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Appeal No. 24-CV-0397

DISTRICT OF COLUMBIA COURT OF APPEALS

CHARLES E. WILSON, et al.

Appellants,

v.

MURIEL E, BOWSER, et al.

Appellees.

On Appeal from the Superior Court of the District of Columbia

Civil Case No. 2023-CAB-005414

(Carl E. Ross, Judge, D.C. Superior Court)

APPELLANTS' BRIEF

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Dated: 7 June 2024

THE PARTIES

Plaintiffs/Appellants - At all times relevant, each Appellant (Plaintiffs below) is a Resident of or does business in the District of Columbia.

The District of Columbia Democratic Party is a Political Organization and the Official local branch of the National Democratic Party.

Charles E. Wilson is a resident of and a voter in the District of Columbia, who serves as Chair of the D.C. Democratic Party.

Keith Silver is a former Independent Candidate for the D.C. Council, having contested for a Seat in the General Election of 2020 and a Four-Term Advisory Neighborhood Commissioner, quondam.

Defendants/Appellees at all times relevant, each Appellee (Defendants below) held the positions described.

Muriel E. Bowser, in her official capacity as Mayor of the District of Columbia – At all times relevant Defendant Muriel E. Bowser, the Mayor of the District of Columbia, has been vested with the Executive Power for this Municipality and as the Chief Operating Officer established as an independent agency OSSE. At all times relevant to this matter Defendant Bowser was responsible for the acts and omissions of employees and agents of the District of Columbia. For any times that she was not Mayor, under law, she inherits the acts and omissions of those employees and agents.

The District of Columbia – At all times relevant, the District of Columbia has been a municipal entity comprised of its agencies, departments and divisions, and the officers and managers of those agencies, departments and divisions, including the DCRA and its Business and Licensing Administration, the Administrators of each of its Administrations, the Mayor and other administrators. Accordingly, Plaintiffs assert *respondeat superior*, where appropriate.

The D.C. Board of Elections - At all times relevant**,** Defendant the D.C. Board of Elections is the Administrative Agency responsible for District of Columbia Elections, and at least at most of the time relevant to this action was responsible for the acts and omissions of employees and agents of that Office. For those times that this Defendant may not have housed its Administrator and Director, under law, he inherited the acts and omissions of those employees and agents.

TABLE OF CONTENTS

THE PARTIES …….. 2

TABLE OF AUTHORITIES …… 3

Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967) **..... 33**

Artis v. Bernanke, 630 F. 3d 1031, 1034 n.4 (D.C. Cir. 2011) **..... 11**

Barnett v. District of Columbia Dep't of Employment Services
491 A.2d 1156, 1161 (D.C. 1985) **..... 29**

Bible Way Church v. Beards, 680 A.2d 419,427 (D.C. Cir. 1996) **..... 39**

Bolling v. Sharpe, 347 U.S. 497, 499 (1954) **..... 22**

Bond v.Wilson, App. D.C., 398 A2d 21 (1979) **38**

Burton v. District of Columbia, 835 A.2d 1076 (D.C. 2003) **28**

California Democratic Party v. Jones, 530 U.S. 567, 574 (2000) **22**

Caminetti v. United States, 242 U.S. 470, 485 (1917) **24**

Carter-Obayuwana v. Howard University 764 A. 2d. 799 (D.C. 2001) **47**

Cascade Broad. Group, Ltd. v. FCC, 822 F.2d 1172, 1174
(D.C. Cir. 1987) **37**

*Casco Marina Dev., L.L.C. v. District of Columbia Redevelopment
Land Agency*, 834 A.2d 77, 81 (D.C. 2003) **39**

Clampitt v. American University, 957 A.2d. 23,29 (D.C.2008) **40**

*****Conley v. Gibson*, 355 U.S. 41, 48 (1957) **27**

Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) **24**

Chamberlain v. Am. Honda Fin. Corp., 931 A.2d 1018,
1022–23 (D.C.2007) **23,36,41**

Citizens Association of Georgetown, supra; March v. United States,
165 U.S. App. D.C. 267, 274, 506 F.2d 1306, 1313 (1974) **24**

*Citizens Association of Georgetown v. Zoning Commission of the
District of Columbia*, D.C. App., 392 A.2d 1027, 1032 (1978) (*en banc*) **24**

*Convention Center Referendum Committee, et al., Appellants, v.
District of Columbia Board of Elections and Ethics, et al., Appellees*,
441 A.2d 889 (1981) **18,20**

Creese v. District of Columbia, 281 F.Supp.3d 46, 52 n.2 (DDC 2017) **22**

Crown Coat Front Co. v. United States, 386 U.S. 503, 512 (1967) **29**

Dano Resource Recovery v. District of Columbia, 566 A.2d 483, 485

(D.C. 1989) **28**

***Darby v. Cisneros*, 509 U.S. 137, 155, (1993) **11, 26**

Davies v. D.C. Bd. of Elections & Ethics, 596 A.2d 992, 994
(D.C. Sept. 20,1991) **44**

Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 122 n.22 (1981) **22**

Dorsey v. District of Columbia, 648 A.2d 675, 677 (1994) **30**

District of Columbia v. Serafin,617 A.2d 516, 519 (D.C. 1992) **41**

Farrow v. J. Crew Group Inc., 12 A.3d 28 (D.C. 2011) **33**

Fisher v. District of Columbia, 803 A.2d 962, 964 (D.C. 2002) **29**

***Foman v. Davis*, 1962, 371 U.S. 178 (1962) **27**

Fowlkes v. Ironworkers Local 40, 790 F.3d 378, 385 (2d Cir. 2015) **11**

Frederique-Alexandre v. Dep't of Nat. & Envtl. Res. of Puerto Rico,
478 F.3d 433, 440 (1st Cir. 2007) **11**

