home Rule Act unconstitutional and enjoining the defendant Board from enforcing those limitations.

Section 401(b)(2) of the Charter read:

"In the case of the first election held for office of member of the Council after the effective date of this title, not more than two of the at-large members (excluding the Chairman) shall be nominated by the same political party. Thereafter, a political party may nominate a number of candidates for the office of at-large member of the Council equal to one less than the total number of at-large members (excluding the Chairman) to be elected in such election."

[2] Section 401(d)(3) read:

"Notwithstanding any other provision of this section, at no time shall there be more than three members (including the Chairman) serving at large on the Council who are affiliated with the same political party.

While the *Hechinger* Court spent much time on the First and Fifth Amendment rights of individual, independent voters, in the end, the Court ruled that the limitations imposed by Congress in the Home Rule Charter, as here, should stand. To the contrary, this Initiative's open primary provision openly violates the District of Columbia Home Rule Charter, as it guts the Home Rule Charter's requirement that the Mayor, DC Council, and Attorney General be elected on a partisan basis, D.C. Code §§1-204.21, 1- 204.01, 1-204.35. D.C. Code §1-1171.01 (5) defines the term "partisan," stating "when used as an adjective means related to a political party." Further, DC Code §1-1171.01(6) provides that a "partisan political group" means any committee, club, or other organization that is regulated by the District and that is affiliated with a political party or candidate for public office in a partisan election, or organized for a partisan purpose, or which engages in partisan political activity." In short, the Home Rule Chater and D.C. laws defining partisan elections require the Mayor, D.C. Council, and Attorney General to be elected on a partisan basis. The *Hechinger* Court did not seek to legislate how best to ensure that the First and Fifth Amendment rights of independent voters are protected --- and the Court reasoned that those rights should be protected --- the Court simply made certain that while it may be fine for Congress, as the sovereign authority over the District of Columbia to do so, only Congress could do so, not the D.C. Board of Elections.

The D.C. Attorney General's Office's reliance on the *En Banc* Decision of the D.C. Court of Appeals, in *Convention Center Referendum Committee, et al., Appellants, v. District of Columbia Board of Elections and Ethics, et al., Appellees,* 441 A.2d 889 (1981), is misplaced. Indeed, the Court, in that case, rejected DCBOE's "acceptance of a Referendum, stating, "The right of initiative, however, does not extend to all legislation the Council could enact. We further conclude that the CCRC initiative is barred by the Charter Amendments exception precluding initiatives for "laws appropriating funds," *id.* — an exception reflected in the "Dixon Amendment," *id.* § 1-1116(k)(7), to the Initiative,

Referendum, and Recall Procedures Act, *id.* §§ 1-1116 to -1119.3 (Initiative Procedures Act)" Erecting the voting apparatus for electing the Mayor, D.C. Council and Attorney General plainly belongs to Congress, and the D.C. Board of Elections may not "accept" and approve an Initiative that seeks to remove that right from Congress.

The Initiative Does Violate the First and Fifth Amendments to the United States Constitution

While the *Hechinger* Court ruled that the D.C. Board of Elections was not authorized and empowered to disturb the Congressional mandates of sections 401(b) (2) and 401(d)(3) of the Charter, the Court fully embraced the First and Fifth Amendment rights of individual voters. If the Initiative goes forward those rights of voters who belong to the Democratic Party in Washington, D.C. would be abridged.

The most fundamental problem with the Make All Votes Count Initiative is that the open primary provision violates the D.C. Democratic party members' and voters' right to freedom of association guaranteed by the First and Fifth Amendments to the U.S. Constitution, *Creese v. District of Columbia*, 281 F.Supp.3d 46, 52 n.2 (DDC 2017) (The Equal Protection Clause applies to the District of Columbia through the Fifth Amendment). See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)). U.S. Supreme Court precedence provides that the "First Amendment protects the freedom to join together in furtherance of common political beliefs which necessarily presupposes the freedom to identify those who constitute the association, and to limit the association to those people only," *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (quoting various Supreme Court precedent). As a corollary, Court precedent provides that "[f]reedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being," *Id*. at 574-75 (quoting *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 122 n.22 (1981)). Like D.C. law, the California law considered in *Jones* provided that political parties

can only nominate their candidates through primaries. 530 U.S. at 569. In such circumstances, the Court asserted that "in no area is the political association's right to exclude more important than in the process of selecting its nominee," *Id*. at 575.

