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' REPLY BRIEF TO THE BRIEF OF APPELLEE DISTRICT OF COLUMBIA BOARD OF ELECTIONS

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FURTHER STATEMENT OF THE CASE

All Appellees would agree that if the Complaint in this Case was filed on 1 September 2023, it was timely filed, and the Case should not have been dismissed by the Trial Court. Notably and ironically, the Rules of this Honorable Court, provide, in pertinent part, D.C. App. Rule 25. Filing and Service. (a) Filing. (1) Filing with the Clerk, "A document required or permitted to be filed in this court must be filed with the Clerk. (2) Electronic Filing and Signing. The following rules

apply to electronic filing in this court ... (G) When filed ... **'A document that is filed on a day when the court is closed' will be deemed to have been filed on the next day on which the court is open.**" In the instant Case, the day the Complaint was docketed by the Clerk of the Court, below, and deemed to have been filed, was indeed 1 September 2023, not 31 August 2023, (the day it was electronically stamped in the Clerk's office at 5:29:46 P.M., by counsel, after business hours, when the D.C. Superior Court was closed.

Date	Document Type	Redaction Status	Document Name	Pages
09/01/2023	Court Document - Public/Anonymous User			Complaint Filed
09/01/2023	Court Document - Public/Anonymous User			D.C. Democratic

Moreover, the Initial Order was not issued, and the Judge in the Case was not appointed until 1 September 2023, the date the D.C. Superior Court was open, after the electronic filing, the night before. Distilled to its essence, Appellants simply argue here that the Trial Judge's dismissal for lack of jurisdiction is reversible error because 1) the Case was not filed early, and 2) even if it was filed early (by one day), an early filing is not fatal and dismissing for that reason is highly prejudicial to Appellants.

HIGHLY RELEVANT FACTUAL BACKGROUND

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 Appellee, 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, more troubling, even the powers of the United States Congress. This Case embodies no minor matter.

This is an appeal from an Order of Dismissal docketed 28 March 2024, in D.C. Superior Court, precipitously dismissing Appellants' Complaint, without a Hearing, vacating all future hearings, and closing the Case. Indeed, the Complaint continued to be timely even if it is held to have been filed prematurely. The Complaint was not rejected by the D.C. Superior Court and was on file *during* the window for such claims. Federal and D.C. Appellate Rules make this clear. Under Rule 4 (a) (2) "**Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision or order -- but before the entry of the judgment or order -- is treated as filed on the date of and after the entry." There is no prejudice to the government.

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.

SIGNIFICANT ISSUES AND TRIAL COURT ERRORS

Beyond the equitable points, 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) to all claims asserted in the Complaint was error because Appellants' Complaint for other relief could have been heard under the trial court's general jurisdiction, without regard to that Statute.

Third, Appellants contend that dismissal for failure to state a cause of action under Rule 12 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 was 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.

While both the General Counsel of the Council of the District of Columbia and the Attorney General of the District of Columbia, here an Appellee, 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,[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 Appellants 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).

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. Congress must pass an appropriations bill for the District of Columbia, as it does for every federal agency. 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.

[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 this Honorable Court and Plaintiffs quite agree; In the interest of compendiousness and brevity, that Advisory Opinion is annexed, as *Appellants' Appendix Pages 4-8*.

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. The Court refused.

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.

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. 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.[2]

[2] 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. The action by Appellee, the D.C. Board of Elections was opposed by the D.C. Democratic Party, a private organization that is charged with making its own rules for the selection of its nominees. See *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

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

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"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).

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).

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."

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

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 pertinent part, below, and a copy of the Statement and the proposed Legislation is annexed in *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 (1) to put before the voters an Initiative proposal that will not be meaningful because it will not be funded ..... 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).

SUMMARY DISPOSITION OF A MATTER IS INAPPROPRIATE

Appellee improperly embody a Motion for Summary Affirmance within its Brief. Appellants address this fatal flaw in its Opposition to the improper use of its Brief for this purpose. In short, contrary to the Rules of this Honorable Court, Appellee District of Columbia Board of Elections conflated, incapsulated and incorporated a Motion for Summary Affirmance with the Initial Brief it filed on 22 July 2024. D.C. App. R. 27. Motions. (a)(3)(A) A separate brief supporting the motion may not be filed, and (C) Documents barred or not required. (i) A separate brief supporting a motion must not be filed. In addition, D.C. App. R. 27. Page Limits, provides at (d)(2) A motion or a response to a motion must not exceed 20 pages (Appellee's Initial Brief is fifty-one pages). This Honorable Court should ignore this fatal effort by Appellee.

THIS COURT REVIEWS *DE NOVO* GRANTS OF DISMISSAL

This Honorable Court has established that it 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).

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 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) 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. 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 more than one year after *Davies*.

CONCLUSION

Plaintiffs-Appellants asserted in their Complaint and continue to maintain 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's (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; 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 the Fifth Amendment of the U.S Constitution. Appellees have offered nothing that counters these well-established pronouncements. It should also 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,

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DATED: 5 August 2024

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellants' Reply Brief was served on the Court and all Counsel using the Court's electronic filing system on this 5th day of August 2024.

/s/ *Johnny Barnes*

DATED: 5 August 2024 **Johnny Barnes, D.C. Bar Number 212985**