Glass v. Smith, 150 Tex. 632, 244 S.W. 2d 645 (1951) **19**

Grayson v. AT&T Corp*., 15 A.3d 219, 228 (D.C. 2011) (*en banc*) **23,36,38, 41

Heard v Johnson, 810 A.2d 871 (2002) **39**

***Hechinger v. Martin*, 411 F. Supp. 650 (D.D.C. 1976) **17**

Hiern v. St.Paul-Mercur' Indem. Co., 262 F.2d 526, 530 (5th Cir. 1959) **38**

Hessey v. Burden, 584 A.2d 1 (D.C. 1990) (*Hessey* I) **44**

***Hessey v. Burden*, 615 A.2d 562 (D.C. 1992) (Hessey II) **44, 49**

Hessey v. District of Columbia Bd. of Elections & Ethics, 601 A.2d 3, 9, 15
(D.C.1991) (*en banc*) **30**

In re K.I., 735 A.2d 448, 453 (D.C. 1999) **39**

Jemison v. Nat'l Baptist Convention, 720 A.2d 275, 281 (D.C. 1998) **39**

Jordan Keys and Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.,
870 A.2d 58, 62 (D.C. 2005) **39**

Joshua v. United States, 17 F.3d 378, 380 (Fed. Cir., 1994) **36**

LaPrade v. Lehman, 490 A.2d 1151, 1155-56 (D.C. 1985) **42**

***Lemke v. United States*, 346 U.S. 325 (1953) **26**

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) **33**

McKart v. United States, 395 U.S. 185 (1969) **28**

Murray v. Wells Fargo Home Mortgage, 953 A.2d. 308, 316(D.C. 2008) **46**

Peoples v. Warfield & Sanford, Inc., 660 A.2d 397, 401 (D.C.1995) **33**

Potomac Dev. Corp. v. District of Columbia, 28 A.3d 531 (D.C. 2011) ... **23,36, 41**

Price v. District of Columbia Board of Elections & Ethics, 645 A.2d 594
(D.C. 1994) **44**

Puckrein v. Jenkins, 884 A.2d 46 2005 D.C. App. LEXIS 497 (2005) **38,44**

Randolph Sheppard Vendors of America v. Weinberger,
254 U.S. App. D.C., 45, 62 (1986) **29**

Rooks v. American Brass Co., 263 F.2d 166, 169 (6th Cir. 1959)
(per curiam) **38**

Rosenberg v. United States, D.C. App., 297 A.2d 763, 765 (1972)
(citations omitted) **24**

Schwab v. Bullock's Inc., 508 F.2d 353, 355 (9th Cir. 1974) **38**

Stephens v. Retirement Income, 464 F.3d 606 (6th Cir. 2006) **28**

Stephens v. Pension Benefit Guaranty Corporation, No. 13-5129 (D. C. Cir. June 24, 2014) **28**

Stewart v. Iancu, 912 F.3d 693 (4th Cir. 2019)
United States v. Fortner, 455 F.3d 752, 754 (7th Cir. 2006) **28**

Summers v. Earth Island Inst., 555 U.S. 488, 492 (2009) **42**

Techniarts Video, Inc. v. 1631 Kalorama Assocs., 572 A.2d 1051, 1054(D.C. 1990)) **41**

Tolson v. Hodge, 411 F.2d 123, 130 (4th Cir. 1969) **38**

Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 245 (3d Cir. 1951) **38**

United States v. Holpuch Co., 328 U.S. 234, 240 (1946) **29**

Williams v. District Columbia, 9 A.3d 484, 488 (D.C.2010) **47**

Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) **28**

Title 28 U.S.C. § 2201 ..... **13**

*****District of Columbia Self-Government and Governmental Reorganization Act, Public Law 93-198, 87 Stat. 774, "The D.C. Home Rule Act **15, 51**

D.C. Code §§ 1-204.101(a) and 1–1001.16(b)(1) **15**

D.C. Code §§1-204.21, 1- 204.01, 1-204.35 ..... **18**

D.C. § 1001.16. et. Seq. **49**

D.C. Code §1-1171.01(5) **18**

DC Code §1-1171.01(6) **18**

*****D.C. Code § 1-1001.16(d)(2) **12**

D.C. Code §§ 1 1-921 ..... **13, 43**

D.C. Code § 1–1001.16(e)(1)(A) **13, 43**

D.C. Code § 11-721(a)(2)(A) **13**

D.C. Code Ann. §§ 13-422 and 13-423 ..... **13**

D.C. Code § 17-305 ..... **40**

D.C. Code § 17-305 (a) **40**

D.C. Code] § 47-304 ..... **31**

D.C. Code § 1-1320(b)(1) **30, 49, 50**

D.C. Superior Court Rule 41(b)(1)(B) **33**

D.C. Superior Court Rule 52(a) **27**

D.C. Superior Court Rule 57 ..... **13**

D.C. Cir. Handbook of Practice & Internal Procedures **37**

Moore, Federal Practice 55.10[1], at 55-235 to 236 (2d ed. 1976) **38**

13 U. D.C. L. Rev. 1, 3, Johnny Barnes **33**

STATEMENT OF THE CASE **9**

HIGHLY RELEVANT YET DISREGARDED FACTUAL BACKGROUND **13**

SUMMARY OF ISSUES AND TRIAL COURT ERRORS **25**

ARGUMENT **26**

I. AN EARLY FILING IS NOT AN UNTIMELY FILING 26

II. THE CASE WAS RIPE FOR CONSIDERATION BY THE TRIAL COURT 29

III. SUMMARY DISPOSITION OF A MATTER IS NOT PREFERRED 36

IV. THE PREFERENCE IS TO MAKE DECISIONS ON THE MERITS 37

V. THE STANDARD OF REVIEW FOR A MOTION TO DISMISS 38

VI. THIS COURT REVIEWS *DE NOVO* GRANTS OF DISMISSAL 40

VII. MULTIPLE ADDITIONAL ERRORS BY THE TRIAL COURT 41

CONCLUSION 51

STATEMENT OF THE CASE

"It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits," *Foman v. Davis*, 1962, 371 U.S. 178 (1962), Justice Arthur Goldberg.