The "Accepted" Initiative Wrongfully and Without Authority Appropriates Funds

The central thrust of the Case of *Convention Center Referendum Committee, et al., Appellants, v. District of Columbia Board of Elections and Ethics, et al., Appellees,* 441 A.2d 889 (1981), with the D.C. Court of Appeals, sitting *En Banc*, is that the Initiative was barred because the Initiative proposed a law appropriating funds. That is the same conclusion that the General Counsel of the D.C. Council reached in its Advisory Opinion about the instant Initiative. Although the D.C. Council requests funds, it is Congress, not the D.C. Council, that actually does the "appropriating, D.C. Code § 47-224.

In *Glass v. Smith*, 150 Tex. 632, 244 S.W. 2d 645 (1951), the Texas Supreme Court stated in a well-considered opinion that it would impose on the initiative right only those limitations expressed in the law or "clear[ly] and compelling[ly]" implied. *Id.* at 637, 244 S.W.2d at 649. The limitation on appropriating is clearly and compellingly expressed in the Home Rule Charter. As implementing legislation, the Initiative Procedures Act is valid, of course, only insofar as it conforms to the underlying Charter Amendments. These amendments to the District Charter, Home Rule Act, *supra* note 1, tit. IV, §§ 401-95; *see* note 5 *supra*, are in the nature of constitutional provisions, *see Washington Home Ownership Council, Inc.*, *supra* at 1369 (Mack, J., with Newman, C. J. & Pryor, J., dissenting); 2 E. McQuillin, *supra* § 9.03, at 623, and cannot be amended or contravened by ordinary legislation. *See* D.C. Code 1978 Supp., §§ 1-124, -125, -128(a); 2 E. McQuillin, *supra* § 9.25, at 703. Accordingly, the D.C. Court of Appeals, in the *Convention Center* Case, concluded that the "laws appropriating funds" exception prevents the electorate from using the initiative to adopt a budget request act or make some other affirmative effort to appropriate funds," *Convention Center Referendum*

Committee, et al., Appellants, v. District of Columbia Board of Elections and Ethics, et al., Appellees, 441 A.2d 914 (1981).

The D.C. Human Rights Act Protects classes that Are Impacted and Affected by the Initiative

As noted, well-known Author and Journalist, Jonetta Rose Barras, recently observed, "[T]he BOE's decision created a precedent that in this case could force the DC Council to prioritize revenues for an unnecessary election change at a time when the city faces limited revenues for critical public policies affecting the availability and protection of low-cost housing and public safety needs, among others. The BOE also indirectly permitted the advance of a process that could ultimately suppress the voice and influence of voters of color for decades to come — although Gary Thompson, the board's chair, wrote in the ruling that "we cannot interfere with the right of initiative based on such speculative concerns, particularly given the lack of evidence of an incurable discriminatory impact and the fact that the Measure is neutral on its face."

And, according to the Chair of the District of Columbia Democratic Party observed, "In any given election year, the under and over vote in predominately Black wards (7 and 8) is significantly higher than other wards in the District, particularly for the At-Large Councilmember races. Many of those voters report their confusion about selecting more than one candidate for what appears to be the same office. Ranked Choice Voting would introduce an additional layer of confusion to the electorate because it could require the voter to select and ranked up to five candidates. The District already has experiences with undervote when voting for two candidates for City Council. The undervote can surpass the vote for the second elected city council member. I have a similar concern for seniors and persons with disabilities. We must ensure that any changes to our electoral process do not undermine the principles of equality and fairness enshrined in our laws."