This is an appeal from an Order of Dismissal docketed 28 March 2024, in D.C. Superior Court, dismissing Appellants' Complaint, without a Hearing, vacating all future hearings, and closing the Case.

Most notably, this Case was dismissed by the Trial Court, not because it was untimely or late filed, but solely because it was early filed, one day earlier than the time asserted by Appellees that the Statute requires, an early filing, the Trial Court found, not a late filing. Opining that it would offend traditional notions of

statutory interpretation, the trial judge ruled that the Complaint was prematurely filed the day before the District of Columbia Board of Elections (Hereafter "DCBOE") published its Notice in the D.C. Register on, September 1, 2023, and was therefore beyond the Court's jurisdiction. Without addressing the question of whether or not Appellants' Complaint asserted claims outside of the statutory ten-day mandate, the trial judge dismissed the Complaint in its entirety, including the rejection of Appellants' argument that even if the entire Complaint could be deemed a protest to the summary statement, short title, and legislative form. **The day the Complaint was docketed by the Court was indeed 1 September 2023, not August 31, 2023, (the day it was stamped in the Clerk's office at 5:29:46 PM by counsel, after business hours) was the presumptive date of filing.**

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. The Complaint raised issues that went beyond the publication acts of the DCBOE and involve momentous matters of law and equity.

Moreover, enlightened courts, including the United States Supreme Court, have reasoned, and ruled that an early filing is not an untimely filing, not jurisdictional, and not grounds for dismissal. A broad reading of statutes and court

rules, at all levels, and in most 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 courts, 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 does not timely act, the waiting period is satisfied by agency inaction, *Darby v. Cisneros*, 509 U.S. 137, 155, (1993). Early filing doesn't determine jurisdiction.

Distilled to its essence, Appellants simply argue here that the trial Judge's dismissal for lack of jurisdiction is reversible error because a premature filing is not fatal and is highly prejudicial to Appellants.

In this Appeal, Appellants contend that the trial court, with prejudicial effect**,** erred in dismissing their Complaint in its entirety, rendering the critical issues raised in the Complaint moot and leaving Appellants with no alternative to adjudicate on the merits of significant public interest matters. Among other things, the Complaint filed by Appellants raises grave questions concerning the powers of

the D.C. Board of Elections, an Agency of the local Government, vis-à-vis the powers reserved to the Council of the District of Columbia, a separate Branch of that local Government, and even the powers of the United States Congress. This Case embodies no minor matter.

Appellants maintain that the trial court made several errors as a matter of law in its ruling. They include, but are not limited to:

First, the trial court's dismissal for lack of timeliness is highly prejudicial to Plaintiffs-Appellants but not to Defendants-Appellees. The trial court erred in ruling that a one-day early filing required outright dismissal without consideration of alternative avenues, allowing the merits of the matter to be heard and decided.

Second, applying the ten-day protest timeframe under D.C. Code § 1-1001.16(d)(2)[1] to all claims asserted in the Complaint was error because Appellants' Complaint for declaratory and injunctive relief could have been heard under the trial court's general equity jurisdiction, without regard to the Statute.[2]

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[1] D.C. Code § 1-1001.16(d)(2) provides "If any registered qualified elector of the District of Columbia objects to the summary statement, short title, or legislative form of the initiative measure formulated by the Board pursuant to subsections (c) and (d) of this section, that person may seek 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 stating objections and requesting appropriate changes. The Superior Court of the District of Columbia shall expedite the consideration of this matter."

[2] Jurisdiction – Apart from the Statute, the trial court had jurisdiction over

Third, Appellants contend that dismissal for failure to state a cause of action under Rule 12(b)(6) is contrary to prevailing case precedents that dismissal for failure to state a claim runs counter to long-standing judicial preference for resolution of disputes on the merits. The merits of Appellants claims were never considered by the trial court. The faulty Initiative has been put forward to be considered by D.C. voters in the next general election scheduled for 4 November 2024. And the deadline for proposers to gather signatures is 8 July 2024.

The trial court's ruling should be reversed, and this Court should remand the matter for consideration of the claims raised in the Complaint.

HIGHLY RELEVANT YET DISREGARDED FACTUAL BACKGROUND

As indicated, dismissal was granted by the trial court, without a hearing and without consideration of the significant, serious, and consequential matters raised by Appellants in their Complaint.

Appellee, D.C. Board of Elections (hereafter DCBOE), held a Hearing on 18 July 2023 and received testimony. At the conclusion of the Hearing, DCBOE

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this action pursuant to the D.C. Code §§ 1 1-921 and D.C. Code § 1–1001.16(e)(1)(A). The Court has the authority to grant declaratory relief under D.C. Superior Court Rule 57, incorporating Title 28 U.S.C. § 2201. This Court has jurisdiction over Appellees pursuant to D.C. Code Ann. §§ 13-422 and 13-423. D.C. Superior Court Civil Rule, Declaratory Judgment. The court may order a speedy hearing of a declaratory-judgment action. And, D.C. Code § 11-721(a)(2)(A) states that the court has jurisdiction to review orders "granting, continuing, modifying, refusing, or dissolving or refusing to dissolve or modify injunctions. These issues were raised below, by Appellants.

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.[3]

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 however agree on the legal limitations of Initiatives. No Initiative should be accepted and approved by DCBOE if 1) it appropriates funds,[4] 2) it violates or seeks to amend the D.C. Home Rule Act (formally Titled

[3] Appellants noted to the trial court in their pleadings, "At this writing, it is unclear whether DCBOE has published its 25 July 2023 Decision and Opinion in the D.C. Register, as required."

[4] 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; In the interest of compendiousness and brevity, that Advisory Opinion is annexed, as *Appellants' Appendix Pages 4-8*.

"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 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 reasons that follow, this initiative violates all those legal limitations and more.

The several states in the United States have sovereign power. By comparison, the District of Columbia 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.

Most problematic, 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 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 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. 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.[5]

[5] This Honorable Court made a similar ruling ten years later, and again fifteen years after that, finding other Initiatives improper subjects because they would appropriate funds. The District of Columbia Court of Appeals has determined that

The subject Initiative violates 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.

"a measure which would intrude upon the discretion of the Council to allocate District government revenues in the budget process is not a proper subject for initiative. This is true whether the initiative would raise new revenues," *Hessey v. District of Columbia Board of Elections and Ethics, et al.*, 601 A.2d 3 19 (D.C. 1991). For an initiative measure to pass muster with respect to the prohibition on laws appropriating funds, the measure must not: block the expenditure of funds requested or appropriated; directly appropriate funds; require the allocation of revenues to new or existing purposes; establish a special fund; create an entitlement enforceable by private right of action; or directly address and eliminate any revenue source. Finally, the mandatory provisions of the initiative may not be precluded by any lack of funding. See *District of Columbia Board of Elections and Ethics and District of Columbia Campaign for Treatment v. District of Columbia*, 866 A.2d 788, 794 (D.C. 2005) ("Campaign Treatment"). By stipulating "39% of the taxable Legalize Retail Cannabis dollars will go to Black Citizens in the District of Columbia, for Ownership, Education/Training & Employment," the LRC ostensibly intrudes upon the discretion of the Council to allocate District government revenues in the budget process. Notwithstanding the proposed measure will arguably generate new taxable revenues, initiatives cannot dictate how those new revenues will be allocated. It runs afoul of the appropriation prohibition because it directs the Council to allocate a specific percentage to a particular purpose. By requiring the Council to adhere to a percentage of taxable 6 revenue devoted to a new purpose, the LRC Initiative is an impermissible appropriation of funds. The use of a specific percentage of tax revenues from retail recreational cannabis is problematic because it amounts to an appropriation for a new purpose.

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.

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. Appellants did that. The trial court ignored it. Again, this Honorable Court 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).

Appellee DCBOE interpreted the relevant Statute, when it published its "Legal Publication"[6] 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.

[6] DCBOE Legal Publication, *Appellants' Appendix, Pages 47-55*.

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.

SUMMARY OF ISSUES AND TRIAL COURT ERRORS

I. AN EARLY FILING IS NOT AN UNTIMELY FILING

The day the Complaint was docketed by the Court was indeed 1 September 2023, not August 31, 2023, (the day it was stamped in the Clerk's office at 5:29:46 PM by counsel, after business hours) was the presumptive date of filing. But, even if that is considered filing early, an early filing is not untimely, not jurisdictional.

II. THE CASE WAS RIPE FOR CONSIDERATION BY THE TRIAL COURT

Exhaustion of Administrative Remedies is not required to commence litigation. The Case must be Ripe. This Case was Ripe when it was filed. The Complaint included issues beyond the Protest of the Legal Publication.

III. SUMMARY DISPOSITION OF A MATTER IS NOT PREFERRED

Summary Disposition, in general, goes against District of Columbia Court Practices and is typically frowned upon.

IV. THE PREFERENCE IS TO MAKE DECISIONS ON THE MERITS

The preference to consider a matter on its merits is long-standing in the Courts of the District of Columbia. The trial court did not address the many merits in this matter.

V. THE STANDARD OF REVIEW FOR A MOTION TO DISMISS

The trial court ignored the multiple substantive issues in this Case.

VI. THIS COURT REVIEWS *DE NOVO* GRANTS OF DISMISSAL

This Honorable Court will take a fresh look at not only the law but also the compelling facts that are presented in the instant matter.

VII. MULTIPLE ADDITIONAL ERRORS BY THE TRIAL COURT

There were multiple, additional errors committed by the trial court, and they are expressed in the Argument.

ARGUMENT

I. AN EARLY FILING IS NOT AN UNTIMELY FILING

As here, when an agency does not act, the waiting period is satisfied by agency inaction, *Darby v. Cisneros*, 509 U.S. 137, 155, (1993). In analogous situations, several Supreme Court cases establish the controlling principles that prematurity is a technicality that should not triumph over substantive rights. For example, in *Lemke v. United States,* 346 U.S. 325 (1953) – Rule 37(a)(2) of the Federal Rule of Criminal Procedure provides that "An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from . . .." Judgement against defendant was not entered into the record until 14 March 1952, but he filed his notice of appeal 11 March 1952, one day after he was sentenced. The appeal was dismissed as premature. The Supreme Court reversed the lower court's judgment and remanded for further proceedings citing Federal Rules of

Civil Procedure Rule 52(a) which reads "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."[7]

In *Foman v. Davis*, 1962, 371 U.S. 178 (1962), on 20 December, appellant filed a motion to vacate. On 17 January, he filed a notice of appeal from the 19 December judgment. On 23 January, the Court denied the motion to vacate. On 26 January, appellant filed a notice of appeal from the 23 January. The Court of Appeals dismissed, reasoning that because of the pendency of the motion the first notice of appeal was premature and that the second notice of appeal did not purport to be from the judgment, but only from the later order. Speaking through Mr. Justice Goldberg, the Supreme Court reversed, and said:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits," Citing, *Conley v. Gibson*, 355 U.S. 41, 48 (1957) (Internal quotations omitted).
>
> Appellees framed their Motion to Dismiss in reliance on the principle of

[7] D.C. Superior Court Rule 52(a) provides that, "Findings and Conclusions by the Court; Judgment on Partial Findings (a) FINDINGS AND CONCLUSIONS. (1) In General. Unless expressly waived by all parties, in an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record or may appear in an opinion, or a memorandum of decision filed by the court and are sufficient if they state the controlling factual and legal grounds of decision."