The D.C. Human Rights Act was enacted by the D.C. Council with the intention "…to secure an

end in the District of Columbia to discrimination for any reason other than that of individual merit …" It is a broad remedial statute, to be generously construed, *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 889 (D.C. 1998); *Simpson v. District of Columbia Office of Human Rights*, 597 A.2d 392, 398 (D.C. 1991). The Courts have also described the Human Rights Act as a "powerful, flexible, 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).

The *Durant* Case

Change began in the District of Columbia with The *Durant* Case, *Durant v. District of Columbia Zoning Commission*, 139 A.3d 880 (D.C. 2016). In *Durant*, the D.C. Court of Appeals stated, "We normally defer to [an] agency's decision so long as it flows rationally from the facts and is supported by substantial evidence." *Levy v. District of Columbia Rental Hous. Comm'n,*126 A. 3d 684, 688 (D.C.2015). Specifically, "[b]ecause of the Commission's statutory role and subject-matter expertise, we generally defer to the Commission's interpretation of the zoning regulations and their relationship to the Comprehensive Plan," *Howell v. District of Columbia Zoning Comm'n*, 97 A.3d 579, 581 (D.C.2014). "We do not defer, however", the Court stated "to an agency interpretation that is unreasonable or contrary to the language of the applicable provisions, e.*g., Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 642 A.2d 125,128 (D.C.1994)." In the end, the D.C. Court of Appeals concluded, "For the foregoing reasons, we conclude that the Commission has failed to justify a conclusion that the proposed PUD would be a moderate-density use." The Application was denied.

In reviewing this court's interpretation, "[w] e must first look at the language of the statute by itself to see if the language is plain and admits of no more than one meaning," *Davis v. United States*, 397 A.2d 951,956 (D.C.1979), "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used." *Varela v. Hi-Lo Powered*

Stirrups, Inc., 424 A.2d 61, 64 (D.C. 1980) (en banc) (quoting *United States v. Goldenberg*, 168 U.S. 95, 102-103 (1897)). Moreover, in examining the statutory language, it is axiomatic that "[t]he words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them," *Davis, supra*, 397 A.2d at 956; *United States v. Thompson*, 347 A.2d 581, 583 (D.C. 1975). See also *Caminetti v. United States*, 242 U.S. 470 (1917) and its progeny, over the years.

"An agency['s] [actions] would be arbitrary and capricious if the agency has relied on factors in which [the Congress or the D.C. Council] has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise", *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance*, 463 U.S. 52, 53 (1983).

Moreover, District of Columbia public policy favors a fair and equitable legal system that is based upon the notion of equity of the law. Equity of law seeks to find balance between the legal and equitable interests of all parties concerned, which is integral to a just legal system. This is certainly true in situations regarding the decisions of an agency.

Elements of the Complaint

Defendants make short shrift of the Elements of the Complaint, choosing to argue for a second time, notwithstanding the Letter from the District's Chief Financial Officer, Plaintiffs' Exhibit 1, that the instant Case is not ripe. Plaintiffs point again to Title IV, Part A, Subpart 1 of the District Charter specifically states that the Council of the District of Columbia and its members shall be elected by the registered qualified electors of the District.