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.

II. THE CASE WAS RIPE FOR CONSIDERATION BY THE TRIAL COURT

It is indeed a "fancy dance" for Appellees 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, *Appellants' Appendix 9-11*, 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, *Appellants' Appendix 4-8*, 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, *Appellants' Appendix Pages 1-3*.

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.

The flaw in Appellees, lack of Ripeness claims is related to the flaw in their lack of jurisdiction claims. 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. **Notably, the Agency Records of DCBOE were not submitted to the Court until 16 November 2023, *Appellants' Appendix, Pages 56-61***. 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 statement for Initiative Measure No. 83, the 'Ranked Choice Voting and Open the Primary Elections to Independent Voters Act of 2024**.'"

And, notably, the trial court did not take any action until it issued an Order, on that same date, 16 November 2023, continuing the Initial Hearing until 23 February 2024, *Appellants' Appendix, Page 62*, some six months after the Complaint was filed by Appellants!

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 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 Appellants.

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).

III. SUMMARY DISPOSITION OF A MATTER IS NOT PREFERRED

Appropriately, courts have constructed stumbling blocks for those who seek summary disposition of cases. These stumbling blocks serve to erect important principles that courts must consider before granting summary disposition. First, there must be a clear indication from the moving party that it is entitled to relief on the merits. A matter need not be frivolous to satisfy this standard, but there must be no "substantial" question for the court to decide, *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir., 1994). Second, summary disposition should not be

granted when the case turns upon a complicated legal question, *D.C. Cir. Handbook of Practice & Internal Procedures* at 36. Third, the record before the court must be sufficient to allow meaningful consideration of the matter, *Cascade Broad. Group, Ltd. v. FCC*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (summary disposition is appropriate "only where the moving party has carried the heavy burden of demonstrating that the record and the motion papers comprise a basis adequate to allow the fullest consideration necessary to a just determination") (internal quotation marks and citation omitted). And finally, the courts are more likely to grant summary disposition in cases in which a delay will substantially harm the moving party, and where an expedited schedule for briefing and argument will be insufficient to prevent that harm, *United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006). There can be no harm to the Plaintiff, or the purported purchaser should the court allow expedited consideration of the matters in Defendant's Statement of Genuine Issues that May be in Dispute, annexed, and any other defenses Defendant may have, growing out of the expedited consideration.

IV. THE PREFERENCE IS TO MAKE DECISIONS ON THE MERITS

It has long been established in District of Columbia Courts that litigation should be decided on the merits of a case. Other than the Motion for Judgment on the Pleadings, no dispositive motions were considered, and there was little trial

preparation. The instant effort by Plaintiff to summarily prevail in the Case runs counter to that long-standing "judicial preference for the resolution of disputes on the merits rather than by the harsh sanction of dismissal," *Bond v.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 should readily give way to the competing interests in reaching the merits of a lawsuit.

V. THE STANDARD OF REVIEW FOR A MOTION TO DISMISS

Appellees are correct on the analysis, but incorrect on its application. *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).

In *Heard v Johnson*, 810 A.2d 871 (2002), the D.C. Court of Appeals said that "the issue of subject matter jurisdiction is a question of law" (quoting *Bible Way Church v. Beards*, 680 A.2d 419,427 (D.C. Cir. 1996). and the standard of review is *de novo. See also Potomac Development v. District of Columbia D.C* 28 A.3d 531, 543 (D.C. 2011) citing *Grayson v. AT & T Corp., 15 A.3d 219, 228 (D.C.2011) (en banc).* *De novo* review requires that the Court review 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). 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).

The standard for review pursuant to a 12(b)(6) dismissal is also *de novo*. *See Chamberlain v. American Honda Fin. Corp., 931 A. 2d.1018 (D.C. 2007)* citing, *Clampitt v. American University,* 957 A.2d. 23,29 (D.C.2008).

In the event this Court determines that there are questions of fact involved in this Appeal, D.C. Code § 17-305 (a) establishes the scope of appellate review .[8] If the case involves questions of fact and law tried without a jury, the Court may review the case as to facts and matters of law. A judgment can be set aside for if it appears that the judgement is plainly wrong or without evidence to support it. In the instant appeal, this case presents both questions of law and fact.

VI. THIS COURT REVIEWS *DE NOVO* GRANTS OF DISMISSAL

In evaluating a motion to dismiss for failure to state a claim, 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. Appellant did that below. This Honorable Court has established that it will review *de novo* the

[8] D.C. Code § 17-305 (a) states, "In considering an order or judgment of a lower court (or any of its divisions or branches) brought before it for review, the District of Columbia Court of Appeals shall review the record on appeal. When the issues of fact were tried by jury, the court shall review the case only as to matters of law. When the case was tried without a jury, the court may review both as to the facts and the law, but the judgment may not be set aside except for errors of law unless it appears that the judgment is plainly wrong or without evidence to support it."

dismissal of a complaint under D.C. Superior Court Civil Rule 12 (b)(6) for failure to state a claim upon which relief can be granted, *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).

VII. MULTIPLE ADDITIONAL ERRORS BY THE TRIAL COURT

Prejudice to Appellees has been minimal to non-existent and the trial court could have imposed lesser drastic sanctions than dismissal. There is ample precedent in a related context – involuntary dismissal for failure to prosecute pursuant to Super. Ct. Civ. R. 41(b)(1)(B) - that while the Superior Court has the authority to dismiss a case, however, doing so is an "extreme sanction" which should be imposed "only sparingly or in extraordinary circumstances," given the strong preference that cases be decided on their merits. and should be made "only after the trial court has considered lesser sanctions," *District of Columbia v. Serafin*,617 A.2d 516, 519 (D.C. 1992) (per curiam) (citing *Techniarts Video, Inc. v. 1631 Kalorama Assocs.*, 572 A.2d 1051, 1054 (D.C. 1990)).

The trial court's failure to consider any relevant factors or any lesser sanctions in granting the Motion to Dismiss is a standalone basis for vacating the dismissal order and remanding the case. "The trial court's failure to consider lesser sanctions is sufficient to require a remand." See *Serafin*, at 617 A.2d at 520; "the

trial court should first resort to the wide range of lesser sanctions which it may impose." *LaPrade v. Lehman*, 490 A.2d 1151, 1155-56 (D.C. 1985).

Moreover, the Trial Court's failure to conduct an expedited review as required under D. C. Superior Court Rule 57 in the case of a declaratory judgment action resulted in extreme prejudice to Appellants. Assuming arguendo that the 1 September 2023, date of publication in the D.C. Register controlled the entire action brought by Plaintiffs, and we contend that it did not, by the time the trial judge's Order was entered, the time to timely re-file within the 10-day period had expired. In the meantime, Appellees continued to move the process along to place the Initiative on the ballot.

For context, besides its main contention that the Complaint was not filed within the 10-day period, Appellee's Motion to Dismiss argued that Appellants' Complaint lacked ripeness because the Initiative has not yet been voted into law. While it is not clear that the trial judge's dismissal for want to jurisdiction was grounded in his discussion of Rule 12(b)(6) standards, Appellants submit that it is not a valid basis for dismissal. The purpose of the ripeness requirement. As discussed above, is to bring before the courts only cases that involve actual or imminent injury, *Summers v. Earth Island Inst*., 555 U.S. 488, 492 (2009). This defense is raised when the harm a plaintiff is asserting has not yet occurred or is not imminent.

In the instant matter, the case became ripe because the harm had in fact already taken place when DCBOE announced its finding that the proposal met proper subject matter requirements and decided to approve the measure at its 21 July 2023 Special Board Meeting. Once this step was taken, the Board was irretrievably committed to certain ministerial steps including convening a hearing (which occurred on 23 August 2023, to formulate the *Short* Title, Summary Statement, and Legislative Form for Initiative Measure No. 83. The next mandatory step was publication of a Notice putting forward the measure for public comment after notice on its website, in the DC Register and in a newspaper of general circulation. This step occurred on 1 September 2023. The next inevitable steps, if the initiative is not successfully challenged in the Superior Court, is to begin the process of gathering the required number of voter signatures to put the measure on the ballot. Regardless of whether the proposer is successful in gathering all of the required signatures, further harm to Appellants grows more imminent.

The trial court erred further in dismissing Appellants' claim for declaratory and injunctive relief claim, and in treating all claims in the Complaint as a protest under D.C. Code § 1–1001.16(e)(1)(A). As plainly stated in the caption of its Complaint, Appellants brought its action pursuant to the D.C. Code §§ 1 1-921 vesting civil actions in law and equity in the DC Superior Court and D.C. Code §

1–1001.16(e)(1)(A) which allows for an elector to file an action in the D.C. Superior Court to contest the Board's ruling on an initiative; and D.C. Superior Court Civil Rule 57, Declaratory Judgment which governs the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201 or otherwise. D.C. Superior Court Rules track the Federal Rules, and 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).

On this issue, this Court's opinion in *Hessey v. Burden*, 615 A.2d 562 (D.C. 1992) is pointedly instructive. *Hessey* is one of a triad of cases brought concerning Initiatives 33 ("Affordable Housing Act), 34 (Housing Now! Act of 1990) and 35 to create the Office of Public Advocate for Assessments and Taxation. *Hessey v. Burden*, 584 A.2d 1 (D.C. 1990) (*Hessey* I) holding that *Price v. District of Columbia Board of Elections & Ethics,* 645 A.2d 594 (D.C. 1994) holding that. The argument that challenges to proposed initiative measures can only be made exclusively under D.C. Code § 1-1001.16(e)(1)(A) is incorrect as Appellees contended in their Motion to Dismiss citing *Davies v. D.C. Bd. of Elections & Ethics*, 596 A.2d 992, 994 (D.C. Sept. 20,1991) for the proposition that "The D.C. Court of Appeals has made clear that the procedures regarding initiatives provide the "only permitted means" by which an initiative may

be challenged." But *Davies* is distinguishable because the case narrowly involved a challenge to signatures gathered to put the measure on the ballot and the administrative procedure to make such a challenge to the Board 10 days from the Board's posting the signatures for public inspection. The Court was quite clear in holding that the administrative process for challenging signatures had to be first exhausted. Appellees conflate this ruling to suit its argument about exclusivity of the remedies under D.C. Code § 1-1001.16(e)(1)(A), a provision that allows an action to be brought directly to the Superior Court. *Hessey II is* the correct controlling precedent on this question, and it is noted that it was decided 27 October 1992 (amended 29 December 1992) more than one year after *Davies*.