1. Section (b)(1) explicitly states that these members shall be elected on a "partisan" basis.

2. The same is true for candidates for the Mayor of the District of Columbia.
3. This means that the intention behind the District Charter was to have partisan political parties nominate their candidates for election in the subsequent general election.
4. Subsequently, the District Charter included partisan elections for the newly created Attorney General.
5. Moreover, the District Charter limits the number of At-Large Councilmembers from the same political party and directs that the political party of an At-Large Councilmember vacating his or her position be filled by the political party of the councilmember vacating that position.
6. Other elected officials are elected on a nonpartisan basis. For example, Advisory Neighborhood Commissioners (ANCs) are elected on a nonpartisan basis. 8 State Board of Education (SBOE) candidates are also elected on a nonpartisan basis.
7. All of this demonstrates that the drafters of the Charter intentionally differentiated between partisan and nonpartisan elections and left the method for determining partisan elections up to the parties.
8. Open primaries would be a direct violation of the DC Home Rule Charter. Allowing 80,000 non-affiliated voters to participate in partisan elections would undermine the intent of the Charter and dilute the votes of party members who seek to nominate party candidates to stand in subsequent general elections.
9. It is crucial that we respect and uphold the provisions of the Home Rule Charter to maintain the integrity of our electoral system.
10. Implementing Ranked Choice Voting and Open Primaries would require DCBOE to commit to a significant financial obligation that has neither been agreed to nor appropriated by the D.C. Council.
11. The courts have ruled that a ballot cannot make an affirmative effort to appropriate funds.

12. The new costs associated with the initiative would include developing voter education materials, purchasing new voting machines and software, significantly redesigning the ballot for all elections (general and primaries), creating a system to allow independents to vote in a political party's primary (including mail cost), maintaining separate ballots for those not participating, hiring additional staff to implement the measure, and securing the services of community nonprofits to educate the public.
13. This could potentially negate or limit a budgetary act of the DC Council and/or force a new budget line item. The level of funding appropriated to District agencies can only be determined annually by local legislation via the DC Council.

Violation of Decision Making under the D.C. Administrative Procedure Act

All actions of any District of Columbia Agency shall be conducted in accordance with the District of Columbia Administrative Procedure Act (D.C. Code § 2-501 et seq.). The decisions of an Agency must not be "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." D.C. Code § 2-510(a)(3)(A) (2001). There is nothing in the Order of the DCBOE that rise to the level of sufficient findings of fact and conclusions of law. Defendants' violations will cause ongoing harm to Plaintiffs and other citizens.

It is widely accepted that Federal Court rulings are persuasive in D.C. Court decisions.[2] In executing significant policy changes or other reversals, an agency is required to comply with the Administrative Procedure Act, *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (2015), holding that the same procedures that an Agency uses when making a rule must be used when repealing or amending that rule. Moreover, an Agency rule that implements a change by repealing or amending an

[2] See *Puckrein v. Jenkins,* 884 A.2d 46, 56 n. 11 (D.C.2005) (federal cases interpreting rules identical to the local rules are persuasive authority); *Perry v. Gallaudet Univ.,* 738 A.2d 1222, 1226 (D.C.1999) ("Interpretations of federal rules identical to our rules are accepted as persuasive authority.").

exist rule is clearly subject to the arbitrary and capricious standard, *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 52 (1983). Defendants did not comply with the D.C. APA in "accepting" Initiative 83.

Defendants' own words, below, published in the Legal Publication of Defendant DCBOE, make the Case for Plaintiffs against the instant Motion to Dismiss. The Court adjudicates. It does not legislate.

"**Pursuant to D.C. Official Code § 1-1001.16(d)(2)(C), which provides that the D.C. Board of Elections shall "[p]ublish the summary statement, short title, legislative form, and, if the measure is an initiative measure, the fiscal impact statement, *on [its] website*", the Board hereby publishes the summary statement, short title, legislative form, and fiscal impact statement1 for Initiative Measure No. 83, the 'Ranked Choice Voting and Open the Primary Elections to Independent Voters Act of 2024**.'"

Respectfully Submitted,

/s/ *Johnny Barnes*

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DATED: 3 November 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November 2023, a true copy of the foregoing Plaintiffs' Opposition to the Motion to Dismiss of Defendants was filed electronically and served on the Court and all Counsel of Record, using the Court's Electronic Filing System.

/s/ *Johnny Barnes*

Johnny Barnes, D.C. Bar Number 212985