The Court in *Hessey II*, citing several case precedents dating back to 1975, firmly pronounced that (then) Sec.1-1320 is not the exclusive source of standing to challenge proposed initiatives, finding it a flawed argument to argue this, because "it ignores the Superior Court's statutory grant of general equity jurisdiction." *Id.* 571. There the plaintiffs' action opposing the acceptance of the petition was not originally brought to the Superior Court under that court's general equity jurisdiction but, rather, under the specific provisions of D.C. Code § 1-1320(b)(3) currently D.C. Code § 1-1001.16(d)(2). The *Hessey II* Court, notably stated:

> "We are [therefore] not persuaded that D.C. Code § 1-1320(b) requires that all legislation enacted by initiative be held constitutional by either the Board or the Superior Court before that initiative may be classified as a

> proper subject. …Nevertheless, we stop short of joining the list of jurisdictions which forbid pre-election review of constitutional challenges to proposed initiatives. We agree with the majority of courts which hold that such review is imprudent. But there may be extreme cases in which it would be both appropriate and efficient to decide the constitutionality of a proposed initiative."

The Initiative presents an extreme case because if enacted it upends the partisan election system mandated by Congress in the Home Rule Act. It is incumbent on the Board to ensure that no unconstitutional initiative or one that violates the Home Rule Charter is accepted. To ensure that it does so, Appellants' recourse to the trial court's equity jurisdiction is proper.

The trial court also erred in dismissing the case under D.C. Superior Court Rule 12(b)(6). First, it must be noted that Appellee's Motion to Dismiss did not raise the defense established under Rule 12(b)(6) - failure to state a claim upon which relief can be granted. However, the trial court, *Sua sponte*, seemed to have determined that the Complaint failed to state a cause of action upon which relief can be granted. Appellants contend that the trial court had no basis in law (or fact) to dismiss the Complaint under the Rule 12(b)(6) standards set forth in its Order.

The D.C. Appeals Court's standard rule when considering dismissal under Rule 12(b)(6) is that it "must accept all facts and inferences in favor of the plaintiff." *Chamberlain, supra* citing *Murray v. Wells Fargo Home Mortgage,* 953 A.2d. 308, 316(D.C. 2008). More germane, the *Chamberlain* Court, quoting from

Carter-Obayuwana v .Howard University 764 A. 2d. 799 (D.C. 2001), reminiscent of Justice Arthur Goldberg, stated that "[o]ur rules reject the approach that pleading is a game of skill in which one misstep ... may be decisive to the outcome and manifest a preference for resolution of disputes on the merits, not on technicalities of pleading, we construe pleadings as to do substantial justice." [internal quotes omitted]. Regardless of any technical deficiency in the Complaint, substantial justice would have required that the trial court consider the pleading as raising legitimate challenges to the Board's administrative decision to approve a faulty initiative measure.

"Dismissal for failure to state a claim on which relief can be granted is impermissible unless it appears **beyond doubt** that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Clampitt*, supra, [emphasis added]. Furthermore, "To survive a motion to dismiss, a complaint must set forth sufficient information to outline the legal elements of a viable claim for relief or to permit inferences to be drawn from the complaint that indicate that these elements exist." *Williams v. District of Columbia,* 9 A.3d 484, 488 (D.C.2010).

Appellants' Complaint outlined each of the Board's violation of the express substantive prohibitions contained in Home Rule Charter (D.C. Code § 1-204.101, *et seq*.,) and amendments thereto and the Initiative Procedure Act that would have

required it to not accept the proposed measure. The Complaint provided sufficient information that outlined the legal elements of viable claims that would have been supported at trial with any required factual evidence, even though the claims presented questions of law. The principal elements of each cause of action in the Complaint[9] were as follows:

Count 1 stated that the proposed Initiative violates the D.C. Human Rights Act. Appellants' Complaint alleges that while, facially neutral, the Initiative has a discriminatory and disparate effect on D.C voters of a certain race and income particularly those in Wards East of the Anacostia River.

Count II alleges that the open primary provision of the Initiative would violate the explicit language of Title IV of the District Charter that provides for District elected officials to be elected on a partisan basis.

Count III asserts that the Initiative violates the First and Fifth Amendments of The United States Constitution because its open primary provision is a substantial intrusion of the Democratic party's right to limit its primaries to only registered Democrats.

Count IV asserts that the both the Ranked Choice Voting and Open Primaries provision of the Initiative requires appropriations in violation of the District

[9] Appellants' Complaint can be found at *Appellants' Appendix, Pages 12-46*.

Charter allows District voters to propose initiative measures except those appropriating funds.

Count V alleges that approving an initiative without complying with the findings of fact and conclusions of law requirement of the District of Columbia Administrative Procedures Act particularly given that the language of the Initiative changes the appropriations exception in the Home Rule Charter.

Examining the arguments set forth by Appellants, *Hessey v. Burden* 615 A.2d. 562 (D.C. 1992) involving the proposed "Taxpayers' Right To Know Act" that would create a new Office of Public Advocate for Assessments and Taxation OPA with the authority to appear and advocate on behalf of the public interest in tax assessment proceedings before the Board of Equalization and Review, is instructional on the question of the DCBOE's authority to accept or reject initiative measures under the mandates contained in D.C. Code § 1-1320(b)(1) (currently codified at D.C. § 1001.16. et. seq. Appellee's motion to dismiss argued that Courts are "required to construe the right of initiative liberally . . . and may impose on the right only those limitations expressed in the law or clearly and compellingly implied," *Hessey v. Burden*, 584 A.2d 1, 3 (D.C. 1990), *remanded*, 615 A.2d 562 (D.C. 1994) ("*Hessey I*" -one in a series of cases concerning that initiative). In *Hessey I* this court reversed the decision of the Superior Court, holding that the two grounds relied upon by the Board and the trial court in rejecting the

initiative were insufficient to make the proposed measure an improper subject under D.C. Code § 1-1320(b)(1). *Hessey II,* is more instructional and as the Court said, "Our first task here is to give the Board, and future proponents and opponents of initiatives, some guidance on the procedural requirements of this densely written statute." *Hessey* II, at 568. The case centered on the essential issue of the Board's responsibility to either accept or reject a proposed initiative measure under D.C. Code § 1-1320 (that is, the standard by which the Board determines if a proposed measure is a proper subject for an initiative. Several critical guides emerged from the Court's well-considered opinion:

1. Superior Court has *de novo* review of board's decision pursuant to D.C. Code § 1-1320(b)(3) (1981 ed.) (currently D.C. Code § 1-1001.16(e)(1)(A)).

> *"We read this language as giving to the Superior Court the power to conduct its own independent, de novo examination of a proposed initiative once it has acquired jurisdiction of the case. The court is not limited to a mere review of the factors considered by the Board,"*

2. The Board must consider all challenges raised. Decision to approve premature until this process is completed. The Court pointedly stated:

"This case was also needlessly complicated by the Board's premature preparation of the summary statement, short title, and legislative form of the proposed initiative before all challenges to that initiative had been finally resolved. The Board erroneously read this court's opinion in Hessey I as holding conclusively that the proposed initiative was a "proper subject" under D.C. Code § 1-1320(b); as a result, it went on to formulate the summary statement, short title, and legislative form of the initiative in accordance with D.C. Code § 1-1320(c). D.C. Code § 1-1320 plainly contemplates sequential, not simultaneous consideration of these matters; the question whether a measure is a "proper subject of initiative"

should be answered in its entirety before the summary statement, short title, and legislative form are even prepared."

CONCLUSION

On Christmas Eve, 24 December 1973, the President of the United States, Richard Nixon, signed the District of Columbia Self-Government and Governmental Reorganization Act, Public Law 93-198, 87 Stat. 774, "The D.C. Home Rule Act" (which included the "District Charter"). Every local election in the District of Columbia, since that time, has been determined by a plurality vote. The proposed Make All Votes Count Act of 2024, Initiative Number 83 (a number that has precipitously been assigned to it) seeks to change how residents cast votes in elections and would enable more than 80,000 additional people, currently registered as non- affiliated with any party, to participate in the primaries of Democrats, Republicans or the D.C. Statehood Green Party, which are currently closed to those voters. The independent voters could very easily dominate the roughly 4,000 voters in the D.C. Statehood Party. The Protest Action filed against this Initiative makes the argument, for several reasons at law, that the D.C. Board of Elections is not authorized to approve this Initiative, and the process of voting in local elections in Washington, D.C. cannot be changed through an Initiative.

On 31 August 2023, Plaintiffs -Appellants, The District of Columbia Democratic Party, Chair, Charles E. Wilson, and Keith Silver, a former ANC

Commissioner and D.C. Council candidate, filed the Complaint that is the subject of this appeal. Plaintiffs' filing is captioned "Complaint for Declaratory Judgment, And Injunctive Relief, Objecting to The Summary Statement, Short Title, And Legislative Form Of Proposed Initiative No. 83 With A Jury Demand For One Count Of The Four Counts Embodied In This Complaint" against the Mayor of the District of Columbia and the DC Board of Elections (DCBOE or Board). Appellants challenged the Board's decision to accept Initiative 83, "*Make All Votes Count Act of 2024*," [10] as a proper subject for an initiative measure. If enacted following the process of the proposers obtaining the requisite number of voter signatures, sweeping changes to how elections are conducted in the District by implementing ranked choice voting and open primaries would be implemented.

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[10] The summary statement of the Initiative published by the DCBOE on its website, in the DC Register and a newspaper of general circulation, *Appellants' Appendix, Pages 47-55*, states:

"If enacted, the Initiative would both:

> (a) implement ranked choice voting to allow voters to rank up to five candidates according to their preference in each contest for any office (other than political party offices); and
>
> (b) permit any voter who is not registered to vote with a political party to vote in the primary election of that voter's choosing for all offices (other than political party offices).
>
> This Initiative will not be implemented unless the D.C. Council separately chooses to appropriate funds for the projected costs."

This would create a new system of open primaries that would enable more than 85,000 (or 16% of registered D.C. voters) persons currently registered as non-affiliated[11] with any party to participate in the primaries of Democrats, Republicans, or the D.C. Statehood Green Party. Party primaries are currently closed to independent voters who are able to cast a vote for the candidate(s) of their choice in the DC General elections. Party nominees are decided in the primaries. Allowing Independent voters to vote in primaries could significantly impact the outcome of partisan primaries. Under the ranked choice voting component of the Initiative, voters can rank multiple candidates in particular race according to their preferences.

Plaintiffs-Appellants asserted in their Complaint that the process of voting in the District of Columbia cannot be changed through the initiative process because it is contravention of the D.C. Home Rule Act (also referred to as the D.C. Home Rule Charter) express language regarding partisan elections and designating certain numbers of elected officials from each party. The Initiative would also violate the Home Rule Charter's express prohibition against initiatives that would require the expenditure of local funds; unlawfully discriminate against District voters in lower income and elderly voters particularly in underserved communities with larger low-income and elderly populations who would be disenfranchised in violation of

the D.C. Human Rights Act; violate the First Amendment right to free association under the U.S. Constitution by requiring Democratic party voters to associate with Independent voters; and violate equal protection rights through Fifth Amendment of the U.S Constitution. It should be noted that the local D.C. Republican Party is also opposed to the Initiative. In July 2023 several House Republicans in the United States Congress also introduced a bill, The One Vote, One Choice Act that would ban ranked choice voting in all District of Columbia elections.

Respectfully submitted,

/s/ *Johnny Barnes*

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DATED: 7 June 2024

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellants' Brief was served on the Court and all Counsel using the Court's electronic filing system on this 7th day of June 2024.

/s/ *Johnny Barnes*

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DATED: 7 June 2024 **Johnny Barnes, D.C. Bar Number 212985**